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SPECIFIC HUMAN RIGHTS ISSUES: NEW PRIORITIES, IN PARTICULAR TERRORISM AND COUNTER-TERRORISM

**Report of the sessional working group to elaborate detailed principles
and guidelines, with relevant commentary, concerning the promotion
and protection of human rights when combating terrorism**

Chairperson-Rapporteur: Ms. Kalliopi K. Koufa

* Pursuant to General Assembly resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including the Sub-Commission, were assumed, as of 19 June 2006, by the Human Rights Council. Consequently, the symbol series E/CN.4/Sub.2/_, under which the Sub-Commission reported to the former Commission on Human Rights, has been replaced by the series A/HRC/Sub.1/_ as of 19 June 2006.

Summary

By its resolution 2005/31, the Sub-Commission on the Promotion and Protection of Human Rights decided to reconvene at its fifty-eighth session the sessional working group of the Sub-Commission with the mandate to continue to elaborate detailed principles and guidelines, with relevant commentary, concerning the promotion and protection of human rights when combating terrorism, based, *inter alia*, on the updated framework of draft principles and guidelines contained in the second expanded working paper prepared by Kalliopi K. Koufa (A/HRC/Sub.1/58/30).

The working group held two public meetings during the fifty-eighth session, on 9 and 10 August 2006. The present report was adopted by the working group on 10 August 2006.

The working group, after the discussion of a number of issues relating to the promotion and protection of human rights when combating terrorism, in view of its further examination and elaboration of the updated framework draft of principles and guidelines concerning human rights and terrorism, expressed the view that it was important for the work on the updated framework of draft principles and guidelines to be continued in a form to be determined by the Human Rights Council, taking into consideration the resolution on the report of the working group by the Sub-Commission at its fifty-eighth session. The working group was of the view that the Council would benefit from a revised version of the updated framework draft of principles and guidelines that took into account comments and contributions made during the working group as well as such inputs that experts and observers indicated that they would submit shortly after the conclusion of the fifty-eighth session of the Sub-Commission. Although it was noted that the draft of principles and guidelines was a work in progress that in all likelihood may require several more years of work, the working group was of the view that it would be preferable if the Council could review a revised framework draft of principles and guidelines that would be prepared after the conclusion of the fifty-eighth session of the Sub-Commission, and that took into account the latest suggestions for change at this stage of the process.

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Introduction

1. By its resolution 2005/31, the Sub-Commission on the Promotion and Protection of Human Rights decided to reconvene at its fifty-eighth session the sessional working group with the mandate to continue to elaborate detailed principles and guidelines, with relevant commentary, concerning the promotion and protection of human rights when combating terrorism, based, inter alia, on the updated framework of draft of principles and guidelines concerning human rights and terrorism contained in the second expanded working paper prepared by Kalliopi K. Koufa (A/HRC/Sub.1/58/30). The working group to elaborate detailed principles and guidelines, with relevant commentary, concerning the promotion and protection of human rights when combating terrorism was established by Sub-Commission decision 2004/109.
2. With the agreement of the other Sub-Commission members, the following experts or alternates of the Sub-Commission were appointed as members of the working group: Ibrahim Salama (Africa), Shiqiu Chen (Asia), Gáspár Bíró (Eastern Europe), Marília Sardenberg Zelner Gonçalves (Latin America and the Caribbean), and Kalliopi K. Koufa (Western Europe and other States).
3. The working group held two public meetings during the fifty-eighth session, on 9 and 10 August 2006. The present report was adopted by the working group on 10 August 2006.
4. A representative of the Office of the United Nations High Commissioner for Human Rights (OHCHR) opened the session. The working group elected, by acclamation, Ms. Koufa as Chairperson-Rapporteur.
5. The following members and alternates of the Sub-Commission attended the working group: Mr. Bíró, Mr. Chen, Emmanuel Decaux, El-Hadji Guissé, Françoise Hampson, Vladimir Kartashkin, Ms. Koufa, Oleg Malguinov, Christy Ezim Mbonu, Lalaina Rakotoarisoa, Mr. Salama, Ms. Sardenberg Zelner Gonçalves, Abdul Sattar, Soli Jehangir Sorabjee, Nken U.O. Wadibia-Anyanwu, Halima Embarek Warzazi, and Yozo Yokota.
6. Representatives of the following States Members of the United Nations and non-Member States were represented by observers: Algeria, Austria, Chile, Colombia, El Salvador, Eritrea, Ethiopia, Finland, France, Germany, Greece, Holy See, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Kuwait, Latvia, Lithuania, Malaysia, Netherlands, Nigeria, Poland, Portugal, Russian Federation, Romania, United Kingdom of Great Britain and Northern Ireland and Venezuela (Bolivarian Republic of).
7. The following non-governmental organizations (NGOs) participated in the discussions of the working group: Association of World Citizens, Indian Movement Tupaj Amaru, International Educational Development, International Institute for Non-Aligned Studies and Pax Romana. A number of other non-governmental organizations also attended the working group.

8. The working group had before it the following documents prepared for its session:

Report of the sessional working group to elaborate detailed principles and guidelines, with relevant commentary, concerning the promotion and protection of human rights when combating terrorism, Chairperson-Rapporteur Ms. Kalliopi K. Koufa (E/CN.4/Sub.2/2005/43);

An updated framework draft of principles and guidelines concerning human rights and terrorism, Second expanded working paper by Kalliopi K. Koufa (A/HRC/Sub.1/58/30);

Working paper by Ms. Françoise Hampson on international judicial cooperation (A/HRC/Sub.1/58/CRP.6/Corr.1) (English only);

Document de travail sur les droits des victimes des actes terroristes, by Mr. Emmanuel Decaux (A/HRC/Sub.1/58/CRP.11) (French only).

9. The working group also had before it the following background documents:

Uniting against terrorism: recommendations for a global counter-terrorism strategy, Report of the Secretary-General (A/60/825);

Protection of human rights and fundamental freedoms while countering terrorism, Report of the High Commissioner for Human Rights (E/CN.4/2006/94);

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (E/CN.4/2006/98);

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; Addendum, Communications with Governments (E/CN.4/2006/98/Add.1);

Note by the Secretary-General transmitting to the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/60/370);

Situation of detainees at Guantánamo Bay, Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt (E/CN.4/2006/120);

Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism, OHCHR, Geneva, 2005;

Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers of the Council of Europe on 11 July 2002;

Recommendation Rec (2006) 8 of the Committee of Ministers to member States on assistance to crime victims, adopted by the Committee of Ministers of the Council of Europe on 14 June 2006;

The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions, Report prepared by Professor Iain Cameron, Council of Europe, 6 February 2006 (no symbol number).

I. ISSUES RELATING TO THE PROTECTION OF HUMAN RIGHTS WHEN COMBATING TERRORISM AND THE ELABORATION OF PRINCIPLES AND GUIDELINES

A. International judicial cooperation

10. Ms. Hampson presented her working paper on international judicial cooperation in the context of counter-terrorism (A/HCR/Sub.1/58/CRP.6), noting that, in some circumstances, individuals had been detained and convicted on the basis of offences which are not well defined and which do not conform with human rights principles. In particular, she noted the problems posed in relation to evidence due to the transnational nature of terrorism. Suspects may have operated in a number of countries and evidence may be gathered in different jurisdictions and with different standards and methods.

11. In her working paper, Ms. Hampson highlighted two key limitations: first, the fact that the working paper is a preliminary document which seeks to identify issues in the field of judicial cooperation and, second, the need to avoid duplicating the work of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. She noted that the object of the working paper is to begin to identify the issues which need to be addressed to enable the successful prosecution of those suspected of terrorist offences in a manner consistent with respect for human rights and fundamental freedoms. The approach adopted is to follow the steps involved in an investigation and trial.

12. Ms. Hampson drew the attention of the working group to the information contained in three annexes to her working paper, on regional and international initiatives to promote judicial cooperation. Annex 1 concerns the activities of the Security Council Counter-Terrorism Committee, while annexes 2 and 3 reflect international and regional initiatives, respectively. She noted that barriers to judicial cooperation on the ground need to be identified before they can be addressed and solved.

13. In identifying the issues to be addressed, the working paper highlighted, as a fundamental characteristic which distinguishes recent terrorist activity from its earlier forms, the transnational nature of terrorism, in particular the ease of travel, transfer of funds by formal and informal mechanisms, and transnational communications, all of which pose particular difficulties for the successful prosecution of criminal offences. Moreover, it noted that the financiers, planners and perpetrators of an operation may be in different jurisdictions from one another and may be in different jurisdictions over time. These facts illustrate the need for cooperation between legal systems.

14. Ms. Hampson outlined in her working paper the various forms which counter-terrorist measures may take, such as:

- Measures not taken with regard to other types of criminal activity but which are consistent with human rights obligations;
- Measures in relation to which the right to derogate from human rights obligations is invoked and established: first, that the circumstances in which derogation is permitted exist and, second, that the measures in question do not exceed the limitations on the scope of permitted derogations;
- Measures which are not consistent with “normal” human rights obligations and where the State has not invoked the right to derogate, or where it has invoked the right but in circumstances in which derogation is not permitted;
- Measures which are not consistent with human rights obligations and where the State has invoked the right to derogate in circumstances in which it was entitled to do so, but where the measures in question exceeded the limitations on the scope of permitted derogations.

15. Ms. Hampson drew attention to the fact that in order for a derogation to be justified, the State must show that the situation is one of “public emergency, which threatens the life of the nation and the existence of which is officially proclaimed”. The measures taken must be both necessary and proportionate. Certain rights are non-derogable. Ms. Hampson suggested that States cannot show the necessity for a measure where other measures not involving derogation would be possible and where such measures have not been tried, notably effective judicial cooperation.

16. With regard to the issue of definition, it is up to national law to define criminal offences, but that definition must comply with the principle of legality in order for it to conform with international human rights law. In many States, however, the definition of terrorist offences in national law does not satisfy this requirement. Moreover, different legal systems may approach the definition of offences in different ways. In order to facilitate judicial cooperation, national definitions of terrorist activity should be as close to one another as possible. Ms. Hampson drew attention to the report of the Special Rapporteur on the promotion of human rights while countering terrorism, which provides important guidance to States in order to ensure that terrorism legislation conforms with international human rights law.

17. Ms. Hampson also addressed in her working paper issues in relation to the gathering of evidence and information sharing, which may impact on the due process guarantees provided under international human rights law. These include limitations on the admissibility of evidence gathered in another jurisdiction, whether domestic law would exclude evidence gathered abroad where the evidence was obtained in conformity with the other State’s domestic law but in breach of human rights law, and the probative value of evidence gathered in a foreign jurisdiction. The knowledge of both normal and exceptional rules of evidence in different legal systems, therefore, would be an important part of judicial cooperation.

18. The working paper also highlighted issues related to the transfer of individuals, a process which is normally dealt with through the process of extradition. However, Ms. Hampson noted that cases of “extraordinary rendition” arise where there is no extradition agreement in place between the States in question or where extradition is seen as too difficult or too long a process. She stressed that the rule of law requires that transfers be conducted within the framework of law. There might be advantages in exploring the possibility of an international extradition agreement, which would apply between ratifying States unless there was a bilateral agreement or some other multilateral arrangement in place. Other issues to be addressed include the importance, in the context of the transfer of individuals, of harmonizing national definitions of criminal offences; the need for arrangements to enable witnesses in one jurisdiction to give evidence in another; and situations where human rights concerns may be raised to prevent an extradition which would otherwise be possible.

19. Other issues identified in the working paper include elements important to the pretrial process, such as conditions of pretrial detention and the right of access to a lawyer, as well as due process requirements during the trial and cooperation during the post-trial period, such as in the execution of a sentence. Where a person has been convicted in absentia, for example, and the issue arises of transferring the convicted person from one jurisdiction to another, the requested State may refuse to act if the trial process would not be restarted.

20. Ms. Hampson concluded that there is a need for in-depth work on the issue of judicial cooperation to identify where the difficulties lie in practice. In some cases, they seem to be simply the result of the way that different legal systems have evolved. These types of problems appear to arise principally with regard to the gathering and admissibility of evidence. Consultations with experts, from amongst the ranks of the police and legal practitioners, might clarify where the difficulties lie and how best the issues can be addressed, in a manner consistent with national legal traditions and human rights law. It would be vital to involve both those who gather evidence and also those who handle the evidence in courts. In the case of extradition, consideration should be given to the conclusion of an international treaty, on condition that the treaty takes into account human rights law requirements. Other difficulties seem principally to arise where States do not respect human rights law requirements regarding not only the risk of ill-treatment, but also due process guarantees.

21. Ms. Hampson noted that discussions between experts in different systems may serve to reduce some of the difficulties identified in her working paper. She suggested that OHCHR hold a seminar on these issues, drawing on practitioners from the police, investigating judges, defence lawyers and other legal professionals from a variety of jurisdictions having different legal traditions. She indicated that as the problems typically arise at the practical level, and result from different procedures and processes rooted in the different legal systems of various States, these practitioners would be most likely to identify the nature of the problems most frequently encountered, and may be helpful in proposing solutions.

B. Rights of the victims of terrorist acts

22. Mr. Decaux introduced his working paper on the rights of victims of terrorist acts (A/HRC/Sub.1/58/CRP.11), noting that this issue has not been addressed adequately to date. The rights of victims first have been denied by the terrorists who have targeted them, and secondly by States which have been unable to prevent terrorist acts. In his working paper,

Mr. Decaux identified a number of issues to be resolved in order to adequately address the rights of victims, such as problems related to the definition of victim and the notion of reparation. Mr. Decaux noted the need for a broad conception of indemnity and suggested that the entire framework for assisting victims required examination, including all forms of reparation. Victims need to be represented by lawyers during criminal proceedings, a problem which raises the issue of discrimination among victims, many of whom may not be in a position to afford legal representation. Mr. Decaux further noted that it may be discriminatory to require victims to obtain reparations from the perpetrators and cited examples of national solidarity funds. He pointed out that assistance could be financial, psychological, medical or spiritual in nature, and that such assistance should be considered on a long-term basis. He noted the importance, above all, of respecting the dignity of victims.

23. Mr. Decaux suggested that the Sub-Commission should develop a compilation of national and regional practices on compensation for victims and proposed a draft questionnaire in this regard. He also noted the Council of Europe's recently adopted recommendation on victims of terrorism. In his working paper, Mr. Decaux noted a number of elements to be explored in addressing the rights of victims, in addition to the question of reparations. These include urgent assistance for the material and psychiatric needs of victims, as well as "spiritual assistance"; long-term assistance including medical and psychological follow-up; the definition of a status for victims; respect for privacy and family life of victims; effective access to justice for victims and the need to ensure that "State secrecy" is not an obstacle to transparency in the conduct of investigations; the role of victims and victims' associations in criminal justice; with regard to reparations, the need to ensure equality and non-discrimination among victims; and the right to justice and to truth.

24. Mr. Decaux also drew attention to a questionnaire that he prepared and attached to his working paper. The questionnaire was directed to States to enable them to focus more on the shortcomings in domestic action to provide civil redress to victims of terrorist acts. This reinforces his goal that these guidelines, as well as State action, fully recognized the rights of the victims as victims.

25. Mr. Salama agreed that victims' rights are often overlooked. He questioned the possibility of introducing a uniform standard, at the international level, on the treatment of individuals, given the variety of legal regimes and definitions of terrorism at national level. He further questioned whether the notion of victims should include victims of grave violations of international humanitarian law. He thought that perhaps the category of victims should be broadened to include them, to ensure equality between victims, and to ensure a balance of power where powerful countries are in a stronger position to bargain. This would also be an indirect deterrent to States promoting terrorism. In any case, the ultimate goal should be to restore dignity to victims. Mr. Salama also noted that only an international fund for victims would allow for equal and non-discriminatory treatment of victims.

26. Mr. Chen commented on the difficulties in defining the notion of victims of terrorism and pointed to the lack of an agreed definition within the United Nations system, suggesting that the Sub-Commission should take this up. He referred to two situations: the first involving direct victims of terrorist acts, including those who have suffered a loss of life, psychological or physical injury, material damage, or loss of wealth; and the second involving indirect victims, for example, companies, such as the ones in the World Trade Center, or tourist agencies whose

rights were also violated and are also victims. Then there are other types of victims resulting from large-scale armed attacks and wars to combat terrorism. These acts also violate human rights, and the number and scale of these new victims are greater than the subjects of the original attack. If infrastructure is destroyed, such as roads, schools and hospitals, the entire population in a region has had their economic rights violated, as well as their rights to health and education. So the definition of victim is a very sensitive issue. He also raised the question of the types of actions which would give rise to reparations and stated that the question of reparations was an even more difficult and complex issue than the definition issue and that it needed an in-depth study.

27. Ms. Hampson raised concerns related to the position of the victims of terrorism vis-à-vis other victims of criminal acts, and suggested that there is a potential for discrimination when special funds are established for specific terrorist acts. She questioned whether the source of funding would be from the perpetrators of terrorist acts, or from another source such as the State. While there may be a need for an international system for reparations, there would still be questions related to situations where terrorist acts occur within the territory of one State, or where it is the State itself that is conducting the terrorist activities. With regard to the different legal systems, she suggested that criteria could be identified and then each State could adapt the criteria to its own legal system. She noted that international humanitarian law does identify a situation where a civil claim may be brought against a perpetrator, however it does not require a State to provide access to its own courts by individuals. Moreover, where a foreign State is sued in a local court, the foreign Government can claim sovereign immunity.

28. An observer from Pax Romana highlighted the need to address who pays for immediate emergency care for victims of terrorist acts, including to foreigners and tourists, and to consider victims who suffer as a result of counter-terrorism measures.

29. Ms. Sardenberg Zelner Gonçalves raised a question related to the role of the family in relation to emergency assistance, financial assistance, psychological assistance, rehabilitation and spiritual assistance, as well as how this role might evolve over time.

30. Mr. Decaux said that it is difficult to define the notion of a victim of terrorist acts if there is no agreed definition of terrorism. Mr. Decaux further referred to the important distinction made by Mr. Chen between companies, which normally have insurance, and individuals, who may not. Mr. Decaux also raised the question of whether victims of counter-terrorism measures would be taken into consideration and what would happen in a situation, for example, where instructions are given to shoot down a plane that had been hijacked.

31. With regard to compensation, Mr. Decaux noted that some families may wish to see an investigation that identifies the truth and holds those responsible to account, rather than focusing on monetary compensation. He noted that issues of moral and monetary compensation raise very difficult questions including, for example, issues of discrimination in relation to financial issues. Referring to the point raised by Mr. Salama, he agreed that it would be difficult to have detailed international standards and noted that an international fund would not be realistic, suggesting instead that the focus should be at national level. On the other hand Mr. Decaux referred to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147), and the Principles for the protection and promotion of

human rights through action to combat impunity (E/CN.4/Sub.2/1997/20/Rev.1 and E/CN.4/2005/102/Add.1), and noted the possibility of developing human rights principles and guidelines that would be applicable in very different situations. He suggested the need to identify issues relating to investigation and the right to truth, which are related to principles on impunity.

C. Issues relating to the protection of human rights while countering terrorism and the elaboration of principles and guidelines

32. Ms. Koufa (Chairperson-Rapporteur) introduced her second expanded working paper and an updated framework draft of principles and guidelines concerning human rights and terrorism (A/HRC/Sub.1/58/30). She noted that the first part of this document responds to a request by members of the working group that she prepare a paper on general or overarching principles of guidelines as well as on the topic of derogations. Her paper notes that general or overarching principles are important as no set of guidelines or principles sits in isolation, but must always be interpreted in light of international law as a whole. In this light, principles and guidelines of the United Nations should place a given subject such as human rights and terrorism in the context of standards enumerated by the Charter and United Nations international instruments, as well as interpretations contained in jurisprudence by relevant United Nations bodies. She noted the importance of situating general or overarching principles in the framework of international law generally, taking into account, in particular human rights law, international humanitarian law, international refugee law and regional standards. She also indicated that general or overarching principles must also be attentive to developments in customary international law, and stated that this is especially true when customary norms evolve into norms of *jus cogens* or *erga omnes*. The importance of jurisprudence of international and regional courts and tribunals was also emphasized.

33. The Chairperson-Rapporteur noted that general or overarching principles were particularly relevant to the issue of examining when and under what circumstances derogations can be allowed under international law. In this respect, she made reference to article 4 of the International Covenant on Civil and Political Rights (ICCPR) that sets out circumstances under which certain articles of the Covenant may be subject to derogation, as well as the jurisprudence of the Human Rights Committee with particular reference to a number of its general comments. She drew attention to limitation clauses on the exercises of human rights contained in both the Universal Declaration of Human Rights and the ICCPR which are distinct from the notion of derogations in the sense of article 4 of the ICCPR. She also noted that regional courts and bodies such as the European Court of Human Rights and the Inter-American Commission on Human Rights have articulated guidance on the circumstances in which limitations on human rights in the context of terrorism can be applied, and said that this should be taken into consideration.

34. The Chairperson-Rapporteur emphasized that in order for the draft principles and guidelines to be useful, they should be not only comprehensive but sufficiently detailed. In this regard, she added that she had tried to take into account the work of special procedures, working groups, treaty bodies and other mechanisms that address the issue of human rights and terrorism.

35. Turning to the second part of her paper, the Chairperson-Rapporteur undertook a brief review of the structure of the updated framework draft of principles and guidelines. She outlined the structure of the document indicating that it had a preamble, a section on the scope of

application and general principles, and a third and main part which consisted of specific guidelines and principles in the following areas: (a) duties of States regarding terrorist acts and human rights; (b) general principles relating to counter-terrorism measures; (c) counter-terrorism measures and the definition of terrorism; (d) exceptions and derogations; (e) specific principles relating to arrest, detention, trial and penalties of alleged terrorists; (f) asylum, forcible transfers, and extradition; (g) freedom of opinion and expression; (h) freedom of thought, conscience and religion; (i) privacy and property rights; (j) freedom of association and assembly; and (k) rights of victims of terrorist acts. The Chairperson-Rapporteur then invited comments on her presentation, and in particular on the updated framework draft of principles and guidelines. She suggested that it would be better if comments and suggestions were made on the basis of an overview of the text, since present time probably did not permit a paragraph by paragraph review.

36. Ms. Hampson noted that a number of texts on terrorism had been already adopted by the United Nations and regional bodies, some of which were adopted relatively rapidly in response to terrorist acts. She said that the working group has the benefit of these previous efforts, but also the responsibility to proceed in a more deliberate and reflective way. The working group should evaluate what issues need to be addressed, including those that have either not been addressed in previous texts or have not been adequately addressed. She said that this preliminary but crucial work was necessary before the working group could proceed further. She observed that most other texts are too general to provide guidance. She mentioned the United Nations Standard Minimum Rules for the Treatment of Prisoners as an example of a document that provided guidance by elaborating criteria, and that could be understood and applied by law enforcement officials. She added that two meetings a year were not sufficient to make progress on the draft principles and guidelines, and mentioned the possibility of having working groups within the working group.

37. Mr. Chen said that this working group should provide its own input. He argued that the Sub-Commission's guidelines could be complementary to other texts on the subject and urged the working group to proceed rapidly with its work. He said the United Nations strategy of how to react to terrorism was evolving and that the working group should try to finish its work as a matter of urgency and contribute to this effort. Otherwise, he expressed the fear that the work would not be widely read and given the attention it would merit.

38. Responding to the discussion, and particularly on specificity, the Chairperson-Rapporteur stressed that the guidelines should remain more or less general, because of the possibility that States will reject a too tight legal regime. She said that at the previous session this topic was discussed and it was agreed to seek a workable and useful balance between specific and general. She stated that the present draft must be viewed as in a preliminary stage, but that its further elaboration and refinement should nonetheless be expedited. She also said that the process of identifying issues was still on the floor and that nobody talked about adoption of this rough draft of guidelines at this stage.

39. Mr. Salama agreed with the Chairperson and underlined that the draft principles and guidelines elaborated by her were very helpful and form already the basis for further elaboration and work. He expressed the view that it would probably take two to three years of work on the draft principles and guidelines before they could be considered for adoption.

40. The Chairperson-Rapporteur concurring with Mr. Salama further clarified her view that her updated version of the draft principles and guidelines remained a general framework and that there was much more work to be done in terms of developing specific issues and improving the language. She indicated that she had to prepare a draft as the basis for discussion by the Sub-Commission on principles and guidelines for the promotion and protection of human rights when combating terrorism, but that she never envisioned or argued about considering the adoption of the draft principles and guidelines in their present form. She also observed that while it might be difficult at the present session to go through the draft principles and guidelines paragraph by paragraph in terms of an actual drafting exercise, she nevertheless invited experts to make their comments and suggestions on specific paragraphs of the draft, and the accompanying commentary.

41. Mr. Decaux welcomed the Chairperson-Rapporteur's approach to reviewing the draft text by the working group, and further suggested that, in addition, members of the Sub-Commission and interested observers could also send specific suggestions, including suggested text, for each part of the draft principles and guidelines, to the Chairperson-Rapporteur, who would then produce a revised draft text in the next two months or so after the conclusion of the Sub-Commission. Mr. Decaux then referred to paragraph 36 of the draft principles and guidelines and noted that not all terrorist acts could be characterized as war crimes or other violations of international humanitarian law. He further suggested that the provision in paragraph 46 dealing with military tribunals could be revised to take into account the Sub-Commission's work in this area (see E/CN.4/Sub.2/2005/9 and resolution 2005/15 of 10 August 2005). He also did not see the purpose for retaining the second sentence of that provision, since the European Court had confirmed that military tribunals cannot judge suspected terrorists. With regard to the provisions in paragraphs 25 and 26, he suggested that inclusion of the word "political" in conjunction with the "military control" could be confusing and would better be deleted.

42. Ms. Hampson supported the suggestions of both the Chairperson-Rapporteur and Mr. Decaux as to how to proceed. Turning to the draft text, she said that the Sub-Commission had adopted a resolution in 2005 that civilians should not be given the death penalty by military tribunals, and suggested that this should be reflected in the commentary on the draft principles and guidelines. She also indicated her reservations concerning the constant use of the term "measures", since in certain cases it would be more appropriate to refer to "laws" or "activities" when this was what was actually being discussed. She referred to paragraph 29 of the draft text that addresses freedom of expression, and said it raised many issues. For example, what is the role of private actors such as newspaper and other media channels? What responsibility do the media have to prevent panic and fear? What can the media report? What should it not report? What should be the role of the State in such a situation? What limits, if any, should be placed on the activity of media that was transnational in character through its availability through satellite or cable? She said that she could develop her ideas on this in approximately one month and would be pleased to submit them to the Chairperson in order to be taken into consideration in the revised version of the principles and guidelines to be drafted. She also stated that at least some of the issues raised in her working paper, as well as some of the sources she cited therein, would be submitted to the Chairperson within a month so that she could include them in either the preamble or the commentary.

43. The Chairperson reiterated that important issues relating to the freedom of expression, press and related questions were not elaborated in the present draft due to anticipation of the promised paper on freedom of expression by Mr. Salama and Mr. Bossuyt. As this did not follow because of the uncertainties concerning the present session of the Sub-Commission and this working group, she still seeks guidance from Mr. Salama as to the follow-up on that paper. This paper and the ideas proposed by Ms. Hampson will of course be taken into consideration in the next draft.

44. Mr. Salama indicated that he had gathered a great deal of information on the subject of freedom of expression and terrorism, even though he had not been able to produce his paper for this session. He stated that he would prepare a note on his research and try to send it to the Chairperson in approximately one month so that it could be taken into account when she further revised the draft principles and guidelines.

45. Mr. Guissé said that very important documents have been produced in this working group on terrorism and that we are in the process of dealing with something very topical and contemporary. Terrorism hurts everyone and pleases no one. It was most important, however, to think also of the underlying causes of terrorism and of a world that has become more and more violent and selfish, a world of exclusion from the economic standpoint. We should also give thought to the situation of persons who live in deep neglect, whose means of subsistence wither away, who live in poverty, misery and exclusion and are desperate. The desperately poor have nothing else to give except their own life, and we do not think of the deep causes that poison our societies. Consequently, the draft principles and guidelines need to give prominence to the underlying causes of terrorism, including those who live in extreme impoverishment and who, in percentage terms, constitute a large part of the world's population. He said that if people are put in a situation of impoverishment and misery, violence can result. He said the resources of developing countries were exploited by large multinational firms from developed countries, and that the laws had been made by and for the benefit of developed countries. The guidelines should give thought to all the causes that poison our society, not just the current situation but also the more remote causes and reasons. He said that today's poverty is the lasting legacy of colonialism, and a most important cause of terrorism. He also suggested that the draft principles and guidelines should await completion of a study on the economic causes of terrorism.

46. Ms. Hampson noted that paragraph 28 of the Chairperson's draft text does mention the causes of terrorism. She suggested that the draft text could have a provision urging States to study the causes of terrorism and why some people support terrorism. She mentioned, as an example, a recent study by R. Pape, entitled "Dying to win: The strategic logic of suicide bombers" that she read about in *The Observer* (6 August 2006, p. 27), which found that many of the people who engaged in suicide bombing were in a relatively favourable economic situation and were relatively well educated. She also noted the study's conclusion that only a minority of these individuals were religious fundamentalists, and that the majority of persons engaging in these acts were motivated by opposing occupation of territory by foreign forces. She further expressed reservations about having to come to firm conclusions about the causes of terrorism before more work was done on the draft principles and guidelines, noting that, while it was important to take into account possible causes of terrorism, the essence of the work should focus on the measures that States take to control terrorism and to develop principles and guidelines so that action taken was in conformity with international law, and in particular human rights law, international humanitarian law and international refugee law.

47. Ms. Warzazi said she agreed with Ms. Hampson that it is not the poor who are terrorists, but those who are relatively well off and well educated. She said that in many cases, these people were shocked by government policies and motivated to act as a consequence. She proposed that the paragraphs be reordered to give greater prominence to the issue of causes of terrorism. She suggested that paragraphs 28 and 29 of the draft text should follow paragraph 25, and then continue with paragraphs 26 and 27. Ms. Warzazi, however, cautioned about having a definitive conclusion about the causes of terrorism, noting that the subject was raised as early as the 1970s and there were many different views on this subject. She added that she thought the working group had done useful work on this subject, and that it was important that the Human Rights Council be able to benefit from the work of the Sub-Commission and the working group on this subject.

48. Mr. Chen proposed that the draft text should include a request to all States to study the causes of terrorism and why there is support for terrorism. He postulated that by studying the causes of terrorism, States could better formulate strategies about how to deal with it. He noted that two years ago, very few people wanted to talk about causes of terrorism and many were openly opposed to such a discussion. Now people were open to such a discussion as it has become accepted that this is important information to take into consideration when devising counter-terrorism measures. He also noted that terrorism appeared to be on the rise. He added that economic hardship may be one of the reasons for terrorism, as it is a long-standing injustice in various parts of the world. He also said that inappropriate and excessive actions against terrorism may have actually lent a helping hand to the impetus for further terrorism. He expressed the view that asymmetrical and heavy-handed reactions to terrorist acts can lead individuals to desperate acts, including suicide bombings.

49. Mr. Bíró raised certain issues in connection with paragraphs 58 and 59 of the draft text. He referred to paragraph 58 and said that a major goal of terrorists was to achieve maximum publicity for their acts. He noted that some commentators had advocated that in certain circumstances a blackout of information should be imposed. He acknowledged that this is a controversial measure in a free society. He added that in practice there was a tendency to have an information blackout on foiled terrorists attacks. He also raised the issue of whether there is any right to know more details about such incidents. He then commented on paragraph 59, and raised the issue of what were the permissible limitations on freedom of religion in the context of combating terrorism. He acknowledged that he was raising questions and not providing answers, but he expressed the view that the text could benefit from more analysis and development with respect to paragraphs 58 and 59. In response to a request from the Chairperson about the possibility of his preparing a note on this subject and forwarding it to her in approximately one month, Mr. Bíró said he doubted that he possessed sufficient expertise to do this alone, but that he would prepare a contribution with input from an NGO that had studied this subject.

50. Ms. Hampson referred to paragraphs 58 and 59 and said that these two paragraphs illustrated why she felt that the draft text needed to be far more specific, in order that it is not confusing at the practical level. She noted that if an official at the State level was in the process of drafting counter-terrorism legislation, the official would not find the guidance he or she needed from the draft text in its present general wording. For instance, there is a problem with

using the word “glorify” - as in words that glorify acts of terrorism - because it is too vague a term. One would be more precise, for example, by mentioning that anything that incites, encourages or advocates acts of violence will not be protected. She said that the case law of the Human Rights Committee gives a better guide to the subject matter of paragraphs 58 and 59 than the draft text, and that it should be taken into account in revising these paragraphs.

51. Mr. Guissé said that the working group represents part of the world’s conscience and everyone is listening to its deliberations. Although he was absent last year he carefully read the relevant documents and felt that the working group was rushing in its work. In his view it would be good to hold the discussion until more research has been completed and we have a comprehensive document that takes account of all the issues, not only the issue that is now being discussed but also the issue of the causes of terrorism.

52. The Chairperson disagreed with Mr. Guissé. She repeated that no definitive text was being elaborated at present and that the working group is continuing to identify those issues that needed to be further studied. She also observed that it would be a great pity for the Sub-Commission to now stop short this process of reviewing the considerable work that has already been put in the draft guidelines by the working group.

53. Ms. Hampson also disagreed with Mr. Guissé. She reiterated that whether or not States are studying the causes, they are undertaking measures, and that it is those measures that had to be subjected to human rights standards. In this context, she also said that an important issue was the independence of the judiciary and the separation of powers.

54. Ms. Warzazi said that she would like to go back to definitions and in particular with regard to the word “glorification”, which she personally hated. Nobody can “glorify” an act of terrorism. One could probably use the word “support” but never the word “glorify” where terrorism was concerned.

55. Mr. Decaux observed that in his view the working group had now reached a crossroads in its work, not only because of the time but also because of substance. He suggested that the working group needs to speed up its work, or else lose whatever influence it has on the human rights system. Whereas the Sub-Commission was the very first in bringing up and studying the subject of terrorism and human rights, there were other bodies that were recently taking up this issue.

56. Ms. Hampson said that she would like to raise a new issue about which she had no ready solution. She would suggest that the draft text could also include a passage to indicate that the fight against terrorist acts should be conducted primarily in the framework of criminal law and not international humanitarian law. She said that the working group needed to send a message that responding to terrorism should not be primarily through a military response. She acknowledged, however, that this would not be the case in some circumstances, and said that she does not have an answer to this. She added that the Security Council had recognized that an attack on a Member State by a non-State actor could constitute an armed attack that justified a military response under the Charter of the United Nations.

57. The Chairperson-Rapporteur noted that this particular issue needed more reflection. She was inclined to agree that the fight against terrorist acts should be conducted primarily in the framework of criminal law, but was hesitant to disregard involvement also of humanitarian law. In her view the issue really deserved further study and she noted that the International Committee of the Red Cross might also have a contribution to make to this subject. Ms. Hampson indicated she would be willing to follow up on this subject and write a note, which she will then forward to the Chairperson in approximately one month.

58. Mr. Yokota noted that sometimes the military could be very useful in responding to a terrorist act. He mentioned that in Japan in the mid-1990s, there was a terrorist act against the public using sarin gas in the subways of a major city. He said that the police were not equipped to deal with such a gas, and that only the Japanese Self-Defense Forces (SDF) had such specialists. He added that people who were normally critical of using the SDF in a domestic situation found this acceptable. While he said he basically agrees with Ms. Hampson that the basic response should be within a criminal law framework, it was important to try to specify the criteria when military forces could be used.

59. Ms. Hampson responded to Mr. Yokota by saying that there were two slightly different issues. The first was what legal regime - criminal law or international humanitarian law - should be used in dealing with the perpetrators of a terrorist act. The second issue was what Mr. Yokota had referred to, which was under what circumstances it was appropriate to use military forces, either internally or externally, in addressing a terrorist threat. She added that, where possible, the police should have the appropriate equipment to deal with different types of terrorist threats, as they were more adapted to policing in a domestic context.

60. Ms. Warzazi asked whether the Japanese incident referred to was not an exceptional case. She expressed some doubt as to whether an absolute ban on a military response to terrorist acts would be accepted by some countries. She added that in some Asian countries, there exist movements that conduct cross-border attacks and this constituted a serious problem.

61. Mr. Guissé said that in addition to deciding whether a criminal law framework or an international humanitarian law framework was appropriate, we also have to work out the responsibility of the State. He also said that compensation of the victims of terrorist acts needed to be considered. Otherwise, the response would only be repressive.

62. The observer for the Indian Movement Tupaj Amaru said that he was of the view that misery in many poor countries was a cause of terrorism. He said that both colonialism and the post-colonialist framework have resulted in a situation where wealthy countries dominate poor countries to have access to their natural resources. He added that this could be considered as a form of State terrorism, and said that it would be important to have a study on the causes of terrorism.

63. The observer for International Educational Development said that poverty could be a cause of terrorism. She suggested that certain documents relating to poverty and development be

reflected in the draft principles and guidelines. She added that it would be more useful to have a contribution from each regional group about the causes of terrorism in order to have different regional perspectives on the question.

64. The observer for the International Institute for Non-Aligned Studies said that terrorist threats are increasing and referred to a recent foiled terrorist act involving a number of planes.

65. The observer for the Association of World Citizens stated that her organization had recently organized a seminar on freedom of association in which Mr. Salama had participated, and added that the report would be available shortly. She added that terrorism sometimes had a structured political and military agenda, and that this should be taken into account.

66. Mr. Decaux indicated that it would be useful to have consultations with various regional organizations such as the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE), the Arab League, the African Union, and the Organization of American States. He also suggested to have an in-depth meeting with NGOs which have been involved in the subject of human rights and terrorism, such as the International Commission of Jurists, and that such a meeting would be a useful forum to exchange information. Ms. Warzazi also proposed that the Secretariat try to keep the working group informed, to the extent possible, on various developments and events of the different regional organizations.

67. In terms of the organizational issue of how to proceed with work on the draft principles and guidelines, it was agreed that those experts and observers who had e-mail should send their contributions directly to the Chairperson-Rapporteur in approximately one month. If experts and observers did not have e-mail, those contributions could be sent to the Chairperson-Rapporteur through the Secretariat.

68. The Chairperson then noted that the seminar that the working group had recommended to be held in last year's report did not take place because of the uncertainty surrounding the future of the Sub-Commission, although she said such a seminar would still be extremely useful for the work on the guidelines. She further noted that a briefing from a representative of the OHCHR on United Nations strategies, programmes and activities on terrorism since the last meeting of the working group was to take place at the present meeting. She indicated that in her view this would be very useful, as it would keep the working group apprised of developments within the United Nations system.

69. After being introduced by the Chairperson-Rapporteur, the representative of OHCHR began her presentation by referring to the Secretary-General's recently issued strategy document entitled *Uniting against terrorism: recommendations for a global counter-terrorism strategy*, Report of the Secretary-General (A/60/825), dated 27 April 2006. She said that the strategy contained five pillars which included: (1) dissuading people from resorting to terrorism or supporting it; (2) denying terrorists the means to carry out an attack; (3) deterring States from supporting terrorism; (4) developing State capacity to defeat terrorism; and (5) defending human rights. In terms of activities of OHCHR, she said that the Office is working on the development

of two publications: one will be a fact sheet on terrorism and human rights, and the other will be a fact sheet on the relationship between international humanitarian law and human rights law. She also stated that OHCHR, in cooperation with the OSCE and its Office for Democratic Institutions and Human Rights (ODIHR), are jointly organizing an expert meeting on international cooperation in the context of counter-terrorism. The expert meeting will share experiences among security experts and legal professionals from relevant national ministries, law enforcement and the judiciary. She also highlighted that OHCHR had worked with OSCE/ODIHR on the development of a draft manual on counter-terrorism and human rights, the publication of which is expected to take place later this year.

70. The OHCHR representative stated that OHCHR had recently participated in a meeting organized by the United Nations Office on Drugs and Crime for West and Central African Governments on national legal frameworks for countering terrorism, and provided input relating to compliance with national counter-terrorism measures with human rights law, international humanitarian law and international refugee law. She also noted that OHCHR has worked with the Council of Europe, making contributions to the Council of Europe's group of specialists on terrorism on the issue of diplomatic assurances, and by providing input to the discussions which resulted in the Council of Ministers recent recommendation on providing assistance to victims of crime, including victims of terrorism.¹

71. The briefing was followed by an interactive dialogue with members of the Sub-Commission.

II. RECOMMENDATIONS FOR FOLLOW-UP TO THE WORKING GROUP

72. The following recommendations were adopted by the working group:

(1) The Chairperson-Rapporteur should take into account comments and observations by experts and observers during the session; and of the various notes and contributions experts and observers had agreed to send to her within approximately one month of the conclusion of the fifty-eighth session of the Sub-Commission so that she could prepare a revised and further updated framework draft of principles and guidelines concerning human rights and terrorism to be considered by the Human Rights Council. The working group, noting that substantial work remained to be done on the draft principles and guidelines, nevertheless was of the view that the Council should have before it the working group's most recent work on this subject;

¹ Recommendation Rec (2006) 8 of the Committee of Ministers to member States on assistance to crime victims, adopted by the Committee of Ministers of the Council of Europe on 14 June 2006.

(2) OHCHR should hold a seminar on issues relating to international judicial cooperation, drawing on practitioners from the police, investigating judges, defence lawyers and other legal professionals from a variety of jurisdictions having different legal traditions;

(3) The work that has been undertaken by the working group should be continued regardless of the framework for expert advice that is ultimately established by the Council. Substantial work has already gone into the draft principles and guidelines and they could, if the experts were given time and an opportunity to further analyse difficult issues, provide a contribution in this field as well as practical guidance to those on the ground at the national level who have to deal with terrorism and its consequences.

III. ADOPTION OF THE REPORT OF THE WORKING GROUP

73. The present report was adopted by the working group on 10 August 2006.
