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

**A preliminary framework draft of principles and guidelines
concerning human rights and terrorism**

Expanded working paper by Kalliopi K. Koufa

Summary

The present submission by Kalliopi K. Koufa is an expanded working paper that develops her preliminary framework draft of principles and guidelines concerning human rights and terrorism, originally submitted to the Sub-Commission at its fifty-sixth session in 2004 (E/CN.4/Sub.4/2004/47). Responding favourably to that submission, the Sub-Commission, by decision 2004/109, decided to establish a sessional working group at its fifty-seventh session in 2005, with the mandate 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 preliminary framework draft of principles and guidelines contained in the working paper prepared by Ms. Koufa”. The Sub-Commission named Ms. Koufa as coordinator in this endeavour.

While the analysis of specific counter-terrorism measures was not a part of her previous mandate to prepare a study on terrorism and human rights, the coordinator, during her mandate as Special Rapporteur of the Sub-Commission on “Terrorism and human rights”, formed the view that there were a number of such measures that gave her great concern, due to likely or apparent incompatibility with long-established human rights and humanitarian law norms. She addressed some general areas of concern in her study. With the present submission, she has further developed her draft guidelines in the hope that this will contribute to the adoption of principles and guidelines by the Sub-Commission as quickly as possible, with due respect given to the views of other members of the working group and the Sub-Commission as a whole.

The author has taken the liberty of providing in the expanded draft guidelines some brief comments based on different sources consulted during her earlier study on terrorism and human rights. The draft reflects careful review of her work on that study, as well as of the relevant work of the human rights treaty bodies, regional human rights bodies, and other guidelines and statements of principle, whether adopted or in progress, of relevance to the topic. The coordinator is aware that in the course of the Sub-Commission’s traditional standard-setting activities, the views of a wide range of experts are sought through the holding of seminars, workshops, consultations, etc. Among her conclusions, she finds that the development of guidelines on protecting human rights while combating terrorism would clearly be enhanced by holding such an event or events. She therefore recommends that seminars or workshops be organized soon under United Nations auspices, hosted by the Office of the High Commissioner for Human Rights and convening as wide a range of participants as possible, including regional intergovernmental organizations and other institutional bodies.

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I. INTRODUCTION

A. Background to the expanded working paper

1. The Sub-Commission, in its resolution 2003/15, entitled “Effects of measures to combat terrorism on the enjoyment of human rights”, requested that the Sub-Commission study the compatibility of counter-terrorism measures adopted at the national, regional and international levels with existing international human rights standards, giving particular attention to their impact on the most vulnerable groups, “with a view to elaborating detailed guidelines” (para. 5). It further appointed its Special Rapporteur on “Terrorism and human rights” to coordinate this effort by gathering the necessary documentation for the effective work of the Sub-Commission (para. 6).
2. Subsequent to that decision, the Commission on Human Rights did not include the elaboration of guidelines by that body, in its resolution 2004/87, entitled “Protection of human rights and fundamental freedoms while countering terrorism”, thereby ensuring that there would not be ongoing efforts at both the Commission and Sub-Commission on the same topic. This expert (coordinator), therefore, assumed that the Commission wanted the Sub-Commission to proceed to draft guidelines.
3. Aware of the urgency of the Sub-Commission on this matter, this coordinator submitted a working paper, entitled “A preliminary framework draft of principles and guidelines concerning human rights and terrorism” (“Draft Guidelines”) to the Sub-Commission at its fifty-sixth session (E/CN.4/Sub.4/2004/47), containing a brief note on Sub-Commission resolution 2003/15, as well as preliminary Draft Guidelines themselves.
4. In the brief note, the coordinator commented on the traditional standard-setting role of the Sub-Commission as an expert body, competent to draft “guidelines” or “principles” regarding the many human rights issues that have come before it, and distinguished among the overall sources of legal norms those derived from international law as a whole (for example, *jus cogens* and *erga omnes*) and those derived from specific human rights provisions (for example, the concept of non-derogability of certain rights coupled with some limitations of rights allowed in wartime). She also pointed out specific issues that would have to be addressed in the most important area of the administration of justice where there is great potential that counter-terrorism measures will overtake long-accepted norms and principles. She concluded her note with a preliminary review of issues to be addressed, as well as the need to address the situation of vulnerable groups and the importance of certain principles (for example non-refoulement) to them. The Draft Guidelines themselves were divided into the following six areas: general principles; terrorist acts and human rights; counter-terrorism measures; issues relating to the administration of justice; asylum and extradition; and a brief list of potential other topics for guidelines.
5. Responding favourably to this initial start, the Sub-Commission, in its decision 2004/109 entitled “Guidelines and principles for the promotion and protection of human rights when combating terrorism”, decided to establish a sessional working group at its fifty-seventh session, with the mandate 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 preliminary framework draft of principles and guidelines contained in the working paper prepared by Ms. Koufa”.

6. While the analysis of specific counter-terrorism measures was not part of her mandate to prepare a study on terrorism and human rights, this coordinator, during her mandate as Special Rapporteur of the Sub-Commission on “Terrorism and human rights”, did form the view that there were a number of such measures that gave her great concern, due to likely or apparent incompatibility with long-established human rights and humanitarian law norms. She addressed, therefore, some general areas of concern in her study, as they were also relevantly addressed in a number of reports and other comments raised by competent United Nations organs and bodies, mechanisms and procedures, international and regional intergovernmental and non-governmental organizations, and national legal associations, about both specific and general counter-terrorism measures.¹

7. As noted by the coordinator in her previous working paper (E/CN.4/Sub.2/2004/47), and in her previous reports on terrorism and human rights, she not only chose to develop more fully in her study the issues that presented the most difficulties, for example, distinguishing terrorists from combatants (to establish eventually a better foundation for guidelines)² but also to reduce possible overlaps and better harmonize with efforts and developments elsewhere in the United Nations system on related issues.³ Consequently, certain other issues were merely mentioned or only minimally addressed (for example, distinguishing terrorist crime from non-terrorist, ordinary or transnational crime) as they were already under consideration or concerted review elsewhere,⁴ and/or in the course of deliberations of the United Nations treaty bodies and at the regional level. She did not address some other issues at all (such as the root causes of terrorism, or terrorist activities by ethnic and national minorities)⁵ as she finally reached the conclusion that these would be better addressed in separate studies to be useful.

8. The coordinator, nonetheless, recognizes that the Sub-Commission guidelines, if they are to be useful, must be comprehensive, that is, they must address all issues relative to human rights and terrorism, whether fully addressed in her study or not.⁶ The working group established by the Sub-Commission faces, therefore, the daunting task of formulating guidelines in areas that have not been fully explored at the Sub-Commission or, in some cases, anywhere else. Thus, at this stage, the coordinator invites all Sub-Commission experts, whether on the working group or not, to both identify some areas where additional work would be helpful, and to submit their views by way of papers or commentary on them.

B. Perspectives and approach: special issues of interest and attention

9. The United Nations needs to adopt detailed and consistent guidelines on the observance and protection of human rights in the fight against terrorism, in order to give clear guidance to States and contribute, in particular, to resolving the question of balance between the imperatives of security and combating terrorism, on the one hand, and of safeguarding civil liberties and human rights, on the other. The ongoing debate over where (or how) to strike that balance, and whether these imperatives should be conceptualized as diametrically opposed or as dual aspects

of the same societal goal, serves to highlight, among other things, the vital importance attached to the drafting of United Nations guidelines concerning human rights and terrorism. Through considered analysis and synthesis of the different issues and dilemmas involved, these guidelines should promote meaningful and practical answers, under international law, to the various challenges posed to the observance and protection of human rights and freedoms, in the fight against terrorism.

10. Concrete problems arising in reality in many countries indicate that counter-terrorism measures and practices can affect a wide range of human rights and freedoms. International and national experience and developments during these last few years show that many counter-terrorism measures and practices raise serious issues not only with respect to international human rights law, but also international humanitarian and refugee law. Several such measures and practices undermine the basic rule of law, i.e. principles such as the separation of public powers and legality. The Sub-Commission guidelines should take into account these problems and different realities and endeavour to provide reliable and constructive international law answers, which will ensure the protection of human rights and freedoms when combating terrorism.

11. To accomplish this, the guidelines need to address a wide variety of issues, including: non-derogable rights and *jus cogens* norms; the role of national courts in supervising national counter-terrorism measures, including judicial remedies; the principle of legality of crimes (*nullum crimen sine lege*), as well as the definition of terrorism and terrorist-related offences in national legislation, including the question of criminalizing the legitimate exercise of rights and freedoms and the question of political offences, and of the non-retroactivity of criminal law; the principle of non-discrimination, including the issue of techniques to screen terrorist suspects; the principle of individual criminal responsibility and the prohibition of collective criminal responsibility; state of emergency and armed conflict; limitations of rights and freedoms in peacetime; fair trial, including special and military courts, and judicial guarantees; the question of interrogation and the prohibition of torture and ill-treatment; the deprivation of liberty, including judicial and administrative detention, incommunicado detention and secret detention; vulnerable groups, including human rights defenders, non-citizens and reporters; non-refoulement, including deportation, extradition, transfer and “rendition”; the right to privacy, including the questions of methods of investigation and evidence, as well as information collection and sharing; the right to property, including compiling lists and freezing assets of persons suspected of terrorism; preventive measures and safeguards to protect human rights.

12. The Sub-Commission guidelines need, moreover, to take into account relevant international human rights standards, including those adopted by regional intergovernmental bodies, and international humanitarian law; relevant analyses, observations and recommendations of both the Charter-based and the treaty-based human rights organs and bodies, including human rights mechanisms and special procedures and, in particular, the reports and studies on the protection of human rights and fundamental freedoms while countering terrorism of the High Commissioner for Human Rights, and of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism; all relevant

studies made by the Sub-Commission for the Promotion and Protection of Human Rights; relevant work of regional institutions and mechanisms, such as the European Union Network of Independent Experts on Fundamental Human Rights, the Council of Europe's Committee of Ministers, the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights. A brief review of some of these is pertinent at this point.

13. Since the adoption of Security Council resolution 1373 (2001), international and regional intergovernmental organizations and other institutional bodies have taken various initiatives to reinforce the protection of human rights and freedoms while fighting terrorism, due to increasing concerns regarding the number of domestic counter-terrorism measures and practices affecting human rights, the rule of law, and generally accepted principles of criminal law.

14. In this context, at the United Nations level, the Office of the High Commissioner for Human Rights compiled and published in September 2003, the *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism*.⁷ Moreover, following a request contained in General Assembly resolution 58/187,⁸ the High Commissioner made general recommendations concerning the obligation of States to promote and protect human rights and fundamental freedoms while taking actions to counter terrorism.⁹ Following the appointment by the Commission of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, pursuant to its resolution 2004/87 of 21 April 2004, the independent expert presented a study contributing also general recommendations to strengthen the promotion and protection of human rights and fundamental freedoms and uphold the rule of law in combating terrorism.¹⁰ A number of important statements, recommendations and country observations made by various human rights treaty bodies and special procedures should also be recalled in this context. Finally, the most important recent step has been the creation by the Commission of the mandate of a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, authorized, inter alia, to "make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism".¹¹

15. Moving on to initiatives taken by regional intergovernmental organizations and other institutional bodies, at the European level, the Council of Europe has already adopted a number of standards relating to the protection of human rights in the fight against terrorism, namely: the "Guidelines on human rights and the fight against terrorism";¹² the "Guidelines on the Protection of Victims of Terrorist Acts";¹³ the Declaration on freedom of expression and information in the media in the context of the fight against terrorism;¹⁴ the Recommendation concerning identity and travel documents and the fight against terrorism;¹⁵ the Recommendation on the protection of witnesses and collaborators of justice;¹⁶ and the Recommendation on "special investigation techniques" in relation to serious crimes including acts of terrorism.¹⁷ The Council of Europe's Steering Committee for Human Rights has been central in the elaboration of these standards, in particular the "Guidelines on human rights and the fight against terrorism", which is the first international legal text on the topic.¹⁸

16. At the Inter-American level, the Inter-American Commission on Human Rights published in October 2002 a significant study entitled Report on Terrorism and Human Rights.¹⁹ In that study, the Inter-American Commission on Human Rights formulated recommendations to member States of the Organization of American States (OAS) with a view to guaranteeing that anti-terrorist measures are in line with their international human rights obligations, international humanitarian law and refugee law. At its thirty-fourth regular session (Quito, 6-8 June 2004), the OAS General Assembly requested the Inter-American Commission on Human Rights “to draw up, with the support of the CICTE [Inter-American Committee against Terrorism] recommendations for the protection of human rights by member States in the fight against terrorism, on the basis of article 15 of the Inter-American Convention against Terrorism and other pertinent international and regional instruments, as appropriate, bearing in mind the Commission’s Report on Terrorism and Human Rights ... and to present [these] to the Permanent Council before the thirty-fifth regular session of the General Assembly”.²⁰ In October 2004, the Inter-American Commission on Human Rights held a hearing with a number of non-governmental organizations²¹ concerning the issue of recommendations for the protection of human rights in the fight against terrorism.

17. At the African level, following a request submitted in 2004 by two non-governmental organizations²² to the African Commission on Human and Peoples’ Rights for the elaboration of guidelines on the protection of human rights in the fight against terrorism, a workshop with the participation of commissioners of the African Commission on Human and Peoples’ Rights was held in London in November 2004. This coordinator was invited to participate but was not able to do so. The African Commission on Human and Peoples’ Rights is currently discussing the issue internally.

18. In order to pursue effectively its mandate to elaborate detailed, as well as comprehensive, guidelines, it is important that the Sub-Commission working group be able to exchange information, views, experiences and legal approaches with the above-mentioned intergovernmental organizations and other institutional bodies. This kind of exchanges and interaction will constitute an extremely valuable input to its drafting of Sub-Commission guidelines concerning the promotion and protection of human rights when combating terrorism, since it can only lead to a greater understanding of the different problems and realities involved, as well as to a more coherent and holistic approach of the subject matter (factually and legally) that takes fully into account the various international developments. The Office of the High Commissioner for Human Rights could valuably contribute, in this regard, by organizing a seminar or workshop on that topic, with the participation of the above-mentioned international and regional intergovernmental and other institutional bodies.

C. Concluding remarks and recommendation

19. At the risk of usurping partially the working group’s future efforts, this coordinator respects the urgency of the Sub-Commission’s directive but recognizes that the task will not be completed in one session of the Sub-Commission. Therefore, she continued work on her Draft Guidelines in the hope that this will contribute to the adoption of principles and guidelines by the Sub-Commission as quickly as possible, giving due respect to other members of the working

group and the Sub-Commission as a whole. For the same reason, she has also taken the liberty to provide in her expanded draft, contained in Part II of this document, some brief comments based on different sources consulted for, or cited in, her study on terrorism and human rights, after carefully reviewing all of her work on that study, as well as sources outside her study, relevant work of the human rights treaty bodies, of regional human rights bodies, and other guidelines and statements of principle, whether already adopted or in progress, of relevance to the topic, recognizing that any guidelines require sound bases in existing and evolving international law. These comments seek to avoid duplication of the *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, and accordingly must be read with the *Digest of Jurisprudence* in mind.

20. This coordinator is aware that in the course of the Sub-Commission's traditional standard-setting activities, the Special Rapporteurs and working groups involved in particular issues have sought the views of a wide range of experts through holding seminars, workshops, consultations, etc. While some of these have taken place outside the United Nations, others have been held under United Nations auspices and hosted by the High Commissioner for Human Rights. Developing guidelines on protecting human rights while combating terrorism would clearly be enhanced by contributions and commentary from such a session, as already suggested in paragraph 18 above, as well as for reasons mentioned therein. Additionally, such a session could include academics and experts from outside the United Nations, as well as persons with day-to-day involvement in combating terrorism. Participation of academics, experts and day-to-day actors, in addition to persons from relevant United Nations organs and bodies, specialized agencies, the secretariat and affiliated non-governmental representatives, has proved to be most useful in the development of other guidelines; therefore, this coordinator is convinced that such would be the case for this topic as well.

21. In light of the above observations, and in the interest of ensuring that the Sub-Commission guidelines are practical and legally sound, this coordinator recommends that such a seminar or workshop be organized under United Nations auspices and hosted by the Office of the High Commissioner, especially if the seminar or workshop goes beyond traditional participants to include the regional intergovernmental organizations or other institutional bodies. In any case, this coordinator feels very strongly that a seminar or workshop on this topic should be held as soon as practicable, and with as wide a range of participants as possible.

II. A FRAMEWORK DRAFT OF PRINCIPLES AND GUIDELINES CONCERNING HUMAN RIGHTS AND TERRORISM

A. General principles

22. All international, regional and national action concerning terrorism should be guided by the Charter of the United Nations, all general principles of law, all norms of human rights as set out in international and regional treaties, and all norms of treaty-based and customary humanitarian law. Due attention should be paid to United Nations or regional treaty bodies, in particular to comments, commentary, guidelines or sets of principles on specific treaty articles or issues.

23. International and regional treaties and agreements relating to terrorism that do not specifically address human rights and humanitarian law should be interpreted and acted upon, as necessary, to conform with all universally binding norms of these bodies of law.
24. International action to combat terrorism should focus heavily on prevention of terrorism or terrorist acts. To the degree possible, international action should focus on the development and implementation of forward-looking strategies rather than being responsive or reflective of individual acts or series of terrorist acts.

Comments

Action relating to terrorism must be firmly based in existing law. Paragraph 2 is self-evident and reflects, inter alia, the principles of pacta sunt servanda, jus cogens, erga omnes. Paragraph 3 reflects the coordinator's concern about hasty and over-reaching measures that do not help in addressing terrorism and eventually have to be curtailed or eliminated.

B. Duties of States regarding terrorist acts and human rights

25. All States have a duty to promote and protect human rights of all persons under their political or military control in accordance with all human rights and humanitarian law norms.
26. All States have a duty to protect and ensure the safety and security of all persons under their political or military control in accordance with all human rights and humanitarian law norms. Special attention should be given to protection of vulnerable groups, such as children, the elderly, the infirm or disabled, or of non-citizens from terrorist acts.
27. All States have a duty to prevent terrorist acts. Special attention should be given to secure works and installations containing dangerous materials as well as objects and supplies, such as foodstuffs and drinking water, essential for survival.
28. All States have a duty to promote and carry out national and international policies and practices to eliminate the causes of terrorism and to prevent the occurrence of terrorist acts.
29. All States have a duty to refrain from producing undue fear or apprehension of terrorist acts among their citizens or residents that is out of proportion to the real threat.
30. There shall be no impunity for terrorism or terrorist acts.

Comments

This section is largely based on the Charter, the Universal Declaration of Human Right (especially article 28), and principles, such as "due diligence", set out in the study. The provision of the duty to refrain from producing undue fear is essential to guarantee citizen confidence in actual counter-terrorism measures so as to prevent measures that undermine human rights and humanitarian law norms. The work on

guidelines relative to impunity, initially undertaken by Sub-Commission members Louis Joinet and El-Hadji Guissé, recently updated, consolidated, and presented to the Commission by Ms. D. Orentlicher, the independent expert appointed to update the set of principles to combat impunity (E/CN.4/2005/102 and Add.1), will provide guidance in this regard and will not be duplicated here. The Secretary-General has been especially concerned with addressing the root causes of terrorism, as has his High Level Panel in its report. A More Secure World: Our Shared Responsibility.

C. General principles relating to counter-terrorism measures

31. Counter-terrorism measures must comply fully with all rules of international law, including human rights and humanitarian law, as interpreted by treaty bodies, experts of Charter-based bodies, regional human rights bodies and all other sources of international law. Special attention should be paid to ensure that all laws, acts and policies in this regard reflect the right to non-discrimination on any basis and are not carried out in a way that fosters racism, xenophobia, religious intolerance, or any undue social unrest.
32. Counter-terrorism measures should to the degree possible foster international solidarity and cooperation.

D. Counter-terrorism measures and the definition of terrorism

33. Counter-terrorism measures must directly relate to terrorism and terrorist acts, not actions undertaken in armed conflict situations or acts that are non-terrorist crimes. Definitions of terrorist acts must be very carefully drawn so as to clearly set out their elements. Due attention should be paid to what the elements are of the acts that support the term “terrorist” when applied to a crime.

(a) Military operations undertaken in times of armed conflict shall be evaluated in light of all existing rules relating to such operations. Military operations that are not prohibited shall not be treated as terrorist acts. The use of force undertaken by a people with the right of self-determination shall not be treated in general as terrorist acts or the group using such force as a terrorist organization: only a particular act that meets the definition of a terrorist act shall be considered as such. Acts that constitute terrorist acts in an armed conflict, regardless of the type of conflict, must be acted upon, as all other violations of humanitarian law, in strict conformity with the rules set out in humanitarian law instruments and not by other means.

(b) States shall not use either the issue of terrorism or the existence of a terrorist act in the conduct of an armed conflict as an excuse to deny the right of self-determination of a people or to avoid application of humanitarian law in situations of armed conflict.

(c) Crimes not having a quality of terrorism, regardless of how serious, shall not be subject to counter-terrorism exceptions or derogations, even when carried out by a suspected terrorist or terrorist group. Definitions of terrorist crimes must be in conformity with all applicable international norms such as *nullum crimen sine lege* or the principle of individual criminal responsibility. In particular, definitions should clearly set out what elements of the crime are terrorist.

Comments

This article addresses the two biggest definition problems: separating terrorism from armed conflicts and terrorist crimes from ordinary crime. The study on terrorism and human rights focused more on the armed conflict definitional problem, but important principles discussed in the report, such as nullum crimen sine lege and the principle of individual criminal responsibility, apply mainly in the criminal law field. This article largely draws from these parts of the study, as well as the norms of humanitarian law relied on in the study, and jurisprudence regarding terrorist crimes. Especially relevant are the many comments, cited in the study, made in both United Nations and regional bodies, expressing concerns with over-broad definitions of terrorist acts. As this coordinator pointed out in her study, great specificity is required, because a charge or conviction of a terrorist crime may be used to justify, for example, denial of bail or enhanced sentences or special penalties.

E. Exceptions and derogations

34. Any exceptions or derogations in human rights law in the context of counter-terrorism measures must be in strict conformity with the rules set out in the applicable international or regional instruments. A State may not institute exceptions or derogations unless that State has been subjected to terrorist acts that would justify such measures. States shall not invoke derogation clauses to justify taking hostages or to impose collective punishments.

(a) Great care should be taken to ensure that exceptions and derogations that might have been justified because of an act of terrorism meet strict time limits and do not become perpetual features of national law or action.

(b) Great care should be taken to ensure that measures taken are necessary to apprehend actual members of terrorist groups or perpetrators of terrorist acts in a way that does not unduly encroach on the lives and liberties of ordinary persons or on procedural rights of persons charged with non-terrorist crimes.

(c) Exceptions and derogations undertaken following a terrorist incident should be carefully reviewed and monitored. Such measures should be subject to effective legal challenge in the State imposing exceptions or derogations.

Comments

In general, only certain mercenary groups, not terrorist groups, have the capacity to threaten the existence of a State, and then only a small or poorly defended one. This section draws largely on the report prepared by Sub-Commission Special Rapporteur Nicole Questiaux (E/CN.4/Sub.2/1982/15), and general comments Nos. 5 and 29 of the Human Rights Committee. The final report on human rights and states of emergency (E/CN.4/Sub.2/1997/19 and Add.1) of Sub-Commission member Leandro Despouy is

also instructive in this regard. Additionally, the Digest of Jurisprudence indicates that this issue has been frequently addressed in all the regional bodies. This issue is particularly difficult relative to freedom of religion and belief, as that right, while non-derogable, is subject to limitation in the manifestation of religion on grounds of public order (ordre public).

F. Specific principles relating to arrest, detention, trial and penalties of alleged terrorists

35. No person shall be arrested for a terrorist act, unless there are reasonable grounds to support the arrest. No person may be detained solely on the basis of race, colour, national origin, ethnicity or religion. Evidence used to justify the arrest of a person must meet all international standards. Abduction and hostage-taking are prohibited in all circumstances.

(a) No person shall be arrested based on evidence obtained by means of a search that violates international standards. While in certain circumstances area-wide searches may be undertaken or restrictions on freedom of movement imposed to facilitate seizure of evidence, there must be sufficient grounds to suspect the presence of terrorists or evidence to justify them, and they should be undertaken in a way that least varies from international standards. Forcible transfers of persons on the pretext of securing evidence, without compelling grounds permitted under international law, constitute crimes against humanity.

(b) No person shall be arrested based on evidence obtained under torture, or cruel, inhuman or degrading treatment.

(c) No person shall be arrested solely on the basis of evidence provided by a person already detained.

36. Persons detained under suspicion of engaging in or planning terrorist acts have at all times the right to know the charges against them. A charge of being a terrorist is insufficient if it is not accompanied by charges of specific acts.

37. Persons detained under suspicion of engaging in or planning terrorist acts have at all times the right to counsel from the moment of arrest.

38. Persons detained under suspicion of engaging in or planning terrorist acts have at all times the right to the presumption of innocence.

39. Persons detained under suspicion of engaging in or planning terrorists acts have the right to remain silent. Exercise of the right to remain silent shall not carry with it any penalties or presumptions.

40. Persons detained under suspicion of engaging in or planning terrorists acts and held in administrative detention must be brought before competent legal bodies promptly, generally within four days.

41. Persons detained under suspicion of engaging in or planning terrorist acts may not be subjected to torture or cruel, inhuman or degrading treatment. No evidence obtained under these conditions may be admitted into evidence or in any way be used to support a conviction. Persons detained for trial in one State may not be transferred to any other State for interrogation purposes and any evidence obtained in these circumstances shall not be admitted into evidence or used in any way to support a conviction.

42. All international and national norms relating to legal proceedings must be followed in any case involving persons charged with terrorist acts. In particular, fundamental requirements of fair trial must at all times be respected. States may limit media or public presence at such trials if the interest of justice so demands. However, there must be some mechanism for observation or review of any trial with limited access of the media or general public to guarantee its fairness.

43. The use of military tribunals should be limited to trials of military personnel for acts committed in the course of military actions. The use of military tribunals to try a person accused of terrorist acts must meet all requirements of international humanitarian law for such tribunals.

44. The right to submit writs such as habeas corpus and *amparo*, as well the legal means to prepare and submit these writs, may not be denied to any person arrested and charged with a terrorist act.

45. No person can be convicted of a terrorist act unless that person has been able fully to present witnesses and evidence in his or her defence, cross-examine witnesses and evidence against him or her, and unless the trial has had all other elements of fairness, impartiality or other requirements of fundamental legal principles.

46. Penalties for convicted terrorists shall conform with all international and national rules, especially those relating to the death penalty and life sentences without possibility of parole. While participation in a terrorist act may be grounds for evoking "special circumstances" that can be used to justify higher penalties, no penalty may be cruel, inhuman or degrading.

47. No person convicted of a terrorist act can be denied the right to appeal, including to relevant regional or international tribunals or mechanisms.

48. Conditions of detention, whether pretrial, during trial or post-conviction, must conform to all international standards, except that in exceptional circumstances, provided for in conformity with international and national law, persons accused or convicted of terrorist acts may be detained in facilities apart from persons accused or convicted of ordinary crimes, provided that rules relating to the prohibition of prolonged solitary detention are obeyed. Under no circumstances may a person be held in either unacknowledged or incommunicado detention.

Comments

This section draws largely on non-discrimination principles of many international and regional human rights treaties and on related principles in humanitarian law, article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and commentary of the Committee against Torture, on

general comments Nos. 5, 8, 21 and 29 of the Human Rights Committee, the directives of the Working Group on Arbitrary Detention and the jurisprudence of regional human rights bodies. While there is some variance in the regional human rights bodies regarding the length of time persons may be held in administrative detention, the European Court of Human Rights is quite firm that persons detained for terrorist-related offences (or any other charges) must be brought before a judicial officer within four days (Brogan and Others v. the United Kingdom, ECHR, 29 November 1988, (para. 62)). The Human Rights Committee, in its general comment No. 29, indicates that the prohibition of unacknowledged detention is absolute due to its status as a norm of general international law (para. 13 (b)). This rule is further supported by obligations regarding both prisoners of war and civilian detainees in humanitarian law. The Geneva Conventions of 12 August 1949 contain explicit fair trial requirements that are not subject to derogation. The Human Rights Committee sees no reason for derogation from them in other emergency situations falling short of war (general comment No. 29, para. 16). The Committee, while not mentioning any particular writs, such as habeas corpus or amparo, declares that the legal means to challenge the lawfulness of a detention is essential to protect non-derogable rights. Humanitarian law, and article 7 (1) (d) and 7 (2) (d) of the Rome Statute of the International Criminal Court address the absolute nature of the rule against deportation or forcible transfer. The Guiding Principles on Internal Displacement also address this point, as does Sub-Commission member Paulo Sérgio Pinheiro in the guidelines he is developing on the right to housing (E/CN.4/Sub.2/2004/22 and Add.1). There are many international instruments relating to the conditions of detention, such as the Standard Minimum Rules for the Treatment of Prisoners, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. The Digest of Jurisprudence cites many decisions in the regional human rights bodies on these issues.

G. Asylum, forcible transfers and extradition

49. All national policies involving asylum, extradition, removal and forcible transfers must conform to international, regional and national law. In particular, there must be full respect for the principle of non-refoulement and full regard to laws relating to the death penalty or other harsh sentences. No person shall be transferred to any State unless there is a verifiable guarantee that there will be full protection for all human rights in the receiving State. Diplomatic assurances by the receiving State are insufficient to prove that the transferred person's rights would be fully respected. Until the transferred person's status is fully settled in accordance with all applicable international and national law, the transferring State remains liable for that person. A transferring State must seek the return of any transferred person whose rights are at risk.
50. Mass deportation and prolonged forcible transfer are crimes against humanity.
51. As extradition is a major procedure in counter-terrorism agreements and measures, all States should endeavour to elaborate extradition rules that are compatible with international law and the rules of other States.

52. Persons detained on grounds of having engaged in a terrorist act may not be transferred by one State to another State except under legally recognized extradition, expulsion or deportation procedures that fully conform with all international human rights and humanitarian rules.

53. Transfers of persons detained on grounds of having engaged in a terrorist act should not be carried out when there is reasonable cause to believe that a request for transfer is motivated by prejudice, discrimination or other impermissible bias or when there is any reason to believe that the person for whom the transfer is sought would not have a fair trial in conformity with all rules of international law relating to the administration of justice, or would be subjected to conditions of detention that do not fully meet all international standards. In particular, States sending a person should affirm that there are no unjustifiable exceptions, limitations or derogations in place in the receiving State.

Comments

This section draws on the Human Rights Committee's general comment No. 31, basic rules of asylum law, relevant provisions of humanitarian law (especially articles 45 and 49 of the Fourth Geneva Convention), the above-mentioned section of the Rome Statute of the International Criminal Court, the Convention against Torture, the report of the Special Rapporteur on migrant workers of the OAS (OEA/Ser.L/V/II.111, Doc.20 rev.16 (2001)) and the OAS Report on Terrorism and Human Rights. The Sub-Commission's expert, Mr. Pinheiro, draws on the same sources in his draft guidelines on the right to housing. The issue of transfers includes the concept of "rendition", and in this regard draws on the work of the Working Group on Arbitrary Detention and, in particular, the urgent appeal issued jointly with the Special Rapporteur on the question of torture of the Commission on Human Rights (E/CN.4/2004/56/Add.1, para. 1823).

H. Privacy and property rights

54. All rules relating to privacy and property rights must be in strict conformity with international human rights and humanitarian law norms. States must not encroach, either electronically or by any other means, on correspondence or other private communications without warrants issued with sufficient cause. Property may not be seized as part of counter-terrorism measures without warrants issued on the basis of sufficient cause. All persons or groups whose property has been seized or whose assets have been frozen have the right to challenge this through full and fair legal proceedings, which, owing to the gravity of seizing property or freezing assets in democratic societies and the principle of the presumption of innocence, must be compulsory.

Comments

Many international and bilateral agreements on the exchange of information and intelligence between States give cause for concern in relation to the right to privacy, as do many anti-terrorist measures introduced since 11 September 2001. The Human Rights Committee, in its general comment No. 16 on the right to privacy, provides basic rules relating to privacy. Property rights are guaranteed in the Universal Declaration

of Human Rights, article 17. Regional human rights declarations and conventions must also be consulted in determining what is sufficient cause. The European Court of Human Rights has ruled that some “secret surveillance” might be allowed during genuine emergency situations, but this is not unlimited. (Klass and Others v. Germany, European Court of Human Rights, judgement of 6 September 1978, Series A, No. 28). The issue of housing rights is relevant, and the above-mentioned guidelines in progress by Mr. Pinheiro on the right to housing will provide that framework.

I. Freedom of association and assembly

55. All rules pertaining to the rights of association and assembly must be in strict conformity with international human rights and humanitarian law norms. In particular, great care should be taken to ensure that any limitations on these rights are specifically targeted at terrorist groups and set out with great precision to avoid affecting non-terrorist groups or persons who have not directly participated in a terrorist act. The international community should be especially vigilant in its review of any State’s limitations on these rights, or the detention or prosecution of any person charged for membership or association with a group labelled terrorist by a State. As the right to freedom of association and assembly is especially important in the context of asylum rights, States should also take great care to ensure their full protection in that context.

Comments

These rights, broadly recognized as both civil individual and political rights, might be misused by States to suppress political dissent. Therefore, their undue restriction by the State may entail even greater animosity against it and have as well little effect in combating threats to its national security. The International Covenant on Civil and Political Rights, articles 21 and 22, the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, article 11, the American Convention on Human Rights, articles 15 and 16, the African Charter on Human and Peoples’ Rights, articles 10 and 11, and the Universal Declaration of Human Rights, article 29, permit, of course, the restriction of these rights for reasons of national security, public safety, public order, public health and morals, or the protection of the rights and freedoms of others; however, States must ensure that the expression of alternative political views, as well as peaceful meetings, are permitted and that administrative or criminal measures are subject to judicial challenge or review. The paragraph draws mainly on the International Bar Association’s Task Force on International Terrorism Report, International Terrorism: Legal Challenges and Responses, the OAS Report on Terrorism and Human Rights, and the coordinator’s additional progress report on terrorism and human rights (E/CN.4/Sub.2/2003/WP.1).

J. Compensation for victims of terrorist acts

56. Victims of terrorist acts are entitled to full remedies for the violations of their rights in conformity with international law relating to effective remedies and reparations. National legislation should provide means by which victims can receive full remedies.

57. Persons unduly affected by counter-terrorism measures, as well as persons who advocate for rights, should have the right to an effective remedy against the State implementing those measures, regardless of their nationality. States may consider establishing expedited procedures, especially for vulnerable groups such as children, the elderly, the infirm or disabled, or for non-citizens.

Comments

Because of the potential for significant social harassment and human rights violations as well as encroachment on long-established procedural rights, persons unduly affected by such measure should be able to challenge them judicially and on an expedited or priority basis. Similarly, interested groups seeking to challenge, for example, overly broad or vague definitions need to have legal standing in this regard. The Guidelines on the protection of victims of terrorist acts recently adopted by the Council of Europe and Sub-Commission expert Theo van Boven's guidelines on compensation, now under review and amendment at the Commission, provide the standards in this regard, and will not be repeated here. Also of relevance in this regard is the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in resolution 40/34 of 29 November 1985.

Notes

¹ See, for example, E/CN.4/Sub.2/2002/35 and E/CN.4/Sub.2/2003/WP.1 and Add.1-2 (second progress report and additional progress report prepared by the Special Rapporteur on terrorism and human rights), and E/CN.4/2002/18, of 27 February 2002 (report of the United Nations High Commissioner on Human Rights pursuant to General Assembly resolution 48/141). While the Commission on Human Rights has, repeatedly, made it clear that the Sub-Commission and its Special Rapporteurs do not have a mandate to address specific country situations, thus preventing also this Special Rapporteur from analysing specific counter-terrorism legislation and measures in her study, at the treaty bodies, more than 50 States are under review each year, and counter-terrorism measures are also subject to review. Furthermore, regarding only the 2004 session of the Commission, 13 procedures referred to national counter-terrorism legislation and measures.

² See E/CN.4/Sub.2/2004/47, para. 2, as well as E/CN.4/Sub.2/2001/31, paras. 71 ff., and E/CN.4/Sub.2/2004/40, paras. 12 ff. The coordinator also points out, in this regard, that while there are distinct bodies of law, there are points of convergence, as well as overlaps between them. Thus, while a certain type of national emergency may allow for some derogation of rights, if the national emergency is an armed conflict, humanitarian law would prevail on that point. This is especially apparent, as will be seen below, regarding certain rights under criminal justice systems: under non-derogation clauses of human rights law, fair trial rights may be subject to exception or derogations, while under humanitarian law such rights are not so subjected.

³ See, for instance, E/CN.4/Sub.2/1999/27, para. 61.

⁴ I.e. the United Nations Commission on Crime Prevention and Criminal Justice and the United Nations Office for Drug Control and Crime Prevention based in Vienna.

⁵ See, for instance, E/CN.4/Sub.2/2004/40, para. 10, and E/CN.4/Sub.2/1997/28, para. 19.

⁶ Regarding some of these issues, the coordinator prepared a considerable amount of text in the course of her mandate as Special Rapporteur on terrorism and human rights; however, for reasons already stated in her reports, in the end she either did not include it or included it in very reduced form. Some of it could now usefully contribute to the drafting of the Sub-Commission guidelines.

⁷ HR/PUB/03/1, United Nations, New York and Geneva, 2003.

⁸ See General Assembly resolution 58/187 of 22 December 2003, para. 10.

⁹ See the study of the United Nations High Commissioner for Human Rights: protection of human rights and fundamental freedoms while countering terrorism (A/59/428), as well as the report of the High Commissioner for Human Rights: protection of human rights and fundamental freedoms while countering terrorism (E/CN.4/2005/100).

¹⁰ See the report of Mr. Robert K. Goldman, independent expert on the protection of human rights and fundamental freedoms while countering terrorism (E/CN.4/2005/103).

¹¹ See Commission resolution 2005/80, of 21 April 2005, para. 14.

¹² Adopted by the Committee of Ministers at its 804th meeting (11 July 2002). See Council of Europe document H (2002) 4, of July 2002.

¹³ Adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers' Deputies. See Council of Europe document DGII (2005) 6, of 3 March 2005.

¹⁴ Adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers' Deputies.

¹⁵ See recommendation Rec(2005)7 of the Committee of Ministers to member States concerning identity and travel documents and the fight against terrorism (adopted by the Committee of Ministers on 30 March 2005, at the 921st meeting of the Ministers' Deputies).

¹⁶ Recommendation Rec(2005)9 of the Committee of Ministers to member States on the protection of witnesses and collaborators of justice (adopted by the Committee of Ministers on 20 April 2005, at the 924th meeting of the Ministers' Deputies).

¹⁷ Recommendation Rec(2005)10 of the Committee of Ministers to member States on "special investigation techniques" in relation to serious crimes including acts of terrorism (adopted by the Committee of Ministers on 20 April 2005, at the 924th meeting of the Ministers' Deputies).

¹⁸ See also Council of Europe press release 369a (2002), available at [http://press.coe.int/cp/2002/369a\(2002\).htm](http://press.coe.int/cp/2002/369a(2002).htm).

¹⁹ See OAS document OEA/Ser.L/V/II.116, doc.5 rev.1corr., of 22 October 2002, available at <http://www.cidh.oas.org/DefaultE.htm>.

²⁰ See OAS General Assembly resolution (AG/RES. 2035 (XXXIV-O/04) entitled “Protecting Human Rights and Fundamental Freedoms While Countering Terrorism”, of 8 June 2004, para. 6.

²¹ The Washington Office on Latin America (WOLA), the Instituto de Estudios Legales (IDL, Peru), the Colombian Commission of Jurists and the International Commission of Jurists.

²² Interights and International Commission of Jurists.
