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COMMISSION ON HUMAN RIGHTS  
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Fifty-seventh session  
Agenda item 6 (c)

**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: Mrs. Kalliopi K. Koufa**

### **Summary**

By its decision 2004/109, the Sub-Commission on the Promotion and Protection of Human Rights decided to establish at its fifty-seventh session a sessional working group of the Sub-Commission 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 Kalliopi K. Koufa.

The working group held two public meetings during the fifty-seventh session, on 2 and 3 August 2005. The present report was adopted by the working group on 9 August 2005.

The working group decided to request the Chairperson to update her preliminary framework draft of principles and guidelines based on the discussions in the working group; to prepare four working papers for the next session of the Sub-Commission on general issues; freedom of expression; international judicial cooperation; and the rights of victims of terrorist acts; to share the report of the working group with States, organizations and bodies of the United Nations system, the specialized agencies, the treaty bodies and other United Nations human rights mechanisms, including the special procedures of the Commission on Human Rights, regional intergovernmental organizations, national human rights institutions and non-governmental organizations and to request them to transmit information relevant to the working group's mandate to the Office of the High Commissioner for Human Rights; to explore the idea for a focused seminar as proposed in Ms. Koufa's expanded working paper; and to reconvene the working group during the fifty-eighth session of the Sub-Commission.

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## **Introduction**

1. By its decision 2004/109, the Sub-Commission on the Promotion and Protection of Human Rights decided to establish at its fifty-seventh session a sessional working group of the Sub-Commission 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 Kalliopi K. Koufa (E/CN.4/Sub.2/2004/47).
2. The Sub-Commission nominated the following experts as members of the working group: Ibrahim Salama (Africa), Chen Shiqiu (Asia), Gáspár Biró (Eastern Europe), Florizelle O'Connor (Latin America and the Caribbean), and Ms. Koufa (Western Europe and other States).
3. The working group held two public meetings during the fifty-seventh session, on 2 and 3 August 2005. The present report was adopted by the working group on 9 August 2005.
4. A representative of the Office of the High Commissioner for Human Rights (OHCHR) opened the session. The working group elected, by acclamation, Ms. Koufa as Chairperson-Rapporteur.
5. The following members or alternates of the Sub-Commission attended the working group: Gudmunder Alfredsson, Mr. Biró, Marc Bossuyt, Mr. Chen Shiqiu, Chin Sung Chung, Emmanuel Decaux, Françoise Hampson, Ms. Koufa, Christy Mbonu, Ms. O'Connor, Lalaina Rakotoarisoa, Mr. Salama, Marilia Sardenberg, Abdul Sattar, Janio Iván Tuñón Veilles, Halima Embarek Warzazi and Yozo Yokota.
6. Representatives of the following States Members of the United Nations were represented by observers: Algeria, Australia, Brazil, Colombia, Finland, France, Greece, Guatemala, Haiti, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kazakhstan, Lesotho, Morocco, Nigeria, Pakistan, Republic of Korea, Slovakia, South Africa, Sri Lanka, Thailand, Turkey, Ukraine, Yemen.
7. The working group attracted a large number of non-governmental participants. Only those who took the floor and identified themselves could be noted in the present report. A representative of the National Human Rights Commission of Korea took the floor, as did representatives of the following non-governmental organizations (NGOs): Association of World Citizens, International Commission of Jurists, Minnesota Advocates for Human Rights, Indigenous World Association, Interfaith International, France Libertés : Fondation Danielle Mitterand, Pax Romana and Association for World Education.
8. The working group had before it the following documents: "A preliminary framework draft of principles and guidelines concerning human rights and terrorism: expanded working paper by Kalliopi K. Koufa" (E/CN.4/Sub.2/2005/39), "A preliminary framework draft of principles and guidelines concerning human rights and terrorism: working paper prepared by Kalliopi K. Koufa, Special Rapporteur on terrorism and human rights" (E/CN.4/Sub.2/2004/47),

“Protection of human rights while countering terrorism: report of the High Commissioner for Human Rights (E/CN.4/2005/100), “Protection of human rights and fundamental freedoms while countering terrorism: note by the United Nations High Commissioner for Human Rights transmitting the report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman” (E/CN.4/2005/103), the Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers of the Council of Europe on 11 July 2002, the *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, and the report of the Secretary-General to the General Assembly at its fifty-eighty session on the protection of human rights and fundamental freedoms while countering terrorism (A/58/266).

## **I. ISSUES RELATING TO THE PROTECTION OF HUMAN RIGHTS WHILE COUNTERING TERRORISM AND THE ELABORATION OF PRINCIPLES AND GUIDELINES**

### **Comments by the members of the working group and Sub-Commission experts**

9. The Chairperson recalled the background that led to the establishment of the working group. Sub-Commission, in its resolution 2003/15, decided to study the compatibility of counter-terrorism measures with international human rights standards, giving particular attention to their impact on the most vulnerable groups, “with a view to elaborating detailed guidelines” (para. 5) and to appoint the Sub-Commission’s Special Rapporteur on terrorism and human rights, Ms. Koufa, as coordinator of the effort. The coordinator had submitted a working paper (E/CN.4/Sub.2/2004/47) to the Sub-Commission at its fifty-fifth session on, inter alia, the standard-setting role of the Sub-Commission and a preliminary framework draft of principles and guidelines on human rights and terrorism. In its decision 2004/109, the Sub-Commission decided to establish at its fifty-seventh session the present working group, based, inter alia, on the preliminary framework draft contained in document E/CN.4/Sub.2/2004/47.

10. The Chairperson commented on the Sub-Commission’s lack of authority to monitor the compatibility of national counter-terrorist measures with international human rights law and underscored its competence to elaborate human rights standards and formulate principles or draft guidelines. She noted that the Sub-Commission’s work on principles and guidelines was especially important at a time when the United Nations-led fight against terrorism was being intensified and the Commission had established the mandate of Special Rapporteur on the promotion and protection of human rights while countering terrorism. She said that the Sub-Commission should be regarded as the focal point in the United Nations system for the development of comprehensive guidelines to address all issues relative to human rights and terrorism, thereby contributing also to the ongoing debate over where or how to strike the balance between the imperatives of security and combating terrorism, and safeguarding civil liberties and human rights. The guidelines needed to be detailed, comprehensive and clear and provide meaningful and practical international law answers to the various challenges that the war against terrorism posed to protecting and promoting human rights and fundamental freedoms. Counter-terrorist measures and practices in the last few years had raised serious issues with respect to international human rights, humanitarian and refugee law.

11. She suggested that the guidelines should cover a variety of issues, including those listed in paragraph 11 of document E/CN.4/Sub.2/2005/39 (hereafter “document 39”) and draw from international and regional human rights standards, international humanitarian law, the work of the Charter- and treaty-based human rights bodies, the reports and studies of OHCHR and the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, all the relevant work of the Sub-Commission and of the regional institutions and mechanisms. It would be important for the working group to be able to exchange information and views with international and regional bodies and organizations that had been involved in initiatives and developments regarding guidelines and in this regard OHCHR could organize a seminar with broad-based participation as soon as practicable.

12. The Chairperson then pointed out where she had expanded on her initial framework draft of principles and guidelines that was contained in document E/CN.4/Sub.2/2005/47 in the expanded draft contained in document 39 and explained that the comments in the expanded draft mostly sought to identify past Sub-Commission work, such as Mme Questiaux’s study on states of emergency and the guidelines and principles on impunity by Mr. Joinet, as well as principles relating to remedies by Mr. van Boven, and present undertakings of the Sub-Commission such as Mr. Decaux’s work on military tribunals and Mr. Pinheiro’s work on housing issues, which were also relevant.

13. The Chairperson emphasized the fact that the working group would be working on principles and guidelines and did not intend to engage in a treaty drafting exercise. Its aim should be to produce a soft-law text to guide States and others in their review of actions and legislation. She suggested that the working group’s task be fourfold: (a) to reflect on the structure of the text; (b) to address generally its content; (c) to assess its comprehensiveness; and (d) to identify its omissions. She invited the group’s comments on the suggested approach.

14. Ms. Hampson suggested that the working group avoid overlap with other bodies and provide added value. She was of the opinion that there would be a need for guidelines on human rights and counter-terrorism and guidance for making them operational. She suggested that the working group establish relations with the new Special Rapporteur of the Commission on the promotion and protection of human rights while countering terrorism and invite him to participate in future sessions. She cited the example of the Representative of the Secretary-General on internally displaced persons (IDPs). When the mandate was created, no one knew its scope or the principles relating to IDPs. The Representative received assistance from a university and Governments in elaborating the Guiding Principles on Internal Displacement; the process could have benefited from the greater inclusion of NGOs. Nevertheless, the lesson learned was that a special procedure with a thematic mandate that was not fully explored needed to be assisted by a broad-based group. On the working group’s mandate, she agreed that it was not the group’s job to draft but to flesh out the issues in paragraph 11 of document 39. She suggested that the issues of free speech and criminalization of incitement and financing of terrorist acts be added to the list. She asserted that the Council of Europe Guidelines were too general and not useful because States would have difficulties identifying what was permissible or not. With rules of evidence, it would be more useful to take a specific issue and identify when the generally applicable rule could be modified and what safeguards needed to be in place. It was not useful to say that, for example, anonymous evidence could not be used since there was existing case law of a human rights body which established in a different field (drugs

proceedings) that such evidence could be used, on condition that there were safeguards. She suggested that working papers on existing case law of regional human rights bodies on issues such as due process in exceptional cases would be helpful.

15. Mr. Salama stated that the approach initiated by the Chairperson was intelligent and similar to that taken by Mr. Decaux on the issue of military tribunals, i.e. to civilize and not to demonize. The more danger States faced, the more temptation there would be to stray from human rights. He said that a dilemma facing the working group was to achieve a balance between the general and the specific. If the working group was too general, it would not be of great use. Mr. Salama noted that incitement had a legal background, but glorifying terrorism had no legal basis. The working group would need to look at these issues and elaborate sub-guidelines on the themes contained in the Chairperson's expanded working paper. Mr. Salama stated his conceptual difficulties with the statement in paragraph 33 that "[d]efinitions of terrorist acts must be very carefully drawn so as to set out their elements". Terrorism was a crime with aggravating circumstances. If this distinction were not made, one would dangerously generalize accusations and demonize large groups, not only the perpetrators, and make them vulnerable to counter-terrorist measures. Regarding paragraph 33 (c), the working group would need to demystify what was meant by terrorism since the word currently described a phenomenon but did not add much except confusion. Paragraph 24 stated that international action to combat terrorism should focus heavily on prevention. Mr. Salama wondered to what extent the working group would need to address developments in New York regarding the drafting of a comprehensive convention on international terrorism, looking at the human rights dimension of a definition and issues such as whether the military could be subject to terrorist acts or, by virtue of being State agents, could be terrorists themselves.

16. Mr. Decaux stated that it was useful to have an overall view of all problems tied to the question of terrorism and human rights. The United Nations had done a lot of work, including in New York and in the Sub-Commission, which showed consistency of effort. It would be very useful to synthesize and continue previous work within the Sub-Commission. Regional organizations such as the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE) were also in the forefront on terrorism and human rights. The Arab League had created the African Centre for the Study and Research on Terrorism in Algiers and important conferences had been held, including in Madrid in March 2005. Referring to Ms. Hampson's comments on paragraph 11 of document 39, Mr. Decaux made three observations. First, he suggested that there be a distinction made between vulnerability relating to discrimination and vulnerability of journalists in terms of the secrecy of their sources and of maintaining their independence. The reference to journalists as a vulnerable group was understandable but confused the use of accepted terminology. Second, he suggested that it would be useful to look at responsibility of legal or moral entities. Third, the working group should look at victims of terrorism also because there were so many transnational victims and of all nationalities. Article XVII of the Council of Europe Guidelines on human rights and the fight against terrorism had watered down the question to material damage only, but victims also had the right to justice, truth and national solidarity.

17. Mr. Biró stated that in working on principles and guidelines, the working group would need to be specific on the principles, using concrete situations to develop them. It seemed that the Chairperson wanted to make a difference between the content and meaning of prevention on

the one hand and counter-terrorism on the other. This difference should be made more apparent because they were two different things. Referring to paragraphs 27 and 28 of document 39, he stated that one could speak of counter-terrorism when in fact a terrorist act had occurred. Counter-terrorism was stronger than prevention and more secret. He added that it would be important for the working group to consider issues relating to free speech.

18. Ms. O'Connor pointed to the extremely informative character of document 39 and said she wished to focus concern on one aspect of paragraph 11. In regions with Island States that had extreme difficulty securing their borders, a heavy narcotics trade had developed along with the loose use of the word "terrorist" to describe those dealing in drugs and arms. This phenomenon had led to the questionable extradition of citizens from their own countries. Thus, she proposed to get as clear a definition of terrorist and counter-terrorist activities as possible. In relation to freedom of expression, there were situations where she noted that justified social dissent through demonstrations or speech could be suppressed under the guise of terrorist activities.

19. Mr. Chen Shiqui stated that the deepening of terrorist actions had provided a challenge to anti-terrorism and created a complex relationship between the two. Two distinctions needed to be made. First, counter-terrorism meant that when terrorist acts had taken place, we acted to fight against terrorist. Perhaps some would limit human rights like freedom of movement and speech. In fighting against terrorists, some human rights would have to be limited but those limitations should not be long term or permanent, but temporary. When terrorist acts occurred, investigations should follow. However, pointing to the recent incident in London where an innocent person was shot, he noted that the shooting took place without proof or evidence and only on the basis of the observation of the police, thereby limiting the victim's freedom and right to life. Second, countries had taken strict measures to prevent the spread of terrorism to other territories; it was evident that entry measures had become very strict as, for example, in the United States where every person had to be fingerprinted and photographed, with the exception of some diplomatic passport holders. Mr. Chen Shiqui wondered how long those measures would last. In another situation, in order to prevent terrorism, supervisory devices had been installed in all public places such as airports, railway stations, etc. This violated the protection of privacy. As measures of prevention, those actions should be strictly limited in time.

20. Mr. Bossuyt stated that balance was needed when speaking about terrorism or counter-terrorism. Referring to paragraphs 25 through 30 of document 39 on the duties of States, he pointed out that the duty of States to cooperate in pursuing those who have committed acts and should be prosecuted is missing. Regarding paragraph 33, although some felt that certain acts were justifiable because they supported a good cause and there was no alternative, it should be restated that terrorist acts were unacceptable regardless of the objective sought. There might be exceptional situations where the oppressed had no option but to resort to force, but these were exceptions and the law of armed conflict applied. The distinction between combatants and non-combatants needed to be made and no unnecessary harm could be inflicted. Acts of terrorism were crimes which aimed to create panic among civilians. On paragraph 37, which stated that "[p]ersons detained under suspicion of engaging in or planning terrorist acts have at all times the right to counsel from the moment of arrest", he noted that many legal systems did not guarantee the right to legal counsel immediately after arrest. Sometimes there was a delay of 24 hours or



so. Thus, paragraph 35 (c) went further than required. Suspected terrorists should receive human rights protection, but not more so than other people.

21. Ms. Hampson referred to Mr. Biró's point on the difference between prevention and counter-terrorism, noting that a distinction could be made but in practice it would not be easy. In States without terrorist acts, everything could be deemed preventive. There was an overlap between prevention and prosecution and a measure could have both characteristics. For example, introduction of closed-circuit televisions underground could serve to detect before the act and to identify after the attack. It would thus be difficult to make a distinction in practice. Regarding Mr. Decaux on the issue of journalists and human rights defenders, she stated that they were particularly vulnerable in the context of terrorism and counter-terrorism. In order to classify them, the context would need to be identified. Regarding Mr. Chen Shiqui's example of the London shooting, the working group should not develop guidelines capable of application only with hindsight. The basis on which the police will open fire in any given situation should be known. Judgements as to whether a violation had occurred should not be made on the basis of the result of an incident. The only test was what the perpetrator knew or ought to have known at the time. Ms. Hampson agreed that exceptional measures should be limited in time. All too often they are taken in response to a terrorist act, but leak into other areas of law and for longer periods. Regarding Mr. Salama's point about a definition, it would be helpful if a definition could be avoided. She cited the problem of legitimate dissent in countries being portrayed as terrorism, thereby limiting the space for opposition. If a definition was pursued, then it should be freed from international humanitarian law and made applicable outside armed conflict situations. Her definition of a terrorist act would be "any intentional attack against persons entitled to protection as civilians, the foreseeable consequence of which is to instil fear or terror in the population". An attack against the security forces of a State was not a terrorist attack but was still criminal. There was a distinction between an ordinary crime and an aggravated crime, and terrorism was the latter. She noted that international judicial cooperation was escaping scrutiny. Referring to the European arrest warrant, she stated that it worked on the basis of confidence that every European Union member State had adequate due process. Thus, instead of normal processes such as extradition, people were just moved around. Ms. Hampson expressed her views on the bilateral extradition agreement between the United Kingdom and the United States. She noted that there was a need for bilateral and multilateral agreements because they were the only way to combat terrorism, but they needed to comply with human rights norms.

22. Mr. Salama stated that international judicial cooperation was fundamental but there was no legal ground to impose criteria; the guidelines under discussion could softly suggest modalities. The text could mention that the guidelines were intended to inspire legislators.

23. Mr. Biró said that in practice it was difficult to distinguish between prevention and counter-terrorist measures. His problem was on the public nature of those measures. While preventive measures were public, most counter-terrorist measures were not. On the definition, he pointed to the "Revised draft outcome document of the High-Level Plenary Meeting of the General Assembly of September 2005" of 22 July 2005 submitted by the President of the Assembly (A/59/HLPM/CRP.1/Rev.1) in paragraph 85 of which there was what appeared to be consensus language on what could amount to a definition of terrorism. It stated:

“We strongly condemn terrorism in all its forms and manifestations, as it constitutes one of the most serious threats to international peace and security. We welcome the Secretary-General’s counter-terrorism strategy and will consider it in the General Assembly with a view to adopting it. We affirm that the targeting and deliberate killing of civilians and non-combatants cannot be justified or legitimized by any cause or grievance, and declare that any action intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government ... cannot be justified on any grounds and constitutes an act of terrorism.”

24. Mr. Decaux stated that it would be useful to hear from the Danish Human Rights Centre as Chair of the International Coordinating Committee of national institutions. The European national human rights institutions had met in Berlin in late 2004 and focused on terrorism on the basis of their hands-on experience with the issues. The OSCE and the Council of Europe input were also relevant. The concept of prevention comprised several levels that needed to be explained: there was prevention concerning the “root causes”, then prevention concerning a specific threat, and prevention of a terrorist act. Making that distinction would settle the difference of views between Ms. Hampson and Mr. Biró. The Council of Europe Convention on the Prevention of Terrorism adopted in May 2005 mixed those things; however, its article 3 identified the different levels of prevention. The first tier was the media, public awareness and education with a view to preventing crimes. The second tier concerned cooperation between States. The third concerned public awareness and encouraged the public to provide factual information.

25. Ms. Chung pointed to the need to discuss international cooperation, as well as initiatives and developments within regional intergovernmental organisations. She said there was a lack of discussion on initiatives at the Asian regional level. All regions should be advised to make an effort to develop principles and guidelines to counter terrorism. Second, there was a need to examine the root causes of terrorism including poverty, discrimination, etc.

26. Ms. O’Connor expressed her support for international judicial cooperation, noting that the judiciary in developing countries was not necessarily aware of discussions as well as rulings made by other bodies in relation to the subject. She stressed that recent experiences in the Latin American and Caribbean region had underscored the need for States requesting extradition or other transfers to respect national judicial procedure, especially when these were in keeping with accepted standards of due process. She further noted that a seminar at regional level, or to which representatives of regions would be invited, would be useful for sensitisation and education.

27. Ms. Mbonu stated that there was a need to have an acceptable definition of terrorism. Minor uprisings could be seen as terrorist acts leading to such things as embassy closures and impacting negatively on economies. On the duty of States, she said that some terrorists were more powerful than States, and suggested that the working group should look at issues of international cooperation. She agreed with Ms. Chung about looking into the root causes of terrorism.

27. The Chairperson thanked all speakers for their kind words and support. She reiterated that the guidelines were very preliminary and that most of the points raised by the experts were

important and needed to be taken into account. She was in agreement with Ms. Hampson's point on avoiding duplication and on establishing relations with the newly appointed Special Rapporteur of the Commission. She agreed that freedom of expression should be further examined and was undecided whether the guidelines should be more specific or more general. At some point, she thought that her draft was too detailed but could now see the value of filling in any gaps, which would make it much more rigorous and specific. Ms. Hampson's point that it would be useful to have working papers presented by the experts and NGOs to fill in the gaps was also important. On Mr. Salama's commentary on the definition, the Chairperson stated that it resonated with the discussions that took place in the Sub-Commission during the years that she was preparing her study on terrorism and human rights. She noted the various comments on the differences between prevention and counter-terrorism and suggested that this could be taken up again later. She further noted Mr. Bossuyt's comments on paragraphs 25 and 33 of document 39 and stated that perhaps a specific discussion on the various provisions of the draft guidelines was premature at the present stage. She agreed that the issue of international cooperation was missing and should be added, and agreed with Ms. Chung's suggestion that regional organisations might be encouraged also to develop guidelines. Various NGOs had given her information on the subject, as reflected in document 39. She invited NGOs to offer observations, assistance and data on international cooperation, privacy rights in new technologies, and police procedures. With regard to the issue of root causes, she was undecided whether it could be included in the guidelines. As for the issue of self-determination, she thought that it was adequately addressed in her study on terrorism and human rights, and was not sure that it would be productive to reopen the issue for consideration in the draft guidelines. Nevertheless, it would be appropriate to keep it in mind.

### **Comments by Member States**

28. The observer for the Islamic Republic of Iran responded to Mr. Bossuyt's comments on the duty of States on the question of safe havens for terrorists and Ms. Chung's on international cooperation, and indicated they were important issues.

29. The observer for Algeria stated that the question of definition was a major problem. Citing General Assembly resolution 1514 (XV), he wondered whether those working to emancipate a people and for the right to self-determination could be considered terrorists. Thus, as broad an approach as possible was warranted.

### **Comments made by national human rights institutions**

30. The observer for the National Human Rights Commission of Korea spoke about the role of national institutions for the protection and promotion of human rights. He referred to a resolution that was adopted by the 70 national institutions participating in the Seventh International Conference of National Institutions for the Promotion and Protection of Human Rights held in the Republic of Korea from 14 to 17 September 2004. The conference was devoted to the theme of terrorism and its impact on human rights and security. He stated that national institutions had a mandate to protect human rights in the counter-terrorism environment and should share information and best practices. The resolution committed national human rights institutions, inter alia, to take all necessary action at the national level; to encourage States

to take action to protect human rights; and to promote cooperation between national human rights institutions.

### **Comments made by non-governmental organizations**

31. The observer for the Indigenous World Association offered comments on indigenous peoples and colonialism in relation to the definition of aggression. He stated that the nature of self-determination for indigenous peoples was not clear and agreed that paragraph 33 (b) was relevant in that regard.

32. The observer for the International Commission of Jurists (ICJ) echoed the remarks of Mr. Salama and Ms. Hampson on the need to give practical guidance to States. Detailed guidance on the use of force by the police was needed. There was extensive regional jurisprudence aimed at prohibiting human rights violations committed by the police. ICJ was happy to see that privacy rights were included in the Chairperson's paper and suggested that a lot could be done by the working group to elaborate specific guidelines in that area. More could be done on intelligence and evidence-gathering technologies. The working group should benefit from reference to national case law and comparison among national cases. She was happy to see victims' rights included since very little had been done other than the Council of Europe's Guidelines on the Protection of Victims of Terrorist Acts; victims' rights to information, access and participation in inquiry procedures on terrorism measures were relevant and ICJ offered to provide the working group with detailed comments.

33. The observer for the Association of World Citizens stated that the limitation of vulnerable groups to journalists or human rights defenders was too narrow. Anyone with public exposure was a target for a terrorist, whether writer, public servant, or someone in a position to publicly express a viewpoint that was moderate compared to the terrorist's cause. It suggested that the issues of freedom of expression and assembly could be looked at together and encouraged sensitizing the rest of the United Nations system to the work taking place in the Sub-Commission.

34. The observer for the Minnesota Advocates for Human Rights stated that an interpretation section would enrich the Chairperson's document, citing Mr. Pinheiro's guidelines as reference. She suggested that the role of civil society in protecting human rights while countering terrorism should be addressed by the working group. The representative proposed assisting with the elaboration of working papers for next year's Sub-Commission to include the information requested from NGOs.

35. The observer for France Libertés: Fondation Danielle Mitterand referred to the comments of Mr. Bossuyt and raised concern about a practice that had tended to become generalized: lists of terrorist organizations established on no grounds, or rather on political considerations and unclear criteria. The lists were used as "proof" by European countries. We should operate in a way that was transparent and should not have a situation where a State was told that it would be put on the list of terrorists unless it signed some trade agreement. The speaker recalled the need for a precise definition of terrorism.

36. The observer for Pax Romana stated that the Asian region was absent from both reference documents – document 39 and the *Digest of Jurisprudence*. Last November, 50 NGOs had come together in Bangkok to map out definitions of terrorism in Asian legislation and initiatives by Governments and regional organizations like the Association of South-East Asian Nations and the Shanghai Cooperation Organization. There was also another meeting on security and terrorism and how measures impacted on people. The question of the freedoms of expression, opinion, thought, conscience and belief should be looked at. One of the first cases in the Indian Supreme Court resulted in the freeing of someone charged with terrorism. The observer also suggested that attention be paid to due process.

37. The observer for the World Association of Education stated that prior to the events of 11 September, the speaker had brought to the Sub-Commission reports about what was coming. The speaker suggested that self-education was crucial.

## **II. DISCUSSION ON FOLLOW-UP TO THE WORKING GROUP**

### **Comments by members of the Sub-Commission**

38. Mr. Sattar emphasized the need for balance between States' responsibilities to respond to terrorism and to protect human rights. There was a need for preventive measures, for education, and for criminalization of propaganda that instigated terrorism. Referring to paragraph 27 of document 39, he noted that unfortunately some States had climbed onto the bandwagon of anti-terrorism to outlaw legitimate means of expression, including advocacy for human rights, including self-determination. He suggested that the working group should avoid the politics of defining terrorism; that should be left to the General Assembly and, as Mr. Biró had stated, it was apparent that States were approaching consensus. So far, the working group was only in agreement on criminalizing the deliberate targeting of civilians while the Assembly was more advanced on the subject of defining terrorism. Since the Sub-Commission was not fully aware of all developments in New York, it should avoid entering a minefield. The new Special Rapporteur of the Commission would benefit from Ms. Koufa's work. Further areas for study in document 39 included extradition.

39. Mr. Salama suggested that the Chairperson should provide a revised version of her draft guidelines on the basis of the discussions in the working group. He noted that it was the Sub-Commission's role and responsibility as an expert body to contribute to a definition of terrorism, especially given the politicized nature of discussions in other forums.

40. Ms. Hampson suggested that paragraphs 1 to 21 of document 39 be updated to take account of the discussions in the working group. Issues other than those listed in paragraph 11 which needed study should be identified. She suggested that three working papers be prepared for next year's Sub-Commission as follows:

- A general paper that would elaborate on the issues outlined in paragraphs 22 to 33 and on exceptions and derogations (general comment No. 29 of the Human Rights Committee would be useful in this regard);
- A paper on arrest and detention;
- A paper on rules of procedure and evidence (prosecution process);

Other papers could be done subsequently on freedom of expression; privacy and property rights; freedom of association and assembly; and on asylum. If that was too many for next year, priorities should be set. An urgent priority would be arrest and detention; rules of procedure/rules of evidence; and an update of general principles (22 to 33 of document 39) plus derogations and exceptions.

41. Mr. Salama agreed with Ms. Hampson's list but suggested a paper on international judicial cooperation. He suggested three papers for next year on general issues; freedom of expression; and international judicial cooperation. In his view, the technical legal papers could follow.

42. The Chairperson raised the issue of cooperation offered by NGOs to draft papers and referred to precedents in other working groups such as the Working Group on Indigenous Populations and the Working Group on Minorities. Papers could be circulated as United Nations documents or unofficial conference room papers. Another possibility would be for NGOs to co-author papers with Sub-Commission experts.

43. Ms. Hampson generally agreed with Mr. Salama about having three papers addressing general issues, freedom of expression, and international judicial cooperation.

44. Mr. Decaux also offered to prepare a paper on the rights of victims of terrorist acts, which was welcomed by the working group. He noted that the 2002 Council of Europe Guidelines on human rights and the fight against terrorism had important lacunae on this issue and the working group could endeavour to fill them. He observed that the Council of Europe Guidelines on the Protection of Victims of Terrorist Acts adopted in 2005 were not perfect and the working group should not seek to copy them. Even though there was old case law in Europe on those issues, they would need to be looked at in light of new developments. Regarding freedom of expression, a legal approach should be taken, looking at article 26 (2) of the Universal Declaration of Human Rights and article 20 (2) of the International Covenant on Civil and Political Rights. States should be asked to have proper legislation on freedom of expression.

45. Ms. O'Connor expressed her support for Mr. Decaux and stated the example of developing countries where victims of terrorism faced a lack of recourse that was available at the international level. She noted that while there were guidelines on reparations, redress was still not easily available to victims.

46. The Chairperson raised the issue of the seminar proposed in her expanded working paper. Mrs. Hampson agreed that the idea was a good one but that a seminar would need to be focused and address specific issues.

47. Mr. Sattar hoped that the Sub-Commission would endorse the idea of a seminar and raised the issue of the relationship between the working group and the new Special Rapporteur of the Commission. Mr. Sattar also inquired about a demarcation between the Sub-Commission and Commission on the subject.

48. Mr. Salama noted that it didn't matter that there were different mandates on the same subject, but it would be important for them to cover different angles. The working group was heading towards a quasi-normative exercise in addition to what States had at the national level but trying to bring together different elements. If a seminar were held, it would need to be linked to the work of the working group.

49. The Chairperson, responding to Mr. Sattar's question on the relationship with the new Special Rapporteur, stated that he was a very qualified academic from Finland and a former member of the Human Rights Committee who had drafted general comment No. 29 on states of emergency. Although she did not know how he envisaged pursuing his mandate, she was certain that he would make the best of his mandate as Special Rapporteur of the Commission and she hoped that the Sub-Commission would have the opportunity to liaise with him.

50. Ms. Hampson reiterated her point made at the previous meeting that it was important for the Special Rapporteur of the Commission to flesh out the details of his mandate and that it would be particularly useful to have the Sub-Commission assist in this task. The Chairperson added that there was so much to do in the area of counter-terrorism that all organs and bodies of the United Nations could make a valuable contribution. Ms. Hampson then asked whether OHCHR could make space on its web site for information from NGOs and others. The Chairperson stated that she would consult OHCHR on the matter. Mr. Decaux responded that opening up the web site would not add much since a lot of information was already available.

51. Ms. Warzazi stated that she was having some difficulties with the proposed study on freedom of expression. She suggested that the working group would be constrained because everyone was in favour of freedom of expression and the role of freedom of expression was to protect the fundamental freedoms in the Universal Declaration. Mr. Salama had referred to the freedom of persons who allegedly glorified terror. The question was to what extent those people had contact with people and access to written or broadcast media. The working group needed to defend freedom of expression and speak out if lapses in language affected the aim that was being sought.

52. Mr. Biró agreed with Ms. Warzazi. He was not against the paper, but cautioned that it would be about restrictions, forcing the group to take a position on restrictions. He recalled his comments about the difference between prevention measures being public and counter-terrorist measures being secret, and noted that journalists were not getting answers to questions posed even at the highest levels. Thus, the balance would be difficult to strike.

53. Mr. Bossuyt noted that much had already been written on hate speech and article 20 of the International Covenant. Both the Committee on the Elimination of Racial Discrimination (CERD) and the Human Rights Committee had dealt with the subject. The latter had said that some limits on freedom of speech were not incompatible with the Covenant.

54. Ms. Hampson stated that the NGO Article 19 had produced a book on hate speech, particularly on racist speech inciting violence. On the basis of the same action, Denmark had been congratulated by CERD but condemned by the European Court of Human Rights. It would be important to identify the basic rule and the limitations.

55. Mr. Salama agreed with Mr. Bossuyt. The question was not about limitation of freedom of expression in terms of hate speech. The question rather was whether additional limitations were needed, for what, how and by whom, and whether there was room for international standards. There was a clash of cultures and civilisations, for example, associating Islam with terror. The authorities of a faith must be deferred to to make judgements about what might be glorifying terrorism or not. It was a difficult job, but the Sub-Commission should tackle it.

56. Ms. Chung noted that international cooperation was missing and there was a need to discuss what regional organizations were doing. She noted work by the Council of Europe, the Inter-American Commission on Human Rights and the efforts in Asia described by Pax Romana and wondered whether the United Nations could encompass these efforts. She suggested a paper on the Asian region's experience with terrorism and counter-terrorism. Mr. Salama suggested that it would be more helpful to ask regional organisations to submit to the working group a compilation of their own experiences. Ms. Hampson was worried about the proliferation of papers and suggested asking Asian and African regional organizations to submit information on the subjects of the working papers.

57. It was finally agreed that there should be four working papers for next year's Sub-Commission, whose subjects would be as follows:

- General principles and issues that would elaborate on the issues outlined in paragraphs 22 to 33 of document 39 and on exceptions and derogations using also Human Rights Committee general comment No. 29 (Ms. Koufa);
- Freedom of expression (Mr. Bossuyt and Mr. Salama);
- International judicial cooperation (Ms. Hampson);
- The rights of victims of terrorist acts (Mr. Decaux).

58. There were different opinions about whether the working group should address the question of root causes. Mr. Salama noted that there was no solution to terrorism unless the root causes of terrorism were addressed. Ms. Hampson stated that there was a need to consider the subject, but it was not the role of the guidelines. The Chairperson agreed with Ms. Hampson, but said that it was possible to mention the subject in the preamble. Several experts reiterated the fact that no act whatsoever could justify terrorism.

59. Mr. Decaux suggested that the working group's report be sent to national human rights institutions. Ms. Warzazi recommended that the report be sent to the Secretary-General. She said that there should be ways and means of informing the Secretary-General about the working group and the important work it had achieved during its first session.

### **Comments by Member States**

60. The observer for the United Kingdom offered some clarification on the extradition treaty between the United Kingdom and the United States following Ms. Hampson's comments on the subject. Under the 1972 treaty, the United States, when seeking extradition from the United Kingdom, had to show a *prima facie* case against the accused. The United Kingdom was only required by the United States to show "probable cause", which was a lower standard of evidence. Under the Extradition Act 2003, the United Kingdom agreed to remove the *prima facie* case



standard in relation to outward extradition to the United States to correct this imbalance. The treaty was not yet in force since the United States had not ratified it but the United Kingdom had been able to give effect to some aspects of the Extradition Act 2003. According to the Act, there were 20 countries with reduced evidential requirements for extradition; 48 countries in total were not required to provide prima facie evidence in support of an extradition request. The observer stated that the Act and current extradition arrangements were in accordance with the United Kingdom's international human rights obligations.

### **III. RECOMMENDATIONS FOR FOLLOW-UP TO THE WORKING GROUP**

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

- **The Chairperson should update her draft based on the discussions in the working group;**
- **Four papers should be prepared for the next session of the Sub-Commission on general issues that would elaborate on the issues outlined in paragraphs 22 to 33 of document 39 and on exceptions and derogations using also Human Rights Committee general comment No. 29 (Ms. Koufa); freedom of expression (Mr. Bossuyt and Mr. Salama); international judicial cooperation (Ms. Hampson); and the rights of victims of terrorist acts (Mr. Decaux);**
- **The report of the working group should be sent by OHCHR to States, organizations and bodies of the United Nations system, the specialized agencies, the treaty bodies and other United Nations human rights mechanisms, including the special procedures of the Commission on Human Rights, regional intergovernmental organizations, national human rights institutions and non-governmental organizations for their views. They would be asked to transmit information relevant to the working group's mandate to OHCHR;**
- **The Chairperson should explore with OHCHR the idea of a focused seminar as proposed in her expanded working paper;**
- **The working group should continue next year.**

### **IV. ADOPTION OF THE REPORT OF THE WORKING GROUP**

62. The present report was adopted by the working group on 9 August 2005.

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