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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**

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In view of the importance accorded by the Commission on Human Rights to the mandate of the Special Rapporteur on human rights and terrorism and taking into account the discussions on this subject at the fifty-sixth sessions of the Sub-Commission, the Special Rapporteur, having submitted the final report on her study (E/CN.4/Sub.2/2004/40), has prepared the attached working paper* for the consideration of the Sub-Commission and the Commission for possible future action.

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A PRELIMINARY FRAMEWORK DRAFT OF PRINCIPLES AND GUIDELINES CONCERNING HUMAN RIGHTS AND TERRORISM

I. BRIEF NOTE ON SUB-COMMISSION RESOLUTION 2003/15 ENTITLED “EFFECTS OF MEASURES TO COMBAT TERRORISM ON THE ENJOYMENT OF HUMAN RIGHTS”

1. The Sub-Commission, in its resolution 2003/15, provided, *inter alia*, for Sub-Commission review of the compatibility of counter-terrorism measures with existing international standards “with a view to elaborating detailed guidelines” (op. para. 5). It further appointed its Special Rapporteur on “Terrorism and human rights”, as the coordinator of this effort (op. para. 6).

2. During the course of her mandate, this Special Rapporteur kept a constant eye on counter-terrorism measures, and presented her views of problems and incompatibility issues in a number of her reports. She also reviewed and documented in her reports a number of concerns (including guidelines) raised by United Nations and regional procedures and bodies, non-governmental organizations and national legal associations about both specific and general counter-terrorism measures. However, as she stated in these reports, she could not evaluate and report on special national, regional or international measures in detail, as such an effort would require essentially full time work, could not be reported within the page limitations imposed on Sub-Commission reports, and would draw her away from her conceptual analysis, until this year not completed. Her hope has been that with the conclusion of her conception study, the necessary chore of measuring up counter-terrorism measures for compatibility would be substantially easier. In this light, in the course of her study she paid particular attention to those issues relating to human rights and terrorism that presented the most difficulties (distinguishing terrorists from combatants, for example), as lack of either precision or understanding in those areas would make the task of developing guidelines factious, frustrating, and perhaps ultimately fruitless.

3. This Special Rapporteur also takes this opportunity to remind the Sub-Commission that the issue of root causes of terrorism was too vast to be neatly tucked into her study and that she has urged the Sub-Commission to take up this topic for a separate study. Even so, it has been all along patently clear to her that evaluation of counter-terrorism measures will require evaluation of State’s over-all compatibility with human rights and humanitarian law norms, as significant deviations from those norms possibly play a substantial role in producing a climate in which persons become willing to carry out terrorist acts. In like fashion, regional or international action that deviates from human rights and humanitarian norms also possibly plays a role in establishing a climate in which acts of terrorism are attractive remedies when legitimate grievances are unanswered or inadequately addressed.

4. While the fate of the Sub-Commission’s sincere desire to address counter-terrorism measures was unclear until very recently - due to pending action by the Commission on its resolution 2004/87 entitled “Protection of human rights and fundamental freedoms while countering terrorism” - this Special Rapporteur has nonetheless proceeded to formulate this very preliminary framework draft of principles and guidelines, since looking at 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” (see op. para. 4 of Sub-Commission resolution 2003/15 entitled “Effects of measures to combat terrorism on the enjoyment of human rights”) is not included in the action provided for in the aforementioned Commission resolution 2004/87 (see op. paras. 8, 9, and 10). Furthermore, the elaboration itself of human rights standards, the formulation of principles, or the drafting of “guidelines” is a normal, well-established undertaking, and certainly within the competences of this Sub-Commission, contributing not only to the development and better understanding of human rights, their promotion and protection, but providing also to the Commission the necessary assistance, intellectual support and expertise it requires from the Sub-Commission.

5. For the rest, this Special Rapporteur understands that principles and guidelines would need to be both comprehensive as well as sufficiently detailed to be useful. Many principles and guidelines derive from basic principles of international law as a whole, such as jus cogens and erga omnes. Others derive from specific human rights provisions, such as the concept of general non-derogability as well as limitations of rights allowed in wartime or when the existence of the State is threatened. In the area of the administration of justice, guidelines will need to also address both general concepts, such as nullum crimen nulla poena sine lege, the obligation to identify with sufficient clarity the elements of crimes and the like, as well as the plethora of procedural rights of persons arrested and charged with terrorist acts. In this context, extradition would also have to be addressed. A further subject for guidelines, as identified in Sub-Commission resolution 2003/15, concerns the situation of vulnerable groups, including human rights defenders, reporters, aliens or asylum seekers and refugees, as well as related concepts such as “non-refoulement”. Additionally, a key component of guidelines concerns the issue of remedies for victims of terrorist acts. Last but not least, the Sub-Commission could seek to incorporate issues relating to preventive measures (taking also into account the issue of root causes) as well as security measures taken to protect both people and human rights.

6. At this stage of her work, this Special Rapporteur has consulted existing regional guidelines and reports relating to counter-terrorism measures, as well as observations and recommendations from treaty-based bodies. She sees the work as having both the components of the elaboration of relevant principles and detailed guidelines, as well as that of the necessary commentary to these principles and guidelines.

7. The preliminary draft that follows should be considered only as an introductory discussion document, since, in the opinion of this Special Rapporteur, each item needs to be elaborated with specific points. Nonetheless, this Special Rapporteur does consider that this preliminary draft addresses most of the main points that she elaborated in the course of her study and even those that, for a variety of reasons, she did not include in her study. It does not follow the issues she developed chronologically, but rather tries to proceed from large issues to more narrow ones in a logical fashion. She respectfully submits, then, this very preliminary framework draft of principles and guidelines for consideration by the Sub-Commission for possible future action.

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

A. General Principles

1. All international, regional and national action concerning terrorism should be guided by the United Nations Charter, 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 any comments or commentary on specific treaty articles or issues.
2. 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.
3. International action to combat terrorism should, to the degree possible, focus on the development and implementation of forward-looking strategies rather than being responsive or reflective of individual acts or series of acts of terrorism.

B. Terrorist acts and human rights

4. All States have a duty to promote and protect human rights in their own territory and everywhere else.
5. All States have a duty to protect and promote the safety and security of their people at all times.
6. All terrorist acts result in violation of human rights, whether committed by States themselves or sub-State actors.
7. 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.

C. Counter-terrorism measures

8. All counter-terrorism measures should comply fully with all rules of international law, including human rights and humanitarian law, as interpreted by treaty bodies, experts of Charter-based bodies and other sources of international law.
9. Counter-terrorism measures should directly relate to terrorism and terrorist acts, not actions undertaken in armed conflict situations or acts that are ordinary crimes. Definitions of terrorist acts must be very carefully drawn so as to clearly set out the elements of terrorist crimes. Due attention should be paid to what is truly “terrifying.”

10. Any exceptions or derogations in human rights law must be in strict conformity with the rules set out in the applicable international or regional instruments. In particular, counter-terrorism measures must not abrogate any existing norm of jus cogens, whether set out in applicable derogation clauses or not.

- (a) Given the sporadic occurrence of terrorist acts, great care should be taken to ensure that exceptions and derogations meet strict time limits and do not become perpetual features of national law.
- (b) Given that most acts of terrorism are carried out by small groups, 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.

11. Any person or class of persons unduly affected by counter-terrorism measures should have the right to an effective remedy against the State implementing those measures, regardless of the nationality of the affected persons or class of persons.

D. Arrest, detention, trial and penalties of alleged terrorists

12. No person shall be arrested for a terrorist act unless there are reasonable grounds to support the arrest.

13. Conditions of detention, whether pre-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.

14. Any person arrested on the grounds of participation in terrorist acts must be informed of the charges, be afforded the right to counsel, and brought promptly before a judge. The writs of habeas corpus and amparo may not be denied any person arrested and charged for terrorist acts.

15. All international and national norms relating to legal proceedings must be followed in any case involving persons charged with terrorist acts.

16. 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.

E. Asylum and extradition

17. All national policies involving asylum and extradition must conform to international 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.

18. As extradition is a major procedure in counter-terrorism agreements and measures, all States should endeavor to elaborate extradition rules that are compatible with the rules of other States and with international law.

19. Extradition requests should not be granted when there is reasonable cause to believe that such a request is motivated by prejudice, discrimination or other impermissible bias.

F. Other issues

20. All rules relating to privacy rights, property rights, compensation for victims of terrorist acts or any other aspect of counter-terrorism action should be in strict conformity with international human rights and humanitarian law norms.
