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David Baluarte

American University Washington College of Law

Jamal Jafari

American University Washington College of Law

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NEWS FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

by David Baluarte and Jamal Jafari*

Inter-American Commission on Human Rights

Report on Terrorism and Human Rights

On October 22, 2002, the Inter-American Commission on Human Rights (Commission) released its Report on Terrorism and Human Rights (Report). The Report comes in the wake of the drafting of the Inter-American Convention against Terrorism (Convention), adopted and opened for signature by the General Assembly of the Organization of American States (OAS) on June 3, 2002 in response to the expanded threat of terrorism currently faced by the global community. The Report was conceived as a tool to aid member states of the OAS in adopting anti-terrorism measures consistent with their international human rights obligations.

Article 15 of the Convention provides that state responses to terrorism may be regulated, independently or concurrently, by several regimes of international law. The Commission in turn developed its analysis within a framework of the international law against terrorism, international human rights law, and international humanitarian law.

The International Law against Terrorism

In developing the Report, the Commission relied primarily on the newly adopted Convention in its articulation of the international law against terrorism. The Convention includes many provisions similar to other anti-terrorism treaties, such as the obligation of mutual assistance among states with respect to the prevention, investigation, and prosecution of crimes of terrorism. The Convention also contains extensive provisions that address the issue of financing for terrorism and outlines states' obligations to halt the flow of such funds.

Although the Convention does not provide a comprehensive definition of terrorism, it does incorporate crimes prescribed by ten existing international treaties on terrorism. Most notably, the Convention renders the political offense exception inapplicable to crimes under the treaty and requires member states to deny refugee status to anyone seriously suspected of committing such crimes. As of the release of the Report, the Convention had been signed by 32 member states, but had yet to be ratified by any government.

International Human Rights Law

The human rights obligations of member states are largely defined in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights (American Convention), which have been supplemented by conventions on the prevention of torture, forced disappearance, and violence against women. The extensive rights guaranteed by these documents are universal in that they extend to all persons subject to a state's authority.

Article 27 of the American Convention provides that in times of war, public danger, or other emergency, some rights guaranteed under these instruments may be suspended. These are the rights to privacy, freedom of expression, freedom of association, property, and freedom of movement and residence, as well as some aspects of the rights to personal liberty and a fair trial. The American Convention strongly emphasizes that the derogation of these rights should occur only to the extent and for the period required by the situation, and that any restrictions be regulated by the principles of proportionality, necessity, and nondiscrimination. Finally, in accordance with international human rights law, the American Convention strictly prohibits derogation from the following: the rights to life, humane treatment, a name, nationality, and juridical personality; and the rights to freedom from retroactive laws,

freedom of conscience and religion, and freedom from slavery. The American Convention also prohibits derogation from the rights of the family and of the child as well as derogation from the right to participate in government.

International Humanitarian Law

Unlike international human rights law, the rules of international humanitarian law are non-derogable virtually without exception. Of particular relevance to the Commission's analysis is the distinction under international humanitarian law between privileged and unprivileged combatants. The "combatant's privilege" is essentially a license to kill enemy combatants and destroy enemy military objectives with the assurance of receiving prisoner of war status upon capture. The privilege also extends to combatants' immunity from criminal prosecution for hostile acts not in violation of the laws and customs of war. Without this privilege, combatants may be prosecuted under municipal law for their belligerence.

The Report stresses the fact that the concepts of terrorism and war are distinct, and the commission of crimes of terrorism will not change the legal status of a conflict. The Report also notes that in war a perpetrator and his or her superior may be individually criminally responsible for the commission of terrorist crimes. In all cases, the international norms applicable to terrorist violence will vary depending upon whether the conflict that is subject to international humanitarian law is of an international nature.

Recommendations: International Law Applied in Terrorist Situations

To form its analysis, the Commission convened a panel of international experts with extensive experience in issues relating to terrorism and the derogation of rights in times of terrorist threat. The experts' testimony was supplemented with reports submitted by member states of the OAS and pertinent non-governmental organizations. This collaboration yielded an analysis of those rights most commonly threatened by state responses to terrorism and prompted a discussion of the pertinent rules of international human rights and humanitarian law, as well as recommendations as to the relative enforceability of those rights in times of peace, states of emergency, and armed conflict. Some of the rights discussed in the Report are the rights to life, personal liberty and security, humane treatment, due process and a fair trial, freedom of expression, as well as the rights of non-nationals.

The Right to Life

The right to life is commonly considered the most fundamental human right. In situations short of armed conflict, states should therefore ensure that the deprivation of the right to life by law enforcement officials occurs only when it is strictly unavoidable to protect themselves or others from imminent death. Further, in situations of armed conflict, states should ensure that armed forces distinguish between military targets and civilians. Armed forces should attack only military targets and take precautions to avoid loss of civilian life incidental or collateral to attacks on legitimate military targets.

Additionally, the Report comments that the death penalty as a punishment for terrorist-related offenses is subject to specific restrictions. The death penalty should be imposed only as a final judgment rendered by a competent court for the most serious

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crimes. Such a sentence should always be accompanied by the opportunity to apply for amnesty, a pardon, or the commutation of the sentence. Under no circumstances should the death penalty be imposed on pregnant women or individuals under the age of 18 or over the age of 70 at the time of commission of the crime.

The Right to Personal Liberty and Security

When states imprison individuals as part of an anti-terrorism initiative in situations outside of armed conflict, certain standards must be met. Among others, the grounds and procedures of prisoners' detention must be prescribed by law, and an appropriate mechanism for judicial review must be in place. Additionally, detainees must be informed of the reasons for their detention and must be allowed to communicate with legal counsel, their families, and where appropriate, their consulates.

Where terrorist acts may trigger or otherwise take place in the context of armed conflict, privileged combatants may be held until the cessation of active hostilities, while unprivileged combatants may be prosecuted for belligerence. The detention of combatants is subject to supervision by the International Committee of the Red Cross. Administrative detention of enemy aliens in the territory of an international armed conflict or of civilians in an occupied territory, is strictly prohibited unless the security interests of the detaining or occupying power make it absolutely necessary.

The Right to Humane Treatment

In times of peace and in the context of armed conflict, states are strictly prohibited from using torture, such as corporal punishment or prolonged solitary confinement, as a means of punishing detainees or as a method of interrogation. Furthermore, conditions of detention should always satisfy minimum standards of humanity, taking into consideration the specific needs of particular categories of people, such as families, women, and children.

The Rights to Due Process and to a Fair Trial

States must ensure that crimes relating to terrorism and corresponding punishment are clearly defined, distinguishing them from behavior, criminal or otherwise, unrelated to terrorism. States should also refrain from using ad hoc, special, or military tribunals to try civilians; refrain from "faceless" judicial procedures; and ensure that courts used to try members of the military are sufficiently independent and impartial.

The Report also references a number of basic and non-derogable procedural protections such as the right to notification of charges, the right to counsel, and the right to be advised of any available post-conviction remedies. If there is any doubt as to the legal status of a detainee, a competent tribunal must be convened to make this determination.

The Right to Freedom of Expression

In situations outside of armed conflict, states should refrain from enacting censorship laws or laws that broadly criminalize terrorist-related speech and opinions unless it can be shown that such speech will effectively incite violence. Speech and access to information may be restricted in times of emergency or for other legitimate reasons, but such restrictions must never be more extensive than required by the situation, and penalties must always be proportional to the violation.

The Situation of Migrant Workers, Asylum Seekers, Refugees, and Other Non-Nationals

The Report emphasizes the vulnerability of specific groups in times when states are responding to terrorist threats and stresses the need for states to refrain from discrimination in anti-terrorist policy formation. Specifically, the Report stresses that legislation

should define with clarity the rights of non-nationals and the conditions in which their personal liberty may be deprived. When they are detained, the right of non-nationals to consular notification must always be respected. States should refrain from collective expulsion of non-nationals, and individual deportation should be avoided where there is reason to believe an individual will be subjected to torture in his or her country of origin. Finally, where non-nationals are the subject of judicial proceedings, criminal or otherwise, they must be allowed the necessary due process protections to ensure fairness.

Conclusion

The Commission developed the Report as a point of reference for member states of the OAS in an environment of global terrorism and increased threat to human rights. In its presentation of the legal regimes that govern state responses to terrorism and its elaboration of those regimes as applied to specific rights, the Commission calls governments' attention to a number of important principles. The Report specifies the limitations on derogation of fundamental rights and reiterates that any restrictions on human rights must comport with the principles of necessity, distinction, proportionality, and humanity. The Commission considers a state's compliance with its human rights obligations to be fundamental, and any deviance from those norms should be specifically tailored and conscientious. As the Report indicates, the principles recognized in the Convention reflect that "the campaign against terrorism and protection of human rights and democracy are complementary responsibilities," and as such, anti-terrorist initiatives in a democratic society are to "protect democratic institutions, human rights, and the rule of law, not to undermine them."

African Commission on Human and Peoples' Rights*Background*

The African Commission on Human and Peoples' Rights (ACHPR) was created pursuant to the African Charter on Human and Peoples' Rights (Charter). The Charter was passed in 1986 by the Organization of African Unity (OAU), which has been dissolved and replaced by the African Union (AU). The primary goals of the ACHPR are to promote and protect human rights and to interpret the Charter for states, the AU, and organizations recognized by the AU. At present, the central functions of the ACHPR are to collect and disseminate information regarding human rights in Africa and to consider reports issued by member states and recognized NGOs. The ACHPR also investigates reports of widespread or systematic human rights abuses as well as reviews complaints submitted by states and non-state parties.

There is no regional court of human rights in Africa, although a protocol to establish such a court was presented to the OAU in 1998. So far, out of the 15 signatories needed to establish a court, only Burkina Faso, The Gambia, Mali, Sao Tomé & Principe, South Africa, and Uganda have ratified the protocol.

The ACHPR, headquartered in Banjul, The Gambia, holds two ordinary sessions a year, usually in October and April, and may hold extraordinary sessions as needed. ACHPR sessions are usually attended by member states, national liberation movements, special institutions, and NGOs with observer status. The agenda of each session addresses periodic state reports mandated by the ACHPR as well as complaints, which are usually brought by NGOs.

The ACHPR is composed of 11 members serving 6-year terms. The members were previously elected by the Assembly of Heads of State and Government (Assembly), which was charged by the OAU with setting policy for the ACHPR. The Assembly will be replaced by a similar body under the AU.

States may notify the ACHPR of violations of the Charter by other states. Typically one state will notify another of a violation,

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after which either will have up to three months to notify the Commission for consideration. If a complaint is submitted to the ACHPR by a non-state party regarding an alleged violation committed by a state, it will be considered only at the request of a majority of the members. In addition, the ACHPR will review a complaint only if local remedies have been exhausted, or if it involves a case that has been unduly delayed in domestic courts. Formerly, if a matter was taken under advisement, the ACHPR would submit its recommendations to the Assembly for action.

The ACHPR is primarily concerned with upholding the principles of the Charter, although other international standards of human rights guide its operations. The ACHPR also gives weight to the UN Charter, the Charter of the African Union, the Universal Declaration of Human Rights, and other UN documents, as well as to African custom and general legal principles recognized by African states.

The 32nd Ordinary Session of the ACHPR

The 32nd Ordinary Session of the ACHPR was held in Banjul from October 17–23, 2002. At that meeting, the Commission passed the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman Treatment or Degrading Punishment in Africa. This resolution calls for the formation of a follow-up committee comprised of the ACHPR; the Association for the Prevention of Torture, an international NGO; and prominent African experts designated by the Commission. This body will be charged with implementing the recommendations outlined in a workshop on torture prevention held on Robben Island, South Africa in February 2002. The new committee will collect and disseminate information, hold seminars and other educational initiatives, and advise the ACHPR on ways to encourage states to adopt the Robben Island Guidelines. This committee will make a progress report to the Commission at each ordinary session.

The Robben Island Guidelines

The Robben Island Guidelines (Guidelines) encourage member states to ratify major regional and international human rights instruments. The Guidelines encourage ratification of the protocol establishing the African Court of Human Rights; the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the Rome Statute for the International Criminal Court. In addition, the Guidelines encourage states to criminalize torture within their own national legal systems in part by eliminating justification for torture based on rationales such as a state of war, a state of emergency, the preservation of public order, or the need to follow orders from superior officers. The Guidelines call for appropriate punishment for those found guilty of torture, while offering protection to officials who refuse to follow orders mandating torture. Finally, states are discouraged from extraditing individuals where there is a real danger of torture in the receiving country.

The Guidelines also call for enactment of proper procedures to protect torture victims and detainees. Any person should be able to report a case of torture to an independent body for investigation. In addition, people placed in detention should be afforded basic rights such as the right to contact a relative, the right to a lawyer, and the right to a medical examination.

The Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa

During the 32nd Ordinary Session, ACHPR also passed the Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (Resolution). The Resolution conveys the Commission's commitment to the principle of universal freedom of expression through all forms of communica-

tion as well as protection from actions inhibiting this right. The Commission did, however, recognize the necessity of restricting freedom of expression if the prohibition is provided in law, serves a legitimate government interest, and is necessary in a democratic society.

The Resolution calls for a commitment to diversity through the expression of a wide range of opinions in mass media, access to the media by vulnerable or marginalized groups, the promotion of African voices and culture in the media, and the dissemination of local languages in the media. In addition, it calls for independent mass media outlets recognizing that complete state control over the media is not consistent with the ideals of freedom of expression. According to the Resolution, government-controlled media outlets should be granted editorial independence and should be governed by a board free from political or economic influence. Such media should be available throughout each country.

Difficulties at the 32nd Session

Despite the work necessary to pass these resolutions, controversy seemed to permeate the 32nd Ordinary Session. For example, one day before the Commission was scheduled to meet in Banjul, the Gambian government withdrew economic support for the conference. According to the Charter, all states of the African Union, the successor to the OAU, must provide conference and logistical support for the work of the Commission held in their respective countries. The Gambian government gave no reason for its withdrawal of support other than its "financial difficulty." As a result of this controversy, the Commission proceeded with an abbreviated agenda.

Report on the Human Rights Situation in Zimbabwe

The Commission, of which Zimbabwean Attorney General Andrew Chigovera is a member, delayed the release of a long-awaited report on the deteriorating human rights situation in Zimbabwe. Although the ACHPR sent a fact-finding mission to the southern African country last June, which came back with substantial evidence of human rights abuses, no information has been formally released. Delegates from the Zimbabwe Human Rights NGO Forum criticized the delay and noted that the Zimbabwean government failed to send a representative as previously agreed.

Human rights practitioners and activists in Zimbabwe have been looking forward to the report in the wake of increased threats against them. One such activist is Gabriel Shumba, a legal officer with the Zimbabwe Human Rights NGO Forum. Shumba was arrested on January 14, 2003 in Harare and charged under the Public Order and Security Act, which generally addresses actions taken in opposition to the government. Reports indicate that Shumba was beaten and subjected to electric shocks before he was forced to sign a confession. Shumba had previously reported to the NGO plenary session at the 31st Ordinary Session of the ACHPR held last May in Pretoria, South Africa on the human rights situation in Zimbabwe. Although there is no hard evidence to suggest that his report on human rights abuses in Zimbabwe was a factor in his arrest, Shumba began to receive anonymous threats after his appearance at the session. Additionally Gabriel Shumba's brother, Bishop Shumba, was abducted, questioned about Gabriel, and tortured by the government's Central Intelligence Organization late last year.

The 33rd Ordinary Session of the ACHPR will be held in Niamey, Niger from May 5–19, 2003. ☺

**David Baluarte is a J.D. candidate at the Washington College of Law and an articles editor for the Human Rights Brief. Jamal Jafari is a J.D. candidate at the Washington College of Law and a staff writer for the Human Rights Brief. Ariel Dulitzky, a principal human rights specialist of the Inter-American Commission on Human Rights, provided research support.*