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## REPORT ON TERRORISM AND HUMAN RIGHTS

### EXECUTIVE SUMMARY

1. Numerous notorious terrorist incidents in this Hemisphere in recent years, culminating in three attacks of unprecedented proportion perpetrated simultaneously in the United States on September 11, 2001, have harshly illustrated that terrorism remains a significant threat to the protection of human rights, democracy and regional and international peace and security. This reality has prompted states and intergovernmental organizations to undertake a variety of initiatives to confront these serious threats. Anti-terrorist measures have included developing domestic legislation and procedures to criminalize, investigate and prosecute terrorist activities and negotiating multilateral treaties on interstate cooperation against terrorism.

2. On June 3, 2002 the OAS General Assembly adopted and opened for signature the Inter-American Convention Against Terrorism, in which OAS member states reaffirmed the "need to adopt effective steps in the inter-American system to prevent, punish and eliminate terrorism through the broadest cooperation." Among the principles explicitly recognized in this Convention is the requirement that anti-terrorist initiatives must be undertaken in full compliance with member states' existing obligations under international law, including international human rights law. According to Article 15 of the Convention, "[t]he measures carried out by the states parties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms." This prerequisite reflects the fundamental principle that the campaign against terrorism and the protection of human rights and democracy are complementary responsibilities; the very object and purpose of anti-terrorist initiatives in a democratic society is to protect democratic institutions, human rights and the rule of law, not to undermine them.

3. The Inter-American Commission on Human Rights, as the OAS organ charged with promoting the observance and protection of human rights in the Hemisphere, has since its creation in 1959 gained extensive experience in evaluating the human rights implications of numerous anti-terrorist initiatives undertaken by OAS member states. In doing so, the Commission has consistently emphasized the need for unqualified respect for the full scope of human rights. This includes rights that have not been legitimately suspended under a

state of emergency in strict compliance with the principles and conditions governing derogations from certain protected rights.

4. In order to reinforce its doctrine in this area and to assist OAS member states in complying with their international legal obligations, the Commission decided in December 2001 to undertake a study by which it would reaffirm and elaborate upon the manner in which international human rights requirements regulate state conduct in responding to terrorist threats. To this end, the Commission convened a panel of international experts during its regular period of sessions in March 2002 to obtain timely and specialized information on the issue of terrorism and human rights. The Commission also invited OAS member states and pertinent non-governmental organizations to submit written observations on this topic.

5. In preparing its report, the Commission adopted a rights-based approach, by which it has examined counter-terrorism initiatives in relation to several core international human rights, in particular the right to life, the right to humane treatment, the right to personal liberty and security, the right to a fair trial, the right to freedom of expression and the obligation to respect and ensure, non-discrimination and the right to judicial protection. The Commission has also included an abbreviated discussion of several additional rights potentially affected by anti-terrorist measures, as well as an analysis of the particular vulnerabilities of migrant workers, asylum seekers, refugees and other non-nationals.

6. Several fundamental precepts underlie the Commission's analysis as a whole. First is a recognition that to date there has been no international consensus on a comprehensive international legal definition of terrorism. As a consequence, the characterization of an act or situation as one of terrorism, including the labeled "war on terrorism", cannot in and of itself serve as a basis for defining the international legal obligations of states. The Commission has not disregarded in this connection that terrorist acts such as those perpetrated on September 11, 2001 may well lead to further developments in international law. This could include, for example, the negotiation of international instruments that are designed to address a new form of "terrorist war" waged by or against non-state actors engaged in armed violence with states at an international level. Such developments are only speculative at this stage, however, and accordingly the Commission's discussion in this report has focused upon member states' obligations under international law as presently constituted.

7. The absence of an internationally-accepted definition of terrorism does not mean that terrorism is an indescribable form of violence or that states are not subject to restrictions under international law in developing their responses to such violence. To the contrary, it is possible to identify several characteristics frequently associated with incidents of terrorism that provide sufficient parameters within which states' pertinent international legal obligations in responding to this violence can be identified and evaluated. These characteristics relate to the nature and identity of the perpetrators of terrorism, the nature and identity of the victims of terrorism, the objectives of terrorism, and the means employed to perpetrate terrorist violence. In particular, the Commission has noted that terrorism may be perpetrated, individually or collectively, by a variety of actors, including private persons or groups as well as governments, may employ varying means and levels of violence ranging from mere threats devised to induce public panic to weapons of mass destruction, and may impact detrimentally upon a variety of persons who are afforded particular protections under international law, including women, children and refugees.

8. Drawing upon these factors, the Commission has observed that several regimes of international law may potentially apply to situations of terrorism. Terrorist violence may be perpetrated in times of peace, when international human rights law is fully applicable, during a state of emergency, when certain human rights protections may be the subject of derogations, or during an armed conflict, to which international humanitarian law applies. Further, the nature and level of violence generated by or against perpetrators of terrorism may trigger a state of emergency or armed conflict. Accordingly, the Commission's analysis is not

limited to member states' obligations under inter-American human rights instruments. It has also taken into account member states' conventional and customary international legal obligations regardless of their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the inter-American system, including international humanitarian law and international refugee law. These obligations constitute components of a interrelated and mutually-reinforcing regime of human rights protections that must be interpreted and applied as a whole so as to afford individuals the most favorable standards of protection available under applicable law. Certain obligations may also provide a *lex specialis* for the interpretation and application of international human rights law. In particular, international humanitarian law prescribes extensive and detailed rules, standards and mechanisms concerning the protection of victims of war that must be taken into account in properly interpreting and applying international human rights protections in armed conflict situations.

9. Closely connected with the regimes of law considered in the Commission's analysis is the importance of properly determining the status of persons who fall within the authority or control of a state or its agents in the course of anti-terrorist initiatives. It is only when the legal status of such persons is properly determined that they can be afforded the rights to which they are entitled under domestic and international law by reason of that status. Where terrorist violence triggers or occurs in the context of an international armed conflict, it is particularly crucial for member states to determine, in accordance with the Third Geneva Convention of 1949 and Additional Protocol I with respect to States that have ratified it, whether a person falling within a state's power constitutes a civilian or combatant and, in the case of the latter, whether the combatant is "privileged" and therefore entitled to prisoner of war status and immunity from prosecution under the domestic law of his captor for his hostile acts that do not violate the laws and customs of war.

10. In the context of the above precepts, the Commission has reached several conclusions, which are summarized below, concerning the rights and freedoms most implicated by states' anti-terrorist initiatives: the right to life, the right to humane treatment, the right to personal liberty and security, the right to a fair trial, the right to freedom of expression, and the obligation to respect and ensure, non-discrimination and the right to judicial protection, as well as the situation of migrant workers, asylum seekers, refugees and other non-nationals. In particular, the Commission has identified the minimum standards of protection that are common to both international human rights law and international humanitarian law in these areas. Where appropriate, the Commission has also identified areas in which the *lex specialis* of international humanitarian law may result in distinct standards of treatment applicable in situations of armed conflict.

11. Perhaps in no other area is there greater convergence between international human rights law and international humanitarian law than in the standards of humane treatment. While governed by distinct instruments, both regimes provide for many of the same minimum and non-derogable requirements dealing with the humane treatment of all persons held under the authority and control of the state. Moreover, under both regimes the most egregious violations of humane treatment protections give rise not only to state responsibility, but also individual criminal responsibility on the part of the perpetrator and his or her superiors.

12. Foremost among these standards is the absolute prohibition of torture or any other cruel, inhuman or degrading treatment or punishment by the state or its agents. This proscription applies to all forms of treatment attributable to the state including, for example, penal or disciplinary sanctions such as corporal punishment and prolonged periods of time in solitary confinement. Also prohibited are inhumane methods of interrogation, including severe treatment such as beatings, rape, or electric shocks, as well as more subtle but equally injurious treatments such as administration of drugs in detention or psychiatric institutions or prolonged denial of rest or sleep, food, sufficient hygiene or medical assistance. International human rights and humanitarian law also prescribe comparable standards concerning

conditions of detention. These requirements relate to such matters as accommodation, nutrition and hygiene, as well as additional protections for particular categories of persons, such as women and children.

13. According to standards applicable in peacetime and in wartime, the treatment of detainees must remain subject to continuous and effective supervision by the appropriate mechanisms as prescribed by international law. In situations other than armed conflict, this requires supervision by regularly constituted courts through *habeas corpus* or equivalent relief. In times of war, oversight mechanisms include the International Committee of the Red Cross and, in situations of international armed conflict, the Protecting Powers regime provided for under the 1949 Geneva Conventions.

14. Notwithstanding the existence of these specific rules and mechanisms governing the detention of persons in situations of armed conflict, there may be circumstances in which the supervisory mechanisms under international humanitarian law are not properly engaged or available, or where the detention or internment of civilians or combatants continue for a prolonged period. Where this occurs, the regulations and procedures under international humanitarian law may prove inadequate to properly safeguard the minimum standards of treatment of detainees, and the supervisory mechanisms under international human rights law, including *habeas corpus* and *amparo* remedies, may necessarily supercede international humanitarian law in order to ensure at all times effective protection of the fundamental rights of detainees.

15. As with the standards governing humane treatment, international human rights and humanitarian law subject member states to essentially the same non-derogable obligation to respect and ensure respect for their international commitments through appropriate and effective mechanisms. They also share the absolute and overriding prohibition against discrimination of any kind, including impermissible distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. While the doctrine of the inter-American human rights system does not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, any permissible distinctions must be based upon objective and reasonable justification, must further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and the means must be reasonable and proportionate to the end sought. Distinctions based on grounds explicitly enumerated under pertinent articles of international human rights instruments are subject to a particularly strict level of scrutiny whereby states must provide an especially weighty interest and compelling justification for the distinction. In the campaign against terrorism, states must be particularly vigilant to ensure that state agents, including military forces, conduct themselves fully in accordance with the proscription against discrimination.

16. The Commission's analysis clarifies that international human rights and humanitarian law share many of the same minimum prerequisites governing an individual's right to due process and to a fair trial. Where member states endeavor to investigate, prosecute and punish individuals for crimes relating to terrorism, the Commission stipulates that member states remain bound by fundamental and non-derogable due process and fair trial protections in all instances, whether in times of peace, states of emergency or armed conflict. These protections encompass fundamental principles of criminal law as well as entrenched procedural and substantive safeguards.

17. Among the protections highlighted by the Commission is the requirement that any laws that purport to proscribe and punish conduct relating to terrorism be classified and described in precise and unambiguous language that narrowly defines the unlawful conduct, in accordance with the principle of legality. The Commission observes that states in this and other regions have taken a variety of approaches in attempting to prescribe sufficiently clear and effective anti-terrorism laws. Some states have endeavored to prescribe a specific crime of terrorism based upon commonly-identified characteristics of terrorist

violence. Others have chosen not to prescribe terrorism as a crime *per se*, but rather have varied existing and well-defined common crimes, such as murder, by adding a terrorist intent or variations in punishment that will reflect the particular heinous nature of terrorist violence. Whichever course is chosen, OAS member states should be guided by the basic principles articulated by the Inter-American Court and Commission on this issue. In order to ensure that punishments imposed for crimes relating to terrorism are rational and proportionate, member states are also encouraged to take the legislative or other measures necessary to provide judges with the authority to consider the circumstances of individual offenders and offenses when imposing sentences for terrorist crimes.

18. Fundamental principles of due process and a fair trial applicable at all times also entail the right to be tried by a competent, independent and impartial tribunal as defined under applicable international human rights or humanitarian law. This requirement generally prohibits the use of *ad hoc*, special, or military tribunals or commissions to try civilians for terrorist-related or any other crimes. A state's military courts may prosecute members of its own military for crimes relating to the functions that the law assigns to military forces and, during international armed conflicts, may try privileged and unprivileged combatants, provided that the minimum requirements of due process are guaranteed. Military courts may not, however, prosecute human rights violations or other crimes unrelated to military functions, which must be tried by civilian courts.

19. Among the non-derogable procedural guarantees identified by the Commission under both international human rights and humanitarian law are the right of an accused to prior notification in detail of the charges against him or her, the right to adequate time and means to prepare his or her defense which necessarily includes the right to be assisted by counsel of his or her choosing or, in the case of indigent defendants, the right to counsel free of charge where such assistance is necessary for a fair hearing, and the right not to testify against oneself. Also protected is the right to be advised on conviction of his or her judicial and other remedies and of the time limits within which they may be exercised, which may include a right to appeal a judgment to a higher court.

20. In situations of emergency, there may be some limited aspects of the right to a fair trial that may be legitimately suspended, provided that states comply strictly with the conditions governing derogation clauses under international human rights instruments, and provided that they do not endeavor to deny an individual more favorable protections that are non-derogable under other applicable international instruments. Potentially derogable protections may include, for example, the right to a public trial and a defendant's right to examine or have examined witnesses against him or her, where limitations on these rights are necessary to ensure the safety of judges, lawyers, witnesses or others involved in the administration of justice. Such measures can never be justified, however, where they may compromise a defendant's non-derogable due process protections, including the right to prepare a defense and to be tried by a competent, impartial and independent tribunal.

21. The right to life is afforded both similar and distinct treatment under international human rights and humanitarian law. Under both regimes, the use of lethal force by state agents must comply with principles of proportionality and distinction as defined under each area of law. Accordingly, in armed conflict situations, parties to the conflict must distinguish between military objectives and civilians or civilian objects, and launch attacks only against the former. Similarly, in peacetime situations, state agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury, or a threat of committing a particularly serious crime involving a grave threat to life, and persons who do not present such a threat, and use force only against the former. At the same time, privileged combatants in situations of armed conflict are not prohibited from using lethal force against enemy combatants who have not laid down their arms or been placed *hors de combat* and the death of a combatant under these circumstances does not constitute a violation of the right to life when interpreted in light of the applicable laws or customs of war.

22. Also pertinent to the right to life is the imposition of the death penalty as a punishment for terrorist-related offenses. Irrespective of whether this measure is imposed during peacetime or armed conflict situations, states must ensure that their legislative provisions comply with certain conditions that limit a state's capacity to apply capital punishment to certain offenses or offenders. They must also ensure that the proceedings through which a capital sentence may be imposed comply with strict procedural requirements and are subject to rigorous control by fundamental minimum judicial guarantees. Without going so far as to abolish the death penalty, the inter-American instruments impose restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance.

23. The right to personal liberty and security similarly exhibits both comparable and distinct requirements in peacetime, states of emergency and armed conflict, as provided for under international human rights and humanitarian law. All persons falling within the authority or control of a state are entitled to the right to personal liberty and security. However, under prevailing international human rights standards, states may, under certain limited circumstances, deprive individuals of their liberty, both in relation to the investigation and punishment of crimes as well as the administration of state authority in other areas where measures of this nature are strictly necessary. This may include, for example, administrative detention for compelling reasons relating to law enforcement, health or other public purposes. These measures must, however, comply with standards as prescribed under applicable regimes of international law.

24. Outside of armed conflict situations, standards governing the right to personal liberty include ensuring that the grounds and procedures for the detention be prescribed by law, the right to be informed of the reasons for the detention, prompt access to legal counsel, family and, where necessary or applicable, medical and consular assistance, prescribed limits upon the length of continued detention, and maintenance of a central registry of detainees. The Commission also emphasizes that appropriate judicial review mechanisms must be available to supervise detentions, promptly upon arrest or detention and at reasonable intervals when detention is extended. In no circumstances may states impose prolonged *incommunicado* detention. Aspects of the foregoing requirements should also be considered non-derogable, because of their integral role in protecting the non-derogable rights of detainees such as the right to humane treatment and the right to a fair trial and the need to ensure that detainees or prisoner are not left completely at the mercy of those holding them.

25. Where emergency situations arise, states may be justified in derogating from certain limited aspects of the right to personal liberty and security. This may include, for example, subjecting individuals to periods of preventative or administrative detention for periods longer than would be permissible under ordinary circumstances. As with all derogations, however, any extended detention must be strictly necessary in the exigencies of the situation, must remain subject to the non-derogable protections noted above, and may in no case be indefinite.

26. Where terrorist acts may trigger or otherwise take place in the context of an armed conflict, the detailed *lex specialis* of presumptions and mechanisms prescribed under international humanitarian law must inform the manner in which states give effect to the right to personal liberty. In the case of international armed conflicts, privileged combatants who fall into the hands of an enemy generally may be interned until their repatriation at the cessation of active hostilities. Unprivileged combatants may also be interned and, moreover, may be subject to prosecution for their unprivileged belligerency. In either circumstance, the detention remains subject to supervision by the mechanisms prescribed under international humanitarian law, including the Protecting Powers regime under the 1949 Geneva Conventions and access by the International Committee of the Red Cross.

27. Enemy non-nationals in the territory of a party to an international armed

conflict or civilians in occupied territory, on the other hand, may not be administratively detained or interned except where the security of the detaining or occupying power make it absolutely necessary. Where such detention or internment is imposed, it must be subject to reconsideration or appeal with the least possible delay and, if it is continued, subject to regular review by an appropriate or competent body, court or other tribunal designated for that purpose.

28. As in the case of the right to humane treatment, there may be circumstances in which the regulations and procedures under international humanitarian law may prove inadequate to properly safeguard the minimum human rights standards of detainees. This may occur, for example, where the continued existence of active hostilities becomes uncertain, or where a belligerent occupation continues over a prolonged period of time. As the paramount consideration must at all times remain the effective protection of the fundamental rights of detainees, the supervisory mechanisms under international human rights law or domestic law may necessarily supercede international humanitarian law in such circumstances in order to safeguard the fundamental rights of detainees.

29. Also included in the Commission's analysis is the right to freedom of expression, which exhibits a lesser degree of convergence between international human rights and humanitarian law, but which nevertheless prescribes fundamental controls upon states' counter-terrorism initiatives. In this connection, the Commission has emphasized the particular importance of respect for and protection of the right to freedom of expression in the Americas, as it plays a fundamental role in strengthening democracy and guaranteeing human rights by offering citizens an indispensable tool for informed participation. Further, the Commission highlights the fact that during situations of terrorist threat, an informed public can be an effective tool in monitoring and preventing abuses by public authorities.

30. Several rules and protections governing the right to freedom of expression warrant particular comment in the context of terrorism. In situations short of a state of emergency, prior censorship should not be used to prevent the circulation of ideas and information. In addition, subsequent penalties for the dissemination of opinions or information may only be imposed through laws that are clear and foreseeable and not overly broad or vague. Moreover, any subsequent penalties must be proportionate to the type of harm they are designed to prevent. States should also refrain from promulgating laws that broadly criminalize the public defense (apologia) of terrorism or of persons who might have committed terrorist acts, without requiring a showing that such expressions were intended to incite, and were likely to produce lawless violence or other similar actions. With respect to access to information in the hands of the government and the right of *habeas data*, there should be a presumption of openness, with restrictions on access only when releasing the information in question would or would be likely to cause serious prejudice to national security. States bear the burden of proof to show that such restrictions are necessary.

31. In states of emergency, the Commission observes that the right to freedom of expression is derogable for the time and to the extent strictly required by the exigencies of the situation. The Commission specifically observes in this connection that laws that impose prior censorship on the publication or dissemination of terrorist-related information or opinions may be permissible through derogation in times of emergency. States may also be justified during emergency situations in imposing additional restrictions on freedom of expression and access to information. However, the burden of proof is again on States to demonstrate that any derogations are not excessive in light of the exigencies of the situation.

32. With regard to situations of armed conflict, the Commission emphasizes in particular the obligation of parties to a conflict to afford journalists and media installations the protection to which their status under international humanitarian law entitles them, which is presumptively that of civilians and civilian objects.

33. The Commission recognizes that persons who find themselves in the territory of a state of which they are not nationals, including migrant workers, refugees and those seeking asylum from persecution, are particularly vulnerable to human rights violations in the development and execution of counter-terrorist measures. This report therefore addresses several fundamental human rights specifically as they pertain to non-nationals in the context of anti-terrorism strategies, including the right to personal liberty and security, the right to humane treatment, the right to due process and to a fair trial, and the absolute and non-derogable prohibition against discrimination. In order to ensure that measures adopted concerning the situation of non-nationals are not formulated or executed in a manner that transgresses these fundamental human rights, states must avoid in particular such practices as unjustified and prolonged detention, failure to inform detainees of their right to consular assistance, mass expulsions of non-nationals, and unavailable or ineffective review of judicial or administrative proceedings involving non-nationals. The Commission has also stressed that proceedings involving the removal or deportation of such persons must properly consider and give effect to the principle of non-refoulement as reflected in such provisions as Article 33 of the UN Convention on the Status of Refugees, Article 3(1) of the UN Convention on Torture, Article 13 of the Inter-American Convention to Prevent and Punish Torture, and Article 22(8) of the American Convention on Human Rights.

34. Finally, the Commission's analysis acknowledges that member states' anti-terrorist initiatives may have detrimental implications for a broad range of human rights beyond those discussed above, including the rights to freedom of assembly and of association, the right to freedom of conscience and religion, the rights to property and privacy, and the right to participate in government. Accordingly, the report provides an abbreviated analysis of these rights and observes in particular that any measures taken by member states to restrict these rights must comply strictly with the procedural and substantive requirements governing restriction clauses under international human rights instruments. This requires that any restrictions be necessary for the security of all and in accordance with the just demands of a democratic society and must be the least restrictive of possible means to achieve a compelling public interest. In addition, any such restrictions must be prescribed by law passed by the legislature and in compliance with the internal legal order and cannot be subject to the discretion of a government or its officials.

35. The Commission's report concludes with a series of specific recommendations that are intended to guide member states in implementing the rules and principles articulated in the Commission's analysis.

**[ TABLE OF CONTENTS | PREVIOUS | NEXT ]**