Marangopoulos Foundation for Human Rights
European Training and Research Centre for
Human Rights and Democracy

Anti-Terrorist Measures and Human Rights

Wolfgang Benedek and
Alice Yotopoulos-Marangopoulos (Eds.)

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FOREWORD
Walter Schwimmer,
Secretary General of the Council of Europe

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Foreword

WALTER SCHWIMMER

Whatever the specific circumstances behind each tragedy, the current wave of terrorist acts is one of the ugliest challenges to our societies.

Let us face it: although terrorism is indeed not a new phenomenon, it has never before been used on such a scale. We have entered, it seems, an era of chaos, in which the threat and the use of massive violence against civilians is considered by some as a legitimate weapon. In some cases, in their sick minds, they consider it a blessed weapon.

In spite of the international mobilisation which followed 11 September 2001, we are obviously still a long way from getting the threat of violence under control. At the same time, the debate about the legitimacy of some of the means used or contemplated for use in the fight against terrorism has attracted wider attention.

The colloquium "Anti-Terrorist Measures and Human Rights", which these proceedings reflect, was indeed part of the international debate: How can we efficiently counter terrorism without betraying the principles we believe in? It is not as easy as it may seem. Terrorism is an assault on human rights, democracy, and the rule of law. This is no rhetoric. Terrorism wants to destroy. It is rooted in hatred. It aims at creating constant insecurity, fear and disorganisation at the expense of innocent citizens. It must be defeated with the utmost vigour. But not at any cost, certainly not at the cost of the fundamental values we have learned to cherish in tragic times and have placed at the very centre of our collective functioning.

I want to pay tribute to the European Training and Research Centre for Human Rights and Democracy of Graz, the Marangopoulos Foundation on Human Rights of Athens and the Diplomatic Academy of Vienna. The colloquium they organised in Vienna on 30-31 October 2002 avoided the trap of academicism, of rhetoric. It would be somewhat indecent to deal with the fight against terrorism in an "academic" way. The participants aimed to present concrete measures – legal and political, international and national – seeking the repression and prevention of terrorism. This is again no rhetoric. They showed that our society is willing to defend itself efficiently but not at any cost. We know by experience that if we allow ourselves excessive State violence, arbitrariness, contempt of law, discrimination, we not only risk shaking the pillars of the democratic societies that painstakingly emerged from World War II and from the end of communism; we also risk feeding terrorism or increasing the understanding and support for terrorism. Con-

versely, we add strength and sharpness to our resolute fight against terrorism if we clearly stand by our principles, rallying broad political opinion, commanding respect, and showing consistency of purpose. It is precisely in a situation of crisis, such as brought about by terrorism, that respect for human rights becomes even more important with even greater vigilance called for.

At the same time, the need to respect human rights is in no circumstances an obstacle to the efficient fight against terrorism. The experts in counter-terrorism assembled by the Council of Europe do not disagree with this "win-win approach". They have encouraged us to stick to that course. Indeed, national authorities in charge of the fight against terrorism have been among the first to call for acting in ways compatible with internationally recognised human rights standards. They were instrumental in shaping the "*Guidelines on Human Rights and the Fight against Terrorism*" adopted by the Committee of Ministers on 11 July 2002, the first international legal text on this issue. These Guidelines are designed to help States strike the right note in their responses to terrorism. We very much hope that these Guidelines and their underlying philosophy will be widely circulated and will help in taking appropriate decisions.

The Council of Europe is making important efforts to strengthen international legal action against terrorism and its funding. One main result of these efforts is the adoption of a Protocol giving additional efficiency to the European Convention for the Suppression of Terrorism (1977). International cooperation in the fight against terrorism is an absolute necessity. International cooperation in the fight for human rights is also essential.

In a longer-term perspective, I engaged the Council of Europe to brush up and better focus earlier work aimed at fostering dialogue and a sense of common purpose both within our multicultural European societies – our civil societies – and in the wider Mediterranean area.

The more I think about it, the more I reject any notion of a clash of civilisations; the more I also see an evident clash of ignorance which is becoming alarming in the context of globalisation. Clearly, we do not want our citizens' ignorance to be abused by people forcing upon them radical views, fundamentalism of all kinds and as a pretence to spill blood under the cloak of religion. We do not want tension and fear to grow as a result of ignorance. We do not want integration of migrants to become jeopardised for the same reasons.

We want our citizens to grow aware of diversity, including religious diversity, and to value it. We strongly invite them to link that diversity through common adhesion to the same fundamental values – including refusal of hatred, discrimination and arbitrariness along with commitment to the rule of law.

This is a long-term process. It will not succeed in a vacuum: parallel initiatives are also needed, in particular to solve ongoing conflicts politically, to reduce injustice and to re-visit aspects of our foreign policies.

This broader agenda must constantly be kept in mind when addressing the issue of terrorism. I am deeply convinced that these proceedings demonstrate this and that they will help readers understand more precisely how the present-day situation is related to anti-terrorist measures and human rights.

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List of Abbreviations

AI	Amnesty International
CAT	Committee against Torture
CDDH	Steering Committee for Human Rights
CIS	Customs Information System
CTC	Counter-Terrorism Committee
DH-S-TER	Group of Specialists on Human Rights and the Fight against Terrorism
ECHR	European Court of Human Rights
EHRR	European Human Rights Reports
EJN	European Justice Network
ETA	Basque Fatherland and Liberty
ETC	European Training and Research Centre for Human Rights and Democracy
ETS	European Treaty Series
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FIU	Financial Intelligence Unit
GMT	Multidisciplinary Group on International Action against Terrorism
HCHR	High Commissioner for Human Rights
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organisation
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESC	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHF	International Helsinki Federation
INS	Immigration and Naturalization Service
INTERPOL	International Criminal Police Organization

MFHR	Marangopoulos Foundation on Human Rights
ODCCP	Office for Drug Control and Crime Prevention
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of the Islamic Conference
OP	Operative Paragraphs
OSCE	Organisation for Security and Co-operation in Europe
SIS	Schengen Information System
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNOV	United Nations Office at Vienna
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act

INTRODUCTIONS

by

WOLFGANG BENEDEK

ALICE YOTOPOULOS-MARANGOPOULOS

ERNST SUCHARIPA

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WOLFGANG BENEDEK

The tragic events of 11 September have led to an intensification of measures against terrorism both at the level of states and international organizations. New laws and resolutions have been passed in order to strengthen national and international action against terrorism. Some of these measures violate human rights and have been introduced without respect for obligatory procedures under international human rights conventions for derogations in cases of emergency.

This has given rise to much concern worldwide. The UN Secretary-General, Kofi Annan, has deplored the "collateral damage" of the war on terrorism on human rights.[1] Reports by Amnesty International, Human Rights Watch and the International Helsinki Federation for Human Rights have denounced human rights abuses worldwide in the name of counter-terrorism.[2] Some authors like Samuel Ignatieff and David Luban even have seen the war on terrorism as the end of human rights.[3]

The president of the Parliamentary Assembly of the Council of Europe, on 30 November 2001, declared that "If our response to terrorism is to lower our standards of human rights, then the terrorists have won."[4]

In any case, the struggle against terrorism is a major challenge for the preservation of those achievements already made in human rights. In ths matter, different approaches can be observed, both as regards the United States and Europe, as well as within Europe. There is the question of the role of international organisations on the universal and regional level, as in particular the United Nations, the Council of Europe and the European Union, which have, *inter alia*, issued important guidelines on how to preserve human rights in the struggle against ter-

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1 Address to the UN Security Council on 21 January 2003.

2 In the Name of Counter-Terrorism: Human Rights Abuses Worldwide, Human Rights Watch Briefing, Paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003, http://hrw.org/un/chr/59/counter-terrorism-bck.htm; see Annex XIII for the report of IHF.

3 David Luban, The War on Terrorism and the End of Human Rights, in: Philosophy and Public Policy Quarterly, Vol. 22 (2002, 3) 9-14; Michael Ignatieff, Will the Quest for Security Kill the Human Rights Era?, International Herald Tribune of 6 February 2002.

4 Netherlands Quarterly of Human Rights 1/2002, 93.

rorism.[5] And there is the question of the legal restrictions on the use of force and of preventive action against terrorism.

Are anti-terrorist measures necessarily "liberty-killers"? How can the delicate balance between security and freedom be maintained? To secure common values like human rights in times of terrorism poses a challenge to limited government and international cooperation, but this, however, is not new.[6] Already in 1993, at the World Conference on Human Rights in Vienna, a resolution was passed on "Human Rights and Terrorism" which led to a series of reports and resolutions[7] as well as to the appointment of a Special Rapporteur on the topic by the UN Commission on Human Rights and the General Assembly. New is the dimensions of terrorism affecting innocent civilians. The response by democratic states and the international community raises issues of unilateralism versus international cooperation and of state-oriented versus community-oriented approaches. How to ensure that the rule of law prevails over arbitrary force, which may instigate further terrorism? How to provide human security for everybody and not only state security?

With the purpose of an objective analysis of the many questions posed by the intensified struggle against terrorism, a two-day symposium was organised in Vienna on 30 and 31 October 2002 on the initiative of the Marangopoulos Foundation for Human Rights (MFHR) of Athens by the European Training and Research Centre for Human Rights and Democracy (ETC) in Graz and the Diplomatic Academy of Vienna together with the MFHR. This brought together a number of high-level experts from academia, diplomacy, international organisations and NGOs for a profound discussion of the topic.

Particular thanks are due to Professor Alice Yotopoulos-Marangopoulos, president of the MFHR, and to Ms. Odette Jankowitsch

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5 See Annex II for the Proposals for „further guidance" for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001) on Compliance with international human rights standards, in: Annex to the Report of the United Nations High Commissioner for Human Rights to the Human Rights Commission of 2002, and Annex X for the Guidelines on Human Rights and the Fight against Terrorism of the Council of Europe.

6 See, for example, Colin Warbrick, Terrorism and Human Rights, in: Janusz Symonides (ed.), Human Rights: New Dimensions and Challenges, UNESCO Publishing (Ashgate) 1998, 219ff. and Roselyn Higgins and Maurice Flory (eds.), Terrorism and International Law, London and New York (Routledge) 1997.

7 See Annex VIII and IX.

as well as Ms. Christiane Bourloyannis-Vrailas from the MFHR for their initiative, contributions and support; and to Ernst Sucharipa, director of the Diplomatic Academy of Vienna and his collaborators for co-organizing and hosting the symposium.

Many thanks go also to the Council of Europe which made a particular effort to support the symposium through the presence and contributions of its first representatives.

This book, based on the symposium, brings together most of the contributions in an updated form. The date of finalization varies between December 2002 and June 2003. It includes an annex with major documents prepared on the question of human rights and terrorism at universal and regional levels by international organizations and NGOs. which represents a useful handbook on the topic. Special thanks go to Ms. Yvonne Schmidt from the Institute of International Law and International Relations at the University of Graz for her assistance in editing this publication.

ALICE YOTOPOULOS-MARANGOPOULOS

Human rights are protected by a large and ever-tighter web of international agreements and organs, including treaty bodies which monitor the implementation of international conventions and extra-conventional mechanisms with more empirical working methods.

Despite the superabundance of instruments and mechanisms, both at the international and regional level, defenders of human rights observe with great concern the many methodical attempts in recent years to eliminate human rights protection.

Among these attempts is the systematic effort to undermine the United Nations by various means. Furthermore, there is a similar systematic effort to hinder the adoption of effective agreements addressing the major socio-economic problems of our times, such as destruction of the environment, racism, the ever-increasing gap between the rich and the poor (both countries and individuals), the prohibition on manufacturing biological, toxic and nuclear weapons and of relevant tests, the reduction of the arms trade, etc. Finally, there is the effort to sabotage in any possible way the establishment and effective functioning of the International Criminal Court. This threat to a major conquest of mankind is of major concern.

The situation has deteriorated alarmingly since the deplorable and tragic terrorist attacks of 11 September in the United States. Terrorism appears stronger, more destructive and more harrowing than ever. But it also has become the occasion for the adoption of so-called "anti-terrorist" measures, some of which clearly violate human rights. Suddenly, democratic values and humanistic achievements have become seriously threatened in the name of national security. The sacrifice of civil liberties, and even more so, the waging of preemptive wars, are used as anti-terrorist measures.

Some countries have passed laws that abolish basic human rights, including habeas corpus and the right to a fair trial, or which simply transgress human rights that are considered as non-derogable, such as prohibition of torture and cruel or degrading treatment or punishment.[1]

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[1] NGOs are very concerned about torture methods used against suspects and detainees as part of the war against terrorism. See, Amnesty International Report 2003 at 265 (USA

This has happened despite UN resolutions and the reports of UN experts and texts adopted at the regional level designed to ensure that anti-terrorist policy should respect human rights and the principle of proportionality between the immediate danger to be addressed and any adverse effects of measures taken to that end.

All human rights defenders cannot fail to worry seriously about these developments, which threaten to embroil humankind in a new world war on a much wider scale than the two previous ones, since the powerful of this Earth have heralded the new dogma of "preemptive wars" against more than fifty countries which they have blacklisted. This war, moreover, could be more devastating, as it is to be expected that all sides could eventually use the most destructive means at their disposal beyond conventional weapons. One may recall the words of President Bush: "There's no telling how many wars it will take to secure freedom in the homeland".[2]

There is an additional problem. By violating human rights, in disregard of the principle of proportionality, under the justification of the fight against terrorism, are we not re-igniting terrorism itself? Recent events seem to prove this point. History calls urgently for confirmation that human rights commitments undertaken by States were and still are sincere.

In this connection, we realize that although States engage themselves on a multilateral level and declare the need to respect human rights standards, several issues arise in practice with regard to the application of national measures.

It is for the above reasons that our Foundation, enthusiastically supported by Prof. Benedek and all distinguished scholars who agreed to participate in this colloquium, felt the need to hold an objective scientific discussion, in full awareness of the present critical situation, on the best and most effective ways to address the scourge of terrorism without violating human rights which are the paramount achievement of long struggle.

On behalf of the MFHR, I would like to express my warmest gratitude to the distinguished speakers and organizers in Vienna who took on

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report) and Human Rights News of 11 March 2003, www.hrw.org/press/2001/11/TortureQandA.htm.

2 August 5, 2002, Remarks by President Bush at a republican fundraiser.

the bulk of the burden. I hope that this colloquium will have contributed to finding a viable solution to the present critical situation.

ERNST SUCHARIPA

Two years have passed since the terrorist attacks on the United States on 11 September, 2001 – and yet time cannot separate us from the horror of that day, from our shock, our grief, our compassion for the children, the spouses, the friends and families of those who perished. We feel that shock still. On 11 September, grief enveloped the globe – not only out of solidarity with the people of the United States, but out of shared loss. More than ninety nations lost sons and daughters of their own – murdered that day, for no other reason than they had chosen to live in the United States.

A year after the attacks, an expert report, prepared for Secretary General Kofi Annan by a group of senior UN officials and outside experts, outlined new ways the UN can contribute to the international battle against terrorism. The group, *inter alia*, argued that the United Nations must project a clear and principled message that terrorism, whatever the cause in whose name it is undertaken, is unacceptable and deserves universal condemnation. It noted that terrorist acts constitute an assault on human rights. But the report also makes clear that human rights must be respected in the fight against terrorism. It warned that the United Nations should be wary of offering, or being perceived to be offering, a blanket endorsement of measures taken in the name of counter-terrorism.[1]

Today, after the war on Iraq, launched without authorization of the use of force by the UN Security Council, international debate has shifted to the question of how to respond to and how to prevent terrorist attacks. Many consider preemptive measures as a necessary tool, although, if those measures are of a military nature, difficult problems arise as far as compatibility with the UN Charter is concerned. The strategic thinking of the European Union, as exemplified in a relevant paper submitted by the High Representative for External Relations to the Thessalonica meeting of the European Council in June, 2003 demonstrated, is also evolving in the direction of considering, in extremis, such measures as long as they occur under a UN mandate.

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1 Annex to A/57/273 – S/2002/875 Report of the Policy Working Group on the United Nations and Terrorism.

We are faced with an obvious dilemma: How to effectively fight terrorism while at the same time ensure that the core set of international norms, values, fundamental rights and freedoms on which our societies are based upon will not be jeopardized.

Of course, in essence, this debate is not new; we know it from national constitutional debates: to what extent can the State fight radical anti-constitutional groups, attacking the constitutional foundations of the State; what if the constitutional framework turns out to prevent effective measures? Can we allow terrorists to endanger and upset our constitutional systems, or indeed the emerging international order? On the other hand, can we allow ourselves, in the fight against terrorism, to abrogate what we all consider to be the very constituent elements of that order: universal human rights and fundamental freedoms?

If we would consider the need to respect human rights as an obstacle to the efficient fight against terrorism we already would have lost this fight. Quite the contrary: also in the fight against terrorism democratic states must uphold human rights and thus set a shining example for the kind of society we are fighting for. Certainly, this is a tall order. Much of the current transatlantic malaise and the disappointment experienced by many friends of the United States stems from the impression that the United States does not live up to those high expectations.

In addition, and maybe most importantly, we need to redouble national and international efforts to ensure, through full enjoyment of human rights, that in the future there will be less fertile ground on which terrorism can breed.

The Diplomatic Academy of Vienna was gratified to be able to co-organize and host in October 2002 a seminar assembling a high number of first class expert-knowledge on these difficult and urgent issues. Discussions were rich and – as one would have expected – not always without confrontation. This volume is intended to encapsulate this debate and assist further international discussion.

My thanks go to Professor Wolfgang Benedek, the Marangopoulos Foundation and to Dr. Odette Jankowitsch for their cooperation in preparing for the seminar, as well to all experts who presented papers and shared their insights as panelists, and in particular to Walter Schwimmer, Secretary General of the Council of Europe, who honored the seminar with his presence.

Finally we were happy to receive necessary financial assistance from the City of Vienna for the conduct of the seminar.

PART ONE

INTERNATIONAL ANTI-TERRORIST MEASURES AND HUMAN RIGHTS

A.

HUMAN RIGHTS AS STANDARDS AND FRAMEWORK CONDITIONS FOR ANTI-TERRORIST MEASURES

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United Nations Human Rights Standards as Framework Conditions for Anti-Terrorist Measures

CHRISTIANE BOURLOYANNIS-VRAILAS

This presentation is intended to provide a brief overview of the significance of the human rights aspects of United Nations actions to combat terrorism. The crux of the matter is how these anti-terrorist measures conform with the international human rights standards set out by the United Nations. This therefore will be the focus of my observations. I will also touch briefly on the issue of the relationship between terrorism and human rights violations as discussed in relevant debates at the United Nations.

I. THE PRINCIPLE OF CONFORMITY OF ANTI-TERRORIST MEASURES WITH INTERNATIONAL HUMAN RIGHTS STANDARDS

1. Human rights and United Nations anti-terrorist action before 11 September

a. Anti-terrorist conventions

It is well known that a major contribution of the United Nations system to the fight against terrorism has been the adoption of a series of relevant conventions, numbering twelve to date.[1] Indeed, the inability to

[1] 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (hereinafter "Tokyo Convention"); 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (hereinafter "Hague Convention"); 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (hereinafter "Montreal Convention"); 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (hereinafter "Convention on Internationally Protected Persons"); 1979 International Convention against the Taking of Hostages (hereinafter "Hostages Convention"); 1979 Convention on the Physical Protection of Nuclear Material (hereinafter "Vienna Convention"); 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971; 1988

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

reach agreement on a definition of terrorism has hindered for decades the conclusion of a comprehensive legal instrument.[2] A sectoral approach has been thus followed, focusing on the prevention and suppression of specific acts which everybody understood to be terrorist acts – namely, hijacking of planes and other criminal acts against civil aviation, hostage-taking, acts of violence against internationally protected persons, offences against the safety of maritime navigation, offences involving the use of nuclear material, bombings and the financing of terrorism. Most such instruments are based on the principle *aut dedere aut iudicare.*

An analysis of these conventions shows how the inclusion of human rights provisions has evolved over time. They are, for example, absent from the first three, i.e. the Tokyo, Hague and Montreal Conventions, possibly because those were adopted within the framework of the International Civil Aviation Organization by negotiators unfamiliar with human rights issues. However, these instruments do contain – as do subsequent ones – provisions on the right to consular assistance,[3] but whether nowadays this forms part of the body of human rights law remains for some an open question[4] despite a ruling by the Inter-American Court of Human Rights that such is indeed the case.[5] Be that as it may, a

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Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter "Rome Convention"); 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; 1997 International Convention for the Suppression of Terrorist Bombings (hereinafter "Terrorist Bombings Convention"); and 1999 International Convention for the Suppression of the Financing of Terrorism (hereinafter "Financing of Terrorism Convention"). For the texts of these instruments, see United Nations, International Instruments related to the Prevention and Suppression of International Terrorism (New York, 2001). See also the website on "UN action against terrorism": www.un.org/terrorism.

2 As to the current prospects of such endeavour, see infra the presentation of Michael Postl.

3 See art. 13 (3) of the Tokyo Convention, art. 6 (3) of the Hague Convention, art. 6 (3) of the Montreal Convention. See also art. 6 (2) of the Convention on Internationally Protected Persons, art. 6 (3) and (4) of the Hostages Convention, art. 7 (3) and (4) of the Rome Convention, art. 7 (3) and (4) of the Terrorist Bombings Convention, art. 9 (3) and (4) of the Financing of Terrorism Convention.

4 Thus, the International Court of Justice, in the LaGrand case, did not rule on the conflicting arguments of the parties on this point. See W. J. Aceves, "LaGrand (Germany v. United States), Judgment, International Court of Justice, June 27, 2001", Case Note, American Journal of International Law, vol. 96 (2002) 210, at 216.

5 The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion No. OC-16/99, 1 October 1999.

guarantee of "fair treatment at all stages of the proceedings" regarding an alleged offender was inserted in the first convention negotiated within the United Nations proper, that is the 1973 Convention on Internationally Protected Persons.[6] Such a provision has been included in every instrument adopted since[7] – whether in the United Nations, the International Atomic Energy Agency or the International Maritime Organization – and the relevant text has been gradually enhanced so as to strengthen the protection of the rights of alleged terrorists. Thus, the two latest instruments, the 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention, make further reference not only to the rights and guarantees under the law of the State in which the alleged offender is present, but also to the "applicable provisions of international law, including international law of human rights." As was apparent during the negotiations, some countries were not particularly happy with this express reference to international human rights standards,[8] which obviously include the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR),[9] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[10] as well as other United Nations instruments such as the Standard Minimum Rules for the Treatment of Prisoners.[11] Yet those countries had to concede the point. One may wonder, however, whether some of the proponents of a stronger human rights language at that time would make the same argument today.

The two latest anti-terrorist conventions mentioned above were adopted in the 1990s, a period when some of the controversy that surrounded the issue of terrorism in the 1970s and 1980s subsided for a variety of reasons: the Cold War had ended and certain Third World countries became more interested in obtaining international support for their problems of domestic terrorism than fighting ideological battles on the right to self-determination. This controversy, in any event, had lost

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6 Art. 9.

7 See art. 8 (2) of the Hostages Convention, art. 12 of the Vienna Convention, art. 10 (2) of the Rome Convention, art. 14 of the Terrorist Bombings Convention and art. 17 of the Financing of Terrorism Convention.

8 See Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/52/37 (1997), Annex IV, paras. 74 and 83.

9 UNTS, vol. 999, at. 171.

10 Ibid., vol. 1465, at 85.

11 UN Doc. A/CONF/6/1 (1955), Annex I, A .

some of its intensity thanks to the progress then achieved in the Middle East peace process. It thus became possible to elaborate somewhat more stringent anti-terrorist instruments than previously. Agreement was reached, in particular, on de-politicizing terrorist bombings and the financing of terrorism and excluding such acts from the protection offered by the political offence exception to extradition and mutual legal assistance.[12] It is important to mention, however, that the relevant provisions were balanced by the inclusion of guarantees against so-called politically motivated requests, that is, extradition or mutual legal assistance requests presented in fact for the purpose of prosecuting a person on account of his or her race, religion, nationality, ethnic origin or political opinion.[13]

Thus, as regards the treaty-making activities of the United Nations for combating terrorism, we are left with the comforting conclusion that the tightest anti-terrorist conventions adopted so far are also those that contain the strongest provisions for the protection of the rights of alleged offenders, albeit worded in general terms. Whether this achievement would be safeguarded in the text of a comprehensive convention against terrorism, if such an instrument were ever concluded, remains to be seen, and some misgivings have already been voiced in this respect.[14]

b. Other anti-terrorist instruments and pronouncements

Turning to other texts adopted by the United Nations regarding anti-terrorist measures, one finds numerous references to the need to respect international human rights standards. Not all can be cited here, but two instruments deserve special mention, as they were the first tangible results of the above-described new spirit of cooperation that emerged in the early 1990s in the United Nations on the issue of terrorism. These preceded the adoption of the Terrorist Bombings and Financing of Terrorism Conventions. They are the 1994 Declaration on Measures to

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12 See art. 11 of the Terrorist Bombings Convention and art. 14 of the Financing of Terrorism Convention.

13 See art. 12 of the Terrorist Bombings Convention and art. 15 of the Financing of Terrorism Convention. Such a provision had been included previously also in the Hostages Convention (art. 9), but without the parallel exclusion of the political offence exception.

14 See Second Progress Report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur on Terrorism and Human Rights, UN Doc. E/CN.4/Sub.2/2002/35, para. 24.

Eliminate International Terrorism[15] and the 1996 Supplementary Declaration thereto.[16] The former clearly states that the "effective and resolute measures" which States are called upon to take "for the speedy and final elimination of international terrorism", must be "in accordance with the relevant provisions of international law and international standards of human rights."[17] A similar provision was included in the 1996 Supplementary Declaration.[18]

The United Nations anti-terrorist Conventions, as well as the two anti-terrorist Declarations, were elaborated in the framework of the Sixth Committee of the General Assembly, a forum whose prime focus is not human rights. Yet, as discussed above, in addressing the legal obligations of States in the fight against terrorism, the Sixth Committee has not failed to stress the importance of the conformity of anti-terrorist measures with international human rights standards and norms. Moreover, this is the case, not only as regards more "high profile" instruments like Conventions and Declarations, but also of its relevant annual resolutions adopted before 11 September. Thus, it was repeatedly stated over the years by the main body of the General Assembly dealing with the agenda item "Measures to eliminate international terrorism" that such measures should conform with international law, including international human rights standards.[19]

It comes as no surprise that this point had been further stressed by United Nations human rights bodies and mechanisms. The Third Committee of the General Assembly,[20] the Commission on Human Rights,[21] the Sub-Commission on the Promotion and Protection of Human Rights[22] and its Special Rapporteur on Terrorism and Human Rights[23]

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15 See Annex VIII: United Nations General Assembly Res. 49/60 of 9 December 1994.

16 See Annex IX: United Nations General Assembly Res. 51/210 of 17 December 1996.

17 Para. 5.

18 Para. 5.

19 See, e.g., the following General Assembly resolutions adopted on the recommendation of the Sixth Committee: 55/158 of 12 December 2000, para. 3; 54/110 of 9 December 1999, para. 3; and 53/108 of 8 December 1998, para. 3.

20 See, e.g. the following General Assembly resolutions adopted on the recommendation of the Third Committee: 52/133 of 12 December 1997, 14th preambular para. and operative paras. 4 and 5; and 50/186 of 22 December 1995, 14th preambular para. and operative paras. 3 and 4.

21 See, e.g., resolutions 2001/37 of 23 April 2001, 22nd preambular para. and operative paras. 5-8; 2000/30 of 20 April 2000, 20th preambular para. and operative paras. 5-8; and 1999/27 of 26 April 1999, 18th preambular para. and operative paras. 5-7.

22 See, e.g., resolution 2001/18 of 16 August 2001, 13th preambular para.

have all repeated it again and again over the years – well before 11 September.

It was also before 11 September that the Human Rights Committee adopted its General Comment on states of emergency. Among other things, this most authoritative body emphasized that a state of emergency can be invoked in no circumstances as justification for acting in violation of international humanitarian law or peremptory norms of international law, by taking such measures as arbitrary deprivations of liberty or deviating from the fundamental principles of fair trial, including the presumption of innocence.[24]

From this brief survey of relevant United Nations texts, it clearly transpires that the principle that anti-terrorist measures should conform to international human rights standards – standards set by that very organisation – was well established before 11 September. The question arises whether anything has changed since the appalling events of 11 September.

2. *HUMAN RIGHTS AND UNITED NATIONS ANTI-TERRORIST ACTION AFTER 11 SEPTEMBER*

The above-mentioned principle, in fact, was re-emphasised in relevant resolutions adopted after 11 September by the General Assembly,[25] the Commission on Human Rights,[26] the Sub-Commission on the Promotion and Protection of Human Rights[27] and in the latest report of the Special Rapporteur on Terrorism and Human Rights.[28] Actually, the General Assembly and the Commission on Human Rights have also both adopted for the first time a resolution entirely devoted to the issue of the "protection of human rights and fundamental freedoms while

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[23] See, e.g., Progress Report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur on Terrorism and Human Rights, UN Doc. E/CN.4/Sub.2/2001/31, paras. 109-117.

[24] UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11. See also infra the presentation by Kevin Boyle.

[25] Resolutions 57/27 of 19 November 2002, para. 3, and 56/88 of 12 December 2001, para. 3, both adopted on the recommendation of the Sixth Committee; and resolution 56/160 of 19 December 2001, adopted on the recommendation of the Third Committee, 22nd preambular para. and operative paras. 5-6 and 8.

[26] Resolutions 2003/37 of 23 April 2003, 19th and 22nd preambular paragraphs and operative paras. 5, 7-8 and 10; and 2002/35 of 22 April 2002, 19th and 22nd preambular paragraphs and operative paras. 5, 7-8 and 10.

[27] Resolution 2002/24 of 14 August 2002, 14th preambular paragraph.

[28] Second Progress Report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur on Terrorism and Human Rights, UN Doc. E/CN.4/Sub.2/2002/35, para. 66.

countering terrorism." These texts, *inter alia*, affirm that "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law."[29]

The Human Rights Committee, for its part, has expressed concern that certain anti-terrorist measures adopted or envisaged may not be in full conformity with the relevant provisions of the ICCPR.[30] Its above-mentioned restrictive interpretation of the provision on derogation in states of emergency takes on particular relevance in this regard.[31]

Other authoritative voices have joined the choir, such as:

a) The Committee on the Elimination of Racial Discrimination, which issued a statement emphasizing that measures to combat terrorism must be in accordance with the Charter of the United Nations, international law, in particular international human rights law and international humanitarian law, and recalling that the prohibition of racial discrimination is a peremptory norm of international law of a non-derogable nature.[32] The Committee has also taken such a stand in connection with its examination of specific State actions;[33]

b) The Committee against Torture, which also issued a relevant statement reminding States of the non-derogable nature of most of the obligations undertaken under the Convention against Torture,[34] and has further expressed concern at certain anti-terrorist measures adopted by States;[35]

c) A group of 17 independent experts of the Commission on Human Rights, who issued a joint statement reminding States of their obligations to uphold human rights and fundamental freedoms, calling special attention on the non-derogability of certain rights under any circumstances.[36]

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29 General Assembly resolution 57/219 of 18 December 2002, para. 1; and Commission on Human Rights resolution 2003/68 of 25 April 2003, para. 3.

30 See UN Docs. CCPR/CO/73/UK; CCPR/CO/73/UKOT (2001), para. 6 and CCPR/CO/74/SWE (2002), para. 12.

31 Supra note 24.

32 UN Doc. A/57/18, Chapter XI, C (2002).

33 See, e.g., UN Doc. CERD/C/62/CO/7, para. 24 (2003).

34 UN Doc. CAT/C/XXVII/Misc.7 (2001).

35 See, e.g., UN Doc. CAT/C/CR/28/6, para. 6 (b) (2002).

36 See Annex I: Commission on Human Rights, Joint statement issued on 10 December 2001 by 17 independent experts of the Commission on Human Rights on the occasion of Human Rights Day, to the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2002/75 of 30 January 2002.

In addition, many of them have underlined the importance of respect for human rights in the fight against terrorism in their respective reports to the Commission;[37]

d) The Secretary-General of the United Nations;[38]

e) The former United Nations High Commissioner for Human Rights, who wasted no occasion for repeating that anti-terrorist measures must conform with human rights;[39]

f) The current High Commissioner;[40]

g) And the Policy Working Group on the United Nations and Terrorism, which, in its report released on 10 September 2002, emphasized that international law requires observance of basic human rights standards in the struggle against terrorism and that various international human rights instruments include clear limitations on the actions that States may take within the context of the fight against terrorism. In this context, the Group made particular reference to the non-derogable provisions of the ICCPR.[41] As to the role to be played by the Organization, it maintained that "[t]he United Nations should beware of offering, or be perceived to be offering, a blanket or automatic endorsement of all measures taken in the name of counter-terrorism."[42]

Consequently, as far as the United Nations is concerned, there appears to be no evidence that the need to strengthen anti-terrorist measures made apparent by the tragic events of 11 September has led in any way to the creation of a legitimate exception to the firmly established principle that anti-terrorist measures must conform to international human rights norms. If anything, this principle has gained prominence and importance.

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37 See, e.g. the reports of the Special Rapporteur on the independence of judges and lawyers (UN Doc. E/CN.4/2003/65) and the Special Rapporteur on the right to freedom of opinion and expression (UN Doc. E/CN.4/2003/67).

38 See, e.g., his statement of 12 April 2002 before the Commission on Human Rights, UN Press Release SG/SM/8196-HR/CN/989.

39 See, e.g., Annex II: Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights (Mary Robinson) and Follow-Up to the World Conference on Human Rights, UN Doc. E/CN.4/2002/18 of 27 February 2002.

40 See, e.g., the statement of Sergio Vieira de Mello to the Informal Meeting of the Commission on Human Rights of 24 September 2002, available at www.unhchr.ch.

41 UN Doc. A/57/273-S/2002/875, Annex, paras. 26-28.

42 Ibid., para. 14.

3. *HUMAN RIGHTS AND MEASURES TO PREVENT ABUSE OF REFUGEE STATUS BY TERRORISTS*

One specific type of anti-terrorist action deserves special mention as it has been advocated with particular emphasis by various United Nations bodies long before 11 September, namely the adoption of measures to prevent abuse of refugee status by terrorists. This entails, first of all, measures to ensure, before granting such status, that an asylum-seeker has not engaged in terrorist activities, and, second, after having granted refugee status, to ensure that this is not used for the preparation and perpetration of terrorist acts. Such action was called for, especially under the two above-mentioned Declarations on Measures to Eliminate International Terrorism,[43] resolutions of the General Assembly[44] and the Commission on Human Rights,[45] and, last but not least, the Security Council in its landmark resolution 1373 (2001) establishing the Counter-Terrorism Committee.[46] Yet, in calling for such measures, United Nations organs have at the same time emphasised that international human rights standards must be observed. The General Assembly has done so, the Commission of Human Rights has done so, and even the Security Council has done so.[47] Moreover, in the 1996 Declaration,[48] the General Assembly stated more specifically that measures to prevent abuse of refugee status by terrorists must not affect the protection afforded under the 1951 Convention relating to the Status of Refugees[49] and its 1967 Protocol[50] or other relevant rules of international law. Needless to say, this is also the position of the United Nations High Commissioner for Refugees.[51]

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43 1994 Declaration (supra note 15) para. 5(f); 1996 Declaration (supra note 16), in fact primarily adopted to address this issue.

44 See, e.g., resolution 56/160 of 19 December 2001, para. 8.

45 See, e.g., resolutions 2002/35 of 22 April 2002, para. 8, and 2001/37 of 23 April 2001, para. 8.

46 Para. 3 (f) and (g).

47 See provisions cited in notes 44-46 supra.

48 7th preambular para.

49 UNTS, vol. 189, No. 2545.

50 Ibid., vol. 606, No. 8791.

51 He has made the point repeatedly in the last few months. For instance, on 7 November 2002, while expressing support for measures to combat misuse of asylum systems, he voiced his concern "that in some cases indiscriminate measures have led to non-

In other words, the message from the United Nations is clear: tighter control as regards the procedure for granting and maintaining refugee status, but not at the expense of international human rights norms.

II. THE RELATIONSHIP BETWEEN TERRORISM AND HUMAN RIGHTS VIOLATIONS: ASPECTS OF THE DEBATE AT THE UNITED NATIONS

Among the many other aspects of the United Nations discussion on terrorism and human rights,[52] I would like to highlight briefly two issues concerning the relationship between terrorist actions and human rights violations: the debate as to whether the two concepts can be equated as regards individual acts and the acknowledgement of the causal link between human rights violations and terrorism.

1. THE QUALIFICATION OF TERRORIST ACTS PERPETRATED BY INDIVIDUALS OR GROUPS AS HUMAN RIGHTS VIOLATIONS

This point has divided United Nations Member States, especially in the Third Committee of the General Assembly and the Commission on Human Rights. The situation is the following: many States, especially developing countries, consider that murders, hostage-taking and other acts committed by terrorist groups, as well as the sense of fear that such acts generate in the population at large, constitute gross human rights violations. Mention is specifically made in this regard to violations of the right to life – characterized by these States as the most essential and basic human right –, the right to liberty and security, and the right to live free from fear. Others, mostly Western States and several Latin American States, strongly hold on to the more traditional view that human rights norms concern exclusively the relationship between a State and individuals under its jurisdiction: as human rights obligations apply only to States, it is only States that can commit violations of human rights.

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admission, denial of access to asylum procedures, and even incidents of refoulement" (statement available at www.unhcr.ch).

52 For a much wider discussion, see, in particular, the reports of the Special Rapporteur on Terrorism and Human Rights of the Sub-Commission on the Promotion and Protection of Human Rights, Kalliopi Koufa, UN Docs. E/CN.4/Sub.2/1997/28; E/CN.4/Sub.2/1999/27; E/CN.4/Sub.2/2001/31 and E/CN.4/Sub.2/2002/35.

For this group of countries, terrorist acts are merely criminal acts that should be prosecuted in criminal courts; otherwise there is a risk of conferring on terrorists some sort of status under international law.[53]

This is not simply a philosophical debate on the concepts of human rights obligations and human rights violations. It is important to remember that the prime proponents of the approach equating terrorist acts with human rights violations have been countries facing internal situations of violence and terrorism, such as Algeria and Turkey.[54] Labelling terrorism as a human rights violation has added a further dimension to the condemnation of these domestic terrorist acts at the international level.[55] Stretching the argument, anti-terrorist measures could thus be presented as a means to protect the rights of the victims, the population at large. Yet, in practice, the anti-terrorist measures adopted by some of these countries have been more often than not quite restrictive of human rights. In addition, by assigning foremost importance to the right to life, the door has been left open for restrictions of other rights by measures seemingly aimed at preventing violations of the paramount right by terrorists.[56]

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53 See the explanations of vote on the relevant resolutions, e.g., on the draft resolution of the Third Committee which became General Assembly resolution 56/160, UN Press Release GA/SHC/3678 (30 November 2001), or on Commission of Human Rights resolution 1999/27, UN Press Release HR/CN/99/59 (26 April 1999). See also the annual "Current Developments" article by Michael J. Dennis in the American Journal of International Law on the session of the Commission on Human Rights, in particular vol. 93 (1999) 246, at 248; vol. 94 (2000) 189, at 192-193; vol. 95 (2001) 213, at 214-215; and vol. 96 (2002) 181, at 183.

While Western countries have generally maintained a consistent position at the United Nations in opposition to the qualification of terrorist acts as human rights violations, we note that, at the regional level, some of these same countries have taken a different view. For instance, in its resolution of 16 March 2000 on Human rights in the European Union, the European Parliament has stated that "terrorism is a violation of human rights" (para. 41, Official Journal of the European Communities, C 377, 29 December 2000, at 344). Moreover, on other subjects, such as violence against women, some Western countries are quite prepared to endorse the view that private individuals may commit human rights violations (see, e.g. Dennis, supra, vol. 96 (2002), at 183).

54 These two countries have often taken the lead in preparing relevant draft resolutions (see, e.g. the articles by Dennis, supra note 53).

55 See also Ph. Daskalopoulou-Livada, Terrorism: Recent Developments in International Law (Athens/Komotini, Ant.N. Sakkoulas Publ., 1998) (in Greek), at 21.

56 It is telling, in this regard that, the representative of Algeria recently stated before the Third Committee that "[t]errorism violated the right to life. One must therefore not completely impede authorities aiming to protect the rights of their citizens to life" (UN Press Release, GA/SHC/3729, 21 November 2002).

Admittedly, one may hold the view that acts of terrorism constitute human rights violations without any ulterior political motive. The debate as to whether human rights norms create obligations for individuals is indeed a much wider one, and many human rights defenders, among others, are in favour of an extensive approach.[57] However, in certain cases, there may exist a danger for human rights in the approach whereby terrorism acquires the additional stigma of a human rights violation, while anti-terrorist policies gain the aura of being also "pro human rights." At a time when anti-terrorist measures are becoming increasingly tighter and wide-ranging, I believe it is important to proceed cautiously and avoid legitimizing indiscriminately any measures restricting human rights as part of the purported effort to protect the population at large from the violations of its rights by terrorist actions – based on the logic that the ends justify the means.

2. *HUMAN RIGHTS VIOLATIONS AS A CONTRIBUTING FACTOR TO TERRORISM*

The question of the root causes of terrorism has been the subject of much controversy. Until recently, in-depth discussion within the framework of the United Nations was fiercely resisted by Western States, lest it should be misunderstood as providing justification for acts of terrorism.[58] However, in the aftermath of 11 September, the position of European countries, in particular, has somewhat shifted. Thus, the European Union has stated before the General Assembly that "the integration of all countries into a fair world system of security, prosperity and improved development is the condition for a strong and sustainable community for combating terrorism."[59]

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[57] See, e.g., Working Paper submitted by Ms. Kalliopi K. Koufa in accordance with Sub-Commission resolution 1996/20, UN Doc. E/CN.4/Sub.2/1997/28, para. 15, citing, inter alia, T. Meron, "When do Acts of Terrorism Violate Human Rights", Israel Yearbook of Human Rights, vol. 19 (1989) 271, at 274 ff; Preliminary Report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur on Terrorism and Human Rights, UN Doc. E/CN.4/Sub.2/1999/27, paras. 44-46 ; A. Clapham, "The 'Drittwirkung' of the Convention" in R.St.J. Macdonald, F. Matscher and H Petzold (eds.), The European System for the Protection of Human Rights (Dordrecht/Boston/London, M. Nijhoff, 1993) 163-206.

[58] See, e.g., J.J. Lambert, Terrorism and Hostages in International Law (Cambridge, Grotius Publications, 1990), at 30-45.

[59] See statement by Belgium on behalf of the European Union on 1 October 2001, available at www.un.org/terrorism/statements/euE.html. This language is based on the Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, Doc. SN 140/01, section 3.

As further discussed by Professor Benedek in this colloquium,[60] it is becoming increasingly apparent that trying to address the root causes of terrorism does not imply a justification thereof, but is part of a comprehensive approach to eliminate this scourge. There is, in parallel, a growing realisation that gross human rights violations provide a breeding ground for terrorism. Among the many other expressions of this view at the United Nations, I would highlight the following two sentences from the above-mentioned Report of the Policy Working Group on the United Nations and Terrorism: "Terrorism often thrives in environments in which human rights are violated. Terrorists may exploit human rights violations to gain support for their cause."[61]

Consequently, the promotion of respect for human rights is acquiring yet another dimension as a necessary, or rather, as Mary Robinson has stated, a *central* element of an effective anti-terrorist strategy.[62]

* * *

United Nations organs have reaffirmed over and over that terrorist acts are unjustifiable under any circumstances, wherever and by whomsoever committed. But the major standard-setting achievements of the UN in the field of human rights and numerous pronouncements of its organs teach us that human rights violations are *also* unjustifiable under any circumstances, wherever and by whomsoever committed.

As the former United Nations High Commissioner for Human Rights, Ms. Mary Robinson most eloquently put it:

> The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends. International human rights and humanitarian law define the boundaries of permissible political and military conduct. A reckless approach towards human life and liberty undermines counter-terrorism measures.[63]

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60 See infra.

61 UN Doc. A/57/273-S/2002/875, Annex, para. 26.

62 UN Doc. E/CN.4/2002/18, supra note 39, para. 55.

63 Ibid., para. 5.

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Human Rights Standards and Framework Conditions for Anti-Terrorist Measures. European Standards and Procedures

MARTIN EATON

I. INTRODUCTION

In the immediate aftermath of the terrorist attacks on the USA on 11 September 2001, the Committee of Ministers of the Council of Europe decided on 21 September (amongst other things which I shall deal with in a later contribution to this Colloquium) to instruct the Steering Committee for Human Rights (CDDH) "to draw up guidelines based on democratic principles for dealing with movements threatening the fundamental values and principles of the Council of Europe".

The Guidelines, negotiated in a specially convened sub-group of CDDH, were adopted by CDDH itself at its meeting in June 2002 and by the Committee of Ministers on 11 July 2002.[1]

In his preface to the Guidelines as published by the Council of Europe (ISBN 92-871-5021-4), Walter Schwimmer, Secretary-General of the Council of Europe, said:

> "The need to respect human rights is in no circumstances an obstacle to the efficient fight against terrorism. It is perfectly possible to reconcile the requirements of defending society and the preservation of fundamental rights and freedoms. The guidelines presented here are intended precisely to aid States in finding the right balance. They are designed to serve as a realistic, practical guide for anti-terrorist policies, legislation and operations which are both effective and respectful of human rights."

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1 See Annex X: Council of Europe, Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies.

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

My aim is to present to you briefly the content of the Guidelines and to say something about their negotiation, their sources, their legal form and their follow-up.

II. CONTENT

The Guidelines proceed on the basis that terrorism is itself an attack on human rights and democracy. States have an imperative duty to protect their populations against possible terrorist acts and to cooperate with one another in the fight against terrorism. But in this process they must equally respect international human rights instruments and especially the European Convention on Human Rights as interpreted by the Court of Human Rights. The Guidelines begin by recalling States' obligation to protect the rights of people within their jurisdiction against terrorist acts – especially, of course, their right to life. They then proceed to list the human rights standards that apply to make sure that measures taken to fight terrorism respect human rights and the principle of the rule of law.

The Guidelines cover *inter alia* the absolute prohibition of torture, the collection and processing of personal data by State authorities, measures interfering with privacy, arrest, legal proceedings and detention, asylum and extradition, the right to property, derogations; and compensation for victims of terrorist acts. Like the treaty provisions and case law on which they are based, some of the Guidelines (like IV on torture) are absolute, admitting of no exception, but most are a mixture of principle and exceptions. A good example is Guideline IX on legal proceedings:

- Paras. 1 and 2 state basic rights, to be enjoyed by any person accused of terrorist activities;
- Fair trial by an independent and impartial tribunal;
- Presumption of innocence;
- Para. 3 sets out some possible exceptions, drawn from case law;
- Para. 4 states the overriding safeguards, particularly proportionality and fairness of proceedings as a whole.

The Guidelines do not define "terrorism" or "terrorist act". The ECHR contains no definition and the Court has never adopted one, preferring a case by case approach. The background Secretariat document, published with the Guidelines, refers to definitions adopted by the CoE

Parliamentary Assembly in 1999 (Recommendation 1426 (1999) European democracies facing up to terrorism (23 September 1999)) and by the EU European Council in its Common Position of 27 December 2001 as texts which were taken as points of reference by the negotiators.

The Guidelines are intentionally brief, pithy and practical. Their aim is to be clear and accessible.

III. NEGOTIATION

The sub-group created by CDDH, DH-S-TER, chaired by Philippe Boillat (Switzerland) was a geographically balanced group of 11 members including representatives of a number of States with direct experience of dealing with terrorist organisations. As well as their human rights experts, States were encouraged to send experts in counter-terrorism to the meetings. Several did.

At one of its first meetings DH-S-TER held a hearing of invited NGOs specialising in human rights and specialists on anti-terrorist action in the Member States and took account of their comments and recommendations.

At its three meetings, DH-S-TER strove to operate by consensus and stick to well-established principles, rules and case law. On the few issues where agreement was not reached in the group, solutions were found in the full CDDH in June.

IV. SOURCES

The Guidelines are deliberately not new. They are a compilation drawing upon existing treaty law, case law, principles and practice. The experts took the view that essentially the necessary rules were already there. The need was to present them in a clear and accessible form to guide States in their responses to terrorism.

The main reference text is the ECHR itself and its case law which has, over the years, dealt with so many complaints arising from the application by States of anti-terrorist measures. For the Council of Europe the ECHR has to be the starting point.

The Guidelines also draw, however, on other Council of Europe conventions as well as UN conventions and other documents. Thus:

Guideline XII (Asylum) draws on the Universal Declaration of Human Rights, the draft general Convention on International Terrorism and the Convention on the Status of Refugees;

Guideline XIII (Extradition) draws on the European Convention on the Suppression of Terrorism;

Guideline XIV (Property) and XVII draw on the UN Convention of Suppression of Financing of Terrorism;

Guideline XVII (Compensation for victims of terrorist acts) also draws on the European Convention on Compensation for Victims of Violent Crime.

Other sources include Resolutions of the General Assembly and Security Council of the UN and of the Parliamentary Assembly of the Council of Europe, and the work of other Council of Europe expert committees.

The sources that underpin the Guidelines are set out in the background "Texts of Reference" document printed and published with the Guidelines. As this document itself is at pains to underline, it is not meant to be taken as an explanatory report or memorandum of the guidelines. It is, however, a most useful Secretariat document which serves to put flesh on the bare bones of the Guidelines and provide clarification of their source and meaning.

V. LEGAL FORM

The Guidelines are a non-binding document, not a Treaty. There are therefore no final clauses and they do not require signature or ratification. The choice to go for a non-binding instrument reflects, first, the need for speed and, second, the fact that most of the Guidelines are in fact based on existing binding texts and case law.

The language of the Guidelines recognises that many of them have their origin in binding instruments. A non-binding CoE text would normally use softer forms like "States should". The Guidelines use instead formulations like States "must" or "may not". In some cases they use the strong present indicative, eg "the use of torture ... is absolutely prohibited in all circumstances". To reflect the fact that this is not a Treaty, however, it was decided to avoid the use of the normal Treaty form in English: "States shall".

VI. FOLLOW-UP AND CONCLUSION

To quote again from the Secretary-General's preface:

> "These Guidelines are the first international legal text on human rights and the fight against terrorism. In adopting them on 11 July 2002, the Committee of Ministers considered it of the utmost importance that they be known and applied by all authorities responsible for the fight against terrorism, both in the Member States of the Council of Europe and in those States that are associated with the work of the Council of Europe as observers."

To ensure that the Guidelines are known, the text itself specifically invites Member States to ensure that they are widely disseminated among all authorities responsible for the fight against terrorism. Like the Convention itself and its case law, the Guidelines need to become part of the culture and fabric of the organs of the State, especially those involved in the fight against terrorism – civil servants, courts, security services, police, prison officers etc. CDDH decided in October to hold a final meeting of DH-S-TER during the second half of 2003 to evaluate the extent of the Guidelines' dissemination at the national level and any difficulties encountered in their implementation.

The Guidelines contain no enforcement machinery, because the instruments on which they are based do – principally, of course, the ECHR. If an individual in a Council of Europe Member State considers that State has breached his or her rights in applying an anti-terrorist measure he/she has all the usual remedies in domestic courts invoking ECHR rights, and, if need be, in application to the European Court of Human Rights. Similarly if Member States derogate from the ECHR in respect of anti-terrorist measures, those measures and the derogation itself can be challenged in domestic courts and the European Court as appropriate.

Finally, the Guidelines are designed for the Member States of the Council of Europe. But they also have a wider audience – not only the Council of Europe Observer States but also States with no formal Council of Europe connection at all. The principles and rules they contain are not parochial to Europe. They are of universal application. The Council of Europe has distributed them widely and the hope is they will be a useful source of inspiration to the international community generally, particularly given the absence so far of any comparable document from any other organisation.

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B.

UNITED NATIONS MEASURES AGAINST TERRORISM

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United Nations Measures against Terrorism: Introductory Remarks

ODETTE JANKOWITSCH-PREVOR

Usually it is quite clear what is meant by "national measures" in discussion of the fight against terror – namely, measures taken by the government of a sovereign State. However, the phrase "United Nations measures" requires further clarification in order to avoid oversimplification and misunderstanding. The subject is normally very wide-ranging but, since in the present context it is necessarily limited, it is important to describe first the overall potential scope of the subject and then to concentrate on the narrower tasks set.

Within the term "the United Nations," the source of any measure has to be defined first, so as to be able to judge its relevance, the nature of the measure and the potential addressee. Measures can be taken, or recommended to be taken by other actors, by one or several of the principal organs of the United Nations established by the UN Charter, i.e. the General Assembly, the Security Council, the Economic and the Trusteeship Councils, the ICTY, and the Secretariat and the Secretary General. The sources can include a UN Committee or other subsidiary bodies newly set up or already in existence. Further, the term "United Nations" would normally include the specialized agencies of the UN system and the IAEA.

The term "measures" also requires precision. We need to be clear whether we are referring to international treaties and conventions elaborated and adopted under the auspices of the United Nations, to resolutions or declarations adopted by the Security Council and/or by the General Assembly, to specific administrative actions taken by the Secretary General and the Secretariat, or to similar catalogues of "measures" adopted by a General Conference, a Governing Body or Director General of a Specialized Agency. United Nations "measures" also have to be looked at from the perspective of who are its addressees. Indeed all "sources" enumerated do not have the power to address measures to sovereign States, or to individual citizens, or to companies. Moreover, measures can be taken regarding one or several States, or populations [as for instance

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

refugees], geographic zones, or individuals, or they may simply address the Secretariat itself.

This summary classification is not intended as an academic exercise, but should help to place the debate in its larger context of United Nations decision-making and implementation. Moreover, it can be used as a tool for analysis. In substance, it clearly demonstrates the fact that only one year after the terrorist attacks of 9/11 against the United States, the need for a concerted effort to fight all manifestations of international terrorism had permeated the entire United Nations system, its assemblies and boards, committees and institutions, all of whom have addressed the issue from their particular perspective and may have adopted some form of measures.

For example, the International Atomic Energy Agency tackled the question of nuclear terrorism at the 45th regular session of its General Conference, held in September only a week after the events. It requested the Director General to review thoroughly the activities and programmes of the Agency with a view "to strengthen the work relevant to preventing acts of terrorism involving nuclear material" (Resolutions GC (45)/RES/14,B). A report on Protection Against Nuclear Terrorism (GOV/2001/50) was submitted by the Director General at the following session of the Board of Governors. The threats covered: theft of a nuclear weapon; acquisition of nuclear material; acquisition of other radioactive material; and violent acts against nuclear facilities.

In our present context, the focus of attention by the members of this panel will be, first of all on the Security Council, notably Resolution 1373 (2001) of 28 September 2001[1] which *inter alia* established a committee of the Security Council consisting of all its members to monitor implementation of the Resolution, later called the Counter-Terrorism Committee. Secondly, consideration of the Ad hoc Committee on Terrorism set up by General Assembly Resolution 51/210 of 17 December 1996[2] for the purpose of elaborating a comprehensive legal framework dealing with the subject of international terrorism. Thirdly, examination of the work of a specific, small UN Secretariat unit, the Terrorism Prevention branch of UNOV.

In each case, attention is being drawn to the degree in which human rights, the Covenants and principles, are specifically mentioned in the

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1 See Annex IV.

2 See Annex IX.

relevant resolutions or are included in some other form in specific actions taken or recommended.

When the General Assembly of the UN met on 12 September 2001 to consider a resolution submitted by the President of the General Assembly, entitled "Condemnation of terrorist attacks in the United States of America", the term "terrorism" was certainly not new to the United Nations.

Again, in order to set matters into perspective, it may be worthwhile recalling briefly some of the efforts made in earlier encounters of the United Nations with the problem of terrorism and its manifestations.[3]

In 1937 the League of Nations adopted a (draft) Convention for the Prevention of Terrorism to assure the punishment of those who acted against public officials, heads of States, or against public property by requiring States parties to apply domestic law, including extradition procedures in ways set out by the Convention. In the same domain, and basically following the same approach, two Conventions were established much later: the 1973 United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, and, in 1977 a European Convention on the Suppression of Terrorism. But, as they were ratified by insufficient numbers of States, or were weakened by reservations regarding the States' discretion to apply municipal law and to protect their own definition of terror and terrorism, these efforts largely failed to achieve their aims.

However, some positive developments took place: in the sensitive area of civil aviation a considerable degree of international cooperation was achieved. The 1963 Tokyo Convention, the 1970 Hague Convention and the 1971 Montreal Convention did much to enhance the protection of civil aviation against attacks of a terrorist nature.

In the nuclear field, the 1980 Convention on the Physical Protection of Nuclear Material sought to cover to the broadest extent the possible targets, forms and manifestations of acts of nuclear terrorism.

In January 1997, the Russian Federation submitted to the Ad Hoc Committee, established by General Assembly Resolution 51/210 (see below), a draft convention on the Suppression of Acts of Nuclear Terrorism". Terrorist bombing was covered in another special convention, the 1997 International Convention for the Suppression of Terrorist

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3 See also the contribution by Christiane Bourloyannis-Vrailas, *supra*.

Bombings, elaborated under the auspices of the same Ad Hoc Committee. And in 1999 a convention was adopted aimed at the Prevention and Suppression of the Financing of Terrorism.

However, despite this increasingly complex and comprehensive network of international instruments – all targeting different forms of crimes committed by international terrorism – agreement on a definition, and establishment of a single convention, on the legal control of international terrorism remained elusive. It is unlikely this will change in the foreseeable future.

The question emerges again: what is the difference between the events that triggered the instruments that go back to the League of Nations and the urgent new measures required today by the terrorist attacks of 9/11? It is necessary, in our view, not to jump to conclusions, but to reflect on this in order to be able to face present and future challenges, without linking them to other events in history.

Indeed, beyond the factual presentation of measures, items and agendas that have been adopted, the debate should centre on whether a fundamental change has occurred in the phenomenon of "terrorism" and in its perception within the United Nations System. If so, what are the parameters of these changes and their possible evolution? These questions have to be addressed in order to define the shield required to defend human rights and fundamental freedoms within and outside the United Nations.

The Secretary General in his first address to the General Assembly after the adoption of Security Council Resolution 1373 (2001) stated *inter alia*:

> "Peace, tolerance, mutual respect, human rights, the rule of law and the global economy are all among the casualties of the terrorist acts",

and, further in the same address, he said:

> "This was an attack on humanity, and humanity must respond to it as one."[4]

All elements of the tragedy, the search for appropriate measures, and the fear of uncontrollable consequences are indeed expressed in these prophetic words.

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4 Secretary-General, Addressing Assembly on Terrorism, calls for 'Immediate Far-Reaching Changes' in the response to terror, Press Release SG/SM/7977, GA/9920 of 01/10/2001.

Special gratitude goes to Ambassador Ernst Sucharipa, Director of the Diplomatic Academy for the choice of presentations made under this chapter, as well, of course, as for the organization, both intellectually and in material terms, of the entire Colloquium.

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The Counter-Terrorism Committee and Security Council Resolution 1373 (2001)

WALTER GEHR[1]

I. THE INSTITUTIONAL FRAMEWORK

On 28 September 2001, the United Nations Security Council (UNSC) adopted Resolution 1373 (the Resolution).[2]

The Resolution is based on Chapter VII of the *Charter of the United Nations* (UN). Hence, the decisions which are reflected therein are legally binding upon UN Member States. Together with the 12 "UN Conventions and Protocols" against terrorism, the resolution has become one of the two existing pillars of the global legal framework for the prevention and suppression of terrorism.[3]

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1 No other person than the author of the present paper himself can be held liable for the opinions expressed in this paper and under no circumstances can they be attributed to other natural or legal persons. The author can be contacted via his website (http://www.public-international-law.net).

2 See Annex IV: United Nations Security Council Res. 1373 (2001) of 28 September 2001.

3 Convention on Offences and Certain Other Acts Committed on Board of Aircraft, 1963;

- Convention for the Suppression of Unlawful Seizure of Aircraft, 1970;
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971;
- Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988;
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988;
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988;
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973;
- International Convention against the Taking of Hostages, 1979;
- Convention on the Physical Protection of Nuclear Material, 1980;
- Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991;

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

Through the Resolution,[4] the UNSC has established the "Counter-Terrorism Committee" (CTC) which has the mandate to monitor the implementation of Resolution 1373 (2001) on the basis of reports sent by States to the CTC[5] with the assistance of experts.[6] The CTC consists of the 15 Member States of the UNSC.[7] It is chaired by Ambassador Jeremy Greenstock (UK); the vice-chairmen are Ambassador Alfonso Valdivieso (Colombia), Ambassador Jagdish Koonjul (Mauritius) and Ambassador Sergey Lavrov (Russian Federation) who chair the CTC's 3 sub-committees.

It is not the primary purpose of the CTC to get into the politics of what is happening in the short term. It is not its intention to solve problems that are for the General Assembly, in particular to define terrorism, or otherwise solve some of the sensitive political issues that are directly, or indirectly attached to the fight against terrorism. The CTC is there to help the world system to upgrade its capability, to deny space, money, support, haven to terrorism, and to establish a network of information sharing and cooperative executive action, including with the international institutions such as INTERPOL,[8] the Financial Action Task Force[9] and ICAO.[10] Some have called Resolution 1373 (2001) a "unique" resolution so far in the history of the work of the Security Council.[11]

- International Convention for the Suppression of Terrorist Bombings, 1997;
- International Convention for the Prevention and Suppression of the Financing of Terrorism, 1999.

4 Paragraph 6.

5 In response to Paragraph 6 of SC Resolution 1373 (2001), the Secretariat has received 179 reports, including from Non-Member States, the EU, the OSCE and UNMIK; in response to 163 letters sent by the CTC to Member States replying to their initial submissions, the Secretariat has received 97 supplementary reports; 16 States have not submitted a report (figures as of 18 October 2002).

6 In the period from January to October 2002, the experts were nationals of the following countries: Australia, Austria, Bahamas, France, India, Jamaica, Netherlands, Peru and Tunesia.

7 In addition to the permanent Members China, France, Russian Federation, the United Kingdom of Great Britain and Northern Ireland and United States of America, the UNSC currently consists of the following non-permanent Members: Bulgaria, Cameroon, Colombia, Guinea, Ireland, Mauritius, Mexico, Norway, Singapore and Syria.

8 International Criminal Police Organization – INTERPOL.

9 See http://www.fatf-gafi.org.

10 International Civil Aviation Organization.

11 The preceding paragraph essentially follows the relevant text of a briefing of Ambassador Greenstock to UN Members States on 19 October 2001.

In order to ensure transparency of its work, the CTC maintains a website[12] on which several documents, such as the Resolution, the reports by UN Member States, a Directory of Assistance and the address of the High Commissioner for Human Rights, Sergio Vieira de Mello, to the CTC, can be accessed.

II. THE SUBSTANTIAL PROVISIONS

Operative paragraphs (OP) 1, 2 and 3 contain the substantial provisions of the Resolution and, in particular, the legal obligations States are requested to implement. In a nutshell, they deal, although not exclusively, with the following issues:

- OP 1: Prevention and suppression of the Financing of Terrorism;
- OP 2: Prevention and criminalization of acts of terrorism;
- OP 3: International Cooperation and ratification of the 12 "UN-Conventions" against terrorism.

In the view of the team of experts, sub-paragraphs 2 (d) and (e) are the key provisions of the Resolution. Consequently, effective implementation of the Resolution requires States to criminalize the use of their respective territory for the purpose of financing, planning, facilitating or committing terrorist acts against other states or their citizens.

Effective implementation of the Resolution, therefore requires, such measures as:

- The criminalization of the financing of terrorism in accordance with articles 2 and 4 of the *International Convention for the Suppression of the Financing of Terrorism* (paragraph 1) and
- ensuring that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists (paragraph 3).

III. ASSISTANCE

UNSC Resolution 1377 of 12 November 2001 has mandated the CTC to explore ways in which States can be assisted as well as the avail-

12 http://www.un.org/sc/ctc.

ability of existing technical, financial, regulatory, legislative or other assistance programs which might facilitate the implementation of Resolution 1373. Ambassador Ward (Jamaica) as been appointed as the expert of the CTC specifically entrusted with the task to deal with this issue. A CTC-Directory of Assistance can be accessed online. A number of States and international organizations have offered to provide assistance. Based in Vienna, the UN Office for Drug Control and Crime Prevention (ODCCP) has started a programme of legal assistance related to the implementation of the 12 international conventions against terrorism and Resolution 1373 (2001).

IV. HUMAN RIGHTS

The CTC is mandated to monitor the implementation of the Resolution. Monitoring performance against other international conventions, including human rights law,[13] is outside the scope of the CTC's mandate. However, the CTC is aware of the interaction of its work with human rights concerns, *inter alia* through the contact the CTC has developed with the Office of the High Commissioner for Human Rights (HCHR). The CTC welcomes parallel monitoring of observance of human rights obligations. The CTC is also operating transparently and openly so that NGOs with concerns can bring them to the CTC's attention or follow up within the established human rights machinery.[14]

In his statement to the UNSC on 4 October 2002 at the occasion of the one-year anniversary of the CTC, the UN Secretary General said: "*By their very nature, terrorist acts are grave violations of human rights. Therefore, to pursue security at the expense of human rights is short sighted, self contradictory, and, in the long run, self-defeating.*"[15]

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13 The expression „international standards of human rights" appears in sub-paragraph 3 (f) of the Resolution.

14 The preceding paragraph essentially follows the relevant part of the presentation made by Ambassador Greenstock at the Symposium: "Combating International Terrorism: The Contribution of the United Nations", held in Vienna on 3-4 June 2002 and which can be accessed via the CTC's website (http://www.un.org/sc/ctc).

15 See the Statement of the Secretary General to the Security Council in Annex V and also Preambular Paragaph 15 of Resolution 56/160 entitled „Human rights and terrorism", adopted by the UN General Assembly on 19 December 2001 (Doc. A/RES/56/160).

The Ad Hoc Committee on Terrorism

MICHAEL POSTL[1]

In UNGA Resolution 3034 (XXVII)[2] of 1972, there is familiar wording concerning the fight against international terrorism. It starts by reading as follows:

> "The General Assembly, deeply perturbed over acts of international terrorism which are occurring with increasing frequency and which take a toll of innocent human lives ..."

and then continues in operative paragraph one to say that the Assembly

> "Expresses deep concern over increasing acts of violence which endanger or take innocent human lives or jeopardize fundamental freedoms ..."

while operative paragraph two goes on

> "Urges States to devote their immediate attention to finding just and peaceful solutions to the underlying causes which give rise to such acts of violence."

Although this UNGA resolution was adopted 30 years ago its content appears to continue to reflect the reaction of the world community today to the terrorist attacks of the recent past.

But this resolution is also important because it established the Ad Hoc Committee on International Terrorism which consisted at the time of thirty-five members, amongst them Greece and Austria.[3]

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1 This article reflects only the personal view of the author. It is based on a lecture at the Vienna Diplomatic Academy on 30 October 2002 but takes also into account developments until 4 December 2002.

2 UNGA Resolution 3034 (XXVII) of 18 December 1972.

3 In accordance with UNGA Resolution 3034 (XXVII), operative paragraph 9, the President of the General Assembly bearing in mind the principle of equitable geographical representation appointed the following UN Member States: Algeria, Austria, Barbados, Canada, Congo, Czechoslovakia, Democratic Yemen, France, Greece, Guinea, Haiti, Hungary, India, Iran, Italy, Japan, Mauritania, Nicaragua, Nigeria, Panama, Sweden, Syrian Arab Republic, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yemen, Yugoslavia, Zaire and Zambia.

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights. © *2004 Koninklijke Brill NV. Printed in the Netherlands.*

The mandate of the Committee was to consider the problem of international terrorism and to submit its observations, including concrete proposals for finding an effective solution to the problem, to the UN Secretary General. According to this rather vague mandate, the Committee concentrated its work on the following three issues: the definition of international terrorism, the underlying causes of international terrorism and the measures for the prevention of international terrorism.[4] However, since all these issues were too contentious and no tangible progress could have been achieved, in 1979 the Committee's mandate was not renewed by the UN General Assembly and it was dissolved.[5] [6]

A new start came in 1996 when the UNGA decided to establish another Ad Hoc Committee, this time open to all States members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency.[7] In contrast to the situation in 1972, this time the Ad Hoc Committee had a defined mandate. This was to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism. This mandate continues to be renewed and revised on an annual basis by the General Assembly.[8] Hence, this Ad Hoc Committee is not a permanent UN body.

Since its reestablishment in 1996, the Ad Hoc Committee has negotiated several texts, resulting in the adoption of two international treaties: the International Convention for the Suppression of Terrorist Bombings adopted in December 1997[9] and the International Convention for the

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4 See the Report of the Sixth Committee to the twenty-eight session of the UNGA on agenda item 94 (Measures to prevent international terrorism) that refers to the report of the Ad Hoc Committee on International Terrorism contained in Document A/9028.

5 According to UNGA Resolution 34/145 of 17 December 1979 the last session of the Ad Hoc Committee on International Terrorism was held from 19 March to 6 April 1979.

6 UNGA Resolution 31/103 of 15 December 1976 established an Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages, the text of which was subsequently annexed to UNGA Res. 34/146 of 17 December 1979.

7 See Annex IX: United Nations General Assembly Res. 51/210 of 17 December 1996.

8 UNGA Resolution 57/27 of 19 November 2002 on Measures to eliminate international terrorism provides in its operative paragraph 18 for the continuation of the Ad Hoc Committee in 2003.

9 Adopted by the General Assembly in resolution 52/164 of 15 December 1997.

Suppression of the Financing of Terrorism adopted in December 1999.[10] It is interesting to note that while on 11 September the Financing of Terrorism Convention had been signed by 43 countries and ratified by only four, it now has 132 signatories and 59 parties[11] and entered into force on 10 April 2002.

After the tragic events of 9/11, it became particularly clear that the issue of financing terrorism had to be confronted more efficiently. It is furthermore worth noting in this context that the Financing of Terrorism Convention was the only convention out of the existing 12 universal legal instruments relating to terrorism that the groundbreaking Security Council resolution 1373 (2001) mentions explicitly.[12] It is therefore evident that the work of the Ad Hoc Committee plays an important role in the establishment of the necessary legal framework for the prevention and suppression of terrorism.[13]

The mandate of the Ad Hoc Committee is further framed by the Declaration on Measures to Eliminate International Terrorism of 1994[14] and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism.[15] Its current mandate is based on the UNGA resolution 57/27 adopted on 19 November 2002. According to this resolution[16], the Ad Hoc Committee shall continue to elaborate a Comprehensive Convention on international terrorism as a matter of urgency. This work had already begun in the year 2000.[17] In addition, the Ad Hoc Committee shall continue its efforts to resolve the outstanding issues relating to the elaboration of a draft international convention for the suppression of acts of nuclear terrorism, as a means of further developing a comprehensive legal framework of conventions dealing with international terrorism. Based on a proposal put forward by the Russian

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10 Adopted by the General Assembly in resolution 54/109 of 9 December 1999.

11 Status as of 4 December 2002. Austria signed the International Convention for the Suppression of the Financing of Terrorism on 24 September 2001 and ratified it on 15 April 2002.

12 Operative paragraph 3 (d) of UNSC Resolution 1373/2001 of 28 September 2001, S/2001/921.

13 Another important role plays the Counter-Terrorism Committee established by UNSC Resolution 1373 (2001).

14 See Annex VIII: United Nations General Assembly Res. 49/60 of 9 December 1994.

15 Supra note 7.

16 Operative paragraph 17 of UNGA Resolution 57/27 of 19 November 2002.

17 India commenced work on a draft of a comprehensive convention already in 1996.

Federation[18], a revised text of October 1998 is currently the basis for discussion.[19] Finally, the Ad Hoc Committee shall keep on its agenda the question of convening a high-level conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations.[20] At this stage, all interested states are invited to forward concrete proposals.

As to its working method, the Ad Hoc Committee has adopted the pattern of holding one session per year over a one- or two-week period, usually early in the year. The work is then continued in the framework of a Working Group of the Sixth Committee held later in the year. The last meeting of the Working Group in October 2002 was held in a constructive manner.[21] At the beginning, the participating delegations strongly condemned the heinous act of terrorism that happened in Bali just before the meeting started.[22]

Concerning the draft text of the Comprehensive Convention agreement has been reached on most issues. However, it is often stated that the whole draft is a package deal and that nothing is agreed until everything is agreed. Nevertheless, there is broad acceptance regarding the elements of the offences. Article 2 of the draft stipulates that "any person commits an offence ... if that person, by any means, unlawfully and intentionally, causes" *inter alia* "death or serious bodily injury to any person ... when the purpose of the conduct, by its nature or context, is to intimidate a population, or compel a Government or an international organization to do or abstain from doing any act." This definition would, for instance, include the sniper attacks that recently occurred in the surroundings of Washington, D.C., or the anthrax letter threats of last year. However, it should be pointed out in this context that article 3 of the draft in general excludes the application of the convention for cases within a single state when offender and victims are nationals of that state.

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18 Contained in annex I of the official records of the UNGA, fifty-third session, supplement no. 37 (A/53/37).

19 Document A/C.6/53/L.4, Annex I.

20 Regarding this high-level conference many states including those of the European Union are of the opinion that first the work on the comprehensive convention has to be completed before this issue could be addressed.

21 This meeting was held on 15 and 16 October 2002 in New York.

22 One delegation, however, and that was rather unfortunate used the opportunity for a political statement condemning the actions by Israel against the Palestinian people.

Another important provision of the draft is article 7 that excludes the possibility of granting refugee status if there are serious reasons to consider that the person concerned has committed a terrorist act. Based on an Austrian proposal that took into consideration the wording of Security Council Resolution 1373 (2001)[23] and the text of the Geneva Convention relating to the status of refugees[24] a compromise has been reached in the negotiation.[25]

Other humanitarian provisions are included in articles 10 and 12 of the draft. Article 10 gives the International Committee of the Red Cross the possibility to communicate with and visit an alleged offender, and article 12 calls for a fair treatment including enjoyment of all rights and guarantees in conformity with *inter alia* applicable provisions of international law, including international human rights law and in particular the Standard Minimum Rules for the Treatment of Prisoners.

The two remaining most contentious issues, however, are the relationship and the savings clauses. The relationship clause contained in article 2 as proposed by the Australian coordinator[26] provides that if a terrorist act would come under the scope of both the comprehensive and a certain sectoral terrorist convention, for instance the terrorist bombings convention, and the states involved are parties to both treaties, the provisions of the sectoral convention shall prevail. Many delegations, including those of the EU, are of the opinion that the scope of the Comprehensive Convention is to fill existing legal lacunae[27] and that it should not undermine in any way existing legal instruments. They also fear that several states not yet parties to some important sectoral conventions might not ratify them once a Comprehensive Convention exists.[28] Other

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23 Operative paragarph 3 (f).

24 Article 1 F of the Convention Relating to the Status of Refugees signed in Geneva on 28 July 1951.

25 Article 7 of the draft reads: States Parties shall take appropriate measures, in conformity with the relevant provisions of national and international law, including international human rights law, for the purpose of ensuring that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offence referred to in article 2.

26 The informal consultations were coordinated by one of the three Vice-Chairmen, the Australian Ambassador Richard Rowe. Chairman of the Ad Hoc Committee is Ambassador Rohan Perera from Sri Lanka.

27 For instance the sniper attacks that occurred in the surroundings of Washington D.C.

28 But UN Security Council Resolution 1373 (2001) based on Chapter VII of the Charter of the United Nations and therefore legally binding calls in its operative paragraph 3

delegations prefer not to include a relationship clause at all. In that case the relevant provisions of the law of treaties would apply. Again other delegations are of the view that the Comprehensive Convention should be the overall legal framework to combat terrorism. Hence, they want its provisions to prevail over those of the sectoral conventions. In reality, however, this provision is closely connected with the final wording of article 18 which is, in fact, the key outstanding provision. This article deals with the savings clause or, in other words, those acts that shall be excluded from the scope of the convention.

At this stage of the negotiations there are two options tabled for discussion – one put forward by the coordinator and supported by many delegations including those of the EU, and another text proposed by the member states of the Organization of the Islamic Conference. The paragraphs 1 and 4 of the two options are identical and already a compromise product. article 1 reads "Nothing in this Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purpose and principles of the Charter of the United Nations, and international humanitarian law." This paragraph rather resembles a preambular paragraph and is already a compromise text. The notion "peoples" is a reference to the principle of equal rights and self-determination of peoples contained in the UN Charter. Paragraph 4, based on an informal Austrian proposal, stipulates that "nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws."

The contentious provisions, however, are in paragraphs 2 and 3 of article 18. Paragraph 2, as proposed by the coordinator, stipulates that "the activities of the armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this convention." The text proposed by the OIC replaces "armed forces" with the word "parties" and includes a reference to "situations of foreign occupation". This proposal is politically motivated[29] and not acceptable to many delegations because it does not reflect existing language such as that in the terrorist bombings convention.[30] Furthermore, it introduces ambiguity into a legal text and

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(d) upon all states to become parties as soon as possible to the relevant international conventions and protocols relating to terrorism.

29 Particular in the context of the backdrop of the Middle East conflict.

30 However, it is interesting to note that UNGA Resolution 3034 (XXVII) of 18 December 1972 that established the first Ad Hoc Committee on International Terrorism

extends the scope of the convention. There is no doubt that the Chechen rebels who took hundreds of hostages in a Moscow theatre would see themselves as a party in an armed conflict in a situation of foreign occupation and would therefore argue that they are excluded from the scope of this convention. Because it is such a highly political issue UN Secretary General Kofi Annan personally urged delegations to find a compromise.[31] He underlined that the aim of the convention is to prevent innocent people from being victims of terrorist attacks and its objective therefore should be the punishment of terrorists and not the solution of regional political problems.

Paragraph 3 of article 18 as proposed by the coordinator stipulates that "the activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention." The text of the OIC replaces "governed by other rules of international law" with "in conformity with international law". Several delegations did not see the difference but there is a substantive one. If one uses the phrase "in conformity", proposed by the OIC, military forces that violate international law would fall under the scope of the convention. The other proposal – using again the wording of the terrorist bombings convention – would exclude any acts of military forces from the scope of this convention as long as they act in exercise of their official duties. But, of course, other relevant provisions of international law would still apply.

Concerning the draft international convention for the suppression of acts of nuclear terrorism, a revised text based on a proposal put forward by the Russian Federation is the current reference document. Again most provisions are acceptable to the majority of delegations and similar to the Comprehensive Convention the savings clause and exclusion from the scope of the convention remains unresolved.[32]

In conclusion the current situation in the Ad Hoc Committee on Terrorism can be summarised as follows: the different views on the

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included an explicit reference to the right of self determination in its operative paragraph 3.

31 At a meeting of the contact group on 5 November 2001 the UNSC stressed that each state has a moral obligation to accept the draft text.

32 A proposal submitted by Mexico is supported by many delegations including those of the EU. It reads "This Convention does not address, nor can it be interpreted as addressing, in any way the issue of the legality of the use or threat of use of nuclear weapons by States"; Doc. A/C.6/56/WG.1/CRP.9.

outstanding issues for both the comprehensive as well as the nuclear terrorism convention are politically motivated and one has to be realistic. Member States of the Organization of the Islamic Conference are not ready to compromise on their demand to have an explicit reference to foreign occupation included in the convention. Many OIC countries see this convention as a real comprehensive one and therefore as their last possibility to include such a reference in an international legal instrument related to terrorism. A peaceful settlement of the Middle East conflict, however, might bring possible movement in that respect.

On the other hand, the window of opportunity that existed after the events of 11 September is gone and countries that are actively engaged in the fight against terrorism see no reason to accept further compromise and will continue their fight against terrorism with or without a Comprehensive Convention on international terrorism.

United Nations Measures against Terrorism and the Work of the Terrorism Prevention Branch: The Rule of Law, Human Rights and Terrorism

ALEX P. SCHMID[1]

When we talk about terrorism we talk about a sensitive issue, one on which the Member States of the United Nations have not been able to agree on a definition for thirty years. Currently, the Ad Hoc Committee on International Terrorism in New York is negotiating a Comprehensive Convention against International Terrorism – as Dr. Jankowitsch has pointed out.[2] At the moment, the following draft definition is on the table:

> Any person commits an offense within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
>
> a) Death or serious bodily injury to any person; or
>
> b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
>
> c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.[3]

This draft text correctly identifies as key purposes of terrorism the intimidation of the public and the effort to bring pressure to bear on state authorities to accede to political demands. However, it does not

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1 The views and opinions expressed in this paper are those of the author and do not necessarily reflect the official position of the United Nation where the author serves as Senior Crime Prevention and Criminal Justice Officer of the Terrorism Prevention Branch of the Office on Drugs and Crime, Vienna.

2 See the article of Odette Jankowitsch-Prevor, United Nations Measures against Terrorism, Introductory Remarks, *supra.*

3 UN Ad Hoc Committee on Terrorism: Informal Text of Art. 2 of the draft Comprehensive Convention.

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

address another major objective of terrorist groups – that is, to bring or keep a particular issue in the forefront of public consciousness by perpetrating acts of violence which the news media cannot ignore. The idea of "propaganda by the deed" is central to terrorism. In the French revolution the guillotine was the instrument of terror; then the dynamite bomb allowed terrorists to achieve disproportionate resonance with their deeds. These days there are hijackings, truck bombs and suicide bombers.

Terrorists create terror – but not only terror. Terrorism polarizes as it addresses different audiences simultaneously: while trying to immobilize one group it tries to mobilize others.

Terrorist target audiences are those who already identify positively with the terrorist group (the goal: to increase their support); those who are their declared opponents (the goal: to demoralize, intimidate or blackmail them); the non-committed bystanders (the goal: to impress them); the terrorists' own organization (the goal: to keep it united through planning "the big one"); and rival groups (the goal: to show them who is Number One).

Their audiences interpret terrorist acts differently. Depending on whether people identify with the perpetrators or the victims of such acts they are viewed as heroic by some and as cowardly by others.

The attacks of 11 September served the purpose of mobilization of discontent at least as much as the purpose of intimidation. According to a treatise titled "The Reality of the New Crusade", 9/11 was meant "to inflame the hearts of Muslims against America", in the hope of "inspiring thousands of others to this type of operation"[4] Terrorism, then, must also – and some think primarily – be seen as a form of violent and coercive communication.[5]

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4 Cit. 'Coordinateur du mardi saint', Ramzi Ben Al-Shaiba promettait 'un millier d'autres operations de ce type'. 'Le Monde 16 September 2001, p. 2. F. Halliday, observed in a similar vein: "11 September did not, nor was it designed to, destroy America as a power so much as to mobilize support against its Middle Eastern allies". – F. Halliday Two Hours that Shock the World. 11 September 2001: Causes & Consequences, London, Saqi Books, 2002, p.

5 An example of this communication function (which is linked to intimidation) is a statement broadcasted by Al Jazeera in early October 2002 in which Aiman Al Zawahiri, the number Two in Al-Qaeda said, referring to the attack on German tourists in front of the Jewish synagogue in Djerba, Tunis, and to the attack on the French oil tanker Limburg off the coast of Yemen: "The Mujahedeen youth has sent one message to Germany and another to France. Should the dose [of the message, AS] not have been sufficient, we are ready – of course with the help of Allah – to increase the dose".

When we try to evaluate the terrorist menace, we therefore not only have to look at terrorism's potential for intimidation and blackmail. We also have to look at the mobilization which bold acts of terrorism can potentially produce in groups vulnerable to the terrorist temptation. In this regard, those responsible for 9/11 were manifestly wrong in their expectations: they did not manage to ignite a war between civilizations. We have seen relatively few copycat crimes and, more importantly, we have not seen a mass movement in the Islamic world marching under the banner of Al Qaeda.[6]

However, terrorists attempt to mobilize their constituencies not only by their own brazen deeds. They rely as much, if not more, on an overreaction of the opponent, which, in turn, might mobilize resistance against those opposing the terrorists.[7] That is the terrorist trap – but a trap in which we will not be caught if we adhere to the principles of the Rule of Law, respect for human rights and minimal and proportionate use of force.

There is a difference between a military response to terrorism and a criminal justice response to terrorism. The military attempts to use maximum force to overwhelm an opponent within a framework of the laws of war, while the police try to use minimal force within a framework of the Rule of Law.[8]

– Cit. Der Spiegel, No. 43, 21 October 2002, p. 21. For an interpretation of terrorism along these lines, see: A.P. Schmid, Violence as Communication. Beverly Hills, Sage, 1982.

6 Remember. 11 September changed the world. But not enough. Leader in The Economist, 7 September 2002, p. 11. Osama bin Laden expressed the hope that "these events [9/11] have divided the world into two camps, the camp of the faithful and the camp of infidels". – Bin Laden Statement, 7 October 2001: "The Sword Fell", repr. in John Prados (Ed.). America Confronts Terrorism. Understanding the Danger and How to Think About It. Chicago, Ivan R. Dee, 2002, p. 13.

7 With regard to Al Qaeda, Brian M. Jenkins hypothesized: "Al Qaeda's leadership probably anticipated that the attack would provoke a major military response, which it could then portray as an assault on Islam. This would inspire thousands of additional volunteers and could provoke the entire Islamic world to rise up against the West. Governments that opposed the people's wrath, quislings to western imperialism, would fall. The West would be destroyed." – Brian M. Jenkins. Countering al Qaeda. An Appreciation of the Situation and Suggestions for Strategy. St. Monica, RAND, 2002, p. 7.

8 For an elaboration of these two models, see. Ronald D. Crelinsten. Analysing Terrorism and Counter-Terrorism: A Communication Model. Terrorism and Political Violence, Vol. 14, No. 2, Summer 2002, pp. 77-122.

I. PRINCIPLES OF THE RULE OF LAW

We at the Office on Drugs and Crime very much use the Rule of Law paradigm. The human rights discourse focuses primarily on the rights of individual citizens and non-citizens, and to a lesser extent on group rights. The Rule of Law paradigm is broader than the human rights paradigm. The ideas behind the concept are quite old but have been codified only at the end of the last century. There are various interpretations of the concept "Rule of Law". A major influence in the original conceptualization was A.P. Dicey.[9] Drawing from Dicey and others, a dozen characteristics of the Rule of Law can be identified:

1. Common ethics: An underlying moral value orientation (e.g. towards equality and fairness) of all laws;
2. The supremacy of the law: all persons are subject to the law (i.e. those holding state power are also bound by a common law or constitution);
3. Restraint of arbitrary power: no power can be exercised except according to procedures, principles and constraints contained in the law;
4. Separation of powers: parliament exercises legislative power; there are restrictions on the exercise of legislative power by the executive.
5. The principle of habeas corpus: arbitrary or preventive detention is prohibited;
6. The principle nulla poena sine lege (no punishment without a law): legislation should be prospective and not retroactive;
7. Judicial independence: an independent and impartial judiciary, with no special courts;
8. Equality before the law: redress for breaches of the law must in principle be open to any citizen against any other citizen or officer of the state;
9. State protection for all: just as nobody should be above the law, nobody should be outside the protection of the laws of the land;
10. Supremacy of civilian authority: military and police forces must be subject to civilian control or oversight;

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9 A. P. Dicey, Introduction to the Study of the Law of the Constitution [1885].

11. Prohibition of summary justice: crimes are viewed as individual acts; there must be no collective punishment of a group for acts of individuals;
12. The principle of proportionality: only minimum force should be used to stop law-breakers; punishment must be relative to the seriousness of the offense.

The Rule of Law establishes a framework for the conduct and behaviour of both members of society and officials of the government. At the core of the concept there are three basic notions:

a) that people should be ruled by the objective determination of general laws;
b) that nobody should stand above the law, and that ordinary citizens can find redress against the more powerful for any act which involves a breach of the law;
c) that nobody should fall outside the protection of the law.

Where the Rule of Law is firmly in place, it ensures the responsiveness of government to the people as it enables enhanced critical civil participation. The more citizens are stakeholders in the political process, the less likely it is that some of them form a terrorist organization. In this sense, it can be argued that the Rule of Law has a preventive effect on the rise of terrorism – at least on the domestic front.

As there is a growing awareness that there is a relationship between the Rule of Law and a nation's internal stability and its ability to manage conflict, the concept of Rule of Law has also become a focus of international technical assistance. In order to help countries in transition to reach a higher level of law enforcement, judges, prosecutors, lawyers, and police need to be instructed or trained to bring national practices in line with recognized international standards. In their technical cooperation programmes, UN agencies like the Office on Drugs and Crime (ODC), focus, *inter alia*, on advancing the development of an independent judiciary and promoting more just legal systems.

Rule of Law principles include human rights principles. Human rights are often conceived as rights of individuals (and sometimes also groups) against the state. Rule of law principles, on the other hand, can be seen as more state- rather than individum-centred. In a way both conceptual frameworks look at the obligations that exist between the state and members of society.

II. TERRORISM AND HUMAN RIGHTS

Let me now turn to the relationship between terrorism and human rights. Human rights are codified in several international and regional instruments on human rights. Human rights instruments are:

1. International Covenant on Civil and Political Rights (ICCPR);
2. International Covenant on Economic, Social and Cultural Rights (ICESC);
3. International Convention on the Elimination of all Forms of Racial Discrimination;
3. Convention on the Elimination of All Forms of Discrimination Against Women;
5. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
6. Convention on the Rights of the Child.

The most famous is the Universal Declaration of Human Rights from 1948 which is, however, only a declaration, not a treaty. Nevertheless, over the years, many of its provisions have gained some customary law status, at least in some countries. These rights can be grouped in a dozen major rights, namely:

The Right to Life
The Right not to be Tortured
The Right not to be Arbitrarily Arrested
The Right to a Fair Trial
The Right not to be Discriminated against
The Right to Freedom of Association
The Right to Political Participation
The Right to Freedom of Expression
The Right to Food
The Right to Health Care
The Right to Education
The Right to Fair Working Conditions

Terrorists violate human rights, including the right to life, and in the case of hostage-taking and kidnapping, the right not to be arbitrarily arrested. However, terrorist crimes are usually punished under national penal laws.

Suspected terrorists often claim respect for their human rights – some of the very same rights they have violated themselves in their acts of focused or indiscriminate victimization. This raises the question

whether terrorists too should be allowed to enjoy human rights. The answer is "yes". People accused of terrorist acts have human rights. That is exactly the difference between a situation of the Rule of Law and a situation where law is arbitrary. Do they have the same rights as victims? Again, the answer is "yes", although this might go against our own feelings of justice. Everybody is equal before the law.

While states can derogate during an emergency from certain human rights – like the right to freedom of association – there are rights which cannot be derogated – for instance, the right not to be tortured or the right to a fair trial. Extraordinary measures should be limited in scope and time. Stern and broad repressive measures alienate large sectors of society from the government and tend to produce new recruits for terrorist organizations.

Terrorists know very well that overreaction by government to their provocative attacks can play into their hands – though at times overreaction has also led to the elimination of the terrorist organization. The price some governments paid for overreactions involving gross violations of human rights were truth commissions and sometimes criminal court procedures against those who went beyond what the law allowed.

We in the UN advocate a human rights-based approach to fighting terrorism. In the words of the Secretary-General:

> "We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long run we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism".[10]

Such statements were made amidst concerns about the erosion of fundamental rights in countries engaged in the fight against terrorism

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10 Kofi Annan, 18 January 2002; cit. Mary Robinson. Human Rights are as important as ever. International Herald Tribune, 21 June 2002, p. 8. – In another statement, Kofi Annan, said: "While the international community must be resolute in countering terrorism, it must be scrupulous in the ways in which this effort is pursued. The fight against terrorism should not lead to the adoption of measures that are incompatible with human rights standards. Such a development would hand a victory to those who so blatantly disregard human rights in their use of terror. Greater respect for human rights, accompanied by democracy and social justice, will in the long terms prove effective measures against terror. The design and enforcement of means to fight terrorism should therefore be carried out in strict adherence with international human rights obligations". Kofi Annan. Message to the African Union's High Level Inter-Governmental Meeting on Terrorism. Algiers, 11 September 2002.

since the attacks of 11 September 2001. There has been a tendency to resort to a war model of fighting terrorism. Yet when we look at successful measures against terrorism since September 2001, we find that criminal justice measures have been prominent.

I believe there are four pillars on which successful anti-terrorist measures should build:

I. Good Governance
II. Democracy
III. Rule of Law
IV. Social Justice

Why these four? The reason for this is simple:

i) When governance is bad, resistance against corrupt rule gains followers and support.
ii) When unpopular rulers cannot be voted away in democratic procedures, advocates of political violence find a wide audience.
iii) When rulers stand above the law and use the law as a political instrument against their opponents, the law loses its credibility.
iv) When long-standing injustices in society are not resolved but allowed to continue for years, without any light in sight at the end of the tunnel, we should not be amazed that desperate people – and others championing their cause – are willing to die and to kill for what they perceive to be a just cause.

These then, are the foundations on which one should build policies aimed at the prevention and suppression of terrorism. These views were expressed by the new UN High Commissioner for Human Rights, Mr. Sergio Vieira de Mello, who said in October 2002:

> "I am convinced that the best – the only – strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the Rule of Law. We need to invest more vigorously in promoting the sanctity and worth of every human life; we need to show that we care about the security of all and not just a few; we need to ensure that those who govern and those who are governed understand and appreciate that they must act within the law.[11]

11 See Annex VII: Address by the United Nations High Commissioner For Human Rights Sergio Vieira de Mello to the Counter-Terrorism Committee of the Security Council on 21 October 2002.

III. ACTIVITIES OF THE CENTRE FOR INTERNATIONAL CRIME PREVENTION OF THE OFFICE ON DRUGS AND CRIME IN THE FRAMEWORK OF THE STRATEGY OF THE UNITED NATIONS

Let me now turn to the activities of the Centre for International Crime Prevention and its Terrorism Prevention Branch. The Centre has, for many years, engaged in standard-setting. As a reminder, here are some of the standards developed by the United Nations Crime Prevention and Criminal Justice Programme over the years, mainly in the quinquennial UN Congresses which are also relevant when it comes to dealing with terrorists and their victims:

1. The Standard Minimum Rules for the Treatment of Prisoners (1957);
2. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975);
3. The Code of Conduct for Law Enforcement Officials (1979);
4. The Capital Punishment Safeguards (1984);
5. The Basic Principles on the Independence of the Judiciary (1985);
6. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1986);
7. The Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions (1989);
8. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990);
9. The Basic Rules for the Treatment of Prisoners (1991).[12]

In recent years, the Centre for International Crime Prevention has engaged more and more in technical cooperation activities to make these and other standards work. Four years ago a small unit, the Terrorism Prevention Branch, was added to the Centre. It engaged mainly in research and analysis before September 2001 when its mandate was strengthened and when the United Nations defined its role in the prevention and suppression of terrorism. Before I turn to our current activities, let us have a brief look at the wider UN strategy.

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[12] Roger S. Clark. The United Nations Crime Prevention and Criminal Justice Program. Formulation of Standards and Efforts at Their Implementation. Philadelphia, University of Pennsylvania Press, 1994, pp. 95-125.

THE STRATEGY OF THE UNITED NATIONS

The overall strategy of the United Nations has been outlined in a report of a high level policy working group on the United Nations and Terrorism, which was made public on 10 September 2002.[13] It is a three-pronged strategy which suggests that the United Nations should set itself three goals: dissuasion, denial and cooperation.

UN Strategy 1 is to dissuade disaffected groups from embracing terrorism. That means:

- The UN ought to continue to make its contribution through norm setting, human rights and communications;
- The UN has a primary role in preparing for the adoption and effective implementation of legal instruments;
- The UN must ensure that the protection of human rights is conceived as an essential concern;
- The UN should project a clear and principled message, underscoring the unacceptability of terrorism;
- These messages must be targeted to key audiences – particularly to achieve a greater impact in dissuading would-be supporters of terrorist acts.

UN Strategy 2 is to deny groups or individuals the means to carry out acts of terrorism. That means:

- The Counter-Terrorism Committee is at the center of UN activities to deny opportunities for the commission of acts of terrorism;
- The UN system as a whole must ensure its readiness to support the Committee's efforts to achieve the implementation of measures to counter terrorism;
- The UN agencies can provide assistance in this process through the development of model legislation for Member States' compliance with international instruments and pertinent resolutions;
- The Department of Disarmament Affairs should draw public attention to the threat posed by the potential use of weapons of mass destruction in terrorist acts;

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13 Annex to A/57/273 – S/2002/875 Report of the Policy Working Group on the United Nations and Terrorism.
General Assembly/Security Council. Item 162 of the provisional agenda. Measures to eliminate international terrorism.

- Preventive measures, especially measures to strengthen the capacity of States, can help to create inhospitable environments for terrorism.

UN Strategy 3 is to sustain broad-based international cooperation in the struggle against terrorism. That means:

- Cooperation between the United Nations and other international actors must be made more systematic;
- An appropriate division of labour based on comparative advantage should be ensured;
- The next high-level meeting between the United Nations and regional organizations in 2003 should establish terrorism as an agenda item, with the goal of developing an international action plan;
- The United Nations family must ensure a higher degree of internal coordination and coherence;
- Consideration should be given to strengthening some UN offices, notably the Office for Drug Control and Crime Prevention of the UN Secretariat.

In line with the last recommendation, the Centre for International Crime Prevention of the Office on Drugs and Crime in Vienna has been working on a *Global Programme Against Terrorism*, which envisages three types of activities.

The first type of activities relates to the Promotion of ratification and implementation of the international instruments to suppress and prevent terrorism. These activities include:

- Analysis of existing relevant universal instruments and prioritisation of international cooperation provisions;
- Assistance in drafting enabling laws, and preparation of model legislation;
- Strengthening the legal regime against terrorism with new tools contained in the conventions against illicit drugs and transnational organized crime;
- Study of the compatibility between the relevant universal legal instruments and bilateral cooperation agreements;
- Preparation of legislative guidelines on the basis of relevant instruments;
- Preparation of implementation kits;
- Analysis of effectiveness of anti-terrorist legislation;

- Organization of regional workshops to review national legislation.

First, the Global Programme will assist countries in taking concrete steps towards becoming parties to, and implementing, the international instruments relating to the prevention and suppression of international terrorism. The Global Programme will, to this effect, develop legislative guidelines and implementation kits.

Many countries have put in place measures to prevent and suppress terrorism. Not all of these mechanisms work in a satisfactory manner. The Global Programme against terrorism will provide advice on possible weaknesses of existing institutional structures and assist in the upgrading of old structures or the establishment of new institutions, providing training to staff in specific areas.

The second type of activities of the Centre for International Crime Prevention relates to National Administration Measures, such as:

- Facilitating mentorship programmes for capacity building;
- Technical assistance for capacity-building for international cooperation;
- Collection of 'Best Practices' on international cooperation;
- Promoting enabling operational structures for international cooperation;
- Promoting counter-money-laundering structures;
- Strengthening international cooperation for common border control;
- Establishment of coordination agencies;
- Provision of early warning check-list.

Finally, the new Global Programme against Terrorism will also use its information and databases in order to inform sectors of the public about measures that can be taken to control terrorism. The information it collects also serves to establish national profiles in the fields of drugs, crime and terrorism and will contribute to the development of recommendations for national strategies.

The third type of activities of the Centre for International Crime Prevention relates to Advocacy and Prevention, including:

- Public awareness and civil society mobilis ation;
- Public service announcements on prevention;
- Contribute to ODCCP's National Profiles (on drugs, crime and terrorism);

- Contribute to National Country Strategies (as above);
- Create "Best Practices" kits.

IV. CONCLUSION

The Secretary-General, on the occasion of the first anniversary of the Counter-Terrorism Committee of the Security Council, said that

> "By its very nature, terrorism is an assault on the fundamental principles of law, order, human rights, and peaceful settlement of disputes upon which the United Nations is established".[14]

When combating terrorism, we can therefore not do away with Human Rights, the Rule of Law, the Principle of the Peaceful Settlement of Disputes and the Laws of War.

It took so long to establish these norms and we have to defend them, even when this means, at times, defending the rights of terrorists.

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[14] See Annex V: Statement of the Secretary General Kofi Annan to the Security Council at the Meeting to Commemorate the One-year Anniversary of the Committee of 4 October 2002.

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EUROPEAN MEASURES AGAINST TERRORISM

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Anti-Terrorist Measures and Human Rights from the Perspective of the Parliamentary Assembly of the Council of Europe

PETER SCHIEDER

Addressing anti-terrorist measures today, after the terrible hostage-taking in Moscow's Dubrovka Theater and its tragic end, is particularly painful for me as President of the Parliamentary Assembly of the Council of Europe because a member State of our organisation, Russia, was the victim of a terrorist act.

I think that the nature of this dreadful event does not allow us at this moment to produce hasty speculations and rumours. Our first thoughts should be those of condolences and comfort.

After, we should ask the Russian authorities to provide detailed information on what exactly happened. This is a democratic practice as well as a duty among the member States of our organisation.

The Council of Europe is the oldest political organisation in Europe with a substantive body of conventions dealing with international legal cooperation, and with an unprecedented legal mechanism for the protection of human rights. As such, it is ideally placed to contribute to the international struggle against terrorism.

It facilitates legal cooperation which may greatly enhance the efficiency of repressive measures undertaken against terrorists, while at the same time it supervises the compliance of such measures with its own, legally binding human rights standards.

I will offer six points which are based on texts adopted by the Parliamentary Assembly of the Council of Europe before and after 11 September 2001.

Firstly, there can never be any justification for resorting to terrorism. This has always been, and remains an unequivocal position of the Assembly.

Secondly, terrorists also have human rights. In the period immediately following the attacks of 11 September, there was huge public pressure for muscled action against those responsible. Many people, including those in governmental circles, believed it was no longer necessary, or even possible, to observe strictly the established principles of human rights.

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights. © *2004 Koninklijke Brill NV. Printed in the Netherlands.*

This resulted in a series of legislative and administrative emergency measures being introduced in the United States, as well as here in Europe, for example in the United Kingdom, which departed from, or completely ignored, some of the basic principles of fundamental rights and civic liberties as they are protected in the European Convention on Human Rights and other international instruments.

People are arrested on the basis of criteria related to their ethnic origin or religion; they are detained without any time limitations and without any charges brought against them. I should like to stress that, while many people have been arrested on terrorist charges, there have been few or none who have been convicted. These people should be presumed innocent until their responsibility for the acts they were charged with is proven in a court of law. To what extent this is the case I leave to you to judge.

While the European Convention on Human Rights allows for derogations of certain rights in exceptional circumstances – which were the grounds invoked for the emergency law in the United Kingdom a year ago – many of the measures adopted by governments around the world and particularly in the United States fail to meet the criteria set by the Convention for such derogations.

The efficiency of these measures in the struggle against terrorists is doubtful, but their negative effect on human rights protection is evident and considerable. A few shortsighted and hasty decisions may wipe out efforts over many decades to promote and consolidate the international protection of human rights.

Thirdly – a successful anti-terrorist policy should stop more terrorists than it helps to create. Nowhere is this simple logic clearer than in the Middle East, although it applies equally to the United States and, to some extent, Europe. Despite its simplicity, it is a logic that seems to elude the leaders most directly concerned.

My criticism of Israel's conduct in the occupied territories should in no way be seen as an apology for terrorist acts perpetrated by Palestinian extremists. These are abominable and absolutely unjustifiable. However, disproportionate and indiscriminate retaliation, hurting huge numbers of innocent people, intentionally destroying the infrastructure and thus condemning the entire Palestinian people to continued poverty and absence of any hope for a better life, is wrong, is counterproductive and is plainly stupid. It facilitates the recruitment of future extremists, creating an army that may sow terror and death for decades to come.

Fourthly – terrorists are afraid of human rights. While some people believe that human rights and civil liberties may help the terrorists to plan and carry out their acts, in the long term the opposite is

true. In fact, terrorists hate freedom and thrive under oppression. Injustice, censorship, torture – every time a state authority departs from the universally agreed standards of justice and human rights, the work of terrorists becomes easier and boosts their popular support.

Fifthly – attacking the root causes of terrorism is not a sign of weakness. Repression alone will never work. To win in the struggle against terrorism, we must put in place long-term preventive measures dealing with social, political, economic and other circumstances related to terrorism. We must deal with legitimate grievances, quickly and fairly, before they are exploited by the extremists.

And my final point – fear should not become a political commodity. Following 11 September, the carnage in Bali and the recent events in Moscow people are afraid and rightly so. The threat is real and it is considerable. Our citizens need, and have the right to demand, protection and security. But fear is a powerful motivator which may be used and abused for political purposes. It diverts public attention from other pressing problems and some politicians may be tempted to manipulate public feelings of insecurity when elections are coming up and polls are going down.

The adverse effects of such an approach are self-evident and, while the primary responsibility to prevent them lies with politicians, voters should also refuse to reward any attempts to exploit their anguish for political gain.

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Council of Europe Measures against Terrorism

MARTIN EATON

The Council of Europe (CoE) reacted very swiftly to the events of 11 September 2001:

- On *12 September 2001* the Committee of Ministers adopted a Declaration on the fight against international terrorism, condemning the terrorists attacks committed in the USA;
- On *21 September 2001* the Ministers' Deputies adopted a Decision to launch CoE actions in the fight against terrorism;
- On *8 November 2001* the Committee of Ministers defined the added values which the Council of Europe should give to resolute international action against terrorism.

The subsequent action of the Council of Europe was organised around three cornerstones:

- Strengthening legal action against terrorism;
- Safeguarding fundamental values;
- Addressing the causes.

As the Secretary-General of the Council of Europe, Walter Schwimmer, said in his report of 29 April 2002:

> "These three elements have in common one and the same conviction: our best weapon is the vigorous defence of the fundamental values of democracy, the dissemination of these and their development."[1]

I. STRENGTHENING LEGAL ACTION AGAINST TERRORISM

It has to be stressed at the outset that Council of Europe action under this head presupposes a *legal framework* permitting substantial international co-operation, *inter alia* between judicial authorities, such as that which only the Council of Europe has set up at pan-European level.

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1 SG/Int(2002)19.

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

The Ministers decided to take steps rapidly to increase the effectiveness of the existing international instruments[2] within the Council of Europe related to the fight against terrorism, by:

- Urging Member States which have not yet done so to become parties; and those which have done so with reservations to reconsider them; This appeal has been heeded: since 11 September 2001 another 76 signatures and 10 ratifications of the most relevant European Conventions – see footnote 1 – have taken place.[3] Some reservations have also been withdrawn;
- If the protocol to the European Convention on the Suppression of Terrorism is agreed inviting the observer States (Holy See, United States of America, Canada, Japan, Mexico, Republic of Belarus and Federal Republic of Yugoslavia) and others to accede to the Convention, which is hitherto been open for participation by member States only;
- And by setting up a multidisciplinary group on international action against terrorism (GMT), to improve existing instruments.

The Ministers also decided to intensify action to cut off sources of funding for terrorism. To this end, they gave increased priority to the work of the Council of Europe Committee on mutual evaluation of anti-money-laundering measures and reinforced existing activities to combat corruption, organised crime, drug trafficking, the traffic in human beings and cybercrime.

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2 The most relevant Council of Europe Conventions are:
- European Convention on Human Rights;
- European Convention on the Suppression of Terrorism (ETS no. 90);
- European Convention on Extradition (ETS no. 24) and its two Additional Protocols (ETS no. 86 and 98);
- European Convention for Victims of Crimes of Violence (ETS no. 116);
- European Convention on Mutual Assistance in Criminal Matters (ETS no. 30) and its two Additional Protocols (ETS no. 99 and 182);
- European Convention on the Transfer of Proceedings in Criminal Matters (ETS no. 73);
- European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS no. 141);
- European Convention on Cyber-crime (ETS no. 185).

3 For example, since 11 September 2001, 6 States signed the 1977 European Convention on the Suppression of Terrorism: Andorra, Armenia, Azerbaijan, Croatia, San Marino, The Former Yugoslav Republic of Macedonia. At the present date, 38 Member States of the Council of Europe are parties to the Convention while 5 have signed but not yet ratified it.

Referring to the special recommendation of the UN Task Force on Terrorist Financing (FATF), the Ministers urged member States to criminalise the financing of terrorism, terrorist acts and terrorist organisations. States should ensure that such offences are designated as money laundering offences, carrying appropriate penalties.

THE MULTIDISCIPLINARY GROUP ON INTERNATIONAL ACTION AGAINST TERRORISM (GMT):

In addition to the member States of the CoE, the EU is participating in the group, as are a large number of international organisations, including the OSCE, and the Council of Europe observer states.

The major outcome of GMT's work so far are the proposals for the updating of the 1977 European Convention on the Suppression of Terrorism. The GMT examined the provisions of the Convention and drafted an amending Protocol, the main elements of which are as follows:

- The list of conventions mentioned in Article 1 of the Convention would be updated and expanded (thereby enlarging the categories of terrorist acts covered by the Convention);[4]
- New provisions would expressly permit the refusal of extradition of an individual who might be exposed to the death penalty, to torture or to inhuman or degrading treatment or to life imprisonment without the possibility of parole (all these are arguably already possible save for the last one);
- New provisions on a follow-up mechanism to the Convention for purposes of Article 13. These are still under negotiation, and it is not yet clear whether the mechanism will be a new or an existing Committee;
- Amendments to the final clauses would open the 1977 Convention and its amending protocol for participation by Council of

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4 Article 1 of the 1977 Convention lists the offences which are not to be regarded as « political » for extradition purposes – thus removing the possibility for States to refuse to extradite on that ground. Currently only two offences created by international Conventions are listed – hijacking and sabotage of aircraft contrary to the Hague and Montreal Conventions of 1970 and 1971. The new Protocol would add to that offences created by eight more Conventions e.g. on Crimes against Diplomatic agents, Hostage-taking, Unlawful acts against safety of Maritime Navigation, Terrorist Bombings and Terrorist Financing. It also expands the offences to include not only the person accused as the principal perpetrator but also those accused of being accomplices or involved in planning the offences.

Europe observer States, and by other non-member States by invitation.

This Protocol is expected to be adopted by the Deputies in early 2003. It will enter into force when all Parties to the 1977 Convention have expressed their consent to be bound by the Protocol.

Other issues addressed by the GMT have been the following:

- Strengthening investigative action;
- Specific needs for the protection of witnesses and repentant terrorists;
- Enhancing the CoE's action against the financing of terrorism (action which complements that of the FATF, particularly through the Select Committee of Experts on the Evaluation of Anti-Money-Laundering Measures);
- Further study of the concept of "*apologie du terrorisme*" (justification of terrorism) and of "incitement to terrorism";
- International law enforcement co-operation (developing measures to intensify and accelerate exchange of information and to improve mutual assistance in criminal matters in view of the need to obtain evidence).

II. SAFEGUARDING FUNDAMENTAL VALUES

This aspect of the Council of Europe's response is represented primarily in the work carried out by the CDDH on the Guidelines on Human Rights and the Fight against Terrorism, adopted on 11 July 2002 by the Committee of Ministers.[5]

A follow-up to these guidelines is planned: A further meeting of the sub-group responsible for drafting the Guidlines, DH-S-TER, is planned for the second half of 2003 to evaluate the extent of the Guidelines' dissemination at the national level, and any difficulties encountered in their implementation. The DH-S-TER might also be charged with examining the issue of victims of terrorism and the situation of ex-terrorists ("repentant terrorists"/"*pentiti*"), subject to the work done by the Multidisciplinary Group on International Action against Terrorism (GMT).

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5 See Martin Eaton, Human Rights as Standards and Framework Conditions ..., *supra.*

OTHER ACTIVITIES HELD ON THE SAFEGUARDING OF FUNDAMENTAL VALUES

Media and terrorism: A conference to be held on 25 November 2002 will address two main issues:

- Reporting on terrorism: reconciling freedom of expression and information and the fight against terrorism;
- Work on a draft Declaration of the Committee of Ministers on media and terrorism.

III. ADDRESSING THE CAUSES

Terrorism is a complex, polymorphous phenomenon that stems from widely diverse situations. Tackling the direct and indirect causes of the different manifestations of terrorism thus calls for a correspondingly diverse range of approaches.

The Council of Europe's response focuses first upon developing strong democracies that respect diversity and foster greater social justice, thereby contributing to weakening the factors on which terrorism feeds.

Many activities under way in the Council of Europe are already of a kind to reduce the risks of tension and radicalisation, for example:

- Programmes of regional co-operation, work on the balanced teaching of history, and the fight against intolerance in all its forms and against discrimination;
- Launch of intercultural and inter-religious dialogue initiatives, within Europe and on both shores of the Mediterranean, to help our societies to achieve greater cohesion and reduce the risks of misunderstanding;
- Opening the North-South Centre for Global Interdependence and Solidarity to countries in the South;
- Making full use of the possibilities of the Development Bank;
- Enabling the Council of Europe to contribute to the European Union's Barcelona process.

I give just three examples of new projects in these fields:

- European Conference on tackling terrorism – the role of local authorities:
  20-21 September 2002
- Intercultural Education for Religion, diversity and dialogue:
  30 September 2002

- Ministerial Colloquium for Ministers of Culture: 17-18 February 2003.

IV. CONCLUSION

The Council of Europe's response to terrorism is well described in the Report of the SG:[6]

The Council's action is dominated by the political conviction that strong democracies, respectful of fundamental values, are best placed to respond effectively to terrorism and to address some of its causes.

Council of Europe action aims at short-term results by mobilising the acquired expertise of the Organisation in order to reinforce rapidly the effectiveness of legal co-operation against this extreme form of criminality.

Simultaneously, it offers guidance to states to help ensure that the unavoidable fight against terrorism does not have negative consequences for democracy and human rights.

Finally, it makes full use of longer-term means of intervention, which are one of its major characteristics, in order to reduce the divisions, tensions and prejudices which constitute some of the causes of this scourge.

As indicated earlier, encouraging first results have been achieved in all three areas one year on from the 11 September attacks. They confirm the Council of Europe's capacity to bring substantial added value to international action.

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6 See SG/Inf(2002)19. On 4 November 2002 the Secretary-General issued an update of this report, in document SG/Inf(2002)43.

The European Union Approach to Measures against Terrorism

WALTER GEHR[1]

The approach of the European Union (EU) to counter-terrorism is outlined in three reports that the EU has sent to the Counter-Terrorism Committee (CTC) of the United Nations Security Council:[2]

- Two reports drafted by the European Council (the "Council") and the European Commission (the "Commission") and adopted by the Council on 20 December 2001 and 26 July 2003, respectively[3] and
- A contribution to the Special Meeting of the CTC of 6 March 2003.[4]

In the contribution, the EU measures are described in a manner that reflects the different national activities aimed at raising counter-terrorism capacity,[5] i.e.:

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1 No other person than the author of the present paper himself can be held liable for the opinions expressed in this paper and under no circumstances can they be attributed to other natural or legal persons. The author can be contacted via his website (http://www.public-international-law.net).

2 A contribution on "The Counter-Terrorism Committee and Security Council Resolution 1373 (2001)" is included in the present publication: see also Walter Gehr, "Le comité contre le terrorisme et la resolution 1373 (2001) du Conseil de sécurité" in Actualité et Droit International, http://www.ridi.org/adi/articles/2003/200301geh.tm. A broad overview is provided by Jan Wouters & Frederik Naert, The European Union and "September 11", K.U. Leuven, Faculty of Law, Institute for International Law, Working Paper No. 40 – January 2003 (available at http://www.law.kuleuven.ac.be/iir/WP/WP40e.pdf).

3 UN Doc. S/2002/1297 and S/2002/928, both available on the website of the CTC at www.un.org/sc/ctc.

4 UN Doc. S/AC.40/2003/SM.1/2, pp. 30-33, which is also available on the above mentioned website of the CTC.

5 UN Doc. S/AC.40/2003/SM.1/2, p. 2. According to the priorities set by the CTC, the establishment of an effective executive machinery for preventing and suppressing terrorist financing has the same level of priority than having legislation in place covering all aspects of 1373, and a process in hand for ratifying as soon as possible the 12 international Conventions and Protocols relating to terrorism; these areas are tagged by the CTC as "Stage A" of the implementation of Security Council resolution 1373 (2001). "Stage B" is defined as the phase in which a State strengthens its executive machinery

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

(1) legislation,
(2) executive machinery to implement the legislation and
(3) international cooperation.

I. LEGISLATION

A. GENERAL COUNTER-TERRORISM LEGISLATION

The EU has adopted a wide range of legislation in the field of counter-terrorism:

On 27 December 2001, the Council adopted two Common Positions[6] and a Council Regulation[7]:

1) A *Common Position on combating terrorism*[8] which copies almost all provisions of Security Council resolution 1373 (2001).[9] This resolution is legally binding and governs counter-terrorism efforts worldwide. In particular, it requires all EU Member

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to implement 1373-related legislation; "Stage C' covers international cooperation, including judicial cooperation, and focuses also on the links between terrorism and other threats to security (arms trafficking, drugs, organized crime, money laundering and illegal movement of weapons of mass destruction).

6 The EU defines and implements its common foreign and security policy in particular through Common Positions; according to Article 15 of the Treaty on European Union, Common Positions define the approach of the EU to a particular matter of a geographical or thematic nature. EU Member States have to ensure that their national policies conform to these Common Positions. According to Article 34 of the same Treaty, the Council may also adopt Common Positions to define the position of the EU on police and judicial cooperation in criminal matters. Common Positions on combating terrorism and on the application of specific measures to combat terrorism both have been adopted in view of Articles 15 and 34 of the Treaty on European Union.

7 These two Common Positions and this Regulation are a product of the EU Council's meeting of 21 September 2001 which was convened because of the terrorist attacks that took place in New York, Washington, D.C., and Pennsylvania on 11 September 2001. At this meeting, the Council declared that "...terrorism is a real challenge to the world and to Europe and that the fight against terrorism will be a priority issue for the European Union ..." (preambular paragraph 1 of the Common Position on the application of specific measures to combat terrorism). It also declared that "... combating the funding of terrorism is a decisive aspect of the fight against terrorism ..." (preambular paragraph 2 of the Council Regulation).

8 2001/930/CSFP (OJ L 344 of 28 December 2001, p. 90).

9 However, this Common Position does not reproduce sub-paragraph 1 (a) of Resolution 1373(2001) which reads: "The Security Council, ... Acting under Chapter VII of the Charter of the United Nations, 1. Decides that all States shall (a) Prevent and suppress the financing of terrorist acts". For the text of the resolution see Annex IV: United Nations Security Council Res. 1373 (2001) of 28 September 2001.

States to become Parties as soon as possible to the relevant international conventions and protocols relating to terrorism[10] and to fully implement them. Until 31 April 2003, 8 out of the 15 EU Member States have ratified all these conventions and protocols.[11]

2) A *Common Position on the application of specific measures to combat terrorism*[12] and
3) A *Council Regulation on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.*[13]

The *Common Position on the application of specific measures to combat terrorism* (2001/931/CFSP) contains a definition of the terms "terrorist act" and "terrorist group"[14] as well as a list of persons, groups and entities sus-

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- Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963;
- Convention for the Suppression of Unlawful Seizure of Aircraft, 1970;
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971;
- Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988;
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988;
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988;
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973;
- International Convention against the Taking of Hostages, 1979;
- Convention on the Physical Protection of Nuclear Material, 1980;
- Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991;
- International Convention for the Suppression of Terrorist Bombings, 1997;
- International Convention for the Prevention and Suppression of the Financing of Terrorism, 1999.

11 Austria, Denmark, Finland, Italy, Netherlands, Portugal, Spain and the United Kingdom. One EU Member State has ratified only 6 of these conventions and protocols. The process of signature and ratification of these conventions and protocols is regularly monitored at the level of the EU.

12 2001/931/CFSP (OJ L 344 of 28 December 2001, p. 93), updated by Council Common Position 2002/976/CFSP (OJ L 337 of 13 December 2002, p. 93). According to preambular paragraph 5 of this Common Position, the measures set forth therein are designed to implement Security Council resolution 1373 (2001).

13 (EC) No. 2580/2001 (OJ L 344 of 28 December 2001, p. 70).

14 Article 1(3). The definition of a "terrorist act" overlaps to a large extent, but not entirely, with the offences defined in the 12 conventions and protocols for the prevention and suppression of terrorism (see footnote 10). The definition of the "terrorist group"

pected of having carried out terrorist activities. The European Community (EC) shall ensure the freezing of funds of such persons, etc.[15] The *Regulation on specific restrictive measures directed against certain persons and entities with a view to combating terrorism* ((EC) No. 2580/2001) is intended to implement the Common Position 2001/931/CFSP.[16] However, the list annexed to the Regulation is not identical with the list attached to the Common Position.[17] The reason given for this discrepancy is that the EC has no power to take unilateral measures against persons, groups and entities acting within the EU Member States. It only has the power to restrict payments and capital movements to third countries. Hence European organizations such as the *Basque Fatherland and Liberty* (E.T.A.), the *Real IRA* and the Greek *Revolutionary Organization 17 November* which are listed in the Common Position are absent from the list attached to the Regulation.[18]

However, it is worthwhile noting that whereas persons, groups and entities identified by the United Nations Security Council *may* be included in the list attached to the Common Position, the lists adopted by the Sanctions

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is similar to the one used for the term "organized criminal group" in Article 2(a) of the United Nations Conventions against Transnational Organized Crime.

15 Article 3. There is also a initiative taken jointly by Belgium, France and Sweden regarding a Council framework decision on the execution in the European Union of orders freezing property or evidence (EP A5-0172/2002 of 16 May 2002).

16 It should be noted in this context that the CTC experts took the view that "... lists of that kind are of little use where the authorities of a country have evidence supporting a reasonable suspicion that a person or group hitherto unknown or operating under a new name is actually engaged in activities in support of terrorism. In those circumstances, there is no time to be lost waiting for a body such as the Security Council to pronounce on the matter or even to await the gazettal of some form of executive order. Indeed, the time taken even to obtain a warrant from a magistrate may put the necessary freezing action at risk", Letter on States' responsibilities to maintain lists and freeze the assets of proscribed individuals and entities (prepared by Mr. Jeremy Wainwright, Expert Adviser), adopted by the CTC on 24 November 2002 and available on the CTC's website or directly at http://www.un.org/Docs/sc/committees/1373/JWLetter.htm. Jeremy W. Wainwright.

17 The latest version of the list annexed to the Common Position is contained in Common Position 2002/976/CFSP (OJ L 337 of 13 December 2002, p. 93); the latest version of the list annexed to the Regulation is laid down in Council Decision 2002/974/EC (OJ L 337 of 13 December 2002, p. 85).

18 However, these European persons, groups and entities which are not subject of Article 3 of the Common Position are nevertheless subject to its Article 4 on police and judicial cooperation, since the Common Position is based on Article 34 of the Treaty on European Union, see footnote 6.

Committee against the Taliban and Al-Qaeda are transposed automatically into Community legislation.[19]

In order to better counteract the financing of terrorism, the European Parliament and the European Council also amended *Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering* (Directive 2001/97/EC).[20] According to this Directive, the EU Member States have to ensure that money laundering is prohibited.[21] In a nutshell, money laundering can be described as "*the processing of criminal proceeds to disguise their illegal origin*".[22] That means that the funds which are subject to money-laundering have originally been generated by criminal activities (so called "predicate" or "underlying" offences). These offences go beyond the drug-related offences targeted by the original text of the Directive of 1991 and now include a broad range of "serious crimes". Although the amended Directive does not specifically mention "terrorism" as such a serious offence,[23] it is likely to be regarded as such by most EU Member States.[24]

In addition to the four above-mentioned legal instruments, the *Council Framework Decision of 13 June 2002 on combating terrorism* constitutes a central piece of counter-terrorism legislation. It includes a common definition of various types of terrorist offences and requires EU Member States to attach serious criminal sanctions to these offences which overlap to a large

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19 See the contribution to the Special meeting of the CTC of 6 March 2003, page 30, A.3 (see footnote 4).

20 Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (OJ L 344 of 28 December 2001, p. 76).

21 A prohibition of money laundering is also provided by Articles 6 and 34 of the United Nations Convention against Transnational Organized Crime.

22 See the document Recurrent Issues, Briefing for member States by Walter Gehr on the CTC's website (www.un.org/sc/ctc or directly at http://www.un.org/Docs/sc/committees/1373/rc.htm#_ftn2.

23 Terrorist offences have been defined by the EU Council in its Framework Decision of 13 June 2002, i.e. more than 6 months after the adoption of the amendment to Council Directive 91/308/EEC on 4 December 2001 (2001/97/EC). In its Special Recommendations on Terrorist Financing of 31 October 2001, the Financial Action Task Force on Money-Laundering (FATF), requires all countries to "... criminalise the financing of terrorism, terrorist acts and terrorist organisations ..." and to "... ensure that such offences are designated as money laundering predicate offences"; on FATF, see www.fatf-gafi.org.

24 Jan Wouters & Frederik Naert, The European Union and "September 11", K.U. Leuven, Faculty of Law, Institute for International Law, Working Paper No. 40 – January 2003, p. 23 (available at http://www.law.kuleuven.ac.be/iir/WP/WP40e.pdf).

extent, but are not identical with the offences set forth in the 12 universal legal instruments for the prevention and suppression of terrorism.[25] Article 9 of the Framework Decision which contains provisions on jurisdiction and prosecution ensures that those who perpetrate the offences set forth therein are brought to justice on the basis of the principle *"to extradite or prosecute"*.[26]

Article 1(2) of the Framework Decision points out that it has no effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.[27] Paragraph 2 of the Preamble of the Framework Decision recalls that *"... terrorism constitutes a threat to democracy, to the free exercise of human rights and to economic and social development"*.[28]

In that context, it is worthwhile noting that the same EU Justice and Home Affairs Council that reached political agreement on the *Framework Decision on combating terrorism* also adopted a legally non-binding Declaration[29] interpreting this Decision which reads:

> *"The Council declares that the framework decision on the fight against terrorism covers acts which are considered by all Member States of the European Union as serious infringements of their criminal laws committed*

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25 See footnotes 10 and 14.

26 See operative paragraph 3 of the declaration which is attached to Security Council resolution 1456 (2003). This kind of jurisdiction is provided by the 10 international conventions against terrorism which also define offences, thereby establishing a type of jurisdiction which both the Commonwealth Secretariat and the French Government call "quasi universal".

27 Article 6 reads as follows:

"1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

3. The Union shall respect the national identities of its Member States.

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."

28 Reference is made in preambular paragraph of the Framework Decision 2 to the La Gomera Declaration adopted at the informal Council meeting on 14 October 1995 (available at http://www.europarl.eu.int/summits/mad2_en.htm#annex3).

29 Although this Declaration is legally non-binding, its content has been incorporated into section 278c of the Austrian Penal Code according to which offences are not considered to be terrorist offences, if they are committed with the objective to bring about or to restore democracy and the rule of law or to exercise or preserve human rights.

ted by individuals whose objectives constitute a threat to their democratic societies respecting the rule of law and the civilisation upon which these societies are founded. It has to be understood in this sense and cannot be construed so as to argue that the conduct of those who have acted in the interest of preserving or restoring these democratic values, as was notably the case in some Member States during the Second World War, could now be considered as "terrorist" acts. Nor can it be construed so as to incriminate on terrorist grounds persons exercising their legitimate right to manifest their opinions, even if in the course of the exercise of such right they commit offences."

Finally, the European Commission has asked a "network of independent experts" to provide a "Thematic Comment" on "*The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats*". This comment[30] has been submitted on 31 March 2003, but does not reflect an opinion of the European Commission nor does it bind it.

B. LEGISLATION CONCERNING AL-QAEDA AND THE TALIBAN

Security Council resolution 1390 (2002) of 16 January 2002[31] condemned the Taliban for allowing Afghanistan to be used as a base for terrorist training and activities as well as the Al-Qaeda network for the multiple criminal, terrorist acts, aimed at causing the deaths of numerous innocent civilians, and the destruction of property. In order to implement this resolution,[32] the EU Council adopted a Common Position[33] and a Regulation[34] that prohibits the exports of military goods and services and weapons

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30 The "Thematic Comment" is available at http://europa.eu.int/comm./justice_home/fsj/rights/network/obs_thematique_en.pdf.

31 The Security Council decided to improve the implementation of this resolution by Security Council Resolution 1456 (2003) of 17 January 2003. Security Council resolution 1363 (2001) had established a Monitoring Group to monitor the implementation of the measures to be taken in accordance with resolution 1267 (1999), 1333 (2000) and 1390 (2002); see also below the text under the heading "Schengen".

32 As for the travel ban imposed by Security Council resolution 1390 (2002), see below the text under the heading "Schengen".

33 Council Common Position of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP (OJ L 139 of 29 May 2003, p. 2).

34 Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation

prohibits the exports of military goods and services and weapons transfers to these two groups and provides for a freezing of the funds belonging to their members.

II. EXECUTIVE MACHINERY

The primary responsibility for establishing an executive machinery to prevent and suppress terrorist financing rests with the EU Member States and not with the EU institutions.[35]

A. COMBATING THE FINANCING OF TERRORISM

Effective implementation of Paragraph 1 of United Nations Security Council Resolution 1373 (2001) requires States to have in place an effective machinery for preventing and suppressing the financing of terrorism. The question which is here at stake is whether a country has an operational and credible financial intelligence unit ("FIU").[36] An indicator – although not the only one – of whether a country meets this requirement is its membership in the so called *Egmont Group*. All but one EU Member Countries and one of the EU accession countries appear on this list dated 7 June 2002.

B. EUROPOL AND EUROJUST

In the EU contribution to the special meeting of the CTC of 6 March 2003,[37] measures concerning the strengthening of the executive machinery to implement counter-terrorism legislation are merged with the account of measures taken in the area of international cooperation. Even the existing institutions with legal personality, i.e. Europol[38] and Eurojust,[39] are rather

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strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ L 139 of 29 May 2002, p. 9). This Regulation has been amended for the 17th time by Council Regulation (EC) No 742/2003 of 28 April 2003 (OJ L 106, p. 16).

35 Contribution to the Special meeting of the CTC of 6 March 2003, see footnote 4.

36 For more information on FIUs, see the Information Paper on Financial Intelligence Units and the Egmont Group, available at http://www.fatf-gafi.org/pdf/EGinfo-web_en.pdf.

37 See footnote 4.

38 Article 26 of the Europol Convention confers legal personality to this organization.

39 Eurojust's legal personality is provided by Article 1 of Council Decision of 28 February 2002 (OJ L 63 of 6 March 2002, p. 1); see also footnote 57.

ancillary institutions through their coordinating and supporting role for EU Member States than operational executive machineries in their own right. However, according to Article 30(2)(a) of the *Treaty on European Union*, Europol is meant to grow into the operational task of investigating terrorist offences; a participation of Europol in joint investigation teams has been envisaged in the *Council Framework Decision of 13 June 2002 on joint investigation teams.*[40]

Europol's mission is to assist the law authorities of Member States,[41] in particular in preventing and combating terrorism.[42] On 20 September 2001, the EU Council decided *"... to set up within Europol, for a renewable period of six months, a team of counter-terrorist specialists for which the Member States are invited to appoint liaison officers from police and intelligence services specialising in the fight against terrorism ..."*[43] (the so called "anti-terrorist unit"). A *Council Decision on the financing of certain activities carried out by Europol in connection with cooperation in the fight against terrorism*[44] is under preparation in order to strengthen Europol's supporting role for EU Member States.[45]

C. *SCHENGEN*

The Schengen Information System (SIS)[46] – is at the heart of the rapidly accelerating process for increased cooperation in policing and immigration

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40 2002/465/JHA (OJ L 162 of 20 June 2002, p.1), see in particular preambular paragraph 9 and Article 1(12).

41 Introduction by the Director of Europol to the organizations website (http://www.europol.eu.int/index.asp?page=introduction).

42 Article 2(1) Europol Convention which entered into force on 1 October 1998. Europol took up its full activities on 1 July 1999.

43 See Conclusions adopted by the Council (Justice and Home Affairs) on 20 September 2001, paragraph 10, available at http://www.europa.eu.int/comm/justice_home/news/terrorism/documents/concl_council_20sep_en.pdf.

44 Proposal for a Council Decision on the financing of certain activities carried out by Europol in connection with cooperation in the fight against terrorism, COM(2002)439 final, 31 July 2002 (OJ C 331/E, p. 111).

45 In this context, the annex to the EU contribution (see footnote 4) lists also a Council Decision of 6 December 2001 extending Europol's mandate to deal with serious forms of international crime listed in the Annex to the Europol Convention (OJ C 362 of 18 December 2001, p. 1).

46 The Schengen information system (SIS) was set up to allow police forces and consular agents from the Schengen countries to access data on specific individuals (i.e. criminals wanted for arrest or extradition, missing persons, third-country nationals to be refused entry, etc.) and on goods which have been lost or stolen. These data are sup-

control across the EU initiated by the Schengen agreements of 14 June 1985 and 19 June 1990.[47] These agreements eliminated internal cross-border controls and strengthened controls on the external borders of the countries of the Schengen area. It is interesting to note that according to the Monitoring Group which assists the Sanctions Committee against the Taliban and Al-Qaeda pursuant to Security Council resolution 1390 (2002), States participating in the Schengen area are not able to prevent the entry into or the transit through their territories of members of these two groups.[48] As highlighted in the Monitoring Group's second report of 22 August 2002[49] the SIS contained by then only around 40 of the 219 names of individuals who appear on the list of names annexed to resolution 1390 (2002).

D. *Other measures*

Other measures to strengthen the executive machinery against terrorism concern, in particular, air transport security[50] and civil protection[51], maritime security[52] and cyber security.[53]

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plied by the Member States via national sections (N-SIS) that are connected to a central technical function (C-SIS). At present the Schengen Information System operates in 13 Member States and two non-member States (Norway and Iceland). According to the Euro-glossary of BBC News, "UK and Ireland remained outside the agreement due to fears of terrorism" (http://news.bbc.co.uk/2/hi/in_depth/europe/euro-glossary/1230052.stm.).

47 The agreements and other documents forming the "Schengen Acquis" of the European Union are listed in the Annex to the Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community.

48 Third report of the Monitoring Group established pursuant to Security Council resolution 1363 (2001) and extended by resolution 1390 (2002) in UN Doc. S/2002/1338 of 17 December 2002, paragraph 57.

49 Second report of the Monitoring Group established pursuant to Security Council resolution 1363 (2001) and extended by resolution 1390 (2002) in UN Doc. S/2002/1050, paragraph 77.

50 Jan Wouters & Frederik Naert, The European Union and "September 11", K.U. Leuven, Faculty of Law, Institute for International Law, Working Paper No. 40 – January 2003, p. 33-38 (available at http://www.law.kuleuven.ac.be/iir/WP/WP40e.pdf).

51 See footnote 57.

52 See http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/651|0|RAPID&lg=EN&display=.

53 See http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/208|0|RAPID&lg=EN&display=.

III. INTERNATIONAL COOPERATION

A broad spectrum of the EU counter-terrorism legislation deals with international cooperation either among EU Member States or with third countries.

A. COOPERATION AMONG EU MEMBER STATES

Within EU member States, *Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism*[54] put EU Member States under an obligation to *"... afford each other the widest possible assistance in preventing and combating terrorist acts."* This has to be achieved *"... through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union"*.[55]

Judicial cooperation can be carried out through the European Justice Network (EJN)[56] which supplements the efforts of Eurojust.[57] EJN is a decentralised network between EU lawyers and judges working on criminal cases and tries to help them exchange information rapidly and effectively. EJN has specialist contact points in all member states, which can be contacted and asked for advice.[58]

In particular, regarding measures against the financing of terrorism, *Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*[59] provides for the exchange of information on bank accounts held by any person who is the subject of criminal investigations.

Most importantly, the adoption of the *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures*

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54 See footnote 12.

55 Article 4 which echoes sub-paragraph 2(f) of Security Council resolution 1373(2001).

56 Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network (98/428/JHA, OJ L 191, p. 4).

57 Eurojust is an emanation of the centralizing forces within the EU which has been assigned an advisory role in the event of multiple requests for arrest (Article 16(2) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA, OJ L 190, p. 1).

58 See http://europa.eu.int/comm/justice_home/news/laecken_council/en/eurojust_en.htm.

59 2001/C 326/01 (OJ C 326 of 21 November 2001, p.1).

between Member States[60] reflects a paradigm shift in legal cooperation: Instead of traditional extradition procedures based on the principle that one State does not execute or enforce decisions of another State, Member States now automatically recognize each others' judicial decisions ordering the arrest of a person on the basis of the high level of integration between EU Member States and their trust into each others' legal system.[61] The Framework Decision applies specifically to acts of terrorism.[62] In order to shield the mechanism of the European arrest warrant from situations of persistent violations of fundamental rights, preambular paragraph 10 provides that it *"...may be suspended in the event of a serious and persistent breach of the principles set out in Article 6(1)*[63] *of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof"*.

In the area of cooperation in administrative matter[64], the contribution of the EU to the CTC meeting of 6 March 2003[65] mentions the *Convention on mutual assistance and cooperation between customs authorities*[66] (the so-called "Naples II Convention") and the Customs Information System (CIS) established by the *Convention on the use of technology between customs authorities for customs purposes.*[67] The aim of CIS is to enable national customs services to exchange and disseminate information on smuggling activities and requests for action. Neither instrument has come into force and been drawn specifically to fight terrorism.

Finally, mention should be made of the fact that, already in 1996, the EU Council envisaged the creation of a *Directory of specialized counter-terrorist*

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60 See footnote 57.

61 Jan Wouters & Frederik Naert, The European Union and "September 11", K.U. Leuven, Faculty of Law, Institute for International Law, Working Paper No. 40 – January 2003, pp. 10-11 (available at http://www.law.kuleuven.ac.be/iir/WP/WP40e.pdf).

62 Article 2(2).

63 See footnote 27.

64 Cooperation in administrative matters is required by sub-paragraph 3(b) of Security Council resolution 1373 (2001).

65 See footnote 4.

66 See Council Act of 18 December 1997 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Convention on mutual assistance and cooperation between customs administration, 98/C 24/01 (OJ C 24 of 23 January 1998, p. 1).

67 EU Contribution (see footnote 4), p. 31.

terrorist competences, skills and expertise to facilitate counter-terrorist co-operation between the Member States of the European Union.[68]

B. COOPERATION WITH THIRD COUNTRIES

Cooperation with the United States of America has been a particular priority.[69] In particular, efforts are underway to conclude EU-US agreements on extradition and on mutual legal assistance. It remains to be seen to what extent the EU Member States and the United States are going to incorporate into these two agreements the relevant provisions of the *United Nations Convention against Transnational Organized Crime* which they have all signed. The EU High Representative for the Common Foreign and Security Policy, Mr. Javier Solana, recognized that to fight terrorism *"... more police cooperation, more intelligence sharing, more efforts on what I would call global homeland security"* were needed.[70] The agreements signed by Europol and the US law enforcement authorities on 11 December 2001 and 20 December 2002 are therefore only a starting point.[71] A series of EU/United States meetings to improve concrete cooperation on border controls[72] and migration managements has been held. Europol is also close to concluding a strategic agreement with the Russian Federation. The EU has also developed cooperation mechanisms with other third countries. Anti-terrorism clauses are being included in EU agreements with third countries[73] and joint state-

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68 Joint Action of 15 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the creation and maintenance of a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter-terrorist cooperation between the Member States of the European Union, 96/610/JHA (OJ L 273 of 25 October 1996, p. 1).

69 EU contribution (see footnote 4), p. 31. No record of a follow-up to this initiative is known to the author.

70 ""Europe and America: Partners of Choice", Speech to the Annual Dinner of the Foreign Policy Association", New York, 7 May 2003, available at http://ue.eu.int/pressdata/EN/discours/75674.pdf.

71 Europol has also concluded agreements with Poland, Hungary Estonia, Slovenia and the Czech Republic and is negotiating agreements with the remaining EC acceding and candidate countries including Turkey.

72 On 18 March 2003, the EU Council of Ministers gave the European Commission a mandate to negotiate with the United States customs control arrangements, particularly of goods transported in containers, so as to address the threat of terrorist attacks.

73 As of 26 July 2002, the standard wording for counter-terrorism clauses has already been used for the counter-terrorism provisions in agreements with Algeria, Chile and Lebanon. This clause is intended to improve cooperation against terrorism, see the Report of the European Union to the CTC adopted by the Council on 26 July 2001 in UN Doc. S/2002/928, available on the CTC's website (www.un.org/sc/ctc).

ments on the fight against terrorism have been adopted with many countries.[74] The EU has provided technical assistance, in particular to Indonesia, the Philippines and Pakistan.

74 EU contribution (see footnote 4), p. 32. Joint statements have been adopted with the United States of America, the Russian Federation, Ukraine, Moldova, Western Balkan countries, 13 candidate countries, Norway, Iceland, Liechtenstein, Switzerland, 12 Euro-Med partners, Israel, Canada, India, Pakistan, South Korea, but also with international organizations such as ASEAN.

D.

NATIONAL ANTI-TERRORIST MEASURES AND HUMAN RIGHTS, GENERAL ISSUES AND CASE STUDIES

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Terrorism, States of Emergency and Human Rights

KEVIN BOYLE

"We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism. While we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities – such as human rights in the process."

Kofi Annan, Secretary General, addressing the Security Council on 18 January 2002

I. INTRODUCTION

This contribution sets out and comments on the balance that international law prescribes for states in the protection of human rights while confronting terrorism. It will focus on two aspects of direct relevance to the current "war on terrorism"; resort to exceptional or emergency measures and the challenges, post-11 September, in ensuring the accountability of States under international human rights law when they resort to such measures.

The attacks of 11 September in the United States generated unprecedented and ongoing co-operation between countries in countering terrorism, stemming from Security Council Resolution 1373.[1] The United Nations had the opportunity envisaged in its Charter to be "a centre for harmonising the actions of nations" in developing effective responses to terrorism.[2] The Security Council has overseen these responses, as analysed in Walter Gehr's chapter, but it has not accepted that it should exercise a role in constraining States' use of counter-terrorism powers

1 See Annex IV.

2 Article 1.4.

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

that may place them in violation of their international human rights obligations.[3]

Others have sought to convey the message that the search for security and the upholding of human rights standards are not in conflict. This has been the consistent message of the Secretary General, Kofi Annan, who is cited above. In a powerful joint statement, following the 11 September attacks, the then UN High Commissioner for Human Rights, Mary Robinson, the Secretary General of the Council of Europe, Walter Schwimmer, and Ambassador Gerard Stoudman, Director of the Organization and Co-Operation in Europe's (OSCE) Office for Democratic Institutions and Human Rights, called upon governments to ensure that measures taken to eradicate terrorism did not lead to unjustified curbs on human rights and fundamental freedoms.[4]

These and other bodies have sought to give practical guidance to States on balancing human rights commitments and effective measures against terrorism.[5] Thus the Inter-American Commission on Human Rights has issued a comprehensive report that examines in great detail the legal duties of states to uphold international human rights in responding to terrorist threats.[6]

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3 See in this book the article of Walter Gehr "The Counter-Terrorism Committee and Security Council Resolution 1373 (2001)".

4 "While we recognise that the threat of terrorism requires specific measures, we call on all governments to refrain from excessive measures which would violate fundamental freedoms and undermine legitimate dissent. In pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms." OHCHR Press Release 29 November 2002.

5 See Annex II: Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights (Mary Robinson) and Follow-Up to the World Conference on Human Rights of 27 February 2002, E/CN.4/2002/18 and appendix; Annex X: Council of Europe, Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on 11 July 2002, H (2002) 4; Report of the Policy Working Group on the United Nations and Terrorism, A/57/273/S/2002/875, paras. 26-28. NGOs have also been active in reminding States of the crucial balance needed in defending human rights and responding to terrorism. See for example, Amnesty International, Rights at Risk, Amnesty International's concerns regarding legislation and law enforcement measures, January 2002, AI Index: ACT 30/001/2002, London; International Council on Human Rights Policy, Human Rights after 11 September 2002, Switzerland, www.ichrp.org; A. Kjok, Terrorism & Human Rights after 11 September, Towards a Universal Approach for Combating Terrorism and Protecting Human Rights, Cairo Institute for Human Rights Studies, Cairo, 2002.

6 See Annex XII: Inter-American Commission on Human Rights, Report on Terrorism and Human Rights of 22 October 2002, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr.

Study of these statements, documents and reports brings out the maturity and the common principles of both regional and international systems of human rights protection. Put simply State authorities have the duty to protect victims and potential victim of terrorism, to apprehend and punish the perpetrators of terrorist acts and to take measures to frustrate or prevent further attacks. However, in their policies to counter-terrorism States should act within the rule of law. Without a commitment to the rule of law at international and national level, what is terrorism and what is anti-terrorism in the eye of the beholder. Nevertheless the sense of optimism that the clarity of human rights principles on the normative level engenders must be tempered by the long experience of neglect of these principles by States in international and national armed conflict. The aftermath of 11 September has brought home once again, the limited capacity of human rights protection systems, national and international, to deter violations and ensure that States uphold the rule of law.

DEFINITION ISSUES

Terrorism is a phenomenon that is plagued by lack of an agreed universal definition.[7] Terrorist acts however have been delimited with greater success.[8] At the least it may be said that terrorist acts are inescapably violent acts directed at the intimidation of civilian populations and at destabilising political institutions. Further it is agreed that no claim of justification is admissible for terrorist acts. Countering terrorism may require different responses from the State depending on its context and scale. Terrorism that is on a limited scale can be effectively countered without the need for exceptional legal measures that impinge radically on rights and freedoms. The democratic state can effectively respond to the threat to the public through the exercise of lawful powers and the normal balancing of rights and freedoms with public interest goals. Thus the

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7 See C. Sederberg, Terrorist Myths: Illusion, Rhetoric and Reality, Englewood Cliffs, N. J.: Prentice–Hall 1989, where over one hundred definitions often contradictory are examined. The General Assembly continues to work on reaching consensus on a general definition in the context of a draft general convention on terrorism, see Michael Postl, The Ad Hoc Committee on Terrorism, supra.

8 There are twelve United Nations Conventions in force on dimensions of terrorism in addition to a number of regional anti terrorism instruments, see UN Treaty Collection, Conventions on Terrorism, www.un.org/Terrorism. The European Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism sets out an extensive definition of terrorist acts, (2001/931/CFSP).

Council of Europe Guidelines draw upon decisions of the European Court of Human Rights, to illustrate how in the context of the fight against terrorism, and subject to specified safeguards, the collection and processing of personal data as well as surveillance measures that interfere with privacy can be compatible with guarantees of human rights under the European Convention. The guidelines also indicate specific measures to protect the identity of witnesses for example that can be justified in countering terrorism, which need not impinge on the guarantee of fair trial.[9]

Terrorism may however be of such intensity that it needs exceptional measures of prevention that are incompatible with normal guarantees of human rights. In such circumstances there may be resort by the State to temporary derogation from certain rights. Terrorism may also have a trans-national dimension and may arise in the context of armed conflict, national or international in which the governing legal framework of international human rights law is supplemented by international humanitarian law. Terrorism that has cross border dimensions is hardly new, but the September 11 attacks in the United States demonstrated an unprecedented degree of trans-national planning as well as execution. The Al-Qaeda network that perpetrated those atrocities was emulating techniques of organised crime that operate within and between countries engaged in activities such as illegal arms, drug trafficking and people smuggling.[10] The difference with terrorism lies in its political or ideological motivation and its open challenge to government. However the need for financial resources for terrorist acts makes terrorist and other criminal networks often difficult to separate.[11] The particular characteristics of the

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9 Annex X.

10 The link between transnational crime and terrorism is made in Security Council Resolution 1373:

"4. Notes with concern the close connection between international terrorism and transnational organised crime, illicit drugs, money laundering, illegal arms trafficking, and illegal movements of nuclear, chemical, biological and other potentially deadly material, and in this regard emphasizes the need to enhance coordination of efforts on national, sub-regional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;" S/RES/1373 (2001).

11 See the comment in the Policy Working Group on the United Nations and Terrorism (A/57/273): "Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality. To overcome the problem of terror-

international terrorism networks, – their mobility, decentralised nature, technological skills and preparedness to acquire and use weapons of mass destruction, – have precipitated the present global crisis. After 11 September there is clearly a new context for both national and international systems of prevention of terrorism as well as for human rights protection.

Terrorism and trans-national crime sets many challenges also to all the interlinked purposes of the United Nations to maintain international peace and security, to advance human rights and human development, and to strengthen the rule of international law.

One reflection of these linked purposes has been the half-century of efforts to involve States in agreeing norms on universal human rights and in establishing treaty regimes and other mechanisms, regional and international, to secure those rights for all human kind without distinction.[12] Such protection systems are designed to constrain the use of unaccountable power by States against all who fall within their jurisdiction, citizens and non-citizens. International humanitarian law that has grown up alongside human rights law carries these principles into both international and internal armed conflict.

However, despite repeated acknowledgments by States of the controlling function of international human rights and humanitarian law, their practice in dealing with terrorism is often to the contrary. The argument made over the challenge of terrorism, national and transnational, heard before but especially after the 9/11 attacks in the United States, is that it entails inevitably a departure from or revision of these foundations of the international legal order which must be strenuously resisted and rejected.[13] There is nothing in Security Council Resolution 1373, which requires states to violate human rights. Nevertheless the danger of this resolution being used to legitimate anti-terrorist actions impinging upon human rights is a serious one. Some states may use their duty to implement the resolution as a pretext to crackdown on legitimate opposition.

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ism it is necessary to understand its political nature as well as its basic criminality and psychology. The United Nations needs to address both sides of this equation."

12 For a comprehensive treatment of the international human rights machinery see, H. Steiner and P. Alston, International Human Rights in Context, Oxford 2000.

13 See Anti-terrorism Policy: Hearing before the Senate Comm. On the Judiciary, 107th Cong. (6 December 2001) (testimony of Attorney General John Ashcroft). An important defence of international humanitarian law and the Geneva Conventions was given to the 58th Annual Session of the UN Commission on Human Rights by Jakob Kellenberg, President of the International Committee of the Red Cross, International Review of the Red Cross 2002, No. 845, p. 240-244.

Another risk is that states may excessively limit the core human rights guarantees. Unofficial monitors of the aftermath of 11 September have documented patterns of such abuses in many countries, including in the United States.[14]

The open ended "war on terrorism" declared by the United States, offers and will continue to offer a major test to the rules governing the use of force in the U.N. Charter as well as to respect for international human rights legal standards. The foreboding that has enveloped many is succinctly summarised by one of the most perceptive studies prepared in the aftermath of 11 September:

> "Human rights organisations are particularly concerned about the legal ambiguity of a campaign that has been described as a war, is undertaken in self defense, has the approval of the Security Council, but has no defined geographical scope or limit, has failed to define its enemy in a clear manner, and has refused to position the conflict in terms of human rights law or humanitarian law."[15]

The inflated language of war whether used by States or by Islamic militants should be deprecated. It is worth reiterating that the United Nations Charter prohibited war, in its technical sense of armed aggression against another state.[16] One consequence of the continued reference to war, including in the context of Iraq, is that it can undermine the foundations of the international order and condition world public opinion to tolerate or even endorse the use of force rather than diplomacy to deal with complex crises.[17] There should be deep concern over the apparent reluctance of democratic states to speak out against abuses of power under the guise of countering terrorism. Such reluctance renders all the more difficult the task faced by the international mechanisms in appraising legal and administrative measures invoked to counter-terrorism in terms of their effects on human rights guarantees. At the outset of the 21st

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14 Lawyers Committee for Human Rights, "A Year of Losses: Re-examining Civil Liberties Since September 11", www.lchr.org., Amnesty International, Annual Report 2002, London, and especially the foreword by Irene Khan, Secretary General.

15 Human Rights after 11 September, supra note 5.

16 Article 2 of the UN Charter, and see Yoram Dinstein, War, Aggression and Self Defence, Part 11, The Illegality of War, pp. 59-151, 3rd. Edition, Cambridge 2001.

17 Human Rights after 11 September, supra note 5, pp. 14-18.

century it is certainly justified to speak of a persistent shadow over the cause of human rights and the international rule of law.[18]

II. DEROGATION AND STATES OF EMERGENCY

The need for a State to have recourse to measures which over reach the guarantees of certain human rights because of circumstances of crisis such as terrorism, that "threaten the life of the nation" is recognised and regulated in international and regional human rights treaties. Thus human rights treaty commitments at international and regional levels are not a straight jacket that puts a legitimate democratic government or its people at risk. They have a flexibility that enables exceptional measures to be taken to defend against threats such as terrorism. In a democratic society the very purpose of emergency security measures is to protect people and their human rights and fundamental freedoms. The State has a duty to confront and defeat terrorist acts and organisations. The International Covenant on Civil and Political Rights 1966 (Article 4), the European Convention on Human Rights (Article 15) and the American Convention on Human Rights (Article 27) provide for temporary resort to emergency measures, that derogate from certain rights in these international treaties, given certain objective conditions and subject to specified safeguards both substantive and procedural.

The need for such safeguards and the insistence in the international standards that it is only in conditions of exceptional threat that resort may be had to derogation, reflects the long experience of treaty monitoring bodies, that governments often resort to emergency powers on illegitimate grounds, for example, where a state of emergency is declared following a military coup. Conditions of violence and terrorism, that may justify resort to derogation, are also the conditions where rights and freedoms are most at risk. Evidence of torture, arbitrary detention, disappearances and censorship are frequently associated with the proclamation of national emergencies. The use and abuse of emergency powers has been in fact a decades old concern of the international human rights system.[19]

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18 Mary Robinson, "Human Rights in the shadow of 11 September", 5th Commonwealth Lecture, London 6 June 2002, www.ohchr.org.

19 See the initial UN Human Rights Commission report on resort to emergency law: Study of the implications for human rights of recent developments concerning situa-

1. ICCPR GENERAL COMMENT NO. 29

It was a fortunate matter that some months before the 11 September attacks the Human Rights Committee, the supervisory body of the International Covenant on Civil and Political Rights (ICCPR), adopted a new *General Comment (No. 29)* on the interpretation of the Covenant's emergency clause, Article 4.[20] General Comments are intended to guide States Parties in preparing reports to the Committee on their day-to-day implementation of the Covenant. General Comment No. 29 (*see* Annex III) contains the most authoritative guidance to States where exceptional measures are taken and on associated safeguards against abuse including in the context of Counter-Terrorism. It builds on the quarter of a century experience of the Human Rights Committee in examining state reports and adjudicating individual complaints under the Covenant. The ICCPR has been ratified by more than 140 states in the world. Comprehensive regard on the part of states for these and other guidelines would make a major contribution to reducing the abuse of human rights in the global efforts to defeat international terrorism. The key provisions of General Comment No. 29 will be examined here supplemented by reference to the jurisprudence of the European and the Inter-American Conventions on safeguarding human rights in the context of terrorism.

Article 4 of the International Covenant on Civil and Political Rights provides:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimi-

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tions known as states of siege or emergency, E./CN.4/Sub.2/1982/15. The final study in this series conducted by a UN Special Rapporteur, in 1997 confirmed a continuing picture of states of emergency being the basis of the worst abuses and the most pernicious forms of arbitrariness, E/CN.4/Sub.2/1997/19. Introduction; T. Hadden, "Human Rights Abuses and the Protection of Democracy during States of Emergency" in: E. Cotran and A. O. Sherif, Democracy, the Rule of Law and Islam, (Kluwer) 1999, p. 111-131; J. Oraa, Human Rights in States of Emergency in International Law (Oxford, 1992), J. Fitzpatrick, Human Rights in Crisis (1994).

20 CCPR/C/21/Rev.1/Add. 11, adopted on 24 July 2001.

nation solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

a. The existence of an emergency

A State may invoke Article 4 only where in fact circumstances warrant it. There must be "a public emergency which threatens the life of the nation". No definition is offered in the General Comment, but the European Court of Human Rights has defined similar language in the European Convention on Human Rights to entail:

> "... an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."[21]

The Human Rights Committee is a quasi-judicial body only, but it has the competence to determine whether or not a public emergency exists and is of such a nature to justify resort to derogation.[22] The European Court which has emphasised its jurisdiction to rule on the factual basis claimed to require resort to emergency measures, has at the same time emphasised that States have a large power of appreciation.[23]

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21 The Lawless Case: Series A Judgements (I July 1961) para. 28; see also the Greek Case, Report of 5 November 1969 Yearbook X11, p. 72; see also Brannigan and Mc Bride v. UK [1994] 17 EHRR 539.

22 See Landinella Silva v. Uruguay Comm. No. 34/1978, (decided 8 April 1981), Selected Decisions under the Optional Protocol U.N. Doc. CCPR/C/OP/1 at 65, 1985.

23 Ireland v. the United Kingdom, judgement of 18 January 1978, Series A no. 25, pp. 78-79, para. 207.

b. *Proportionality – 'strictly required by the exigencies of the situation'*

Similar external supervision is exercised, along with a power of appreciation for the State, in respect of the question as to whether the specific measures taken under the emergency are limited to those "strictly required by the exigencies of the situation."[24] This concept reflects the principle of proportionality. As the Human Rights Committee notes:

"This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Convention are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation."[25]

c. *Non-derogability*

Certain rights guaranteed by the Covenant may never be derogated from even in a public emergency. These are set out in Article 4 (2) above and include, the right to life, the prohibition against torture and the principle of legality in criminal law. The Committee notes that in considering the reports of a number of States whom it identifies, it has expressed concern over non-derogable rights being either derogated from or at risk of derogation owing to inadequacies in the national legal system.[26] The absolute prohibition on torture is a central guarantee required from States under international human rights treaties and customary international

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24 See Brannigan and Mc Bride v. the United Kingdom, 26 May 1993, para. 43.

25 Para. 5.

26 Para. 7 and footnote 4.

law.[27] Nevertheless there is ample evidence that the prohibition is less than effective especially in situations of conflict and terrorism. Since 11 September, the question of the justification of torture has come to be aired periodically.[28] In addition credible reports have been published of alleged use of ill treatment and torture (including "stress and duress" interrogation techniques) by or at the behest of the United States.[29] NGOs have sought the intervention of the Inter-American Commission on Human Rights in the light of these reports.[30]

The General Comment adds several important clarifications to the scope of the non-derogation principles of direct relevance to counter-terrorism measures and armed conflict. First, it identifies a number of rights in the Covenant, which are not included in the non-derogation clause and may in principle therefore be suspended in a public emergency. Such provisions the Committee considers contain "non-derogable" elements that cannot be suspended. These include the prohibition on discrimination (Article 26 of the Covenant) whose special status is reinforced by the reference to the non-discrimination condition in resort to derogation stated in Article 4 (1). The other rights affected by this interpretation include the right of all persons detained to be treated with humanity, the right to a remedy, and the right to a fair trial and the rights of minorities.[31]

On fair trial and due process, the Comment links the obligations of States under international humanitarian law and the Geneva Conventions, to uphold these guarantees, where the state of emergency is precipitated by armed conflict, international or non-international, to other forms of

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27 N. Rodley, The Treatment of Prisoners in International Law, Oxford University Press, 2nd ed. 1999, pp. 75-101. See also the statement following the 11 September attacks of the Committee against Torture, the treaty body of the Convention against Torture, reminding States of the non-derogable nature of most of the obligations under that Convention, CAT/C/XXV11/Misc. 7, 22 November 2001.

28 For example, "Time to think about torture" Newsweek, 5 November 2001 "Should we use torture to stop terrorism?" Steve Chapman, Chicago Tribune, 1 November 2001, See also the Economist editorial, "Is Torture ever justified"? 9 January 2003, which while condemning torture, moots the question of possible justification for interrogation that falls short of such degree of infliction of pain in the struggle against terrorism.

29 "US Decries Abuse but Defends Interrogations 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities, Dana Priest and Barton Gellman, Washington Post, 26 December 2002, page 101.

30 The petition seeking precautionary measures has been filed by the Centre for Constitutional Rights and the International Human Rights Law Group, www. crc-ny.org.

31 See paras. 13 and 14.

emergencies. Thus, "since certain elements of fair trial are explicitly guaranteed under international humanitarian law during armed conflict the Committee finds no justification for derogation from these guarantees during other emergency situations."[32] In particular the Committee identifies as non-derogable the presumption of innocence and the requirement that only a court of law may try and convict for a criminal offence.

Further, although the right to liberty may be suspended in a public emergency, the right to *habeus corpus* and *amparo* to challenge the lawfulness of detention cannot be.[33] The rejection of the remedy of habeus corpus by United States Courts in the cases of foreign detainees held in Guantanamo Bay detention camp and of a US citizen held in incommunicado military detention in Virginia, places the US government in breach of Article 9 of the Covenant.[34]

Invoking Article 5 of the Covenant the Committee records that States parties may not invoke Article 4 in justification of violations of international humanitarian law.[35] The overlapping and reinforcing role of international humanitarian law, international criminal law and human rights law is similarly emphasised by the Inter-American Commission in its report on terrorism and human rights.[36]

A further pertinent clarification on non-derogable norms relates to the continued applicability of other human rights obligations on States that have the character of peremptory norms of international law. The Committee instances the taking of hostages and collective punishments. It also includes within the scope of additional non-derogable norms, human rights violations that constitute crimes against humanity as defined

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32 Paras. 3 and 15.

33 Para. 16; see also Council of Europe Guidelines on human rights and the fight against terrorism, p. 26, in Annex X and the Inter-American Commission on Human Rights Report on Terrorism and Human Rights, para. 53 in Annex XII.

34 See Rasul et. al. v. George Walker Bush et. al., U.S. District Court, District of Columbia, July 2002, Hamdi v Donald Rumsfeld, US Court of Appeals 4th Circuit, 12 July 2002. Both cases are discussed in an English case concerning access to British detainees in Guantanamo Bay, Abbasi & Anor, R. (on the application of) v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department [2002] EWCA Civ 1598n (November 2002) and can be accessed through www.lchr.org.

35 Article 5 (2) " There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent".

36 See Annex XII.

in the Rome Statute of the International Criminal Court, including deportation and forcible transfer of population.[37]

d. The case of non-nationals

The 11 September attacks on the United States notoriously were carried out by non-nationals and other terrorist incidents before and after the attacks on the US, have involved conspiracies and networks involving different nationalities acting outside their own countries. The international character of such acts as well as the involvement of the Al-Qaeda fighters in the Afghanistan conflict has necessitated the unprecedented efforts at prevention of terrorism required by Security Council Resolution 1373. It has also however resulted in dramatic vulnerability to human rights abuses for the millions of migrants, legal and non-legal, as well as asylum seekers and refugees in all parts of the world.[38] Although not specifically identified in General Comment No. 29 of the Human Rights Committee, States have duties to respect the rights of non-nationals under international human rights law including the Covenant. The General Comment places emphasis on the principle of non-discrimination, a principle that runs throughout the Covenant whether a public emergency has been invoked or not. It also refers to the non-derogable core of the Covenant's guarantees of minority rights. The International Covenant and regional human rights treaties enshrine as non-derogable the principle of *non-refoulement.* Collective expulsion or deportation of non-nationals is prohibited, there must be individual decisions and under the International Covenant, "except where compelling conditions of national security require", and there must be a right to challenge grounds of expulsion through a review procedure.[39] Where extradition is requested, States have a duty not to grant the request where there is a serious risk that the person

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37 Paras. 11, 12, 13.

38 Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights (Mary Robinson), Part III The Rights of Refugees and Migrants a Special Concern, supra note 5. The Commission on Human Rights has asked the Special Rapporteur on Contemporary Forms of Racism to report to its 59th session in 2003 on "the situation of Muslim and Arab peoples in various parts of the world with special reference to physical assaults and attacks against their places of worship, cultural centres, businesses and properties in the aftermath of the events of 11 September 2001" (Resolution 2002/9).

39 ICCPR Article 13.

if extradited, may suffer torture or inhuman or degrading treatment.[40] The non-refoulement principle extends also to asylum seekers whose applications have been refused, a duty that arises also from the Convention on the Status of Refugees and the Convention against Torture.[41]

e. Procedural principles of proclamation and notification

There can be no secret emergencies. Under the Covenant, States must make a formal declaration of emergency under national law and must notify immediately other States Parties through the Secretary General of the UN. Such notification should list the rights derogated from and the reasons necessitating derogation. A further duty of international notification arises at the termination of a state of emergency. The Committee notes in General Comment 29, that international notification is a critical requirement for the discharge of its functions as well as to enable other States to monitor compliance with the provisions of the Covenant. It is not always respected, and in some cases the Committee has become aware of the existence of a state of emergency only when examining a State report.[42] The United Kingdom, the only State Party to the Covenant to formally derogate under Article 4, after 11 September, has followed the procedure.[43] On the other hand the USA, which is also a State Party, proclaimed a state of emergency, but has not notified any derogation in respect of any measures it has taken post-11 September.[44]

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40 Under the Council of Europe guidelines, extradition should also be refused if guarantees are not given that the person will not be sentenced to death or if imposed that it will not be carried out, see Annex X, p. 34.

41 Convention on the Status of Refugees of 28 July 1951, Article 33, United Nations Convention against Torture and other Cruel and Inhuman Treatment or Punishment, 1984, Article 3.

42 Para. 17.

43 UK notification of derogation from Article 9 of the Covenant, dated 18 December 2002, accessed through www.bayefsky.com.

44 Proclamation by US President George W. Bush 23 September 2001, www.whitehouse.gov/press/releases. The United States submitted its initial report under the ICCPR in 1994, CCPR/C/81/Add.4 (1994). Its second periodic report was due on 7 September 1998, but has not to date been submitted.

III. UPHOLDING HUMAN RIGHTS: IMPLEMENTATION AND ACCOUNTABILITY

In the light of this account of the normative framework governing states of emergency, a framework which is often invoked in responding to terrorism, the second theme arises – how to ensure in practice that human rights and humanitarian law standards are upheld, when anti-terrorism measures and exceptional powers are invoked?

Long experience teaches that the claims of security always threaten the erosion of rights. The post-11 September experience has been little different. There is cause for concern in that after September 11, in many countries non-violent activities have been considered as terrorism, and excessive measures have been taken to suppress or restrict individual rights.[45] One of the most serious examples, already noted, is the denial of access to court and legal advice to the large number of detainees captured during the Afghanistan conflict in 2001 and 2002, and held under US authority in Guantanamo Bay and in Afghanistan. The US courts have declared that they lack jurisdiction to enforce such rights under US law.[46] However, the international standards that are binding on the United States, in particular the International Covenant on Civil and Political Rights provide that every one, under the jurisdiction of a State Party has the right to take proceedings before a court to challenge the lawfulness of detention. This right may not be suspended under conditions of emergency. While the International Committee of the Red Cross has been granted access to prisoners held in Guantanamo and at the US airbase in Bagram in Afghanistan, the US Government has been reluctant or has simply refused consular access to the detainees.[47] The Federal authorities have also declared that all those detained are "unlawful combatants" and cannot invoke protection as prisoners of war under the 3rd Geneva Convention 1949.[48] The ICRC is in dispute with the US authorities over its

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45 For an extensive report see Amnesty International Annual Report 2002 and Human Right Watch, World Report 2002.

46 See supra note 34.

47 See the case of Moazzam Begg, a UK national held at Bagram, who has claimed in a letter to his father that he was seized in Pakistan and detained in Bagram Afghanistan in February 2002. The UK Foreign Office confirmed that despite continuing efforts its officials have been denied access to him. "Father fears for son held by US in Afghanistan", The Guardian Newspaper, 10 February 2002.

48 Geneva Convention III Relative to the Treatment of Prisoners of War, 75 U.N.T. S. 135 1949. See Rasul et. al. v. George Walker Bush, supra note 34, for the US position.

classification of these prisoners.[49] The US Government has rejected a request for precautionary measures to clarify the legal status of the detainees made by the Inter-American Commission on Human Rights. It argued that the Commission had no jurisdiction to consider the applicable law, the law of armed conflict.[50] In *Abassi* the United Kingdom Court of Appeal described their position as constituting a legal "black hole".[51] In effect they are victims of arbitrary detention. The experiences of some 1000 non-nationals detained in the United States under immigration rules in the aftermath of 11 September has also been characterised as arbitrary detention.[52]

A very different situation is that of Chechnya. The long running and brutal conflict has merged with the global war on terrorism, at least as far as the Russian authorities are concerned. The abuses of humanitarian law by both sides to the conflict are egregious and well known. But the international community's limited capacity to seek to monitor violations and encourage peaceful resolution has been undermined by the Government's decision to terminate the role of the regional organization, the Organisation on Security and Co-operation in Europe (OSCE). An OSCE Assistance Group has worked with the Russian authorities in Chechnya since 1995 in promoting human rights, investigating violations as well as helping refugees and other persons displaced by the conflict.[53] The mandate expired at the end of 2002. The Russian government refused to allow

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49 "There has been much public debate about whether the internees in Guantanamo Bay are prisoners of war or not. The ICRC thinks that the legal status of each internee needs to be clarified on an individual basis and has repeatedly urged the US to do this. In any case, the US has the right to legally prosecute any internee at Guantanamo Bay suspected of having committed war crimes or any other criminal offence punishable under US law prior to or during the hostilities". ICRC Update "Guantanamo Bay-one year on" 6-01-03 www.icrc.org.

50 In March 2002 the Inter-American Commission forwarded the request to the US Government. The petition had been submitted by the Centre for Constitutional Rights, see for full documentation www.crc.ny.org. The reply of the Government is published in XLI ILM 1015 (July 2002).

51 The Queen on the application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department [2002] EWCA civ. 1598, at para. 22, per Lord Phillips.

52 By Human Rights Watch, see "Presumption of Guilt, Human Rights Abuses of Post September 11 Detainees" "[T]he country has witnessed a persistent, deliberate, and unwarranted erosion of basic rights against abusive governmental power that are guaranteed by the US Constitution and international human rights law. Most of those directly affected have been non U.S. citizens" p. 3.

53 Established by Decision No. 35 of the Permanent Council, 11 April 1995.

the human rights work of the Assistance Group to continue.[54] No other OSCE state objected.

In the case of China, the decade long repression of ethnic Uighur people in the Xinjuang Uighur Autonomous Region was intensified after 11 September. According to Amnesty International, although there have been hardly any violent acts in recent years thousands of people were detained and new restrictions imposed on religious freedom and cultural rights. A number of 'separatists' were executed at "public sentencing meetings" in the months following 11 September. These measures were justified with the claim that 'ethnic separatists' were linked to international terrorists.[55]

1. HUMAN RIGHTS AND SECURITY COUNCIL RESOLUTION 1373

The unprecedented initiative of the Security Council in Res. 1373, requiring mandatory action against terrorism by all States, invoking Chapter VII of the Charter, should, but has not, resulted in parallel and similarly determined oversight by the international community of the human rights impact of measures taken by states.

The former and present UN High Commissioner for Human Rights pressed the Counter-Terrorism Committee of the Security Council to consider human rights. It was pointed out that the Counter-Terrorism Committee employed a number of experts to assist it in assessing reports from States under Resolution 1373, but none was a human rights expert. Both the former and new High Commissioner has addressed the CTC.[56] The Committee's position has remained that a human rights role was not within its mandate. The Committee has softened that position somewhat over time. Thus documents aimed at States reporting under Resolution 1373 providing advice on human rights dimensions of anti terrorism and emergency legislation, and prepared by the Office of the High Commissioner have been posted on the Committee's website.[57] The Chairman, Sir

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54 OSCE Chairman regrets end of OSCE Mandate in Chechnya, Press Release 3 January 2003, www.osce.org.

55 Amnesty International "China: Extensive Crackdown on Uighurs to counter "terrorism." must stop", AI Index: ASA /17/012/2002, 22 March 2002 .

56 See Counter-Terrorism Committee, documents, CTC website www.un.org and Annex VII.

57 Op. cit.

Jeremy Greenstock has instituted a relationship of co-operation with the High Commissioner, Sergio Vierra de Mello.[58]

2. 58TH UN HUMAN RIGHTS COMMISSION

In March 2001, in response to the position of the Security Council's Counter-Terrorism Committee, the then High Commissioner for Human Rights, Mary Robinson, proposed to the UN Human Rights Commission at its 58th annual session, that the Commission should take up a human rights protection role to operate alongside the Counter-Terrorism Committee of the Security Council.[59] What was envisaged was the creation of a mechanism, involving an independent expert to report to the Commission on human rights and terrorism concerns in the world. The idea was taken up with the energetic support of NGOs. However the resolution finally tabled (by Mexico) "Protecting Human Rights in Countering Terrorism" proposed that the High Commissioner's Office, and not a rapporteur, would analyze the effects of counter-terrorism measures on human rights and would provide advice to States and UN bodies on how to maintain human rights and fundamental freedoms whilst countering terrorism. It was co-sponsored by all EU states. It was ultimately withdrawn following a combination of disagreements involving Algeria and the United States.[60]

Mexico tabled a similar resolution before the General Assembly in New York in September 2001, which after a number of amendments, was passed without a vote. The High Commissioner for Human Rights is now mandated to:

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58 "Ambassador Greenstock said the CTC had discussed the four proposals of the High Commissioner for Human Rights (HCHR) for strengthening the CTC's interaction with the UN's human rights instruments. There had been no agreement on the principle of appointing a human rights advisor, therefore the CTC would not seek advice at this stage on possible Terms of Reference for such a position. The CTC would invite a representative of the Human Rights Committee to brief the CTC. The CTC had noted the OHCHR's intention to prepare a factual note of concerns in the area of human rights and Counter-Terrorism. Ambassador Greenstock also recalled that OHCHR was prepared to offer advice to member states who requested it; if States approached the CTC looking for advice in this area, the Technical Assistance Team (TAT) would direct them to the OHCHR Briefing of 14 November 2002.

59 Opening statement to the 58th Session Human Rights Commission, 18 March 2002, www.ohchr.org.

60 For an account see United Kingdom Foreign &Commonwealth Office Human Rights Annual Report, p. 71.

"a) examine the question of the protection of human rights and fundamental freedoms while countering terrorism taking into account reliable information from all sources;
b) make general recommendations concerning the obligations of States to promote and protect human rights while taking action in countering terrorism;
c) to provide assistance to States, upon their request, on the protection of human rights and fundamental freedoms while countering terrorism, as well as to relevant United Nations agencies."[61]

The General Assembly resolution requests that the High Commissioner report to the Commission on Human Rights, as well as to the General Assembly, through the Secretary General. This initiative is to be welcomed. It is an overdue recognition by UN members that human rights are at special risk in times of crisis. Despite the less than robust language, the High Commissioner and his Office has been given an important monitoring function on the impact of counter-terrorism measures as well as that of offering recommendations and advice. Nevertheless the case for an actual mechanism, such as an independent expert or rapporteur of the Secretary General or of the Commission on Human Rights remains compelling. Arguably the High Commissioner has been invited to do no more than is already within his mandate. The High Commissioner will submit the first report to the 59th session of the Commission. It is to be hoped that the argument for additional means of ensuring the salience of human rights and humanitarian standards, such as through a special rapporteur who can reinforce the imperative of upholding these standards in counter-terrorism actions, can be agreed.

3. *THE DRAFT UN COMPREHENSIVE TREATY AGAINST TERRORISM*

The United Nations Sixth Committee continues its protracted efforts to finalise a comprehensive convention against terrorism.[62] The definition issue, in particular the question of exclusion of struggle against "foreign occupation" from consideration as terrorism continues to stall progress. The opportunity presented through the drafting process of incorporating

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61 A/Res/57/219 on Protection of human rights and fundamental freedoms while countering terrorism, adopted 18 December 2002.

62 See Report of the Working Group A/C.6/56/L.9 and Michael Postl, supra.

direct obligations to uphold human rights and humanitarian law standards in combating terrorism is an important one to press.[63] The example of the Inter-American Convention against Terrorism which includes an operative provision to that effect, should be followed.[64] Article 15 of that Convention provides:

> Human rights
>
> 1. The 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.
> 2. Nothing in this Convention shall be interpreted as affecting other rights and obligations of states and individuals under international law, in particular the Charter of the United Nations, the Charter of the Organization of American States, international humanitarian law, international human rights law, and international refugee law.
> 3. Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including the enjoyment of all rights and guarantees in conformity with the law of the state in the territory of which that person is present and applicable provisions of international law.

4. *THE INTERNATIONAL CRIMINAL COURT*

A further positive development for the future lies in the strengthening of individual accountability through international criminal law. Under existing norms of international criminal law, the attacks in the United States of 11 September can be characterised as a crime against humanity – both because of the nature and scale of those attacks, and because they were directed against civilians.[65] The coming into operation of the permanent international criminal court will mean that international crimes of

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63 Human Rights Watch is lobbying for a human rights clause, see Commentary on the Draft Comprehensive Convention on Terrorism, Human Rights News 22 October 2001, www.hrw.org.

64 Inter-American Convention against Terrorism AG/RES. 1840 (XXXII-O/02), adopted 3 June 2002.

65 See the Rome Statute of the International Criminal Court, opened for signature 17 July 1998, reprinted in 33 ILM 999 (1998), art. 7; M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, 2nd ed. 1999, 240.

this nature can be punished either at national or international levels.[66] The Court will also have jurisdiction over violations of the laws of war whether committed by state or non-state actors. The future work of the Court can make a major contribution to the long-term prevention of terrorism and of gross violations of human rights in countering terrorism.

5. *THE ROLE OF EXISTING HUMAN RIGHTS PROCEDURES*

Meanwhile the existing international human rights machinery, regional and global, however limited its powers, must continue to investigate, monitor and report on the operation of counter-terrorism measures in terms of their impact on human rights and humanitarian law. The relevant 'special procedures', experts appointed by the UN Human Rights Commission to examine country and thematic human rights concerns, are committed to exercise vigilance.[67] At United Nations level, the Human Rights Committee will have a central and long-term role to play in ensuring vigilance over human rights standards during the current anti-terrorism campaign. It now has the function of pressing States that have ratified the ICCPR, a large majority of states, to integrate the advice contained in General Comment No. 29 into their counter-terrorism polices. There has now been agreement that the Chair of that Committee should meet with the Security Council Counter-Terrorism Committee.[68] Such initiatives can contribute to building the political will at international level and within countries that States abide by the human rights and humanitarian standards and ensure effective remedies for all whose rights are violated through counter-terrorism measures.

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66 The Rome Statute entered into force on 1 July 2002. As of 1 January 2003 139 States had ratified or acceded to the treaty.

67 In particular the Special Rapporteurs on Torture, on Migrants, and the Working Groups on Arbitrary Detention and Enforced and Involuntary Disappearances. See also the Joint Statement issued on Human Rights Day, on 10 December 2001 by 17 special rapporteurs and independent experts, reminding States of their obligations under international law to uphold human rights and fundamental freedoms in the aftermath of 11 September, in Annex I.

68 Briefing by Ambassador Jeremy Greenstock, Chairman of the CTC, 14 November 2002.

6. THE ROLE OF GLOBAL CIVIL SOCIETY

Established mechanisms and procedures in defense of human rights can be strengthened in their effectiveness through the expression of such international support. But at this juncture of serious challenge to the international human rights movement the likely most important contribution can be made by civil society. It has been human rights NGOs in all regions, that have provided most of the information on the abuse of human rights since 11 September, as well as proving the most effective defenders of those most at risk. There has been an enormous growth over the last several decades of independent organisations functioning at global, regional, national and local levels concerned not alone with human rights, but with humanitarian assistance, democracy, peace, the environment and human development.[69] For too long these organisations have worked in isolation one from the other. They should now work within an explicit common framework of values and goals that brings together all the purposes of the United Nations. The defense of human rights in this new era needs to explicitly embrace the cause of global social justice and human security. That requires concern with the sources of terrorism in human despair, poverty, powerlessness, discrimination and injustice. Human rights NGOs, without diluting their own focus on accountability and international human rights standards, need to make common cause with the other social movements. Such alliances can give emphasis to the prevention of conflict and terrorism through the prevention of human rights violations. They can also ensure concerted commitment to pressing governments on global social justice, through the fulfilment of such commitments as the UN millennium development goals. Development along with universal human rights protection can secure human security and thus the elimination of terrorism.[70]

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69 For the scale of these developments see Anheir at al, Global Civil Society Yearbook 2001 Oxford University Press.

70 These ideas were debated at an NGO Conference on Human Rights and Terrorism held in Cairo in January 2002, see Ashild Kjok (ed) "Terrorism and Human Rights after September 11, Towards a Universal Approach for Combating Terrorism and Protecting Human Rights" Cairo Institute for Human Rights Studies, Cairo, 2002; see also Wolfgang Benedek, Human Security and Prevention of Terrorism, infra.

National Anti-Terrorist Measures in the United Kingdom

TOM HADDEN

As might be expected the United Kingdom Government acted quickly in the aftermath of the attacks on 11 September to strengthen its already impressive armoury of legal measures against national and international terrorism. The appointment of the United Kingdom Ambassador to the UN, Sir Jeremy Greenstock, as chair of the United Nations Counter-Terrorism Committee was an additional incentive to set a "good example" to other countries. But there has been considerable controversy and criticism over the human rights implications of the principal new initiative, the detention without trial of non-national suspects who cannot be deported due to the risk that they might be tortured in their home states. Major concerns have been raised in respect of the open-ended derogation from art. 5 of the European Convention on Human Rights and the issue of discrimination on the ground of nationality. The nature and scope of these measures, however, can only be understood in the light of the extensive and long-standing legislation to deal with Irish and more recently international terrorism and the ensuing litigation over its operation.

I. MEASURES AGAINST IRISH TERRORISM

The initial British legislation[1] in respect of the emergency in Northern Ireland both under the Northern Ireland (Emergency Provisions) Acts 1973-1996 and the Prevention of Terrorism (Temporary Provisions) Acts 1974-89 was centred on a wide but simple definition of terrorism:

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1 Prior to the decision by the British Government in London to take direct control over Northern Ireland in 1972 the Unionist Government in Belfast had used a much wider power of internment without trial under which the Minister of Home Affairs could order the indefinite detention of any person if there were reasonable grounds to suspect he or she had acted or was about to act in a manner prejudicial to the preservation of the peace or maintenance of order; Civil Authorities (Special Powers) Act 1922-1933, Regulation 23.

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

> "Terrorism" means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.[2]

Under these statutes the Government was authorised to proscribe terrorist organisations[3] and in Northern Ireland to detain suspected terrorists without trial.[4] Membership of proscribed organisations, giving assistance or financing them and even failure to give information about terrorist incidents became serious criminal offences.[5] Suspected terrorists could be detained for interrogation for up to 7 days without judicial authority.[6] This measure was held to require a derogation from the European Convention on Human Rights in *Brogan v. United Kingdom*.[7] In Northern Ireland suspects could be tried before special non-jury courts, known as "Diplock Courts", under special rules of evidence.[8] A form of internal exile was also implemented: under "exclusion orders" suspected terrorists in Great Britain could be sent back to either Northern Ireland or the Irish Republic.[9]

The large number of cases brought before the European Court of Human Rights resulted in the introduction of some significant safeguards, such as the abandonment of "interrogation in depth" following the decision in *Ireland v. United Kingdom,*[10] a requirement of reasonable suspicion for arrest adopted following *Fox, Campbell & Hartley v. United Kingdom*[11] and most recently a requirement of more effective investiga-

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2 Northern Ireland (Emergency Provisions) Act 1996, p. 58; Prevention of Terrorism (Temporary Provisions) Act 1989, p. 20 (1).

3 Northern Ireland (Emergency Provisions) Act 1996, p. 30; Prevention of Terrorism (Temporary Provisions) Act 1989, p. 1.

4 Northern Ireland (Emergency Provisions) Act 1996, p. 36 & Schedule 3. Use of this measure required a derogation which was upheld in Ireland v. United Kingdom (1982) 4 European Human Rights Reports 40. The derogation was withdrawn when the use of internment without trial was abandoned in 1975 but the power to re-introduce by executive order was retained until 2000.

5 Northern Ireland (Emergency Provisions) Act 1996, pp. 30-31; Prevention of Terrorism (Temporary Provisions) Act 1989, pp. 2-3, 9-13 & 18.

6 Prevention of Terrorism (Temporary Provisions) Act 1996, p. 14.

7 11 European Human Rights Reports 117 (1989); the derogation was duly entered and upheld in Brannigan & McBride v. United Kingdom (1993) 17 European Human Rights Reports 539.

8 Northern Ireland (Emergency Provisions) Act 1996, pp. 1-16.

9 Prevention of Terrorism (Temporary Provisions) Act 1989, pp. 4-8.

10 (1982) 4 European Human Rights Reports 40.

11 (1990) 13 European Court of Human Rights 157.

tion of disputed killings by state forces following the decision in *Jordan v. United Kingdom.*[12] But in most cases the Government successfully defended its right to use these special measures, and to maintain any derogation held to be necessary under the European Convention on Human Rights.

No final judgment on the effectiveness of this anti-terrorist legislation is possible. Some aspects of the system and the abuses which occurred under it undoubtedly contributed to the sense of alienation among those opposed to British rule in Northern Ireland and thus to escalation of the conflict. Others made a significant contribution to the containment of the IRA campaign and the loyalist terrorist activity which accompanied it. But it did not result in the elimination of either republican or loyalist terrorist activity. The major contributor to the decline in terrorism related to the conflict in Northern Ireland, though not as yet its complete elimination, has been the political negotiations aimed at dealing with the underlying causes of the conflict.

II. MEASURES AGAINST INTERNATIONAL TERRORISM

Following the peace deal in Northern Ireland the United Kingdom Government introduced more permanent legislation against international as well as Irish terrorism.[13] Under the Terrorism Act 2000 a much wider definition of terrorism has been adopted, which may be summarised as follows:

> The use or threat of action designed to influence the government or to intimidate the public or a section of the public and for the purpose of advancing a political, religious or ideological cause where it involves serious violence against a person or serious damage to property, endangers a person's life other than that of the person committing the action, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or disrupt an electronic system.[14]

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12 European Court of Human Rights, 4 May 2001.

13 See the Lloyd Report. Inquiry into Legislation Against Terrorism (Cm 3420) (1996) and the Government's Consultation Paper Legislation Against Terrorism (Cm 4178) (1998).

14 Terrorism Act 2000, s. 1; where firearms or explosives are threatened or used it is not necessary to prove an intention to influence government or intimidate the public.

This formulation has been widely criticised on the ground that it could be applied to many actions that would not normally be regarded as terrorism, notably certain forms of industrial strike action that might threaten the health or safety of the public. It has also been argued that the potential for abuse is such that the legislation breaches the European Convention on Human Rights. The Government has responded that a breach can only be claimed if and when the powers are actually used in an abusive way and that the mere possibility that the definition could be applied to industrial strike action is not sufficient to make the legislation incompatible with the Convention.

As before a wide range of special powers are applicable to actions falling within the definition. There is provision for the proscription of terrorist organisations.[15] Membership, financing and other forms of support for proscribed organisations (including "inviting support") are criminal offences.[16] The powers of search and arrest for interrogation for up to seven days have been retained, though the need for a derogation from the European Convention on Human Rights has been avoided by the introduction of a form of judicial authorisation.[17] The "port powers" which permit the detention for questioning of suspected terrorists at all ports and airports, notably those between Great Britain and both parts of Ireland[18], have also been retained, though internal exclusion orders have not. New powers to authorise the seizure of terrorist property (including property which may be likely to be used for terrorism)[19] and to impose temporary cordons around potential target areas such as the City of London[20] have been added. The most significant improvement from a human rights perspective has been the extension of powers of judicial review of proscription and detention[21], thus removing the need for any derogation from the European Convention on Human Rights.

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15 Ibid., p. 3.

16 Ibid., pp. 11-13.

17 Ibid., p. 41 & schedule 8.

18 Ibid., p. 53 & schedule 7.

19 Ibid., pp. 14-31.

20 Ibid., pp. 33-36.

21 Ibid., pp. 4-8 & schedule 8, part 3.

III. ADDITIONAL MEASURES IN THE AFTERMATH OF THE ATTACKS ON 11 SEPTEMBER

The new measures introduced under the Anti-Terrorism, Crime and Security Act 2001 rely heavily on those in the Terrorism Act 2000. The most significant and controversial are the powers to deport aliens suspected of involvement in international terrorism and to detain without trial those who cannot be deported because they may face death or torture in their home countries.[22] It is in respect of these provisions that the United Kingdom has entered a derogation to article 5 of the European Convention on Human Rights. In addition new powers have been introduced to freeze the assets of any person reasonably thought by the Treasury to be likely to take action to the detriment of the United Kingdom economy or to constitute a threat to the life or property of a United Kingdom national.[23] It should be noted that these powers are not limited to those suspected of terrorism. There are also extensive measures to improve security in respect of potential biological weapons and other potential weapons of mass destruction.[24]

The new powers to deport suspected terrorists or to detain them without trial if that is not possible have been formulated as extensions to the existing legislation on immigration and asylum rather than terrorism. But they have been carefully drafted to ensure at least formal compliance with the European Convention on Human Rights. Both the certification of any person as a suspected international terrorist and his or her deportation or detention may be contested in a specially established court, the Special Immigration Appeals Commission.[25] So too may any relevant derogation from the European Convention on Human Rights.[26] This brings into operation new provisions to allow representation to be made by special advocates who are to be given access to "closed" security information.

The power to detain indefinitely without trial non-nationals suspected of involvement with terrorism has been used against 14 persons (as of 24 February 2004) and has been the subject of two recent court decisions. In the initial proceedings before the Special Immigration Appeal

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22 Anti-Terrorism, Crime and Security Act 2001, pp. 21-23.

23 Ibid., pp. 4-14.

24 Ibid., pp. 43-88.

25 Ibid., pp. 21-27.

26 Ibid., p. 30.

Commission it was held on the basis of submissions on both "open" and "closed" security material that the derogation could be justified on the ground that there is a special threat to the United Kingdom as opposed to other European countries, but that the restriction of this power to non-nationals was discriminatory on the grounds of nationality and could not be justified as proportional for the purposes of the European Convention.[27] This finding of discrimination was subsequently overruled by the Court of Appeal on the ground that it was legitimate under international law to differentiate between nationals and non-nationals; the court held that the fact that nationals suspected of involvement in terrorism but against whom there was not sufficient evidence to support a criminal trial might have to be released did not of itself remove the justification for the detention of non-nationals.[28] This issue will almost certainly be pursued to the European Court of Human Rights which may take a stricter view of the justification for what may turn out to be an indefinite derogation. The use of a derogation in this context has already been the subject of widespread criticism, not least by the Secretary-General and Human Rights Commissioner of the Council of Europe. The Court may find it more difficult on its current case-law, however, to take a different view on the issue of discrimination.

IV. ISSUES OF CONTINUING CONCERN

This brief account of developments in the United Kingdom raises a number of related issues of concern from a human rights perspective:

- the very wide definition of terrorism in the Terrorism Act and related offences, potentially covering activities far beyond the ordinary concept of terrorism;
- the use of a derogation on a more or less open-ended basis to legitimise indefinite detention in contravention of normal human rights principles;
- the complex and confusing interrelationship between national and international rules on immigration/asylum and terrorism (the *Chalal* gap);

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27 A & Others v. Secretary of State for the Home Department, Special Immigration Appeals Commission, 30 July 2002.

28 A & Others v. Secretary of State for the Home Department, Court of Appeal, 25 October 2002.

- problems over extra-territorial protection of human rights standards (the *Bankovic* gap);
- the absence of any linkage between anti-terrorist measures and the need to address the underlying causes.

V. THE WIDE DEFINITION OF TERRORISM AND RELATED OFFENCES

The very wide definition of terrorism and related criminal offences in the British legislation, as in many other jurisdictions, gives a high degree of discretion to security authorities to arrest, question and to detain for lengthy periods, pending trial or deportation, anyone suspected of even peripheral involvement in or association with terrorist activity. Despite the incorporation of the European Convention on Human Rights into United Kingdom law, however, the breadth of the legislation cannot be effectively challenged either in national or international courts until it has been abused in a specific case. A mechanism by which the European Court of Human Rights and/or the Secretary-General of the Council of Europe could review the formulation of contested legislation rather than its application in individual cases is needed.

VI. THE USE OF A DEROGATION ON A MORE OR LESS OPEN-ENDED BASIS

As international terrorism seems likely to become a more or less permanent threat, there is a danger that governments under pressure from security agencies will resort to more or less permanent derogations from their normal obligations under human rights conventions. The wide margin of appreciation hitherto granted to governments on issues of national security makes this difficult to challenge. More stringent criteria by which the reality and duration of threats of this kind could be assessed need to be developed.

VII. THE COMPLEX AND CONFUSING INTERRELATIONSHIP BETWEEN NATIONAL AND INTERNATIONAL RULES ON ASYLUM, IMMIGRATION AND TERRORISM

The established rules under the Refugee Convention on the denial of refugee status to those seriously suspected of an international crime, and the exemption to the principle of non-refoulement, and thus the possibility of deportation, in cases where there are reasonable grounds to suspect a threat to national security do not always give a clear signal to national governments on what is and what is not permissible. The British Government has used the additional prohibition of deportation in cases where there is a risk of torture or killing in the country of origin, following the decision in *Chahal v. United Kingdom*[29] and other cases, as the primary justification for its derogation in respect of indefinite detention in such cases. The uncertain status of asylum seekers in advance of a formal decision on the grant of refugee status in many jurisdictions often adds to this confusion, notably in respect of whether extended detention in such cases can be justified.[30] Some further consideration and guidance on what should be done in respect of individuals who can legitimately be denied refugee status because of a reasonable suspicion of involvement in terrorism is urgently required to plug what might be called the Chahal gap.

VIII. PROBLEMS OVER EXTRA-TERRITORIAL PROTECTION OF HUMAN RIGHTS STANDARDS

There is a further problem in respect of the extra-territorial protection of human rights. The decision in *Bankovic v. Belgium et. al.*[31] in respect of the NATO bombing in Belgrade has highlighted a significant gap in the coverage of the European Convention in respect of the activities of members of the armed forces or security agencies of member states in areas where they do not exercise full control. A similar difficulty in respect of alleged abuses by foreign soldiers and police officers in Kosovo has been

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29 (1997) 23 European Human Rights Reports 413.

30 In Regina (Saadi) v. Secretary of State for the Home Department (2002) 1 Weekly Law Reports 3131 the House of Lords held that asylum seekers could legitimately be held in detention for a reasonable period while their application cases were being considered and that it was not necessary to establish that there was a risk that they might abscond.

31 European Court of Human Rights, 12 December 2001.

raised by the Office of the Ombudsman there. The decision of the British Court of Appeal in *Regina (Abassi) v. Secretary of State for Foreign Affairs*[32] that no action could be taken in respect of British subjects detained by United States in Guantanamo Bay in Cuba raises further concerns. Urgent consideration and action is required to plug what may be called the Bankovic gap, if the essential principles of human rights conventions are to be effectively protected in such circumstances, notably those arising from multi-national interventions.

IX. THE ABSENCE OF ANY LINKAGE BETWEEN ANTI-TERRORIST MEASURES AND THE NEED TO ADDRESS THE UNDERLYING CAUSES OF TERRORISM

A more general problem is the absence of any direct incentive under the principles of human rights law to address the underlying causes of any outbreak of terrorism. The criteria for assessing the legitimacy of anti-terrorist measures and any related derogations are focused almost exclusively on the threat posed by terrorist organisations. Governments and security authorities are not required to give any account of what action, if any, has been taken to deal with issues of inequality, discrimination or controversial or aggressive foreign policies which may lie behind or contribute to the resort by their opponents to terrorism. Experience in Northern Ireland and elsewhere, however, suggests that measures against the threat of national or international terrorism are unlikely to be fully effective in the absence of appropriate political action to deal with legitimate grievances or double standards in dealing with national unrest or international crises. If this is accepted, as many contributors to the colloquium did, there is clearly a need for the development of international standards and guidelines that focus on this relationship. One possibility would be to include the adoption of appropriate measures to deal with underlying problems as one of the criteria in assessing the legitimacy of any derogation from the main human rights conventions.[33] Another would be to re-

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32 The Times, 8 November 2002: the court expressed its concern over the fact that a British subject was being subjected to indefinite detention in territory over which the United States had exclusive control with no opportunity to challenge the legitimacy of his detention.

33 This suggestion is developed in greater detail, in: T. Hadden, "Human Rights and the Protection of Democracy during States of Emergency", in: Cotran & Sherif (eds) Democracy, the Rule of Law and Islam, Kluwer 1999, pp. 111-131.

quire States to make regular reports on the measures they have adopted in response to the reference to "long term measures with a view to preventing the causes of terrorism" in paragraph (h) of the Preamble to the Council of Europe *Guidelines on Human Rights and the Fight Against Terrorism* and in the format for reports to the United Nations Security Council under Resolution 1373.[34]

[34] See Annexes X and IV.

Anti-Terrorist Measures of Greece

ALICE YOTOPOULOS-MARANGOPOULOS

I.

The events of 11 September 2001 found Greece with recently-adopted legislation addressing terrorist acts. To be more specific, I am referring to Law 2928/2001, based on the UN Convention against Transnational Organized Crime (Palermo Convention).

The initial Bill was made public by the Government on 2 February, 2001, and was open to amendments, especially on the basis of the written views and comments of the Greek National Committee for Human Rights – whose President, that is myself, was also invited to orally express her opinion thereon before the Greek Parliament –, of the Greek Bar Association, of the Union of Greek Penalists and other experts. On 3 March, 2001 the bill was submitted to Parliament, which adopted it after long discussion. It was then published in the Official Gazette on 27 June, 2001.

The proposed amendments, some of which were adopted in the final text of the Bill, were primarily aimed at the least possible restriction of the rights of persons suspected or accused of participation in and the commission of crimes, as members of a gang. However, it was generally agreed that there was indeed a need to address organized – often transnational – crime with more rigorous and effective measures than heretofore. It was recognized that in modern societies the bulk of criminal activity takes this form, resulting in a tremendous increase of crime victims, while the perpetrators, particularly the ringleaders, remain invisible and unpunished.

The question was raised whether terrorist acts are covered by the provisions concerning gangs, who mostly have lucrative aims whereas terrorist organizations normally do not. In the end, the Greek law dealt with the issue in the same way as the Convention of Palermo: from the Explanatory Report of the Minister of Justice, it is clear that the provisions of the law also cover terrorist organizations and acts.

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Law 2928/2001 amends certain specific provisions of the Penal Code and the Code of Penal Procedure.

As indicated in the Minister of Justice's Explanatory Report, the primary concern of the law was to ensure "respect of the rights of the citizens guaranteed under the Constitution together with security that citizens must enjoy in a democratic society, which (security) concerns also human rights and their protection".

So in all cases where it is considered that the right of all citizens to security is violated by criminal acts committed by gangs and where no effective protection can be offered to all citizens, an additional restriction of the personal freedoms of the alleged offenders is provided for. However, in comporting with the principle of proportionality, this restriction is counterbalanced with more extended and specific judicial guarantees.

II.

The main provisions of Law 2928/2001 are the following:

1. The basic crime (felony) is the establishment of and participation in an organization with the aim of systematically committing one or more of the specific crimes mentioned in article 1 of the Law, (that is the new article 187 of the Penal Code), namely, those which are set out in articles 207 (forgery), 208 (setting into circulation forged banknotes), 216 (forgery), 218 (forgery and abuse of stamps), 242 (false attestation, falsification), 264 (arson), 265 (arson in woods), 268 (floods), 270 (explosions), 272 (offences regarding explosive materials), 277 (shipwrecks), 279 (poisoning of springs and food), 291 (disruption of railways, water transportation and aviation security), 299 (premeditated murder), 310 (seriously bodily injury), 322 (abduction), 323 (trafficking of slaves), 324 (abduction of minors), 327 (kidnapping), 336 (rape), 338 (abuse in indecent assault), 339 (seduction of children), 374 (aggravating circumstances of theft), 375 (defalcation), 380 (robbery), 385 (extortion), 386 (fraud), 386A (fraud through computer), 404 (usury), and other crimes that are also felonies, such as are set out in the legislation on drugs, arms, explosive materials and protection from materials that emit radiation harmful to human beings. It is self-evident that the members of a gang who participate in the commission of one or more of these crimes, face the penalty provided for each committed crime as well. In the end, the

aggregate penalty for each perpetrator is determined according to the provisions for concurring offences.

2. According to article 1 (paragraph 4 of the new article 187), the manufacturing, supply or possession of arms, explosive materials and chemical or biological materials or materials which emit radiation harmful to human beings, with the purpose of using them for the commission of the above-mentioned crimes, as well as the pursuit by the members of the gang of lucrative or other material benefits, constitutes aggravating circumstances.

On the other hand, the fact that a gang has not yet committed any of the projected crimes constitutes a mitigating circumstance.

3. The provisions of article 2, which had raised objections providing for a lenient treatment of the member of the gang who facilitates the prevention of crimes and the suppression of the gang, proved in retrospect to be effective in practice. The law provides that if a member of a gang makes possible the prevention of one of the projected crimes by alerting the authorities, or if he/she substantively contributes in the same way to the suppression of the gang, he/she is acquitted for his/her participation in or establishment of the gang. Such a person, though, does not enjoy impunity with respect to the commission of a crime included in the planned activity of the gang. In such a case, a reduced penalty shall be imposed. All the above provisions are applied on the condition that the accusations against the co-members of the gang are proven reliable.

According to article 2 (paragraph 4 of the new article 187A), on the basis of the principle of proportionality, persons who denounce actions of organized crime, who are themselves in an illegal status as a result of violating legislation concerning foreigners (i.e. foreigners who are illegally in Greece and are victims of sexual exploitation by an organized criminal group), not only are not punished for their illegal stay in the country but they also can obtain a residence permit after a reasoned order of the Prosecutor of the Court of First Instance, approved by the Prosecutor of the Court of Appeals.

4. Article 4 provides that the competent court for the trial of crimes falling within the purview of the law is the Three Member Court of Appeal, in the first instance, and the Five Member Court of Appeal in the second instance. The Greek National Committee for Human Rights and the Bar Association of Athens argued in favour of the competence of mixed courts (consisting of judges and a jury). The arguments of these institutions were: i) as the number of victims of organised crime is much

larger than that of ordinary criminality, there is a stronger reason not to exclude a jury representing citizens; ii) in a time of promotion of a citizens' society, restriction of the participation of the jury goes to the opposite direction. In the end, the opinion that prevailed was that a court consisting purely of judges, and moreover, judges of the Court of Appeal, provided greater guarantees for the accused.

5. Article 5 contains detailed provisions about DNA analysis of the accused and introduces a new related article (article 200A) to our Code of Penal Procedure.

DNA analysis is allowed only under an order of the competent judicial council and only for the purpose of discovering the identity of the perpetrator if there are serious indications of a felony by use of violence or sexual abuse. The analysis is compulsory if the accused requests it in order to prove his innocence.

In any case, after the criminal trial in a case, the genetic material and the respective data must be destroyed (new article 200A, para. 3).

6. Article 7 provides that the Council of the Judges of the Court of Appeal is the competent body for concluding the main investigation relating to the felonies mentioned in article 1 (new article 187 of the Penal Code) and for deciding whether or not the suspect shall be brought to trial. As for the duration of detention of persons expecting trial, the general provisions of the Constitution and of the penal legislation apply here as well.

7. The provision of article 8 about the "penal" responsibility of the legal entities is very interesting, especially as regards corporations who are involved in transactions of organized crime (i.e. money-laundering etc.).

In the first place, the "penalties" provided are only of a financial nature (payment of money or suspension of the functioning of the operation for a certain period of time).

The law provides for the expansion of the scope of these provisions even to enterprises which are not legal entities (personal enterprises).

If there is no penal conviction already acknowledging the guilt of an executive of the legal entity, it is evidently the administrative courts that are competent to decide on the legal and justified imposition of penalties.

It is interesting, I think, that according to the law the severity of the penalty depends on the size of the acquired profit and on whether the legal entity was aware of, or whether it negligently ignored, the criminal origin of the profit. In the first case, of course, the penalty is more severe.

8. Another important issue is the protection of witnesses who are in great danger, as well as of members of the gang who may have informed against other members of the same gang. Their protection by specialized staff is considered necessary. The need for transfer or classification in another service of civil servants may further be reasonable. Other protective measures of different kinds can also be applied.

9. The question of whether the disclosure of the real name of a witness should be compulsory was much debated. In the end, the legislation concluded that disclosure must be made if the accused or the prosecutor so requests (article 9). In any case, if the name is not revealed, the testimony of the witness is not sufficient for conviction of the accused.

10. Article 10 introduces for the first time protective measures for judicial officials who investigate or examine a case (unfortunately in the past, there have been some cases of judicial officers who were victims of organized interests in Greece).

III.

After 11 September 2001, no additional measure was taken by the Greek state. On the contrary, law 2928/2001 was successfully put to the test for the suppression of the terrorist organization "17 November". It was effected without violating the rights of the arrested persons suspected or accused of participation in a terrorist gang and of commission of one or more crimes which article 1 of the new law proclaims as being objects of the activity of gangs.

That is why we maintain that no further restriction of the human rights of citizens (suspects, accused etc. for terrorist acts) is necessary, and consequently, any further restriction is, according to a basic principle of penal law, inadmissible.

Most importantly, we consider that the rules of habeas corpus and the principle of a fair trial – which are conquests of long and bloody struggles and are among the basic principles of democratic regimes and are set out as far as Europe is concerned in article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms – must not be suppressed on the pretext of antiterrorist measures. Even less, of course, is it allowed to have recourse to war, which suppresses the human rights of civilians of an entire country to a far greater extent than any possible ter-

rorist act. Furthermore, recent events have shown that terrorism is intensified by war used as an antiterrorist measure.

Already, 17 special rapporteurs and independent experts of the Commission on Human Rights have "expressed their deep concern over anti-terrorist and national security legislation and other measures adopted or contemplated that might infringe upon the enjoyment by all of their human rights and fundamental freedoms."[1] Certainly the most important and frightening threat to human rights is the plan of preventive wars against the "axis of evil" that has been announced and already put into practice. The first of a series – so it seems – of preventive wars is finished, leaving behind thousands of dead bodies and a devastated country. The attack against Iraq clearly showed that terrorism provided the attackers with a pretext to achieve their real economic and strategic goals and the opportunity to ensure their sovereignty at both a national and international level by restricting, or even suppressing, human rights. War suppresses all human rights, creates more bodies than any terrorist action and certainly gives birth to more terrorist attacks. It certainly cannot be considered as an effective measure to combat terrorism. Recently, on 18 December 2002, the UN General Assembly adopted Resolution 57/216 on the promotion of the right of peoples to peace. It is more than obvious that such a right cannot be respected if the above-mentioned plan of preventive wars against terrorism continues.

Before closing, we should keep in mind the two recent framework decisions of the European Union, binding on all its Member States – one on combating terrorism and the other on the European arrest warrant. But these important documents fall within the subject of antiterrorist measures taken by the European Union, already presented by another speaker.

I have to mention that Greece has ratified 12 international instruments and one European, which address various specific aspects of the terrorist problem. These instruments are:

- 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft;
- 1970 Convention for the Suppression of Unlawful Seizure of Aircraft;

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[1] See Annex II: Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights (Mary Robinson) and Follow-Up to the World Conference on Human Rights, UN Doc. E/CN.4/2002/18 of 27 February 2002.

- 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;
- 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;
- 1979 International Convention against the Taking of Hostages;
- 1980 Convention on the Physical Protection of Nuclear Material;
- 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971;
- 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
- 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf;
- 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection;
- 1997 International Convention for the Suppression of Terrorist Bombings;
- 1999 International Convention for the Suppression of the Financing of Terrorism[2]; and at European level;
- 1977 European Convention on the Suppression of Terrorism.[3]

The International Convention on Suppressing the Financing of Terrorism, recently ratified by Greece (Off. Journal A 168/19.7.2002), establishes a new crime that may be committed in several expressly mentioned ways, and imposes on States parties to the Convention obligations to take legislative measures regarding this problem as well as the punishment of all forms of this crime.

We have already mentioned that the Greek legislation to combat terrorism has proved sufficient and effective. According to the general principles of criminal law, the imposition of heavier punishment or more re-

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2 For the texts of these instruments see the website on "UN action against terrorism": www.un.org/terrorism. See also the presentation by Christiane Bourloyannis-Vrailas "United Nations Human Rights Standards as Framework Conditions for Anti-Terrorist Measures".

3 On 15 May 2003 the Protocol amending the European Convention on the Suppression of Terrorism was adopted, it is not yet ratified by Greece. For the texts of these instruments see www.conventions.coe.int.

strictions of the human rights of suspects or accused than are strictly necessary are prohibited. Nevertheless, the recent draft Agreements on Extradition and on Mutual Assistance between the European Union and the United States of America create serious dangers of much harsher treatment of European persons – including Greeks, of course – who are suspected by the USA of having links with terrorism.

The new agreements transgress human rights guaranteed by international and national law – particularly the Constitution. Firstly, the extradition agreements concern even offences punishable by less than one year's deprivation of liberty, if there exists a concurrent charge of a more serious act carrying a sentence of more than one year (article 4, par. 2) – that is, not even grave criminal acts. The Agreements on Extradition should absolutely exclude the surrender of persons to countries whose legislation recognizes and applies the death penalty or where torture or inhuman or degrading treatment is inflicted.[4] Both, generally, occur in the USA in respect of persons accused of or convicted for involvement in terrorist activities.

In addition, given the procedures applied to persons suspected of terrorism in the USA, European citizens extradited to the USA confront abolition of other fundamental rights, beginning with habeas corpus and fair trial.[5]

I think it useful to point out that the reference in the text of the agreements to the possibility that the requested State can refuse the extradition or ask for guarantees, provided in international and national instruments, is without practical meaning. In view of the fact that none of the 15 countries dared to explicitly exclude extradition to a requesting State that may impose the death penalty or inflict torture, inhuman or degrading treatment, is it possible that during the implementation of the Agreement a single country will dare to refuse extradition in a concrete case?

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4 Art. 3 of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Art. 19 para. 2 of the E.U. Charter of Fundamental Rights and the Council of Europe Guidelines on Human Rights and the Fight Against Terrorism, 15.7.2002, part XIII. See also the jurisprudence of the European Court of Human Rights relevant to death penalty considered by the Court under article 3 ECHR (prohibition of torture); Soering v. UK, Judgment of 7 July 1989; Chahal v. UK, Judgment of 15 November 1996 and Cruz-Varas v. Switzerland, Judgment of 20 March 1991.

5 See below our Concluding Thoughts.

We think that we have to mention article 17, para. 2 of the Agreement on the Extradition, which provides: "Where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfillment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States". That means that a "bargaining" discussion between requesting and requested States should follow, aiming at the transgression of the Constitution (!) by the ensuing surrender of a citizen by his/her own country.

Finally, we must mention that general extradition agreements between the contracting States already exist. All the above points are sufficient to demonstrate that a substantial deterioration of the legal status of Europeans and their prosecution as suspects of terrorism under the above Agreements is *totally unnecessary.* Consequently, these new Agreements must be considered as unacceptable.

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U.S. Measures against Terrorism: The Civil Rights Impacts

SUSAN M. AKRAM AND KEVIN R. JOHNSON

After the tragic events of 11 September 2001, including the hijacking of four commercial airliners for use as weapons of mass destruction, the United States went to "war" on many fronts, including but not limited to military action in Afghanistan. War in Iraq followed not long after, despite the fact that no link had been established between the events of 11 September and that nation.

Heightened security and an intense criminal investigation in the United States followed 11 September. Almost immediately after the tragedy, Arabs and Muslims, as well as those "appearing" to be Arab or Muslim, were subject to crude forms of racial profiling. Airlines removed Arab and Muslim passengers from airplanes and subjected them to special security procedures. Hundreds of anti-Arab, anti-Muslim hate crimes, up to and including murder, were committed after 11 September. The Federal Bureau of Investigation (FBI) reported that hate crimes against Arabs and Muslims rose 1,600 % during 2000-01.[1]

This chapter analyses the United States response to the 11th's September horrific loss of life and the civil rights impacts of the measures taken in the name of national security. The "war on terror" has resulted in across-the-board civil rights deprivations. Arabs and Muslims noncitizens were the initial targets. However, the security measures also have affected all immigrants – and, for that matter, U.S. citizens as well.

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1 See Bill Ong Hing, Vigilante Racism: The De-Americanization and Subordination of Immigrant America, 7 MICHIGAN JOURNAL RACE & LAW 441 (2002); Ken Ellingwood & Nicholas Riccardi, Arab Americans Enduring Hard Stares of Other Fliers, L.A. TIMES, 20 September 2001, at A1; American-Arab Anti-Discrimination Committee Fact Sheet: The Condition of Arab Americans Post-9/11, available at http://www.adc.org/indez.php?id=811&type=100; www.fbi.gov/ucr/01hate.pdf_(last visited 25 April 2003); Laurie Goodstein & Tamar Lewin, Victims of Mistaken Identity, Sikhs Pay a Price for Turbans, N.Y. TIMES, 19 September 2001, at A1; Richard Serrano, Assaulting Against Muslims, Arabs Escalating, L.A. TIMES, 28 September 2001, at A1.

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

I. HISTORICAL BACKGROUND

The United States has a long history of violating the civil rights of immigrants and citizens in the name of national security. The regulation of political ideology of immigrants dates at least as far back as the Alien and Sedition Acts of the 1790s. Harsh actions directed at "anarchists" and "communists" during the Red Scare following World War I and the McCarthy era are well known. In addition, immigrants of color often have been punished brutally because they were perceived threats to the social order.[2]

Non-citizens historically have been the most vulnerable to civil rights deprivations in times of concern over national security, in no small part because the law permits, and arguably encourages, extreme governmental conduct with minimal protections for the rights of non-citizens. U.S. courts have been reluctant to disturb the decisions of the President on matters of national security, especially when the rights of non-citizens are at stake.

The current treatment of Arabs and Muslims in the United States fits comfortably into a long history of concerted efforts by the U.S. government to stifle political dissent in the name of national security. This historical moment is especially troubling because of the possibility – exemplified by the internment of the Japanese during World War II[3] – that racial, religious, and other differences could fuel the animosity toward Arabs and Muslims.[4] Long before 11 September, demonization of Arabs and Muslims negatively influenced the evolution of the law and encouraged harsh governmental efforts to remove Arabs and Muslims from the United States. Arabs and Muslims, for example, were targeted for special procedures, including arrest and detention, only to face de-

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2 See generally Kevin R. Johnson, The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons For Citizens and Non-citizens, 28 ST. MARY'S LAW JOURNAL 833 (1997); Kevin R. Johnson, Race, The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness, 73 INDIANA LAW JOURNAL 1111 (1998).

3 See Korematsu v. United States, 323 U.S. 214 (1944) (upholding internment of persons of Japanese ancestry during World War II).

4 See Natsu Taylor Saito, Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists," 8 Asian Law Journal 1, 11-26 (2001).

portation hearings in which the government sought to eject them from this country based on secret evidence not revealed to them.[5]

Vigorously denying that the federal government is waging a war on Islam or discriminating on the basis of race, President Bush has claimed that the government is simply focusing on persons from nations that harbor terrorists. In the past, the courts have permitted the federal government to employ national origin classifications for foreign policy and national security reasons. However, in those cases, the government focused on nationals of one or a few nations, not many different ones with the one uniting characteristic between the nations being religion. Consequently, the security measures taken after 11 September go well beyond the ordinary national origin classifications used in the past. They are much broader in scope and thus more of a threat to civil rights of law-abiding citizens and non-citizens.

II. THE IMMEDIATE IMPACTS OF THE "WAR ON TERROR" ON CIVIL RIGHTS

The federal government responded with ferocity to the events of 11 September. Hundreds of Arab and Muslim non-citizens were rounded up as "material witnesses" in the investigation of the acts of terrorism. Many non-citizens were detained on relatively minor immigration violations. Congress swiftly passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act),[6] which, among other things, allowed the government the authority to detain suspected non-citizen "terrorists" for up to a week without charges, bolstered federal law enforcement surveillance powers over citizens and non-citizens, and amended the immigration laws to substantially expand the definition of "terrorist activity." President Bush issued a military order allowing alleged non-

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5 See Susan M. Akram, Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion, 14 GEORGETOWN IMMIGRATION LAW JOURNAL 51 (1999).

6 Public Law No. 107-56, 115 Statutes at Large 272. For criticism of the Act, see David Cole, Enemy Aliens, 54 STANFORD LAW REVIEW 853, 966-74 (2002) and David Cole, The New McCarthyism: Repeating History in the War on Terrorism, 38 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 1 (2003); see also Thomas W. Joo, Presumed Disloyal: Wen Ho Lee, War on Terrorism and Construction of Race, 34 COLUMBIA HUMAN RIGHTS LAW REVIEW 1 (2002).

citizen terrorists, including those arrested in the United States, to be tried in military courts with few guaranteed rights.[7]

Existing U.S. law affords considerable leeway to the political branches of the federal government in regulating immigration. Invoking the so-called plenary power doctrine, the U.S. Supreme Court has upheld immigration laws discriminating against non-citizens on the basis of race, national origin, and political affiliation that would patently violate the Constitution if the rights of citizens were affected.[8] Plenary power of the federal government over immigration increases exponentially when, as in the case of international terrorism, perceived foreign relations and national security matters are at stake.

The law supporting much of the immigration and civil rights incursions of the U.S. government's security measures, including the plenary power doctrine, has been subject to sustained scholarly criticism.[9] Indeed, in important ways, the law in this area ignores a constitutional revolution that occurred over the latter half of the twentieth century. Nonetheless, the administration of President Bush has relied on the vast discretion afforded by the law in its domestic responses to the fear of terrorism.

The ripple effects of national security measures in the end likely will adversely affect many more people than simply Arabs and Muslims. Immigration laws have been tightened for all immigrants. For example, many non-citizens, including many Mexican immigrants, have been deported from the country as the verification of identities has no less than terrorized the undocumented immigrant community.

1. DRAGNET

Within weeks of 11 September 2001, the U.S. government arrested and detained almost 1,000 people as part of the Justice Department's investigation into the attacks. In the end, the federal government has never claimed that this mass dragnet of Arab and Muslim non-citizens

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7 See Military Order of Nov. 13, 2001, 66 Federal Register 57833 (16 November 2001).

8 See, for example, Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding deportation of immigrants based on their political views); The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581(1889) (upholding law prohibiting Chinese immigration).

9 See, for example, Gerald L. Neuman, Strangers to the Constitution (1996); Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 SUPREME COURT REVIEW 255.

produced any direct links to the terrorist acts. Some non-citizens were charged with minor crimes and many more were held in custody on immigration-related matters, such as having overstayed their temporary non-immigrant visas.[10]

As the next step in the widening investigation, the Justice Department proceeded to interview about 5,000 men – almost all of them Arab or Muslim – between the ages of 18-33 who had arrived on non-immigrant visas in the United States since 1 January 2000. The government never suggested that there was evidence that any of the thousands of people had been involved in terrorist activities. Although the federal government claimed that the interviews were voluntary, the interviews with law enforcement authorities undoubtedly felt compulsory to many non-citizens who considered deportation from the United States a distinct possibility if they refused to cooperate. Arab and Muslim fears of the federal government were reinforced by the much publicized November 2001 arrest and later deportation of Mazen Al-Najjar, who before 11 September had been jailed for many months on secret evidence not revealed to him or his attorney by the government and released after the government failed to produce evidence that Al-Najjar had engaged in any sort of terrorist activity.[11]

In March 2002, Attorney General Ashcroft asked U.S. attorneys to interview another 3,000 or so Arab and Muslim non-citizens who had recently entered the country. Around the same time as this announcement, the federal government stepped up raids on offices of Arab and Muslim community groups and private homes in search of terrorist connections.[12]

The targeting of Arabs and Muslims for interrogations could be expected to alienate the Arab and Muslim community. A memorandum from the Office of the U.S. Deputy Attorney General offered detailed instructions to state and local police officers on information to be solic-

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10 See Josh Meyer, Dragnet Produces Few Terrorist Ties, L.A. TIMES, 28 November 2001, at A1.

11 See Al Najjar Again in INS Detention Due to Alleged Terrorist Ties, 78 INTERPRETER RELEASES 1859, 1859 (2001); Administration Defends Military Commissions, Other Antiterrorism Measures During Senate Hearing, 78 INTERPRETER RELEASES 1809, 1810 (2001); DOJ Orders Incentives, 'Voluntary' Interviews of Aliens to Obtain Info on Terrorists, 78 INTERPRETER RELEASES 1816, 1816-17 (2001).

12 See Sharon Behn, US Muslim Community Outraged by Raids on Muslim Offices and Homes, AGENCE FRANCE PRESSE, 21 March 2002; U.S. Attorney General John Ashcroft Holds News Conference, FDCH POL. TRANSCRIPTS, 20 March 2002.

ited, and mentioned that the U.S. government should be informed if an interviewee was suspected of being in the country in violation of the immigration laws,[13] implying an effort to remove Arabs and Muslims from the country based on immigration law violations wholly unrelated to terrorism. To this end, the federal government detained Arabs and Muslims held for immigration violations pending deportation as a powerful gesture demonstrating that the U.S. government was "getting tough" on immigration enforcement.

Much of the federal government's "war on terror" had more of a symbolic rather than practical impact. The federal government moved quickly and decisively in responding to the massive loss of life. But few persons with any knowledge about the 11 September violence ever came to light. The only person that the government has charged with a crime in the events of that day, Zacarias Moussaoui, was in federal custody on 11 September. Consequently, the benefits of the dragnet are far from clear, although it generated a great deal of fear and desperation in the Arab and Muslim community.

The interviews of Arabs and Muslims expanded in scope during the U.S. war in Iraq in 2003. As part of Operation Liberty Shield, agents of the FBI in March 2003 began interviewing Iraqi-born persons in the United States, naturalized citizens as well as non-citizens. Put simply, U.S. citizens of Iraqi ancestry were subject to interrogations, thus implicitly placing their loyalties in question. The FBI compiled a list of more than 50,000 persons to interview; with 11,000 persons assigned priority. Security efforts that extended to U.S. citizens of a particular nationality marked an expansion from the previous interrogations of non-citizens.[14]

By almost all accounts, Muslims allegedly perpetrated the terrorism of 11 September and a few Arab and Muslim non-citizens might have information about terrorist networks. The dragnet directed at all Arabs and Muslims, however, is contrary to fundamental notions of equality and the individualized suspicion ordinarily required by the U.S. Consti-

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13 See Memorandum from the Deputy Attorney General, to all United States Attorneys and all Members of the Anti-Terrorism Task Forces, (9 November 2001), reprinted in DOJ Orders Incentives, 'Voluntary' Interviews of Aliens to Obtain Info on Terrorists, Foreign Students, Visa Processing Under State Dept. Scrutiny, 78 INTERPRETER RELEASES 1816 app. 1 (3 December 2001).

14 See Anita Ramasastry, Operation Liberty Shield: A New Series of Iraqi-Born Individuals in the U.S. is the Latest Example of Dragnet Justice (25 March 2003) http://writ.news.findlaw.com/ramasastry/20030325.html.

tution to justify law enforcement action.[15] It exemplifies the excessive reliance on race in criminal investigation, a problem that long has plagued law enforcement in the United States, and demonstrates how, once race (at least of nonwhites) is considered, it can come to dominate the investigatory process.[16]

In important ways, the 11 September dragnet, especially as it evolved over the next 18 months, carried out by the federal government resembles the Japanese internment during World War II. Not surprisingly, in the wake of September 11, a member of Congress defended the internment as a reasonable security measure.[17] In each case, statistical probabilities, not individualized suspicion, resulted in action directed at a discrete and insular minority that had been classified as a foreign enemy. National identity and loyalty are defined in part by national origin and "foreign" appearance, ambiguous as those factors may be.[18] Citizens of particular ancestries, non-citizens and citizens alike, were subject to security measures. Although Arabs and Muslims have not suffered actual internment, similarities exist between their treatment and that of persons of Japanese ancestry.

The secrecy surrounding the federal government's security measures exacerbated tensions and fears and made Arabs and Muslims in the United States feel all the more vulnerable. Arab and Muslim communities across the country were terrified as members were interrogated, detained, and held incommunicado, and mosques under surveillance, with their every move possibly under scrutiny.

Importantly, the law, which allows the Executive Branch a good deal of leeway in the area of immigration and national security, has not deterred the U.S. government in any meaningful way. In a similar time of national crisis when U.S. citizens were held hostage in Iran, a court

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15 See, for example, United States v. Sokolow, 490 U.S. 1, 7 (1989); Terry v. Ohio, 392 U.S. 1, 27 (1968).

16 See, for example, David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 MINNESOTA LAW REVIEW 265, 275-88 (1999).

17 See Christopher Marquis, Lawmakers Says Interning Japanese was Proper, N.Y. TIMES, 6 February 2003, at A23.

18 See Frank Wu, Yellow: Race in America Beyond Black and White 79-129 (2002); Keith Aoki, "Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 4 UCLA ASIAN PACIFIC AMERICAN LAW JOURNAL (1996); Natsu Taylor Saito, Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law, 76 OREGON LAW REVIEW 261, 296 (1997).

of appeals upheld a regulation that required Iranian students on nonimmigrant visas to report to the Immigration and Naturalization Service (INS) and provide information about residence and evidence of school enrollment.[19] The court held that the regulation had a "rational basis" and emphasized that "it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy." Courts reviewing other regulations directed at Iranian citizens also refused to disturb the Executive Branch's judgment.[20] Recent U.S. Supreme Court precedent further suggests that it will be difficult to prevail on any claim that the federal government is selectively enforcing the immigration laws.[21]

Legal challenges are possible, however, especially as the memory of 11 September recedes in the collective memory. The classifications employed by the government are not simply well-focused national origin classifications like those upheld in the past. Measures in the war on terrorism are broad, with race, religion, national origin, and ancestry the touchstones, not a narrowly-tailored nationality classification. Moreover, the practices, including interrogation and indefinite detention, go well beyond the reporting requirements imposed on nationals of Iran in the 1980 hostage crisis.

Even if not disturbed by the courts, the post 11 September dragnet of Arabs and Muslims might prove to be a poor law enforcement technique. Racial profiling in criminal law enforcement has been criticized for alienating minority communities and making it more difficult to secure their much-needed cooperation in law enforcement. In a time when the cooperation of Arab and Muslim communities is needed in investigating terrorism, they are being rounded up, humiliated, and discouraged from cooperating with law enforcement by fear of arrest, detention, and deportation.

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19 See Narenji v. Civiletti, 617 F.2d 745. 748 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980).

20 See, for example, Ghaelian v. INS, 717 F.2d 950, 953 (6th Cir. 1983); Nademi v. INS, 679 F.2d 811 (10th Cir. 1982).

21 See Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (holding that immigration law barred review of selective enforcement claim).

2. THE VEIL OF SECRECY

Throughout the expansion of the security measures since 11 September, the federal government moved forward in a shroud of secrecy and vigorously defended its power to do so. It refused to reveal the identities of non-citizens in detention even when requested by members of Congress and offered little information about the Arabs and Muslims interviewed and detained, including even their identities and place and length of detention.[22] The federal government closed deportation proceedings to the public.[23] Attorneys were denied access to Arab and Muslim clients in custody or were provided access in difficult circumstances. One attorney with alleged terrorists as clients was indicted based on electronic surveillance of attorney-client communications. In the one major case in which the government prosecuted a person for alleged involvement in the events of 11 September, the federal judge criticized the government for excessive secrecy.[24]

Persons labeled as "enemy combatants" and "illegal combatants" were subject to indefinite detention without being charged with any wrongdoing, with attorneys and families barred from communicating with the detainees. Basically, they were held incommunicado or "disappeared," a term used to describe people arrested and detained, and sometimes killed, in repressive countries. All these measures were designed to deny basic constitutional rights to persons held in custody and maintain secrecy over how that was being accomplished.[25]

Moreover, the Bush administration aggressively moved to silence critics of the administration's policies. Within months of 11 September,

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22 See Center for National Security Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94 (D.D.C. 2002) (addressing motions in action seeking federal government to disclose identities of persons detained in investigation of terrorism).

23 See North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (addressing legal challenges to closed proceedings); Detroit Free Press v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (same).

24 See Philip Shenon, Judge Critical of Secrecy in Terror Case Prosecution, N.Y. TIMES, 5 April 2003, at B13 (reporting that, in case of Zacarias Moussaoui, judge "was skeptical that the government could prosecute the case 'under the shroud of secrecy under which it seeks to proceed'").

25 See Human Rights Watch, Presumption of Guilt: Human Rights Abuses of Post 11 September Detainees (August 2002), available at http://www.hrw.org/reports/2002/US911/USA0802.pc; Amnesty International, Amnesty International's Concerns Regarding Post 11 September Detentions in the USA (14 March 2002), available at http://web.amnesty.org/library/Index/engAMR5104420.

Attorney General Ashcroft stated that critics of the security measures were aiding and abetting the terrorist cause. Combined with increased surveillance powers under the USA Patriot Act, such charges by the chief law enforcement officer of the United States were designed to chill questioning of the security measures.

3. *GUANTÁNAMO BAY*

The U.S. government held persons captured during hostilities in Afghanistan in Guantánamo Bay, Cuba as "enemy combatants," not prisoners of war with the protection of international law. The courts have declined to interfere with the Bush administration's judgment, with the result being that the legal rights of the detainees went unprotected.[26] Not physically in the United States, these persons have been denied fundamental constitutional protections, such as the right to counsel, and held in harsh conditions.

The federal government labeled some U.S. citizens as "enemy combatants," including Jose Padilla and Yaser Esam Hamdi. It held them without bail, did not charge them with a crime, and denied them access to counsel.[27] The federal government in fact arrested Padilla in the United States. The treatment of Padilla and Hamdi compare unfavorably with that of John Walker Lindh, a native of affluent Marin County, California, who was apprehended in Afghanistan, quickly charged with a crime, afforded access to counsel (but only after interrogation yielded a confession), and pleaded guilty to a crime.[28]

The new "enemy combatants" category of rightless persons was employed to justify the indefinite detention of non-citizens and citizens. The federal government's use of this classification in the war on terror again reveals expansion of the security measures to focus on citizens and non-citizens sharing similar characteristics. No legal limits seemed to constrain the U.S. government in its treatment of Arabs and Muslims held at Guántanamo Bay.

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26 See Al Odah v. United States, 2003 U.S. App. LEXIS 4250 (D.C. Cir. 2003); Coalition of Clergy, Lawyers & Law Professor v. Bush, 310 F.3d 1153 (9th Cir. 2002).

27 See Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003); Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

28 See Jane Mayer, Why Did the Government's Case Against John Walker Lindh Collapse?, NEW YORKER, 10 March 2003, at 50.

4. VISA PROCESSING AND REMOVALS

Some of the 11 September airplane hijackers had entered the United States on student visas but never attended school. The INS caused a national furor when it sent visa renewals to several hijackers who died on 11 September. These events created strong political pressures for increased monitoring of non-citizens in the United States on student and other temporary visas.

As an early response to perceived problems with visa monitoring, federal investigators contacted administrators at more than 200 colleges and universities to collect information about students from Middle Eastern countries. In December 2001, with a mass arrest, the INS announced its crackdown of non-citizens who violated the terms of student visas. The arrests originally focused exclusively on students from nations with alleged terrorist links: Iran, Iraq, Sudan, Pakistan, Libya, Saudi Arabia, Afghanistan, and Yemen.[29]

Visa monitoring was combined with stepped-up efforts to remove Arab and Muslim non-citizens from the United States. In January 2002, the Justice Department announced that "Operation Absconder" would focus removal efforts on 6,000 young men from the Middle East who had had deportation orders entered against them. The federal government also stepped up other efforts to deport Arabs and Muslim non-citizens.[30]

In 2002, Congress passed a law requiring increased monitoring of non-citizens in the country. Student visas became more difficult to secure. In addition, Attorney General Ashcroft created special registration requirements on non-citizens who, as he determines, pose "national security risks." Registration focused on Arabs and Muslims from a select

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29 See Neil A. Lewis & Christopher Marquis, Longer Visa Waits for Arabs, N.Y. TIMES, 10 November 2001, at A1; Matthew Purdy, Bush's New Rules to Fight Terror Transform the Legal Landscape, N.Y. TIMES, 25 November 2001, at A1; James Sterngold with Diana Jean Schemo, 10 Arrested in Visa Cases in San Diego, N.Y. TIMES, 13 December 2001, at B1.

30 See DOJ Focusing on Removal of 6,000 Men from Al Qaeda Haven Countries, 79 INTERPRETER RELEASES 115, 115 (2002); Tamara Audi, Federal Agents Escalate Deportation Attempts, DETROIT FREE PRESS, 8 April 2003. In March 2003, the National Council of Pakistani Americans reported that 103 Pakistani nationals were being deported, with more expected. See 12 March, NCPA Release, available at http://www.ncpa.info; see also Louise Cainkar, No Longer Invisible: Arab and Muslim Exclusion After 11 September, MIDDLE EAST REPORT 224 (fall 2002), available at http://www.merip.or/mer/mer224_cainkar.html.

group of nations; hundreds of non-citizens who appeared to register in compliance with the law were detained, creating further fear in the Arab and Muslim community.[31]

In spring 2003, the federal government announced that asylum seekers from Arab and Muslim nations would be detained while their asylum claims were being processed. This selective exercise of the detention power, which former INS Commissioner Doris Meissner characterized as "very wrongheaded", again goes well-beyond narrow nationality-based classifications. It also may not make policy sense. Iraqis who fled persecution under the regime of Saddam Hussein in Iraq, for example, will be locked up as security risks while their asylum claims are being decided.[32]

Immigration enforcement efforts affected communities other than Arabs and Muslims. Security checks of airport employees led to arrests of hundreds of undocumented persons; few were of Arab or Muslim ancestry. One pregnant undocumented Mexican woman who worked at a Domino's pizza concession in the Denver airport was arrested, gave birth while in custody, was immediately separated from her baby, and later was deported with her U.S. citizen child to Mexico. Similarly, security measures taken in San Diego shortly before the 2003 Super Bowl included an operation (Operation Game Day) in which documents were checked of workers having anything to do with the football game. It resulted in the deportation of many undocumented Mexican immigrants, none of whom were shown to have anything to do with terrorism.[33] Along these lines, the Attorney General later justified detention of Hai-

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31 See Enhanced Border Security and Visa Entry Reform Act, Public Law No. 107-173, 116 Statutes at Large 543 (2002); 67 Federal Register 52,584 (Aug. 12, 2002); Rights Groups Sue Due to Arrests of NSEERS Registrants, Lawmakers Respond to NSEERS Implementation, 80 INTERPRETER RELEASES 41 (2003); Closing the Gates, CHRONICLE OF HIGHER EDUCATION, 11 April 2003, at A12.

32 See Christopher Drew & Adam Liptak, Immigration Groups Fault Rule on Automatic Detention of Some Asylum Seekers, N.Y. TIMES, 31 March 2003, at B 15; Shorhan Roth, Immigration Vise Tightened–Again, LEGAL TIMES, 24 March 2003, at 15 (quoting Meissner).

33 See Tina Griego, DIA Terror Raid, Mom's Deportation Shatter Family, ROCKY MOUNTAIN NEWS, 7 December 2002, at 1A; Patrick J. McDonnell, 200 Airport Workers in West Arrested by INS, L.A. TIMES, 27 March 2002, at pt. 2, p. 7; H.G. Reza, INS Arrests 50 in Pre-Super Bowl Sweep, L.A. TIMES, 24 January 2003, at pt. 2, p. 8.

tian asylum-seekers on the ground of the "national security" threat they posed to the United States.[34]

5. TORTURE

The Arab and Muslim dragnet was not the most extreme policy option considered in the wake of 11 September. Torture to extract information from alleged terrorists, or the threat of sending a suspect to a country that engaged in torture, was discussed as a policy option. A public re-evaluation of the blanket prohibition of such practices under the U.S. Constitution ensued. Alan Dershowitz, a Harvard law professor, well-known as a defender of civil liberties, outlined an argument for use of torture pursuant to a warrant issued by a court, to protect national security.[35]

Torture apparently was not simply a policy option under consideration. U.S. forces reportedly engaged in "stress and duress" tactics to extract information from prisoners in Afghanistan.[36] Military and intelligence leaders evidently justified this conduct on the perceived nature of the enemy.

Torture unquestionably goes well beyond the conventional law enforcement techniques of arrest, detention, and interrogation. Besides violating the U.S. Constitution, it violates international law, specifically the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[37] The consideration of such extreme measures reveals the popular perception about Arabs and Muslims. Torture of Arabs and Muslims is based on the popular perception that they are religious fanatics bent on violence and destruction and are less than human. This rationalization of patently unlawful conduct taps into a long history of nativism and the view that foreigners are presumptively disloyal and dangerous.

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34 See In re D-J-, 23 Immigration & Nationality Decisions 572 579-81 (Attorney General 2003).

35 See ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGERS 131-63 (2002); Jonathan Alter, Time to Think About Torture, NEWSWEEK, 5 November 2001, at 45.

36 See Mayer; Dana Priest & Barton Gillman, US Decries Abuse but Defends Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities, WASH. POST, 26 December 2002, at A1.

37 See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027.

III. LONG TERM CIVIL RIGHTS IMPACTS

The federal government's reaction to the events of 11 September promises to have a deep and enduring impact on civil rights in the United States. Immigration reform will likely be one of the impacts of 11 September. Recent history offers helpful, if not comforting, lessons in this regard.

In 1996, Congress passed tough immigration legislation in response to the fear of terrorism in the wake of the Oklahoma City bombing; the reforms created special removal proceedings for alleged terrorists. This and other aspects of the Antiterrorism and Effective Death Penalty Act[38] adversely affected the Arab and Muslim community, as well as other non-citizens in the United States. Congress enacted such drastic measures despite the fact that a former U.S. army officer and U.S. citizen, Timothy McVeigh, was the primary perpetrator of the Oklahoma City bombing.

The Antiterrorism Act arguably did little to quell the threat of terrorism in the United States. However, it and another 1996 immigration law has adversely affected non-citizens in many different ways. Only in 2001 did the Supreme Court resolve a conflict among the circuits and ensure that habeas corpus review of removal orders remained intact. The Executive Branch had vigorously argued that the reforms precluded any judicial review of many deportation decisions.[39] The Court also rejected the Executive Branch's argument that the 1996 immigration reforms authorized indefinite detention of immigrants whose native country refused to accept them.[40]

1. IMMIGRATION REFORM: THE USA PATRIOT ACT AND MORE

In the USA Patriot Act, Congress has already taken an initial cut at reform of the immigration laws. The definition of "terrorist activity," which triggers removal from the country and many special procedures, was broadly defined before 1996, expanded in the 1996 immigration reforms, and expanded even further in the USA Patriot Act.

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38 Public Law No. 104-132, 110 Statutes at Large 1214 (1996).

39 See INS v. St. Cyr, 533 U.S. 289 (2001).

40 See Zadvydas v. Davis, 533 U.S. 678 (2001).

Specifically, section 411 of the USA Patriot Act expands the definition of "terrorist activity," which justifies exclusion, to include using any, "explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." The Act further provides that a spouse or child of a "terrorist" who is also inadmissible generally is inadmissible.[41] A non-citizen also may be deemed inadmissible for being "associated with a terrorist organization," whose broad terms seem to build on the principle of guilt by association. The USA Patriot Act also allows indefinite detention of persons classified by the Attorney General as "terrorists," expands the definition of "terrorist activity" to include protected speech and perhaps even silence, and any material assistance to organizations denominated a "terrorist organization" by the Attorney General.

The Act expands the surveillance powers of the Attorney General in investigating "terrorist activity." An extreme example is its requirement that libraries, upon request, provide the federal government with book lending records from patrons and prohibits libraries from letting the target of the investigation know of the government's request.[42] Librarians, ordinarily not thought to be political activists by nature, have protested the intrusion on borrowers' privacy.

A proposed USA Patriot Act II, which has been circulated for public comment, would go further, perhaps even stripping U.S. citizens of their citizenship for "terrorist activity."[43] The American Civil Liberties Union has condemned this piece of legislation, which would afford the federal government increased surveillance powers over citizens and non-citizens.[44]

Besides the USA Patriot Act, Congress passed the Aviation and Transportation Security Act,[45] which placed airport security in the hands of the federal government and made U.S. citizenship a qualification for airport security personnel. The citizenship requirement injured many

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41 See USA PATRIOT ACT § 411.

42 See USA PATRIOT ACT § 215.

43 See Rajeev Goyle, Patriot Act Sequel Worse Than First, BALT. SUN, 21 February 2003, at 19A.

44 See ACLU, Stop the New Patriot Act, at_http:///www/aclu.org/news/NewsPrint.cfm?ID+11904&c=206.

45 Public Law No. 107-71, § 111(a)(2), 115 Statutes 597, 617 (2001).

lawful immigrants who had held these low-wage jobs.[46] Somewhat ironically, while lawful immigrants can be conscripted into the military and can fly commercial airliners, they cannot screen bags at the airport. With Congressional encouragement, federal, state, and local government and private employers may follow suit to adopt such requirements.

2. *ENFORCEMENT OF THE IMMIGRATION LAWS BY STATE AND LOCAL LAW ENFORCEMENT*

In the security measures taken after 11 September, the federal government, once exclusively in charge of enforcing the immigration laws,[47] solicited state and local law enforcement officer assistance in interviewing non-citizens and enforcing the immigration laws.[48] It specifically sought state and local assistance in questioning Arabs and Muslim non-citizens. This later blossomed into the federal government's decision that immigration could be enforced by state and local governments. To this end, the federal government in 2002 entered an agreement with the state of Florida to train law enforcement officers to assist in the enforcement in the immigration laws.

State and local involvement in enforcing the immigration laws may lead to civil rights abuses of immigrant and minority communities. One justification for exclusive federal power over immigration enforcement has been the fear of civil rights abuses of immigrants and citizens at the state and local levels. Historically, state and local law enforcement agencies frequently have been charged with violating the rights of immigrants and minority citizens. In addition, local enforcement of the immigration laws may diminish the trust of immigrants in the police, trust that is essential to effective law enforcement in immigrant communities. State and local involvement in immigration enforcement, however, may chill immigrants from assisting the police in ordinary law enforcement.

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46 See Steven Greenhouse, Groups Seek to Lift Ban on Foreign Screeners, N.Y. Times, 12 December 2001, at B10 (reporting that large percentage of the security screeners at San Francisco and Los Angeles airports were immigrants facing job loss).

47 See DeCanas v. Bica, 424 U.S. 351, 354 (1976).

48 See Kevin R. Johnson, 11 September and Mexican Immigrants: Collateral Damage Comes Home, 52 DEPAUL LAW REVIEW (forthcoming 2003).

3. THE END OF POSITIVE IMMIGRATION REFORM

Efforts to remedy the harsh edges of 1996 immigration reforms ended in 11 September. Immigrant rights advocates for several years had built a coalition that appeared to have a chance at improving the immigration laws and eliminating the excesses of the 1996 reforms, which were viewed by some informed observers as unduly harsh and unforgiving. Those legislative efforts stopped in their tracks on 11 September, with advocates now seeking to thwart increasingly restrictionist immigration measures in Congress.

Moreover, another major immigration reform possibility went by the wayside on 11 September. For several years, serious negotiations had been ongoing between the United States and Mexican governments to change the migration relationship between the two nations. Mexico desired an amnesty for undocumented Mexican immigrants in the United States while the United States coveted a temporary worker program. The discussions of a migration deal ended abruptly. The U.S. government's emphasis on immigration controls made any liberalization of migration between the United States and Mexico unlikely, at least in the short run.

Immigrants as a whole, not simply Arab and Muslim non-citizens, were injured by the end of discussion of positive immigration reform. The end of serious discussions with Mexico over regularizing the status of undocumented Mexican immigrants in the United States and a guest worker program, specifically adversely affected the Mexican immigrant community in a direct and concrete way.

4. THE COMEBACK OF RACIAL PROFILING

Although racial profiling of African Americans and Latinos by state and local police has been aggressively condemned by the federal government in recent years, many of the federal government's security measures in the post 11 September period amounted to racial profiling. Commentators and the public began to re-evaluate the profiling of Arabs and Muslims in the war on terror. Popular sentiment supported the view that racial profiling was necessary to ensure public safety in a post 11 September world.

The resurgence of the popularity of racial profiling in the war on terror may have ripple effects on ordinary criminal law and immigration

enforcement. Efforts to curb race-based enforcement of the criminal and immigration laws had made great strides in the years preceding 11 September. Racial profiling made a comeback after that date, which may well affect African Americans, Latinos, and Asian Americans in domestic law enforcement. All racial profiling rests on the reliance of statistical probabilities in enforcing the laws. Once one group is targeted by law enforcement based on alleged probabilities and propensities, all minority groups are at risk of suffering a similar fate.

In sum, statistically-based law enforcement is not simply a "war on terror" or Arab and Muslim issue. It stands to affect minority citizens as well.

IV. CONCLUSION

The federal government's response to the events of 11 September reveals much about the relationship between immigration and civil rights in the United States. The U.S. government responded with a vengeance, focusing on Arab and Muslim non-citizens across the country. With few legal constraints, and acting in a time when the public was more willing to sacrifice civil liberties of Arab and Muslims in the name of national security, the U.S. government pursued harsh means with little resistance. Security measures had civil rights consequences on Arabs and Muslims. In the long run, the United States will likely see greater impacts on the greater community.

The Anti-Terrorist Measures of Austria

ROLAND MIKLAU

The traditional attitude towards terrorism in Austrian criminal policy and criminal law has not considered necessary any special anti-terrorist legislation: no specific definition of "terrorist" offences, no special police powers, no special provisions in investigation and prosecution, and no special courts exist.

Obviously, that attitude – to deal with terrorist offences in the context of ordinary criminal law and ordinary procedure – has been determined by the fact that Austria has not had to cope with home-grown terrorism, but only with the side effects of terrorist activities in Germany and the Near East. This situation differs from events in Germany, Spain or the United Kingdom.

Nevertheless, Austria has ratified all relevant international conventions against terrorism including the last one: the U.N. Convention on the Suppression of Terrorist Financing.

Now, following the events of 11 September, we have to acknowledge a new international dimension and a new quality of terrorism. In this context, it is to be admitted that some activities of a preparatory nature, in particular the financing of terrorism, are not covered by classical definitions of criminal offences.

Immediately after 11 September, no legislative measures were envisaged in Austria. Certain preventive measures in the areas of police protection (for airports, U.S. institutions, etc.) and in visa administration were taken. Requests for information on certain bank accounts were primarily dealt with by the financial sector, not by judicial authorities. The same was true for the "listing" and "delisting" of certain persons and organizations. Police investigations (including electronic surveillance of one certain commercial location in Vienna for two months) failed to indicate any connections between Al Qaeda and Austria.

Political discussions on issues of security and liberty, following the events of 11 September, were rather of a symbolic nature, generated by the profiling desire of political parties, and did not lead to concrete measures of legal nature. Such measures were more or less exclusively

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

the result of EU discussions and negotiations and international developments, including Security Council Resolution 1373(2001).

Now, however, the new Austrian Criminal Law Amending Act 2002[1], which has been in force since 1 October, implements international commitments, primarily those resulting from the EU Framework Decision on combating terrorism.[2] It provides for new offences (terrorist association, terrorist financing) and outlines a definition of terrorist offences based on the list in the Framework Decision and containing a definition of "terrorist intent". It stipulates an increase of the maximum prison sentence by 50 percent over the maximum provided for the respective ordinary offence.

As far as human rights are concerned, the following exception to the definition of terrorist offences is of interest:

> "The act is not considered a terrorist act if it is aimed at establishing or restoring democratic conditions and the rule of law or aimed at exercising or preserving human rights".[3]

The significance of this exception (defence) is not that of decriminalizing the act, but to adjudicate it as an ordinary offence.

There has been some concern, however, in political debates that such a legal definition of terrorism might limit civil rights and criminalize acts of civil disobedience.

The new Austrian law also provides for the confiscation of property which is under the control of a terrorist organization and of assets designed for the financing of terrorist acts. The offence of money-laundering has been extended accordingly, and the extra-territorial jurisdiction of Austrian courts was extended to terrorist acts committed abroad. Electronic surveillance, providing for investigations against suspected criminal organizations under strict judicial control, has been extended to investigations against terrorist organizations.

The new Austrian anti-terrorist legislation is, I am sure, in line with the rule of law and the principles of legality and proportionality.

In terms of human rights, not all measures newly developed at the international scene or abroad can be observed without concern.

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1 Strafrechtsänderungsgesetz 2002, BGBl. I Nr. 134/2002.

2 Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002, p. 3.

3 Strafrechtsänderungsgesetz 2002, supra note 1, Article I, Cipher 25, § 278c (3).

The system of "listing" certain individuals and groups suspected of being involved in terrorist activities, as it has been developed by the U.N. Security Council and by (Foreign and Security Policy) Cooperation in the EU, based on intelligence information, lacks sufficient legal protection. It circumvents the judicial systems of Member States and is certainly in danger of being openly politicized. (Who is considered to be a political and/or terrorist organization?)

Similar concerns prevail, in my personal judgment, vis-á-vis some legal and factual measures of the United States. Provisions of the Patriot Act[4] seem to set aside traditional principles of data protection, due process and the rule of law in general. The internment of suspects captured in Afghanistan at Guantanamo Bay and the intended establishment of "military commissions" are not in line with international standards. The U.S. opposition to the International Criminal Court seriously hampers this unique development in international law and human rights. In this field I am not so much concerned about eventual war crimes and eventual impunity, I am more concerned about the negative example which has been given by the most powerful nation in the world which, until recently, contributed significantly to progress in international criminal and humanitarian law.

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4 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, HR 3162 RDS.

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PART TWO

PREVENTIVE MEASURES AGAINST TERRORISM AND HUMAN SECURITY

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Combating Terrorism: Issues of Jus ad Bellum *and* Jus in Bello – *The Case of Afghanistan*

GIORGIO GAJA

I. STATE SOVEREIGNTY AND THE SCOPE OF OBLIGATIONS TO PREVENT AND REPRESS TERRORISM

As the result of the ever-growing concern in international society about terrorism, a number of obligations under international law have been stated to prevent and repress acts of terrorism. A comprehensive statement to this effect was made by the Security Council (SC), "acting under Chapter VII" of the Charter, in Resolution 1373 (2001). The Council declared that "all States" are under the obligation to "prevent and suppress the financing of terrorist acts" and to take a series of measures that include adopting "the necessary steps to prevent the commission of terrorist acts".

Some of the obligations stated in Resolution 1373 (2001) have been expressly given a territorial or personal delimitation. For instance, the prohibition on making "any funds, financial assets or economic resources or financial or other related services available" for the benefit of terrorists only applies for States with regard to "their nationals or any persons and entities within their territories". For each State, the obligation to "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens" is implicitly limited to the State's territory. Other obligations appear to have wider scope, for instance, the obligation to "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists". However, even this type of obligation does not require States to take coercive measures worldwide beyond the area of their respective jurisdiction or control. There is no indication that States are required, or even authorized, to

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

impinge on the territorial sovereignty of other States in order to comply with any of the obligations stated in SC Resolution 1373 (2001). Given the duty that States have under general international law to refrain from exercising their authority over another State's territory without its consent, one cannot lightly assume that the resolution implicitly allows States to infringe that duty.

Should obligations to prevent and repress terrorism be on the contrary understood as implying that measures would have to be taken irrespective of which State has territorial sovereignty, the rules of international law concerning territorial sovereignty would be jeopardized. According to circumstances, each State would not only be authorized to ignore another State's sovereignty: it would also be under an obligation to do so. Moreover, the practical result would hardly contribute to the more effective prevention and repression of terrorism, since a plurality of uncoordinated acts in this regard is likely to generate chaos. This may be illustrated by what could easily occur in the case of a terrorist group taking hostages. Should, for instance, the territorial State choose to pursue negotiations with the group while preparing for an effective police or military response, this policy would be frustrated by initiatives that other States may take, possibly without adequate means. An entirely different picture would present itself if, respecting territorial sovereignty, States other than the territorial State limited themselves to lending the latter State support which was either requested or accepted.

If one takes the proposed reading of Resolution 1373 (2001) as not impinging on territorial sovereignty, coercive measures should be regarded as the prerogative of the State under whose jurisdiction or control measures are to be taken. Other States could only assist the territorial State and thus act in coordination with the same State.

This approach appears adequate only if the territorial State does not sponsor terrorism or, when unable to take the necessary measures to prevent and suppress terrorism, does not refuse other States' assistance. When the territorial State fails to take measures and other States are prevented from acting in its place because the territorial State does not give its consent, the concern of international society about terrorism would not be met. State sovereignty would then work as an instrument that favours the strengthening of terrorist groups, allowing them to breed in areas where they are out of reach of measures of prevention and repression.

II. THE SECURITY COUNCIL'S ROLE IN COMBATING TERRORIST GROUPS

In order to respond to a terrorist group when the territorial State fails to take the required measures and refuses other States' assistance in preventing and repressing the group's activities, one has to find ways to circumvent the need for respect of territorial sovereignty. The principal and, according to a large body of opinion, the only method would be to resort to a SC resolution under Chapter VII of the UN Charter providing for intervention by the United Nations or authorizing some States to intervene.

The basis for a response under Chapter VII is that acts of international terrorism fulfil one of the requisites in Article 39, because they have to be considered at least as threats to the peace. The SC has often accepted this equation. For instance, with regard to the bomb attack in Bali and "other recent terrorist acts in various countries", SC Resolution 1438 (2002) viewed "such acts, like any act of international terrorism, as a threat to international peace and security". Thus, any act of international terrorism may now be considered as representing a threat to the peace. The breach on the part of the territorial State of its obligations to prevent and repress terrorism is not considered to be an additional requirement. The territorial State's attitude is regarded as relevant only in so far as the type of SC response is concerned.

Generally, SC resolutions view as threats to the peace only terrorist acts that have already taken place. However, it would be reasonable to consider as threats to the peace also terrorist acts that are perceived as imminent. In Resolution 1373 (2001) the SC has even gone further. It implicitly considered as threats to the peace acts of terrorism in general[1] and provided for measures designed to prevent those acts. This Resolution was based on Chapter VII and thus at least implied that a threat to the peace already existed.

Whereas the SC has given a wide interpretation to the term threat to the peace with regard to acts of international terrorism as well as in other circumstances,[2] it has mainly limited its role in combating terror-

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1 One of the preambular paragraphs of SC Resolution 1373 (2001) reaffirmed "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts".

2 For an analysis of SC Resolutions under this aspect I refer to my study *Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial. A propos des rapports en-*

ism to making recommendations and stating obligations, without taking coercive action directly impinging on State sovereignty. The foremost example is again given by SC Resolution 1373 (2001), which has been likened to a treaty in the way it imposes obligations for an indefinite set of circumstances.[3] This Resolution does not envisage remedies if a State refuses to comply. Paragraph 8 only contains a vague threat of measures against any such State.[4]

The SC would be entitled to take steps for directly fighting terrorist groups. The territorial State's consent would not be a necessary condition. However, in the absence of the latter State's consent, a full-scale military operation would probably have to be undertaken in order to take forcible measures against a terrorist group. It is unlikely that the SC will be able to undertake this type of operation under its own command. One could more realistically envisage that the SC would authorize certain Member States to "take all necessary measures" to combat a terrorist group. According to practice, the use of this wording, which was first made with regard to the Korean war and was later revived for the Gulf war,[5] would clearly imply the authorization to use military force should circumstances warrant it.

Should the SC not authorize the use of force but approve State action retrospectively, the use of force by some States could be viewed as having been brought into line with the UN Charter.[6] However, a subsequent SC resolution, even if it refrains from expressing condemnation, does not necessarily represent *post factum* endorsement of military ac-

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tre maintien de la paix et crimes internationaux des Etats, *Revue Générale de Droit International Public* Vol. 97 (1993) p. 297.

3 This similitude was first made by L. Condorelli, *Les attentats du 11 septembre et leurs suites: où va le droit international?*, *Revue Générale de Droit International Public* Vol. 105 (2001) p. 829 at p. 835.

4 In paragraph 8 the SC "[e]xpresses its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with the responsibilities under the Charter".

5 Resolution 83 (1950) recommended "that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area", while Resolution 678 (1990) authorized certain Member States "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area".

6 Arguments to this effect have been made with regard to SC Resolutions 1244 (1999) and 1483 (2003) respectively concerning the situations in Kosovo and Iraq after military operations were carried out without the SC's authorization.

tion that has been taken by one or more States. As history cannot be undone, the SC may well limit itself to addressing the situation as it results from the military intervention without saying anything on the intervention itself, in view of the attitude of one or more of the SC's permanent members.

III. THE CASE OF A TERRORIST ACT BEING AN ARMED ATTACK

A coercive response against terrorist acts that impinges on the territorial State's sovereignty is also lawful when the terrorist act represents an "armed attack" within the meaning of Article 51 of the UN Charter.

One condition for this is that the SC has not yet taken what Article 51 calls "necessary measures": a term that is not meant to go as far as requiring that the SC should use coercive measures under Article 42. For the SC, the fact of not taking measures may be a policy option, in order to leave the State which was the object of the attack, together with other States that support the attacked State and have received that State's consent, free to act in self-defence. When the SC authorizes the use of force, it could state purposes and conditions for such use; resort to self-defence leaves the limits of the response relatively undefined, within the bounds of proportionality. This is one possible explanation why the SC refrained from taking "necessary measures" after the 11 September attack. According to the clear wish of the US Government, the way was left entirely open to the military operation "Enduring Freedom".[7]

Resort to self-defence presupposes that one accepts the idea that the 11 September attack could be regarded as an "armed attack" within the meaning of Article 51. The SC seemed to subscribe to this view when a preambular paragraph in Resolution 1368 (2001) recognized the "inherent right of individual or collective self-defence" under the circumstances. This view was reaffirmed in a preambular paragraph of

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7 While SC Resolution 1373 (2001) has been rightly viewed as a significant response against terrorist activities, it was not specifically directed towards the terrorist group which was held responsible for the 11 September attacks. The SC did not in any case consider that this response could represent "necessary measures" within the meaning of Article 51 of the UN Charter that would prevent any further recourse to individual and collective self-defence.

Resolution 1373 (2001). The same approach was clearly endorsed on 7 October 2001 by the US representative Negroponte in a letter addressed to the President of the SC.[8]

The fact that the SC used the term "threat to the peace" instead of "aggression" does not imply a denial of the existence of an armed attack. The use of softer language corresponds to SC practice. Even Iraq's invasion of Kuwait was defined by the SC as a breach of the peace and not as an aggression, although the SC did not fail to recall the applicability of self-defence under Article 51 of the UN Charter.

In the context of the UN Charter, which is concerned with the use of force by States or by international organizations established by States, it seems clear that the reference in Article 51 to an armed attack means an attack coming from a State.[9] The fact that the SC did not explicitly attribute the attack to Afghanistan is not very significant, because the UN organs still considered the Northern Alliance as the legitimate Government of Afghanistan and hence distinguished the Taliban regime from that Government. In fact, the Taliban regime was the Government of a *de facto* State and was well capable of mounting an armed attack against another State.

A further question concerns the relations between the Al-Qaeda organization and the Taliban regime. SC Resolutions 1214 (1998), 1267 (1998) and 1333 (2000) had distinguished between the Taliban and Al-Qaeda and requested the Taliban to take preventive and repressive measures against Al-Qaeda in the same way as a State would be required to do in relation to a terrorist group operating on its territory. The links between the Taliban and Al-Qaeda may have been less evident in

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8 UN Doc. S/2001/946. In his letter US representative Negroponte noted: "The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation."

9 The view that the meaning of Article 51 could be stretched so as to comprise within the concept of an armed attack, under circumstances, also acts of a terrorist group that is not linked to a State was held by A. Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, *European Journal of International Law* Vol. 12 (2001) p. 993 at p. 997 and M. Krajewski, *Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen – Der 11. September 2001 und seine Folgen*, *Archiv des Völkerrechts* Vol. 40 (2002) p. 183, especially at p. 197-198. The latter author argues from the fact that a non-State entity may cause a threat to the peace within the meaning of Article 39 of the UN Charter. However, there is a considerable difference between a threat to the peace and an armed attack, also in view of the different consequences that they entail under the UN Charter.

the past. When proclaiming "the inherent right of individual or collective self-defence" in the aftermath of the 11 September attack, SC Resolutions 1368 (2001) and 1373 (2001) did not specify the target against which response could be directed. This may be due to the fact that it had become clear after the 11 September attack that the two organizations were, as was said by President Bush in November 2001, "virtually undistinguishable".[10] They operated in tandem, with Al-Qaeda giving the Taliban financial and military support. They were arguably part of the same structure of Government. Al-Qaeda could thus be described as a *de facto* organ of the Afghan State, although it also operated outside Afghanistan.[11]

It is true that, after the military operation "Enduring Freedom" had started, the SC reverted in a preambular paragraph of Resolution 1378 (2001) to the distinction between the Taliban regime and Al-Qaeda and condemned "the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaeda network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaeda and others associated with them". This language may be seen as reflecting a tentative shift in policy, in order to open up the possibility of a military response being carried outside Afghanistan.

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10 On 20 September 2001 President Bush had stated to Congress that "[t]he leadership of Al-Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of the Country". *Facts on File World News Digest* Vol. 61 (2001) p. 740. The United Kingdom Government had taken a similar position. For instance, Prime Minister Blair emphasized in a statement to Parliament on 4 October 2001 the "closeness of Bin Laden's relationship with the Taliban". See www.pm.gov.uk.

11 S. D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, *Harvard International Law Journal* Vol. 43 (2001) p. 41 at p. 50-51 held the Taliban regime as responsible because it "essentially allowed Al-Qaeda to exercise governmental functions in projecting force abroad" and "adopted Al-Qaeda's conduct as its own". According to L. Condorelli, *Conclusions*, in: R. Méhdi (ed.), *Les Nations Unies et l'Afghanistan* (forthcoming), a *lex specialis* has arisen to the effect that terrorist acts committed by individuals are attributed to the State that could and should have prevented them. In the case of Al-Qaeda, N. Schrijver, *Responding to International Terrorism: Moving the Frontiers of International Law for 'Enduring Freedom'*, *Netherlands International Law Review* Vol. 48 (2001) p. 271 at p. 285-286 held the Taliban regime responsible because it exercised an "effective control" on Al-Qaeda. However, Al-Qaeda seemed more in control of the Taliban regime than vice versa. The view expressed in the text, which was the one held in my brief comment *In What Sense was there an "Armed Attack"?*, www.ejil.org/forum, has since been developed by M. Frigessi di Rattalma, *Qualche riflessione sull'azione bellica in Afghanistan e la legittima difesa*, in: A. Calore (ed.), *"Guerra giusta"? Le metamorfosi di un concetto antico* (2003) p. 211.

However, there is no clear indication that the SC intended to endorse the so-called Shultz doctrine, that a State could use force in response to terrorist groups wherever they are, in "international waters or airspace" or "on the soil of other nations".[12] What could be said is that the SC did not define the limits of self-defence in this regard. Only few States would in any case agree with the opinion, which was notably expressed in the Joint Resolution adopted by the House and Senate after the 11 September attack, that considers that force may be used also in the absence of an armed attack on the part of the State on whose territory the military operation takes place.[13]

SC resolutions concerning Afghanistan also throw little light on the extent to which a response against an armed attack may be carried out lawfully. SC Resolutions 1368 (2001) and 1373 (2001) confirm the view that under Article 51 of the UN Charter self-defence may justify a response also after an attack has taken place.[14] Self-defence may be regarded as an instrument for preventing further attacks. Thus a military operation against a terrorist group may lawfully pursue the aim of eliminating the group's ability to resort to further attacks.

In the case of Afghanistan, the military response was carried out both against the Taliban and Al-Qaeda and clearly aimed at the collapse

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12 This doctrine was expressed by US Secretary of State Shultz on 15 January 1986. See *International Legal Materials* Vol. 25 (1986) p. 204 at p. 206. M. Byers, *Terrorism, the Use of Force and International Law after 11 September*, *International and Comparative Law Quarterly* Vol. 51 (2002) p. 401 at p. 408-409 noted that claiming the existence of "a right to attack terrorists who simply happened to be within the territory of another State" was more of a "stretch from pre-existing international law" than what was held in 2001. This is because, like J. Frowein, *Der Terrorismus als Herausforderung für das Völkerrecht*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* Vol. 62 (2002) p. 879 at p. 887, he viewed the existence of substantial links between the Taliban regime and Al-Qaeda as essential. However, Secretary of State Shultz had probably in mind only attacks and responses on a limited scale.

13 The Resolution authorized the President "to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons". *International Legal Materials* Vol. 40 (2001) p. 1282. The wide reading of the exception of self-defence in the context of terrorist acts has found support in literature. See especially W.M. Reisman, *International Legal Responses to Terrorism*, *Houston Journal of International Law* Vol. 22 (1999) p. 3 at p. 37 and T. M. Franck, *Terrorism and the Right of Self-Defence*, *American Journal of International Law* Vol. 95 (2001) p. 839.

14 See on this point especially C. Tomuschat, *Der 11. September 2001 und seine rechtlichen Konsequenzen*, *Europäische GrundrechteZeitschrift* Vol. 28 (2001) p. 535 at p. 542.

of the regime. This collapse could not be defined as simply a collateral effect of a military response against Al-Qaeda. SC Resolution 1378 (2001), adopted during the military operations, implicitly endorsed the scope of the ongoing operations by expressing support for the "international efforts to root out terrorism, in keeping with the Charter of the United Nations" and also "the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government". Should one accept the idea that the Taliban regime and Al-Qaeda were components of one and the same organization, the deposition of the Taliban regime could be justified on the basis of self-defence. It would on the contrary be hard to justify the military operations against the Taliban regime if, contrary to the opinion expressed above, one considered that the Taliban had only failed to prevent and repress acts of a terrorist group with which the regime could not be identified.

Once a new Government came into being in Afghanistan, the continuation of the operation "Enduring Freedom" could be viewed as lawful on the basis of that Government's consent. No SC resolution addressed this aspect of the military intervention. While still "supporting international efforts to root out terrorism, in keeping with the Charter of the United Nations", SC Resolution 1386 (2001), which was adopted after the Bonn Agreement, established the International Security Assistance Force (ISAF) with the limited mandate of assisting "the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas".

IV. THE NATURE OF THE ARMED CONFLICT AGAINST A TERRORIST GROUP

The definition of the nature of the 11 September attack depends on the way one views the relations between the Taliban regime and Al-Qaeda. Should one consider the attack as originating from a *de facto* State one would have to regard it as the beginning of an international armed conflict between that State and the United States. On the other hand, if the attack were considered only as the work of a terrorist group, an armed conflict would not yet have come into existence.

Since the military operation "Enduring Freedom" was carried out by the United States and the other States in the coalition against both the Taliban and Al-Qaeda and was in substance a single operation, the ensuing conflict was in any case an international armed conflict, irrespective

of the nature of the relations between the Taliban and Al-Qaeda. Even if the two entities could have been sharply distinguished, they built together the opposition to the military operation. The existence in Afghanistan of a parallel non-international conflict between the Northern Alliance and the Taliban regime would not affect the issue of the classification of the conflict. Even if the operation "Enduring Freedom" was regarded as an intervention in the non-international conflict, which arguably it was not, the operation would have given rise to an international conflict.[15]

A problem concerning the nature of the conflict could have arisen if the military response occurring on the territory of a foreign State had been directed only against the terrorist group. With regard to this type of situation one could argue that, although that State's territorial sovereignty was infringed, no armed conflict would exist with the same State. On the other hand, the use of force against the terrorist group might then not reach the level of an armed conflict. Moreover, such a conflict would not come within the definition of Article 1 of Protocol II additional to the Geneva Conventions because it would not be a conflict "in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups".[16]

In Afghanistan, once the resistance on the part of the Taliban regime and Al-Qaeda collapsed, the international armed conflict with them came to an end. The operation "Enduring Freedom" nevertheless continued. It became first an intervention by foreign States in a non-international armed conflict and later a police action undertaken with the consent of the Afghan Government. In the final stage, while international humanitarian law no longer applies to the operation, obligations under human rights treaties and general rules for the protection of human rights do not cease to apply. Moreover, international humanitarian law is still relevant for the treatment of those who were taken prisoner during the armed conflicts.[17]

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15 See D. Schindler, *The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols*, *Recueil des Cours de l'Académie de Droit International de La Haye* t. 163 (1979-II) p. 117 at p. 150ff. and, more recently, D. Momtaz, *Le droit international humanitaire applicable aux conflits armés non internationaux*, *ibidem* t. 292 (2001).

16 Even under common Article 3 of the Geneva Conventions a similar problem would arise. See E. Chadwick, *Self-Determination, Terrorism and the International Law of Armed Conflict* (1996) p. 148ff.

17 See especially H.-P. Gasser, *Acts of terror, "terrorism" and international humanitarian law*, *International Review of the Red Cross* Vol. 84 (2002) p. 547 at p. 566ff.

Human Security and Prevention of Terrorism

WOLFGANG BENEDEK

I. MILITARY SECURITY OR HUMAN SECURITY?

Following the tragedy in the United States on 11 September 2001 many counter-measures have been taken – mainly increased spending for the military and police in order to fight terrorism worldwide by force, tightened controls, etc. However, many commentators have asked whether this is the proper and sufficient response, because it addresses only the manifestations of terrorism, but does not deal with its root causes. As the conflict in Palestine shows, no force can be strong enough to stop suicide bombers ready to kill themselves for their political objectives. Force, including military means, will always be necessary to deal with crime in general and terrorism in particular, but as long as the root causes of terrorism – the underlying problems which make people so fanatic they are ready to do everything – are not addressed each terrorist killed will be replaced by another willing to do the same. The examples of Palestine or Chechnya confirm this finding.

In its Resolution 1258 (2001) on "Democracies facing terrorism", the UN General Assembly suggested that states "renew and generously resource their commitment to pursue economic, social and political policies designed to secure democracy, justice, human rights and well-being for all people throughout the world".[1] The cost of fighting terrorism worldwide by the use of force and by increasing security arrangements of all kind is enormous. It may well be higher than the cost of dealing with the underlying problems which breed terrorism. In this context, the Council of Europe Guidelines, stating the "obligation of states to protect everyone against terrorism" as the first principle, do not go into any further detail. Only in the preamble it is said that "the fight against terrorism implies long-term measures with a view to preventing the causes of terrorism by promoting, in particular, cohesion in our so-

1 See UN General Assembly Resolution 1258 of 26 September 2001.

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cieties and a multicultural and inter-religious dialogue".[2] This paragraph could also have appeared in the main body of the 17 principles.

The world can hardly be separated into good and evil. Both exist everywhere and innocent people are the most likely to suffer. A main purpose of terrorism is to draw attention to certain political issues or to fight a particular political or socio-economic system. When there is over-reaction to acts of terrorism, the terrorists achieve what they want, i.e. the provocation of such reaction may be exactly part of their plan – for example, to provoke the United States into a new "Vietnam" or "Somalia" through military involvement in foreign countries starting with Afghanistan. The tightened security measures and new security legislation which restrict personal liberties may also be a desired by-product of terrorism against open societies. However, as Sadako Ogata, co-chair of the Commission on Human Security, stated in May 2002 "terrorism in a globalised world cannot be counteracted by military power or governmental control."[3]

There is a danger of confusing revenge with justice and to legitimise actions with allegations which have never been proven according to the standards of Western democracy. However, crimes against humanity like genocide need to be brought to justice, even if there is an undeclared war. That is why the International Criminal Tribunal for the Former Yugoslavia and other criminal tribunals have been set up. Justice needs to be seen to be done.

The aftermath of the war by the United States and its allies against Iraq in 2003 demonstrates the limits of military security. The United States was able to militarily occupy Iraq in a brief time, but it appears unable to provide human security, i.e. law and order, vital supplies like water and energy, as well as security for its own soldiers.

Generally speaking, conflict prevention, in order to be successful, needs to address the root causes of conflicts, which is a task for the development and humanitarian agencies of the UN system.[4] It is also a task of preventive diplomacy, which the UN Agenda for Peace of 1992 defined as "action to prevent disputes from arising between parties, to

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2 See Council of Europe, Guidelines on Human Rights and the Fight against Terrorism, Annex X.

3 Sadako Ogata, From State Security to Human Security, Brown University Ogden Lecture on 26 May, 2002, www.humansecurity-chs.org/doc/ogata_ogden.html.

4 See Kofi A. Annan, Secretary-General of the United Nations, Annual Report on the Work of the Organization 2001, United Nations 2001, 8.

prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur."[5] Preventive action strategies are needed in various fields ranging from governance and societal stability to personal and economic security.[6] However, as the Deputy High Commissioner for Human Rights, Bertrand G. Ramcharan, observed in his book on Human Rights and Human Security, "the best conflict prevention strategy, at the end of the day, is a strategy of respecting human rights".[7] And the President of the Parliamentary Assembly of the Council of Europe, Peter Schieder, observes in his contribution:

> "We must put in place long-term preventive measures dealing with social, political, economic and other circumstances related to terrorism. We must deal with legitimate grievances, quickly and fairly, before they are exploited by extremists."[8]

A similar approach can be found in the communication of the European Union on conflict prevention.[9]

Furthermore, the former High Commissioner for Human Rights, Mary Robinson, in her report to the Human Rights Commission of 2002, insisted on "taking prevention seriously". According to her report entitled "Human rights: a unifying framework", she notes that the "structural" category of prevention, i.e. considering the root causes of insecurity, are neglected in Security Council Resolution 1373 (2001) which primarily is focused on "operational" prevention.[10]

However, this does not exclude the use of military force to provide basic stability as in the case of Bosnia-Herzegovina or Kosovo. In this way, military action and human security can be complementary.

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5 Boutros Boutros-Ghali, An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping, United Nations – New York, 1992.

6 See John G. Cockell, Human Security and Preventive Action Strategies, in: Edward Newman and Oliver P. Rickmond (eds.), The United Nations and Human Security, New York (Palgrave) 2001, 15-30.

7 Bertrand G. Ramcharan, Human Rights and Human Security, The Hague (Kluwer Law International) 2002, 12.

8 See Peter Schieder, supra.

9 See Communication from the Commission on Conflict Prevention, (COM) 2001, 211 final of 11.04.2001.

10 See paras. 35ff. of the report in Annex II.

II. NEED TO ADDRESS THE ROOT CAUSES OF TERRORISM

It has mainly been the United Nations and the European Union which have been open to discussion of the underlying root causes of terrorism. But, compared to the enormous military spending by the United States in particular, there has been no similar increase of funding for dealing with the problems behind terrorist activities. Most of these problems are of a political nature and need to be addressed by negotiation and mediation but these also need resources to back up political decisions. The problems including living conditions, social distress, marginalization combined with a lack of perspective, violations of religious beliefs and lack of respect for other cultures, religions and civilisations. There are no simple recipes but we can learn something from history.

When the United States and its allies planned the post-world war order after 1945 they started well in advance thinking about economic and social cooperation, and how to improve the living standards of those nations with which they were still at war. They planned international political and economic institutions to achieve economic growth and social progress for all nations, because a root cause of the Second World War was the international economic crisis of the 1920s and early 1930s. This crisis made it possible for Hitler to come to power and for the Germans to follow him as their leader. After the Second World War the Marshall Plan helped rebuild the destroyed economies of Europe and transformed former enemies into partners.

The enormous disparities of our world and the unresolved global problems create an environment for acts of terrorism which, accordingly, require a global effort by all nations, together with international institutions, to start a struggle by peaceful means against the underlying causes of insecurity, fundamentalism and terrorism. In a globalised world, security by military means alone is an illusion and a costly one. What we have to aim for is human security, putting individuals and their wellbeing into the centre of our concern, because people who enjoy decent living conditions and democratic rule are less likely to generate terrorists or sympathise with them. The report of the former UN High Commissioner for Human Rights, Mary Robinson, to the Commission on Human Rights of 2002 states:

> "Achieving global security requires a comprehensive strategy to address the causes of insecurity, not only its consequences and manifestations.

> This strategy must place individuals and their universal rights at the centre of national and global security policies."[11]

This is not just a power struggle, where the "evil empire" attacks the first world power to win control of our planet, as in *Independence Day* or *Star Wars*. A major reason why political terrorism has developed appears related to the lack of human security among an increasing number of people in the world. They feel economically excluded, ethnically discriminated, and not respected for their social, cultural and religious beliefs. Such people are more receptive to fundamentalism, from which terrorism may emanate.

As we can see from several United Nations reports, including the UNDP human development reports,[12] there are an increasing number of people in our world who feel marginalized, who do not have their basic needs covered, who live in poverty, who are discriminated against for reasons of their race, colour, sex, language, religion and political opinion, who lack the right to self-determination, who feel exploited and dominated by others, who do not enjoy the most basic civil and political as well as economic, social and cultural rights, and who do not feel respected nor protected – i.e., they do not feel secure in their personal lives.

Furthermore, we observe a change in the nature of threats to peace and security: a greater number of violent conflicts occur within the boundaries of states and the victims are mainly civilians.[13]

III. THE HUMAN SECURITY APPROACH

In 1994, the United Nations Development Programme (UNDP) first used the concept "human security" in reference to basic economic and social rights, like the right to food, to health and social security, etc., stating that: "the world can never be at peace unless people have security in their daily lives".[14] On 4 October 2002, UN Secretary General Kofi Annan authored an article on "World Inclusivity" in the International Herald Tribune in which he spoke about a "new insecurity" since 11 September and concluded that "peace, tolerance, mutual respect, human rights, the rule of

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11 See para. 28 of the report in Annex II.

12 UNDP, Human Development Report, yearly, which uses a Human Development Index.

13 Commission on Human Security, Human Security Now, Protecting and Empowering People, Washington 2003, 21ff. See also www.humansecurity-chs.org.

14 UNDP, Human Development Report 1994.

law and the global economy are all among the casualties of the terrorists' acts". He also stated:

> "We cannot continue to exclude the poor, the disenfranchised or those who are denied basic rights to liberty and self-determination. Or that if we do, we cannot at the same time hope to secure lasting peace and prosperity".[15]

In the mid-90s the so-called "Human Security Network", a new group of "like-minded states", was formed with at first eight states and now 11, committed to drawing political conclusions from the changing nature of threats to peace and security and to act together in international fora, in particular in the United Nations.[16]

The "human security" approach can be characterized by an awareness that exclusive emphasis on the classical military approach to security is becoming increasingly obsolete or inefficient: "new vulnerabilities" have emerged. States using traditional concepts of security are increasingly unable to protect their citizens against the new threats, partly because of their international dimension.

These threats are characterized by "internal conflicts", creating refugees and displacement, by terrorism against civilians, by organized crime, by drug problems, trafficking in human beings, and also poverty, natural disasters, unemployment, i. e., the lack of basic economic and social rights. The targets or victims mainly are civilians, often children. Mines and small weapons kill thousands of people; firearms in the hands of civilians kill some 500,000 people a year. About 1,2 billion people have to live on less than $1 a day; more than one billion have no access to drinking water, meaning that they lack safety or security in their daily life.[17]

The "human security" agenda covers issues like landmines, small arms, children in armed conflict and other forms of exploitation of children, international humanitarian law including the International Criminal Court, conflict prevention, transnational organised crime, and development including health, poverty, food security and human rights education.

A similar approach can be found in the Millennium report of the Secretary General of the United Nations in 2000, which he structured into

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15 Kofi Annan, International Herald Tribune of 4 October 2002.

16 See the Human Security Network website, www.humansecuritynetwork.org.

17 Commission on Human Security, note 13, 21ff. and UNDP, Human Development Report 2002, 17ff.

"freedom from want" and "freedom from fear", responding also to the new challenges of globalization. The emphasis is on conflict prevention, conflict management and sustainability of our life style.[18] The Millennium Declaration contains concrete objectives up to 2015. Its implementation by a "compact among nations" is the focus of the 2003 Human Development Report.[19]

Two major countries have made human security the main principle of their foreign policy: Canada, under the title "Human Security: Safety for People in a Changing World"[20], and Japan, with the triple objectives "freedom from want", "peace and co-existence" and "dignity of the individual".

A Commission on Human Security was set up in 2000 at the Millennium Summit with the support of Japan and the Secretary General of the United Nations, but outside the UN organization and independent of any government. Headed by Sadako Ogata, former High Commissioner for Refugees, and Amartya Sen, Nobel Prize winner in economics, this commission issued its report in May 2003.[21]

OSCE voted at its summit in Istanbul in 1999 to work to improve human security and the life of individuals and to focus on respect for human rights, children in armed conflicts and control of small weapons.[22] The then UN High Commissioner for Human Rights, Mary Robinson, when addressing the OSCE Permanent Council in July 2002 in Vienna, said:

> "There is a duty to confront and defeat terrorism but ... the actions taken by states to combat terrorism must be in conformity with international human rights and humanitarian law standards ... In the aftermath of the terrible events of last September 11, as States seek effective ways to deal with the threat of terrorism, OSCE has not wavered in asserting this linkage between human rights and human security."[23]

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18 The Millennium Assembly of the United Nations, „We the peoples: the role of the United Nations in the twenty-first century, Report of the Secretary-General, UNGA Doc. A/54/2000 of 27 March 2000.

19 UNDP, Millennium Development Goals: A compact among nations to end human poverty, Human Development Report 2003, New York/Oxford (Oxford University Press) 2003.

20 Department of Foreign Affairs and International Trade, Human Security: Safety for People in a Changing World, April 1999.

21 See note 13.

22 OSCE, Istanbul Summit Declaration, 1999; www.osce.org/does.

23 Address by Mary Robinson, The United Nations High Commissioner for Human Rights to OSCE Permanent Council, Vienna, 19 July 2002, PC. Del/581/02.

UNESCO has included human security in its five-year plan and has organised pertinent meetings worldwide.[24]

For the Council of Europe, the Report of its Secretary-General, Walter Schwimmer, states that: "Our best weapon is the vigorous defence of the fundamental values of democracy, the dissemination of these and their development."[25]

With regard to national situations, the contribution of Tom Hadden confirms that "measures against terrorism are unlikely to be effective in the absence of appropriate political action to deal with legitimate grievances ...".[26]

An important element of this new policy is the recognition of the importance of international cooperation. The weaknesses of global governance in addressing "global concerns" need to be dealt with.[27] The countries of the Human Security Network support international cooperation in the United Nations as well as its efforts in the field of peace-keeping, humanitarian action, post-conflict peace building, fighting international crime, drugs trade, and terrorism.[28]

The human security approach places the human person and human dignity at the centre of all considerations. This is similar to the human rights approach, which in the Universal Declaration on Human Rights of 1948 started from the basic assumption of the human dignity of each individual. However, whereas the human rights approach today is based on a legal framework of treaties and resolutions, the human security approach is more a political strategy or agenda, aimed at strengthening and elaborating international standards and procedures for the safety of the human person, ranging from humanitarian law and criminal justice to development and human rights.[29]

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24 See, for example, Proceedings of the expert meeting on „Peace, Human Security and Conflict Prevention in Latin American and the Caribbean", in: Moufida Goucha and Francisco Rojas Aravena, Human Security, Conflict Prevention and Peace in Latin America and the Caribbean, UNESCO 2003.

25 See SG/Int(2002)19, quoted also in Martin Eaton, Council of Europe Measures against Terrorism, supra.

26 See Tom Hadden and also Kevin Boyle, supra.

27 Report of the Secretary-General, note 19, para. 41ff.

28 See, for example the agenda of the UN Commission on Crime Prevention and Criminal Justice, UNIS/CP/432 of 23 May 2003.

29 See Gerd Oberleitner, Human Security and Human Rights, ETC Occasional Paper Series, No. 8, June 2002, www.etc-graz.at/publikationen/Human%20Security%20occasional%20paper.pdf.

IV. THE NEED FOR HUMAN RIGHTS, GOOD GOVERNANCE AND AN INTERCULTURAL DIALOGUE

Human security can best be achieved through the full realisation, in a holistic way, of all human rights, of civil and political as well as of economic social and cultural rights. Where human rights are guaranteed, there is also human security, and "without human security there can be no human development".[30]

In his famous message to Congress of President Roosevelt on 6 January 1941, President Roosevelt spelled out the basic principles of the post-war order, i. e., freedom from fear and freedom from want, together with freedom of speech and expression and freedom to worship.[31] These were endorsed by the Atlantic Charter of August 1941 and the Declaration on the United Nations of 1 January 1942 and are still relevant today. They have been taken up in the Millennium Report of the UN Secretary-General of 2000.[32] Freedom from fear today can be understood as civil and political rights while freedom from want equals economic, social and cultural rights. Certainly the first is today a Western priority while the second is considered a developing country priority but only because it has been largely achieved in the West. In this context, attention is drawn to Art. 3 of the Universal Declaration of Human Rights, dealing with the right to life, to liberty and the "security of the human person", which today has to be understood in a wider sense.

Human rights can best be protected by international law, and human security can best be advanced by international cooperation. The negative effects of globalization need to be addressed by positive instruments of global governance, in particular by more representative international bodies, which have legitimacy as large as possible and work on the basis of human rights.

In the work of the United Nations High Commissioner on Human Rights, but also the International Committee of the Red Cross, human rights are increasingly seen in the context of conflict prevention and post-conflict resolution. In the words of the UN High Commissioner for Human Rights, Sergio Viera de Mello: "We must integrate human rights in efforts of conflict prevention, peacemaking, peacekeeping, peace-building, devel-

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30 Mary Robinson, United Nations High Commissioner for Human Rights at World Conference on Racial Discrimination in Durban 2001.

31 See American Journal of International Law, Vol. 35 (1941), 339.

32 See note 19.

opment and humanitarian operations."[33] Where human rights are respected, conflicts are less likely to evolve and there can be no sustainable solution in post-conflict reconstruction without human rights.

Human Security is also linked to human rights education as people need to know about their rights, which are also the rights of everybody else, of every human being including terrorists from abroad. They all have a human right to a fair trial (see the case of the Oklahoma bomber). It is a criterion of civilization to treat even the worst enemy in a civilized, i. e., human rights way – respecting human dignity, but also using all legal means to bring those responsible for a crime to justice. In addressing the root causes of violence and threats to security, it is often overlooked that among the root causes there is a neglect of violations of basic human rights. Accordingly, the guarantee and enforcement of basic human rights is the best approach to human security.

Already in the year 2000, the European Training and Research Centre for Human Rights and Democracy (ETC), on behalf of the Austrian Ministry for Foreign Affairs, organised a seminar on Human Security and Human Rights Education.[34] The ministerial meetings of the Human Security Network have at several occasions made recommendations on the relationship between human rights (education) and human security, i.e. that "human rights provide a foundation upon which human development and human security are pursued",[35] "enhancing human security through human rights education"[36] or the Graz Declaration on Principles of Human Rights Education and Human Security" of 2003.[37] Austria, as the chair of the Human Security Network in 2002/2003, is promoting the importance of human rights education as one of its major priorities in the Human Security Network. For this purpose, a manual on Human Rights Education has been elaborated by the ETC.[38] The same approach has also been propagated by the HCHR, Sergio Vieira de Mello elaborating on human rights education:

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33 Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, Commission on Human Rights, Doc. E/CN.4/2003/14 of 26 February 2003, para. 52.

34 International Workshop on Human Security and Human Rights Education, Graz, Austria, 30 June and 1 July 2000, www.etc-graz.at/humansecurity.

35 Report on Conclusions and Recommendations of IVth Ministerial Meeting, Santiago de Chile, 2-3 July 2002, Annex No. 1.

36 Ministerial Meeting of the Human Security Network, Lucerne, 11-12 May 2000.

37 See www.etc-graz.at/humansecurity/.

38 Wolfgang Benedek and Minna Nikolova, Understanding Human Rights, Manual on Human Rights Education, Vienna 2003.

"Security will be enhanced as we fill in the lacunae of ignorance, empower the dispossessed and enable them to recognize and claim their rights."[39]

There can be no human security for everybody without human development for all. This is the message of the UNDP Development Report 2002, with its particular focus on democracy. Mark Melloch Brown, UNDP Administrator, said: "Terrorism feeds on failed states and poor governance as much as failures of national security". The report stresses the interlinkages between global threats and human rights and the need to address those threats through international rules and institutions supporting democracy, human rights, rule of law and good governance. It offers strong evidence that a trade-off between national stability and personal freedom as suggested by authoritarian regimes does not promote development.[40]

This was also confirmed by the decision of the European Union and later on by the United States in the context of the EU summit meeting in Barcelona and the UN Conference on Financing for Development in Monterrey in March 2002, where a commitment was made to increase the means for development cooperation over the next five years.

In a similar way, there is also a need for a well-functioning state, which is not the enemy of people, but has to serve the people, who need the state when it comes to redistribution and to social services along with security. Accordingly, human security requires both good governance-building and strengthening of civil society.

Finally, the overall objective has to be a "political culture of human rights", in which everyone knows his or her rights and respects the rights of others without discrimination and in which also the state is led in all its activities by the respect for human rights.[41] In this way human rights become an instrument of empowerment of the people and of social transformation.

Human security is also strengthened by the "dialogue of civilizations", which takes place in the United Nations based on resolutions of the General Assembly since 1998. This cultural dialogue is based on respect for one another and the tolerance of differences or "otherness". The right to be different has been highlighted by UNESCO and others. Nobody, no religion, no culture can claim to have the truth, which automatically would lead to

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39 Statement to the Opening of the Fifty-Ninth Session of the Commission on Human Rights by Sergio Vieira de Mello, 17 March 2003, www.unhchr.ch.

40 UNDP, Human Development Report 2002: „War on Terror must not put Democracy on the Backburner says HDR", www.undp.org/hdr2002.

41 Wolfgang Benedek, For a Culture of Human Rights in the Balkans, in: Mirjana Todorovic (ed.), Culture of Human Rights, Belgrade 2003, 128ff.

clusion rather than inclusion of otherness. Not uniformity, but diversity is what gives colour to society. The Parliamentary Assembly and the Secretary General of the Council of Europe have on various occsions emphasized the importance of multicultural and inter-religious dialogue as preventive measures in the fields of education and religion.[42] Art. 5 of the Vienna Declaration on Human Rights, adopted by the UN World Conference on Human Rights in 1993, also reflects the approach that all human rights need to be respected and enforced by all states, while taking into account historical and cultural differences.

V. CONCLUSION

In conclusion, there is the great risk that any response to terrorism based on force alone will be counter-productive as it will stimulate more violence and legitimise earlier instances. Efforts to protect countries and whole continents through increased security measures and barriers against access, also have their limits. Accordingly, more attention needs to be given, and significantly more resources need to be devoted, to measures increasing human security for deprived and excluded people, including poor and marginalized societies mainly in the South, by addressing their civil and political rights as well as their economic, social and cultural rights. This is an indispensable element of any credible strategy of prevention.

Hernando de Soto, president of the Institute for Liberty and Democracy, said: "Don't let terrorists seduce the enterprising poor" and "It is not enough to appeal to stomachs. One must appeal to aspirations".[43] Consequently, prevention of terrorism means providing the perspective of a better future to economically marginalized and politically excluded majorities in this world. This perspective should be based on common human rights, reflecting universal human values. Because, as Thomas L. Friedman observed in the New York Times a year after 11 September, "only human values can repair civilization" and (only) "imposing norms and rules on ourselves gives us the credibility to demand them from others" and "building

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42 See Walter Schwimmer, supra.

43 Hernando de Soto, New York Times of 17 October 2001.

higher walls may feel comforting, but in today's interconnected world, they are an illusion".[44]

This echoes what UN Secretary-General Kofi Annan had to say:

> "Either we help the outsiders in a globalized world out of a sense of moral obligation and enlightened self-interest, or we will find ourselves compelled to do so tomorrow, when their problems become our problems in a world without walls."[45]

If we are aware of all this, where are the determined efforts of international cooperation and assistance, where is the grand strategy, the master plan for a safer world based on human rights and human security?

International cooperation against terrorism has improved but international cooperation to deal with the prevention of terrorism by addressing its root causes still needs to be given adequate attention as well as the needed resources. And people need to be empowered to actively improve their human security through human rights education and learning.

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44 Thomas L. Friedman, Only human values can repair civilization, International Herald Tribune of 11 September 2002.

45 Kofi Annan, The walls have to come down, in: International Herald Tribune of 4 October 2002.

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CONCLUSIONS

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Concluding Thoughts

ALICE YOTOPOULOS-MARANGOPOULOS

"They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

Benjamin Franklin

I think that in our conclusions we must start by taking a clear stand against terrorism, which provokes the death of innocent people. The attack of 11 September justifiably generated the reaction by the entire international community that it was the most important terrorist act of our time.

I. HUMAN RIGHTS PRINCIPLES AND ANTI-TERRORIST MEASURES

Concerning the methods of addressing the terrorist phenomenon, I think that the "Guidelines on Human Rights and the Fight against Terrorism", adopted by the Committee of Ministers of the Council of Europe at its 804th session (11 July 2002), constitute a set of very important and helpful rules.[1]

The world community should react to terrorism only by means which are in accordance with international law, including human rights law and humanitarian law. Human rights should always constitute the leading standards for the determination of anti-terrorist policy.[2] It is noteworthy that 17 independent experts of the UN Commission on Human Rights – in a joint statement issued on 10 December 2001 on the occasion of Human Rights Day – expressed:

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1 See above contribution by Martin Eaton "Council of Europe Measures against Terrorism" and the "Guidelines" in Annex X.

2 See above contributions by Christiane Bourloyannis-Vrailas "United Nations Human Rights Standards as Framework Conditions for Anti-Terrorist Measures" and Martin Eaton "Human Rights as Standards and Framework Conditions for Anti-Terrorist Measures: European Standards and Procedures".

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights. © *2004 Koninklijke Brill NV. Printed in the Netherlands.*

> "(...) their deep concern over the adoption or contemplation of anti-terrorist and national security legislation and other measures that may infringe upon the enjoyment for all of human rights and fundamental freedoms and deplored human rights violations and measures that have particularly targeted groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media."[3]

Indeed vulnerable groups of people, such as migrants and refugees, became even more vulnerable after 11 September. The impact of anti-terrorist measures was immediate, as evidenced by the arrest and detention of hundreds of migrants or members of minorities, especially Arabs and Muslims.[4] Moreover, migration policy became stricter in the name of national security and all efforts for improvement seem hopeless. Anti-terrorist measures affect processes of screening entrants, criteria for admission and deportation (including removal proceedings), interior enforcement, including administrative/preventive detention and secret procedures for all of them.[5] Refugee protection and human rights bars

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3 See the "Joint Statement" in Annex 1 and the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2002/75.

4 See above contribution by Susan Akram and Kevin Johnson on U.S. Measures against Terrorism.

5 In the USA, a directive (known as the "Creppy Directive") to the immigration courts restricts access to information and proceedings of deportation cases that present a "special interest" with regard to the events of 11 September. In *Detroit Free Press, et. al., v. Ashcroft, et. al.* (August 26, 2002), the applicants challenged this directive on the ground that it violated the First Amendment to the USA Constitution that prohibits the government from making any law "abridging the freedom of speech, or of the press". The USA Court of Appeal for the Sixth Circuit has affirmed an injunction that prohibits the government from closing immigration hearings to the public and the press without an individualized showing of justification. It is significant that Judge Damon Keith said in this case that "Democracies die behind closed doors". Nevertheless, a few months later the USA Court of Appeals for Third Circuit, in *North Jersey Media Group, Inc. v. Ashcroft* (October 8, 2002), took the opposite position. The Supreme Court decided not to hear the latter case without, as is customary, explaining its reasoning. Most recently, in *Center For National Security Studies, et. al. v. U.S. Department of Justice* (June 17, 2003), the applicants brought the Freedom of Information Act (FOIA) against the Department of Justice seeking release of information concerning persons detained in the wake of the 11 September terrorist attacks. The USA Court of Appeals for the District of Columbia concluded that the government was entitled to withhold the names of detainees and information on their whereabouts because disclosing information could give terrorists important insight into the government's investigation.

against non-refoulement are also influenced.[6] However, the States of the world affirmed their commitment to combat discrimination and to respect their humanitarian obligations relating to the protection of refugees and asylum-seekers in the Durban Declaration adopted in 2001 at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

According to the UN High Commissioner for Human Rights Report entitled "Human rights: a uniting framework"[7], "ensuring that innocent people do not become the victims of counter-terrorism strategy should be an important component of the anti-terrorism strategy".[8] The "balance between human rights law and security", through respect of requirements and principles of international law, such as legal requirements for derogation, and international humanitarian law, as reflected in jurisprudence and general comments of human rights bodies, is absolutely essential to ensure that States combat terrorism in accordance with their international obligations.[9]

We must always remember that human rights law prescribes that restrictions and limitations should be proportionate to the legitimate aim pursued. The principle of proportionality is one of the factors to be taken into account when assessing whether a measure of interference – and which measure – is necessary.[10] There should always be a fair balance between legitimate national security dangers and respect of fundamental human rights. Even during an armed conflict, measures derogating from provisions of treaties are permitted only to the extent that the situation constitutes a threat to the life of the nation.[11] Recent U.S. and British anti-terrorist measures are not consistent with the above principles. Moreover, human rights instruments, e.g. ICCPR article 4,

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6 See Joan Fitzpatrick, "Terrorism and Migration", ASIL, Task Force on Terrorism, October 2002.

7 See Annex II: Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights (Mary Robinson) and Follow-Up to the World Conference on Human Rights of 27 February 2002, E/CN.4/2002/18.

8 Ibid., para. 9.

9 Ibid., paras. 8-18.

10 See relevant jurisprudence of ECHR, *Handyside v. UK* (7 December 1976, EHRR 24), Sunday Times v. UK (26 April 1979, EHRR 30).

11 See the presentation by Kevin Boyle "Terrorism, States of Emergency and Human Rights" and Annex III: International Committee on Civil and Political Rights, General Comment No. 29 on States of Emergency (Article 4) of 31 August 2001, CCPR/C/21/Rev.1/Add. 11.

provide that certain rights, such as the right to life (article 6), the prohibition against torture or cruel, inhuman or degrading treatment (article 7), the principle of legality in the field of criminal law (article 15), the recognition of everyone as a person before the law (article 16) and the freedom of thought, conscience and religion (article 18), may not be derogated from under any circumstances.

Of course the perpetrators of terrorist acts which may constitute "crimes against humanity"[12] must be punished. The International Criminal Court (ICC) should play an important role in this regard. Regrettably, the reality is different. A strong reaction against this very important organ for the punishment of crimes against humanity and war crimes has been led by the United States of America. After the establishment of this Court, in spite of all American reaction, the United States has exerted all possible pressure to exempt itself from the competence of this International Criminal Court through resolutions of the UN Security Council and bilateral agreements. [13]

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12 Terrorism, as such, is not expressly included in article 7 of the ICC Statute that refers to crimes against humanity. Nevertheless, terrorist acts could be considered as crimes against humanity to the extent that they are committed as part of a widespread or systematic attack against a civilian population. Mary Robinson qualified the attacks of 11 September, 2001 in her report "Human rights: a uniting framework", (see above note 7, p. 3 at para. 4), as crimes against humanity; she based this opinion on the large-scale nature of the attacks and the fact that they were directed against the civilian population.

13 Security Council Resolution 1422 (2002) and 1487 (2003); as to the bilateral agreements, see Coalition for the International Criminal Court, 13 June 2003, "U.S. Bilateral Immunity or So-Called "Article 98" Agreements; Human Rights Watch, 2 April 2003, "International Criminal Court: U.S. Efforts to Negotiate Bilateral Immunity Agreements".

The basic policy of the USA is the following: Firstly, they avoid to be monitored by international organs and consequently, they fight strongly against the ICC and they do not ratify international conventions on human rights that provide for individual complaint mechanisms; Secondly, they do not want their citizens to be tried by foreign (national) courts and therefore, they sign bilateral agreements that exempt their citizens from the jurisdiction of national courts. One clear example is the Comprehensive Technical Agreement (CTA), recently ratified by the Greek Parliament by Law 3108 of 7/10 February 2003, between Greece and USA providing for the exemption of the members of armed forces, civil servants and their dependents from the jurisdiction of Greek courts after a relevant request of the United States; Thirdly, they plan carefully that, on the contrary, nationals of other States be extradited to and tried in the USA; the recent draft Agreements on Extradition and on Mutual Legal Assistance between the EU and the USA clearly promotes this view.

II. VIOLATIONS OF HUMAN RIGHTS BY NATIONAL ANTI-TERRORIST MEASURES

1. USA ANTI-TERRORIST MEASURES

Instead of supporting the ICC – the hope of all democratic and peace-loving peoples – the USA through the Presidential Military Order issued on November 13, 2001 and approved by Congress, created special military commissions[14] to try suspects of terrorist acts.

The establishment of these commissions and the whole procedure of prosecution of people suspected of involvement in terrorist activities has abolished several fundamental rights. Indeed the Presidential Order of November 13, 2001, provides for the arrest of suspects of terrorist acts without a judicial warrant, without informing the accused of the charges against him, and without setting a maximum length of pre-trial detention. In practice, this means the elimination of *habeas corpus*, the fundamental right that prohibits arrest and detention, except under the conditions provided for by international instruments (art. 14 ICCPR, art. 5 ECHR) and, as a general rule, by national constitutions.

The creation, even after the commission of certain crimes, of *ad hoc* military commissions that shall substitute for ordinary courts and the abolishment of the right to appeal to a court, means that the fundamental *right to a fair trial has been eliminated* (art. 14 ICCPR, art. 6 ECHR).

The monitoring committee of the UN International Covenant on Civil and Political Rights (ICCPR) has specifically considered whether Article 14 of this Covenant permits trials of civilians by special military courts and concluded that, although it is not expressly prohibited, "the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14".[15]

The same Presidential Order constitutes a major deviation from the *principle of equality without any discrimination*, as this order concerns

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14 For the text of this Presidential Military Order, see www.whitehouse.gov. On the context that led to this option, see Drumbl, M. A, "Judging the 11 September Terrorist Attack", Human Rights Quarterly 24 (2002) pp. 323-360.

15 ICCPR General Comment 13 (Twenty-first session, 1984), para. 4.

only foreigners and consequently, it discriminates on the ground of nationality.[16]

Moreover, this Presidential Order is seriously *inconsistent with one of the fundamental principles of democracy, namely the separation of powers*: both legislative and judicial duties are entrusted to the President or the Secretary of Defense (executive power) and other persons with no relation to the judicial branch.[17] Even the decisions of these commissions are subject to final approval only by the President of the USA to whom they are sent, together with the records of the trial, or by the Secretary of Defense if so authorized by the President (Section 4, par. 8).

In addition, the November 13 Presidential Order *excludes access to any international tribunal or committee* seeking redress for any human rights violations that may occur during arrest, detention or prosecution (Section 7, par. b, number 2). Besides, it is well known that the United States has not accepted any mechanism of individual complaints of violation of human rights conventions.

Finally, it is commonly accepted that the treatment of detainees of any kind may not in any way violate the fundamental right that *no person shall for any reason and without any exceptions be subjected to torture or to cruel, inhuman or degrading treatment or punishment* (art. 7 ICCPR, art. 3 ECHR, art. 3 CAT). This right is being *gravely violated by the USA*. What is happening at the expense of detainees, who purportedly have any link whatsoever to terrorism, is well known. The word "Guantanamo" suffices.[18]

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16 Later on, American citizens' rights have not remained intact. Indeed the American Congress passed legislation, entitled Uniting and Strengthening America by providing Appropriate Tools required to Intercept and Obstruct Terrorism Act (October 26, 2001, briefly the USA Patriot Act), which applies also to Americans that are presumably "enemy combatants". The USA Patriot Act provides intelligence agencies, both domestic and international, wide range of new law enforcement powers (such as the possibility of sharing widely data collected in a criminal investigation without judicial review, or the increase of the power of government surveillance to include the seizure of voice-mail messages pursuant to warrants) and has abolished in essence the possibility for courts to ensure that these powers are not abused.

17 The Secretary of Defense acquired an expanded power to issue regulations that cover the entire procedure starting from the selection of the members of the military commissions, who have no connection to the judicial branch (that is why the order uses the neologism "triers" and not "judges" with respect to these persons), to the overview of their functioning.

18 See, in Annex XI, the Report of the Council of Europe on the Human Rights of Persons in the custody of the US in Afghanistan or Guantanamo Bay.

2. BRITISH ANTI-TERRORIST MEASURES

On the other side of the Atlantic, the *British Anti-Terrorism, Crime and Security Act 2001*[19] assigns extended power to the police, which among others may extract financial data and other information from competent financial services of the country. In addition, communications service providers are allowed to retain data about their customers' communications for national security purposes.[20]

According to the Act of December 14, an arrest can take place within the territory of the United Kingdom *without judicial warrant* and a person thus arrested can be *detained indefinitely.* A detainee may *not be informed of the reason of his or her deprivation of liberty.* The Act provides that the Home Secretary has the power to detain indefinitely a person who is not a UK national based on his assessment as to whether there is reasonable belief that the person's presence is a risk to national security or that she/he is a suspected "terrorist". Detainees under this Act (Part 4 – Immigration and Asylum) may also voluntarily leave the UK if they can find a country willing to accept them. Under Article 3 (prohibition of torture) of the European Convention on Human Rights, people that face torture in the only country to which they may be returned cannot be expelled to it. Consequently, it seems that they have to be detained indefinitely, or as long as there is no safe receiving country for them. On the other hand, foreigners that can be deported to a safe country and may be connected to terrorist organizations representing a threat to the UK can potentially continue their dangerous activity from abroad – if deported.[21] There is an appeal to the pre-existing Special Immigration Appeals Commission, set up by the Act of the same name in 1997, following jurisprudence of the European Court of Human Rights.[22] However, under the Commission's (Procedure) Rules 2003,

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19 Anti-terrorism, Crime and Security Act adopted on 14 December 2001, www.legislation.hmso.gov.uk.

20 This Act applies to persons suspected to finance terrorism and relates also to information from telecommunication companies concerning telephone calls or electronic communications, when there is suspicion that terrorist activities are promoted.

21 See also relevant thoughts of the Commissioner for Human Rights of the Council of Europe, Opinion 1/2002 of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on certain aspects of the UK 2001 derogation from article 5 par. 1 of the European Convention on Human Rights, paras. 36-41.

22 *Chahal v. UK*, Judgment of 15 November 1996, 23 EHRR 413. On the Special Immigration Appeals Commission see also above contribution of Tom Hadden "National Anti-Terrorist Measures in the United Kingdom". It is significant that this Commission

Secretary of State may object to the disclosure to the appellant or his representative of material, such as the facts relating to the decision being appealed, the grounds on which he opposes the appeal and the evidence which he relies upon in support of those grounds (Rule 12). Furthermore, according to Rule 38, the Commission may exclude the appellant and his representative from the hearing, or a part of it, and conduct it in private. The justification for both rules is to secure that information contrary to the public interest is not disclosed. [23]

It is significant that the government has derogated under Article 15, para. 1[24] of the ECHR from one of its fundamental provisions, the prohibition of arbitrary arrest and detention, that is *the right to habeas corpus* (Article 5, para. 1 ECHR).

This derogation is a clear regression compared to the position that the European Court of Human Rights has taken on the matter several years ago. Indeed in *Lawless v. Ireland* (No. 3) case[25], the Court stated that the words "other public emergency threatening the life of the nation" "refer to an exceptional situation of crisis or emergency, which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed." Furthermore, as to what extent the provisions violating article 5 are "strictly required" by this emergency, the European Commission of Human Rights in the *Ireland v. UK* case[26] stated that there must be a link between the facts of

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has ruled on 30 July 2002 that powers under Part 4 of the Anti-terrorism, Crime and Security Act 2001 are discriminatory, unlawful, as it targets non-British citizens, and disproportionate.

23 It is noteworthy that a decision of the Special Immigration Appeals Commission, which had turned down an order of deportation on the grounds of national security against the Muslim cleric Maulana Shafiq-ur Rehman, was quashed by the UK Court of Appeal (May 23, 2000). The Court considered that the Commission had taken too narrow a view of what could constitute a threat to national security (which would justify the deportation of the person responsible under 3 (5)(b) of the Immigration Act 1971) and that a global approach should be adopted "taking into account the executive's policy with regard to national security", although it could not be proved to a high degree of probability that Rehman had performed any individual act, which would justify that conclusion. For the evaluation of policies in the USA and the UK on this matter see also note 5 above.

24 Article 15 (1) states: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under international law."

25 Judgment of 1 July 1961, para. 28.

26 Judgment of 18 January 1978.

the emergency on the one hand and the measures chosen to deal with it on the other and that obligations under the Convention do not entirely disappear.

It is worth mentioning that the Commissioner for Human Rights of the Council of Europe, in his Opinion 1/2002, expressed his position on certain aspects of the UK 2001 derogation from article 5, para. 1, and acknowledged the obligation for a State to protect its citizens against the threat of terrorism. But he noted that detailed information pointing to a real and imminent danger to public safety in the UK will have to be shown.[27] Finally, the Commissioner was of the view that "in so far as these measures are applicable only to non-deportable foreigners, they might appear, moreover, to be ushering in a two-track justice, whereby different human rights standards apply to foreigners and nationals".[28]

III. "PREEMPTIVE WARS": A WEAPON AGAINST TERRORISM OR A MEANS OF DESTRUCTION OF HUMAN RIGHTS FOR ECONOMIC INTERESTS?

Thus the above American and British legislative models of anti-terrorist policy abolish fundamental human rights and are disproportionate to the dangers to be neutralized. But the real climax in the disproportionate abolition of most human rights is the series of wars – even preemptive ones – promoted by the USA and the UK and already in progress. Indeed, "antiterrorist" wars, particularly preventive ones, provoke more extended violations of almost all the human rights of the entire populations of attacked countries – beginning with the right to life and finishing with the destruction of the entire material and technical infrastructure – on the grounds of preventing an alleged terrorist danger. It is completely obvious that the extent of killings and devastations resulting from a war are incomparably greater than those of even the most massive terrorist act.

War probably even vivifies terrorist activities, as recent events demonstrate. In fact, it is rather illusionary to consider that preventive wars in Afghanistan and Iraq (and, alas, a next target is to be determined more precisely) leave any hope for a reasonable policy against terrorism. People are called upon to choose between terrorism by terrorist

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27 Op. cit., note 21, at para. 33.

28 Ibid., para.40.

groups, on the one hand, and on the other, terrorism by powerful States determined to target the "Axis of Evil" – but in reality to extend their power and serve their own interests.

Moreover, preemptive wars reduce to nothing the obligation to promote peace as a vital requirement for the full enjoyment of human rights by all. Yet, relevant decisions of the Commission on Human Rights[29] and the UN General Assembly[30] declare that the preservation of peace and its promotion constitute a fundamental obligation of each State.

Furthermore, people around the world are not convinced by the justification of these wars. If it is difficult to establish the extent to which a person is implicated in the preparation or the commission of a terrorist act, as the UNHCHR stressed in her report (and this is one reason why States should be very cautious with requirements of fair trial and habeas corpus)[31], this is even more difficult to determine for an entire population of a country and contend that it must be "punished" after oppression for years by a dictator.[32] The Iraqi people have suffered enormously from Gulf War I and from the ten-year embargo and have been totally devastated by Gulf War II. The rationale initially presented for the latter was purported collaboration with terrorist groups. As that was never proved by the American administration, another reason has been presented: the possession by Iraq of weapons of mass destruction. But this has also been proved to be completely untrue. So the preemptive catastrophic Gulf war II against Iraq remains without any rationale (a real reason of course existed: appropriation of the oil of the country).

Rebuilding countries destroyed by the war should be based on democratic principles and it is rather sad to see that the UN should participate only at a humanitarian level, while the powers that attacked and occupy the countries are more interested in economic gain (exploitation of the oil and the big business of "reconstruction" of the destroyed infrastructure, etc.) and in world domination.

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29 Res. 2003/61 of 24 April 2003, Res. 1997/36 of 28 August 1997 and Res. 1996/16 of 29 August 1996.

30 GA Res. 39/11 of 12 November 1984.

31 Op. cit., note 4, para. 21.

32 Even less justified is such an argument if it is sustained by powerful countries having imposed or supported dictatorial régimes (such as, Saddam Hussein or Pinochet or Greek Colonels, etc.) or terrorist organizations (Talibans, etc.).

According to the High Commissioner for Human Rights, structural *prevention* of terrorism requires a more comprehensive strategy that considers the *root causes of insecurity* and not only the apparent causes of violence. Security Council resolution 1373 (2001) also underlined the need for *international cooperation* to combat terrorism. The roots of the real causes must be determined by a majority of States and not by two or three of them and the means for combating such causes should be the object of deep international reflection, an ensuing plan of action and sharing of financial costs for its implementation.

The end of the cold war was considered as beginning a new period in history, where States have common interests and need to work together to achieve their goals of peace and the respect of human life and dignity for all through human rights. The prevalence of unilateralism of the most powerful now is contrary to the entire concept on which the United Nations was founded – with the strong help of the United States at that time!

Now, after 11 September and the Moscow October, the basic problem is: will terrorism and antiterrorism, as they are conceived and carried out, lead to a new era of human history – the era of abolition of human rights? This danger surely exists.

Nevertheless, let me argue that on the contrary 11 September could be an opportunity for a new, fuller, realization of human rights, democracy and development in our world. As Alain Pellet stressed at the start of the war against Iraq,

> "When the weapons speak, the voice of the law is deafened. War is the sign of a failure of international law, but it is never too early [or too late] to wonder about its causes and to reflect on the reconstruction of a more effective and realistic system of international security".[33]

We are observing a phenomenon in which the more contempt is shown – particularly by the powerful of the planet – for human rights and social justice, the less security we have and consequently the more conflicts and violence may emerge on an international scale.

And by reacting to terrorism by further human rights transgressions and conflicts, we have to expect more terror.

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[33] Alain Pellet, « L'agression », Le Monde, article published on 23 March 2003; translation by the author. The bracketed words are added by the author.

> "It is time to understand that deprivation and denial of rights in the world can no longer be viewed simply as holding a moral claim on us all. They must now be seen as crucial battlefields for the security of all. If we really wish to ensure greater human security and to combat terror, we have to understand that we shall be successful only if we combat discrimination, disadvantage and despair".[34]

Thus, it is up to all of us to take action to ensure that the terrible tragedy of 11 September, 2001 and that in Moscow of October 23, 2002 do, ultimately, lead to some positive results. We owe it to the victims of these appalling acts, to all victims of terrorism; and to the victims of World War II, after which all of humankind awaited peace and respect of human rights (freedoms and social justice) for all peoples of the planet in order to avoid the inhuman catastrophe that contemporary destructive means can generate.

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[34] Mary Robinson, Fifth Commonwealth Lecture, Human Rights in the Shadow of 11 September, Commonwealth Institute, 6 June 2002.

Concluding Remarks

WOLFGANG BENEDEK

The contributions to this publication largely emanated from a symposium in October 2003 on Anti-Terrorist Measures and Human Rights, co-organized by the Marangopoulos Foundation on Human Rights, the Diplomatic Academy of Vienna and the European Training and Research Centre on Human Rights and Democracy. To wind up, I would like to draw some conclusions from the debates.

The reaction of states, largely under the leadership of the United States, to the events of 11 September has given rise to increasing concern that the unprecedented scale of this terrorist act is being misused to justify widespread derogations of basic human rights.

Human rights have not been given adequate attention in the elaboration of international and national anti-terrorist measures. This can be seen from measures agreed upon or taken on the basis of SC-Res. 1373 at UN, EU and national levels. These do not foresee appropriate legal remedies and therefore violate human rights, like the right to fair trial, the right to property or the right not to be arbitrarily detained. One simple reason for these shortcomings seems to be that human rights experts have not been adequately involved in drawing up international anti-terrorist measures and in implementing them. For example, the request of the HCHR to the Counter-Terrorism Committee to include a human rights advisor was refused for reasons of the committee's narrow mandate although the possibility for hearing human rights arguments was conceded.[1]

On a more general note, the way anti-terrorist measures have been worked out and implemented shows that in the field of security the various interested communities are still much apart. Security and criminal law experts from the Ministries of the Interior and of Justice hardly ever meet with human rights experts, either on a national or an international level. It seems that in the field of military security the experts for humanitarian law are more involved on the institutional level, which might

1 See Annex VI.

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be due to the close cooperation the International Committee of the Red Cross has managed to build with the military. This leads to the conclusion that there is need for closer, preferably institutionalised cooperation between the communities of experts involved in internal security, military security, criminal justice, humanitarian law, human rights, conflict resolution and development. It would be an interesting task for international organizations with a broad mandate like the United Nations, the Council of Europe or OSCE to involve these communities of experts in developing joint responses to challenges like terrorism.

There are problems of definition to be taken into account when taking anti-terrorist measures. The lack of agreement on a general definition of terrorism remains a political problem, as the same people who are labelled terrorists by some states are considered to be freedom fighters by others. The right of legitimate resistance against state terrorism is equally difficult to agree upon. Determination of the conditions for a state of emergency is still a prerogative of the state and as a unilateral act it can hardly be reviewed by multilateral bodies. Obligations which do exist when proclaiming a state of emergency have been ignored by the United States, together with other obligations under humanitarian law, by its pursuit of a largely unilateral approach. An analysis of different national practices does show that a response to terrorism, based on the rule of law and human rights, is possible and can also be effective. While the UK entered a new derogation of the European Convention, Turkey withdrew its long-standing derogations. Generally speaking, there is a need for increased international supervision of states of emergency.

Furthermore, the application of humanitarian law requires clarification on what a war is and when it is considered over, which affects legal obligations such as the release of prisoners of war.

Another issue of general relevance is the application and monitoring of the principle of proportionality to avoid or correct over-reactions or the misuse of anti-terrorist measures for other political purposes. The asymmetric response of states is also characterized by an underestimation of the importance of the root causes. The danger of demonstration effects on other governments of a fast use of emergency powers by democratic governments has been highlighted on several occasions. Existing freedoms should not be sacrificed without compelling reasons for the promise of higher security.

The emphasis on short-term security measures, frequently of a technical nature, neglects the need for longer-term structural measures and political solutions to address the underlying root causes of terrorism like economic marginalization, political discrimination and social injustice. If terrorists are "criminals with political objectives", then a political approach should complement criminal law to deal with the political issues. There is still a large need here for further academic work.

A wider focus on the issue of anti-terrorist measures is required through the concept of human security, by providing freedom from fear and from want, in other words, by giving serious support to the ideals of implementing the UN Millennium goals for 2015.

The "guidelines" adopted by the Committee of Ministers of the Council of Europe can be considered as an example of good practice. It would, however, be desirable to supplement these with further guidelines on their wider aspects. Furthermore, a system of monitoring compliance should be developed.

Alternative dispute resolution approaches like mediation could help to prevent conflicts from becoming violent and facilitate their resolution. For example, the creation of International Mediation Centres could be a cost-effective way of achieving political solutions.

The concept of prevention employed by governments often appears too limited. It mainly focuses on criminal prevention and neglects the need for wider approaches, including the economic and political dimensions. State sovereignty is another reason that international organisations might find it difficult to get involved. The building of a "culture of prevention" is often confronted with a lack of political will.

In a similar way, the prevailing concept of security still neglects the human security dimension. Military security absorbs most funds, while civil or human security is always under-funded. However, as can be seen from post-conflict situations, the military often gets itself involved in projects improving civilian conditions which is a recognition of the importance of improving human security for achieving the overall objectives of such missions.

Human security is based on the realization of human rights. As the High Commissioner for Human Rights, Sergio Vieira de Mello, observed in his presentation to the Counter-Terrorism Committee: "Human Rights violations create ripe environments for terrorism."[2] The reaction

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2 See Annex VII.

of the CTC that it was not competent to take wide action shows that there is a need for either a wider mandate or a different body with a membership which is more understanding of the concerns at stake.

The overriding concern with regard to anti-terrorist measures remains the safeguarding and application of the rule of law. Even if derogations may result in short-term successes in some cases, in the longer term they may affect the rule of law for all. The struggle against terrorism does not excuse the use of means which violate the rule of law. Any reaction against terrorism should be based on five principles: the rule of law, democracy, good governance, human rights and social justice.

The strengthening of international cooperation and, for that purpose, of multilateral institutions appears to be necessary in view of the increased temptation for unilateral approaches in dealing with terrorism. Regional institutions like the Council of Europe and the European Union, who are committed to the five principles mentioned, can make a particular contribution on their own as well as at the universal level and can build wider constituencies on the basis of inter-cultural dialogue.

I would like to end with another quote from the High Commissioner for Human Rights, Sergio Vieira de Mello, who has made the rule of law and the rights-based approach the main concern of his mandate:

> "Too many international actors today are pursuing policies based on fear, thinking they will increase security. But true security cannot be built on such a basis. True security must be based on the proven principles of human rights."[3]

[3] Statement to the Opening of the Fifty-Ninth Session of the Commission on Human Rights by Sergio Vieira de Mello, Geneva, 17 March 2003; www.unhchr.ch.

PART THREE

ANNEXES

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ANNEX 1

Commission on Human Rights, Joint Statement Issued on 10 December 2001 by 17 Independent Experts of the Commission on Human Rights on the Occasion of Human Rights Day

On the occasion of United Nations Human Rights Day, the undersigned independent experts of the United Nations Commission on Human Rights strongly remind States of their obligations under international law to uphold human rights and fundamental freedoms in the context of the aftermath of the tragic events of 11 September 2001.

We express our deep concern over the adoption or contemplation of anti-terrorist and national security legislation and other measures that may infringe upon the enjoyment for all of human rights and fundamental freedoms. We deplore human rights violations and measures that have particularly targeted groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media. Concerned authorities have already been requested to take appropriate actions to guarantee the respect for human rights and fundamental freedoms in a number of individual cases drawn to the attention of relevant independent experts. We shall continue to monitor the situation closely.

We remind States of the fundamental principle of non-discrimination which guarantees that everyone is entitled to all rights and freedoms "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (article 2 of the Universal Declaration of Human Rights). We also remind States that under international human rights law some rights cannot be derogated from under any circumstances, including in times of public emergency. These include: the right to life, the prohibition of torture or cruel, inhuman or degrading treatment or punishment, the freedom of thought, conscience and religion, as well as the principles of precision and non-retroactivity of criminal law

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except where a later law imposes a lighter penalty. Furthermore, we call upon States to take appropriate measures to uphold the respect for fundamental rights such as the right to liberty and security of the person, the right to be free from arbitrary arrest, the presumption of innocence, the right to a fair trial, the right to freedom of opinion, expression and assembly and the right to seek asylum.

We call upon States to limit the measures taken to the extent strictly required by the exigencies of the situation. Public policies must strike a fair balance between, on the one hand, the enjoyment of human rights and fundamental freedoms for all and, on the other hand, legitimate concerns over national and international security. The fight against terrorism must not result in violations of human rights, as guaranteed under international law.

Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights on religious intolerance

Enrique Bernales Ballesteros, Special Rapporteur of the Commission on Human Rights on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination

Theo van Boven, Special Rapporteur of the Commission on Human Rights on the question of torture

Radhika Coomaraswamy, Special Rapporteur of the Commission on Human Rights on violence against women, its causes and consequences

Dato' Param Cumaraswamy, Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers

Francis Deng, Representative of the Secretary-General on internally displaced persons

Abid Hussain, Special Rapporteur of the Commission on Human Rights on the promotion and protection of the right to freedom of opinion and expression

Asma Jahangir, Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions

Hina Jilani, Special Representative of the Secretary-General on human rights defenders

Miloon Kothari, Special Rapporteur of the Commission on Human Rights on adequate housing as a component of the right to an adequate standard of living

Anne-Marie Lizin, Special Rapporteur of the Commission on Human Rights on human rights and extreme poverty

Juan Miguel Petit, Special Rapporteur of the Commission on Human Rights on the sale of children, child prostitution and child pornography

Gabriela Rodríguez Pizarro, Special Rapporteur of the Commission on Human Rights on the human rights of migrants

Katarina Tomasevski, Special Rapporteur of the Commission on Human Rights on the right to education

Jean Ziegler, Special Rapporteur of the Commission on Human Rights on the right to food

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ANNEX II

Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights (Mary Robinson) and Follow-Up to the World Conference on Human Rights of 27 February 2002, E/CN.4/2002/18

INTRODUCTION

1. Human insecurity is a major preoccupation of today's world. The horrific terrorist acts of 11 September on the United States and their aftermath raised levels of anxiety and insecurity worldwide. Ensuring security for every human being around the globe is one of the major challenges facing us today. In addressing these concerns, we need to enhance the search for common ground. Human rights provide such a ground. Respect for human life and respect for human dignity are values shared by all cultures and religions. Over the last 50 years, States have successfully translated these values into comprehensive universal norms. These global human rights standards have survived the cold war, armed conflict and economic instability. They provide States with red and green lights to guide their actions. The Commission on Human Rights has a specific role to play today, as it has in the past, in promoting respect for human rights as a uniting framework in the face of the insecurities now confronting us.
2. Terrorism is a threat to the most fundamental human right, the right to life. The elaboration of a common approach to counter terrorism serves human rights. As United Nations High Commissioner for Human Rights, I share the legitimate concern of States that there should be no avenue for those who plan, support or commit terrorist acts to find safe haven, avoid prosecution, secure access to

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funds, or carry out further attacks. Security Council resolution 1373 (2001) creates an important framework for action in this regard.

3. Although terrorism has yet to be defined comprehensively and authoritatively at the international level, States have already agreed on some core elements. The General Assembly, in the Declaration on Measures to Eliminate International Terrorism, adopted by the Assembly in the annex to its resolution 49/60 of 9 December 1995, declared that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious, or other nature that may be invoked to justify them". Numerous conventions deal with various acts of terrorism. A comprehensive convention on terrorism such as that being debated at the General Assembly could provide a further basis for international action. The consistency of the provisions of this future convention with human rights law, humanitarian law and refugee law will help to attract global support.
4. In addition to being terrorist acts, the large-scale nature of the 11 September attacks and the fact that they were directed against the civilian population would qualify them as crimes against humanity. All States that are victims of crimes against humanity may employ a variety of legal measures to pursue the perpetrators and their accomplices. Under international criminal law, individuals can be prosecuted for their participation in crimes against humanity. Indeed, the international nature of this crime creates a duty on all States to assist in the prosecution of suspects. International law also specifies that there is no statute of limitation for crimes against humanity. Therefore, someone suspected of such a crime could be prosecuted at any time in the future. Crimes against humanity are also subject to universal jurisdiction. This means that any State may pursue, arrest and prosecute persons suspected of being involved in the 11 September attacks.
5. An effective international strategy to counter terrorism should use human rights as its unifying framework. The suggestion that human rights violations are permissible in certain circumstances is wrong. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends. In-

ternational human rights and humanitarian law define the boundaries of permissible political and military conduct. A reckless approach towards human life and liberty undermines counter-terrorism measures.

6. The subject of human rights and terrorism has been the focus of several resolutions of the Commission on Human Rights in recent years, the latest being 2001/37. The Sub-Commission on the Promotion and Protection of human rights has mandated one of its members to carry out an in-depth analysis of this subject; its Special Rapporteur, Kalliopi K. Koufa, has already submitted a preliminary report (E/CN.4/Sub.2/1999/27) and a progress report (E/CN.4/Sub.2/2001/31).
7. The promotion and protection of human rights is central to an effective strategy to counter terrorism. This report to the Commission addresses policies and strategies that would ensure that human rights operate as a unifying framework for action against terrorism. The elements of this strategy include ensuring that the fair balances built into human rights law are at the centre of the overall counter-terrorism efforts. Other essential components of this strategy are addressing in parallel the broader issue of human insecurity, particularly the need to enhance international cooperation, to take prevention seriously, to reinforce equality and respect, and to fulfil human rights commitments.

I. THE BALANCE BETWEEN HUMAN RIGHTS AND SECURITY

8. On 10 December 2001, on the occasion of Human Rights Day, 17 special rapporteurs and independent experts of the Commission on Human Rights issued a joint statement reminding States of their obligations under international law to uphold human rights and fundamental freedoms in the context of the aftermath of the tragic events of 11 September 2001. The special rapporteurs and experts expressed their deep concern over anti-terrorist and national security legislation and other measures adopted or contemplated that might infringe upon the enjoyment by all of their human rights and fundamental freedoms. They warned against human rights violations and measures that have targeted particular groups such as human rights defenders, migrants, asylum-seekers and refugees, re-

ligious and ethnic minorities, political activists and the media. They addressed their concerns to the relevant authorities, requesting them to take appropriate action to guarantee respect for human rights and fundamental freedoms. The special rapporteurs and experts particularly reminded States of the fundamental principle of non-discrimination under which everyone is entitled to all rights and freedoms "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

9. Ensuring that innocent people do not become the victims of counter-terrorism measures should be an important component of the anti-terrorism strategy. This requires that States adhere strictly to their international obligations to uphold human rights and fundamental freedoms. Counter-terrorism strategies pursued before and after 11 September have sometimes undermined efforts to enhance respect for shared human rights values. Excessive measures have been taken in several parts of the world that suppress or restrict individual rights including privacy rights, freedom of thought, presumption of innocence, fair trial, the right to seek asylum, political participation, freedom of expression and peaceful assembly. In order to construct the solid human rights culture required to root out terrorism, there is a need to bridge the gulf between human rights norms and their application in reality.
10. Human rights law strikes a fair balance between legitimate national security concerns and fundamental freedoms in each case. These balances are reflected in the International Covenant on Civil and Political Rights (ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, and the Arab Charter on Human Rights.
11. Human rights law, notably ICCPR article 4, requires that certain rights may not be derogated from under any circumstances. These rights include the right to life, freedom of thought, conscience and religion, freedom from torture or cruel, inhuman or degrading treatment, and the principles of precision and of non-retroactivity of criminal law except where a later law imposes a lighter penalty. Derogation from other rights is only permitted in the special circumstances defined in international human rights law: any such measures must be of exceptional character, strictly limited in time

and to the extent required by the exigencies of the situation, subject to regular review, consistent with other obligations under international law and not involve discrimination. Where derogation is invoked, there is an obligation to notify other States parties through the Secretary-General and to indicate the provisions from which a State has derogated and the reasons for such derogation.

12. Even during an armed conflict, measures derogating from provisions of treaties such as ICCPR are permitted only if and to the extent that the situation constitutes a threat to the life of the nation. Even then, States should carefully consider the justification for and legitimacy of the measure in the circumstances. In its General Comment No. 29 (CCPR/C/21/Rev.1/Add.11), the Human Rights Committee developed a list of elements that cannot be subject to lawful derogation. These elements include the following: all persons deprived of liberty must be treated with respect for their dignity; the prohibition against hostage-taking, abduction, or unacknowledged detention; the protection of persons belonging to minorities; the prohibition of unlawful deportation or transfer of population; and that "no declaration of a state of emergency ... may be invoked as justification for a State party to engage itself ... in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence" (ibid., para. 13).
13. The right to a fair trial during armed conflict is explicitly guaranteed under international humanitarian law. As the Human Rights Committee clarified in its General Comment No. 29, the principles of legality and the rule of law require that fundamental requirements of fair trial be respected during a state of emergency. The Committee stressed that it is inherent in the protection of rights explicitly recognized as non-derogable in article 4 (2) that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. In particular, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the ICCPR, including those on fair trial. These include the right to equality before the courts and tribunals; the right to a fair hearing by a competent, independent and impartial tribunal; the presumption of innocence; the

right to be informed promptly and in detail in a language which the accused understands of the nature and cause of the charge against him or her; the right to communicate with a counsel of choice; the right to examine witnesses and secure the attendance and examination of witnesses on behalf of the accused; and the right not to be compelled to testify against oneself or to confess guilt.

14. In addition, human rights law requires that, in the exceptional circumstances where it is permitted to limit some rights for legitimate and defined purposes other than emergencies, the principles of necessity and proportionality must be applied. The measures taken must be appropriate and the least intrusive to achieve the objective. The discretion granted to certain authorities to act must not be unfettered. The principle of non-discrimination must always be respected and special effort made to safeguard the rights of vulnerable groups. Anti-terrorism measures targeting specific ethnic or religious groups is contrary to human rights and would carry the additional risk of an upsurge of discrimination and racism.
15. The Human Rights Committee has made a number of other policy statements that could assist Governments in taking counter-terrorism measures that are consistent with their human rights obligations. For example, the Committee has repeatedly raised concerns, in the context of States' adherence to article 9 of the ICCPR (right to liberty and security of the person), over the tendency to extend and broaden powers of arrest and detention. It has stated that the period of custody before an individual is brought before a judge or other officer may not exceed a "few days". The Committee has also often criticized the extension of the jurisdiction of military courts to civilians and the use of "faceless judges", in the context of its examination of articles 14 and 15 on the right to a fair trial
16. Torture is absolutely prohibited under any circumstances. Article 2 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Article 3 of the Convention also provides an absolute prohibition on expelling, returning or extraditing a person to another State where there is risk of torture. In several instances, the Committee against Torture noted that most allegations of torture relate to individuals who have been accused or

convicted of terrorist acts. The Committee has identified a number of measures that commonly contribute to the practice of torture. These include the wide scope of arrest and detention powers granted to the police; overlapping of jurisdiction of various police and security agencies; secret detention; lack of or inadequate legal infrastructure to deal with allegations of torture; the existence of extensive pre-trial detention powers; the use of administrative or preventive detention for prolonged periods of time; the lack of a central registry of detainees; interference with the prosecutor's powers to investigate allegations of torture; and the denial of access to lawyers, family and medical personnel.

17. On 22 November 2001, the Committee against Torture issued a statement (CAT/C/XXVII/Misc.7) reminding States parties to the Convention of the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention. After condemning utterly the terrorist attacks of 11 September and expressing its "profound condolences to the victims, who were nationals of some 80 countries, including many States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", the Committee highlighted the obligations contained in article 2, mentioned above, article 15, prohibiting confessions extorted by torture being admitted in evidence, except against the torturer, and article 16, prohibiting cruel, inhuman or degrading treatment or punishment. The Committee stated that such provisions must be observed in all circumstances. The Committee expressed its confidence that "whatever responses to the threat of international terrorism are adopted by States parties, such responses will be in conformity with the obligations undertaken by them in ratifying the Convention against Torture".

18. Persons under 18 years of age enjoy the full range of rights provided in the Convention on the Rights of the Child. This Convention, which has been ratified by almost every State in the world, does not allow for derogation from rights. As article 38 clearly states, the Convention is applicable in emergency situations. All the rights of the child embodied in the Convention must be protected even in times of emergency. Particularly significant is the recognition that every child has the inherent right to life. This includes the prohibition against imposing death sentences for crimes committed by persons below 18 years of age, which should not be disregarded

at any time. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) are also relevant.

II. THE RIGHTS OF REFUGEES AND MIGRANTS: A SPECIAL CONCERN

19. Refugees and migrants were already vulnerable in various parts of the world before 11 September, and they became even more vulnerable afterwards. There is no doubt that States have a right, even a duty, to ensure that their territory does not become a safe haven for terrorists, and that rights and freedoms are not cynically abused by citizens and aliens alike to nourish terrorist acts. However, those asylum-seekers who are fleeing genuine persecution and violence, often including acts of terrorism, should not become the victims of harsh anti-terrorism policies. Migrants, even if undocumented, also have the right to be protected from violence, discrimination and excessive measures. OHCHR activities marking Human Rights Day 2001 included an expert panel focusing on the situation of refugees and migrants post-11 September. The panel was organized jointly with the Office of the United Nations High Commissioner for Refugees (UNHCR). It took place in the context of the follow-up to the Durban Declaration and Programme of Action (A/CONF. 189/12, Chap. I) adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.
20. In the Durban Declaration States affirmed their commitment to respect and implement humanitarian obligations relating to the protection of refugees, asylum-seekers, returnees and internally displaced persons. The Declaration notes the importance of international solidarity, burden sharing and cooperation for the protection of refugees and reaffirmed that the 1951 Convention relating to the Status of Refugees and its 1967 Protocol remain the foundation of the international refugee regime.
21. UNHCR has stressed that proper implementation of the provisions of the 1951 Refugee Convention leads to the exclusion from refugee protection of persons with respect to whom there are serious reasons for considering that he or she has committed a crime against peace, a war crime, or a crime against humanity, or serious

non-political crimes, or acts contrary to the purposes and principles of the United Nations. Serious non-political crimes are commonly interpreted to include terrorist acts. UNHCR, however, has emphasized that whether an individual is implicated in such crimes should be determined on a case-by-case basis. Therefore, there should be no summary or wholesale rejection of asylum claims at borders or points of entry as that may amount to refoulement. Each case should be determined on its own merits, and each person seeking asylum should undergo individual refugee status determination. Although human rights law does not preclude restrictions on the movements of asylum-seekers under certain circumstances, proposals to introduce automatic detention of all asylum-seekers entering illegally or coming from particular countries for fear of terrorism could amount to an excessive and discriminatory response.

22. There are currently 143 States parties to the Convention relating to the Status of Refugees and/or the Protocol. Last year, the international community commemorated the fiftieth anniversary of the Convention. To mark that occasion, a ministerial-level conference took place in Geneva on 12 and 13 December 2001. I participated in this meeting, which was attended by 156 States and a large number of intergovernmental and non-governmental organizations. The participants adopted a Declaration reaffirming their commitment to "implement [their] obligations under the 1951 Convention and/or its 1967 Protocol fully and effectively" and acclaiming the treaty as one of "relevance and resilience" and of "enduring importance". This public affirmation by States is noteworthy, particularly at a time when the Convention is being criticized by some States as outdated in the wake of the terrorist threats.
23. In preparation for the fiftieth anniversary, UNHCR undertook Global Consultations on International Protection. OHCHR supports the draft Agenda for Protection resulting from that process. The Agenda includes strengthening the implementation of the Convention, ensuring protection of refugees within broader migration movements, improving burden sharing among receiving countries, handling security-related concerns more effectively, and redoubling efforts to find long-lasting solutions for refugees.
24. In order to eliminate manifestations of racism and xenophobia against migrants, the Durban Declaration highlights the importance of creating conditions conducive to greater harmony, tolerance and

respect between migrants and the rest of society in the countries in which migrants find themselves. The Programme of Action encourages States to promote education on the human rights of migrants and to engage in information campaigns to ensure that the public receives accurate knowledge regarding migrants and migration issues, including on the positive contribution of migrants to the host society and the vulnerability of migrants, particularly those in an irregular situation. Reinforcing the work of the Special Rapporteur on the human rights of migrants and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance is also an integral part of giving effect to the Durban Declaration and Programme of Action.

25. It is encouraging that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which was adopted in New York on 18 December 1990, should soon come into force.[1] This will take place three months after the twentieth instrument of ratification or accession is deposited. Nineteen States are now party to this Convention and there are 11 signatories. It is important that this convention come into force as soon as possible, and I call on States to consider ratifying it. The Convention envisages the establishment of a treaty body, to be known as the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Committee will be composed initially of 10 experts and will examine States parties' reports on the legislative, judicial, administrative and other measures taken by States parties to give effect to the Convention.

III. HUMAN RIGHTS: THE UNIFYING STRATEGY

26. Although the causes and the consequences are different, the feeling of personal insecurity is common to most people in the world today. People do feel insecure because of threats of terrorism; many also

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[1] The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families embodies some basic rights for migrant workers and their families, including the freedom from discrimination; the right to life; freedom of thought; freedom of opinion; the right to privacy; freedom from arbitrary deprivation of property; the right to liberty and security of person and effective protection against violence, physical injury, threats and intimidation; the right to be treated with humanity and respect; and the right not to be subject to collective expulsion measures.

experience insecurity for other reasons such as armed conflict, racial discrimination, injustice, arbitrary detention, torture, rape, extreme poverty, HIV/AIDS, job insecurity and environment degradation. Around the world, people feel insecure when their rights and the rights of others are at risk. Applying a broader definition of security places freedom from pervasive threats to rights at the centre of security analysis.

27. The Human Development Report 1994 advanced the notion of human security as a core operational concept in tackling global uncertainty. The value of this concept is that it places the human person at the centre of the security debate. The commitment to human security underlines much of United Nations action in the areas of peace and security, crime prevention and development, among others. The concept has now been adopted as the foreign policy doctrine of several States and advanced by some regional organizations, non-governmental organizations and academic institutions.

28. Achieving global security requires a comprehensive strategy to address the causes of insecurity, not only its consequences and manifestations. This strategy must place individuals and their universal rights at the centre of national and global security policies.

A. ENHANCING INTERNATIONAL COOPERATION

29. Security Council resolution 1373 (2001) underscored the responsibility of all States to eradicate terrorism. It required all States to take a wide range of legislative, procedural, economic, and other measures to prevent, prohibit and criminalize terrorist acts.[2] The resolution, which was adopted under Chapter VII of the Charter of the United Nations, is binding on all Member States. It stressed the need for international cooperation to tackle terrorism and estab-

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[2] The measures include criminalizing the collection of funds for terrorist acts and freezing the assets of terrorists; refraining from providing any support to entities or individuals involved in terrorist acts; preventing terrorist acts through early warning and exchange of information with other States; denying safe haven to terrorists; preventing the State's territory from being used by terrorists or supporters of terrorists; criminalizing terrorist acts and prosecuting supporters of terrorism; assisting other States in prosecuting terrorism and the financing of terrorist acts; preventing the movement of terrorists through effective border controls and effective issuance of identity documents, including measures to prevent their forger; intensifying and accelerating the exchange of operational information concerning terrorists; ensuring that refugee status is not abused by terrorists.

lished a committee of the Security Council to monitor its implementation. States were requested to report to the committee by 28 December 2001 on the steps they have taken to implement the resolution.

30. The Committee, known as the Counter-Terrorism Committee, is composed of the 15 Council members. On 26 October 2001, a note was issued containing "Guidance for the submission of reports pursuant to paragraph 6 of Security Council resolution 1378 (2001) of 28 September 2001". To assist the Committee in its work and to avoid the misapplication of the resolution, OHCHR has formulated proposals for "Further guidance" to assist States in complying with their international human rights obligations. Proposals for "Further guidance" are annexed to this report.

31. As of 31 January 2002, 134 States had submitted reports to the Counter-Terrorism Committee. Paragraph 6 of resolution 1373 (2001) refers to the Committee's role in monitoring the implementation of this resolution "with the assistance of appropriate expertise". The experts are tasked with analysing States' reports and submitting their findings to the Committee. The Committee has indicated its intention to seek expertise principally in the area of legislative drafting, financial law and practice, customs law, immigration law, extradition law, police and law enforcement work, and illegal arms trafficking. Several of these areas have a strong human rights dimension. Owing to the serious human rights concerns that could arise from the misapplication of resolution 1373 (2001), it would be desirable that a human rights expert assists the Committee.

32. A comprehensive strategy to address terrorism requires tackling insecurities at their root. The international conferences that took place in the 1990s concluded that human rights, sustainable development, women's rights and environmental issues should be at the heart of States' policies and action. Maintaining the international consensus built around these agendas is an indispensable means of addressing the causes of insecurity. This requires the mobilization of resources.

33. Progress can be made when States commit themselves to cooperate in tackling common concerns. During the cold war, international relations were characterized by tension and the adoption of adversarial positions. Ideological as well as real walls kept countries apart. Each camp defined itself and its interests in terms of being

against the other. Following the end of the cold war, States came to recognize that they have shared interests and concerns and that they need to work together to address them. Divisive walls should not be reconstructed between nations.

34. In addition to the mechanisms created by the Commission on Human Rights, the treaty bodies and OHCHR's work on technical cooperation, OHCHR recently embarked on a process to assist various regions in identifying their specific human rights needs and strategies to address them. Useful consultations were held in Geneva on strategies for African and Central and South American countries. A meeting for European and Central Asian countries was also held in Dubrovnik, in collaboration with the Council of Europe and the Organization for Security and Cooperation in Europe. These consultations were attended by States, non-governmental organizations and human rights experts. To assist in the implementation of such strategies, I have placed human rights representatives in the headquarters of the regional economic commissions in Bangkok, Beirut, Santiago, and Addis Ababa, and also in Pretoria. The Subregional Centre for Human Rights and Democracy in Central Africa, in Yaounde, will serve nine countries of the Subregion. Such an approach takes into account national and regional concerns and assists States in discharging their duty to promote and protect all human rights and fundamental freedoms.

B. TAKING PREVENTION SERIOUSLY

35. In his report to the General Assembly and Security Council on the prevention of armed conflict (A/55/985-S/2001/574 and Corr.1), the Secretary-General pledged to move the United Nations from a culture of reaction to a culture of prevention. Following this report, the Security Council adopted resolution 1366 (2001) inviting the Secretary-General to refer to the Council information and analyses from within the United Nations on cases of serious violations of international law, including international human rights and humanitarian law.
36. According to the Carnegie Commission on Preventing Deadly Conflict, cited in the Secretary-General's report, strategies for prevention fell into two categories: operational and structural. Operational prevention refers to measures taken to confront immediate crises,

while structural prevention refers to measures that could be taken to ensure that crises do not arise in the first place, or do not recur.

37. The prevention of terrorism requires both operational and structural responses. The range of measures required of States under Council resolution 1373 (2001) are focused primarily on operational prevention. Structural prevention of terrorism requires a more comprehensive strategy that considers the root causes of insecurity and, therefore, conflict. In other words, it is not adequate to respond only to the apparent causes of violence; it is imperative to address the underlying conditions that lead individuals and groups to violence. There is no doubt that claims of domination, discrimination and denigration of groups and individuals are often the triggering factors.

38. In times of insecurity, adhering to rules and principles becomes a stabilizing factor. Ensuring respect for humanitarian law, in particular the four Geneva Conventions of 1949 and their 1977 Additional Protocols, provides predictability and reduces the inhumane impact of conflict. As we have seen in recent conflicts, State agents and non-State actors often indiscriminately attack civilians, in particular women, children and the elderly. The use of force is also sometimes neither necessary nor proportionate. The protection of civilians in times of conflict is an essential obligation of humanitarian law.

39. In my report to the Commission on Human Rights at its fifty-sixth session (E/CN.4/2000/12), I considered the quest for the prevention of gross violations of human rights and of conflicts as a defining issue of our time. The report identified a number of areas where action was needed to prevent gross violations of human rights. They included the crime of genocide, racial discrimination, slavery, trafficking in human persons and impunity. The report also defined some preventive measures, particularly with regard to the right to development and human rights education.

40. In my report to the General Assembly at its fifty-sixth session (A/56/36 and Add.1 and Corr.1), I explained how OHCHR addressed the issue of operational and structural prevention of human rights violations and conflict. I considered the important role played by the United Nations human rights mechanisms, particularly the special rapporteurs and the treaty bodies, and emphasized the need for States to cooperate with them. I am pleased that 35 States have

informed my Office in writing that they have issued an open invitation to the human rights mechanisms to visit, and I encourage other States to adopt this approach.[3] I also stressed my commitment to enhancing States' capacity in the human rights area, as well as the need to end impunity for serious human rights violations.

C. *REINFORCING EQUALITY, TOLERANCE AND RESPECT*

41. It is widely acknowledged that racism and intolerance can be both a cause and a consequence of violence, and therefore of insecurity. Despite the difficulties it faced, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance was able to adopt a comprehensive anti-discrimination agenda. Implementing this framework is now more relevant than ever.
42. The Durban Declaration and Programme of Action addresses the plight of victims of racism, racial discrimination, xenophobia and related intolerance. It recognizes the suffering of many groups, particularly Africans and people of African descent, Asians and people of Asian descent, indigenous peoples, Jews, Muslims, Arabs, those subjected to anti-Semitism and Islamophobia, the Palestinian people, Roma/Gypsies/Sinti/Travellers, migrants, refugees, asylum-seekers, displaced persons, minorities and others. By paying attention to such specific groups and their grievances, Durban provided a basis for dealing with a major dimension of human insecurity.
43. Terrorism often stems from extreme hatred, and leads to more hatred. Behind the resort to terrorism is an assumption of the diminished humanity of the victims. The Durban anti-discrimination agenda offers an antidote to terrorism. It affirms the richness of human diversity, and therefore respect for every human life. The Durban Declaration affirms that all peoples and individuals have contributed to the progress of the civilization and cultures that form the common heritage of humanity. It recognizes that promotion of tolerance, pluralism and respect for diversity would produce more

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[3] These States are: Austria, Belgium, Bulgaria, Canada, Costa Rica, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, United Kingdom of Great Britain and Northern Ireland.

inclusive societies. The indispensable role of civil society, including that of non-governmental organizations and the media, in promoting and enhancing the Durban anti-discrimination efforts is particularly highlighted.

44. As a result of the terrorist attacks and their aftermath, some are taking approaches that deepen the divisions between civilizations. This is damaging. The Durban documents encourage an honest and robust dialogue between cultures and civilizations. They encourage each society to reflect on its own enlightened and humane values that need to be nourished and proclaimed. They envisage a common ground based on the inherent dignity and equal rights of all human beings and the fundamental principles of justice.
45. For most people in the world, religion, spirituality and belief contribute to enhancing the inherent dignity and worth of every human person. Religion, however, is sometimes used and abused to fuel hatred, superiority and dominance. The politicization of culture and religion creates an intolerant environment. The rise of religious intolerance, especially Islamophobia, is a cause of serious concern.
46. Last year, an International Consultative Conference on School Education in relation with Freedom of Religion and Belief, Tolerance and Non-Discrimination took place in Madrid from 23 to 25 November. This significant event, which was organized within the framework of the mandate of the Special Rapporteur on freedom of religion or belief, aimed at contributing to the promotion and protection of human rights by redesigning the role that school education should play, with a view to eliminating all forms of intolerance and discrimination based on religion or belief. The declaration resulting from the meeting suggested ways and means by which curricula and textbooks should contribute to the promotion of tolerance and non-discrimination, as well as of the legitimate self-representation through full respect for how others are represented.
47. Significant issues were developed during the formulation of the Durban Programme of Action. For instance, there is a focus on efforts to identify the causes, forms and contemporary manifestations of racial discrimination. Concrete steps were recommended in the area of prevention, education and protection at the national, regional and international levels, including the adoption of legislative, judicial and administrative measures, the prosecution of racist acts, the development of independent national institutions, and the en-

hancement of affirmative action policies. It also recognizes the need for effective remedies, recourse, redress and similar measures at the national, regional, and international levels. Amongst the most significant parts of the Durban Declaration and Programme of Action are the strategies developed to combat racism, racial discrimination, xenophobia and related intolerance and thereby achieve full and effective quality. These strategies should constitute an essential component of the international agenda to foster social harmony and address the causes of insecurity.

48. OHCHR is spearheading the implementation of the Durban Declaration and Programme of Action and is working with States, intergovernmental bodies and non-governmental organizations to ensure a sustained follow-up. Steps taken at OHCHR in this regard include the establishment of an anti-discrimination unit to strengthen the Office's capacity to promote equality and non-discrimination. The unit will focus on promoting the implementation of the Durban outcome, inter alia, through exchanges of experience and technical cooperation activities aimed at combating racism, and increasing awareness of the work of the Committee on the Elimination of Racial Discrimination.
49. Human Rights Day 2001 focused on an initial stocktaking of activities and plans for the implementation of the anti-discrimination agenda. OHCHR will follow up with a second stocktaking on 21 March, International Day for the Elimination of Racial Discrimination. While OHCHR, the United Nations specialized agencies and regional organizations have an important role to play in advancing the Durban Plan of Action, it rests with States, working in cooperation with civil society, to play the principal role in implementing it.

D. Fulfilling human rights commitments

50. The key to enhancing human security is the pursuit of a comprehensive human rights agenda. The 139 provisions of the 1993 Vienna Declaration and Programme of Action continue to provide the world with all the elements of a comprehensive, universal human rights approach. They offer a road map to guide States, civil society and the United Nations in addressing many of the root causes of insecurity. June 2003 will mark the tenth anniversary of the Vienna Declaration and Programme of Action. This will present each State,

and the international community as a whole, with the opportunity to reflect on how much of the Vienna Declaration and Programme of Action, which all endorsed, has been implemented.

51. One recommendation made in Vienna was that States ratify the international human rights conventions. There has been significant progress in ratifying the six core treaties. In 1990 the total number of States parties to the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Convention on the Elimination of all Forms of Racial Discrimination was 272. By 15 February 2002, this figure had increased to 437.[4] However, implementation remains a major concern. Impunity for those who have committed gross violations of human rights and grave breaches of humanitarian law remains rampant. Impunity for violations induces an atmosphere of fear and terror. It produces unstable societies and de-legitimizes Governments. It encourages terrorist acts and undermines the international community's effort to pursue justice under the law. The coming into force of the Rome Statute of the International Criminal Court will strengthen the capacity of international law to respond to impunity.[5] But it is only one of the significant and necessary building blocks. The most effective measures to ensure that the domestic legal and judicial systems do not tolerate impunity are those that are taken at the local level.

52. Pursuing a comprehensive human rights approach requires that States give equal importance to all rights, whether civil, cultural, economic, political or social. The Vienna Declaration and Programme of Action reaffirmed that all human rights are universal, indivisible, interdependent and interrelated. It stressed that the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

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4 There are 148 ratifications of the International Covenant on Civil and Political Rights, 128 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and 161 of the International Convention on the Elimination of all Forms of Racial Discrimination.

5 As of 10 February 2001, 52 States had ratified the Rome Statute of the International Criminal Court. The Statute will come into force when 60 States have deposited their instrument of ratification. Several States have indicated that their process of ratification has reached its final stages.

53. Extreme poverty remains amongst the most serious causes of human insecurity. The pursuit of a rights-based approach to development and the right to development are crucial in addressing the root causes of conflict and terrorism. The Vienna Declaration and Programme of Action laid emphasis on the right to development, and reiterated that the human person is the central subject of development. This was reinforced in the Millennium Declaration of the General Assembly (resolution 55/2), which pledged to "spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected". The Millennium Declaration also highlighted States' commitment "to making the right to development a reality for everyone and to freeing the entire human race from want".
54. The Vienna Declaration and Programme of Action identified many other challenges to the establishment of inclusive, participatory and coherent democratic societies. For instance, the document addresses the rights of vulnerable groups such as indigenous peoples, ethnic minorities, people living under foreign occupation, women, children, displaced persons, refugees, migrants, and persons with disability. It also recognizes that gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. The Vienna documents also laid emphasis on the positive role of NGOs and called on States to work in partnership with them at the local, national and international levels. The enduring importance of the Declaration and Programme of Action can be seen in the degree to which its many dimensions shape our human rights thinking and policy today, as was underlined by the Millennium Declaration.

IV. FINAL REMARKS

55. Despite global uncertainty, it is essential for everyone to uphold the universal human rights standards that were created collectively. Acts, methods and practices of terrorism aim at the destruction of these standards. This is why it is essential that all States implement

the operational measures sought by the Security Council in resolution 1373 (2001) in a manner consistent with human rights. At the same time, building a durable global human rights culture, by asserting the value and worth of every human being, is essential if terrorism is to be eliminated. In other words, the promotion and protection of human rights should be at the centre of the strategy to counter terrorism.

56. States have resolved to respect fully and uphold the Universal Declaration of Human Rights.[6] The Declaration starts with solemn concepts. It reminds us that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace. It emphasizes that disregard and contempt for human rights have resulted in barbarous and outrageous acts. It pledges that the United Nations will work for a world free of fear and want. Continuing to work for a world free of fear and want is the best way for the international community to address the sense of insecurity in today's world.
57. Democratic values, public accountability, and the checks and balances built into the system of government must remain strong, even in difficult times. The legislature and the judiciary have a significant role to play in discharging States' obligations under international law. Supporting an independent judiciary is an important part of the strategy to address the root causes of violence. An independent judiciary is part of the essential infrastructure for social harmony. Adjudicating disputes in a fair and objective manner reinforces confidence in the system of government. An independent judiciary is transparent; it not only ensures that justice is done, but that it is seen to be done. Its representative, and its members are selected on the basis of merit and without discrimination on the basis of race, ethnicity, gender, political opinion, or other discriminatory grounds. It is effective in checking abuse and providing remedies.
58. The role of civil society, in particular human rights defenders, is more crucial than ever. Explaining the delicate and fair balances in human rights law, and encouraging its enforcement at all times, is vital. In several parts of the world, human rights defenders have been harassed and persecuted for their human rights activities. Such

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6 See for instance the Millennium Declaration of the General Assembly.

attacks undermine the collective effort to confront violence and terrorism.

59. In the immediate aftermath of 11 September, some suggested that human rights could be set aside while security was being achieved. Now, however, there is wide recognition that ensuring respect for human rights and dignity throughout the world is the best long-term guarantor of security. Such an approach focuses attention on the elimination of the root causes of violence and therefore isolates terrorists. The Commission on Human Rights is looked to for leadership on the basis of these values, which are the international community's best answer to terrorism.

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ANNEX III

International Committee on Civil and Political Rights, General Comment No. 29 on States of Emergency (Article 4) of 31 August 2001, CCPR/C/21/Rev.1/Add. 11

1. Article 4 of the Covenant is of paramount importance for the system of protection for human rights under the Covenant. On the one hand, it allows for a State party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards. The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant. In this general comment, replacing its General Comment No. 5, adopted at the thirteenth session (1981), the Committee seeks to assist States parties to meet the requirements of article 4.
2. Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their re-

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ports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers.

3. Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1. During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.[1]

4. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant.[2] Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a

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1 See the following comments/concluding observations: United Republic of Tanzania (1992), CCPR/C/79/Add.12, para. 7; Dominican Republic (1993), CCPR/C/79/Add.18, para. 4; United Kingdom of Great Britain and Northern Ireland (1995), CCPR/C/79/Add.55, para. 23; Peru (1996), CCPR/C/79/Add.67, para. 11; Bolivia (1997), CCPR/C/79/Add.74, para. 14; Colombia (1997), CCPR/C/79/Add.76, para. 25; Lebanon (1997), CCPR/C/79/Add.78, para. 10; Uruguay (1998), CCPR/C/79/Add.90, para. 8; Israel (1998), CCPR/C/79/Add.93, para. 11.

2 See for instance articles 12 and 19 of the Covenant.

specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party. When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.[3]

5. The issues of when rights can be derogated from, and to what extent, cannot be separated from the provision in article 4, paragraph 1, of the Covenant according to which any measures derogating from a State party's obligations under the Covenant must be limited "to the extent strictly required by the exigencies of the situation". This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.

6. The fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists. The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful

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[3] See, for example, concluding observations on Israel (1998), CCPR/C/79/Add.93, para. 11.

analysis under each article of the Covenant based on an objective assessment of the actual situation.

7. Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2. The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in article 6 of that Protocol. Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would ever be justified. The reference in article 4, paragraph 2, to article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in article 18, paragraph 3. On several occasions the Committee has expressed its concern about rights that are non-derogable according to article 4, paragraph 2, being either derogated from or under a risk of derogation owing to inadequacies in the legal regime of the State party.[4]

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[4] See the following comments/concluding observations: Dominican Republic (1993), CCPR/C/79/Add.18, para. 4; Jordan (1994) CCPR/C/79/Add.35, para. 6; Nepal (1994) CCPR/C/79/Add.42, para. 9; Russian Federation (1995), CCPR/C/79/Add.54, para. 27; Zambia (1996), CCPR/C/79/Add.62, para. 11; Gabon (1996), CCPR/C/79/Add.71, para. 10; Colombia (1997) CCPR/C/79/Add.76, para. 25; Israel (1998), CCPR/C/79/Add.93, para. 11; Iraq (1997), CCPR/C/79/Add.84, para. 9; Uruguay (1998) CCPR/C/79/Add.90, para. 8; Armenia (1998), CCPR/C/79/Add.100, para. 7;

8. According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.
9. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.
10. Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. Therefore, when invoking article 4, paragraph 1, or when reporting under article 40 on the legal framework related to emergencies, States parties should present information on their other international obligations relevant for the protection of the rights in question, in particu-

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Mongolia (2000), CCPR/C/79/Add.120, para. 14; Kyrgyzstan (2000), CCPR/CO/69/KGZ, para. 12.

lar those obligations that are applicable in times of emergency.[5] In this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations.[6]

11. The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

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5 Reference is made to the Convention on the Rights of the Child which has been ratified by almost all States parties to the Covenant and does not include a derogation clause. As article 38 of the Convention clearly indicates, the Convention is applicable in emergency situations.

6 Reference is made to reports of the Secretary-General to the Commission on Human Rights submitted pursuant to Commission resolutions 1998/29, 1996/65 and 2000/69 on minimum humanitarian standards (later: fundamental standards of humanity), E/CN.4/1999/92, E/CN.4/2000/94 and E/CN.4/2001/91, and to earlier efforts to identify fundamental rights applicable in all circumstances, for instance the Paris Minimum Standards of Human Rights Norms in a State of Emergency (International Law Association, 1984), the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, the final report of Mr. Leandro Despouy, Special Rapporteur of the Sub-Commission, on human rights and states of emergency (E/CN.4/Sub.2/1997/19 and Add.1), the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), the Turku (Åbo) Declaration of Minimum Humanitarian Standards (1990), (E/CN.4/1995/116). As a field of ongoing further work reference is made to the decision of the 26th International Conference of the Red Cross and Red Crescent (1995) to assign the International Committee of the Red Cross the task of preparing a report on the customary rules of international humanitarian law applicable in international and non-international armed conflicts.

12. In assessing the scope of legitimate derogation from the Covenant, one criterion can be found in the definition of certain human rights violations as crimes against humanity. If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct. Therefore, the recent codification of crimes against humanity, for jurisdictional purposes, in the Rome Statute of the International Criminal Court is of relevance in the interpretation of article 4 of the Covenant.[7]
13. In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below.
    (a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10.
    (b) The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.

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[7] See articles 6 (genocide) and 7 (crimes against humanity) of the Statute which by 1 July 2001 had been ratified by 35 States. While many of the specific forms of conduct listed in article 7 of the Statute are directly linked to violations against those human rights that are listed as non-derogable provisions in article 4, paragraph 2, of the Covenant, the category of crimes against humanity as defined in that provision covers also violations of some provisions of the Covenant that have not been mentioned in the said provision of the Covenant. For example, certain grave violations of article 27 may at the same time constitute genocide under article 6 of the Rome Statute, and article 7, in turn, covers practices that are related to, besides articles 6, 7 and 8 of the Covenant, also articles 9, 12, 26 and 27.

(c) The Committee is of the opinion that the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances. This is reflected in the prohibition against genocide in international law, in the inclusion of a non-discrimination clause in article 4 itself (paragraph 1), as well as in the non-derogable nature of article 18.

(d) As confirmed by the Rome Statute of the International Criminal Court, deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, constitutes a crime against humanity.[8] The legitimate right to derogate from article 12 of the Covenant during a state of emergency can never be accepted as justifying such measures.

(e) No declaration of a state of emergency made pursuant to article 4, paragraph 1, may be invoked as justification for a State party to engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

14. Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

15. It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a

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[8] See article 7 (1) (d) and 7 (2) (d) of the Rome Statute.

way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15.

16. Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.[9]

17. In paragraph 3 of article 4, States parties, when they resort to their power of derogation under article 4, commit themselves to a regime of international notification. A State party availing itself of the right of derogation must immediately inform the other States parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures. Such notification is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by

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[9] See the Committee's concluding observations on Israel (1998) (CCPR/C/79/Add.93), para. 21: "... The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency ... . The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention." See also the recommendation by the Committee to the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the Covenant: "The Committee is satisfied that States parties generally understand that the right to habeas corpus and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole." Official Records of the General Assembly, Forty-ninth session, Supplement No. 40 (A/49/40), vol. I, annex XI, para. 2.

the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. In view of the summary character of many of the notifications received in the past, the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law. Additional notifications are required if the State party subsequently takes further measures under article 4, for instance by extending the duration of a state of emergency. The requirement of immediate notification applies equally in relation to the termination of derogation. These obligations have not always been respected: States parties have failed to notify other States parties, through the Secretary-General, of a proclamation of a state of emergency and of the resulting measures of derogation from one or more provisions of the Covenant, and States parties have sometimes neglected to submit a notification of territorial or other changes in the exercise of their emergency powers.[10] Sometimes, the existence of a state of emergency and the question of whether a State party has derogated from provisions of the Covenant have come to the attention of the Committee only incidentally, in the course of the consideration of a State party's report. The Committee emphasizes the obligation of immediate international notification whenever a State party takes measures derogating from its obligations under the Covenant. The duty of the Committee to monitor the law and practice of a State party for compliance with article 4 does not depend on whether that State party has submitted a notification.

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[10] See comments/concluding observations on Peru (1992) CCPR/C/79/Add.8, para. 10; Ireland (1993) CCPR/C/79/Add.21, para. 11; Egypt (1993), CCPR/C/79/Add.23, para. 7; Cameroon (1994) CCPR/C/79/Add.33, para. 7; Russian Federation (1995), CCPR/C/79/Add.54, para. 27; Zambia (1996), CCPR/C/79/Add.62, para. 11; Lebanon (1997), CCPR/C/79/Add.78, para. 10; India (1997), CCPR/C/79/Add.81, para. 19; Mexico (1999), CCPR/C/79/Add.109, para. 12.

ANNEX IV

United Nations Security Council Resolution 1373 (2001) of 28 September 2001

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, DC, and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased co-operation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international co-operation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or ac-

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quiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. *Calls upon all States* to:

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

(b) Exchange information in accordance with international and domestic law and co-operate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Co-operate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase co-operation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. *Notes with concern* the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance co-ordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and calls upon all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. *Decides* to remain seized of this matter.

ANNEX V

Statement of the Secretary General Kofi Annan to the Security Council at the Meeting to Commemorate the One-Year Anniversary of the Committee of 4 October 2002

Today's Security Council meeting reflects the Council's determination to confront reality rather than escape from it; to recognize an evil rather than excuse it. The Council's decision a year ago to establish the Counter-Terrorism Committee (CTC) was a swift and concrete reaction to the terrorist attacks of 11 September. It showed that the Council was willing to act, as well as speak, in defence of every country and every citizen threatened by international terrorism.

Terrorism is a global threat with global effects. Its methods are murder and mayhem, but its consequences affect every aspect of the United Nations agenda — from development to peace, to human rights and the rule of law. No part of our mission is safe from the effects of terrorism, and no part of the world is immune from this scourge. By its very nature, terrorism is an assault on the fundamental principles of law, order, human rights and the peaceful settlement of disputes upon which the United Nations is established. Countering terrorism, therefore, is in the interest not only of States and intergovernmental institutions, but also of local, national and global civil society. This Organization therefore has a clear obligation to deal with this global threat. But it is also well placed to do so. The United Nations has an indispensable role to play in providing the legal and organizational framework within which the international campaign against terrorism can unfold.

Let me here pay tribute to the Counter-Terrorism Committee and its Chairman, Sir Jeremy Greenstock, for its work in ensuring the implementation by all Member States of an effective counter-terrorism strategy. Through its work, the CTC has become an important agent for international consensus on counter-terrorism, calling for the effective implementation of the 12 international anti-terrorism conventions. Moreo-

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ver, the CTC has helped to strengthen global capacity in this field through a coordinated programme of needs-assessment and technical assistance. Let me also say that I very much welcome the Chairman's intention to consult with the High Commissioner for Human Rights, Sergio Vieira de Mello.

Last autumn, to identify the long-term implications and broad policy dimensions of terrorism for the United Nations, I set up a Policy Working Group on the United Nations and Terrorism. It combined the expertise of key agencies, programmes and departments within the Organization with that of independent specialists. On 28 June this year, the Group submitted a report with recommendations on steps that the United Nations can take. The report, which I made public on 10 September, contains proposals for a strategic definition of priorities to orient the Organization's work in this complex field. I endorse the three-pronged strategy suggested by the report.

When approaching issues related to terrorism, the United Nations will set itself three goals: dissuasion, denial and cooperation.

First, we must dissuade the would-be perpetrators of terror by setting effective norms and implementing relevant legal instruments, by mounting an active public information campaign and by rallying an international consensus behind the fight against terrorism. To achieve effective dissuasion, it is essential to remember that the fight against terrorism is above all a fight to preserve fundamental rights and sustain the rule of law. By their very nature, terrorist acts are grave violations of human rights. Therefore, to pursue security at the expense of human rights is short-sighted, self-contradictory and, in the long run, self-defeating. In places where human rights and democratic values are lacking, disaffected groups are more likely to opt for a path of violence or to sympathize with those who do.

Secondly, we must deny would-be terrorists the opportunity to commit their dreadful acts. We can do this by supporting the efforts of the Counter-Terrorism Committee to monitor compliance with Security Council resolution 1373 (2001); by greater efforts to achieve disarmament, especially through strengthening global norms against the use or proliferation of weapons of mass destruction; and by giving technical support to States seeking to curb the flow of arms, funds and technology to terrorist cells.

To be effective and sustainable, a strategy of denial must be grounded in both international and domestic law. It is not good enough

to sign the key international instruments. We must implement them as well.

Given the levels of inhumanity to which modern-day terrorists have descended, efforts to curb the proliferation of weapons of mass destruction have assumed new urgency.

Other legal instruments – such as those that deal with transnational crime, narcotics and money-laundering – are essential to denying sources of finance for terrorist networks. States must ensure that these instruments are adopted and effectively applied. Moreover, the struggle against terrorism demands closer analysis of its links with crime, narcotics and the illicit trade in weapons.

There may, in addition, be a need for the General Assembly to consider making more resources available to ensure that the work of the CTC is effective and sustainable over the long-term. As I have mentioned in the past, the CTC's unprecedented effort to review national reports on the implementation of international legal instruments relating to terrorism has stretched, almost to breaking point, the Secretariat's resources for processing documentation.

Thirdly, we must sustain cooperation in the struggle against terrorism, on as broad a basis as possible, while encouraging subregional, regional and global organizations to join forces in a common campaign. In overcoming as elusive a transnational threat as terrorism, cooperation is essential. Fortunately, there has been some progress. The United Nations is committed to working with international partners in the fight against terrorism and to achieving unity of purpose and action. Just as terrorism must never be excused, so genuine grievances must never be ignored simply because terrorism is committed in their name. It does not take away from the justice of a cause that a few wicked men or women murder in its name. It only makes it more urgent that the cause is addressed, the grievances heard and the wrong put right.

As the United Nations unites to defeat terrorism in the months and years ahead, we must act with equal determination to solve the political disputes and longstanding conflicts which generate support for terrorism.

To do so is not to reward terrorism or its perpetrators, it is to deny them the opportunity to find refuge in any cause, any country. Only then can we truly say that the war on terrorism has been won.

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ANNEX VI

Statement of the Chairman of the Counter-Terrorism Committee, Sir Jeremy Greenstock, to the Security Council at the Meeting to Commemorate the One-Year Anniversary of the Committee of 4 October 2002

In my national capacity may I warmly welcome you to the presidency of the Security Council for this month. You have our full support. May I express my delegation's gratitude for the very constructive presidency of your predecessor, Ambassador Tafrov.

I am extremely grateful to the Secretary-General for joining us this morning on this important subject and I would like to express my gratitude to him and through him for the solid support which the Secretariat has shown under his leadership over the past year.

I speak to you this morning against the sombre background which the Secretary-General has so eloquently set out. One year ago today, the CTC held its first ever meeting to discuss how it would fulfil the mandate set by the Security Council to monitor the implementation of Security Council resolution 1373 (2001). The task which faced us then was challenging; to begin a dialogue with every Member State on resolution 1373 (2001), to find out what measures Governments had put in place already and what more needed to be done to ensure that there was no support, active or passive, for terrorism, and to work with the resolve demanded by the Council's determination in paragraph 8 of resolution 1373 (2001) to take all necessary steps to ensure the full implementation of that resolution.

The way in which the CTC has responded to this challenge is well known to the Council through the quarterly reports I have made on behalf of the Committee, and through the CTC's 90-day work programmes, the fifth of which, issued recently as document S/2002/1075.

Cooperation has the first hallmark of the CTC's modus operandi, because resolution 1373 (2001), while mandatory on all Member States,

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has to be implemented willingly by Governments to make a difference. Dialogue and partnerships with Governments is essential in order to be successful in raising global standards against terrorism. The natural ally of partnership is transparency, which I hope has become our second hallmark.

The CTC is not a tribunal and does not judge States, but it does expect every State to work at its fastest possible speed to implement the far-reaching obligations of resolution 1373 (2001). They therefore all need to know, all the time, how the CTC is operating and why.

There is still much more to do before terrorists find that there is no safe haven, because the bar against terrorism has been raised in every country. The CTC will continue to offer encouragement, advice and guidance to States on the implementation of resolution 1373 (2001). It will focus, when reviewing reports or working on assistance, on the areas which need to be tackled first. For most States that will be by ensuring that they have, first, legislation in place covering all aspects of resolution 1373 (2001) and a process in hand for ratifying as soon as possible the twelve international conventions and protocols relating to terrorism. Secondly, States must have effective executive machinery for preventing and suppressing terrorist financing.

The CTC will continue to coordinate and facilitate the provision of technical assistance focusing on these priority areas. There is now, on the CTC's web site (www.un.org/sc/ctc) a comprehensive directory of information and sources of assistance in the field of counter-terrorism, which has been put together as a tool for States. Our experts are in direct contact with Permanent Missions to discuss the provision of assistance. They will do whatever they can to help States access the help they need, and you will find that the experts may have their own ideas about where assistance might be helpful, drawing on their knowledge of what assistance programmes are available, what best practice has been established around the world and what gaps have been identified in resolution 1373 (2001) implementation, in the State concerned.

While the response from the United Nations membership to resolution 1373 (2001) has been remarkable, it has not yet quite been universal. Let me draw the Council's attention to the fact that 16 Member States have not yet filed a report with the CTC. Of these, 7 have not made any kind of written contact; they are: Chad, Dominica, Equatorial Guinea, Guinea-Bissau, Liberia, Swaziland and Tonga. The CTC is actively following up, with a view to offering advice and assistance to

these States on preparing a report. The CTC urges all these States to submit a report, and to be in dialogue with the Committee on the steps needed to implement resolution 1373 (2001).

The CTC does not expect any State to report that it has fully implemented resolution 1373 (2001). Indeed, as I have said before in the Council, the CTC will not declare any State "fully compliant". But it does expect every State to strengthen its capacity against terrorism by implementing resolution 1373 (2001) at its fastest capable speed.

Achieving this will be easier for individual States if they work within the collective effort of their region. Regional organizations must ensure that no gaps are left within their overall territory. To help them in this task, the CTC will deepen its relationships with international, regional and sub-regional organizations during the coming work period. It will invite them to contribute information on their activities, which can be collated so that each organization can be aware of, and glean ideas from, the activities of sister organisations around the world. We will work closely with them on the provision of assistance.

The CTC will remain in touch with Sergio Vieira de Mello, the new High Commissioner for Human Rights, in the context of the Committee's wish to remain fully aware of the interaction of its work with human rights concerns.

Let me say something about how the global environment for terrorists has changed since October 2001, when the CTC was created. Forty meetings, eighty-three sub-committee meetings and nineteen open briefings later, I am honoured to set out some of the achievements in the counter-terrorism field to which the CTC has contributed. As you will see from the following examples, global activity on resolution 1373 (2001) is taking place far beyond the walls of conference room 7, in virtually every capital of every Member State of the United Nations.

At the national level Governments throughout the world have responded to the challenge laid down in resolution 1373 (2001) to prevent and suppress terrorism. In almost every case, parliaments have begun to consider or adopt new laws and Governments have reviewed the strength of their institutions to fight terrorism. As required by the resolution, States have looked again at the 12 international conventions and protocols related to terrorism. Ratifications have gone up significantly since July a year ago. Then, only Botswana and the United Kingdom had ratified all 12 instruments; today, 24 States have done so. We want the pace to accelerate further.

At the regional level, States have worked together in practical ways, often through their regional organizations, to improve regional capacity against terrorism. They have recognized that no country is safe from terrorism if its neighbour is not. Let me give a few examples. The European Union (EU), already a well-connected region, has introduced new measures aimed at tackling terrorism, such as the Common European arrest warrant. Across the Atlantic, the Organization of American States (OAS) has agreed to a regional convention and has developed practical ways of sharing best practice and coordinating on region-wide issues such as border security.

Last month, members of the African Union adopted an action plan that sets out their own determination to fight terrorism. The CTC has had constructive contact with the Commonwealth of Independent States, the Regional Forum of the Association of South-East Asian Nations and Pacific Islands Forum. We shall continue our exchanges with over 30 international, regional and subregional organizations from every region of the world. It is welcome that they have tackled counter-terrorism, a new area for many of those organizations, with seriousness and determination.

At the global level, the CTC has enjoyed unprecedented support from the United Nations membership for its efforts to turn the global consensus on fighting terrorism into practical action. One hundred and seventy-four Member States and five others have reported to the CTC on the action taken and planned, and the dialogue has continued. The CTC has responded to almost all of those first reports and has begun to review the 86 follow-up reports that States have provided. To date, the total number of reports received by the CTC stands at 265. Awareness of what we are doing, and of what we need to know, is close to universal.

Cooperation between States, particularly in the form of assistance, has increased. More and more States and organizations are looking at what they have to offer and are informing the Committee of their willingness to help where needed. Many States have begun to provide help, and others have moved quickly to turn commitments into action on the ground. The International Monetary Fund, the World Bank and the Financial Action Task Force on Money-Laundering of the Organisation for Economic Cooperation and Development are developing programmes to help States put in place measures to stop their financial systems from being abused by terrorists. The Commonwealth Secre-

tariat, with major funding from the United Kingdom and Canada, is offering help to its 46 members and others with legislative drafting. The United States has already offered training to representatives of over 48 countries.

Let me close by paying tribute to the work of all members of the Committee, the Vice-Chairmen, the experts and the Secretariat. I recognize the strains we have placed on the Secretariat, but we have all had to raise our game on this important subject. Everyone has worked with dedication, good will and increasing professionalism. I should particularly like to mention for tribute the three leaving experts of our team, Dr. Walter Gehr, Ms. Heidi Broekhuis and Mr. Lotfi Daoues, who have all served with distinction on that team. I should also like to pay tribute to the support that I have had from my own delegation, notably from Anna Clunes and Juliet Gilbert.

The Security Council has placed confidence in the Bureau to continue for a further six-month period, and I am grateful to the Council for that. I thank the Vice-Chairmen, Ambassadors Koonjul, Lavrov and Valdivieso, for steering the work of the CTC and its subcommittees. To gether we are determined to make the next months even more productive.

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ANNEX VII

Address by the United Nations High Commissioner for Human Rights, Sergio Vieira De Mello, to the Counter-Terrorism Committee of the Security Council on 21 October 2002

Mr. Chairman,

Distinguished members of the Counter-Terrorism Committee,

Thank you for inviting me to meet with the CTC and seek to build on the valuable interactions my predecessor enjoyed with you.

I am aware of the enormous responsibility you have on your shoulders to advance the international community's capacity and resolve to eliminate terrorism. This evil, which has been with us for decades, has taken on a different dimension with the monstrous attacks of 11 September, 2001. One year, one month and one day later, the horrific bombings in Bali further underscored the need to redouble efforts to deal with this scourge. In my statement to the one-day session of the Commission on Human Rights, this 24 September, I reiterated my total support for the need to combat terrorism as vigorously as we could.

It will come as no surprise to you to hear from me my firm-held belief that upholding human rights and demonstrating respect for the dignity and worth of all people is crucial to our efforts in this regard. Human rights violations create a ripe environment for terrorism. Fundamental grievances, embedded in a denial of human rights and basic justice, must be addressed if we are to ensure that terrorist groups cannot cloak their acts with a spurious veil of justification.

I am convinced that the best – the only – strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law. We need to invest more vigorously in promoting the sanctity and worth of every human life; we need to show that we care about the security of all and not just a few; we need to ensure that those who govern and those who are governed understand and appreciate that they must act within the law.

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Terrorism – including global terrorism – has many manifestations and a variety of causes, but allow me to be candid. There would be a pregnant silence if I failed to mention at this point the tragically internecine conflict in the Middle East. This situation is breeding hatred. And this hatred is inspiring terrorism. Force alone (often entailing serious abuses of human rights) does not break this chain – rather it strengthens it.

We need to give this protracted conflict our priority attention. A solution must be found that stops the bloodshed and secures peace and justice for all. The elements of the solution are out there. Every day that passes without a lasting resolution to this conflict further undermines the right to live in peace and security in the Middle East. It also undermines the security of us all.

We live in a world where perception is often as important as fact. Since being appointed High Commissioner, I have been struck by just how strong a perception there is both of a rising tide of new forms of anti-Semitism and, equally disturbing and dangerous, of a vilification of the Islamic world. The fight against terrorism must not single out, or be seen to single out, a religion or a group of people. If we are to combat terrorism – and succeed – we must be united. If we are to unite, we must address these perceptions, however grounded or not they are in reality, earnestly and with sensitivity.

Mr. Chairman, Distinguished Members,

Your Committee has been encouraging all States to act with vigour and resolve to implement Security Council resolution 1373. States do not simply have the right, but the duty to protect their citizens from terrorism. I particularly appreciate your approach in ensuring not only that States know what they should do, but also in assisting them in how it can be done. Here the human rights discourse is helpful. Human rights principles provide guidance on what States can do to fight terrorism and remain within the rule of law.

Human rights norms recognize that measures can be taken and some rights can even be suspended in times of a public emergency that threatens the life of a nation. The measures must, however, be taken within the framework of the law, for not even States are above the law. They should be taken in transparency, they should be of short duration, and they must respect the fundamental non-derogable rights embodied in human rights norms.

Even in the absence of an emergency, many human rights are not absolute. They can be limited in certain circumstances for aims such as re-

specting the rights of others; protecting national security or public order; or for reasons of public health or morals. Human rights treaties provide some criteria on when and how these limitations can be introduced, requiring for instance that they be provided by law, that they must be necessary in a democratic society, or necessary to achieve a legitimate purpose.

These important nuances should be brought to the surface in a more forthright way because they will help States to act within the framework of their international obligations. The UN human rights mechanisms have provided useful guidance about the exact scope of these considerations. But their work is often not sufficiently highlighted.

Mr. Chairman, Distinguished Members,

While there is no contradiction at all between implementing Security Council resolution 1373 and respecting human rights, I am concerned by reports I have been receiving, for example, from the Special Rapporteur on the Independence of Judges and Lawyers, of too many states enacting anti-terrorism legislation that is too broad in scope (namely, that allows for the suppression of activities that are, in fact, legitimate), or who are seeking to fight terrorism outside the framework of the court system. In other words, I am concerned that yet one more casualty of the terrorist has been the erosion in some quarters of fundamental civil and political rights.

My Office is at your disposal to engage systematically and regularly with you on relevant human rights issues. I say this with full appreciation that yours is not a human rights forum. Our intention is not to turn you into one: rather it is to assist you in encouraging the non-abuse of 1373; in other words, that it is not used for purposes other than those strictly intended by the Security Council or which are not permitted, in any circumstance, by our human rights laws. To that end, I would urge you to consider once more the value of appointing a human rights advisor to the CTC. I for one am convinced that this would only strengthen our collaborative efforts in fighting terrorism.

My Office stands ready to continue to provide you with information that could help you in ensuring 1373's proper implementation. For example, we could provide advice on appropriate standards and principles (such as explanations of the exact scope of non-derogable rights and the need for transparency through the notification of the derogable ones), or furnish you with the conclusions and recommendations of the UN human rights mechanisms on relevant issues. After all these are organs created by the Member States of our Organization. If you find this information useful, I would urge

you to place it under the Directory of Assistance on your Committee's web site.

You may also wish to benefit from a direct exchange with the UN human rights mechanisms to clarify some aspects of how States can pursue terrorism without sacrificing the rule of law. I particularly encourage you to strengthen links with the Human Rights Committee, but also recommend that contact be developed not only with relevant treaty bodies, but also with our special procedures, as appropriate.

Mr. Chairman, Distinguished Members,

I am pleased that the report of the Policy Working Group on the United Nations and Terrorism, which was set by the Secretary-General, has recommended that all relevant parts of the United Nations system should emphasize that key human rights must always be protected and never derogated from. The report identifies the independence of the judiciary and the existence of legal remedies as essential elements for protecting fundamental human rights in all situations involving counter-terrorism measures. It recommends that my Office, in cooperation of the Department of Public Information, publish a digest of core human rights jurisprudence in the area of terrorism. It further recommends that my Office convenes a consultation on the protection of human rights in the struggle against terrorism. I believe that these are wise and pertinent recommendations and I am committed to implementing them and implementing them soon. I know I can count on the full support of the CTC in so doing.

Finally, allow me to end with an appeal. We all know well that terrorism can only be defeated by both bringing to justice its perpetrators, and by addressing its root causes. To acknowledge the latter is not to excuse the former. We must acknowledge the impact on us of poverty, destitution, protracted humiliation, and perceptions of systematic injustice and double standards, as well as the dangers of appearing to single out a people or a religion in the application of preventative measures. These should be as much a part of our considerations as the efficacy and compliance with human rights standards of enforcement measures taken in the fight against terrorism. In other words, an all-encompassing approach is required. Human rights can help provide such a framework.

Let me thank you once again for this valuable opportunity to discuss with you practical ways of cooperation. I hope that this is the start of a fruitful relationship and I assure you of my utmost support and commitment to you in your work.

ANNEX VIII

United Nations General Assembly Resolution 49/60 of 9 December 1994

49/60. MEASURES TO ELIMINATE INTERNATIONAL TERRORISM

The General Assembly,

Recalling its resolution 46/51 of 9 December 1991 and its decision 48/411 of 9 December 1993,

Taking note of the report of the Secretary-General,

Having considered in depth the question of measures to eliminate international terrorism,

Convinced that the adoption of the declaration on measures to eliminate international terrorism should contribute to the enhancement of the struggle against international terrorism,

1. Approves the Declaration on Measures to Eliminate International Terrorism, the text of which is annexed to the present resolution;
2. Invites the Secretary-General to inform all States, the Security Council, the International Court of Justice and the relevant specialized agencies, organizations and organisms of the adoption of the Declaration;
3. Urges that every effort be made in order that the Declaration becomes generally known and is observed and implemented in full;
4. Urges States, in accordance with the provisions of the Declaration, to take all appropriate measures at the national and international levels to eliminate terrorism;
5. Invites the Secretary-General to follow up closely the implementation of the present resolution and the Declaration, and to submit to the General Assembly at its fiftieth session a report thereon, relating, in particular, to the modalities of implementation of paragraph 10 of the Declaration;

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6. Decides to include in the provisional agenda of its fiftieth session the item entitled "Measures to eliminate international terrorism", in order to examine the report of the Secretary-General requested in paragraph 5 above, without prejudice to the annual or biennial consideration of the item.

ANNEX

DECLARATION ON MEASURES TO ELIMINATE INTERNATIONAL TERRORISM

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations,

Recalling the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the Declaration on the Strengthening of International Security, the Definition of Aggression, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,

Deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States,

Deeply concerned by the increase, in many regions of the world, of acts of terrorism based on intolerance or extremism,

Concerned at the growing and dangerous links between terrorist groups and drug traffickers and their paramilitary gangs, which have resorted to all types of violence, thus endangering the constitutional order of States and violating basic human rights,

Convinced of the desirability for closer coordination and cooperation among States in combating crimes closely connected with terrorism, including drug trafficking, unlawful arms trade, money laundering and smuggling of nuclear and other potentially deadly materials, and bearing in

mind the role that could be played by both the United Nations and regional organizations in this respect,

Firmly determined to eliminate international terrorism in all its forms and manifestations,

Convinced also that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is an essential element for the maintenance of international peace and security,

Convinced further that those responsible for acts of international terrorism must be brought to justice,

Stressing the imperative need to further strengthen international cooperation between States in order to take and adopt practical and effective measures to prevent, combat and eliminate all forms of terrorism that affect the international community as a whole,

Conscious of the important role that might be played by the United Nations, the relevant specialized agencies and States in fostering widespread cooperation in preventing and combating international terrorism, inter alia, by increasing public awareness of the problem,

Recalling the existing international treaties relating to various aspects of the problem of international terrorism, inter alia, the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at To kyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted in New York on 14 December 1973, the International Convention against the Taking of Hostages, adopted in New York on 17 December 1979, the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988, and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, done at Montreal on 1 March 1991,

Welcoming the conclusion of regional agreements and mutually agreed declarations to combat and eliminate terrorism in all its forms and manifestations,

Convinced of the desirability of keeping under review the scope of existing international legal provisions to combat terrorism in all its forms and manifestations, with the aim of ensuring a comprehensive legal framework for the prevention and elimination of terrorism,

Solemnly declares the following:

I.

1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States;
2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of uman rights, fundamental freedoms and the democratic bases of society;
3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;

II.

4. States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts;
5. States must also fulfil their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to

take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism, in particular:

(a) To refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens;

(b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law;

(c) To endeavour to conclude special agreements to that effect on a bilateral, regional and multilateral basis, and to prepare, to that effect, model agreements on cooperation;

(d) To cooperate with one another in exchanging relevant information concerning the prevention and combating of terrorism;

(e) To take promptly all steps necessary to implement the existing international conventions on this subject to which they are parties, including the harmonization of their domestic legislation with those conventions;

(f) To take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in subparagraph (a) above;

6. In order to combat effectively the increase in, and the growing international character and effects of, acts of terrorism, States should enhance their cooperation in this area through, in particular, systematizing the exchange of information concerning the prevention and combating of terrorism, as well as by effective implementation of the relevant international conventions and conclusion of mutual judicial assistance and extradition agreements on a bilateral, regional and multilateral basis;

7. In this context, States are encouraged to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter;
8. Furthermore States that have not yet done so are urged to consider, as a matter of priority, becoming parties to the international conventions and protocols relating to various aspects of international terrorism referred to in the preamble to the present Declaration;

III.

9. The United Nations, the relevant specialized agencies and intergovernmental organizations and other relevant bodies must make every effort with a view to promoting measures to combat and eliminate acts of terrorism and to strengthening their role in this field;
10. The Secretary-General should assist in the implementation of the present Declaration by taking, within existing resources, the following practical measures to enhance international cooperation:
    (a) A collection of data on the status and implementation of existing multilateral, regional and bilateral agreements relating to international terrorism, including information on incidents caused by international terrorism and criminal prosecutions and sentencing, based on information received from the depositaries of those agreements and from Member States;
    (b) A compendium of national laws and regulations regarding the prevention and suppression of international terrorism in all its forms and manifestations, based on information received from Member States;
    (c) An analytical review of existing international legal instruments relating to international terrorism, in order to assist States in identifying aspects of this matter that have not been covered by such instruments and could be addressed to develop further a comprehensive legal framework of conventions dealing with international terrorism;

(d) A review of existing possibilities within the United Nations system for assisting States in organizing workshops and training courses on combating crimes connected with international terrorism;

IV.

11. All States are urged to promote and implement in good faith and effectively the provisions of the present Declaration in all its aspects;

12. Emphasis is placed on the need to pursue efforts aiming at eliminating definitively all acts of terrorism by the strengthening of international cooperation and progressive development of international law and its codification, as well as by enhancement of coordination between, and increase of the efficiency of, the United Nations and the relevant specialized agencies, organizations and bodies.

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ANNEX IX

United Nations General Assembly Resolution 51/210 of 17 December 1996

51/210. MEASURES TO ELIMINATE INTERNATIONAL TERRORISM

The General Assembly,

Recalling its resolution 49/60 of 9 December 1994, by which it adopted the Declaration on Measures to Eliminate International Terrorism, and its resolution 50/53 of 11 December 1995,

Recalling also the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations,

Guided by the purposes and principles of the Charter of the United Nations,

Deeply disturbed by the persistence of terrorist acts, which have taken place worldwide,

Stressing the need further to strengthen international cooperation between States and between international organizations and agencies, regional organizations and arrangements and the United Nations in order to prevent, combat and eliminate terrorism in all its forms and manifestations, wherever and by whomsoever committed,

Mindful of the need to enhance the role of the United Nations and the relevant specialized agencies in combating international terrorism,

Noting, in this context, all regional and international efforts to combat international terrorism, including those of the Organization of African Unity, the Organization of American States, the Organization of the Islamic Conference, the South Asian Association for Regional Cooperation, the European Union, the Council of Europe, the Movement of Non-Aligned Countries and the countries of the group of seven major industrialized countries and the Russian Federation,

Taking note of the report of the Director-General of the United Nations Educational, Scientific and Cultural Organization on educational activities under the project entitled "Towards a culture of peace",

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Recalling that in the Declaration on Measures to Eliminate International Terrorism the General Assembly encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there was a comprehensive legal framework covering all aspects of the matter,

Bearing in mind the possibility of considering in the future the elaboration of a comprehensive convention on international terrorism,

Noting that terrorist attacks by means of bombs, explosives or other incendiary or lethal devices have become increasingly widespread, and stressing the need to supplement the existing legal instruments in order to address specifically the problem of terrorist attacks carried out by such means,

Recognizing the need to enhance international cooperation to prevent the use of nuclear materials for terrorist purposes and to develop an appropriate legal instrument,

Recognizing also the need to strengthen international cooperation to prevent the use of chemical and biological materials for terrorist purposes,

Convinced of the need to implement effectively and supplement the provisions of the Declaration on Measures to Eliminate International Terrorism,

Having examined the report of the Secretary-General,

I.

1. *Strongly condemns* all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;
2. *Reiterates* that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them;
3. *Calls* upon all States to adopt further measures in accordance with the relevant provisions of international law, including international standards of human rights, to prevent terrorism and to strengthen international cooperation in combating terrorism and, to that end, to consider the adoption of measures such as

those contained in the official document adopted by the group of seven major industrialized countries and the Russian Federation at the Ministerial Conference on Terrorism, held in Paris on 30 July 1996, and the plan of action adopted by the Inter-American Specialized Conference on Terrorism, held at Lima from 23 to 26 April 1996 under the auspices of the Organization of American States, and in particular calls upon all States:

(a) To recommend that relevant security officials undertake consultations to improve the capability of Governments to prevent, investigate and respond to terrorist attacks on public facilities, in particular means of public transport, and to cooperate with other Governments in this respect;

(b) To accelerate research and development regarding methods of detection of explosives and other harmful substances that can cause death or injury, undertake consultations on the development of standards for marking explosives in order to identify their origin in post-blast investigations, and promote cooperation and transfer of technology, equipment and related materials, where appropriate;

(c) To note the risk of terrorists using electronic or wire communications systems and networks to carry out criminal acts and the need to find means, consistent with national law, to prevent such criminality and to promote cooperation where appropriate;

(d) To investigate, when sufficient justification exists according to national laws, and acting within their jurisdiction and through appropriate channels of international cooperation, the abuse of organizations, groups or associations, including those with charitable, social or cultural goals, by terrorists who use them as a cover for their own activities;

(e) To develop, if necessary, especially by entering into bilateral and multilateral agreements and arrangements, mutual legal assistance procedures aimed at facilitating and speeding investigations and collecting evidence, as well as cooperation between law enforcement agencies in order to detect and prevent terrorist acts;

(f) To take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist

organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds;

4. *Also calls* upon all States, with the aim of enhancing the efficient implementation of relevant legal instruments, to intensify, as and where appropriate, the exchange of information on facts related to terrorism and, in so doing, to avoid the dissemination of inaccurate or unverified information;
5. *Reiterates* its call upon States to refrain from financing, encouraging, providing training for or otherwise supporting terrorist activities;
6. *Urges* all States that have not yet done so to consider, as a matter of priority, becoming parties to the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted in New York on 14 December 1973, the International Convention against the Taking of Hostages, adopted in New York on 17 December 1979, the Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988, the Convention for the Suppression of Un-

lawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988, and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, done at Montreal on 1 March 1991, and calls upon all States to enact, as appropriate, domestic legislation necessary to implement the provisions of those Conventions and Protocols, to ensure that the jurisdiction of their courts enables them to bring to trial the perpetrators of terrorist acts and to provide support and assistance to other Governments for those purposes;

II.

7. *Reaffirms* the Declaration on Measures to Eliminate International Terrorism contained in the annex to resolution 49/60;
8. *Approves* the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, the text of which is annexed to the present resolution;

III.

9. *Decides* to establish an Ad Hoc Committee, open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism;
10. *Decides* also that the Ad Hoc Committee will meet from 24 February to 7 March 1997 to prepare the text of a draft international convention for the suppression of terrorist bombings, and recommends that work continue during the fifty-second session of the General Assembly from 22 September to 3 October 1997 in the framework of a working group of the Sixth Committee;
11. *Requests* the Secretary-General to provide the Ad Hoc Committee with the necessary facilities for the performance of its work;

12. *Requests* the Ad Hoc Committee to report to the General Assembly at its fifty-second session on progress made towards the elaboration of the draft convention;
13. *Recommends* that the Ad Hoc Committee be convened in 1998 to continue its work as referred to in paragraph 9 above;

IV.

14. *Decides* to include in the provisional agenda of its fifty-second session the item entitled "Measures to eliminate international terrorism".

ANNEX

DECLARATION TO SUPPLEMENT THE 1994 DECLARATION ON MEASURES TO ELIMINATE INTERNATIONAL TERRORISM

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations,

Recalling the Declaration on Measures to Eliminate International Terrorism adopted by the General Assembly by its resolution 49/60 of 9 December 1994,

Recalling also the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations,

Deeply disturbed by the worldwide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States,

Underlining the importance of States developing extradition agreements or arrangements as necessary in order to ensure that those responsible for terrorist acts are brought to justice,

Noting that the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, does not provide a basis for the protection of perpetrators of terrorist acts, noting also in this context articles 1, 2,

32 and 33 of the Convention, and emphasizing in this regard the need for States parties to ensure the proper application of the Convention,

Stressing the importance of full compliance by States with their obligations under the provisions of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, including the principle of non-refoulement of refugees to places where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group or political opinion, and affirming that the present Declaration does not affect the protection afforded under the terms of the Convention and Protocol and other provisions of international law,

Recalling article 4 of the Declaration on Territorial Asylum adopted by the General Assembly by its resolution 2312 (XXII) of 14 December 1967,

Stressing the need further to strengthen international cooperation between States in order to prevent, combat and eliminate terrorism in all its forms and manifestations,

Solemnly declares the following:

1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed, including those which jeopardize friendly relations among States and peoples and threaten the territorial integrity and security of States;
2. The States Members of the United Nations reaffirm that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations; they declare that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;
3. The States Members of the United Nations reaffirm that States should take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts, considering in this regard relevant information as to whether the asylum-seeker is subject to investigation for or is charged with or has been convicted of offences connected with terrorism and, after granting refugee status, for the purpose of ensuring that that status is not used for

the purpose of preparing or organizing terrorist acts intended to be committed against other States or their citizens;

4. The States Members of the United Nations emphasize that asylum- seekers who are awaiting the processing of their asylum applications may not thereby avoid prosecution for terrorist acts;
5. The States Members of the United Nations reaffirm the importance of ensuring effective cooperation between Member States so that those who have participated in terrorist acts, including their financing, planning or incitement, are brought to justice; they stress their commitment, in conformity with the relevant provisions of international law, including international standards of human rights, to work together to prevent, combat and eliminate terrorism and to take all appropriate steps under their domestic laws either to extradite terrorists or to submit the cases to their competent authorities for the purpose of prosecution;
6. In this context, and while recognizing the sovereign rights of States in extradition matters, States are encouraged, when concluding or applying extradition agreements, not to regard as political offences excluded from the scope of those agreements offences connected with terrorism which endanger or represent a physical threat to the safety and security of persons, whatever the motives which may be invoked to justify them;
7. States are also encouraged, even in the absence of a treaty, to consider facilitating the extradition of persons suspected of having committed terrorist acts, insofar as their national laws permit;
8. The States Members of the United Nations emphasize the importance of taking steps to share expertise and information about terrorists, their movements, their support and their weapons and to share information regarding the investigation and prosecution of terrorist acts.

ANNEX X

Council of Europe, Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on 11 July 2002, H (2002) 4

PREAMBLE

The Committee of Ministers,

[a.] Considering that terrorism seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society;

[b.] Unequivocally condemning all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed;

[c.] Recalling that a terrorist act can never be excused or justified by citing motives such as human rights and that the abuse of rights is never protected;

[d.] Recalling that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law;

[e.] Recalling the need for States to do everything possible, and notably to co-operate, so that the suspected perpetrators, organisers and sponsors of terrorist acts are brought to justice to answer for all the consequences, in particular criminal and civil, of their acts;

[f.] Reaffirming the imperative duty of States to protect their populations against possible terrorist acts;

[g.] Recalling the necessity for states, notably for reasons of equity and social solidarity, to ensure that victims of terrorist acts can obtain compensation;

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights. © *2004 Koninklijke Brill NV. Printed in the Netherlands.*

[h.] Keeping in mind that the fight against terrorism implies long-term measures with a view to preventing the causes of terrorism, by promoting, in particular, cohesion in our societies and a multicultural and inter-religious dialogue;

[i.] Reaffirming states' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights;

adopts the following guidelines and invites member States to ensure that they are widely disseminated among all authorities responsible for the fight against terrorism.

I. STATES' OBLIGATION TO PROTECT EVERYONE AGAINST TERRORISM

States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.

II. PROHIBITION OF ARBITRARINESS

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III. LAWFULNESS OF ANTI-TERRORIST MEASURES

1. All measures taken by States to combat terrorism must be lawful.

2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

IV. ABSOLUTE PROHIBITION OF TORTURE

The use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.

V. COLLECTION AND PROCESSING OF PERSONAL DATA BY ANY COMPETENT AUTHORITY IN THE FIELD OF STATE SECURITY

Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular:

(i) are governed by appropriate provisions of domestic law;
(ii) are proportionate to the aim for which the collection and the processing were foreseen;
(iii) may be subject to supervision by an external independent authority.

VI. MEASURES WHICH INTERFERE WITH PRIVACY

1. Measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and use of undercover agents) must be provided for by law. It must be possible to challenge the lawfulness of these measures before a court.

2. Measures taken to fight terrorism must be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force and, within this framework, the use of arms by the security forces must be strictly proportionate to the aim of protecting persons against unlawful violence or to the necessity of carrying out a lawful arrest.

VII. ARREST AND POLICE CUSTODY

1. A person suspected of terrorist activities may only be arrested if there are reasonable suspicions. He/she must be informed of the reasons for the arrest.

2. A person arrested or detained for terrorist activities shall be brought promptly before a judge. Police custody shall be of a reasonable period of time, the length of which must be provided for by law.

3. A person arrested or detained for terrorist activities must be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court.

VIII. REGULAR SUPERVISION OF PRE-TRIAL DETENTION

A person suspected of terrorist activities and detained pending trial is entitled to regular supervision of the lawfulness of his or her detention by a court.

IX. LEGAL PROCEEDINGS

1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law.

2. A person accused of terrorist activities benefits from the presumption of innocence.

3. The imperatives of the fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to:

(i) the arrangements for access to and contacts with counsel;

(ii) the arrangements for access to the case-file;

(iii) the use of anonymous testimony.

4. Such restrictions to the right of defence must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

X. PENALTIES INCURRED

1. The penalties incurred by a person accused of terrorist activities must be provided for by law for any action or omission which constituted a criminal offence at the time when it was committed; no heavier penalty may be imposed than the one that was applicable at the time when the criminal offence was committed.

2. Under no circumstances may a person convicted of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it may not be carried out.

XI. DETENTION

1. A person deprived of his/her liberty for terrorist activities must in all circumstances be treated with due respect for human dignity.

2. The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to:

(i) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client;

(ii) placing persons deprived of their liberty for terrorist activities in specially secured quarters;

(iii) the separation of such persons within a prison or among different prisons,

on condition that the measure taken is proportionate to the aim to be achieved.

XII. ASYLUM, RETURN ("REFOULEMENT") AND EXPULSION

1. All requests for asylum must be dealt with on an individual basis. An effective remedy must lie against the decision taken. However, when the State has serious grounds to believe that the person who seeks to be granted asylum has participated in terrorist activities, refugee status must be refused to that person.

2. It is the duty of a State that has received a request for asylum to ensure that the possible return ("*refoulement*") of the applicant to his/her

country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion.

3. Collective expulsion of aliens is prohibited.

4. In all cases, the enforcement of the expulsion or return ("*refoulement*") order must be carried out with respect for the physical integrity and for the dignity of the person concerned, avoiding any inhuman or degrading treatment.

XIII. EXTRADITION

1. Extradition is an essential procedure for effective international co-operation in the fight against terrorism.

2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:

(i) the person whose extradition has been requested will not be sentenced to death; or

(ii) in the event of such a sentence being imposed, it will not be carried out.

3. Extradition may not be granted when there is serious reason to believe that:

(i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment;

(ii) the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person's position risks being prejudiced for any of these reasons.

4. When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.

XIV. RIGHT TO PROPERTY

The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court.

XV. POSSIBLE DEROGATIONS

1. When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.

2. States may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law.

3. The circumstances which led to the adoption of such derogations need to be reassessed on a regular basis with the purpose of lifting these derogations as soon as these circumstances no longer exist.

XVI. RESPECT FOR PEREMPTORY NORMS OF INTERNATIONAL LAW AND FOR INTERNATIONAL HUMANITARIAN LAW

In their fight against terrorism, States may never act in breach of peremptory norms of international law nor in breach of international humanitarian law, where applicable.

XVII. COMPENSATION FOR VICTIMS OF TERRORIST ACTS

When compensation is not fully available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State must contribute to the compensation of the victims of attacks that took place on its territory, as far as their person or their health is concerned.

TEXTS OF REFERENCE USED FOR THE PREPARATION OF THE GUIDELINES ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM

PRELIMINARY NOTE

This document was prepared by the Secretariat, in co-operation with the Chairman of the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER). It is not meant to be taken as an explanatory report or memorandum of the guidelines.

AIM OF THE GUIDELINES

1. The guidelines concentrate mainly on the limits to be considered and that States should not go beyond, under any circumstances, in their legitimate fight against terrorism.[1] [2] The main objective of these guidelines is not to deal with other important questions such as the causes and consequences of terrorism or measures which might

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1 The Group of Specialists on Democratic Strategies for dealing with Movements threatening Human Rights (DH-S-DEM) has not failed to confirm the well-foundedness of this approach : "*On the one hand, it is necessary for a democratic society to take certain measures of a preventative or repressive nature to protect itself against threats to the very values and principles on which that society is based. On the other hand, public authorities (the legislature, the courts, the administrative authorities) are under a legal obligation, also when taking measures in this area, to respect the human rights and fundamental freedoms set out in the European Convention on Human Rights and other instruments to which the member States are bound*". See document DH-S-DEM (99) 4 Addendum, para. 16.

2 The European Court of Human Rights has also supported this approach: "*The Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate*", *Klass and Others v. Germany*, 6 September 1978, Series A n° 28, para. 49.

prevent it, which are nevertheless mentioned in the Preamble to provide a background[3].

LEGAL BASIS

2. The specific situation of States parties to the European Convention on Human Rights ("the Convention") should be recalled: its Article 46 sets out the compulsory jurisdiction of the European Court of Human Rights ("the Court") and the supervision of the execution of its judgments by the Committee of Ministers). The Convention and the case-law of the Court are thus a primary source for defining guidelines for the fight against terrorism. Other sources such as the UN Covenant on Civil and Political Rights and the observations of the UN Human Rights Committee should however also be mentioned.

GENERAL CONSIDERATIONS

3. The Court underlined on several occasions the balance between, on one hand, the defence of the institutions and of democracy, for the common interest, and, on the other hand, the protection of individual rights: "The Court agrees with the Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention".[4]

4. The Court also takes into account the specificities linked to an effective fight against terrorism: "The Court is prepared to take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism".[5]

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3 See below paras. 8-12.

4 *Klass and Others v. Germany*, 6 September 1978, A n° 28, para. 59. See also *Brogan and Others v. United Kingdom*, 29 November 1999, A n° 145-B, para. 48.

5 *Incal v. Turkey*, 9 June 1998, para. 58. See also the cases *Ireland v. United Kingdom*, 18 January 1978, A n° 25, paras. 11 and following, *Aksoy v. Turkey*, 18 December

5. *Definition* – Neither the Convention nor the case-law of the Court give a definition of terrorism. The Court always preferred to adopt a case by case approach. For its part, the Parliamentary Assembly "considers an act of terrorism to be 'any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public' ".[6]

6. Article 1 of the European Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism gives a very precise definition of "terrorist act" that states:
"3. For the purposes of this Common Position, "terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aims of:
i. seriously intimidating a population, or
ii. unduly compelling a government or an international organisation to perform or abstain from performing any act, or
iii. seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
a. attacks upon a person's life which may cause death;
b. attacks upon the physical integrity of a person;

1996, paras. 70 and 84; *Zana v. Turkey*, 25 November 1997, paras. 59-60; and, *United Communist Party of Turkey and Others v. Turkey*, 30 November 1998, para. 59.

6 Recommendation 1426 (1999), *European democracies facing up to terrorism* (23 September 1999), para. 5.

c. kidnapping or hostage-taking;
d. causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
e. seizure of aircraft, ships or other means of public or goods transport;
f. manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
g. release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
h. interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
i. threatening to commit any of the acts listed under (a) to (h);
j. directing a terrorist group;
k. participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, which knowledge of the fact that such participation will contribute to the criminal activities of the group.

For the purposes of this paragraph, "terrorist group" shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. "Structured group" means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."

7. The work in process within the United Nations on the draft general convention on international terrorism also seeks to define terrorism or a terrorist act.

PREAMBLE

THE COMMITTEE OF MINISTERS,

[A.] CONSIDERING THAT TERRORISM SERIOUSLY JEOPARDISES HUMAN RIGHTS, THREATENS DEMOCRACY, AND AIMS NOTABLY TO DESTABILISE LEGITIMATELY CONSTITUTED GOVERNMENTS AND TO UNDERMINE PLURALISTIC CIVIL SOCIETY;

8. The General Assembly of the United Nations recognises that terrorist acts are "activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and having adverse consequences for the economic and social development of States".[7]

[B.] UNEQUIVOCALLY CONDEMNING ALL ACTS, METHODS AND PRACTICES OF TERRORISM AS CRIMINAL AND UNJUSTIFIABLE, WHEREVER AND BY WHOMEVER COMMITTED;

[C.] RECALLING THAT A TERRORIST ACT CAN NEVER BE EXCUSED OR JUSTIFIED BY CITING MOTIVES SUCH AS HUMAN RIGHTS AND THAT THE ABUSE OF RIGHTS IS NEVER PROTECTED;

[D.] RECALLING THAT IT IS NOT ONLY POSSIBLE, BUT ALSO ABSOLUTELY NECESSARY, TO FIGHT TERRORISM WHILE RESPECTING HUMAN RIGHTS, THE RULE OF LAW AND, WHERE APPLICABLE, INTERNATIONAL HUMANITARIAN LAW;

[E.] RECALLING THE NEED FOR STATES TO DO EVERYTHING POSSIBLE, AND NOTABLY TO CO-OPERATE, SO THAT THE SUSPECTED PERPETRATORS, ORGANISERS AND SPONSORS OF TERRORIST ACTS ARE BROUGHT TO JUSTICE

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7 Resolution 54/164, *Human Rights and terrorism*, adopted by the General Assembly, 17 December 1999.

TO ANSWER FOR ALL THE CONSEQUENCES, IN PARTICULAR CRIMINAL AND CIVIL, OF THEIR ACTS;

9. The obligation to bring to justice suspected perpetrators, organisers and sponsors of terrorist acts is clearly indicated in different texts such as Resolution 1368 (2001) adopted by the Security Council at its 4370th meeting, on 12 September 2001 (extracts): "The Security Council, (...) Reaffirming, the principles and purposes of the Charter of the United Nations, (...) 3. Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks (...)". Resolution 56/1, *Condemnation of terrorist attacks in the United States of America*, adopted by the General Assembly, on 12 September 2001 (extracts): "The General Assembly, Guided by the purposes and principles of the Charter of the United Nations, (...) 3. Urgently calls for international cooperation to bring to justice the perpetrators, organizers and sponsors of the outrages of 11 September".

[F.] REAFFIRMING THE IMPERATIVE DUTY OF STATES TO PROTECT THEIR POPULATIONS AGAINST POSSIBLE TERRORIST ACTS;

10. Committee of Ministers has stressed "the duty of any democratic State to ensure effective protection against terrorism, respecting the rule of law and human rights (...)".[8]

[G.] RECALLING THE NECESSITY FOR STATES, NOTABLY FOR REASONS OF EQUITY AND SOCIAL SOLIDARITY, TO ENSURE THAT VICTIMS OF TERRORIST ACTS CAN OBTAIN COMPENSATION;

[H.] KEEPING IN MIND THAT THE FIGHT AGAINST TERRORISM IMPLIES LONG-TERM MEASURES WITH A VIEW TO PREVENTING THE CAUSES OF TERRORISM, BY PROMOTING, IN PARTICULAR, COHESION IN OUR SOCIETIES AND A MULTICULTURAL AND INTER-RELIGIOUS DIALOGUE;

11. It is essential to fight against the causes of terrorism in order to prevent new terrorist acts. In this regard, one

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[8] Interim resolution DH (99) 434, *Human Rights action of the security forces in Turkey: Measures of a general character.*

may recall Resolution 1258 (2001) of the Parliamentary Assembly, *Democracies facing terrorism* (26 September 2001), in which the Assembly calls upon States to "renew and generously resource their commitment to pursue economic, social and political policies designed to secure democracy, justice, human rights and well-being for all people throughout the world" (17 (viii)).

12. In order to fight against the causes of terrorism, it is also essential to promote multicultural and inter-religious dialogue. The Parliamentary Assembly has devoted a number of important documents to this issue, among which its Recommendations 1162 (1991) *Contribution of the Islamic civilisation to European culture,*[9] 1202 (1993) *Religious tolerance in a democratic society,*[10] 1396 (1999) *Religion and democracy,*[11] 1426 (1999) *European democracies facing up terrorism,*[12] as well as

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[9] Adopted on 19 September 1991 (11th sitting). The Assembly, inter alia, proposed preventive measures in the field of education (such as the creation of an Euro-Arab University following Recommendation 1032 (1986)), the media (production and broadcasting of programmes on Islamic culture), culture (such as cultural exchanges, exhibitions, conferences etc.) and multilateral co-operation (seminars on Islamic fundamentalism, the democratisation of the Islamic world, the compatibility of different forms of Islam with modern European society etc.) as well as administrative questions and everyday life (such as the twinning of towns or the encouragement of dialogue between Islamic communities and the competent authorities on issues like holy days, dress, food etc.). See in particular paras. 10-12.

[10] Adopted on 2 February 1993 (23rd sitting). The Assembly, inter alia, proposed preventive measures in the field of legal guarantees and their observance (especially following the rights indicated in Recommendation 1086 (1988), paragraph 10), education and exchanges (such as the establishment of a "religious history school-book conference", exchange programmes for students and other young people), information and "sensibilisation" (like the access to fundamental religious texts and related literature in public libraries) and research (for instance, stimulation of academic work in European universities on questions concerning religious tolerance). See in particular paras. 12, 15-16.

[11] Adopted on 27 January 1999 (5th sitting). The Assembly, inter alia, recommended preventive measures to promote better relations with and between religions (through a more systematic dialogue with religious and humanist leaders, theologians, philosophers and historians) or the cultural and social expression of religions (including religious buildings or traditions). See in particular paras. 9-14.

[12] Adopted on 23 September 1999 (30th sitting). The Assembly underlined inter alia that "The prevention of terrorism also depends on education in democratic values and tolerance, with the eradication of the teaching of negative or hateful attitudes towards others and the development of a culture of peace in all individuals and social groups (para. 9).

its Resolution 1258 (2001), *Democracies facing terrorism.*[13] The Secretary General of the Council of Europe has also highlighted the importance of multicultural and inter-religious dialogue in the long-term fight against terrorism.[14]

[i.] REAFFIRMING STATES' OBLIGATION TO RESPECT, IN THEIR FIGHT AGAINST TERRORISM, THE INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS AND, FOR THE MEMBER STATES IN PARTICULAR, THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS;

ADOPTS THE FOLLOWING GUIDELINES AND INVITES MEMBER STATES TO ENSURE THAT THEY ARE WIDELY DISSEMINATED AMONG ALL AUTHORITIES RESPONSIBLE FOR THE FIGHT AGAINST TERRORISM.

I. STATES' OBLIGATION TO PROTECT EVERYONE AGAINST TERRORISM

STATES ARE UNDER THE OBLIGATION TO TAKE THE MEASURES NEEDED TO PROTECT THE FUNDAMENTAL RIGHTS OF EVERYONE WITHIN THEIR JURISDICTION AGAINST TERRORIST ACTS, ESPECIALLY THE RIGHT TO LIFE. THIS POSITIVE OBLIGATION FULLY JUSTIFIES STATES' FIGHT AGAINST TERRORISM IN ACCORDANCE WITH THE PRESENT GUIDELINES.

13. The Court indicated that:

"the first sentence of Article 2 para. 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B. v. the United Kingdom* judgment of 9 June 1998,

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[13] Adopted on 26 September 2001 (28th sitting). "(...) the Assembly believes that long-term prevention of terrorism must include a proper understanding of its social, economic, political and religious roots and of the individual's capacity for hatred. If these issues are properly addressed, it will be possible to seriously undermine the grass roots support for terrorists and their recruitment networks" (para. 9).

[14] See "The aftermath of September 11: Multicultural and Inter-religious Dialogue – Document of the Secretary General", Information Documents SG/Inf (2001) 40 Rev.2, 6 December 2001.

Reports of Judgments and Decisions 1998-III, p. 1403, para. 36). This obligation (...) may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual *(Osman v. the United Kingdom judgment of 28 October 1998,* Reports *1998-VIII, para. 115; Kiliç v. Turkey, no. 22492/93, (Sect. 1) ECHR 2000-III, paras. 62 and 76).*"[15]

II. PROHIBITION OF ARBITRARINESS

ALL MEASURES TAKEN BY STATES TO FIGHT TERRORISM MUST RESPECT HUMAN RIGHTS AND THE PRINCIPLE OF THE RULE OF LAW, WHILE EXCLUDING ANY FORM OF ARBITRARINESS, AS WELL AS ANY DISCRIMINATORY OR RACIST TREATMENT, AND MUST BE SUBJECT TO APPROPRIATE SUPERVISION.

14. The words "discriminatory treatment" are taken from the Political Declaration adopted by Ministers of Council of Europe member States on 13 October 2000 at the concluding session of the European Conference against Racism.

III. LAWFULNESS OF ANTI-TERRORIST MEASURES

1. ALL MEASURES TAKEN BY STATES TO COMBAT TERRORISM MUST BE LAWFUL.

2. WHEN A MEASURE RESTRICTS HUMAN RIGHTS, RESTRICTIONS MUST BE DEFINED AS PRECISELY AS POSSIBLE AND BE NECESSARY AND PROPORTIONATE TO THE AIM PURSUED.

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15 *Pretty v. United Kingdom*, 29 April 2002, para. 38.

IV. ABSOLUTE PROHIBITION OF TORTURE

THE USE OF TORTURE OR OF INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, IS ABSOLUTELY PROHIBITED, IN ALL CIRCUMSTANCES, AND IN PARTICULAR DURING THE ARREST, QUESTIONING AND DETENTION OF A PERSON SUSPECTED OF OR CONVICTED OF TERRORIST ACTIVITIES, IRRESPECTIVE OF THE NATURE OF THE ACTS THAT THE PERSON IS SUSPECTED OF OR FOR WHICH HE/SHE WAS CONVICTED.

15. The Court has recalled the absolute prohibition to use torture or inhuman or degrading treatment or punishment (Article 3 of the Convention) on many occasions, for example:

"As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 para. 2 even in the event of a public emergency threatening the life of the nation (...). The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see the *Chahal v. the United Kingdom* judgment of 15 November 1996, Reports 1996-V, p. 1855, para. 79). The nature of the offence allegedly committed by the applicant was therefore irrelevant for the purposes of Article 3."[16]

"The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits

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16 *Labita v. Italy*, 6 April 2000, para. 119. See also *Ireland v. United Kingdom*, 18 January 1978, A n° 25, para. 163; *Soering v. United Kingdom*, 7 July 1989, A n° 161, para. 88; *Chahal v. United Kingdom*, 15 November 1996, para. 79; *Aksoy v. Turkey*, 18 December 1996, para. 62; *Aydin v. Turkey*, 25 September 1997, para. 81; *Assenov and Others v. Bulgaria*, 28 October 1998, para. 93; *Selmouni v. France*, 28 July 1999, para. 95.

being placed on the protection to be afforded in respect of the physical integrity of individuals."[17]

16. According to the case law of the Court, it is clear that the nature of the crime is not relevant: "The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[18]

V. COLLECTION AND PROCESSING OF PERSONAL DATA BY ANY COMPETENT AUTHORITY IN THE FIELD OF STATE SECURITY

WITHIN THE CONTEXT OF THE FIGHT AGAINST TERRORISM, THE COLLECTION AND THE PROCESSING OF PERSONAL DATA BY ANY COMPETENT AUTHORITY IN THE FIELD OF STATE SECURITY MAY INTERFERE WITH THE RESPECT FOR PRIVATE LIFE ONLY IF SUCH COLLECTION AND PROCESSING, IN PARTICULAR:

(i) ARE GOVERNED BY APPROPRIATE PROVISIONS OF DOMESTIC LAW;

(ii) ARE PROPORTIONATE TO THE AIM FOR WHICH THE COLLECTION AND THE PROCESSING WERE FORESEEN;

(iii) MAY BE SUBJECT TO SUPERVISION BY AN EXTERNAL INDEPENDENT AUTHORITY.

17. As concerns the collection and processing of personal data, the Court stated for the first time that:
"No provision of domestic law, however, lays down any limits on the exercise of those powers. Thus, for instance, domestic law does not define the kind of information that may be recorded, the categories of people against whom surveillance measures such as gathering and keeping information may be taken, the circum-

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17 *Tomasi v. France*, 27 August 1992, para. 115. See also *Ribitsch v. Austria*, 4 December 1995, para. 38.

18 *Chahal v. United Kingdom*, 15 November 1996, para. 79. See also *V. v. United Kingdom*, 16 December 1999, para. 69.

stances in which such measures may be taken or the procedure to be followed. Similarly, the Law does not lay down limits on the age of information held or the length of time for which it may be kept.
(...)
The Court notes that this section contains no explicit, detailed provision concerning the persons authorised to consult the files, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained.
(...) It also notes that although section 2 of the Law empowers the relevant authorities to permit interferences necessary to prevent and counteract threats to national security, the ground allowing such interferences is not laid down with sufficient precision".[19]

VI. MEASURES WHICH INTERFERE WITH PRIVACY

1. MEASURES USED IN THE FIGHT AGAINST TERRORISM THAT INTERFERE WITH PRIVACY (IN PARTICULAR BODY SEARCHES, HOUSE SEARCHES, BUGGING, TELEPHONE TAPPING, SURVEILLANCE OF CORRESPONDENCE AND USE OF UNDERCOVER AGENTS) MUST BE PROVIDED FOR BY LAW. IT MUST BE POSSIBLE TO CHALLENGE THE LAWFULNESS OF THESE MEASURES BEFORE A COURT.

18. The Court accepts that the fight against terrorism may allow the use of specific methods:
"Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a

19 *Rotaru v. Romania*, 4 May 2000, paras. 57-58.

democratic society in the interests of national security and/or for the prevention of disorder or crime."[20]

19. With regard to tapping, it must to be done in conformity with the provisions of Article 8 of the Convention, notably be done in accordance with the "law". The Court, thus, recalled that: "tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated (see the above-mentioned *Kruslin* and *Huvig* judgments, p. 23, para. 33, and p. 55, para. 32, respectively)". [21]

20. The Court also accepted that the use of confidential information is essential in combating terrorist violence and the threat that it poses on citizens and to democratic society as a whole:
"The Court would firstly reiterate its recognition that the use of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives of citizens and to democratic society as a whole (see also the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 23, para. 48). This does not mean, however, that the investigating authorities have carte blanche under Article 5 (art. 5) to arrest suspects for questioning, free from effective control by the domestic courts or by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (ibid., p. 23, para. 49)."[22]

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20 *Klass and Others v. Germany*, 6 September 1978, A n° 28, para. 48.

21 *Kopp v. Switzerland*, 25 March 1998, para. 72. See also *Huvig v. France*, 24 April 1990, paras. 34-35.

22 *Murray v. United Kingdom*, 28 October 1994, para. 58.

2. MEASURES TAKEN TO FIGHT TERRORISM MUST BE PLANNED AND CONTROLLED BY THE AUTHORITIES SO AS TO MINIMISE, TO THE GREATEST EXTENT POSSIBLE, RECOURSE TO LETHAL FORCE AND, WITHIN THIS FRAMEWORK, THE USE OF ARMS BY THE SECURITY FORCES MUST BE STRICTLY PROPORTIONATE TO THE AIM OF PROTECTING PERSONS AGAINST UNLAWFUL VIOLENCE OR TO THE NECESSITY OF CARRYING OUT A LAWFUL ARREST.

21. Article 2 of the Convention does not exclude the possibility that the deliberate use of a lethal solution can be justified when it is "absolutely necessary" to prevent some sorts of crimes. This must be done, however, in very strict conditions so as to respect human life as much as possible, even with regard to persons suspected of preparing a terrorist attack.

"Against this background, in determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force."[23]

VII. ARREST AND POLICE CUSTODY

1. A PERSON SUSPECTED OF TERRORIST ACTIVITIES MAY ONLY BE ARRESTED IF THERE ARE REASONABLE SUSPICIONS. HE/SHE MUST BE INFORMED OF THE REASONS FOR THE ARREST.

22. The Court acknowledges that "reasonable" suspicion needs to form the basis of the arrest of a suspect. It adds that this feature depends upon all the circumstances, with terrorist crime falling into a specific category:

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23 *McCann and Others v. United Kingdom*, 27 September 1995, para. 194. In this case, the Court, not convinced that the killing of three terrorists was a use of force not exceeding the aim of protecting persons against unlawful violence, considered that there had been a violation of article 2.

"32. The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 para. 1 (c) (art. 5-1-c). (...) [H]aving a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances. In this respect, terrorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge.

(...) [T]he exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 para. 1 (c) (art. 5-1-c) is impaired (...).

(...)

34. Certainly Article 5 para. 1 (c) (art. 5-1-c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism (...). It follows that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity.

Nevertheless the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 para. 1 (c) (art. 5-1-c) has been secured. Consequently the respondent Government have to furnish at least some

facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence."[24]

2. A PERSON ARRESTED OR DETAINED FOR TERRORIST ACTIVITIES SHALL BE BROUGHT PROMPTLY BEFORE A JUDGE. POLICE CUSTODY SHALL BE OF A REASONABLE PERIOD OF TIME, THE LENGTH OF WHICH MUST BE PROVIDED FOR BY LAW.

3. A PERSON ARRESTED OR DETAINED FOR TERRORIST ACTIVITIES MUST BE ABLE TO CHALLENGE THE LAWFULNESS OF HIS/HER ARREST AND OF HIS/HER POLICE CUSTODY BEFORE A COURT.

23. The protection afforded by Article 5 of the Convention is also relevant here. There are limits linked to the arrest and detention of persons suspected of terrorist activities. The Court accepts that protecting the community against terrorism is a legitimate goal but that this cannot justify all measures. For instance, the fight against terrorism can justify the extension of police custody, but it cannot authorise that there is no judicial control at all over this custody, or, that judicial control is not prompt enough:
"The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3 (art. 5-3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.
The difficulties, alluded to by the Government, of judicial control over decisions to arrest and detain suspected terrorists may affect the manner of implementation of Article 5 para. 3 (art. 5-3), for example in calling for appropriate procedural precautions in view of the nature of the suspected offences. However, they cannot justify, under Article 5 para. 3 (art. 5-3), dispensing altogether with "prompt" judicial control."[25]

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24 *Fox, Campbell and Hartley v. United Kingdom*, 30 August 1990, paras. 32 and 34.

25 *Brogan and Others v. United Kingdom*, 29 November 1998, A n° 145-B, para. 61.

"The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3 (art. 5-3)."[26]

"The Court recalls its decision in the case of *Brogan and Others v. the United Kingdom* (judgment of 29 November 1988, Series A no. 145-B, p. 33, para. 62), that a period of detention without judicial control of four days and six hours fell outside the strict constraints as to time permitted by Article 5 para. 3 (art. 5-3). It clearly follows that the period of fourteen or more days during which Mr Aksoy was detained without being brought before a judge or other judicial officer did not satisfy the requirement of 'promptness'."[27]

"The Court has already accepted on several occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see the *Brogan and Others v. the United Kingdom* judgment of 29 November 1988, Series A no. 145-B, p. 33, para. 61, the *Murray v. the United Kingdom* judgment of 28 October 1994, Series A no. 300-A, p. 27, para. 58, and the above-mentioned *Aksoy* judgment, p. 2282, para. 78). This does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (see, *mutatis mutandis*, the above-mentioned *Murray* judgment, p. 27, para. 58).

What is at stake here is the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. Judicial control of interferences by the executive is an

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26 *Brogan and Others v. United Kingdom*, 29 November 1998, A n° 145-B, para. 62. See also *Brannigan and Mc Bride v. United Kingdom*, 26 May 1993, para. 58.

27 *Aksoy v. Turkey*, 12 December 1996, para. 66.

essential feature of the guarantee embodied in Article 5 para. 3, which is intended to minimise the risk of arbitrariness and to secure the rule of law, "one of the fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention" (see the above-mentioned *Brogan and Others* judgment, p. 32, para. 58, and the above-mentioned *Aksoy* judgment, p. 2282, para. 76)."[28]

VIII. REGULAR SUPERVISION OF PRE-TRIAL DETENTION

A PERSON SUSPECTED OF TERRORIST ACTIVITIES AND DETAINED PENDING TRIAL IS ENTITLED TO REGULAR SUPERVISION OF THE LAWFULNESS OF HIS OR HER DETENTION BY A COURT.

IX. LEGAL PROCEEDINGS

1. A PERSON ACCUSED OF TERRORIST ACTIVITIES HAS THE RIGHT TO A FAIR HEARING, WITHIN A REASONABLE TIME, BY AN INDEPENDENT, IMPARTIAL TRIBUNAL ESTABLISHED BY LAW.

24. The right to a fair trial is acknowledged, for everyone, by Article 6 of the Convention. The case-law of the Court states that the right to a fair trial is inherent to any democratic society.

25. Article 6 does not forbid the creation of special tribunals to judge terrorist acts if these special tribunals meet the criterions set out in this article (independent and impartial tribunals established by law):
"The Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 para. 1, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an

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28 *Sakik and Others v. Turkey*, 26 November 1997, para. 44.

appearance of independence (see, among many other authorities, the *Findlay v. the United Kingdom* judgment of 25 February 1997, Reports 1997-I, p. 281, para. 73).
As to the condition of "impartiality" within the meaning of that provision, there are two tests to be applied: the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. (...) (see, *mutatis mutandis*, the *Gautrin and Others v. France* judgment of 20 May 1998, Reports 1998-III, pp. 1030–31, para. 58)."[29]

"Its (the Court's) task is not to determine in abstracto whether it was necessary to set up such courts (special courts) in a Contracting State or to review the relevant practice, but to ascertain whether the manner in which one of them functioned infringed the applicant's right to a fair trial. (...) In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (see, among other authorities, the *Hauschildt v. Denmark* judgment of 24 May 1989, Series A no. 154, p. 21, para. 48, the *Thorgeir Thorgeirson* judgment cited above, p. 23, para. 51, and the *Pullar v. the United Kingdom* judgment of 10 June 1996, Reports 1996-III, p. 794, para. 38). In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see, *mutatis mutandis*, the *Hauschildt* judgment cited above, p. 21, para. 48, and the *Gautrin and Others* judgment cited above, pp. 1030–31, para. 58).

(...) [T]he Court attaches great importance to the fact that a civilian had to appear before a court composed,

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29 *Incal v. Turkey*, 9 June 1998, para. 65.

even if only in part, of members of the armed forces. It follows that the applicant could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case."[30]

2. A PERSON ACCUSED OF TERRORIST ACTIVITIES BENEFITS FROM THE PRESUMPTION OF INNOCENCE.

26. Presumption of innocence is specifically mentioned in Article 6, paragraph 2, of the European Convention on Human Rights that states: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". This article therefore applies also to persons suspected of terrorist activities.

27. Moreover, "the Court considers that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities".[31] Accordingly, the Court found that the public declaration made by a Minister of the Interior and by two high-ranking police officers referring to somebody as the accomplice in a murder before his judgment "was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. There has therefore been a breach of Article 6 para. 2".[32]

3. THE IMPERATIVES OF THE FIGHT AGAINST TERRORISM MAY NEVERTHELESS JUSTIFY CERTAIN RESTRICTIONS TO THE RIGHT OF DEFENCE, IN PARTICULAR WITH REGARD TO:

(i) THE ARRANGEMENTS FOR ACCESS TO AND CONTACTS WITH COUNSEL;

(ii) THE ARRANGEMENTS FOR ACCESS TO THE CASE-FILE;

(iii) THE USE OF ANONYMOUS TESTIMONY.

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30 *Incal v. Turkey*, 9 June 1998, paras. 70-72.

31 *Allenet de Ribemont v. France*, 10 February 1995, para. 36.

32 *Id.*, para. 41.

4. SUCH RESTRICTIONS TO THE RIGHT OF DEFENCE MUST BE STRICTLY PROPORTIONATE TO THEIR PURPOSE, AND COMPENSATORY MEASURES TO PROTECT THE INTERESTS OF THE ACCUSED MUST BE TAKEN SO AS TO MAINTAIN THE FAIRNESS OF THE PROCEEDINGS AND TO ENSURE THAT PROCEDURAL RIGHTS ARE NOT DRAINED OF THEIR SUBSTANCE.

28. The Court recognises that an effective fight against terrorism requires that some of the guarantees of a fair trial may be interpreted with some flexibility. Confronted with the need to examine the conformity with the Convention of certain types of investigations and trials, the Court has, for example, recognised that the use of anonymous witnesses is not always incompatible with the Convention[33]. In certain cases, like those which are linked to terrorism, witnesses must be protected against any possible risk of retaliation against them which may put their lives, their freedom or their safety in danger.
"The Court has recognised in principle that, provided that the rights of the defence are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities, for his own or his family's protection and so as not to impair his usefulness for future operations." [34]

29. The Court recognised that the interception of a letter between a prisoner – terrorist – and his lawyer is possible in certain circumstances:
"Il n'en demeure pas moins que la confidentialité de la correspondance entre un détenu et son défenseur constitue un droit fondamental pour un individu et touche directement les droits de la défense. C'est pourquoi, comme la Cour l'a énoncé plus haut, une dérogation à ce principe ne peut être autorisée que dans des cas exceptionnels et doit s'entourer de garanties

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33 See *Doorson v. The Netherlands*, 26 March 1996, paras. 69-70. The Doorson case concerned the fight against drug trafficking. The concluding comments of the Court can nevertheless be extended to the fight against terrorism. See also *Van Mechelen and others v. The Netherlands*, 23 April 1997, para. 52.

34 *Van Mechelen and others v. The Netherlands*, 23 April 1997, para. 57.

adéquates et suffisantes contre les abus (voir aussi, *mutatis mutandis*, l'arrêt *Klass* précité, ibidem)."[35]

30. The case-law of the Court insists upon the compensatory mechanisms to avoid that measures taken in the fight against terrorism do not take away the substance of the right to a fair trial[36]. Therefore, if the possibility of non-disclosure of certain evidence to the defence exists, this needs to be counterbalanced by the procedures followed by the judicial authorities:

"60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the *Brandstetter v. Austria* judgment of 28 August 1991, Series A no. 211, paras. 66, 67). In addition Article 6 para. 1 requires, as indeed does English law (see paragraph 34 above), that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see the above-mentioned *Edwards* judgment, para. 36).

61. However, as the applicants recognised (see paragraph 54 above), the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the *Doorson v. the Netherlands* judgment of 26 March 1996, Reports of Judgments and Decisions 1996-II, para. 70). In some cases it

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35 *Erdem v. Germany*, 5 July 2001, para. 65, text only available in French.

36 See notably *Chahal v. United Kingdom*, 15 November 1996, paras. 131 and 144, and *Van Mechelen and others v. The Netherlands*, 23 April 1997, para. 54.

may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 para. 1 (see the *Van Mechelen and Others v. the Netherlands* judgment of 23 April 1997, Reports 1997-III, para. 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see the above-mentioned *Doorson* judgment, para. 72 and the above-mentioned *Van Mechelen and Others* judgment, para. 54).

62. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them (see the above-mentioned *Edwards* judgment, para. 34). Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused."[37]

X. PENALTIES INCURRED

1. THE PENALTIES INCURRED BY A PERSON ACCUSED OF TERRORIST ACTIVITIES MUST BE PROVIDED FOR BY LAW FOR ANY ACTION OR OMISSION WHICH CONSTITUTED A CRIMINAL OFFENCE AT THE TIME WHEN IT WAS COMMITTED; NO HEAVIER PENALTY MAY BE IMPOSED THAN THE ONE THAT WAS APPLICABLE AT THE TIME WHEN THE CRIMINAL OFFENCE WAS COMMITTED.

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37 *Rowe and Davies v. United Kingdom*, 16 February 2000, paras. 60-62.

31. This guideline takes up the elements contained in Article 7 of the European Convention on Human Rights. The Court recalled that:

"The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see the *S.W. and C.R. v. the United Kingdom* judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41-42, para. 35, and pp. 68-69, para. 33 respectively)."[38]

"The Court recalls that, according to its case-law, Article 7 embodies, *inter alia,* the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence and the sanctions provided for it must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see the *Cantoni v. France* judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1627, para. 29, and the *S.W. and C.R. v. the United Kingdom* judgments of 22 November 1995,

38 *Ecer and Zeyrek v. Turkey*, 27 February 2001, para. 29.

Series A nos. 335-B and 335-C, pp. 41-42, para. 35, and pp. 68-69, para. 33, respectively)."[39]

2. UNDER NO CIRCUMSTANCES MAY A PERSON CONVICTED OF TERRORIST ACTIVITIES BE SENTENCED TO THE DEATH PENALTY; IN THE EVENT OF SUCH A SENTENCE BEING IMPOSED, IT MAY NOT BE CARRIED OUT.

32. The present tendency in Europe is towards the general abolition of the death penalty, in all circumstances (Protocol No. 13 to the Convention). The Member States of the Council of Europe still having the death penalty within their legal arsenal have all agreed to a moratorium on the implementation of the penalty.

XI. DETENTION

1. A PERSON DEPRIVED OF HIS/HER LIBERTY FOR TERRORIST ACTIVITIES MUST IN ALL CIRCUMSTANCES BE TREATED WITH DUE RESPECT FOR HUMAN DIGNITY.

33. According to the case law of the Court, it is clear that the nature of the crime is not relevant: "The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[40]

34. It is recalled that the practice of total sensory deprivation was condemned by the Court as being in violation with Article 3 of the Convention.[41]

2. THE IMPERATIVES OF THE FIGHT AGAINST TERRORISM MAY NEVERTHELESS REQUIRE THAT A PERSON DEPRIVED OF HIS/HER LIBERTY FOR TERRORIST ACTIVITIES BE SUBMITTED TO MORE SEVERE RESTRICTIONS

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39 *Baskaya and Okçuoglu v. Turkey*, 8 July 1999, para. 36.

40 *Chahal v. United Kingdom*, 15 November 1996, para. 79. See also *V. v. United Kingdom*, 16 December 1999, para. 69.

41 See *Ireland v. United Kingdom*, 18 January 1978, notably paras. 165-168.

THAN THOSE APPLIED TO OTHER PRISONERS, IN PARTICULAR WITH REGARD TO:

(i) THE REGULATIONS CONCERNING COMMUNICATIONS AND SURVEILLANCE OF CORRESPONDENCE, INCLUDING THAT BETWEEN COUNSEL AND HIS/HER CLIENT;

35. With regard to communication between a lawyer and his/her client, the case-law of the Court may be referred to, in particular a recent decision on inadmissibility in which the Court recalls the possibility for the State, in exceptional circumstances, to intercept correspondence between a lawyer and his/her client sentenced for terrorist acts. It is therefore possible to take measures which depart from ordinary law:

« 65. Il n'en demeure pas moins que la confidentialité de la correspondance entre un détenu et son défenseur constitue un droit fondamental pour un individu et touche directement les droits de la défense. C'est pourquoi, comme la Cour l'a énoncé plus haut, une dérogation à ce principe ne peut être autorisée que dans des cas exceptionnels et doit s'entourer de garanties adéquates et suffisantes contre les abus (voir aussi, *mutatis mutandis,* l'arrêt *Klass* précité, ibidem).

66. Or le procès contre des cadres du PKK se situe dans le contexte exceptionnel de la lutte contre le terrorisme sous toutes ses formes. Par ailleurs, il paraissait légitime pour les autorités allemandes de veiller à ce que le procès se déroule dans les meilleures conditions de sécurité, compte tenu de l'importante communauté turque, dont beaucoup de membres sont d'origine kurde, résidant en Allemagne.

67. La Cour relève ensuite que la disposition en question est rédigée de manière très précise, puisqu'elle spécifie la catégorie de personnes dont la correspondance doit être soumise à contrôle, à savoir les détenus soupçonnés d'appartenir à une organisation terroriste au sens de l'article 129a du code pénal. De plus, cette mesure, à caractère exceptionnel puisqu'elle déroge à la règle générale de la confidentialité de la correspondance entre un détenu et son défenseur, est assortie d'un certain nombre

de garanties : contrairement à d'autres affaires devant la Cour, où l'ouverture du courrier était effectuée par les autorités pénitentiaires (voir notamment les arrêts *Campbell*, et *Fell et Campbell* précités), en l'espèce, le pouvoir de contrôle est exercé par un magistrat indépendant, qui ne doit avoir aucun lien avec l'instruction, et qui doit garder le secret sur les informations dont il prend ainsi connaissance. Enfin, il ne s'agit que d'un contrôle restreint, puisque le détenu peut librement s'entretenir oralement avec son défenseur; certes, ce dernier ne peut lui remettre des pièce écrites ou d'autres objets, mais il peut porter à la connaissance du détenu les informations contenues dans les documents écrits.

68. Par ailleurs, la Cour rappelle qu'une certaine forme de conciliation entre les impératifs de la défense de la société démocratique et ceux de la sauvegarde des droits individuels est inhérente au système de la Convention (voir, mutatis mutandis, l'arrêt *Klass* précité, p. 28, para. 59).

69. Eu égard à la menace présentée par le terrorisme sous toutes ses formes (voir la décision de la Commission dans l'affaire *Bader, Meins, Meinhof et Grundmann c. Allemagne* du 30 mai 1975, n° 6166/75), des garanties dont est entouré le contrôle de la correspondance en l'espèce et de la marge d'appréciation dont dispose l'Etat, la Cour conclut que l'ingérence litigieuse n'était pas disproportionnée par rapport aux buts légitimes poursuivis. »[42]

(ii) PLACING PERSONS DEPRIVED OF THEIR LIBERTY FOR TERRORIST ACTIVITIES IN SPECIALLY SECURED QUARTERS;

(iii) THE SEPARATION OF SUCH PERSONS WITHIN A PRISON OR AMONG DIFFERENT PRISONS,

36. With regard to the place of detention, the former European Commission of Human Rights indicated that:

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42 *Erdem v. Germany*, 5 July 2001, paras. 65-69. The text of this judgment is available in French only. See also *Lüdi v. Switzerland*, 15 June 1992.

"It must be recalled that the Convention does not grant prisoners the right to choose the place of detention and that the separation from their family are inevitable consequences of their detention".[43]

ON CONDITION THAT THE MEASURE TAKEN IS PROPORTIONATE TO THE AIM TO BE ACHIEVED.

"(...) the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society" regard may be had to the State's margin of appreciation (see, amongst other authorities, *The Sunday Times v. the United Kingdom* (no. 2) judgment of 26 November 1991, Series A no. 217, pp. 28-29, para. 50)."[44]

XII. ASYLUM, RETURN ("REFOULEMENT") AND EXPULSION

1. ALL REQUESTS FOR ASYLUM MUST BE DEALT WITH ON AN INDIVIDUAL BASIS. AN EFFECTIVE REMEDY MUST LIE AGAINST THE DECISION TAKEN. HOWEVER, WHEN THE STATE HAS SERIOUS GROUNDS TO BELIEVE THAT THE PERSON WHO SEEKS TO BE GRANTED ASYLUM HAS PARTICIPATED IN TERRORIST ACTIVITIES, REFUGEE STATUS MUST BE REFUSED TO THAT PERSON.

37. Article 14 of the Universal Declaration of Human Rights states: "1. Everyone has the right to seek and enjoy in other countries asylum from persecution".

38. Moreover, a concrete problem that States may have to confront is that of the competition between an asylum request and a demand for extradition. Article 7 of the draft General Convention on international terrorism must be noted in this respect: "States Parties shall take appropriate measures, in conformity with the relevant provi-

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43 *Venetucci v. Italy* (application n° 33830/96), Decision as to admissibility, 2 March 1998.

44 *Campbell v. United Kingdom*, 25 March 1992, A n° 233, para. 44.

sions of national and international law, including international human rights law, for the purpose of ensuring that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offense referred to in article 2".

39. It is also recalled that Article 1 F of the Convention on the Status of Refugees of 28 July 1951 provides: "F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations".

2. IT IS THE DUTY OF A STATE THAT HAS RECEIVED A REQUEST FOR ASYLUM TO ENSURE THAT THE POSSIBLE RETURN ("*REFOULEMENT*") OF THE APPLICANT TO HIS/HER COUNTRY OF ORIGIN OR TO ANOTHER COUNTRY WILL NOT EXPOSE HIM/HER TO THE DEATH PENALTY, TO TORTURE OR TO INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT. THE SAME APPLIES TO EXPULSION.

3. COLLECTIVE EXPULSION OF ALIENS IS PROHIBITED.

40. This guideline takes up word by word the content of Article 4 of Protocol No 4 to the European Convention on Human Rights.

41. The Court thus recalled that:
"collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of

each individual alien of the group (see *Andric v. Sweden*, cited above)".[45]

4. IN ALL CASES, THE ENFORCEMENT OF THE EXPULSION OR RETURN ("*REFOULEMENT*") ORDER MUST BE CARRIED OUT WITH RESPECT FOR THE PHYSICAL INTEGRITY AND FOR THE DIGNITY OF THE PERSON CONCERNED, AVOIDING ANY INHUMAN OR DEGRADING TREATMENT.

42. See the comments made in paragraph 15 above and the case-law references there mentioned.

XIII. EXTRADITION

1. EXTRADITION IS AN ESSENTIAL PROCEDURE FOR EFFECTIVE INTERNATIONAL CO-OPERATION IN THE FIGHT AGAINST TERRORISM.

2. THE EXTRADITION OF A PERSON TO A COUNTRY WHERE HE/SHE RISKS BEING SENTENCED TO THE DEATH PENALTY MAY NOT BE GRANTED. A REQUESTED STATE MAY HOWEVER GRANT AN EXTRADITION IF IT HAS OBTAINED ADEQUATE GUARANTEES THAT:

(I) THE PERSON WHOSE EXTRADITION HAS BEEN REQUESTED WILL NOT BE SENTENCED TO DEATH; OR

(II) IN THE EVENT OF SUCH A SENTENCE BEING IMPOSED, IT WILL NOT BE CARRIED OUT.

43. In relation to the death penalty, it can legitimately be deduced from the case-law of the Court that the extradition of someone to a State where he/she risks the death penalty is forbidden.[46] Accordingly, even if the judgment does not say *expressis verbis* that such an extradition is prohibited, this prohibition is drawn from the fact that the waiting for the execution of the sentence by the condemned person ("death row") constitutes an inhuman treatment, according to Article 3 of the Convention. It must also be recalled that the present tendency in Europe is towards the general abolition of the death penalty, in all circumstances (see guideline X, *Penalties incurred*).

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45 *Conka v. Belgium*, 5 February 2002, para. 59.

46 See *Soering v. United Kingdom*, 7 July 1989, A No. 161.

3. EXTRADITION MAY NOT BE GRANTED WHEN THERE IS SERIOUS REASON TO BELIEVE THAT:

(i) THE PERSON WHOSE EXTRADITION HAS BEEN REQUESTED WILL BE SUBJECTED TO TORTURE OR TO INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT;

(ii) THE EXTRADITION REQUEST HAS BEEN MADE FOR THE PURPOSE OF PROSECUTING OR PUNISHING A PERSON ON ACCOUNT OF HIS/HER RACE, RELIGION, NATIONALITY OR POLITICAL OPINIONS, OR THAT THAT PERSON'S POSITION RISKS BEING PREJUDICED FOR ANY OF THESE REASONS.

44. As concerns the absolute prohibition to extradite or return an individual to a State in which he risks torture or inhuman and degrading treatment or punishment see above para. 44.

4. WHEN THE PERSON WHOSE EXTRADITION HAS BEEN REQUESTED MAKES OUT AN ARGUABLE CASE THAT HE/SHE HAS SUFFERED OR RISKS SUFFERING A FLAGRANT DENIAL OF JUSTICE IN THE REQUESTING STATE, THE REQUESTED STATE MUST CONSIDER THE WELL-FOUNDEDNESS OF THAT ARGUMENT BEFORE DECIDING WHETHER TO GRANT EXTRADITION.

45. The Court underlined that it "does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."[47]

46. Article 5 of the European Convention for the suppression of terrorism[48] states:

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47 *Soering v. United Kingdom* (7 July 1989, A n° 161) para. 113. Position confirmed by the Court in its judgment in the case *Drozd and Janousek v. France and Spain*, 26 June 1992, A No. 240, para. 110 : "*As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 (art. 6) of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 (art. 6) would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice (see, mutatis mutandis, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 45, para. 113).*" and in its final decision on admissibility in the case *Einhorn v. France*, 16 October 2001, para. 32.

48 ETS No 090, 27 January 1977.

"Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."

47. The explanatory report indicates:
"50. If, in a given case, the requested State has substantial grounds for believing that the real purpose of an extradition request, made for one of the offences mentioned in Article 1 or 2, is to enable the requesting State to prosecute or punish the person concerned for the political opinions he holds, the requested State may refuse extradition.
The same applies where the requested State has substantial grounds for believing that the person's position may be prejudiced for political or any of the other reasons mentioned in Article 5. *This would be the case, for instance, if the person to be extradited would, in the requesting State, be deprived of the rights of defence as they are guaranteed by the European Convention on Human Rights.*"[49]

48. Moreover, it seems that extradition should be refused when the individual concerned runs the risk of being sentenced to life imprisonment without any possibility of early release, which may raise an issue under Article 3 of the European Convention on Human Rights. The Court underlined that "it is (...) not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention (see Nivette, cited above, and also the *Weeks v. the United Kingdom* judgment of 2

[49] Emphasis added.

March 1987, Series A n° 114, and *Sawoniuk v. the United Kingdom (dec.)*, n° 63716/00, 29 May 2001)".[50]

XIV. RIGHT TO PROPERTY

THE USE OF THE PROPERTY OF PERSONS OR ORGANISATIONS SUSPECTED OF TERRORIST ACTIVITIES MAY BE SUSPENDED OR LIMITED, NOTABLY BY SUCH MEASURES AS FREEZING ORDERS OR SEIZURES, BY THE RELEVANT AUTHORITIES. THE OWNERS OF THE PROPERTY HAVE THE POSSIBILITY TO CHALLENGE THE LAWFULNESS OF SUCH A DECISION BEFORE A COURT.

49. See notably Article 8 of the United Nations Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999):

"1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.

3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.

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50 *Einhorn v. France*, 16 October 2001, para. 27.

5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith."

50. The confiscation of property following a condemnation for criminal activity has been admitted by the Court.[51]

XV. POSSIBLE DEROGATIONS

1. WHEN THE FIGHT AGAINST TERRORISM TAKES PLACE IN A SITUATION OF WAR OR PUBLIC EMERGENCY WHICH THREATENS THE LIFE OF THE NATION, A STATE MAY ADOPT MEASURES TEMPORARILY DEROGATING FROM CERTAIN OBLIGATIONS ENSUING FROM THE INTERNATIONAL INSTRUMENTS OF PROTECTION OF HUMAN RIGHTS, TO THE EXTENT STRICTLY REQUIRED BY THE EXIGENCIES OF THE SITUATION, AS WELL AS WITHIN THE LIMITS AND UNDER THE CONDITIONS FIXED BY INTERNATIONAL LAW. THE STATE MUST NOTIFY THE COMPETENT AUTHORITIES OF THE ADOPTION OF SUCH MEASURES IN ACCORDANCE WITH THE RELEVANT INTERNATIONAL INSTRUMENTS.

2. STATES MAY NEVER, HOWEVER, AND WHATEVER THE ACTS OF THE PERSON SUSPECTED OF TERRORIST ACTIVITIES, OR CONVICTED OF SUCH ACTIVITIES, DEROGATE FROM THE RIGHT TO LIFE AS GUARANTEED BY THESE INTERNATIONAL INSTRUMENTS, FROM THE PROHIBITION AGAINST TORTURE OR INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, FROM THE PRINCIPLE OF LEGALITY OF SENTENCES AND OF MEASURES, NOR FROM THE BAN ON THE RETROSPECTIVE EFFECT OF CRIMINAL LAW.

3. THE CIRCUMSTANCES WHICH LED TO THE ADOPTION OF SUCH DEROGATIONS NEED TO BE REASSESSED ON A REGULAR BASIS WITH THE PURPOSE OF LIFTING THESE DEROGATIONS AS SOON AS THESE CIRCUMSTANCES NO LONGER EXIST.

51. The Court has indicated some of the parameters that permit to say which are the situations of "public emergency threatening the life of the nation".[52]

52. The Court acknowledges a large power of appreciation to the State to determine whether the measures derogat-

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51 See *Phillips v. United Kingdom*, 5 July 2001, in particular paras. 35 and 53.

52 See *Lawless v. Ireland* (No 3), 1st July 1961.

ing from the obligations of the Convention are the most appropriate or expedient:

"It is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other (see the above-mentioned *Ireland v. the United Kingdom* judgment, Series A no. 25, p. 82, para. 214, and the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 23, para. 49)".[53]

53. Article 15 of the Convention gives an authorisation to contracting States to derogate from the obligations set forth by the Convention "in time of war or other public emergency threatening the life of the nation".

54. Derogations are however limited by the text of Article 15 itself ("No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7" and "to the extent strictly required by the exigencies of the situation").

"As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 para. 2 even in the event of a public emergency threatening the life of the nation (...)."[54]

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53 *Brannigan and McBride v. United Kingdom*, 26 May 1993, para. 59.

54 *Labita v. Italy*, 6 April 2000, para. 119. See also *Ireland v. United Kingdom*, 18 January 1978, A n° 25, para. 163; *Soering v. United Kingdom*, 7 July 1989, A n° 161, para. 88; *Chahal v. United Kingdom*, 15 November 1996, para. 79; *Aksoy v. Turkey*, 18 Decem-

55. The Court was led to judge cases in which Article 15 was referred to by the defendant State. The Court affirmed therefore its jurisdiction to control the existence of a public emergency threatening the life of the nation: "whereas it is for the Court to determine whether the conditions laid down in Article 15 (art. 15) for the exercise of the exceptional right of derogation have been fulfilled in the present case".[55]

56. Examining a derogation on the basis of Article 15, the Court agreed that this derogation was justified by the reinforcement and the impact of terrorism and that, when deciding to put someone in custody, against the opinion of the judicial authority, the Government did not exceed its margin of appreciation. It is not up to the Court to say what measures would best fit the emergency situations since it is the direct responsibility of the governments to weigh up the situation and to decide between towards efficient measures to fight against terrorism or the respect of individual rights:
"The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, pp. 78-79, para. 207).

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ber 1996, para. 62; *Aydin v. Turkey*, 25 September 1997, para. 81; *Assenov and Others v. Bulgaria*, 28 October 1998, para. 93; *Selmouni v. France*, 28 July 1999, para. 95.

55 *Lawless v. Ireland*, 1 July 1961, A n° 3, para. 22.

Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision (ibid.). At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation."[56]

57. Concerning the length of the custody after arrest, and even if the Court recognizes the existence of a situation that authorises the use of Article 15, 7 days seem to be a length that satisfies the State obligations given the circumstances,[57] but 30 days seem to be too long.[58]

58. The General comment n° 29 of the UN Human Rights Committee[59] on Article 4 of the International Covenant on Civil and Political Rights (16 December 1966) need also to be taken into consideration. This general observation tends to limit the authorised derogation to this Covenant, even in cases of exceptional circumstances.

XVI. RESPECT FOR PEREMPTORY NORMS OF INTERNATIONAL LAW AND FOR INTERNATIONAL HUMANITARIAN LAW

IN THEIR FIGHT AGAINST TERRORISM, STATES MAY NEVER ACT IN BREACH OF PEREMPTORY NORMS OF INTERNATIONAL LAW NOR IN BREACH INTERNATIONAL HUMANITARIAN LAW, WHERE APPLICABLE.

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56 *Brannigan and Mc Bride v. United Kingdom*, 26 May 1993, para. 43.

57 See *Brannigan and Mc Bride v. United Kingdom*, 26 May 1993, paras. 58-60.

58 See *Aksoy v. Turkey*, 18 December 1996, paras. 71-84.

59 Adopted on 24 July 2001 at its 1950th meeting, see document CCPR/C/21/Rev.1/Add.11.

XVII. COMPENSATION FOR VICTIMS OF TERRORIST ACTS

WHEN COMPENSATION IS NOT FULLY AVAILABLE FROM OTHER SOURCES, IN PARTICULAR THROUGH THE CONFISCATION OF THE PROPERTY OF THE PERPETRATORS, ORGANISERS AND SPONSORS OF TERRORIST ACTS, THE STATE MUST CONTRIBUTE TO THE COMPENSATION OF THE VICTIMS OF ATTACKS THAT TOOK PLACE ON ITS TERRITORY, AS FAR AS THEIR PERSON OR THEIR HEALTH IS CONCERNED.

59. First, see Article 2 of the European Convention on Compensation of Victims of Violent Crimes (Strasbourg, 24 November 1983, ETS No 116):

"1. When compensation is not fully available from other sources the State shall contribute to compensate:

a) those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;

b) the dependants of persons who have died as a result of such crime.

2. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished."

60. See also Article 8, para.4, of the International Convention for the Suppression of the Financing of Terrorism (New York, 8 December 1999):

"Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, sub paragraph (a) or (b), or their families."

ANNEX XI

Council of Europe, Report on the Rights of Persons in the Custody of the U.S. in Afghanistan or Guantanamo Bay, Doc. 9817 of 26 May 2003

REPORT

COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS
RAPPORTEUR: MR KEVIN MCNAMARA, UNITED KINGDOM, SOCIALIST GROUP

SUMMARY

In this report the Assembly deplores the fate and the treatment of persons, including minors, being held in Afghanistan or Guantanamo Bay, whom the United States designates as "unlawful combatants". The Assembly believes that these persons should be considered "prisoners of war" or, at least, the United States should allow a "competent tribunal", within the meaning of the Third Geneva Convention, to determine their status. The prisoners' rights are in no way guaranteed. Only three former detainees are being tried in the United States. The Assembly, reminding the United States of their responsibility for these prisoners' well-being, asks that the detention facilities be brought into line with recognised international legal standards and that observers from states which have nationals being detained and from the ICRC be given access to the sites. It urges states whose nationals are being unlawfully detained to assist them by all possible means and to seek their extradition. Lastly, it considers that the United States are in breach of their obligations under the Statutory Resolution on observer status and reserves the right to issue further recommendations before its next part-session if no improvement is noted.

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

I. DRAFT RESOLUTION

1. The Assembly:
   a. notes that some time after the cessation of international armed conflict in Afghanistan, more than 600 combatants and non-combatants, including citizens from member states of the Council of Europe, may still be held in United States military custody – some in the Afghan conflict area, others having been transported to the US facility in Guantanamo Bay, Cuba, and elsewhere, and that further individuals have been arrested in other jurisdictions and taken to these facilities;
   b. further notes that a number of children are being held in Guantanamo Bay, including "a handful" of children between 13 and 15 years of age transferred from the Bagram Air Base in 2003, and a 16-year old Canadian national transferred late 2002;
   c. believes that children should only be detained in the last resort and that they require special protection; that the continuing detention of these young people is in most flagrant breach of the UN Convention on the Rights of the Child.
2. The Assembly is deeply concerned at the conditions of imprisonment of these persons as such which it considers unacceptable, and it believes that their status being undefined, their detention, to be unlawful.
3. The United States refuses to treat captured persons as "prisoners of war"; instead it designates them as "unlawful combatants" – a definition that is not contemplated by international law.
4. The United States also refuses to permit a determination to be made on the status of individual prisoners by a "competent tribunal" as provided for in the Third Geneva Convention and thus making their continued detention 'arbitrary'.
5. The United States has failed to exercise its responsibility with regard to international law to inform those prisoners of their right to contact their own consular representatives or to permit detainees the right to legal counsel.

6. Despite any protection offered by domestic law, the Assembly reminds the government of the United States that it is responsible under international law for the well-being of prisoners in its custody.
7. The Assembly restates its constant opposition to the death penalty, a threat faced by those prisoners in or outside the United States.
8. The Assembly expresses its disapproval that those held in detention may be subject to trial by a Military Commission, receiving a different standard of justice than United States nationals, amounting to a serious violation of the right to receive a fair trial and to an act of discrimination contrary to the International Covenant on Civil and Political Rights.
9. In view of the above, the Assembly strongly urges the United States to:
   i. bring conditions of detention into conformity with internationally recognised legal standards, for instance by giving an access to the ICRC and by following its recommendations;
   ii. recognise that under Article 4 of the Third Geneva Convention members of armed forces of a party to an international conflict, as well as members of militias or volunteer corps forming part of such armed forces, are entitled to be granted Prisoner of War status;
   iii. allow the status of individual detainees to be determined on a case-by-case basis by a competent tribunal operating through due legal process as envisaged under Article 5 of the Third Geneva Convention and to release non-combatants which are not charged with crimes immediately.
10. The Assembly urges the United States to permit representatives of states which have nationals detained in Afghanistan and in Guantanamo Bay accompanied by independent observers, access to sites of detention and unimpeded communication with detainees.
11. Furthermore, the Assembly urges those member states of the Council of Europe whose nationals are detained in Afghanistan and Guantanamo Bay or elsewhere:

i. to assist them strongly by all legal and diplomatic possible means;
ii. to seek the extradition of those who are threatened with the death penalty;
iii. and that all competent jurisdictions commit themselves not to request the death penalty.

12. Finally, the Assembly expresses its profound regrets that the United States is not meeting its obligations according to Statutory Resolution (93) 26 on observer status as a country enjoying observer status with the Council of Europe.
13. The Assembly furthermore regrets that the USA are maintaining the contradictory position that Guantanamo Bay is fully under the jurisdiction of the USA but is outside the protection of the US Constitution. In the event of the United States' failure to take remedial actions before the next Assembly's part-session, or to ameliorate conditions of detention, reserves the right to issue appropriate recommendations.

II. EXPLANATORY MEMORANDUM BY MR MCNAMARA, RAPPORTEUR

A. INTRODUCTION

1. In the course of armed hostilities following the events of 11 September 2001, the United States authorities seized persons suspected of belonging to al-Qa'eda or of being Taliban fighters.
2. On 8 April 2002, according to the US Government, 242 persons were being held in Afghanistan and 299 more at Guantanamo Bay. These prisoners were reportedly nationals of various countries: Afghanistan, Algeria, Saudi Arabia, Azerbaijan, Bahrain, Belgium, China, Denmark, Spain, Egypt, France, Iran, Kuwait, Uzbekistan, Pakistan, Qatar, United Kingdom, Russia, Sweden, Turkey and Yemen. Eight of these states are Members of the Council of Europe. Nationals from other countries may be detained in Afghanistan and in Guantanamo Bay (according to Amnesty International, there could be more than 600 detainees of 40 nationalities held in the US

base). Apparently, nationals from Georgia have also been delivered to the United States for interrogation at Guantanamo Bay in fall 2002. A person in Bosnia and Herzegovina faced the risk of being transferred to Guantanamo Bay, but he was released from SFOR custody on 30 January 2003, following a provisional measure by the Bosnia and Herzegovina Human Rights Chamber. The US military admitted that children aged 16 years and younger are among the detainees being interrogated in Guantanamo Bay.

3. At present, great uncertainty surrounds the legal status of these prisoners. There is a discrepancy between the way they should be treated and the way they are actually treated by the United States authorities. Their situation is disturbing not only because of the legal confusion over their status, but also because of their conditions of detention.
4. The United States Government claims these persons are detained as "enemy combatants in connection with an armed conflict" and does not accept they are entitled to protection under international human rights law. At the same time the United States does not recognise the rights of the detainees under international humanitarian law – the 'rules of war'. While detainees are denied protection of international law, their imprisonment gives rise to allegations of arbitrary and unlawful detention.
5. Concerns have also focussed on the conditions of detention and the internal regime at Guantanamo Bay giving rise to allegations of torture, inhuman and degrading treatment.

B. STATUS AND LEGAL REGIME

a. Choice of the Guantanamo Bay military base

6. Guantanamo Bay is an enclave in the south-east of Cuba. It was ceded to the United States in 1903 and was made a USA concession under a treaty of 1934.
7. The United States authorities contend that the base is not on USA soil, implying that the United States Constitution does not apply there. Accordingly, the prisoners do not enjoy protection of the fundamental rights enshrined in the Constitution

position is confirmed by the United States courts, which have ruled that the Constitution does not apply to federal government action outside the United States concerning foreigners.[1]

8. But, for example, the International Covenant on Civil and Political Rights (ICCPR) applies to persons placed under the jurisdiction of a State Party, even if abroad. For instance, Article 2(1) provides that "each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind". The Human Rights Committee has found it necessary "to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction".[2] The Human Rights Committee has made it clear that the ICCPR applies to areas outside States Parties' territory but under their control.[3]

b. Application of the Geneva Convention

9. The Third Geneva Convention on the treatment of prisoners of war is the only one applicable, since neither Afghanistan nor the United States have ratified the First Protocol on the protection of victims of international armed conflicts. However, the USA has recognised that the First Additional Protocol to the Geneva Conventions reflects customary international law.
10. After some hesitation and contradictory statements, the President of the United States, Mr Bush, declared on 7 February 2002 that the Third Geneva Convention applied to prisoners suspected of fighting for the Taliban regime, but not to al-Qa'eda militia, because al-Qa'eda was "a foreign terrorist group". This was a departure from the previous interpretation

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1 See, for example, the decision of the US Supreme Court in *Johnson v. Eisentrager*, 339 US 763. 1 950.

2 General Comment N°3, §1.

3 Concluding Observations of the Human Rights Committee: Israel. 18/08/98. UN Doc CCPR/C/79/Add.93.

whereby all the prisoners, both Afghan and foreign, were considered "unlawful combatants" or "battlefield prisoners".[4]

11. The Geneva Convention (III) of 12 August 1949 on the treatment of prisoners of war was ratified by the United States in 1955. The Convention applies regardless of the duration of the conflict, how deadly it is, the size of the forces involved and their status.
12. It is valid "in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them".[5] The term "armed conflict" clearly applies to the United States intervention in Afghanistan, implicitly authorised by Resolution 1368 of the Security Council. According to the *travaux préparatoires* of the Geneva Convention, any dispute between states giving rise to the intervention of armed forces is an armed conflict. The United States clearly embarked upon armed action against the de facto authority in Afghanistan and the prisoners were arrested in the course of those operations.
13. The Geneva Conventions should accordingly apply to all the prisoners, without distinction, held at Guantanamo Bay and in Afghanistan.
14. If the United States allowed a competent tribunal to rule on the status of al-Qa'eda members and the tribunal refused to recognise them as prisoners of war, they would then be entitled to the safeguards of the Fourth Geneva Convention on the protection of civilians in time of war. However, another problem could then arise. A United States court might interpret the transfer of al-Qa'eda prisoners from Afghanistan to Guantanamo as rendering obsolete the protection afforded by the Fourth Convention. While there is no doubt that the Fourth Convention applies to the international armed conflict on Afghan soil, the situation on USA soil is quite different.
15. Article III of the bilateral agreement of 1903 between the Republic of Cuba and the United States stipulates:

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4 White House communiqué of 7 February 2002.

5 Article 2 Third Geneva Convention.

"While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise *complete jurisdiction* and control over and within said areas [...]".

16. The United States base is thus governed by the same laws as apply to United States territory.

c. *Prisoner-of-war status under the Geneva Convention*

17. According to the United States authorities, the Guantanamo Bay prisoners are "unlawful combatants" and do not have prisoner-of-war status. So they ought to be regarded as "civilians". But they have no means of challenging the violation of their elementary rights and are yet subject to military tribunals.[6] On 16 January 2002 the former High Commissioner for Human Rights Mrs Robinson, stated that the legal status of the detainees, and their entitlement to prisoner-of-war status, if disputed, had to be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention. The responsibility for convening a "competent tribunal" under the Geneva Conventions to determine their status lies with the United States government.
18. First of all, the notion of "unlawful combatants" is unknown in international law and corresponds to no legal status. No soldier has ever been prosecuted for being a combatant; even for the purpose of war crimes' tribunals, it has generally been the officers or those responsible for giving orders that were prosecuted but the individual 'foot soldier' has not been tried.
19. According to the Geneva Convention (III), prisoners of war are "(...) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps form-

6 «Le statut incertain des détenus sur la base américaine de Guantanamo», Philippe Weckel, R.G.D.I.P. 2002-2.

ing part of such armed forces" captured by one of the belligerents.[7]

20. This broad terminology was chosen in order to avoid ambiguities due to the diversity of combatants. The Taliban combatants and volunteers in Afghanistan clearly fall into the category of prisoners of war. Some and possibly many of those detained fall into neither category but are civilians or non-combatants caught up in the area of conflict. Some individuals travelled to Afghanistan for religious reasons not connected with the subsequent developments.
21. Where members of al-Qa'eda are concerned, there is a difference of opinion between the United States authorities and certain organisations (International Committee of the Red Cross, Amnesty International). The Third Geneva Convention stipulates that "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." (Article 5)
22. The United States authorities have declared that there was no need for a "competent tribunal" to determine the status of prisoners at Guantanamo Bay. They contend that recourse to such a tribunal is necessary only if the detaining authorities have any doubt as to prisoners' status, which is not so in this case. This is a distortion of Article 5, which lends no support to such an interpretation.
23. The United States authorities should have recourse to a competent, independent and impartial tribunal because there is doubt as to the prisoners' status.

d. The prospect of indefinite detention without trial or after acquittal

24. The right to be tried within a reasonable time is closely related to the principle of presumption of innocence. The Presidential Order of 13 November 2001 authorises detention without trial and the United States authorities envisage "various possible

7 Article 4(1) Third Geneva Convention.

options including detention and trial under the Presidential Order, trial by other means such as the civilian courts, repatriation, release or *continuing detention under an authority other than the Order*". A statement by the Pentagon's General Counsel on 21 March 2002 is enlightening about the the United States position not to envisage an early end to the conflict and let indefinite detention continue; he said that some detainees could be held for the duration of the conflict, and the conflict was still going on, and that no end was in sight.

25. The United States continue to consider that it would be irresponsible not to continue to detain the prisoners until the conflict is over. However, the conflict in Afghanistan might have ended with the setting up of a provisional administration under the auspices of the United Nations (Afghanistan Interim Authority) controlling the whole territory.
26. There is no such legal term in international law like "war against terrorism" declared by President Bush on 20 September 2001 or "the axis of evil" referred to in a State of the Union speech on 31 January 2002, under which the United States could derogate from their obligations under international law.
27. Even worse, the United States authorities have stated that some prisoners could be detained for the duration of the conflict, even if acquitted, but the Third Geneva Convention, provides that "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities" (Article 118). It may be assumed that it is one reason why the United States have for the time being refused to grant the prisoners prisoner-of-war status.
28. Under international law binding on the United States, according to Article 9(4) of the ICCPR, "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". The prisoners at Guantanamo Bay and in Afghanistan should have access as soon as possible to a competent tribunal to examine the lawfulness of their detention.
29. According to the established case-law of the European Court of Human Rights, a prisoner must be released pending trial as

soon as continued detention ceases to be reasonable: only "the existence of a genuine requirement of public interest "can, having regard to the presumption of innocence, justify departure from the rule of respect for individual liberty. Provided there are still plausible reasons for suspecting the arrested person of having committed an offence, continuing detention before trial must satisfy two conditions: there must be "relevant" and "sufficient" reasons that continue after a certain lapse of time to legitimise custody; and "special diligence" on the part of the authorities in the conduct of the proceedings.[8] Moreover, anyone held in custody is entitled to take proceedings to seek a ruling on the lawfulness of his or her detention.[9]

30. The Human Rights Committee also considers that continuing detention before trial must be not only lawful, but also reasonable in all respects[10] and that pre-trial detention should be the exception and is justified only if there is a likelihood that the suspect might abscond or destroy evidence, exert pressure on witnesses or leave the territory of the State Party.[11] The detention of the prisoners would thus amount to an arbitrary detention in violation of the ICCPR. In a judgment of the United Kingdom High Court on the case of Feroz Abassi, who was among the first group of prisoners to arrive in Guantanamo Bay, the judges clearly characterise the situation as such.

e. Presumption of innocence

31. In international human rights law, the right to an impartial tribunal includes the right to be presumed innocent until convicted. Accordingly, Article 14(2) of the ICCPR provides that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". This right allows of no exceptions and is recognised in international and other armed conflicts.

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8 For examples of violation by France: *Tomasi*, 27 August 1992, A 241 A.

9 Article 5§4 European Convention on Human Rights.

10 N° 305/1988, *Van Alphen v. Netherlands*, Dec. 23July 1990, A/45/40, vol. II, p. 124.

11 N° 526/1993, *Michael and Brian Hillvc/ Spain*, 2 April 1997, CCPR/C/59/D/526/1993.

32. The right to be presumed innocent means that judge and jury must not pre-judge a case. It also means that the public authorities ought not to make pronouncements as to the guilt or innocence of an individual before conclusion of the trial. In its General Comment N°13, the Human Rights Committee found that there was "a duty for all public authorities to refrain from prejudging the outcome of a trial".[12]
33. Military Commission Order No 1 also includes the principle of presumption of innocence.[13] But the principle has repeatedly been ignored by the United States authorities, including the President and the Secretary of Defense, in public comments on the presumed guilt of Guantanamo Bay prisoners. For example, on 28 January 2002, the President referred to them as "killers, terrorists".
34. These declarations cast grave doubts on the impartiality and independence of the administration of justice.

f. Interrogation of prisoners and denial of access to lawyers

35. According to information supplied by the United States authorities, the prisoners do not have access to lawyers, despite the fact that interrogations began on 23 January 2002. According to Amnesty International's Memorandum on the situation of prisoners held by the United States,[14] the interrogations can last up to four hours at a stretch and may take place at any time of the day or night. Evidence obtained from these interrogations may subsequently be used against prisoners in trials before the Military Commissions. It is worthwhile to recall here that one of the commitment to which the United States subscribed when ratifying the ICCPR was to secure the right for everyone to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have legal assistance,

12 §7 General Comment N°13 concerning Article 14 ICCPR.
13 Department of Defense, Military Commission Order No. 1, 5(b).
14 AI Index: AMR 51/053/2002. April 2002.

of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it (Article 14 of the ICCPR).

36. Article 17 of the Third Geneva Convention clearly proscribes interrogation of prisoners of war for purposes of military intelligence. Prisoners of war are required only to state their name, rank, number and date of birth. Once anyone has been identified as a crime suspect, they are entitled to be informed promptly of their rights, which include the right to remain silent, to be assisted by a lawyer of their choice and not to be interrogated without that lawyer being present.
37. The detainees should have a right to legal advice and to freely choose their own representation. A source of concern is that there may be interference or bar on some lawyers for political reasons. In this regard, one will refer to the Basic Principles on the Independence of the Judiciary endorsed by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan in 1985, and especially article 2 setting that "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".
38. In addition, interrogation conditions have to be considered as a whole. Some people have undergone surgery, others are suffering from post-traumatic stress. What is more, the detention conditions (confinement in small cells, possibility of unlimited detention or military trial) may be regarded as inhuman and degrading treatment.[15] Some persons may not only be vulnerable and make questionable statements, but they may also by subjected to undue pressure and make self-incriminating statements. Principle 21 of the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment provide that "it shall be prohibited to take undue advantage of the situation of a detained or imprisoned person

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15 AI Index: AMR 51/053/2002. April 2002: "Their detention at Guantanamo has no purpose other than to obtain intelligence from them and their conditions of detention are intended partly to prevent aggression on their part, but also to encourage them to talk".

for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person".

g. Diplomatic protection

39. The states whose nationals are detained at Guantanamo Bay are entitled to offer them diplomatic protection and to demand compliance with the ordinary law by the United States. Depending on the charges, which have yet to be decided, they may request their extradition for trial in their own territory.[16]
40. The United States authorities have stated that extraditions would be decided on a case-by-case basis. When deciding, the United States should bear in mind the principle of *non-refoulement*, so as not to extradite a prisoner to a country where he might be subjected to torture or to inhuman or degrading treatment.

C. *Military tribunal*

41. On 13 November 2001, the President of the United States, Mr Bush signed a Military Order on the "detention, treatment and trial of certain non-citizens in the war against terrorism".[17] This Order includes the establishment of special military tribunals to try non-United States citizens.
42. The Order broadly covers any individual who does not have United States nationality who "(i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse ef-

16 These states' attitude remains very cautious. When making the second visit to check prisoners' identities at the end of March a representative of the French Foreign Ministry indicated that France wanted them to be tried in France, and not by a military tribunal. Pakistan has made representations that detainees were low level combatants. A representative of the German government has said prisoners should have been subject to interrogation and should not have been taken to Guantanamo Bay but released. The UK has made diplomatic representations as well.

17 Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism'.

fects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harboured one or more individuals described in subparagraphs (i) or (ii)".[18]

43. On 21 March 2002, the Secretary of Defense, Mr Rumsfeld, signed Military Commission Order No 1,[19] detailing procedures for trial by the military commissions.
44. Although Military Commission Order No 1 takes account of certain criticisms made after publication of the Presidential Order, it is clear that certain fundamental rights might not in future be respected if prisoners were tried by these military commissions.
45. At the time of writing, only three people arrested in connection with the war on terrorism have been prosecuted.
46. John Walker Lindh, the "United States Taliban" captured in Afghanistan, decided on Monday 15 July before the *Federal Court of Alexandria, Virginia,* to plead guilty. Lindh, aged 21, is accused of links with the Taliban and Osama bin Laden's al-Qa'eda network. John Walker Lindh has been removed from detention (he was returned to the United States in January 2002) and accorded a trial, but none of the foreign nationals has. This is clearly discriminatory.
47. A plea agreement enabled the young man, facing ten charges, to escape life imprisonment. He agreed to forego the possibility of appeal if found guilty, on condition that his sentence would not exceed twenty years' imprisonment, while the prosecution agreed to drop the principal charges, especially conspiracy to commit attempts on United States lives.
48. On 4 October 2002, he was sentenced by the Federal Court of Alexandria (Virginia) to twenty years in federal prison after telling the courtroom that he made a mistake in joining the Taliban.
49. Zacarias Moussaoui is accused of conspiring to "*commit acts of terrorism and aircraft piracy, destroy aircraft, use weapons of mass destruction, murder United States employees and destroy property*". Four of these six charges carry the death penalty. But Moussaoui, a French citizen, will be tried by the

18 Military Order. Section 3(a).

19 Military Commission Order No 1.

Federal Court of Alexandria, Virginia, and not by a military tribunal.

50. He is regarded by the prosecution as the 20th hijacker of 11 September 2001, who was unable to take part in the hijackings, having been arrested in Minneapolis on 16 August because his visa was out of date. At the time, he was training on Boeing flight simulators.
51. In a statement to the court on 22 April, Moussaoui asked to conduct his own defence, without the aid of officially appointed counsel. On 18 July 2002, he declared that he belonged to al-Qa'eda and told the court that he would plead guilty to four charges. This position was not immediately accepted by the court, which gave him a week to think it over. On 25 July 2002, Moussaoui finally decided to plead not guilty. The trial was due to start with jury selection on 30 September, but the federal judge granted a six-month delay in the start of the trial (it is the second time the judge has delayed the start of the trial).
52. Richard Reid, a British citizen, aged 28, was arrested after attempting to detonate explosives contained in his shoes on the Paris-Miami flight on 22 December 2001. The case is being investigated by the *US Attorney's Office in Boston.* On 4 October 2002, Richard Reid pleaded guilty; he faces a minimum sentence of sixty years.

a. Violations of the Constitution

53. According to the Fifth Amendment to the United States Constitution, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger [...]". The Guantanamo prisoners, whom the United States denies the status of prisoners of war, could revert *de facto* to the status of ordinary civilians to whom the Fifth Amendment must be applied.
54. The argument that foreign terrorists may be arraigned before courts martial because United States soldiers are themselves liable to military jurisdiction has no foundation in United

States law. The United States Constitution, while recognising the jurisdiction of military courts over United States military personnel, does not authorise the organisation of military proceedings against civilians suspected of committing terrorist acts or ordinary crimes. Furthermore, the Military Order of 13 November 2001 does not even provide the safeguards enjoyed by any court-martialled United States member of the armed forces.

55. Moreover, the United States Supreme Court has stated unequivocally that civilians may on no account be arraigned before a special military court as long as the ordinary courts are able to function properly.[20]

56. The Presidential Order removes from the jurisdiction of the ordinary courts matters that are their proper concern, which violates Article II of the United States Constitution. Article II stipulates that "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office (...)".[21] The offences covered by this article are federal offences. Three exceptions are provided for: territorial courts, courts martial and cases involving *public rights*. The military tribunals provided for in the Presidential Order are not courts martial because the safeguards provided for are not equivalent to those of the *Uniform Code of Military Justice*. What is more, they will not try military personnel, but civilians. By inventing tribunals specially to try civilians accused of committing federal crimes, the Executive is violating Article II, which stipulates that only Congress has the power to establish federal courts.

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20 For cases of internal armed conflict, see *ex parte Milligan*, *United States Reports*, vol. 71, 1866, p.1 and for cases of international armed conflict, see *Duncan v. Kahanamoku*, *United States Reports*, vol. 327, 1946, p.304.

21 http://www.ridi.org/adi/articles/2002/200206pel.htm-_ftn27

b. Only prisoners who are not US citizens will be tried by the Military Commissions

57. According to the Presidential Order, prisoners who are not United States citizens may be tried by the Military Commissions, even if charged with less serious offences than other, United States prisoners tried by ordinary civilian courts. Consequently, any foreign prisoner tried by a Military Commission will benefit from a lower minimum standard of justice than an United States prisoner. The ordinary civilian courts, unlike the Military Commissions, are obliged to abide by the United States Constitution, which guarantees certain fundamental rights.
58. No reason or objective, reasonable criterion can explain this difference in treatment, which amounts to discrimination.
59. The Presidential Order does not apply to United States citizens, yet there is no constitutional basis to justify foreigners not enjoying the same constitutional rights as United States in criminal proceedings. For instance, the US Supreme Court has declared that a law which had the effect of sentencing unlawful Chinese immigrants to a year's forced labour without trial was unconstitutional.[22] In a later ruling, the Supreme Court clarified its case-law by stating: "Under our law, the alien in several respects stands on an equal footing with citizens [...]. [I]n criminal proceedings against him, he must be accorded the protections of the Fifth and Sixth Amendments".[23]
60. Furthermore, according to Article 14 of the ICCPR, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

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22 *Wong Wing v. United States*, *United States Reports*, vol. 163, 1896, p. 228.

23 *Harisiades v. Shaughnessy*, *United States Reports*, vol. 342, 1952, p.580.

61. When ratifying the ICCPR, the United States made an interpretative declaration, stating that "the United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status – as those terms are used in Article 2 paragraph 1 and Article 26 – to be permitted when such distinctions are, at minimum, rationally related to *a legitimate governmental objective*. The United States further understands that the prohibition in paragraph 1 of Article 4 upon discrimination in time of public emergency, based 'solely' on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have *a dispro portionate effect upon persons of a particular status*".
62. The Human rights Committee, in its concluding observations on the United States' report on the implementation of the ICCPR stated that "in the first statement of understanding made at the time of ratification, the principle of non-discrimination is construed by the [US] government as not permitting distinctions which would not be legitimate under the Covenant".[24]
63. The International Convention on the Elimination of all forms of Racial Discrimination, ratified by the United States on 21 October 1994, provides in Article 5 that: "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice".
64. Other international instruments, such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Standard Minimum Rules for the Treatment of Prisoners, prohibit all discriminatory treatment. Lastly, the first Protocol to the Third Geneva Convention, which applies to all persons captured in the course of an armed conflict (regardless of prisoner-of-war status) provides that "persons who are in the power of a Party to the conflict

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24 UN Doc. CCPR/C/79/Add.50. 24 August 1994.

who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour (...), national or social origin (...) or any other similar criteria".[25]

65. The establishment of Military Commissions to try only non-United States prisoners constitutes discrimination which clearly contravenes international standards. The trial of two foreigners arrested after 11 September (Zacarias Moussaoui and Richard Reid) by ordinary criminal courts lends force to the idea that all prisoners, whatever their nationality, should be tried by the same kind of courts.

c. Right to be tried by an independent and impartial tribunal

66. The Presidential Order gives the Executive substantial discretionary powers to decide who shall be prosecuted and under what system, and whether review is necessary or not. That is contrary to the principle of separation of powers between the Executive and the Judiciary.

67. The Secretary of Defense can: appoint military officers to the Military Commissions and dismiss them; determine the number of a Commission's members (from 3 to 7); designate the presiding officer; appoint the Chief Prosecutor, an United States armed forces lawyer; appoint the chief Defence Advocate, an United States armed forces lawyer; withdraw an officer's qualification to appear before a Commission; approve the charges brought by the prosecution; approve a judicial agreement between the prosecution and the accused; consider the amount of information to be made available to the defence; decide which parts of the proceedings will be held in camera and which open to the public and accredited journalists; select the panel of three military officers (who may include reserve officers or officers recalled from retirement); if designated by the President, take the final decision in all

25 Article 75(1) Third Geneva Convention.

cases, including the death sentence; amend procedure before the Military Commission at any time.

68. The President of the United States may: determine who is to be tried by a Military Commission; take the final decision in all cases, including the death sentence.
69. This non-separation of powers is contrary to the ICCPR, according to which all trials must be conducted "by a competent, independent and impartial tribunal established by law" (Art. 14-1).
70. The Military Commissions as provided for by the United States authorities will not be independent. The impartiality of their members, as officers appointed by the Executive, cannot be guaranteed. Moreover, all their members, including the Presiding Officer, may be dismissed by the Secretary of Defense "for good cause".[26] Lastly the proposed Military Commissions are not established by law, but set up by executive order of the President.

d. Accused's right to be legally assisted by counsel of his or her choice

71. Military Commission Order No 1 provides that the Chief Defense Counsel, appointed by the Minister of Defense or his designee, shall detail one or more military officers who are judge advocates in the United States armed forces.[27] However, the accused may choose another judge advocate in addition to or in place of the one detailed to defend him.
72. The accused may also, at his own expense, choose a civilian attorney, who must be an United States citizen who meets certain security and trustworthiness requirements.
73. But civilian counsel may not have access to certain classified secret documents used in the trial, to which only the military counsel will have access.[28] Accordingly, if the accused has chosen a civilian attorney, he may nonetheless be defended by military counsel, against his will.

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26 Military Commission Order No. 1. 4(A)3.

27 Military Commission Order No. 1. 4(C)2.

28 Military Commission Order No. 1. 4(C)3b.

74. Furthermore, according to Military Commission Order No 1, "The Accused must be represented at all relevant times" by his military counsel (4C4). This could be interpreted as preventing an accused who has chosen a civilian lawyer and been obliged to retain his military counsel, from communicating confidentially with his civilian lawyer.
75. This violates Article 14(3)b of the ICCPR whereby everyone is entitled to "communicate with counsel of his own choosing". Moreover, the Human Rights Committee asserted in its General Comment on this Article that this "requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications".

e. Rules of evidence

76. Military Commission Order No 1 provides that an accused "shall not be required to testify during the trial" but that this "shall not preclude admission of evidence of prior statements or conduct of the Accused".
77. According to Article 14(3)g of the ICCPR, anyone accused of a criminal offence is entitled "not to be compelled to testify against himself or to confess guilt."
78. Furthermore, Military Commission Order No 1 does not explicitly rule out statements extorted under torture or coercion. According to international law, any statement made under torture is inadmissible as evidence. The case of Lindh, the "United States taliban" is revealing, since he claims he was subjected to coercive measures during interrogation (blindfolded, naked and shackled in a metal container) at an United States base near Kandahar.
79. Lastly, according to Military Commission Order No 1 (Section 6D(2)b), the Commission may hear testimony from a witness who refuses to swear an oath or make a solemn undertaking, as well as anonymous witnesses. It may also take evidence that is kept secret.
80. In conclusion, the Military Commission's rules of evidence will afford less protection than those prevailing in ordinary civilian courts, That is all the more disturbing because the

Military Commission will be able to pronounce the death sentence.

f. Right of appeal to an independent and impartial tribunal

81. The Presidential Order explicitly stipulates that anyone tried by the Military Commission "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal".[29]
82. Instead, an accused convicted by the Military Commission can have his trial reviewed first by the Secretary of Defense, who will carry out an "administrative review". If the Secretary of Defense finds that the proceedings were in order, he must then forward the record to a Review Panel.
83. This Panel will be composed of three Military Officers appointed by the Secretary of Defense, who himself approved the charge or charges.[30] Within 30 days, the Panel must forward the case to the Secretary of Defense with a recommendation or re-submit the case to him for further proceedings if an error of law has occurred.
84. The final decision rests with the President of the United States, who determined that the suspect be tried by the Commission, or with the Secretary of Defense, if designated by the President.
85. According to Article 14(5) of the ICCPR, "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". But, according to Article 14(1) ICCPR, the tribunal must be "competent, independent and (...) established by law".

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29 Military Order. Section 7(b)2.

30 Military Commission Order No. 1 .6(A) 2.

g. Sentencing by the Military Commission

86. The Commission will deliberate and vote in camera. A two-thirds majority is required for a finding of guilt, unanimity for the death sentence. In view of the procedure before the Commission and the risk of bias, it is very disturbing that a Commission should have the power to inflict the death penalty. The risk of an irrevocable miscarriage of justice is greater in the case of death sentences handed down by military commissions than in the ordinary civilian courts, for military commissions generally accept lower standards of evidence and lack independence from the executive.

D. CONDITIONS OF TRANSFER AND DETENTION

a. Conditions of transfer

87. The transfer of prisoners from Afghanistan to Guantanamo Bay (Camp X-Ray) began on 10 January 2002. During transfer, which involved 25-hour flights, the prisoners were handcuffed and shackled and made to wear mittens and surgical masks, ear-muffs and dark glasses. They had their heads shaved and their beards shaved off. At least two were sedated.
88. Security measures during the transfer of prisoners are legitimate, but they should be proportional to the risk and comply with international standards, which prohibit inhuman and degrading treatment. Moreover, Rule 45 of the Standard Minimum Rules for the Treatment of Prisoners provides that "the transport of prisoners in conveyances with inadequate ventilation or light, or in any way which would subject them to unnecessary physical hardship, shall be prohibited".

b. Conditions of detention

89. Until the end of April 2002, when they were transferred to a purpose-built prison (Camp Delta), the prisoners were kept in cages (2.4x2.4m) open to the elements. They are entitled to

one quarter-hour's ablutions per day, without necessarily having access to showers.

90. Practising Moslems were given a copy of the Koran and a skull-cap and they are attended by a chaplain at their five daily prayers.
91. They are allowed to communicate with other prisoners in adjoining cells, but not with guards.
92. The prisoners are handcuffed during medical examinations and interrogation and are shackled when outside their cells. To begin with, they had to walk from their cells to the interrogation buildings, but to save time and because the shackles caused sores, they are now transported by motor-van or on stretchers, but are still handcuffed.
93. The camp and the cells are brightly lit from 6 pm until daylight.
94. Prisoners are entitled to twice fifteen minutes' exercise outside their cells each week, while the Standard Minimum Rules for the Treatment of Prisoners provide for one hour daily.
95. The new cells to which the prisoners have been transferred are smaller than the previous ones (2.03x2.44m) and have a bed, toilet, wash-basin with running water and a window. They can still communicate with their neighbours.
96. Constant illumination in cells constitutes a sleep deprivation.
97. The authorities have supplied the prisoners with sheets, mattresses, pails, sandals and toiletries. Contrary to the provisions of Article 18 of the Third Geneva Convention, the prisoners have been deprived of all personal belongings. A prisoner of war normally continues to wear his uniform, which is a mark of his military dignity. At Guantanamo, the prisoners wear an orange overall and have been allowed to keep nothing, not even a scarf.[31]
98. The Standard Minimum Rules for the Treatment of Prisoners provide that "every prisoner who is not employed on outdoor work shall have at least one hour of suitable exercise in the open air daily, if the weather permits"[32] and that "all accom-

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31 A hunger strike by a large number of prisoners (of whom there were 194 on 1 March 2002) was provoked on 28 February by a soldier making a prisoner remove a turban he had made from a towel.

32 Standard Minimum Rules for the Treatment of Prisoners. Rule 21(1).

modation provided for the use of prisoners, and in particular all sleeping accommodation, shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floorspace, lighting, heating and ventilation".[33]

99. Chapter I of Section II of the Third Geneva Convention deals with the internment of prisoners of war, providing for open conditions and the grouping of prisoners according to their nationality, language or customs. In February 2002, Mrs Robinson joined the International Committee of the Red Cross in asking the United States administration to clarify whether the Guantánamo prisoners would be allowed the protections of the Geneva Conventions for prisoners of war.

100. It is therefore disturbing to note that, despite the efforts of the United States administration, the detention conditions do not comply with international standards. Detention in small cells, virtually 24 hours a day with a minimum of exercise for over 5 months may be regarded as inhuman and degrading treatment according to international law. The psychological stress upon prisoners is heightened by the arbitrary and indefinite nature of their detention. The Pentagon recognised that 14 prisoners have attempted suicide since the prison was built one year ago, and there were five suicide attempts in January 2003; a Pentagon spokeswoman said medical and psychiatric teams were working to try to prevent further injury or attempted suicides.

c. Communication with the outside world

101. Anyone detained or imprisoned is entitled, according to international standards, to inform or require the competent authority to inform the members of his family or other persons of his choice of his arrest, detention or imprisonment. Moreover, any prisoner is entitled to inform his family promptly of his place of detention after each transfer.

102. According to Amnesty International, information concerning attempts by prisoners' families to obtain information about

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[33] Standard Minimum Rules for the Treatment of Prisoners. Rule 10.

them show that the United States authorities have not fully and speedily facilitated communications between prisoners and their families.

103. Furthermore, according to the Pentagon, many prisoners at Guantanamo did not know, at least until 1 February 2002, where they were. Keeping the prisoners in ignorance about their place of detention obviously restricted their ability to inform their families.
104. Various international instruments have recognised the importance of facilitating prisoner-family communications and visits. But so far no family has been allowed this right.
105. International law recognises prisoners' right to be informed promptly of their right to communicate by appropriate means with a consular post or diplomatic mission of the state whose nationality they hold. No information concerning the conditions of detention sheds light on whether the prisoners have been informed of this right. If they are granted this right, then "foreign nationals shall be allowed reasonable facilities to communicate with [their] diplomatic and consular representatives". (Standard Minimum Rules for the Treatment of Prisoners. Rule 38-1).
106. Mr Abassi's solicitor received a bundle of 18 communications from the prisoner requesting legal representation and the conditions of detention, this after the third interrogation by military intelligence. Indications are reported that there are delays in the receiving/sending mail.
107. To conclude on this section, it appears that prisoners in Afghanistan and in Guantanamo Bay are subjected to a treatment which can be qualified as torture or other cruel, inhuman or degrading treatment. The United States government would be wise to treat these prisoners in accordance with international human rights law and humanitarian law.

E. CONCLUSION AND RECOMMENDATIONS

108. Fundamental judicial safeguards are not afforded by the Military Order, nor *a fortiori* by the procedural rules applicable by the special military tribunals. The indictment is not decided by

the Grand Jury, which has no part in the proceedings, the presumption of innocence is not respected, the accused's right not to testify against himself is not provided for, the accused cannot choose counsel, there is no right of access to prosecution evidence, there is no provision for allowing the accused the benefit of reasonable doubt, there is no possibility of appeal, there are no provisions governing rules of evidence, the applicable law is unknown, but there can be no question of retroactive rules or of law invented by these tribunals or by executive order, because Congress alone is empowered to define federal offences.

109. The Human Rights Committee, in General Comment No 13 on Article 14 ICCPR, "notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14".
110. The Parliamentary Assembly might invite the United States forthwith to align their practice concerning prisoners held in Afghanistan and at Guantanamo Bay with international law, that is to let an international competent tribunal determine the legal status of the detainees, to install an independent court to review individual cases, and to review the conditions of detention according to the Geneva Conventions and the Standard Minimum Rules for the Treatment of Prisoners.
111. The Assembly should call upon the United States not to extradite prisoners to countries where there is a clear risk of torture or inhuman or degrading treatment, or where they might be subjected to the death penalty.
112. The member states of the Council of Europe might dispatch representatives to question certain of their nationals on the spot, accompanied by experimented lawyers. A delegation of

the Council of Europe Parliamentary Assembly could even ask to visit Camp Delta with a team of lawyers.

113. The Parliamentary Assembly refers to its Resolution 1253 of 25 June 2001, in which it re-affirms its opposition to capital punishment, considering that it has no legitimate place in the penal systems of modern civilised societies and that its application constitutes an act of torture and inhuman or degrading punishment. In that resolution, it also stated that the United States was failing in its obligations according to Statutory Resolution (93) 26 as a country enjoying observer status with the Council of Europe.

114. In the event of a clear danger of failure to abide by the rules of international law, the member states are entitled to demand the extradition of their nationals in order to try them in their territory. The states whose nationals risk the death penalty should seek their extradition. Secretary of Defence Rumsfeld said the United States might agree to return suspects if the receiving country would guarantee prosecution. It is alleged the United States agreed to return eight Russian suspects to Russia on that condition.

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 9445, Reference No 2732 of 29 May 2002

Draft resolution adopted by the Committee on 29 April 2003 with 40 votes in favour, 1 vote against and 1 abstention

Members of the Committee: Mr *Lintner* (*Chairperson*), Mr *Marty*, Mr *Jaskiernia*, Mr *Jurgens* (*Vice-Chairpersons*), Mrs Ahlqvist, Mr *Akçam*, Mr G. Aliyev (alternate: Mr R. *Huseynov*), Mrs Arifi, Mr Arzilli, Mr Attard Montalto, Mr *Barquero Vázquez*, Mr *Berisha*, Mr *Bindig*, Mr Brecj, Mr Bruce (alternate: Mrs *Smith*), Mr *Chaklein*, Mrs *Christmas-Møller*, Mr *Cilevics*, *Clerfayt*, Mr *Contestabile*, Mr *Daly*, Mr *Davis*, Mr *Dees*, Mr *Dimas*, Mrs Domingues, Mr *Engeset*, Mrs Err, Mr *Fedorov*, Mr *Fico*, Mrs Frimansdóttir, Mr Frunda, Mr Galchenko (alternate: Mr *Sharandin*), Mr Guardans (alternate:

Mrs *Alvarez-Arenas*), Mr *Gündüz*, Mrs Hajiyeva, Mrs Hakl, Mr Holovaty (alternate: Mr *Shybko*), Mr Jansson, Mr Kelber (alternate: Mrs *Hoffmann*), Mr Kelemen, Mr *Kontogiannopoulos*, Mr S. Kovalev (alternate: Mr *Zavgayev*), Mr *Kroll*, Mr *Kroupa*, Mr *Kucheida*, Mrs *Leutheusser-Schnarrenberger*, Mr Livaneli, Mr Manzella (alternate: Mr *Ianuzzi*), Mr Martins, Mr Mas Torres, Mr Masson, Mr *McNamara*, Mr Meelak, Mrs *Nabholz-Haidegger*, Mr *Nachbar*, Mr Olteanu (alternate: Mrs *Cliveti*), Mrs *Pasternak*, Mr *Pehrson*, Mr Pellicini (alternate: Mr *Budin*), Mr Pentchev, Mr *Piscitello*, Mr Poroshenko, Mrs Postoica, Mr *Pourgourides*, Mr Raguz, Mr Ransdorf, Mr Rochebloine, Mr Rustamyan, Mr *Skrabalo*, Mr *Solé Tura*, Mr Spindelegger, Mr *Stankevic*, Mr Stoica, Mr Symonenko, Mr Tabajdi, Mrs Tevdoradze, Mr *Toshev*, Mr *Vanoost*, Mr *Wilkinson*, Mrs *Wohlwend*

N.B. The names of those members who were present at the meeting are printed in italics.

Secretaries to the Committee: Ms Coin, Mr Schirmer, Mr Cupina, Mr Milner

ANNEX XII

Inter-American Commission on Human Rights, Report on Terrorism and Human Rights of 22 October 2002, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr.

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,

Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), Anti-Terrorist Measures and Human Rights.

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 hot 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 un-

lawful 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 choos-

ing 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 com-*

bat 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 intern-

ment 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.

ANNEX XIII

International Helsinki Federation for Human Rights (IHF), Report on Anti-Terrorism Measures, Security and Human Rights of 15 April 2003 – Introduction

I. INTRODUCTION

The attacks on the United States (US) on September 11, 2001[1] horrified and outraged people around the world. Although an attack on civilians was certainly nothing new, the scale of the attacks, not to mention the fact that they resulted in a large number of civilian deaths on US soil, shocked the world and led to a perceptible sense of fear and vulnerability in many countries of the OSCE region, and in particular in the United States. Over 18 months since the September 11 attacks, the repercussions are still being felt throughout the world and are likely to have lasting implications. This is particularly true with regard to human rights protection. One of the most serious casualties of the post-September 11 environment is the erosion of civil and political rights in the region.

1. The Human Rights Impact of Post-September 11 Security Measures

In response to the tragedy, the member states of the OSCE[2], both individually and collectively, immediately turned their attention to a re-

1 Throughout the report, we use the term "September 11" or "the events of September 11" to refer to the terrorist attacks on Washington, DC and New York that took place on 11 September 2001.

2 This report focuses on human rights developments related to the post-September 11 fight against terrorism in the OSCE region. There are, however, human rights concerns related to this fight in other areas of the world as well. See for example, Human Rights Watch, World Report 2003: Events of 2002, (New York: Human Rights Watch, 2003), pp. xxv-xxvi. For a list of the member states of the OSCE, see appendix A.

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evaluation of their security. In the months that have passed since the tragedy, states have *inter alia* increased the powers of law enforcement and intelligence institutions, including to interrogate and detain persons, to intercept private communications and to conduct searches of private homes and personal property without the normal procedural safeguards; have tightened border controls that impede access to their territory and adopted new, restrictive asylum and immigration measures that may limit access for bona fide asylum seekers; and have authorized various registration and profiling schemes that appear to target certain groups solely because of their race, ethnicity or religion. Some of these measures are necessary and appropriate. However, many of the measures that have been adopted appear to be disproportionate to the threats posed or the goal of enhancing national security. A number of these measures violate fundamental human rights that the OSCE member states are committed to uphold, including some which are absolute rights even in times of emergency.

There are many examples of the erosion of rights in the OSCE region since September 11, but nowhere is the concern more acute than in the United States itself. The US, which has strong traditions of ensuring due process and fair trials to criminal defendants, has placed a large number of persons in legal limbo in Guantanamo Bay, Cuba – outside the jurisdiction of any state and unable to avail themselves of even the most basic due process guarantees accorded to prisoners of war. Suspects inside the US have been detained on immigration charges, as material witnesses, or designated "enemy combatants", in order to deny them due process rights. The speed with which the Bush administration abandoned any pretense of a presumption of innocence, the right to counsel and to challenge the lawfulness of detention for those held at Guantanamo and inside Afghanistan is particularly troubling, as are reports suggesting that so-called "stress and duress" methods – such as keeping prisoners naked, forcing them to maintain uncomfortable positions for hours on end, sleep deprivation and disorientation, all of which are prohibited under international law – may be used during the interrogation of detainees.[3] Similarly, although the US has a

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[3] Such "stress and duress" methods are prohibited by international law as "cruel, inhuman or degrading treatment". See for example, Ireland v. UK, (Judgment of 18 January 1978, series A, no. 25, paras. 96 and 168), in which the European Court of Human Rights held that so-called "disorientation" or "sensory deprivation" techniques, such as "wall-standing", hooding, subjection to continuous loud noise, sleep deprivation, and deprivation of food and drink combined to create a violation of article 3 of the ECHR. See also footnote 4 below.

proud history of multiculturalism and strong anti-discrimination laws, it has used widespread racial profiling as a tool in its campaign against terrorism.

The US is certainly not the only country in the region that has experienced a significant deterioration in human rights protection since September 11. The United Kingdom (UK), which already prior to September 11 had among the strongest anti-terror laws in Europe, arrested more than a dozen suspects under new powers allowing it to detain indefinitely without charge or trial persons suspected of terrorism. Germany has weakened privacy safeguards that were built up over decades, and carried out nationwide computer profiling of men of Muslim faith or Arab descent, demanding access to private and public computer databases. In Belarus, a new anti-terror law gives security forces virtually unlimited rights to enter homes and businesses and search persons and property without the need for court permission. In Russia, a new anti-extremism law is so vaguely formulated that it could be used to restrict virtually any anti-government protests. A number of countries – including countries such as Sweden, which for decades has been at the forefront in defending human rights at the international level – have extradited, expelled or deported people in violation of the principle of non-refoulement. In Uzbekistan, the government has used its involvement in the international coalition against terrorism as a guise to continue to crack down on religious, political and civil opponents on a massive scale. Many of these measures have also been rushed through parliaments without sufficient transparency or opportunities for public debate.

2. *Weakened Commitment to Human Rights Norms*

The human rights violations discussed in depth in this report raise serious concern about the willingness of the member states of the OSCE to fulfil their international human rights obligations while struggling against terrorism. However, what is most troubling is that many states apparently do not view human rights as a matter requiring due consideration in the fight against terrorism. As will be discussed in more detail later, in their rush to counter terrorism after September 11, member states of the OSCE have often focused exclusively on the security aspects of the anti-terrorism campaign with little or no willingness to make human rights protection a core component of any anti-terrorism initiative. While the importance of respecting human rights in the fight against terrorism has been rhetorically affirmed, the balancing of individual rights against the security interests of

the state has in practice tended to tip in favour of the state. International human rights norms that had been deemed beyond question prior to September 11 have suddenly become open for reconsideration. So, for example, comments that torture may, under certain circumstances, be acceptable if it is to fight terrorism, are particularly troubling.[4] As a result, international human rights standards, which have been so painstakingly developed since World War II, are now vulnerable to being eroded by the pressures exerted by the anti-terrorism campaign.

3. *HUMAN RIGHTS ARE NOT AN IMPEDIMENT TO COUNTERING TERRORISM*

Some governments argue that human rights protection is actually an impediment to the campaign against terrorism (just as they have argued in the past that due process rights were an impediment to anti-crime efforts). However, there is no evidence whatsoever that states need more power than that which is authorized by international human rights law in order to counter terrorism effectively. Human rights conventions provide for the possibility of limitations and derogations in times of crisis, recognizing that some emergencies are of such a serious nature that states may need to have access to additional tools to counter them. At the same time, however, states have accepted that their power cannot be absolute, even during emergencies, and have thus established procedural and substantive conditions for the exercise of emergency powers, accompanied by international or regional oversight. These norms are codified in international human rights conventions and are, in fact, core values of democratic states ruled by law. Thus, international law has recognized that emergency powers, while sometimes necessary, must be narrowly drawn in order not to erode the very rights that are being defended.

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4 There are reports indicating that since September 11, US authorities have used methods involving ill-treatment and torture when interrogating terrorist suspects. Government officials have also reportedly defended the use of such methods as just and necessary. In a Washington Post article that was published in December 2002, one official, for example, was quoted as saying: "If you don't violate someone's human rights some of the time, you probably aren't doing your job". Another official was quoted as saying: "There was a before 9/11, and there was an after 9/11. After 9/11 the gloves came off". See Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations – 'Stress and Duress' Tactics Used on Terrorist Suspects Held in Secret Overseas Facilities", Washington Post, 26 December 2002.

What is more, it is now universally accepted that certain tactics – such as torture and inhuman and degrading treatment – are so repugnant to the world community as to be unacceptable under any circumstances. Simply put, the ends cannot justify the means. The Inter-American Commission on Human Rights recently commented that:

> As the Commission has previously observed, "unqualified respect for human rights must be a fundamental part of any anti-subversive strategies ... Not only is a commitment to this approach dictated as a matter of principle, namely to respect the very values of democracy and the rule of law that counter-terrorism efforts are intended to preserve, it is also mandated by the international instruments to which states are legally bound ... These international legal obligations create no general exception for terrorism in their application, but rather establish an interrelated and mutually reinforcing regime of human rights protections with which states' responses to terrorism must conform.[5]

This is consistent with international humanitarian law, which applies precisely in times of the greatest crisis. States have recognized that, in times of war, certain practices must be prohibited even if some military advantage could be gained.

In fact, any fight against terrorism that does not maintain scrupulous respect for human rights is incompatible with a state's efforts to achieve national security. As one scholar has noted, "A state may be said to be secure only when all of its constituent elements, its territory, its inhabitants, and its government are secure. Security in regard to the inhabitants consists of the inviolability of their human rights. In a state where security to inhabitants is completely lacking, state security cannot be said to exist".[6]

Respect for human rights is a core component of any state governed by law. Any anti-terrorism campaign that undermines human rights is both morally bankrupt and self-defeating. In a March 2002 speech to the United Nations (UN) Commission on Human Rights, Mary Robinson, then-High Commissioner for Human Rights, observed: "Some have suggested that it is not possible to effectively eliminate terrorism while respecting human rights. This suggestion is fundamentally flawed. The only long-term guar-

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5 Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc 5, rev. 1 corr., 22 October 2002, para. 22 at http://www.cidh.oas.org/Terrorism/Eng/intro.htm.

6 Bert B. Lockwood, Jr., Janet Finn and Grace Jubinsky, "Working Paper for the Committee of Experts on Limitation Provisions", Human Rights Quarterly, vol. 7, no. 1 (1985), p.72.

antor of security is through ensuring respect for human rights and humanitarian law".[7]

4. *State Responses to Terrorism Can Also Threaten Security and Liberty*

As noted above, the struggle against terrorism and the scrupulous protection of human rights are not conflicting priorities, but integral parts of the long-term fight for liberty and security. Terrorism clearly poses a threat to the most fundamental values of personal liberty and security. Its means are antithetical to human rights and the rule of law. As such, states have a right and obligation to ensure that those in their territory are protected from terrorist violence and that the perpetrators of such violence are brought to justice. Enormous harm and loss of life has already occurred as a result of terrorist violence, and the IHF recognizes that the threat of such violence still exists.

However, the state response to terrorism can itself endanger the very freedom it seeks to protect and pose a serious threat to our security and liberty. In times of crisis and fear, states and their citizenry are more likely to make security the single priority, with little regard for the means used to achieve it. Observers of human rights in states of emergency have noted that civil liberties and human rights are particularly threatened during times of crisis:

> Emergencies exert great pressure against continued adherence to protection of human rights. In times such as these, governments often consider protecting human rights and civil liberties to their fullest extent as a luxury that must be dispensed with if the nation is to overcome the crisis it faces. Moved by perceptions of physical threat both to the state and to themselves as individuals, motivated by growing fear and by hatred toward the "enemy," the citizenry may support and even goad the government to employ more radical measures against the perceived threats. Aroused emotions frequently overshadow rational discourse both among ordinary citizens and among their leaders. In these circumstances, no-

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7 Mary Robinson, statement at 59th session of UN Human Rights Commission, 20 March 2002, via http://www.unhchr.ch/huricane/huricane.nsf/NewsRoom?OpenFrameSet.

> tions of the rule of law, rights, and freedoms take a back seat, considered as legalistic niceties that bar effective action by the government.[8]

In such an environment, there is a real danger that governments will overreact, that human rights values will become increasingly subordinated to the campaign against terrorism, and that minorities and those who represent critical voices in the society will be disproportionately affected. In the end, this process may result in an escalation in human rights abuses and a significant weakening of the mechanisms and institutions that limit absolute state power and help prevent such abuse. This in turn would lead to an increasingly insecure environment for all.

But this need not be the case. It is possible to fight terrorism effectively and protect human rights. As UN Secretary General Kofi Annan has stated: "We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long-term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism....while we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities – such as human rights – in the process".[9]

While there is no evidence that states need more power in order to combat terrorism effectively, it is clear that states seek ever greater power in times of crisis and that there is invariably a corresponding narrowing of individual rights and freedoms. Effective international and/or regional monitoring is therefore absolutely essential. International mechanisms are needed to ensure that in times of crisis or perceived crisis, when governments may be blind to concerns other than security, they are not allowed to lose sight of their long-term, as well as short-term, priorities, including the protection of human rights and rule of law. In order for such mechanisms to have any deterrent effect, however, stronger international oversight and scrutiny are needed that grant substantially less deference to states opting to derogate from and limit human rights than has been the case to date.

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8 Oren Gross and Fionnuala Ní Aoláin, "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights", Human Rights Quarterly, vol. 23, no. 3 (August 2001), pp. 638-9.

9 Speech by UN Secretary General Kofi Annan to the Security Council, 18 January 2002.

5. *A New Human Rights Status Quo?*

The fight against terrorism is a long-term, perhaps permanent, effort. Most believe that it can never be definitively won. There is no event or time at which a government will be able confidently to claim that terrorism no longer poses a threat. However, the limitations and derogations provided for in international law are exceptional by definition and should be only temporary tools that foresee a return to normalcy at the earliest possible opportunity. There is currently a danger that what international law views as an exceptional, rare occurrence – a state's emergency response – may become the new status quo. In other words, the erosion of rights will be ongoing – with no end in sight – and the minimum level of rights protection will be indefinitely lowered. Any anti-terrorism campaign that does not include human rights protection as a core component of its overall security strategy endangers the very values it is trying to preserve and is therefore counterproductive. The OSCE has worked for more than two decades to promote respect for human rights. Effective regional and international mechanisms, and political courage at the national level, are necessary to ensure that the backsliding that has occurred since September 11 is not allowed to continue.

II. EROSION OF HUMAN RIGHTS IN EIGHT KEY AREAS

This report identifies eight key groups of rights that have been eroded in the context of the anti-terrorism campaign since September 11. Member states of the OSCE have adopted a number of laws attempting to prohibit "terrorist acts" and "terrorist groups": the laws are sometimes so vaguely worded and/or are overly broad as to leave doubts as to the acts being prohibited and run the risk of arbitrary enforcement. Such vaguely worded or overly broad laws also lend themselves to selective application against opposition groups on the basis of political considerations and may result in interpretations that unduly restrict the legitimate exercise of basic civil rights such as freedom of expression, association and assembly.

As noted above, some states in the OSCE region have abandoned principles of liberty, due process and the right to a fair trial where those principles are perceived to present an obstacle to fighting terrorism and prosecuting terrorist activities. States have sought to place terrorist suspects outside the protection of the legal system, both through legislation

and action, so as to enable them to detain such suspects indefinitely without trial. In some cases, suspects have been ill-treated in detention.

This report also discusses the xenophobic backlash that occurred in many OSCE member states immediately after September 11, and the increasing number of incidents of harassment and violent attacks that were reported against people of Muslim faith or Arabic appearance. Although the initial level of violence abated after several months, in many countries it remains at a considerably higher level than prior to September 11. While most governments in the region have condemned all forms of "revenge" against Muslims, a number of national political leaders have also exploited public outrage to push through new policies that disproportionately affect Muslims and other minority groups. The policies, which include arbitrary arrests, interrogations, registration and fingerprinting, have served to aggravate intolerance and foster the perception that ordinary Muslims, Arabs and members of other minority communities are potential terrorists.

At the international, as well as regional level, there have been renewed efforts to stop the international financing of terrorist groups and acts since September 11. A UN list initially established in 1999 to freeze Taliban and Al Qaida assets was given new impetus by the Security Council in September 2001. Many OSCE states took prompt action to freeze the assets of persons and groups identified on the UN list. However, these efforts have not been accompanied by the necessary procedural safeguards: the process and criteria used to add names to the list has lacked transparency, individuals and organizations have been immediately named publicly without any opportunity to review their inclusion, mechanisms to apply for the emergency release of funds are inadequate, and until August 2002 there was no mechanism to appeal inclusion on the list.

Efforts to limit asylum and immigration have gained a newfound legitimacy in the OSCE area since September 11 with damaging consequences for refugee protection. Illegal immigration and a lax control of asylum procedures are now commonly viewed as presenting a security risk, and security arguments have been used to justify more restrictive measures toward asylum seekers, refugees and migrants. Member states have applied increasingly tough border control policies and removed undocumented migrants, often without adequate procedural safeguards, at an increasing rate. What is more, a number of OSCE member states have been willing to extradite, expel or exclude individuals from their

territory, even if there is a real threat that the person is being sent to a situation where he or she will face torture or cruel, inhuman or degrading treatment or indefinite detention without trial. Some of these measures may unduly block access to asylum procedures and increase the risk of *refoulement*, in violation of governments' obligation to provide protection to those fleeing persecution.

The member states of the OSCE have also adopted new legislation and proposals affecting privacy since September 11. Search and surveillance powers have been enhanced and judicial oversight over them has been weakened. Time limits for the retention of telecommunications traffic data have been extended, and safeguards on the collection of and access to personal data have been weakened at both national and regional levels. Government agencies have demanded increasing amounts of personal data from airline passengers, foreign nationals, students and asylum seekers, but there has been no corresponding increase in protections against its misuse. In addition, information gathered through the use of extraordinary powers granted for the conduct of terrorist investigations has not been restricted to use in those investigations.

Some OSCE member states have also restricted freedom of expression in general and freedom of the media in particular since September 11. Some states have passed legislation permitting state interference in media organizations during anti-terrorism efforts, put pressure on media outlets to refrain from critical reporting and blocked or restricted journalists' access to prisoners, court proceedings and war zones. The public's right to know about the activities of its government has been curbed in several states, and, in some cases, the inviolability of journalists' sources has been placed at risk.

Finally, some states have used the post-September security environment as a pretext to further target and repress non-violent domestic opposition. This is particularly true in Central Asia, where even before September 11 governments were aggressively persecuting those perceived as religious and political critics of the government, although the large majority of these groups advocate non-violent change. Because of their geographical proximity to Afghanistan, the governments of Central Asia have benefited from closer relations with the US and other western governments, which refrained from criticizing their poor human rights record in the immediate aftermath of September 11 and more recently have voiced muted concern, but without attaching consequences to their criticism. Similarly, as a key member of the international coalition against terrorism, the Russian gov-

ernment has faced significantly less international criticism for the human rights and humanitarian law violations being committed by Russian forces in Chechnya. The absence of effective international opposition to the repressive policies of the governments of the region has only served to enhance the sense of impunity and encourage further abuse.

This report surveys human right concerns related to the post-September 11 counter-terrorism campaign and the new security environment that has evolved in the OSCE region during that period. The report covers developments between 12 September 2001 and 1 March 2003. Given the scope of the problem and the number of countries potentially implicated, the report does not cover all possible human rights concerns that have emerged as a result of states' efforts to strengthen domestic tools for combating terrorism during this period. An attempt has been made to report on some of the most typical and troubling developments and to make recommendations to inter-governmental bodies, as well as member states of the OSCE, regarding steps that should be taken to address these concerns. There are a number of concerns not covered in the report, such as measures limiting freedom of assembly and association, which would benefit from a separate, thorough analysis. Similarly, the report does not attempt to cover developments in every country of the OSCE region. The specific country examples that are included in the report were selected because they are cases of particular concern and/or are typical of the kinds of abuses seen more generally throughout the region. The examples are not comprehensive. Thus, the fact that any specific OSCE country is not mentioned under a given heading does not automatically mean there are no such substantive concerns in that country. It may merely reflect the absence of sufficient reliable information.

The IHF hopes that this report will serve to highlight the significant deterioration in human rights protection that has occurred in some parts of the OSCE region since September 11, as well as the negative impact this has had on human rights and the rule of law as governing principles. The IHF also hopes that this report will sound an alarm for the OSCE and UN, as well as other international institutions, that stronger monitoring mechanisms and greater international supervision of states' conduct in the campaign against terrorism is absolutely essential. Ad hoc reporting and monitoring mechanisms, while welcome, are not sufficient.

As noted above, the fight against terrorism will be a long-term one. Member states of the OSCE have had 18 months to review their security

plans, outfit and train their security services to function and cooperate better, and develop greater international coordination and cooperation in the fight against terrorism. It is high time that states turned their attention and resources to ensuring that this fight takes place in a manner that does not undermine the very rights and liberties it is supposed to protect. The member states of the OSCE and the international institutions tasked with protecting human rights must insist on a renewed commitment to international standards and a strengthening of the international mechanisms to ensure state compliance with these norms. The international community must make clear its commitment to human rights as a core component of the long-term fight against terrorism.

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