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Terrorism and Human Rights No.2

New challenges and old dangers

Terrorisme et Droits de l'Homme N°2

Nouveaux défis et vieux dangers

Terrorismo y Derechos Humanos N°2

Nuevos retos y viejos peligros

Federico Andreu-Guzmán

March 2003

International Commission of Jurists

Terrorism and Human Rights No. 2

NEW CHALLENGES AND OLD DANGERS

"There is a danger worldwide that, under the guise of combating terrorism, some Governments may increase their efforts to stifle peaceful dissent and suppress opposition. In the current climate, those who question the legitimacy of some of the post-11 September so-called anti-terrorist measures, or simply anyone who does not socially conform - be they migrants, refugees, asylum-seekers, members of religious or other minorities, or simply people living at the margins of society - may be branded as terrorists and may end up being caught in a web of repression and violence."[1]

Ms. Jila Hilani,
Special Representative of the UN Secretary-General on human rights defenders

1 UN Doc. E/CN.4/2002/106, 27 February 2002, paragraph 97.

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I. Introduction

Since the 11 September 2001 attacks in the United States of America, combating terrorism has become a priority for the entire international community and one of the major, if not dominant, subjects of debate within all intergovernmental forums. This fight has picked up a breathtaking pace: a wide range of measures and decisions have been adopted at both the national and international levels. A large number of initiatives have already been adopted in the national and intergovernmental spheres, or are being prepared. Most of these initiatives relate to the definition of the crime of terrorism, police and judicial co-operation and extradition. A considerable number of them have serious consequences for human rights, international humanitarian law and the right of asylum.

As regards the United Nations, two major events must be mentioned. On the one hand, the reactivation of the work of the Ad Hoc Committee for the elaboration of a comprehensive convention on terrorism[2] and, on the other hand, the adoption of Security Council Resolution 1373 (2001). Resolution 1373 (2001), in particular, will deeply mark the coming years and raises many challenges. In addition, in the course of the year 2002, the idea of organising an international Conference on terrorism under United Nations auspices has gained momentum. Finally, on 10 June 2002, the International Convention for the Suppression of the Financing of Terrorism came into force.

At the regional level, numerous initiatives have been taken or are under way. In June 2002, the General Assembly of the Organization of American States (OAS) adopted the Inter-American Convention against Terrorism. The Ministerial Council of the Organization for Security and Co-operation in Europe (OSCE) adopted the "Bucharest Plan of Action for Combating

2 The *Ad Hoc* Committee was established by UN General Assembly Resolution 51/210, 17 December 1996.

Terrorism", in December 2001, then the "OSCE Charter on Preventing and Combating Terrorism" in December 2002. Within the European Union, two Framework Decisions have been adopted, defining the offence of terrorism and establishing common criminal sanctions, on the one hand, and creating a European arrest warrant on the other. The Council of Europe, for its part, has adopted a European Cyber-crime Convention and Guidelines on human rights and the fight against terrorism, and a draft Protocol to the European Convention on the Suppression of Terrorism is under preparation. The Parliamentary Assembly of the Council of Europe has also adopted several important texts on terrorism in 2001 and 2002. The African Summit on Terrorism adopted a Declaration Against Terrorism in October 2001. In December 2002, the OAU Convention on the Prevention and Combating of Terrorism came into force, and an additional protocol is being prepared. In April 2002, the Organization of the Islamic Conference (OIC) adopted the "Kuala Lumpur Declaration and Plan of Action on International Terrorism" and set up a Committee on terrorism.

At the national level, generally following Security Council Resolution 1373 (2001), many States have adopted or announced measures to combat terrorism. Other countries have continued to apply antiterrorist measures adopted before 11 September which had previously been the subject of strong criticism and recommendations by international human rights bodies and protection mechanisms, both at the universal and regional levels.

Reactions to the events of 11 September 2001, as well as much of the momentum gained and initiatives taken in the name of the fight against terrorism, are most preoccupying. Many of them raise serious challenges with respect to international law, especially international human rights law, humanitarian law and refugee law. Several of them stretch to the limit, or even breach human rights obligations and undermine principles of international law. In addition to this process of erosion, in many countries, weakened supervision of human rights or the acceptance of practices violating fundamental rights may be observed in the name of the fight against terrorism. The publication of an editorial in a prestigious United States newspaper raising the question of the possible need to use measures of necessary physical force - perhaps even torture - to combat terrorism, is but one example.

As the Special Representative on human rights defenders has pointed out: "It would appear… that the widespread sense of insecurity and fear that the attacks have generated internationally and domestically have given rise to a climate in which legislatures, judiciaries and the general public at large are increasingly less vigilant in their scrutiny of the actions or acts of omission of their respective executives."[3]

International human rights bodies and protection mechanisms have warned some States of the dangers involved in conducting the fight against terrorism outside international law and with contempt for their human rights obligations. Thus, in a Statement to the Ministers' Deputies of the Council of Europe on 4 October 2001, the President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment stated that:

> "Terrorist activities must meet with a strong response from State authorities; and States which have to contend with such activities are entitled to the full support of others. At the same time, the fight against terrorism must never be allowed to degenerate into acts of torture and ill-treatment or, for that matter, into violations of other human rights and fundamental freedoms; this would be to sink to the level of the terrorist and could only undermine the foundations of our democratic societies. Civilised nations must avoid the trap of abandoning civilised values."[4]

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3 UN Doc. E/CN.4/2002/106, 27 February 2002, paragraph 99.

4 Statement by the President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to the Ministers' Deputies on 4 October 2001, Document CPT/Inf (2001) 24 [EN]: 4 October 2001 (http://www.cpt.coe.int/en/annual/rep-11-speech.htm).

II. The challenges in the fight against terrorism

Generally, the challenges in the fight against terrorism are presented in terms of eradication of this scourge, traditionally through police and judicial repression and co-operation, but also through military action since 11 September 2001. Many of the reactions to the attacks on New York put the accent on military responses to terrorism. The North Atlantic Treaty Alliance Organization (NATO) has invoked Article 5 of the Washington Treaty. The North Atlantic Council also adopted a Declaration affirming "the events of 11 September to be an armed attack not just on one ally, but on us all… Accordingly, we have decided to support, individually and collectively, the ongoing US-led military operations against the terrorists who perpetrated the 11 September outrages and those who provide them sanctuary.".[5] Within the Organization of American States (OAS), at the request of the OAS Assembly of Consultation of Ministers of Foreign Affairs, the Inter-American Defense Board presented a working document based on the hypothesis that "[t]he conflict spreads, leading to a supra-regional war with ethnic and religious connotations"[6], and recommended invoking Article 3 (collective defence) of the Treaty of Reciprocal Assistance (IATRA). In its Bucharest Declaration of December 2001, the OSCE Ministerial Council asserted that "[i]n the fight against terrorism, there is no neutrality"[7] and requested States to "pursue the OSCE's concept of comprehensive and indivisible security in its politico-military dimension.".[8]

Clearly, a strongly security oriented discourse is becoming prevalent. In the name of the fight against terrorism, national measures have been taken

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5 Press Release M-NAC-2 2 (2001) 159, "NATO's Response to Terrorism, Statement issued at the Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, 6 December 2001", paragraph 3.

6 Document of the OAS Inter-American Defense Board, C-3056 (X-409), 20 September 2001, page 3.y.

7 Bucharest Ministerial Declaration, in OSCE Doc., MC.DOC/2/01, 4 December 2001, point 2.

8 *Ibid.*, point 9. See also point 12.

or announced in several countries which limit freedom of information and the press, thus infringing the basic principles of functioning democracy, or breaching fundamental rights and freedoms. Whereas some countries are confronted with real terrorist threats, in others, where there is no such threat, the fight against terrorism is invoked in order to adopt measures aimed at restraining public freedoms and restricting social and political opposition. In the name of the defence of democracy against the terrorist scourge, many measures are announced or adopted which prejudice the very foundations of democracy and the Rule of law. Some of these measures imply militarising justice and discarding the principle of separation of powers. The fight against terrorism raises the classic problem of “the end that justifies the means”. This may be one of the major issues raised by the fight against this scourge. The question must be asked whether the principles of the Rule of law and of all democracies as well as fundamental rights and freedoms can be sacrificed or put to one side in order to eradicate terrorism. As the Special Rapporteur on terrorism and human rights, Ms. Kalliopi K. Koufa explains, the problem is to find the “balance between the often conflicting imperatives of securing and defending democratic society, and of safeguarding civil liberties and human rights.”[9]

This is an old debate. Can those responsible for odious crimes be deprived of their fundamental rights? Does the inhumane nature of their illegal behaviour justify denying their humanity as human beings? Can the fight against barbarity, which proclaims itself to be a defence of elementary principles of humanity, exonerate reactions which deny these principles and become barbarous themselves? The Second World War, as well as genocide in the former Yugoslavia and Rwanda, have already raised these questions. Faced with crimes against humanity and war crimes committed by the major leaders of the Third Reich, many voices were raised in favour of their summary execution. The Soviet Union and the United States proposed that they be tried by an international court, which led to the establishment of the international military tribunal in Nuremberg. In his report to President Roosevelt in response to the question of what to do with the Nazi leaders, Robert H. Jackson, who became one of the prosecutors in Nuremberg, claimed that

9 UN Doc. E/CN.4/Sub.2/2002/35, 17 July 2002, preamble, paragraph 4.

“[w]e could, of course, set them at large without a hearing. But it has cost unmeasured thousands of American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.”[10] The combat against even the most odious crimes cannot justify depriving those responsible of their fundamental rights, in particular the right to be tried by an independent and impartial court, to enjoy judicial guarantees, not to be arbitrarily deprived of life and not to be tortured. The elaboration of a draft *Code of crimes against the peace and security of humanity* by the International Law Commission, the establishment of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, and the adoption of the Rome Statute of the International Criminal Court only serve to confirm this principle. As stressed by the Secretary-General of the Council of Europe, Mr. Walter Schwimmer, during the 10th International Judicial Conference, on 23 May 2002:

> “Terrorism is an assault on human rights, democracy, and the Rule of law. It must be defeated with utmost vigour, but not at any cost, certainly not at the cost of those values. We must not destroy or even undermine democracy on the grounds of defending it, as the European Court of Human Rights warned us in a 1978 judgment delivered in the context of the Baader-Meinhof terrorism in Germany.”[11]

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10 The Avalon Project: International Conference on Military Trials: London, 1945 - Report to President Roosevelt by Mr. Justice Jackson, June 6, 1945; http://www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm.

11 Opening Speech, Secretary-General of the Council of Europe, Mr. Walter Schwimmer, 10th International Judicial Conference (Strasburg, 23 - 24 May 2002), available on internet, Council of Europe: http://www.coe.int/T/E/ Communication_and_Research/Press/Events/5.-Ministerial_conferences/2002/2002-05_International _Judicial_Conference_-_Strasbourg/Disc_SG.asp#TopOfPage.

It is certain that ever State has the right and duty under international law to combat and suppress criminal acts which, by their nature, aims, or the means used to commit them are alleged to be, or characterised as terrorist acts. Furthermore, the international community must adopt the necessary instruments and means to combat this scourge. Nonetheless, States must fight terrorism in respect for the Rule of law, international law and the norms and obligations of international human rights and humanitarian law. When suppressing terrorist acts, State action must not ignore certain elementary principles of criminal law and international law. The concepts of *jus cogens* obligations, peremptory norms of international law and inderogable rights are essential, even unavoidable, in this respect as they constitute a basic reference.

The odious and particularly serious nature of some terrorist acts cannot serve as a pretext for States to avoid their international obligations concerning human rights, especially where inderogable rights are concerned. This was underlined by the UN High-Commissioner for Human Rights, in her report entitled "Human rights: a uniting framework":

> "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. 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."[12]

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12 Report of the High Commissioner submitted pursuant to General Assembly Resolution 48/141, Human rights: a uniting framework, UN Doc. E/CN.4/2002/18, 27 February 2002, paragraph 5.

III. Security council resolution

1. Resolution 1373 and the Counter-Terrorism Committee

On 28 September 2001, The United Nations Security Council adopted Resolution 1373 (2001). Given that it was adopted pursuant to Chapter VII of the UN Charter, the resolution is binding on all UN Member States. Reaffirming that all acts of international terrorism constitute a threat to international peace and security and to the inherent right of individual or collective self-defence, the Security Council called on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism. The Security Council also recognized the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of terrorist acts.

In Resolution 1373 (2001), the Security Council decided, in particular, that all States must prevent and suppress the financing of terrorist acts; criminalize terrorist acts and the willful provision or collection of funds in order to carry out terrorist acts; and freeze funds and other financial assets or economic resources of persons who commit terrorist acts or participate in the commission of terrorist acts, as well as all entities belonging to them or coming under their control. The Security Council also decided that all States shall refrain from providing any form of support to entities or persons involved in terrorist acts, take the necessary steps to prevent the commission of terrorist acts and 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. The resolution also imposes several obligations concerning judicial, administrative and police assistance and co-operation; effective border controls of identity papers and travel documents; and the exchange of operational information and intelligence. As regards refugees, the resolution calls on States to refuse to grant asylum to those who finance, plan, facilitate or commit acts of terrorism or harbour the authors; to take

appropriate measures, "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"; and "ensure… 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".

Finally, the Security Council decided to create a committee of the Security Council for the suppression of terrorism – better known as the Counter-Terrorism Committee (CTC) –, composed of all the members of the Security Council, the role of which is to monitor State implementation of the obligations contained in Resolution 1373 (2001). The Security Council called on all States to report to the CTC on the steps taken to implement the resolution. On 12 November 2001, the Security Council adopted Resolution 1377 (2001), further mandating the CTC to examine the means of providing technical assistance to States, in co-operation with regional and sub-regional intergovernmental organizations, for the implementation of the provisions of Resolution 1373 (2001). Thus, the CTC has a double mandate with respect to Resolution 1373 (2001): monitor its implementation by States and provide and co-ordinate technical assistance granted in this context.

The CTC began its work in October 2001, and has now established written guidance notes for States concerning the sort of information that States must provide in their reports.[13] Under these guidelines, when compiling their reports, "States should aim to demonstrate concisely and clearly, by reference to the provisions of resolution 1373 (2001), the legislative and executive (ie administrative or non-legislative) measures in place or contemplated to give effect to the resolution, and the other efforts they are making in the

13 The Guidelines are available at: http://www.un.org/Docs/sc/committees/1373/1373 DocsEng.htm.

14 "Guidance for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001", paragraph 1(2).

areas covered by the resolution."[14] The CTC has designated 6 experts to assist it in the analysis of the reports received.[15] By October 2002, 174 States and 5 bodies had presented reports to the CTC.[16] Only 17 States had not yet presented a report to the CTC by that date.

2. Resolution 1373 and national measures

At the national level, generally following Security Council Resolution 1373 (2001), many states have adopted or announced measures to combat terrorism. Several of these antiterrorist measures and initiatives had already been the object of strong criticism and recommendations from international human rights bodies and protection mechanisms, both at the universal and regional levels. As Ms Kalliopi K. Koufa, Special Rapporteur on terrorism and human rights for the UN Sub-Commission on the Promotion and Protection of Human Rights, explains:

"In addition to the events of 11 September 2001, acts of terrorism throughout the world have escalated, especially related to a number of other crisis situations and "hot spots" throughout the world. Responses to terrorism have themselves been dramatic, sometimes undertaken with a sense of panic or emergency. In fact, there still exists a tone of 'close-to-panic' reaction in much of the political and legal activity relating to terrorism […]. And 'close-to-panic' reactions may have serious implications for international and human rights law, as well as humanitarian law."[17]

Thus, in October 2002 for example, following the hostage-taking at a theatre in Moscow, the Russian Duma (the lower House of Parliament) approved a Bill modifying the 1991 Law on the press and the 1998 Law on

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15 They are Mr. Walter Gehr (Austria), Ms. Heidi Broekhuis (The Netherlands), Mr. Joel Sollier (France), Mr. Jeremy Wainwright (Australia), Mr. M.R. Sivaraman (India), and Mr. Benedicto Jimenez Bacca (Peru).

16 "Declaration, President of the Security Council", UN Doc. S/PRST/2002/26, 8 October 2002.

17 UN Doc. E/CN.4/Sub.2/2002/35, 17 July 2002, paragraph 59.

the fight against terrorism.[18] The Bill provided for the non-restitution of the bodies of terrorist attackers to their next of kin and prohibited any information concerning the place of burial. The representative of President Vladimir Poutine in the Duma, Mr. Alexandr Kotenkov, justified this measure on the basis that "a terrorist is not only an assassin, but also a member of a political organization pursuing specific aims. The sole act of burial is a political act the use of which must be prevented from the outset".[19] Drastic restrictions on freedom of information and the press were imposed. The Law was adopted on 13 November by the Federation Council (Upper House), after a parliamentary debate lasting less than an hour.

UN Human rights treaty bodies have been able to examine the impact on human rights of the measures adopted by some States. Thus, in its observations to the United Kingdom of Great Britain and Northern Ireland, the Human Rights Committee noted "with concern that the State party, in seeking *inter alia* to give effect to its obligations to combat terrorist activities pursuant to Security Council resolution 1373 (2001), is considering the adoption of legislative measures which may have potentially far-reaching effects on rights guaranteed in the Covenant and which, in the State party's view, may require derogations from human rights obligations. The State party should ensure that any measures it undertakes in this regard are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the Covenant."[20] As regards Egyptian antiterrorist measures, the Committee noted with alarm "that military courts and State security courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those courts' independence and their decisions are not subject to appeal before a higher court... [and] that Egyptian nationals suspected or convicted of terrorism abroad and expelled to Egypt have not benefited in detention from the safeguards required to ensure that they are not ill-treated, having notably been

18 Federal Law N° 130-FZ, concerning the fight against terrorism, 25 July 1998.

19 Declaration by Mr. Alexandr Kotenkov quoted in El País, 17 October 2002, (original en Spanish, free translation).

20 UN Doc. CCPR/CO/73/UK,CCPR/CO/73/UKOT, 5 November 2001, paragraph 6.

held incommunicado for periods of over one month".[21] Concerning restrictions on the right of asylum and expulsion proceedings initiated as part of the fight against terrorism, the Human Rights Committee expressed its concern at measures taken by Sweden[22], New-Zealand[23] and Yemen[24]. The Committee also observed with preoccupation that some States had not made any attempt to ensure that legislative and other measures taken in application of Security Council Resolution 1373 (2001) respected the obligations of Parties to the Covenant.[25]

The Committee Against Torture has also expressed its preoccupation with the practice of expelling foreigners suspected of terrorist acts, without any right to appeal, in Sweden.[26] Concerning the Russian Federation, the Committee reiterated that even in the fight against terrorism, no exceptional circumstance whatsoever may be invoked as a justification of torture.[27] The Committee for the elimination of racial discrimination noted with concern that, in New Zealand, "almost all asylum-seekers presenting themselves at the border after the events of 11 September 2001 were initially detained. While it notes that this practice by the New Zealand Immigration Service was successfully challenged in the High Court and the practice of detaining asylum-seekers has been suspended except for a small number of cases, it also notes that the High Court's decision has been appealed by the

21 "Concluding observations of the Human Rights Committee: Egypt", UN Doc. CCPR/CO/76/EGY, 28 November 2002, paragraph 16.

22 "Concluding observations of the Human Rights Committee: Sweden", UN Doc. CCPR/CO/74/SWE, 24 April 2002, paragraph 12.

23 "Concluding observations of the Human Rights Committee: New-Zealand", UN Doc. CCPR/CO/75/NZL.

24 "Concluding observations of the Human Rights Committee: Yemen", UN Doc. CCPR/CO/75/YEM.

25 "Concluding observations of the Human Rights Committee: Republic of Moldavia", UN Doc. CCPR/CO/75/MDA, 26 July 2002, paragraph 8.

26 "Conclusions and Recommendations of the Committee against Torture - Sweden", UN Doc. CAT/C/CR/28/6, 6 June 2002, paragraph 6(b).

27 "Conclusions and Recommendations of the Committee against Torture - Russian Federation", UN Doc. CAT/C/XXVIII/Concl.5, 16 may 2002, paragraph 4.

Immigration Service and that the practice may resume if the appeal is successful."[28] With respect to Canada, the Committee has expressed its concern that "in the aftermath of the events of 11 September 2001 Muslims and Arabs have suffered from increased racial hatred, violence and discrimination. The Committee therefore welcomes the statement of the Prime Minister in the Ottawa Central Mosque condemning all acts of intolerance and hatred against Muslims, as well as the reinforcement of Canadian legislation to address hate speech and violence. In this connection, the Committee requests the State party to ensure that the application of the Anti-terrorism Act does not lead to negative consequences for ethnic and religious groups, migrants, asylum-seekers and refugees, in particular as a result of racial profiling."[29]

The thematic mechanisms of the Commission on Human Rights have also dealt with these phenomena. On 10 December 2001, on the occasion of Human Rights Day, 17 special rapporteurs and independent experts on the Commission on Human Rights published a joint declaration in which they reminded States that under international law they are bound to ensure respect for human rights and fundamental freedoms. Deeply concerned by laws and other measures adopted or envisaged to combat terrorism and protect national security, which tend to restrain the enjoyment of human rights and fundamental freedoms, the special rapporteurs and independent experts reminded States, in particular, of the fundamental principle of non-discrimination under which everyone is entitled to enjoy 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".

Since 11 September, in many countries, the situation of certain human groups has degraded and their rights have been weakened. They are frequently confronted with added difficulties or affected by measures taken in

28 "Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand", UN Doc. A/57/18, 1 November 2002, paragraph 429.

29 "Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada", UN Doc. A/57/18, 1 November 2002, paragraph 338.

the name of the fight against terrorism. These groups include human rights defenders, migrants, asylum seekers and refugees, members of religious and ethnic minorities, political activists and journalists. Accordingly, in 2002, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, explained how, “[i]n the ensuing confusion, some people were quick to associate Muslims and/or Arabs with terrorists [and] that the terrorist attacks of 11 September provoked racist reactions against Muslims, Arabs and other Middle Eastern population groups in a number of countries, in particular Australia, Canada, the United States and several member countries of the European Union (Germany, Belgium, Denmark, France, Netherlands, Portugal, the United Kingdom and Sweden). There were reports of an increase in insults, physical assaults against members of those communities and destruction of their property. The authorities of the countries concerned and most of the other political players in those countries spoke up against these racist reactions.”[30] The Special Rapporteur on the human rights of migrants has also expressed her concern for the situation of migrants and has warned the International Community against “policies discriminating against migrants because of their national origin”.[31] The Special Representative on human rights defenders observed, in her 2002 report, that “In the current climate, upholding human rights and fundamental freedoms is being portrayed in a number of countries as a threat to national and international security. Against this stark reality, human rights defenders are finding themselves under siege. Peaceful pro-independence activists are being portrayed as disseminators of propaganda likely to harm the State, as a threat to national security, as attempting to overthrow the Government and as aiding and abetting terrorism. While spuriously equating legitimate and peaceful advocacy of the right to self-determination with terrorism - however defined - is not a new phenomenon, it is certainly assuming a greater resonance and human rights defenders working for the realization of peoples’ quests for self-determination are experiencing some of their darkest hours.”[32] The Special Representative also

30 UN Doc. E/CN.4/2002/24, 13 February 2002, paragraph 12.

31 UN Doc. E/CN.4/2002/94, 15 February 2002, paragraph 46.

32 UN Doc. E/CN.4/2002/106, 27 February 2002, paragraph 103.

noted that "[i]n the aftermath of the 11 September attacks, human rights defenders face greater challenges in their work of promoting and protecting the human rights of all."[33] The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, preoccupied by the fact that several States have responded to the events of 11 September by adopting laws which have negative implications for certain rights, including freedom of expression, noted that "[t]o respond to terror by rolling back human rights which in some cases have taken centuries to establish is to play into the hands of the terrorists and to let fear overcome rights."[34]

3. Challenges and shortfalls in Resolution 1373 and the CTC

Resolution 1373 (2001) is heavy with consequences due to its compulsory nature and the wide range of obligations it imposes on States. In implementing Resolution 1373 (2001), many countries have adopted new measures, in particular new criminal legislation to combat terrorism, or applied existing national legislation. In other countries, similar projects are being prepared. Many of these measures involve serious challenges to international law, in particular international human rights law, humanitarian law and refugee law.

Unfortunately, Resolution 1373 makes too little mention of international law, especially human rights. A reference to international law is made with respect to exchanging intelligence, extradition and abuse of the right of asylum. Yet the Security Council makes no mention of the fact that "all measures to counter terrorism must be in strict conformity with the relevant provisions of international law including international human rights standards"[35], as the General Assembly and the Commission on Human Rights

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33 *Ibid.*, paragraph 106.

34 UN Doc. E/CN.4/2002/75, 30 January 2002, paragraph 74.

35 UN General Assembly Resolution 54/164, 17 December 1999 (preamble, last paragraph), and UN General Assembly Resolution 56/160, 19 December 2001.

36 See UN Commission on Human Rights Resolutions 2002/35, 2001/37, 2000/30, 1999/27 and 1998/47.

have reiterated insistently.[36] This absence is not a simple problem of semantics. This notable absence, when linked with reiterated references to national legislation, constitutes a source of great concern. In her report entitled "Human rights: a uniting framework", the UN High-Commissioner for Human Rights underscored the "serious human rights concerns that could arise from the misapplication of resolution 1373 (2001)".[37]

One of the paradoxes in Resolution 1373 is that it establishes a long list of legal obligations aimed at combating terrorism without providing any legal definition. As the Chief Commissioner of the French National Police, Mr. Jean-François Gayraud, and the Judge, David Sénat, have noted, "Resolution 1373... opens the universal hunting season on terrorism without defining it".[38] Accordingly, in order to satisfy their obligations under Resolution 1373, States have recourse to the definitions of terrorism adopted in their domestic legislation. The latter differ widely in nature and incriminate a range of behaviour. Some national legislation incriminates acts which cannot be considered "terrorist acts". Others incriminate acts which are licit under international law, such as political and/or social opposition and exercise of the freedom of association and expression. Several domestic systems establish legal definitions of the crime of terrorism in vague imprecise terms, thus allowing the criminalisation of legitimate and/or licit acts under international law as well as legitimate forms of exercise of fundamental freedoms and peaceful political and/or social opposition. This type of incrimination violates the principle of legality for crimes, *nullum crimen sine lege*. This universally recognised principle[39], especially in human rights treaties[40], prescribes that the legal definitions of criminal offences must be

37 Report of the High Commissioner submitted pursuant to General Assembly Resolution 48/141, Human rights: a uniting framework, UN Doc. E/CN.4/2002/18, 27 February 2002, paragraph 31.

38 Jean-François Gayraud; David Sénat, Le terrorisme, Collection "Que sais-je?", N° 1768, Presses universitaires de France, 3ème édition, Paris, 2002, page 29.

39 The International Law Commission has declared it to be a fundamental principle of criminal law (UN Doc., Supplement N° 10 (A/49/10), page 81).

40 Article 15 of the International Covenant on Civil and Political Rights, Article 7 of the European Convention on Human Rights; Article 9 of the American Convention on Human Rights; and Article 7 of the African Charter of Human and Peoples' Rights.

strictly construed and exempt of all ambiguity.[41] The corollaries of this principle are the non-retrospective application of criminal law, the restrictive interpretation of criminal law and the prohibition of analogy.[42] As indicated by the UN Special Rapporteur on the independence of judges and lawyers, such definitions violate international human rights law and the "general conditions provided in international law".[43] For example, the Human Rights Committee recommended that the Egyptian authorities revise their antiterrorist law because "[t]he definition of terrorism contained in that law is so broad that it encompasses a wide range of acts of differing gravity."[44] This concern was reiterated in 2002, when the Committee recommended that "[t]he State party must ensure that steps taken in the campaign against terrorism are fully in accordance with the Covenant. It should ensure that legitimate action against terrorism does not become a source of violations of the Covenant."[45]

Resolution 1373 (2001) confers power on the CTC to monitor its implementation. This involves monitoring the measures taken to execute the obligations imposed by Resolution 1373 (2001), i.e. measures to combat terrorism. But nothing is said about monitoring the compliance of these measures with the norms and international obligations stemming from

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41 See for example, "Concluding Observations, Human Rights Committee: Algeria", UN Doc. CCPR/C/79/Add.95, 18 August 1998, paragraph 11; "Concluding Observations, Human Rights Committee: Portugal (Macao)", UN Doc. CCPR/C/79/Add.115, 4 November 1999, paragraph 12; and "Concluding Observations, Human Rights Committee: Democratic Peoples Republic of Korea", UN Doc. CCPR/CO/72/PRK, 27 August 2001, paragraph 14. See, also, European Court of Human Rights, Kokkinakis v. Greece, Judgement, 25 May 1993, Series A, N° 260-A, page 22, paragraph 52.

42 This principle and its corollaries apply both to national criminal law and international criminal law. Thus, Article 22 (2) of the Rome Statute provides that: "The definition of a crime shall be strictly construed and shall not be extended by analogy".

43 Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/1998/39/Add.1, paragraph 129.

44 "Observations and recommendations, Human Rights Committee - Egypt", CCPR/C/79/ Add.23, 9 August 1993, paragraph 8.

45 "Concluding Observations, Human Rights Committee: Egypt", UN Doc. CCPR/CO/76/EGY, 11 November 2002, paragraph 16.

human rights, international humanitarian law and refugee law. This is confirmed by the guidelines for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001), drafted by the CTC.[46] States are not requested to provide information in their reports concerning existing or proposed national safeguards for the protection and respect of human rights, international humanitarian law and refugee law, in the framework of the fight against terrorism. Neither Resolution 1373 nor the guidelines adopted by the CTC refer to monitoring of the compliance of antiterrorist measures with international human rights law. The Chairman of the CTC has announced on several occasions that a human rights dimension is to be included in monitoring by the Committee. These announcements are important, but they are not sufficient to guarantee effective monitoring, because CTC control is fundamentally based on a criminal law approach, with human rights relegated to a residual role.

This failing is of great concern given the important consequences of Resolution 1373 (2001) for human rights. There is a serious deficit as regards the mechanisms for monitoring human rights principles and obligations faced with State implementation of Resolution 1373 (2001). The United Nations human rights system, as it stands, is not in a position to reply to the serious challenges, needs and urgency created by Resolution 1373 (2001). The control exercised by human rights treaty bodies and the proceedings of the Commission on Human Rights is important but insufficient.

The committees established under the various human rights conventions exercise control through the examination of State periodic reports (administrative review) or individual communications (quasi-judicial review). Although important and necessary, this control has legal, procedural, structural and operational limits. Review, whether it be administrative or quasi-judicial, can only by exercised by each Committee with respect to the States

46 "Guidance for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001", Web page: http://www.un.org/Docs/sc/committees/1373/guide.htm.

47 As for the Human Rights Committee, 44 States are not parties to the International Covenant on Civil and Political Rights. As for the Committee Against Torture, 61 States are not parties to the Convention against Torture and Other Cruel, Inhuman or

Parties to the relevant human rights treaty.[47] Moreover, quasi-judicial review is subject to recognition by the State Party to the treaty of the competence of the respective Committee to accept individual communications. Administrative review is also limited by the fact that it is only exercised in relationship to the rights and obligations set out in each treaty. That being said, it must be admitted that the International Covenant on Civil and political Rights covers, in a general way, all human rights, excepting economic, social and cultural rights. The periodic nature of the reporting system, the immense accumulated delays in presentation of reports and the limited work capacity of the Committees, largely the result of budgetary constraints, are also factors which limit review. Thus, for example, the Human Rights Committee examines an average of 15 to 20 reports per year. Since the adoption of Resolution 1373 (2001) and up until November 2002, the Human Rights Committee has examined the reports of 12 States Parties to the Covenant , for six of which it has expressed concern at the antiterrorist measures taken and has reiterated that all States Parties must ensure that the measures taken to implement the Security Council resolution fully respect the Covenant. Quasi-judicial review is random, because it depends on the Committee receiving individual communications. In addition, individual communication proceedings generally drag on for at least three years, if not

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Degrading Punishment or Treatment. As for the Committee on the Elimination of Racial Discrimination, 28 States are not parties to the International Convention on the Elimination of All Forms of Racial Discrimination. As for the Committee for the Elimination of All Forms of Discrimination Against Women, 23 States are not parties to the Convention on the Elimination of All Forms of Discrimination Against Women. As for the Committee for the Rights of the Child, only two countries have not signed the Convention on the Rights of the Child.

48 Thus for example, as regards communications before the Human Rights Committee, 88 of the 149 States Parties to the International Covenant on Civil and Political Rights are not parties to the optional Protocol, which bestows this competence on the Committee. The Convention on the Rights of the Child does not establish a system of individual communications.

49 Azerbaijan, Egypt, Georgia, Hungary, New-Zealand, Moldavia, the United Kingdom, Sweden, Switzerland, Togo, Ukraine and Yemen. During this period the Committee should also have examined three other reports: Afghanistan, Gambia and Surinam.

50 Egypt (CCPR/CO/76/EGY), New Zealand (CCPR/CO/75/NZL), Moldavia (CCPR/CO/75/MDA), Great Britain (CCPR/CO/73/UK,CCPR/CO/73/UKOT) Sweden (CCPR/CO/74/SWE) and Yemen (CCPR/CO/75/YEM).

more. In this respect both administrative and quasi-judicial review is more *ex post facto* than preventive.

The special control mechanisms of the Commission on Human Rights are also unable to reply to the need to monitor measures adopted under Resolution 1373 (2001). Although the Commission's control covers all United Nations Member States, it is based on a thematic approach, limited by the nature of each mandate, and does not, therefore, allow integrated supervision. Furthermore, for several years now, the special mechanisms of the Commission on Human Rights have suffered serious budgetary restrictions and grave shortages of secretarial personnel. Thus, rapporteurs and special representatives, experts and chairs of the Commission's working groups have affirmed that the inadequate administrative support provided by the High-Commission to mandate holders has become a serious factor which “causes a major disruption in their work”.[51]

Accordingly, the establishment of a mechanism or system to supervise the compliance of antiterrorist measures adopted in the implementation of Resolution 1373 (2001) by States with international norms and human rights obligations is indispensable. Such a system, or mechanism, should integrate the work of treaty bodies, in particular the Human Rights Committee, as well as the mechanisms and special proceedings used by the Commission on Human Rights. To be effective, it should have both a distinct control function, and preventive and technical assistance dimensions. The UN High-Commissioner for Human Rights should be at the centre of this system, by reason of the general mandate established by UN General Assembly Resolution 48/141 in 1993.[52] Finally, such a system would have to interact and co-operate with the CTC, following clearly established bases and procedures.

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51 “Report of the United Nations High Commissioner for Human Rights and follow up to the world conference on human rights, effective functioning of human rights mechanisms, Note by the United Nations High Commissioner for Human Rights”, UN Doc. E/CN.4/2002/14, 11 September 2001, paragraph 76.

52 Paragraph 4 of Resolution 48/141, stipulates that “the High Commissioner for Human Rights shall be the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General”. In particular, the High Commissioner has the responsibility to: “promote

During the 58th session of the Commission on Human Rights, in 2002, Mexico and other countries presented a draft resolution establishing a mechanism to control national measures adopted under Resolution 1373 (2001) with reference to international human rights law, humanitarian law and refugee law. The proposed mechanism was anchored within the United Nations High Commissioner for Human Rights. However, due to strong opposition from many States and the chance that the object of the draft resolution might be denatured, Mexico withdrew the proposed text. In June 2002, the Chairman of the CTC publicly expressed the need to integrate a human rights dimension into control of the implementation of Resolution 1373 (2001).[53] The Chairman announced at that time that contact had been made between the CTC and the High-Commissioner for Human Rights, and welcomed the parallel control of the respect for human rights obligations. Following these contacts, the proposals for "further guidance" for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001)"[54] formulated by the High-Commissioner for Human Rights in her report, entitled "human rights: a uniting framework", to the Commission on Human Rights in February 2002, were integrated by the CTC in its "Guidance for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001".[55] This was the substance of the High Commissioner for Human Rights' report to the General Assembly, during its 57th session in 2002.[56]

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and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights; … provide … advisory services and technical and financial assistance … ;play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world … ; [and] coordinate the human rights promotion and protection activities throughout the United Nations system" (Paragraph 4, a, d, f and i).

53 Presentation by Ambassador Jeremy Greenstock, Chairman of the Counter Terrorism Committee, at the Symposium on "Combating International Terrorism: the contribution of the United Nations", held in Venice from 3 to 4 June 2002. Text available on the Web page: http://www.un.org/Docs/sc/committees/1373/1373DocsEng.htm. In October 2002, the High Commissioner for Human Rights spoke before the CTC.

54 UN Doc. E/CN.4/2002/18, 27 February 2002, Annex I.

55 See Web page: http://www.un.org/Docs/sc/committees/1373/briefings.htm

56 "Report, High-Commissioner for Human Rights", UN Doc. A/57/36, paragraph 3.

This first step towards rectifying the situation was followed, in December 2002, by the adoption of UN General Assembly Resolution 57/219, entitled "Protecting human rights and fundamental freedoms while countering terrorism". In that resolution, the General Assembly charges the UN High-Commissioner for Human Rights with responsibility to formulate general recommendations concerning the obligation of States to promote and protect human rights and fundamental freedoms while countering terrorism. The General Assembly also reaffirmed that States must ensure that all measures taken to combat terrorism are in compliance with their obligations under international law, and in particular, that they respect internationally recognised human rights, refugee law and humanitarian law. Although this was a new step forward and without denying the importance of the mandate conferred on the High-Commissioner, it must be observed that the resolution does not establish any concrete system of supervision for human rights. During debate before the General Assembly, the Russian Federation made a proposal to draft an effective "code for the protection of human rights against terrorism".[57] However, the Russian proposal focuses on the fight against terrorism as a means to protect human rights rather than the protection of human rights in combating this scourge. Although the proposal was not retained, the Russian Federation has announced that it intends to discuss it again during the 59th session of the Commission on Human Rights in March-April 2003.

57 Letter dated 5 November 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc. A/C.3/57/7.

IV. The draft convention on international terrorism

Following 11 September 2001, work has continued on the draft Comprehensive Convention on International Terrorism within the Ad Hoc Committee set up by General Assembly Resolution 51/210 in 1996, and the debates commenced in 2000 have taken on greater importance. The Ad Hoc Committee met in October 2001 and January 2002.[58] At that stage, the draft international convention already contained several sources of concern, especially concerning the definition of the crime of international terrorism, the scope of the convention and international humanitarian law, the principle of *non-refoulement* and safeguards against impunity. Amnesty International,[59] Human Rights Watch[60] and the International Commission of Jurists[61] all raised questions and concerns relating to these subjects.

Upon the initiative of the Ad Hoc Committee, the Sixth Committee of the General Assembly decided, on 7 October 2002, that its work should continue in the Committee, within the framework of a Working Group.[62] During its first session from 15 to 16 October 2002, the Working Group examined the draft Comprehensive Convention on International Terrorism.[63] The Working Group only examined some of the provisions of the draft convention. Nevertheless, several of the problems raised by the International Commission of Jurists in January 2002 still persisted.

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58 UN Docs. A/C.6/56/L.9 and A/57/37.

59 See "Comprehensive Convention Against International Terrorism - Joint Letter - Amnesty International/Human Rights Watch", 28 January 2002 (http://hrw.org/press/2002/01/terror012802-ltr.htm).

60 See "Human Rights Watch Commentary on the Draft Comprehensive Convention on Terrorism", 15 October 2001 (http://www.hrw.org/press/2001/10/terrorcom1017.htm).

61 See "International Commission of Jurists (ICJ)'s position on the draft Comprehensive Convention on International Terrorism", 24 January 2002 and Terrorism and Human Rights, International Commission of Jurists, Geneva, April 2002, pages 34-43.

62 UN Doc. A/C.6/57/L.9, paragraphs 1 and 2.

63 UN Doc. A/C.6/57/L.9, 16 October 2002.

The proposed definition of the crime of international terrorism (Articles 2 and 2 bis) raises many problems, especially concerning the principle of legality, *nullum crimen sine lege*. The definition contains several elements which go against a clear, precise definition of the offence. Certain expressions, such as "serious damage", "major economic loss", "its nature or context", and "a credible and serious threat", refer to unclear, vague and uncertain concepts. The use of the terms "by its nature or context", which suggest that the intentional element will depend on the "functionality" of the crime and not on the intention of the author (*mens rea*), delineates a principle of strict responsibility, contrary to the principle of subjective responsibility in criminal law and the principle of legality.[64] The Working Group was unable to reach consensus on the definition of the crime of international terrorism in October 2002. Several governmental delegations stated that the definition could only be finalised after agreement on the scope of the Convention, that is Article 18.

The scope of the Convention (Articles 1.2 and 18.2) is also a source of concern. Article 18(2) of the original draft excludes armed forces, defined as "Military Forces of a State" (Article 1.2), from the scope of the Convention. However, the draft does not exclude non-state parties to an internal armed conflict from the scope of the Convention[65] and movements which are "fighting against colonial domination and alien occupation and against

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64 As Professor Pierre-Marie Dupuy points out, subjective responsibility in criminal matters, and individualised sentencing, are principles of international criminal law and peremptory rules ("Normes internationales pénales et droit impératif (jus cogens)",.in H. Ascencio, E. Decaux and A. Pellet, Droit international pénal, Ed. A. Pedone, Paris 2000, Ch. 6, paragraphs 10 and 11, page 74). See also, Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, Doc OAS/Ser.L/V/ll.116, Doc. 5 rev. 1 corr., 22 October 2002, paragraph 227.

65 See Common Article 3 to the Geneva Conventions and Article 1 of the Additional Protocol relating to the protection of victims of non-international armed conflicts.

racist regimes".[66] The result is to criminalise under international law all acts of war perpetrated by such parties and movements, whether they comply with international humanitarian law or not. Such a provision is contrary to the principles of international humanitarian law and allows the penalisation of acts which are licit under the 1949 Geneva Conventions and their two additional Protocols. This amounts to a fundamental breach of existing international law. To be in line with the provisions of international humanitarian law, the Convention would have to exclude from its scope all parties to such conflicts, whether they be governmental armed forces, non-governmental parties to an internal armed conflict, as envisaged in common Article 3 to the Geneva Conventions, or movements which "are fighting against colonial domination and alien occupation and against racist regimes". During debate in January 2002, two new drafts of paragraph 2 were proposed: one by the Co-ordinator and another by the Organization of the Islamic Conference. The latter excludes the parties to armed conflicts, and not just State armed forces, from the scope of the convention.[67] Nevertheless, in October 2002, the Working Group had not reached any consensus on the subject.

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66 Article 1, para. 4 of the First Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts. It should be noted that this concerns movements which are struggling in the exercise of their right to self-determination, enshrined in the UN Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations: UNGA Resolution 2625 (XXV), 1970. This does not apply to just any national liberation movement, but to those recognised as fighting in colonial territories, against foreign occupation or against racist regimes. Numerous resolutions of the UN General Assembly lay down the conditions under which such struggles will be considered legitimate under international law. Thus, for example, General Assembly Resolution 2105 (XX), 20 December 1965, recognised the legitimacy of the struggle of peoples under colonial domination for the implementation of their right to self-determination and independence. In Resolution 3103 (XXVIII), 12 December 1973, entitled "Basic Principles concerning the Legal Status of Combatants Struggling Against Alien Domination and Racist Regimes", the General Assembly specified the legal status of combatants in national liberation movements.

67 The provision proposed by the OIC is as follows: "The activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention." (UN Doc. A/AC.252/2002/CRP.1, Annex IV).

Concerning the principle of *non-refoulement*, set out in Article 15 of the draft, no improvement has been made to the text. Article 15 summarises the "Irish clause" of the European Convention on Extradition, adding reasons of ethnic origin, but does not take account of the principles of international human rights law concerning *non-refoulement*[68], thus reducing the scope of that principle. Moreover, Article 15 of the draft subjects *non-refoulement* to the existence of "substantial grounds for believing" that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion. This requirement for "substantial grounds for believing" is not required by Article 33 of the Convention relating to the status of refugees. This additional condition included in Article 15 thus violates the protection established by Article 33 of the Convention relating to the Status of Refugees.

However, it must be underscored that a safeguard clause against impunity has been incorporated in Article 18 (paragraph 4).[69] This inclusion is important because the exclusion clause from the scope of the convention should not be open to interpretation as "permission" to commit illicit acts, especially acts amounting to international crimes. Nevertheless, this safeguard clause against impunity must be strengthened by including a clearer reference to international crimes.

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68 See in particular, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Article 3(1) ; the Declaration on Territorial Asylum; the Declaration on the Protection of All Persons from Enforced Disappearance, Article 8 ; and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principle 5. See also the American Convention on Human Rights, Article 22(8), and the Inter-American Convention to Prevent and Punish Torture, Article 13(4).

69 This clause appears in identical terms in the two proposed drafts of Article 18, as follows: 4. "Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws." (UN Doc. A/AC.252/2002/CRP.1, Annex IV).

V. The European Union

Important decisions have been adopted within the framework of the European Union. On 20 September 2001, the Council of the European Union held an extraordinary session, leading to the adoption of a plan of action relating to terrorism on 21 September. The Council adopted the important aims of replacing extradition by a procedure for handing over perpetrators of terrorist attacks; establishing a common legal definition of terrorism; and "to overcome the requirement of double criminality in terrorist cases".[70] The Council also decided, *inter alia*, to set up "Eurojust"[71] and a Police Chiefs Task Force. On 10 December 2001, the Council of the European Union agreed upon a common position relating to the measures to be taken in order to step up the fight against terrorism. The agreement, which includes a wide range of measures, has the "objective of replacing extradition with a procedure for handing over perpetrators of terrorist attacks on the basis of a European arrest warrant" and launching a process of "establishing a common definition of a terrorist act and laying down common criminal sanctions". Later, the Council of the European Union adopted a Framework Decision on a common definition of a terrorist act, and another Framework Decision on an European arrest warrant. Nevertheless, it should be noted that these initiatives were under way well before the tragic events of 11 September 2001.[72]

70 "Council conclusions on the fight against terrorism and the prevention of attacks", Bulletin EU 9-2001, at http://europa.eu.int/abc/doc/off/bull/en/200109/p104003.htm.

71 "Eurojust" is a judicial co-operation body, made up of prosecutors, judges and police officers from each State Member of the European Union. A provisional unit of "Eurojust", "Pro-Eurojust", had already been established at the Tampere European Council (1999). The Council decision of 28 February 2002 established "Eurojust".

72 Thus, on 3 December 1998, the Council of the European Union adopted an Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice. The European Councils in Tampere (15 and 16 October 1999) and Santa Maria da Feira (19 and 20 June 2000) discussed the problem of the fight against terrorism.

1. The Council Framework Decision on Combating Terrorism

The negotiation of a common definition of a terrorist act began on 6 December 2001 and the final text was adopted on 13 June 2002, under the title "Council Framework Decision on Combating Terrorism".[73] This Framework Decision, which was to take effect in January 2003, is intended to establish a common definition of terrorist offences for all States Members of the European Union, as well as common jurisdictional rules "to ensure that the terrorist offence may be effectively prosecuted."[74]

The Framework Decision establishes two sorts of terrorist offences, (terrorist offences and offences relating to a terrorist group) and "offences linked to terrorist activities". The definition of the terrorist offence is strongly inspired by that in the draft comprehensive convention on international terrorism. The Framework Decision defines the terrorist offence as a series of "intentional acts … as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation."[75] The intentional acts to which the definition refers, extend from killing to the perturbation or interruption of any fundamental natural resource having for effect to put human life in danger.[76]

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73 Official Journal n° L 164, 22/06/2002 p. 0003 - 0007.

74 "Council Framework Decision on Combating Terrorism", paragraphs 7 and 8, Preamble.

75 *Ibid.*, Article 1.

76 Article 1 lists the following acts: attacks upon a person's life which may cause death;attacks upon the physical integrity of a person; kidnapping or hostage taking; 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; seizure of aircraft, ships or other means of public or goods transport; manufacture, possession, acquisition, transport, supply or use of

Offences relating to a terrorist group are defined in terms of directing a terrorist group or participation in the activities of a terrorist group.[77] The Framework Decision defines "terrorist group" as "a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences".[78] The Framework Decision adds that "the term structured group" shall mean "a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.".[79]

Offences linked to terrorist activities cover common crimes committed with a view to the perpetration of a terrorist offence or an offence relating to a terrorist group. The Framework Decision limits these acts, as regards terrorist offences, to aggravated theft, extortion, or drawing up false administrative documents. As concerns offences relating to a terrorist group, the offences linked to terrorist activities are limited solely to drawing up false administrative documents.[80]

The Framework Decision incriminates inciting, aiding or abetting and attempts to commit terrorist offences, an offence relating to a terrorist group or an offence linked to terrorist activities.[81] The responsibility of legal persons is established by the Framework Decision, when one of the offences is "committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person".[82]

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weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; threatening to commit any of these acts.

77 Article 2 of the framework decision, Conseil relative à la lutte contre le terrorisme.

78 *Ibid.*

79 *Ibid.*

80 Article 3.

81 Article 4.

82 Article 7.

As for criminal penalties, the Framework Decision provides that States Members must take necessary measures in order that these offences be liable to severe custodial sentences. Concerning terrorist offences and offences linked to terrorist activities, the former must be "punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent..., save where the sentences imposable are already the maximum possible sentences under national law."[83]. For the offence of directing a terrorist group, custodial sentences must not be less than fifteen years and for participation in the activities of a terrorist group, eight years. The Framework Decision establishes a mitigating circumstance concerning the criminal responsibility of the author, accomplices and instigators of offences, through renouncing terrorist activities accompanied by co-operation with authorities.[84] Concerning legal persons, the Framework Decision provides that States Members must take the measures necessary to ensure that every legal person held liable "is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties".[85]

It is important to note that the Framework Decision incorporates a safeguard. Its preamble provides that "[t]his Framework Decision respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they emerge from the constitutional traditions common to the Member States as principles of Community law... Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expres-

83 Article 5 (2).

84 Article 6 establishes that this co-operation consists of providing "the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to: (i) prevent or mitigate the effects of the offence; (ii) identify or bring to justice the other offenders; (iii) find evidence; or (iv) prevent further offences referred to in Articles 1 to 4."

85 Article 8 of the Framework Decision lists other penalties, including: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; a judicial winding-up order; temporary or permanent closure of establishments which have been used for committing the offence.

sion, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate."[86] However, the safeguards contained in the body of the Framework Decision are well below the provisions in the preamble.[87]

Nevertheless, especially concerning the definition of terrorist offences, some of the terms employed refer to unclear, vague and uncertain concepts. Thus, the expressions "nature or... context" and "seriously destabilising or destroying the fundamental political,... economic or social structures" are not very precise and this ambiguity opens the way to varying interpretations. This draft is in breach of the principle of legality, *nullum crimen sine lege*, under which the definition of criminal offences, must not be extensively construed and must be clearly defined in law[88].

2. The European Arrest Warrant

On 11 December 2001, the European Union reached agreement on a European arrest warrant, leading to adoption of the "Council Framework Decision on the European arrest warrant and the surrender procedures between Member States" by the Council of the European Union on 13 June 2002, which should take effect on 1 January 2004. Steps have already been taken to extend the application of the European arrest warrant to other non-Member States of the European Union. Thus, Recommendation 1534 (2001) of the Parliamentary Assembly of the Council of Europe requested the Committee of Ministers to co-operate with European Union authorities to examine means of extending the European arrest warrant to all 44 Member States of the Council of Europe, as regards the fight against terrorism.

86 Paragraph 10, Preamble.

87 Article 1, paragraph 2 of the Framework Decision: "This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

88 European Court of Human Rights, *Kokkinakis v. Greece*, Judgement, 25 May 1993, Series A, N° 260-A, page 22, paragraph 52.

The purpose of the European arrest warrant is "abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities... to remove the complexity and potential for delay inherent in the present extradition procedures"[89] It should be noted that the European arrest warrant is not limited to terrorist offences. The warrant is designed to cover all offences punishable by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.[90] For some offences, the decision excludes application of the principle of double criminality to the European arrest warrant. For the exclusion to operate, the offence in question must satisfy two simultaneous conditions: be punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years; and figure on the list of offences not subject to the principle of double criminality. The Framework Decision establishes a list of such offences, ranging from trafficking in stolen vehicles to crimes coming under the jurisdiction of the International Criminal Court.[91] Terrorism, participation in a criminal organisation, kidnapping and hostage-taking are all included in the list of offences

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89 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, paragraph 5, Preamble.

90 *Ibid.*, Article 2.

91 Article 2, paragraph 2, includes the following offences in this category: participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of Convention of 26 July 1995 on the protection of the European Communities financial interests; laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.

not subject to the principle of double criminality. At any time, The Council may, acting unanimously after consulting the European Parliament, add other offences to this list. In Sum, under the Framework Decision, the forced transfer of a person from one Member State of the European Union to another for the purposes of criminal prosecution, or the execution of a custodial sentence or detention order, will be possible without the need for formal extradition proceedings and, for some offences, without verification of double criminality.

The European Arrest Warrant is defined as "a judicial decision issued by a Member State with a view to the arrest and surrender by another State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."[92] Under the Framework Decision, the judicial authorities of the Member State issue a European Arrest Warrant (issuing judicial authority) to the judicial authorities of the country where the person concerned by the warrant is to be found (executing judicial authority). The issuing judicial authority may transmit the European Arrest Warrant directly to the executing judicial authority or issue an alert for the requested person in the Schengen Information System or the European Judicial Network. Any person arrested in relation with the execution of a European arrest warrant has the right to be assisted by legal counsel and an interpreter and to be heard by the executing judicial authority. The executing judicial authority must decide on execution of the European arrest warrant within sixty days of arresting the suspect, which may be extended for thirty days. The person must be surrendered to the issuing judicial authority no later than ten days after the final decision on execution of the European Arrest Warrant. The transfer may be deferred or conditional. In cases where the person consents to surrender, a special procedure is to be used.

The Framework Decision lays down mandatory and optional grounds for non-execution of a European Arrest Warrant. The grounds for mandatory non-execution are related to cases where the offence is covered by amnesty in the executing Member State and where that State had jurisdiction to pros-

92 Article 1(1).

ecute the offence under its own criminal law; when the person has been has been finally judged by a Member State in respect of the same acts provided that, where there a sentence has been handed down, it has been served or is currently being served or may no longer be executed under the law of the sentencing Member State; or when the person may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

The Framework Decision incorporates two safeguard clauses in its preamble and another clause in the text itself. The first provides that "[t]his Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (1), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons. This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media."[93] The second prescribes that "[n]o person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.".[94] Finally, paragraph 3 of Article 1 provides that "[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.".

The Framework Decision has several consequences. In the first place, it

93 Paragraph 12, Preamble.

94 Paragraph 13, Preamble.

excludes the application of extradition conventions between Member States of the European Union for the offences set out therein.[95] Secondly, correspondingly, it excludes "the political control which accompanies extradition proceedings"[96] in many countries. Thirdly, it derogates from the principle of double criminality for a whole series of offences. This provision raises some problems because the principle of double criminality is directly linked to the principle *nullum crimen sine lege*[97] and is partly founded on the protection of human rights. The principle of double criminality is a recognised rule in extradition matters[98] and as regards the transfer of criminal proceedings.[99] Some authors consider that faced with international offences, especially genocide and grave breaches of the 1949 Geneva Conventions, the scope of the principle is weakened, because "States are bound either by the customary definition of some offences, or the treaties to which they are parties".[100]

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95 The European Convention on Extradition, 13 December 1957, its Additional Protocol, 15 October 1975, its second Additional Protocol, 17 mars 1978, and the European Convention on the Suppression of Terrorism, 27 January 1977 to the extent that it relates to extradition; the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989; the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union; the Convention of 27 September 1996 relating to extradition between the Member States of the European Union; and Title III, chapter 4, of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on thegradual abolition of checks at their common borders.

96 Jean-François Gayraud, and David Sénat, Le terrorisme, Collection "Que sais-je?", N° 1768, Presses universitaires de France, 3 édition, Paris, 2002, page 94.

97 Eric David, Eléments de droit pénal international - Première partie, Deuxième sous partie: la coopération judiciaire internationale pour la prévention et la répression des infractions de droit interne, Université Libre de Bruxelles - Presses Universitaires de Bruxelles, Bruxelles 2000, page 284, paragraph 7.51.

98 1957 European Convention on Extradition, Article 2.1; 1981 Inter-American Convention on Extradition, Article 3.1; United Nations Model treaty on Extradition, adopted by the UN General Assembly in Resolution 45/116, Article 2.

99 Model Treaty on the Transfer of Proceedings in Criminal Matters, adopted by UN General Assembly Resolution 45/118. Article 6 treats the principle of double incrimination as a condition for the transfer of proceedings. Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released, adopted by UN General Assembly Resolution N° 45/118. Article 6 treats the principle of double incrimination as a condition for the transfer of surveillance.

100 Mikaël Poutiers, "L'extradition des auteurs d'infractions internationales", (Chapitre 76) in Hervé Ascencio, Emmanuel Decaux and Alain Pellet, Droit international pénal, Editions A. Pedone, Paris, 2000, para. 31, page 945.

Thus “refusal to extradite based on non-respect for the principle of double criminality should not be accepted”[101], given that “international offences are superior to any national offences and bind States”,[102] their legal regime is determined by international law, and the acts in question are punishable regardless of whether they are incriminated by national law or not. While these arguments may justify derogation from the principle of double criminality for crimes within the jurisdiction of the International Criminal Court, among others, one may question such derogation for the other offences set out in the list.

Finally, the principle of *non-refoulement* is given weakened or diluted recognition in the Framework Decision. True, its *non-refoulement* clause goes further than the “Irish clause” in the European Convention on the Suppression of Terrorism[103], because it incorporates motives of ethnic origin and sexual orientation. Yet, despite the fact that the *non-refoulement* clause is explicitly incorporated in paragraph 12 of the preamble, no express reference is made to it in the body of the Framework Decision. This is a paradox, given that the principle of *non-refoulement* is included in European treaties concerning extradition and terrorism.[104]

The Framework Decision is also a response to the practice of some European Union countries of avoiding extradition through expulsion. This is a time honoured practice, which allowed Germany to surrender former Colonel Argoud to the French authorities for his activities in the OAS (*Organisation Armée Secrète*). The French authorities have frequently used such measures to avoid extradition procedures for Basque nationalists wanted by Spain. Nevertheless, this practice had been regularly and rightly criticised, especially concerning the consequences for the respect of human rights and the principle of *non-refoulement*. Thus, in a case involving the

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101 *Ibidem*.

102 *Ibid.*, paragraph 32, page 946.

103 Article 5 of the European Convention on the Suppression of Terrorism. See also P. Weis, “Asilo y Terrorismo”, in La Revista, Comisión Internacional de Juristas, N° 18-19, 1977, pages 94 et seq.

104 Thus, Article 3 of the European Convention on Extradition and Article 5 of the European Convention on the Suppression of Terrorism.

expulsion of a presumed member of the ETA from France to Spain, in which it declared that France had violated Article 3 of the Convention, the Committee against Torture stated that:

> "The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police, without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That meant that a detainee's rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned."[105]

The European Arrest Warrant operates between judges, which is an improvement in comparison with the former practice of expulsion or surrender from police force to police force. However, in addition to the points raised above, some black points still subsist, especially concerning the right of appeal. The Framework Decision is silent on the appellate rights of a person the subject of a European Arrest Warrant. Yet this right quite clearly exists, as the Human Rights Committee has pointed out: "Before expelling an alien, the State party should provide him or her with sufficient safeguards and an effective remedy, in conformity with article 13 of the Covenant. The State party is urged to consider the adoption of legislation governing the expulsion of aliens, which should be consistent with the principle of *non-refoulement*."[106]

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105 Decision, 9 November 199, Communication No 63/1997, Josu Arkauz Arana c. France, CAT/C/23/D/63/1997, paragraph 11.5.

106 "Concluding Observations, Human Rights Committee : Democratic Peoples Republic of Korea", UN Doc. CCPR/CO/72/PRK, 27 August 2001, Paragraph 21. See also General Comment N° 15 "The position of aliens", Human Rights Committee.

VI. The Council Of Europe

Following the events of 11 September 2001, the Committee of Ministers of the Council of Europe adopted a "Declaration on the fight against international terrorism".[107] In its declaration, the Committee of Ministers launched a revision process for the existing legal instruments relating to the fight against terrorism and, in particular, the revision of the European Convention on the Suppression of Terrorism (ETS 90). The Committee of Ministers later decided, *inter alia*, to create a Multidisciplinary Group on International Action against Terrorism (GMT)[108] and to draw up "Guidelines based on democratic principles for dealing with movements threatening the fundamental values and principles of the Council of Europe"[109].

The Parliamentary Assembly of the Council of Europe has adopted several texts on terrorism since 11 September 2001. In its Resolution 1258 (2001)[110], "Democracies facing Terrorism", the Parliamentary Assembly called on Member States of the Council of Europe to "review the scope of the existing national legal provisions on the prevention and suppression of terrorism", and "give urgent consideration to amending and widening the Rome Statute to allow the remit of the International Criminal Court to include acts of international terrorism". It also invited UN Member States to modify the Charter of the United Nations. In its Recommendation 1534 (2001)[111], the Parliamentary Assembly demanded that the Committee of Ministers, "as regards the European Convention on the Suppression of Terrorism, remove as a matter of urgency Article 13, which grants contracting states the right to make reservations which can defeat the purpose of the convention by enabling the states to refuse extradition for offences otherwise extraditable". In the same recommendation, the Parliamentary

107 http://cm.coe.int/ta/decl/2001/2001dec3.htm.

108 Decision, Committee of Ministers, 8 November 2001.

109 Decision of the Ministers' Deputies on the fight against international terrorism, 21 September 2001.

110 Adopted on 26 September 2001.

111 Adopted on 26 September 2001.

Assembly asked the Committee of Ministers to examine the means of extending the arrest warrant to all Member States of the Council of Europe, as regards the fight against terrorism.

A number of the recommendations and requests made by the Parliamentary Assembly in 2001 have remained unheeded, mainly because they were not taken up by the Assembly itself in 2002. In its Resolution 1271 (2002) and Recommendation 1550 (2002), entitled "Combating terrorism and respect for human rights", adopted on 24 January 2002, the Parliamentary Assembly placed the accent on the respect for fundamental guarantees. In its Resolution 1271, the Assembly reiterated that "the combat against terrorism must be carried out in compliance with national and international law and respecting human rights". The Assembly asked Member States of the Council of Europe to "refuse to extradite suspected terrorists to countries that continue to apply the death sentence, ... unless assurances are given that the death penalty will not be sought", and to "refrain from using Article 15 of the European Convention on Human Rights (derogation in time of emergency) to limit the rights and liberties guaranteed under its Article 5 (right to liberty and security)." In its Recommendation 1550, the Assembly recommended that the Committee of Ministers "amend the European Convention on the Suppression of Terrorism to include a provision according to which extradition may be refused in cases where there are no guarantees that the death penalty will not be sought for the accused person".

1. The draft Protocol amending the European Convention on the Suppression of Terrorism

The GMT was requested to revise Council of Europe documents relating to the fight against terrorism, including the European Convention on the Suppression of Terrorism (ETS 90), and to prepare a report for the Committee of Ministers of the Council of Europe on additional action the Council of Europe might implement in the fight against terrorism. On 10 October 2002, the GMT approved a "draft Protocol amending the European

Convention on the Suppression of Terrorism".[112] Approved on 7 November by the Committee of Ministers, the draft was transmitted for opinion to the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights, which was to give its opinion by mid-December 2002.

The draft Protocol makes several amendments to the Convention. In the first place, it widens its scope by enlarging the list of offences deemed non-political for the purposes of extradition[113] and the means of participation in those offences.[114] Secondly, the draft modifies the extradition refusal clause - the Irish clause - by introducing the non-obligation to extradite if the person the subject of the extradition request risks being exposed to torture. Although this clause increases protection levels, it remains less protective than the principle of *non-refoulement* because it makes no reference to extrajudicial executions and enforced disappearances.[115] Finally, the draft

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112 http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/ Doc02/EDOC9625.htm

113 Thus, offences within the scope of the following Conventions will not be considered political or politically motivated: the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, signed at New York on 14 December 1973; the International Convention Against the Taking of Hostages, signed at 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, signed at Montreal on 24 February 1988; the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, signed 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, signed at Rome on 10 March 1988; the International Convention for the Suppression of Terrorist Bombings, signed at New York on 15 December 1997; and the International Convention for the Suppression of the Financing of Terrorism, signed at New York on 9 December 1999.

114 Now included are attempt, complicity, and "organising the perpetration of, or directing others to commit or attempt to commit, any of these principal offences". These means of participation in the crime apply both to "principal offences" and all serious acts of violence against the life, physical integrity or liberty of a person, or against property… if the act created a collective danger for persons.

115 See the Declaration on the Protection of all Persons from Enforced Disappearance, Article 8 and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principle 5.

expands the role of the European Committee on Crime Problems, by granting it a power of recommendation.

2. Guidelines on human rights and the fight against terrorism

The elaboration of the guidelines was conferred on the Council of Europe's Steering Committee for Human Rights. To that end, the Steering Committee set up a Group of Specialists on human rights and the fight against terrorism with the mandate to draw up the draft guidelines before 30 June 2002. On 15 July 2002, the Committee of Ministers of the Council of Europe adopted the "Guidelines on human rights and the fight against terrorism".[116]

The Guidelines contain numerous safeguards for human rights. They reaffirm the obligation of States to protect all persons against terrorism, the *prohibition of arbitrariness*, the necessary legality of all anti-terrorist measures taken by States and the absolute prohibition of torture. They also create a mechanism concerning *inter alia* the collection and processing of data of a personal nature, measures interfering in private life, arrest, police custody and pre-trial detention, legal proceedings, extradition and victim compensation. Accordingly, it is important to stress the two general guideline provisions. The first, entitled Prohibition of arbitrariness, states that "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." The second, entitled *Respect for peremptory norms of international law* and for international humanitarian law, establishes that "[i]n 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."

116 http://www.coe.int/T/E/Communication_and_Research/Press/Theme_Files/Terrorism/CM_Guidelines_ 20020628.asp#TopOfPage

3. Terrorism and cyber-crime

In November 2001, the Council of Europe adopted the Convention on Cyber-crime (ETS No. 185). Its main objective, stated in the preamble, is to continue "a common criminal policy aimed at the protection of society against Cyber-crime, *inter alia*, by adopting appropriate legislation and fostering international co-operation". The fruit of four years work by experts from the Council of Europe, and associated experts from non-member States of the Council of Europe, the Convention is the first international treaty on criminal offences committed via the Internet and other computer systems. Although the Convention is not specifically oriented towards terrorism and covers a vast range of infractions,[117] it incriminates violations of computer system security.[118] Some of these violations, such as computer "pirating" and "cracking", are considered to be forms of "computer terrorism". The Convention also contains a series of powers and procedures, such as search and interception powers over computer systems. As for the repression of offences, it applies the principle *aut dedere aut judicare*.

The Convention incorporates a safeguard clause, under which "the establishment, implementation and application of the powers and procedures provided... are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality."[119] This general formulation, based on references to national law, has been justified by the Council of Europe due to the difficulty "to specify in detail the applicable conditions and safeguards for each power or procedure", given the "many different legal systems and cul-

117 In particular, violations of intellectual property, computer fraud and child pornography.

118 Such as Illegal access (art. 2), Illegal interception (art. 3), Data interference (art. 4), System interference (art. 5).

119 Article 15 of the Convention on cyber-crime.

tures" represented by the State Parties.[120] The clause allows for optional judicial supervision of the powers and procedures. When explaining the scope of the safeguard, the Council of Europe affirmed that "National legislatures will have to determine, in applying binding international obligations and established domestic principles, which of the powers and procedures are sufficiently intruse in nature to require implementation of particular conditions and safeguards."[121] Nevertheless an important margin of implementation and interpretation is given to States and some safeguards may be overridden. Thus, for example, the *non-refoulement* clause is not included explicitly in any of the provisions of the Convention, especially those relating to extradition.[122] Article 24(5), provides that "Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds on which the requested Party may refuse extradition." The Council of Europe considers that such a formulation would allow refusal to extradite, in particular, if the request is claimed to have been made for the purpose of prosecuting or punishing a person for reasons relating, *inter alia*, to his race, religion, nationality or political opinions.[123] Nevertheless, the absence of any clear provision concerning refusal to extradite and *non-refoulement* is not without consequences, and it would have been preferable for such a provision to be included in the Convention.

On 7 November 2002, the Committee of Ministers of the Council of Europe adopted an additional Protocol to the Convention on cyber-crime, prohibiting racist and xenophobic acts committed by means of computer systems. The Protocol widens the scope of the Convention, including the provisions concerning substantive law, criminal proceedings and international co-operation, so as to cover offences related to racist or xenophobic propaganda.

120 Council of Europe, *Convention on cyber-crime - Explanatory Report*, adopted on 8 November 2001, paragraph 145, (http://conventions.coe.int/Treaty/ EN/Reports/Html/185.htm).

121 *Ibid.*, paragraph 147.

122 Article 24 of the Convention on cyber-crime.

123 Council of Europe, *Convention on cyber-crime - Explanatory Report*, Doc. cit., paragraph 250.

VII. THE ORGANIZATION OF AMERICAN STATES

The Permanent Council of the Organization of American States (OAS), acting as Provisional Organ of Consultation of the Inter-American Treaty of Reciprocal Assistance (IATRA), called a Meeting of Ministers of Foreign Affairs on 19 September 2001.[124] On 21 September 2001, the OAS Ministers of Foreign Affairs held their twenty-third Meeting of Consultation and adopted two resolutions.[125] In the resolution on "Strengthening hemispheric cooperation to prevent, combat and eliminate terrorism", the Ministers of Foreign Affairs requested the Permanent Council to draw up an Inter-American Convention Against Terrorism[126] and to reactivate the Inter-American Committee against Terrorism (CICTE).[127]

1. The Inter-American Convention Against Terrorism

The Permanent Council of the OAS chose the Committee on Juridical and Political Affairs to prepare a draft Convention.[128] Previously, a draft Inter-

124 Resolution CP/RES.797 (1293/01), 19 September 2001

125 Resolution RC.24/Res.1/01 "Terrorist threat to the Americas" and Resolution RC.23/RES/1/01, "Strengthening hemispheric cooperation to prevent, combat and eliminate terrorism", adopted on 21 September 2001.

126 Resolution RC.23/RES/1/01 rev. 1 corr.1, 21 September 2001. The Inter-American Convention Against Terrorism is the second treaty adopted by the OAS in this area. The first was the Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes against Persons and Related Extortion That Are of International Significance, concluded in Washington, D.C. on 2 February 1971.

127 The CICTE was set up in 1999 by Resolution AG/RES.1650 (XXXIX-0/99) of the OAS General Assembly, following the Second Inter-American Specialised Conference on Terrorism (Mar del Plata, Argentina, 1998). The CITCE held its first session in 1999. It was only after the events of 11 September, following the Meeting of Consultation of the Ministers of Foreign Affairs, on 12 September, that the CICTE held a second session. Chaired by the United States of America, the CITCE established three sub-comities (financial control, border control) and adopted a work plan for the 2002-2003 period.

American Convention for the Prevention and Elimination of Terrorism had been drawn up by the Judicial Committee in 1995. The Committee on Juridical and Political Affairs created a Working Group to prepare the draft Inter-American Convention Against Terrorism, which took up the work on the 1995 draft Inter-American Convention for the Prevention and Elimination of Terrorism.[129] Nevertheless, the new draft convention differs from the 1995 draft in several aspects, especially concerning the criminalisation technique.[130] On 3 June 2002, the OAS General Assembly adopted the Inter-American Convention Against Terrorism.[131] Canada was the first State to ratify the Convention, on 2 December 2002.

The Inter-American Convention Against Terrorism does not create a new definition of the crime of terrorism. Using the technique of indirect incrimination in order to define terrorism, the Inter-American Convention refers to incriminations included in ten international conventions.[132] It also imposes a number of obligations to combat the financing of terrorist activities,

128 OAS Doc., OEA/Ser.G CP/CAJP-1829/01, 27 September 2001.

129 OAS Doc. OEA/Ser.G CP/CAJP-1848/01, 14 December 2001.

130 OAS Doc. OEA/Ser.G CP/CAJP-1891/02 rev. 1 corr. 1, 8 May 2002.

131 Resolution AG/RES. 1840 (XXXII-O/02), 3 June 2002.

132 Article 2 of the Inter-American Convention Against Terrorism, lists: the Convention for the Suppression of Unlawful seizure of Aircraft, signed in The Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973; the International Convention Against the Taking of Hostages, adopted by the UN General Assembly on 17 December 1979; the Convention on the Physical Protection of Nuclear Material, signed in 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 March 10, 1988; the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, signed in Rome on 10 March 1988; the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997; and the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999.

money laundering, arms trafficking and the "international movement of terrorists".[133]

The Convention provides for the transfer of persons in custody from one country to another in order to testify or collaborate in investigations or trials for terrorist acts. Transferred detainees cannot be prosecuted or have their freedom of movement restricted by the receiving State for any acts or convictions committed prior to their transfer.[134] Nevertheless, the Convention allows States to accept that detainees be prosecuted or placed in custody after transfer for later acts or convictions. An incorrect interpretation of this provision could allow avoidance of extradition proceedings.

Finally, the Convention incorporates two safeguard clauses. The first, so-called "non-discrimination" clause, allows for refusal of co-operation and mutual legal assistance when the requested State has grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, or political opinion[135]. A second, so-called "human rights" clause, provides that in implementing the Convention and the obligations which it contains, States must ensure full respect for the Rule of law, human rights and fundamental freedoms.[136] Moreover, the clause specifies that the provisions of the Convention must not be interpreted so as to breach, *inter alia*, international humanitarian law, international human rights law and international refugee law.

2. The IACHR and Terrorism

The Inter-American Commission on Human Rights (IACHR) adopted a resolution entitled "Terrorism and human rights" on 12 December 2001. In that resolution, the IACHR affirmed that terrorist acts must not remain

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133 Article 7 of the Inter-American Convention Against Terrorism.

134 Article 10 of the Inter-American Convention Against Terrorism.

135 Article 14 of the Inter-American Convention Against Terrorism.

136 Article 15 of the Inter-American Convention Against Terrorism.

unpunished and that States have the right and indeed the duty to defend themselves against international crime within the framework of international
instruments. Faced with the antiterrorist measures taken by countries in the region, especially the establishment of "military commissions", the Commission recalled its doctrine under which "military courts may not try civilians, except when no civilian courts exist or where trial by such courts is materially impossible. Even under such circumstances, the IACHR has pointed out that the trial must respect the minimum guarantees established under international law, which include non-discrimination between citizens and others who find themselves under the jurisdiction of a State, an impartial judge, the right to be assisted by freely-chosen counsel, and access by defendants to evidence brought against them together with the opportunity to contest it."[137]

Subsequently, the IACHR published an important study entitled "Report on terrorism and human rights".[138] In the study, the IACHR formulates recommendations to OAS Member States in order to guarantee that antiterrorist measures are in line with their international human rights obligations, international humanitarian law and refugee law. The IACHR recalled that States cannot invoke international human rights instruments to limit or deny other wider or more favourable individual rights or practices, whether under international or national law. The IACHR also underscored that in interpreting and applying human rights norms in the context of armed conflict, international humanitarian law must be applied as *lex specialis*. The IACHR study, and more particularly the recommendations formulated therein, constitute an excellent guide to ensure that State measures and action against terrorism are in line with their international obligations and the protection of human rights.

137 Resolution "Terrorism and Human Rights", of 2 December 2001.

138 Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/ll.116, Doc. 5 rev. 1 corr., 22 October 2002. The report is available at the Web page of the IACHR: http://www.cidh.oas.org./DefaultE.htm

VIII. The Organization for security and co-operation in Europe

After the 11 September 2001 attacks, the Organisation for Security and Co-operation in Europe (OSCE), took several initiatives. The two main aspects are the OSCE's tendency to approach the problem of terrorism jointly with other phenomena, such as organised crime, the drug and arms trade and trafficking in human beings[139], and to stress the “politico-military” dimension of the fight against this scourge.

1. The Bucharest Declaration and Plan of action

During its Ninth meeting in Bucharest, on 3 and 4 December 2001, the OSCE Ministerial Council adopted a Declaration and “Plan of Action for Combating Terrorism”.[140] Underlining that “terrorism is a threat to international peace and security, in the OSCE area as elsewhere”, the Ministerial Council asserted that the “aim of the Action Plan is to establish a framework for comprehensive OSCE action to be taken by participating States and the Organization as a whole to combat terrorism, fully respecting international law, including the international law of human rights…”. For the Ministerial Council, the Bucharest Plan of Action is the OSCE's contribution to the fight against terrorism by applying “its comprehensive security concept linking the politico-military, human and economic dimensions”.[141] The Plan aims to increase interaction between States (especially through ratification of the United Nations conventions and protocol relating to terrorism, police and judicial co-operation and border controls) and the strengthening of national

139 See, for example: the Bucharest Ministerial Declaration (point 3, MC(9).DEC/1/Corr.1 in OSCE Doc. MC.DOC/2/01, 4 December 2001) and the Declaration by the Bishkek International Conference (point 2).

140 Decision N° 1 “Combating Terrorism”, (MC(9).DEC/1/Corr.1) in OSCE Doc., MC.DOC/2/01, 4 December 2001.

141 *Ibid.*, paragraph 2.

anti-terrorist legislation. The Plan of Action also aims to prevent conflicts, organised crime and the drug and arms trades.[142]

Following the Bucharest Plan of Action, several initiatives were launched. The OSCE Forum for Security Co-operation (FCS), adopted in March 2002, a "Road Map of the FCS" for application of the Bucharest Plan of Action, notably for "implementation of politico-military commitments and agreements".[143] On 29 January 2002, the Portuguese Presidency of the OSCE appointed the former Danish Defence Minister, Jan Troejborg, as the personal representative of the Presidency for preventing and combating terrorism, with power to co-ordinate the antiterrorist efforts of the OSCE. In December 2001, in partnership with the United Nations Office for drug control and crime prevention, the OSCE held an international Conference on the "Strengthening Comprehensive Efforts to Counter Terrorism", in Bishkek (Republic of Kyrgyzstan). The Conference adopted a Declaration and Program of Action. The Declaration places the accent on links between terrorism and organized transnational crime, the drug and arms trades and trafficking in human beings. The Program of Action also seeks co-operation between State and inter-governmental antiterrorist and anti-drug agencies. In May 2002, a second conference was organized in Almaty (Kazakhstan) on the drug and arms trades and terrorism. In October 2002, the OSCE held a Conference on the role of religions in the fight against terrorism, at Bakou (Azerbaijan).

2. The Antiterrorist Charter

On 7 December 2002, during its tenth meeting in Porto, the Ministerial Council adopted an "OSCE Charter on Preventing and Combating Terrorism".[144] However, the OSCE Charter remains on the political level,

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142 *Ibid.*, paragraphs 14 and 19.

143 OSCE Doc. FSC.DEC/5/02, 20 March 2002.

144 OSCE Doc. MC(10).JOUR/2, 7 December 2002, Annex 1.

and shows little sign of being a legal instrument. It reaffirms the contents of the of the Bucharest Declaration and Plan of Action as well as the Bishkek Program of Action. The Charter also reaffirms the commitment of the OSCE to UN Security Council Resolution 1373. Similarly, it reaffirms the "politico-military" dimension of the fight against terrorism. The Charter extols a "global" approach and co-operation with respect to terrorism, including organised crime, the drug and arms trade and trafficking in human beings.

IX. The African Union

The Organization of African Unity (OAU), now the African Union[145] since 2002, has also taken several initiatives. In October 2001, the African Summit on Terrorism adopted a Declaration Against Terrorism, calling for ratification of the OAU Convention on the Prevention and Combating of Terrorism and United Nations treaties. During the Summit, the President of Senegal launched the idea of an "African Pact Against Terrorism". In November 2001, during its 5th Extraordinary Session, the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution reiterated this call and requested Member States to ensure the effective follow-up and implementation of UN Security Council Resolution 1373 (2001)[146]. In September 2002, the African Union held a "High-Level Intergovernmental Meeting On the Prevention and Combating Of Terrorism In Africa" in Algiers. Upon this occasion, a Plan of Action was adopted and submitted for approval to the Policy Organs of the African Union. The plan includes a variety of provisions, notably concerning police, judicial and military co-operation, intelligence services, border controls and banking control. The entry into force of the OAU Convention on the Prevention and Combating of Terrorism, on 6 December 2002, and the elaboration of an additional protocol to the Convention, constitute the two major events.

1. The Algiers Convention

The OAU Convention on the Prevention and Combating of Terrorism (the "Algiers Convention") was adopted in July 1999 by the 35th Ordinary

145 Created in 1999, African Union held its first Conference - ordinary session - in July 2002.

146 "Report on OAU efforts to Prevent and Combat Terrorism", document Organ/Mec/MIN/2/Ex.Ord(V), 11 November 2001, page Web: http://www.africa-union.org/en/commarchive.asp?Page=3&ID=137.

Session of the OAU Meeting of Heads of State and Government (the "Algiers Summit").[147] In December 2002, it counted 16 States Parties.[148]

Article 1 of the Algiers Convention adopts a fairly wide, ambiguous definition of "terrorist act" : any act or threat "which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to [*inter alia*] public or private property". The definition also establishes three distinct, alternative subjective, or intentional, elements. The first relates to the intention to "intimindate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles". The second consists in the intention to "disrupt any public service, the delivery of any essential service to the public or to create a public emergency". The third consists of the intention "to create general insurrection in a State". It also incriminates "any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing or procurement of any person, with the intent to commit" a terrorist act.

The definition of "terrorist act" chosen by the Algiers Convention contains some unclear, vague and uncertain elements, such as the expression "according to certain principles". The expressions "contribution" and

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147 OUA Doc. AHG/Decl.132(XXXV).

148 The States Parties to the Convention are: South Africa, Algeria, Angola, Egypt, Eritrea, Ghana, Kenya, Lesotho, Libya, Mali, Rwanda, Saudi Arabia, Senegal, Sudan and Tunisia.

149 Article 1, paragraph 3, defines "terrorist act" as "any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

" (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or

(ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or

(iii) create general insurrection in a State."

"encouragement" are equally uncertain. They have no precise contours and it is not clear which modes of criminal participation they refer to. On the other hand, the definition allows criminalisation of the exercise of fundamental rights, and political and/or social opposition, such as strikes, by assimilating them to modes of "terrorism". Thus, the definition would allow a threat to strike in the energy sector to be construed as a terrorist act which could cause electrical alimentation problems in hospitals. The Algiers Convention also eliminates the frontier between political crimes and terrorist acts. By assimilating insurrection to terrorism, the Algiers Convention denies the existence of any political crimes. Terrorist acts and political crimes are two different criminal categories, subject to distinct rules, especially as regards extradition. It is likely that, during an insurrection, terrorist acts are committed (and their authors must be tried for those acts). This is a problem of cumulated incriminations. International law does not prohibit insurrection. What is forbidden, and illicit, is the perpetration of certain acts,[150] because the prohibition of the recourse to terror and terrorist acts is not general nor abstract and is in strict relationship with the notions of civil population and protected persons under international humanitarian law.

The definition of "terrorist act" in the Algiers Convention breaches the principle of legality- *nullum crimen sine lege*, *nulla poena sine lege*[151], to the extent that it hampers a stricter more precise definition of the offence. Under this principle, acts which are qualified as criminal offences under domestic or international law must be strictly defined, without equivocation or

150 Common Article 3 to the 1949 Geneva Conventions, and the Additional Protocols to the Geneva Conventions, 12 August 1949 relating to the protection of victims of non international conflicts (Articles 4 and 13).

151 This principle, which applies both to national incriminations and those contained in criminal law treaties, is reaffirmed as a general principle of criminal law in the Rome Statute of the International Criminal Court. As Professeur Pierre-Marie Dupuy points out, *nullum crimen sine lege* is a principle de "international criminal law belonging to jus cogens" ("Normes internationales pénales et droit impératif (*jus cogens*)",.in H. Ascencio, E. Decaux and A. Pellet, Droit international pénal, Ed. A. Pedone, Paris 2000, Chapter 6, paragraph 11, page 74). See also, Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/ll.116, Doc. 5 rev. 1 corr., 22 October 2002, paragraph 222.

ambiguity.[152] Thus, as the UN Special Rapporteur on the independence of judges and lawyers has said, these vague, nebulous, legal definitions, or which allow the criminalisation of legitimate and/or licit acts under international law, are contrary to international human rights law and the "general conditions prescribe by the international law".[153]

The Convention incorporates the rule *aut dedere aut judicare* and contains several clauses relating to extradition.[154] Nevertheless the Convention does not contain any clear clause concerning *non-refoulement*, although Article 22 states that States must comply with the general principles of international law, especially the principles of international humanitarian law and the African Charter on Human and Peoples' Rights.

2. The draft Protocol

The initiative for a draft additional protocol to the Algiers Convention was taken by Senegal during the Dakar Summit, on 17 October 2001. The Declaration Against Terrorism adopted by the African Conference on Terrorism in October 2001 took up the idea. In November 2001, during its 5th Extraordinary Session, the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution, strongly supported this initiative.[155] On 12 April 2002, the Government of Senegal submitted a draft additional Protocol to the Secretary-General of the OAU instituting a Mechanism for combating terrorism. In September 2002, The "OAU High-Level Intergovernmental Meeting On the Prevention and Combating Of Terrorism In Africa" examined the draft Protocol.

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152 See *inter alia*, European Court of Human Rights, *Kokkinakis v. Greece*, Judgement, 25 May 1993, Series A, N° 260-A, page 22, paragraph 52, and Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, Doc. cit, paragraph 225.

153 UN Doc. E/CN.4/1998/39/Add.1, paragraph 129.

154 Articles 8 to 13 of the Algiers Convention.

155 "Report on OAU efforts to Prevent and Combat Terrorism", document Organ/Mec/MIN/2/Ex.Ord(V), 11 November 2001, page Web: http://www.africa-union.org/en/commarchive.asp?Page=3&ID=137.

The draft Protocol aims to establish a “Mechanism for combating terrorism”, which the Algiers Convention failed to do. Algeria made the point during the meeting: “The Algiers Convention does not, however, provide for a continental body, committee or mechanism to support the required co-operation between States. Nor is there a mechanism to give effect to the purposes and objects of the Convention, to implement its operative provisions or to assist AU Member States to comply with international law and their continental obligations”.[156] At this point, it is not clear whether the envisaged mechanism will have a supervisory role over the compatibility of measures adopted at the national level to implement the Algiers Convention, and the obligations of States with respect to human rights, refugee and international humanitarian law. Nevertheless, it is most regrettable to observe that this aspect was absent from debate on the draft Protocol and its mechanism.

156 Working Document, “The challenge of terrorism: the implementation of the Algiers Convention on the prevention and combating of terrorism and other relevant international instruments”, OAU Doc., Mtg/HLIG/Conv.Terror.2/Working.Doc, 11 to 14 September 2002, paragraph 25.

X. The League of Arab States

Since 11 September 2001, the League of Arab States[157] has made a number of declarations. The accent has been placed on the refusal of confusion between terrorism and Islam and the need for the United Nations to be the pivot for the fight against terrorism. However, the most important point has been the notoriety gained by the Arab Convention for the Suppression of Terrorism.

Adopted in Cairo in 1998 and entered into force in July 1999, the Arab Convention for the Suppression of Terrorism is a source of serious concern. The Convention establishes two definitions - "terrorism"[158] and "terrorist crimes"[159] - and also refers to offences established by others treaties.[160] Terrorism and terrorist crimes are defined in a vague, imprecise man-

157 The League of Arab States is made up of the following countries: Algeria, Saudi Arabia, Bahrain, Comoros, Djibouti, Egypt, United Arab Emirates, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Somalia, Sudan, Syria, Tunisia and Yemen.

158 Article 1, paragraph 2: "Terrorism: Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources."

159 Article 1, paragraph 3: "Terrorist offence: Any offence or attempted offence committed in furtherance of a terrorist objective in any of the Contracting States, or against their nationals, property or interests, that is punishable by their domestic law."

160 Article 1, paragraph 3: "[…] The offences stipulated in the following conventions, except where conventions have not been ratified by Contracting States or where offences have been excluded by their legislation, shall also be regarded as terrorist offences: (a) The Tokyo Convention on offences and Certain Other Acts Committed on Board Aircraft, of 14 September 1963; (b) The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, of 16 December 1970;(c) The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, of 23 September 1971, and the Protocol thereto of 10 May 1984; (d) The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973;(e) The International Convention against the Taking of Hostages, of 17 December 1979;(f) The provisions of the United Nations Convention on the Law of the Sea, of 1982, relating to piracy on the high seas."

ner, allowing a whole range of common offences to be assimilated to terrorist crimes. As Professor Eric David points out, "this definition is at the very least extensive, because it could apply to theft perpetrated in 'terrorising' circumstances".[161] With reason, Amnesty International has concluded that the definition in the Convention "can be subject to wide interpretation and abuse, and in fact does not satisfy the requirements of legality in international human rights and humanitarian law".[162]

Article 2 of the Convention provides that "all cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence". The style of this provision suggests that all possible means - even those qualified as terrorist acts by international humanitarian law - will be licit in this context. As Professor Eric David points out, "although a large number of banal common offences risk passing for terrorism under this convention, on the other hand... any indiscriminate attack would not be considered as terrorist as long as it was perpetrated in the name of the right to self-determination."[163] While it is clear that under international law, and more particularly international humanitarian law, the struggle against foreign occupation, colonial domination or racist regimes is legitimate and should not be assimilated to terrorism, it is none the less true that the use of all means is not authorised and that some acts - notably terrorist - are prohibited.[164]

The Convention establishes many obligations concerning police, judicial and intelligence service co-operation as well as border controls, migration and customs. Although it contains several clauses concerning extradition, the Convention contains no provision concerning *non-refoulement*.

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161 Eric David, Eléments de droit pénal international -Titre II, le contenu des infractions internationales, Presses universitaires de Bruxelles, 8th Ed., Brussels 1999, page 539.

162 Amnesty International, *The Arab Convention for the Suppression of Terrorism, a serious threat to human rights*, Index AI: IOR 51/01/001/02, 9 January 2002.

163 Eric David, Eléments de droit pénal international -Titre II…, *op. cit.*, page 540.

164 For example, Article 33 of Geneva Convention IV of 1949, and Article 51, Additional Protocol to the Geneva Conventions, 12 August 1949 relating to the protection of victims of non international conflicts.

XI. The Organization of the Islamic Conference

The Organization of the Islamic Conference (OIC) held an extraordinary session of the Islamic Conference of Foreign Ministers in April 2002,[165] during which the OIC adopted the “Kuala Lumpur Declaration and Plan of Action on International Terrorism” and set up a Committee on the fight against terrorism.[166] This Committee has a mandate to make recommendations, especially concerning the means to accelerate implementation of the Code of Conduct for Combating International Terrorism and the Convention on Combating International Terrorism.

On several occasions, the OIC has supported the idea of convening an international conference on terrorism under UN auspices. The OIC also insists on the need to “define the concept of terrorism and make a distinction between it and peoples’ struggle for national liberation”.[167] It is important to note that in the final Declaration of its 29th Session, the Islamic Conference of Foreign Affairs Ministers took note of the unjustified wave of hostility against Islam and Moslems that these events have raised, leading to an iniquitous amalgam between Islam and terrorism, confusing the latter with legitimate national resistance against occupation.”[168]

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165 Resolution 65/9-p (IS). See also, the OCI press release at: http://www.oic-oci.org/index.asp.

166 The Committee is chaired by Malaysia and composed by Qatar, The Islamic Republic of Iran, Republic of Sudan, the Kingdom of Saudi Arabia, the Algerian Popular Democratic Republic and the Islamic Republic of Pakistan, the Syrian Arab Republic, the Arab Republic of Egypt, the Kingdom of Morocco, the Palestinian State, the Republic of Djibouti, the Tunisian Republic and the Republic of Indonesia.

167 Final Communiqué of the annual co-ordination meeting of Foreign Ministers, held at UN headquarters in New York, on 17 September 2002, paragraph 33. See, also, Final communiqué of the twenty-eighth session of the Islamic Conference of Foreign Ministers, held in Mali, from 25 to 27 June 2001 (paragraph 88) and 29th Session of the Islamic Conference of Foreign Ministers of OIC States Members, held in Khartoum on 27 June 2002.

168 Final Communiqué of the 29th Session of the Islamic Conference of Foreign Ministers of OIC States Members, held in Khartoum on 27 June 2002.

Finally, it is important to add that the OIC adopted a Convention on Combating International Terrorism in 1999. The definition of terrorism adopted in this convention is based on that of the Arab Convention for the Suppression of Terrorism, but in an even more vague and extensive manner.[169]

169 Article 1, paragraphs 2 and 3.

XII. Concluding Observations

The 11 September 2001 attacks and the reactions which followed them have raised new challenges, but also resuscitated old dangers. The relationship between security and human rights, too often falsely presented as contradictory, depends on a fragile balance in which human reason must prevail over reasons of State. As the UN High-Commissioner for Human Rights has stated: "The promotion and protection of human rights is central to an effective strategy to counter 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."[170]

The initial problem raised by terrorism is how to successfully combat this scourge while respecting and guaranteeing human rights, international law and the Rule of law. The Committee on the Elimination of Racial Discrimination pointed out in its *Statement on racial discrimination and measures to combat terrorism*, adopted in August 2002, that "measures to combat terrorism must be in accordance with the Charter of the United Nations and that they are only legitimate if they respect the fundamental principles and the universally recognized standards of international law, in particular, international human rights law and international humanitarian law".[171] International law and the case-law of human rights courts and bodies constitute a priceless source indicating the sorts of measures involved, the circumstances in which they can be adopted and the conditions for their implementation in order to counter terrorist acts within the framework of the Rule of law.

Beyond the serious consequences which would flow from combating terrorism outside the framework of international law, with contempt for human

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170 Report of the High Commissioner submitted pursuant to General Assembly Resolution 48/141, Human rights: a uniting framework, UN Doc. E/CN.4/2002/18, 27 February 2002, paragraph 7.

171 *Statement on racial discrimination and measures to combat terrorism*, UN Doc. A/57/18, Chapter XI(C), 1 November 2002, paragraph 3.

rights and to the detriment of the Rule of law, such an approach would have exactly the opposite result from its goal. As the UN Secretary-General recently declared before the Security Council, "we must never lose sight of the fact that any sacrifice of freedom or the Rule of law within States - or any generation of new tensions between States in the name of anti-terrorism - is to hand the terrorists a victory that no act of theirs alone could possibly bring. … the danger is that in pursuit of security, we end up sacrificing crucial liberties, thereby weakening our common security, not strengthening it - and thereby corroding the vessel of democratic government from within. Whether the question involves the treatment of minorities here in the West, or the rights of migrants and asylum seekers, or the presumption of innocence or the right to due process under the law - vigilance must be exercised by all thoughtful citizens to ensure that entire groups in our societies are not tarred with one broad brush and punished for the reprehensible behaviour of a few."[172]

172 Press Release, *Menace of terrorism requires global response, says Secretary-General, stressing importance of increased United Nations role*, UN Doc. SG/SM/8583, 20 January 2003.

XII. Annexes

Annex 1

Statement on racial discrimination and measures to combat terrorism

The Committee on the Elimination of Racial Discrimination

(Adopted the 8 March 2002, UN DOC-A/57/8A)

1. Condemns unequivocally the terrorist attacks on the United States of America of 11 September 2001;
2. Affirms that all acts of terrorism are contrary to the Charter of the United Nations, the Universal Declaration of Human Rights and other human rights instruments referred to in the Preamble to the International Convention on the Elimination of All Forms of Racial Discrimination;
3. Emphasizes that measures to combat terrorism must be in accordance with the Charter of the United Nations and that they are only legitimate if they respect the fundamental principles and the universally recognized standards of international law, in particular, international human rights law and international humanitarian law;
4. Recalls that the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted;
5. Demands that States and international organizations ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin;
6. Insists that the principle of non-discrimination must be observed in all matters, in particular in those concerning liberty, security and dignity of the person, equality before the courts and due process of law, as well as international cooperation in judicial and police matters in these fields;
7. Intends, in this context, to monitor, in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination, the potentially discriminatory effects of legislation and practices in the framework of the fight against terrorism.

Annexe 2

Declaration of the Committee Against Torture

(UN DOC CAT/c/XXVII/Misc.7, 22.11.2001)

By letter dated 11 October 2001, the United Nations High Commissioner for Human Rights solicited the views of the Committee against Torture on the matter of ensuring that the human rights covered by its mandate are maintained with a high visibility in the light of various State responses to the events of 11 September 2001.

It is in the spirit of this request that the Committee against Torture decided to communicate directly to the States parties to the Convention against Torture the following statement:

The Committee against Torture condemns utterly the terrorist attacks of 11 September and expresses 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 is mindful of the terrible threat to international peace and security posed by these acts of international terrorism, as affirmed in Security Council resolution 1368 (2001) of 12 September 2001. The Committee also notes that the Security Council in resolution 1373 (2001) of 28 September 2001 identified the need to combat by all means, in accordance with the Charter of the United Nations, the threats caused by terrorist acts.

The Committee against Torture reminds States parties to the Convention of the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention.

The obligations contained in articles 2 (whereby "no exceptional circumstances whatsoever … may be invoked as a justification of torture"), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions and must be observed in all circumstances.

The Committee against Torture is confident 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.

Annex 3

Proposals for "further guidance" for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001)

(intended to supplement the Chairman's note on "Guidance" of 26 October 2001)

Compliance with international human rights standards

High Commissioner for Human Rights

GENERAL GUIDANCE: CRITERIA FOR THE BALANCING OF HUMAN RIGHTS PROTECTION AND THE COMBATING OF TERRORISM

1. The Security Council has asked States to take specific measures against terrorism. States' action in this area should also be guided by human rights principles contained in international law.

2. Human rights law strikes a balance between the enjoyment of freedoms and legitimate concerns for national security. It allows some rights to be limited in specific and defined circumstances.

3. Where this is permitted, the laws authorizing restrictions:

   (a) Should use precise criteria;

   (b) May not confer unfettered discretion on those charged with their execution.

4. For limitations of rights to be lawful they must:

   (a) Be prescribed by law;

   (b) Be necessary for public safety or public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;

   (c) Not impair the essence of the right;

(d) Be interpreted strictly in favour of the rights at issue;

(e) Be necessary in a democratic society;

(f) Conform to the principle of proportionality;

(g) Be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;

(h) Be compatible with the objects and purposes of human rights treaties;

(i) Respect the principle of non-discrimination;

(j) Not be arbitrarily applied.

5. Comments on the compliance of adopted anti-terrorist measures with international human rights could refer to whether the measures are compatible with, for instance:

(a) The right to personal liberty (International Covenant on Civil and Political Rights (ICCPR), art. 9);

(b) Freedom of movement (ICCPR, art. 12), including the right of all persons to leave any country, including one's own country (ICCPR, art. 12, para. 4);

(c) The right to a fair trial, particularly in the determination of any criminal charge (ICCPR, arts. 14 and 15);

(d) The protection against arbitrary interference with privacy, family, home or correspondence and against unlawful attack on honour and reputation (ICCPR, art. 17);

(e) Freedom of expression (ICCPR, art. 19);

(f) The right to manifest one's religion or belief (ICCPR, art. 18);

(g) The right of peaceful assembly (ICCPR, art. 21);

(h) Freedom of association (ICCPR, art. 22);

(i) Rights of participation (ICCPR, art. 25);

(j) The right of persecuted persons to seek asylum in the territory or jurisdiction of a State (Universal Declaration of Human Rights (UDHR), art. 14 and the Convention relating to the Status of Refugees), and the right of *non-refoulement* (ICCPR, art. 7 and other more specific treaty provisions);

(k) Procedural guarantees related to deportation of an alien (in particular, ICCPR, arts. 9, 13 and 14).

Annex 4

Guidelines of the Committee of Ministers of the Council of Europe on Human rights and the fight against terrorism

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;

[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.