COUNCIL OF EUROPE CONSEIL DE L'EUROPE

.
Strasbourg, 7 December 2001
DH-S-TER(2001)003

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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GROUP OF SPECIALISTS ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM (DH-S-TER)

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1st meeting, 26 - 28 November 2001

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REPORT

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Introduction

1. The Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) held its 1st meeting in Strasbourg, *Palais de l'Europe*, from 26 to 28 November 2001 with Mr Philippe BOILLAT (Switzerland) in the Chair.

2. The list of participants is set out in Appendix I. The agenda, as adopted, is set out in Appendix II, as are the references of the working papers.

3. At the meeting, DH-S-TER *inter alia*:

- examined the terms of reference received from the CDDH and decided how its work would be organised;

- held a hearing with NGOs;

- drew up an interim activity report containing first preliminary elements with a view to drawing up the future guidelines and the explanatory report thereto (Appendix III).

Item 1 : Opening of the meeting and adoption of the agenda

4. See introduction.

Item 2 : Role and terms of reference of the DH-S-TER

5. Following the terrorist attacks of 11 September 2001, the Ministers' Deputies had asked the CDDH to draw up guidelines based on democratic principles for dealing with movements threatening the fundamental values and principles of the Council of Europe (see extracts from the CDDH report, document DH-S-TER (2001) 1). On that basis, the CDDH had set up the DH-S-TER, giving it the terms of reference set out in Appendix V.

6. The DH-S-TER noted that, under these terms of reference, it was responsible for drawing up, by 30 June 2002, guidelines reminding member States of the principles for safeguarding human rights which should guide their actions in fighting terrorism in a manner which respected democracy and the rule of law. It was envisaged that the DH-S-TER would hold three meetings and submit a final activity report setting out its draft guidelines to the CDDH in time for the latter's 53rd meeting (25-28 June 2002).

7. The DH-S-TER noted the setting up of a Multidisciplinary Group on international action against terrorism (GMT)[1], instructed with the task of improving the efficiency of the Council of Europe's existing instruments for combating terrorism, or of suggesting, if necessary, new instruments in this field. The DH-S-TER had been asked to draw up an interim activity report during the present meeting, which would be forwarded to the GMT as the CDDH contribution and would be presented to the GMT, if need be, by the Chair of the DH-S-TER (see item 4 of the agenda).

Item 3 : Hearing with representatives of NGOs and other bodies

[1] See Communiqué on international action against terrorism, adopted by the Committee of Ministers at its 109th session (7-8 November 2001).

8. In accordance with the decisions of the CDDH, the DH-S-TER held a hearing with representatives of four non-governmental organisations[2] and with the European Coordinating Group for National Institutions for the Promotion and Protection of Human Rights. The hearing took place on the afternoon of 26 November 2001.

9. The Chair reminded the participants that the aim of the consultation was to obtain reactions, opinions, information and suggestions from NGOs early enough for the DH-S-TER to be able to take them into account before starting its work. After the individual presentations, an exchange of views with the DH-S-TER took place.

Statements by those invited to the hearing

10. The statements by those invited to the hearing highlighted the issues which they viewed as particularly sensitive as regards human rights and the rule of law in the combating of terrorism.

11. They stressed in particular that:

a. the future guidelines should on no account threaten human rights protection under the cover of effective measures to combat terrorism, however legitimate those might be;

b. the content of the guidelines would certainly come to the attention of persons beyond the confines of our continent, even if they were aimed primarily at European States, and this is something which should be kept in mind during the elaboration of these texts;

c. the respect of the rule of law was vital, including fundamental international obligations in the area of human rights;

d. there could be no derogation from certain fundamental rights and that any erosion of fundamental rights as protected today by the Council of Europe was to be avoided at all costs;

e. the Convention and the case-law of the Court had to guide all thinking on the subject. For certain aspects, however, considerations should go beyond that case-law. In this respect NGO representatives suggested making a fair trial in the requesting State a prerequisite for granting extradition;[3]

f. as the Court's case-law was evolving, it was not to be excluded, from the point of view of one NGO representative, that the Court may now assess the requirements linked to the right to respect for private life more rigorously, for example as regards undercover agents in respect of which the latest available case-law dates back ten years.

Exchange of views with the members of DH-S-TER

12. This exchange of views focused in particular on the following three questions which were asked to those invited to the hearing:

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[2] Amnesty International, International Federation for Human Rights, International Commission of Jurists, Committee on the Administration of Justice.

[3] They recalled that in principle the Court does not exclude that, for example within the framework of an extradition procedure, the question of a requesting State's respect of the requirement of a fair trial could exceptionally be raised. In a decision of 4 May 2000 delivered in the case of *Naletelic v. Croatia* (application No. 51891/99), a Chamber of the Court (IVth Section) found an application introduced by a person handed over to the International Criminal Tribunal for the Former Yugoslavia (ICTY) inadmissible as, taking into account the Statute of the ICTY and its internal rules, the Tribunal offered all the necessary guarantees, including those of impartiality and independence.

1. In the experience of your organisation, what would be the central topics to reiterate in guidelines for member States on human rights and terrorism?

2. What specific human rights could be restricted in the fight against terrorism and under which conditions?

3. Are you aware of any specific proposals which have been or are being made to amend current national laws or to adopt new legislation, in the fight against terrorism, which could restrict human rights?

13. During the debate, those invited to the hearing raised the following points in particular:

a. A definition of terrorism did not seem possible nor desirable to them.

b. In all cases, describing an act as a terrorist act must not restrict or have as a consequence any restriction of the human rights afforded under the Convention, particularly its Articles 7-11.

c. Extension of powers of investigation (body-searches, house searches, phone-tapping) is a subject for preoccupation. Any measures of constraint should at one moment or the other be subject to judicial control.

d. The fight against terrorism extends the scope for the use of pro-active criminal investigation policies, implemented before the crime has been committed. Within this policy, the handling of personal data concerning individuals, with respect to whom information has been collected because they belong to certain groups or because of their participation in certain events, has a decisive role to play. Therefore, in particular the handling of data by security or investigation services, must conform with the rules defined in Convention No. 108 of 28 January 1981.

e. The fight against terrorism is carried out through an intensification of the exchange of information between the security services of various States, member States of the Council of Europe and other States. It is important in this respect that these exchanges do not reduce the level of protection of personal data to which persons under the jurisdiction of the member States of the Council of Europe have the right, both under the above-mentioned Convention No. 108, for the States that have ratified it, and under Article 8 of the European Convention on Human Rights, for all the member States of the Council of Europe.

f. Any detention had to comply with the basic rules, such as notifying grounds of detention in a language understood by the person, court supervision of detention, *habeas corpus*, regular checks on the need for detention, possibility of appeal and other rights of the defendant.

g. Any detention had to be subject to court supervision. Those invited to the hearing mentioned the problem of detention for an undefined period of time based on secret testimony. They recalled that any criminal and administrative procedures had to comply with the international standards concerning the right to a fair trial and that the right for imprisoned terrorists should be guaranteed (no solitary confinement or prolonged periods where communication was not allowed; lawyer should be allowed contact with the defendant in both remand custody and administrative detention, and monitoring communication between the lawyer and his client should be avoided).

h. Extradition was a key element in countering impunity but there was to be no extradition to a country where there was a risk of an unfair trial, inhuman or degrading treatments, torture or the death penalty. They recalled the importance of strict maintenance of the *non-refoulement* clause in texts for combating terrorism, while pointing out that this should not result in impunity following the principle "*aut dedere, aut judicare"*.

i. Requests for asylum were another area of concern. There was a danger of *a priori* assessment in the light of efforts to combat terrorism, based on elements of discrimination such as race or ethnic origin of persons requesting asylum (drifting towards racism).

j. There was a need for systematic monitoring at European level of "emergency" legislation: a need for regional machinery to check the conformity of emergency legislation with the Convention and its case-law, and with other texts such as European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) directives or the general comment no. 29 of the United Nations. Mention was made to the failure of special legislation for combating terrorism with negative impact on public opinion (mistrust of the State and notably the courts) when theoretically temporary legislation became a fixture.

k. The activities of the Council of Europe should be based also on non-European sources such as, for example, the case-law of the Inter-American Court of Human Rights, which had had to deal with a number of cases relating to terrorism, as well as to the work of the special rapporteur of the United Nations on the independence of judges and lawyers.

14. At the end of the hearing, the Chair thanked the participants for the wealth of ideas and information contributed. It was decided that the NGO representatives would receive the Group's meeting reports in time to allow them to send in any proposals. The Chair also invited the NGOs to pass on to the Group of Specialists any case-law they regarded as relevant in this field.

15. The DH-S-TER noted that its next meeting would include an exchange of views with national counter-terrorism specialists. In this connection, participants were reminded that the CDDH had asked the delegations to the DH-S-TER to bring with them, where possible, and at the expense of their authorities, an expert with specific knowledge of combating terrorism. The presence of these experts was particularly desirable for the Group's next meeting (13-15 February 2002), so that they could comment on the draft guidelines being prepared.

Item 4 : Drafting of the interim activity report

16. The DH-S-TER proceeded with the drafting of its interim activity report, setting out the first preliminary elements considered by the Group at this stage for the future guidelines and the explanatory report.

First preliminary elements for the elaboration of the guidelines

17. Firstly, the DH-S-TER expressed the view that human rights must not be perceived by public opinion, under any circumstances, as a hindrance to effectively fighting terrorism, whether at national level or within international cooperation.

18. It also noted that the case-law of the Court (and the former Commission) was not solely configured around the limits imposed on States in their fight against terrorism, but contained many points demonstrating that the Court (and the former Commission) were fully aware of the absolute necessity for States to effectively combating terrorism.

19. It was stressed that the States were under a positive obligation to protect the fundamental rights of everyone within their jurisdiction against possible terrorist acts, notably their right to life as guaranteed in Article 2 of the Convention.

20. The DH-S-TER was of the opinion that, in all events, what was important was that measures were never taken in an arbitrary manner and could, at a given time, be subject to court supervision. It also agreed on the need to ensure that the implementation of such measures was not done in a racist manner ("*délit de facies*": offence based on physical appearance) or discriminatory way contrary to Article 14 of the Convention.

21. It was reiterated that one of the Group's tasks was to list the key points, drawing on the numerous sources of inspiration, with which it could develop the guidelines. In this respect, the case-law of the Court, as pointed out by the CDDH (see document CDDH (2001) 32), was obviously a prime source. The work of DH-S-TER should reflect this case-law, without, however, limiting itself to "making a photography of it". The Group would keep in mind the evolving character of the Court's case-law with respect to certain ever-changing aspects of the terrorist phenomena. It observed in particular that some States had already taken initiatives in the fight against terrorism. The Group would consequently have to raise certain issues in its guidelines which were not necessarily reflected in the present case-law. The DH-S-TER would also draw on work carried out within the United Nations and the European Union.

22. The Group agreed that the guidelines had to be concise, limited to the fundamental points and seek to instruct. For this reason it was thought that the guidelines should reiterate some points, even if these were not at issue in the Court's case-law.

23. The task was to draw the attention of States that had adopted, were in the process of adopting or intended to adopt, anti-terrorism legislation to the imperatives of human rights and the rule of law.

24. The basis for discussion was document CDDH (2001) 32, which contains a collection of pertinent texts, as well as, more particularly, document DH-S-TER (2001) 2 ("*Fight against terrorism: Elements with a view to the elaboration of guidelines based on the respect of Human Rights and the rule of law*"), prepared by the Chairman of the DH-S-TER in co-operation with the Secretariat. The latter document aimed to facilitate the Group's discussions by providing a draft framework for the future guidelines, without any prejudice as to the result of the debate.

25. On the whole, the DH-S-TER favoured the general approach advocated in the document. A preliminary discussion took place on the qualification of terrorism as a permanent source of human rights violations and on its condemnation, whatever its political reasoning. It was decided to come back to these points at the next meeting (13-15 February 2002), in particular on the possible wording which could be retained in the future preamble of the guidelines. At this stage, the DH-S-TER agreed to reiterate in the preamble:

- the fact that human rights protection cannot be invoked as an excuse or justification of terrorism;

- **the need to bring criminals to justice, as well as the States' imperative duty to protect the fundamental rights of everyone within their jurisdiction against possible terrorist acts;**

- the need to fight terrorism effectively by reinforcing national measures and international cooperation;

- the need to prevent terrorism, in particular by combating poverty throughout the world or by seeking political settlements to conflicts while encouraging inter-cultural and inter-religious dialogue to foster cohesion in our societies.

26. Although the DH-S-TER felt it was crucial to include these points in the preamble of the guidelines, it agreed that it had to focus its efforts above all on a certain number of guidelines deriving from the respect for human rights and the rule of law in the fight against terrorism.

27. Since terrorism was a phenomenon which evolved and took on many forms, the guidelines should not only be inspired by the circumstances of the moment, by definition temporary, but have a fundamental nature that would survive the test of time. Moreover, the DH-S-TER is aware that its terms of reference are limited to the perspective *of human rights protection and the rule of law*, to avoid interference with the work of the GMT (see paragraph 7 above).

28. *Possible definition of the offence of terrorism* - There was prolonged discussion on whether or not to define terrorism as such. The obvious risk, in the absence of a definition of terrorism accepted by all the States, was that each State would adopt its own definition. This approach had two major drawbacks; the first was that the States could frame an excessively broad definition of terrorism and, consequently, apply certain measures restrictive of fundamental rights to crimes or offences that could not be considered as terrorist acts; the second was that this might lead to diverging interpretations on an international level and, consequently, hamper effective cooperation between the States in fighting terrorism[4]. In any event, however, the experts did not consider that the definition of terrorism fell within the terms of reference entrusted to the DH-S-TER.

29. *Extradition* – The DH-S-TER recalled that extradition was an essential procedure for effective international co-operation in the fight against terrorism. However, according to the Court’s case-law, if a State has received a request for extradition, it must obtain a guarantee

[4] In this context, one expert supplied a draft definition of the offence of "terrorism":

> 1. Terrorism is any serious act, committed intentionally and in breach of the law, defined in national legislation in conformity with Article 7 of the European Convention on Human Rights, with the aim and having the effect of seriously undermining – notably by intimidating a country's people - or destroying the fundamental political, economic and social institutions of a member State of the Council of Europe or an international organisation within the jurisdiction of the member States; member States or organisations not gravely and persistently violating the principles, values and fundamental rights on which Council of Europe is founded.
>
> 2. Nothing in this definition shall be regarded as preventing any Council of Europe member State from:
>
> (a.) prosecuting acts defined under the criminal law as infringements of common law in the absence of the description set out in § 1 of the present article;
>
> (b.) establishing its competence concerning infringements linked to terrorism in cases where it refuses to hand over or extradite an individual suspected or convicted of such an infringement to another member State.

from the requesting State that the person likely to be extradited would not be condemned to a death sentence or, in the event of such a sentencing, that it would not be carried out. Moreover, it must ensure that the person would not be subjected to torture or inhuman and degrading treatment. In this context, the DH-S-TER recalled, in the light of the Court's case-law, that it was not excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention[5].

30. The Group also pointed out that in the light of the Court's case-law, it was not to be excluded that an issue might exceptionally arise under Article 6 of the Convention by an extradition decision, in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country or in another country[6].

31. *Request for asylum* – There was a discussion on asylum requests in the context of the fight against terrorism. It was inter alia stated that a State where a request for asylum is made has the duty to ensure that the 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 and degrading treatment. In this context reference was also made to the risk of denial of justice in the country of origin or in another country.

32. It was also pointed out that, if it was suspected that an asylum seeker belonged to a terrorist organisation or might have participated in terrorist acts, the above-mentioned obligation would apply, but the requested State should have the right to take any exceptional supervision measures (for example, [house arrest][7], obligation to present him/herself regularly to the police authorities). If, on the other hand, there were good reasons to believe that the applicant had participated, in one way or another, in a terrorist act, and that it was impossible for the State concerned to extradite, expel or return the applicant, because he would be exposed to the death penalty or to torture or inhuman and degrading treatment, the State should, in so far as possible, judge him ("*aut dedere, aut judicare*").

33. *Competent jurisdictions* – The Group examined the question of whether it was legitimate to set up special courts to judge terrorist acts. It was pointed out that, whatever jurisdiction would be called upon to judge these acts, they must meet the requirements of Article 6 of the Convention (independent and impartial tribunal established by law).

34. *Derogations in case of emergency* – The DH-S-TER considered that several issues raised by a possible application of Article 15 of the Convention should be examined in depth at a more advanced stage of its reflection process.

35. At the end of this examination, the DH-S-TER adopted its "first preliminary elements for the elaboration of the guidelines" as set out in Appendix III.

36. The DH-S-TER agreed to examine during its next meeting:

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[5] See the Court's Final decision as to the admissibility in the *Einhorn v. France* case, 16 October 2001, § 27.

[6] See the *Soering v. United Kingdom* case, 7 July 1989, § 113, confirmed by the Court in *Drozd and Janusek v. France and Spain*, 26 June 1992, § 110, and in its Final decision as to the admissibility in the *Einhorn v. France* case, 16 October 2001, § 32.

[7] House arrest is a very problematical measure. It is a direct interference – and in some circumstances for an undefined period of time – to the freedom of movement guaranteed by Article 5 of the Convention, without the person concerned having the opportunity to prove his/her "innocence" within a judicial procedure. The legitimacy of this measure and the conditions of its application will still need to be discussed thoroughly within the DH-S-TER.

- the other provisional elements mentioned in document DH-S-TER (2001) 2, as contained in Appendix IV hereafter;

- the issue of regular assessment, by the States concerned, of emergency legislation that may be adopted in the fight against terrorism, with a view to repealing this legislation, or parts of it, as soon as the reasons for its existence are no longer at hand (in this context it agreed to examine the General Comment No. 29 (state of emergency) of the Human Rights Committee of the United Nations of 31 August 2001);

- the possibility for additional guidelines, on (i) action taken against the property of terrorist organisations (freezing of the sources for financing terrorism); (ii) the media coverage of terrorist acts in the light of Article 10 of the Convention.

First preliminary elements for the draft of the future explanatory report

37. These first elements, extracts from document DH-S-TER (2001) 2, are contained in Appendix III. They will be subjected to an in-depth examination at the 2nd meeting together with those contained in Appendix IV to the present report, which are also extracts from document DH-S-TER (2001) 2.

38. The members of the DH-S-TER were invited to transmit all observations and proposals for amendments of these texts, as well as references to judgments and decisions of the Court and the former Commission, or to other texts, that they wished to insert in the future explanatory report. The time-limit for sending such remarks (by e-mail) was set at 31 January 2002.

Interim activity report

39. As has already been indicated (see paragraph 7 below), the DH-S-TER was called to prepare, during the present meeting, an interim activity report, to submit for information to the Multidisciplinary Group on international action against terrorism (GMT).

40. The DH-S-TER elaborated the interim activity report as contained in Appendix III. It was composed of the following parts:

I. First preliminary elements for the elaboration of the guidelines,
II. First preliminary elements for the elaboration of the future explanatory report.

41. The DH-S-TER also found it would be useful to transmit document CDDH (2001) 32 prov. mentioned above (see paragraph 24 above) to the GMT.

42. The Chair of the DH-S-TER, in his capacity of representative of the CDDH within the GMT, would present these documents during the first meeting of that Group (12-14 December 2001) if necessary.

Item 5 : Dates of the next meetings

43. The DH-S-TER took note of the following dates:

2nd meeting: 13-15 February 2002
- 3rd meeting: 17-19 April 2002

44. The result of its work would be examined by the CDDH at its 53rd meeting (25-28 June 2002).

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Appendix I : LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS

BELGIUM / BELGIQUE
M. Claude DEBRULLE, Directeur Général, Ministère de la Justice, Boulevard de Waterloo 115, B-1000 BRUXELLES

FRANCE/FRANCE
Mme Michèle DUBROCARD**,** Sous-Directrice des Droits de l'Homme, Direction des Affaires juridiques, Ministère des Affaires étrangères, 37 Quai d'Orsay, F-75007 PARIS

GERMANY/ALLEMAGNE
Ms Lydia GLOWATZKI**,** Richterin**,** Verwaltungsgericht, Federal Ministry of Justice, Mohrenstrasse, 10117 BERLIN

Ms Angelika LAITENBERGER, Staatsanwältin, Verwaltungsgericht, Federal Ministry of Justice, Mohrenstrasse, 10117 BERLIN

GREECE/GRECE
Mr Emmanuel ROUCOUNAS**,** Professor, Academy of Athens, Panepistimiou str., ATHENS 10679

ITALY/ITALIE
M. Roberto BELLELLI, Juge, Ministero degli Affari Esteri, servizio del Contenzioso diplomatico e dei trattati e, Piazzale della Farnesina 1, I-00194 ROME

POLAND/POLOGNE
Mr Krzysztof DRZEWICKI, Minister Councellor, Deputy Permanent Representative of Poland to the Council of Europe, Agent of the Government before control organs of the ECHR, 2, rue Geiler, F-67000 STRASBOURG

Ms Renata KOWALSKA, Legal Adviser, Ministry of Foreign Affairs, Aleja Szucha 23, WARSAW 00950

RUSSIAN FEDERATION/FEDERATION DE RUSSIE
M. Vladislav ERMAKOV**,** Premier Secrétaire du Département pour les affaires des compatriotes et les droits de l'homme, Ministère des affaires étrangères de la Fédération de Russie, 32/34 Smolenskaya-Sennaya sq., MOSCOW

SPAIN/ESPAGNE
M. Francisco Javier BORREGO BORREGO, Avocat d'Etat, Sous-Directeur Général, Chef du service juridique des Droits de l'Homme, Ministère de la Justice, Calle Ayala, no 5, E-28001 MADRID

SWITZERLAND/SUISSE
M. Philippe BOILLAT, Chairman/Président, Sous-Directeur de l'Office fédéral de la justice, Chef de la Division des affaires internationales, CH-3003 BERNE

TURKEY/TURQUIE
Mme Deniz AKCAY**,** Adjoint au Représentant permanent de la Turquie auprès du Conseil de l'Europe, 23, boulevard de l'Orangerie, F-67000 STRASBOURG

Ms Isik BATMAZ-KEREMOGLU, Legal Expert on Human Rights, Department of European Court of Human Rights, Ministry of Foreign Affairs, BALGAT/ANKARA

UNITED KINGDOM/ROYAUME-UNI
Mr Derek WALTON, Assistant Legal Adviser, Foreign and Commonwealth Office, King Charles Street, LONDON SW1 2AH

Mr David NOBLE, Deputy Legal Adviser, Home Office, Room 807, 50 Queen Anne's Gate, LONDON SW1H 9AT

* * *

OBSERVERS/OBSERVATEURS

HOLY SEE/SAINT-SIEGE
M. Giorgio FILIBECK, Conseil Pontifical "Justice et Paix", I-00120 CITE DU VATICAN

European Commission / Commission européenne
M. Aristote GAVRILIADIS, Administrateur principal, Direction générale Justice et Affaires intérieures, Unité Droits fondamentaux, 200 rue de la Loi, B – 1049 BRUXELLES

United Nations High Commissioner for Human Rights / Haut Commissariat aux droits de l'homme des Nations Unies (HCHR)
Mr Zdzislaw KEDZIA, Leader of the Policy Planning and Methodology Team, Conseiller principal, Palais des Nations, CH-1211 GENEVA 10

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HEARING / AUDITION
Monday 26 November 2001

Amnesty international

Ms Jill HEINE, Legal Adviser, Amnesty International, International Secretariat, 1 Easton Street, LONDON WC1X ODW, United Kingdom

International Commission of Jurists / Commission Internationale de Juristes

M. Federico ANDREU-GUZMAN**,** Comision International de Juristas, Consejero juridico, 81 A, Avenue de Châtelaine, CH – 1219, CHÂTELAINE-GENEVE, Suisse

International Federation of Human Rights / Fédération Internationale des Ligues des Droits de l'Homme

M. Olivier DE SCHUTTER**,** Secrétaire général de la Ligue des droits de l'Homme, Professeur à la Faculté de Droit de l'Université catholique de Louvain, Place Montesquieu, 2, B-1348 LOUVAIN-LA-NEUVE, Belgique

M. Pierre BOULAY, Représentant FIDH auprès du Conseil de l'Europe, responsable du regroupement ONG-DH, 40, rue Principale, F-67300 SCHILTIGHEIM, France

Committee on the Administration of Justice

Mr Paul MAGEEAN, Committee on the Administration of Justice, 44/47 Donegall street, BELFAST, BT1 2BR, Northern Ireland, United Kingdom

Justice and Peace Commissions/Commissions justice et paix d'Europe
Apologised/Excusé

European Coordinating Group for National Institutions for the Promotion and Protection of Human Rights / Groupe de coordination européenne des institutions nationales pour la promotion et la protection des droits de l'homme

Ms Ida Elisabeth KOCH, The Danish Centre for Human Rights, Wilders Plads 8H, DK-1403 COPENHAGEN K, Denmark

SECRETARIAT

Directorate General of Human Rights – DG II / Direction Générale des Droits de l'Homme – DG II
Council of Europe/Conseil de l'Europe, F-67075 STRASBOURG CEDEX

M. Pierre-Henri IMBERT, Director General of Human Rights / Directeur Général des Droits de l'Homme

M. Alfonso DE SALAS, Head of the Human Rights Law and Policy Development Division / Chef de la Division de la coopération intergouvernementale en matière de droits de l'homme

M. Mikaël POUTIERS, Administrator/Administrateur
Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'homme

Mme Sonia PARAYRE, Lawyer/Juriste
Human Rights Law and Policy Development Division / Division du développement du droit et de la politique des droits de l'homme

Mme Michèle COGNARD, Administrative Assistant/Assistante administrative
Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'homme

Interpreters/Interprètes

Mme Amanda BEDDOWS
Mme Christine MARTEAU
Mr Derrick WORSDALE

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Appendix II : DRAFT AGENDA

Item 1: Opening of the meeting and adoption of the agenda

Item 2: Role and terms of reference of the DH-S-TER

Working documents

Extracts of the report of the 52nd meeting of the CDDH (6 – 9 November 2001)
DH-S-TER (2001) 1

Item 3: Hearing of representatives of NGOs and other bodies

Item 4: Drafting of the interim activity report

Working documents

Extracts of the report of the 52nd meeting of the CDDH (6 – 9 November 2001)
DH-S-TER (2001) 1

First elements from the Secretariat with a view to the future contribution of the CDDH to the activities concerning the fight against international terrorism
CDDH (2001) 32

Fight against terrorism: Elements with a view to the elaboration of guidelines based on the respect of Human Rights and the rule of law
DH-S-TER (2001) 2

Item 5: Other business

Item 6: Dates of the next meetings

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Appendix III : INTERIM ACTIVITY REPORT

drawn up by the DH-S-TER
at its 1st meeting (26-29 November 2001)

Preliminary Note

The present interim activity report has been drawn up in response to the CDDH's request to provide the Multidisciplinary Group on international action against terrorism (GMT)[8] with an initial idea of the work in progress within the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER)[9].

The present report contains the first provisional elements adopted at this stage by the DH-S-TER, at the end of its 1st meeting (26-28 November 2001), with a view to drawing up future guidelines for the fight against terrorism geared to respect for human rights and the rule of law. It also contains provisional elements for the preparation of the draft explanatory report accompanying the future guidelines.

The report is composed of three parts:

It goes without saying that the following texts are the result of the DH-S-TER's initial discussions and can in no way be considered definitive or prejudice the work still to be carried out.

It is recalled that the terms of reference of the DH-S-TER received from the CDDH are set out in Appendix V hereafter.

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[8] Set up by the Committee of Ministers during its 109th session (7-8 November 2001), the GMT has been charged with improving the efficiency of the existing instruments of the Council of Europe in the fight against terrorism.

[9] Set up by the CDDH during its 52nd meeting (6-9 November 2001, document CDDH (2001) 35). The terms of reference of the DH-S-TER appear in Appendix V hereafter.

I. First preliminary elements for the elaboration of the guidelines

Preliminary note:

The present elements reflect the discussions held during the first meeting of the DH-S-TER (26-28 November 2001).

The structure of these elements will be revised globally on completion of the work done by the DH-S-TER (April 2002).

Preamble[10]

[…]

[a.] [Qualification of terrorism as a permanent source of human rights violations: issue to be examined at the 2nd meeting (13-15 February 2002)]

[b.] [Condemnation of terrorism, whatever its political reasoning: issue to be examined at the 2nd meeting (13-15 February 2002)]

[c.] [Recalling that an effective fight against terrorism can be led whilst respecting human rights and the rule of law;

[d.] Also recalling that a terrorist act can never be excused or justified, by citing the protection of human rights as a motive and that the abuse of rights is never protected;

[e.] Stressing firmly that defending a democratic society requires that the presumed perpetrators, organisers and sponsors of terrorist attacks are brought to justice;

[f.] Reaffirming the imperative duty of States to protect the fundamental rights of its populations against possible terrorist acts;

[g.] Convinced about the need to prevent terrorism, in particular by combating poverty throughout the world or by seeking political settlements to conflicts while encouraging inter-cultural and inter-religious dialogue to foster cohesion in our societies;]

Positive obligations of States

1. States are under a positive obligation to protect the human rights of everyone within their jurisdiction, as guaranteed by the Convention, especially the right to life such as guaranteed by its Article 2.

2. This obligation justifies the measures they may take in the fight against terrorism, providing that these measures respect human rights and the rule of law, while excluding any form of arbitrariness and subjecting them to an appropriate judicial control.

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[10] For the attention of the members of DH-S-TER: paragraph 25 of the meeting report recalls that a discussion took place within the DH-S-TER on the qualification of terrorism as a permanent source of human rights violations and on its condemnation, whatever its political reasoning. It was decided to come back to these points at the 2nd meeting of the DH-S-TER (13-15 February 2002), in particular on the possible wording which could be retained in the future preamble of the guidelines.

Extradition, expulsion and return ("refoulement")

1. Extradition is an essential procedure for effective international co-operation in the fight against terrorism.

2. If a State has received a request for extradition, the requesting State must guarantee that:

(i) the person likely to be extradited will not be condemned to a death sentence;
(ii) in the event of such a sentencing, that it will not be carried out.

3. [It is not excluded that an extradition decision might exceptionally raise an issue under Article 6 of the Convention, in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country[11].]

4. [It is not excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention[12].]

5. 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 and degrading treatment[13]. The same applies to expulsion.

6. In all cases, the processing of the extradition, the expulsion or the *refoulement*, needs to be carried out with respect for the dignity of the person concerned, and avoiding any inhuman or degrading treatment.

Detention

1. A person deprived of his/her liberty for terrorism shall not, under any circumstances, and like any other person, be submitted to torture or inhuman or degrading treatment, such as total sensorial isolation. Furthermore, his/her right to have the legality of custody examined should not be subject to limitation in conformity with Article 5 para. 4 of the Convention, except in situations in which a State has made a declaration under Article 15 of the Convention.

2. A person deprived of his/her liberty for terrorism shall, in principle, be treated like any other prisoner. The specific characteristics of the fight against terrorism can nevertheless require different treatment for such a person, particularly concerning:

(i) the regulations concerning communications between the lawyer and his/her client;
(ii) supervision of correspondence;
(iii) placing terrorists in specially secured quarters;

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[11] For the attention of the members of DH-S-TER: Quotation from the *Soering v. United Kingdom* case, 7 July 1989, § 113, confirmed by the Court in *Drozd and Janusek v. France and Spain*, 26 June 1992, § 110, and in its Final decision as to the admissibility in the *Einhorn v. France* case, 16 October 2001, § 32.

[12] For the attention of the members of DH-S-TER: quotation from the Court's Final decision as to the admissibility in the *Einhorn v. France* case, 16 October 2001, § 27.

[13] For the attention of the members of DH-S-TER: : paragraph 1 of the previous "guideline" "*request for asylum*".

(iv) the separation of terrorists within the one prison or among different prisons[14];
(…),

under the condition that the measure taken is proportionate to the goal to be attained.

Jurisdiction of courts

Whatever courts may be called upon to judge terrorist acts, they must respect the criteria of Article 6 of the Convention (independent and impartial tribunal established by law).

[…]

II - First preliminary elements for the elaboration of the future explanatory report

Preliminary note: The precise wording which could be retained for the paragraphs below will be examined by the DH-S-TER at its 2nd meeting (13-15 February 2002).

AIM OF THE GUIDELINES

1. The guidelines concentrate mainly on the limits to be considered and that States should not go beyond, under any circumstances, in their legitimate fight against terrorism[15] [16] [17]. The main objective of these guidelines is not to deal with other important questions such as the causes and consequences of terrorism, which are simply mentioned in the Preamble to provide a background.

LEGAL BASIS

2. The specific situation of States parties to the ECHR should be recalled (Article 46 of the ECHR: the compulsory jurisdiction of the Court, execution of judgments by the Committee of Ministers). The case-law of the European Court of Human Rights is thus a primary source for defining guidelines for the fight against terrorism. The UN Covenant II on Civil and Political Rights and the observations of the UN Human Rights Committee should also be mentioned.

GENERAL CONSIDERATIONS

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[14] In this respect, the admissibility decision of the former European Commission of Human Rights in the case of *Venetucci v. Italy* (application No. 33830/96) of 2 March 1998 indicates that: "*it must be recalled that the Convention does not grant prisoners the right to choose the place of detention and that the separation from their family are inevitable consequences of their detention*".

[15] The terms of reference given by the CDDH (which follows those of the Committee of Ministers) are clear on this point. They are reproduced in Appendix V of the present report, p. 35.

[16] The Group of Specialists on Democratic Strategies for dealing with Movements threatening Human Rights (DH-S-DEM) has not failed to confirm the well-foundedness of this approach : "*On the one hand, it is necessary for a democratic society to take certain measures of a preventative or repressive nature to protect itself against threats to the very values and principles on which that society is based. On the other hand, public authorities (the legislature, the courts, the administrative authorities) are under a legal obligation, also when taking measures in this area, to respect the human rights and fundamental freedoms set out in the European Convention on Human Rights and other instruments to which the member States are bound*". See document DH-S-DEM (99) 4 Addendum, § 16.

[17] Finally, the European Court of Human Rights has drawn attention to the danger that some legislative measures may pose of "*undermining or even destroying democracy on the ground of defending it*". See *Klass and Others v. Germany*, 6 September 1978, Series A n° 28, § 49.

3. The Court recalls the balance between, on one hand, the defence of the institutions and of democracy, for the common interest, and, on the other hand, the protection of individual rights: *"The Court agrees with the Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention"*[18].

4. The Court also takes into account the background of the cases linked to terrorism: *"The Court is prepared to take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism"*[19].

5. *Definition* - Neither the Convention nor the case-law of the Court give a definition of terrorism. The Court always preferred to adopt a case by case approach. The Parliamentary Assembly, however, indicated that: "*The Assembly considers an act of terrorism to be 'any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public'*"[20].

6. As to the notions "*genuine democracy*" and "*rule of law*", as there is no definition, the main characteristics may be found in the Court's case-law […].

* * *

Preamble[21]

[a.] [Qualification of terrorism as a permanent source of human rights violations: issue to be examined at the 2nd meeting (13-15 February 2002)]

7. The General Assembly of the United Nations recognises that terrorist acts are "*activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and having adverse consequences for the economic and social development of States*"[22].

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[18] *Klass and Others v. Germany*, 6 September 1978, A n° 28, § 59. See also *Brogan and Others v. United Kingdom*, 29 November 1999, A n° 145-B, § 48.

[19] *Incal v. Turkey*, 9 June 1998, § 58. See also the cases *Ireland v. United Kingdom*, 18 January 1978, A n° 25, §§ 11 and following, *Aksoy v. Turkey*, 18 December 1996, §§ 70 and 84; *Zana v. Turkey*, 25 November 1997, §§ 59-60; and, *United Communist Party of Turkey and Others v. Turkey*, 30 November 1998, § 59.

[20] **Recommendation 1426 (1999),** *European democracies facing up to terrorism* (23 September 1999), § 5.

[21] For the attention of the members of DH-S-TER: paragraph 25 of the meeting report recalls that a discussion took place within the DH-S-TER on the qualification of terrorism as a permanent source of human rights violations and on its condemnation, whatever its political reasoning. It was decided to come back to these points at the 2nd meeting of the DH-S-TER (13-15 February 2002), in particular on the possible wording which could be retained in the future preamble of the guidelines.

[22] Resolution 54/164, *Human Rights and terrorism*, adopted by the General Assembly, 17 December 1999.

[b.] [Condemnation of terrorism, whatever its political reasoning: issue to be examined at the 2nd meeting (13-15 February 2002)]

[c.] [Recalling that an effective fight against terrorism can be led whilst respecting human rights and the rule of law;]

[d.] Also recalling that a terrorist act can never be excused or justified, by citing the protection of human rights as a motive and that the abuse of rights is never protected;

[e.] Stressing firmly that defending a democratic society requires that the presumed perpetrators, organisers and sponsors of terrorist attacks are brought to justice;

8. Reference to Article 6 (right to a fair trial). Quote the relevant case-law. - Resolution 1368 (2001), adopted by the Security Council at its 4370th meeting, on 12 September 2001 (extracts): *"The Security Council, (…) Reaffirming, the principles and purposes of the Charter of the United Nations, (…) 3. Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks (…)".* Resolution 56/1, *Condemnation of terrorist attacks in the United States of America,* adopted by the General Assembly, on 12 September 2001 (extracts): *"The General Assembly, Guided by the purposes and principles of the Charter of the United Nations, (…) 3. Urgently calls for international cooperation to bring to justice the perpetrators, organizers and sponsors of the outrages of 11 September".*

[f.] Reaffirming the imperative duty of States to protect the fundamental rights of its populations against possible terrorist acts;

9. Absolute duty of States to protect the fundamental rights of potential victims of terrorism, in particular their right to life (include a certain number of references to pertinent international texts). The European Commission on Human Rights also recalled the obligation of States to protect the life of individuals against terrorist threats (decisions of the Commission in cases concerning the United Kingdom, declared inadmissible as it has been considered that the United Kingdom had taken sufficient measures to protect the population). The Committee of Ministers has also recalled this duty : "*Stressing the duty of any democratic State to ensure effective protection against terrorism, respecting the rule of law and human rights (…)*"[23].

[g.] Convinced about the need to prevent terrorism, in particular by combating poverty throughout the world or by seeking political settlements to conflicts while encouraging inter-cultural and inter-religious dialogue to foster cohesion in our societies;]

10. It is essential to fight against the causes of terrorism in order to prevent new terrorist acts. Among the causes of terrorism, one can mention extreme poverty and political conflicts left unresolved for a long time. In this regard, one may recall Resolution 1258 (2001) of the Parliamentary Assembly, *Democracies facing terrorism* (26 September 2001), in which the Parliamentary Assembly calls upon States to "*renew and generously resource their commitment to pursue economic, social and political policies designed to secure democracy, justice, human rights and well-being for all people throughout the world*" (17 (viii)).

[23] Interim resolution DH (99) 434, *Human Rights action of the security forces in Turkey: Measures of a general character*.

11. In order to fight against the causes of terrorism, it is also essential to promote intercultural and inter-religious dialogue in order to encourage cohesion in society. The Parliamentary Assembly has devoted a number of important documents to this issue, among which its Recommendations 1162 (1991) *Contribution of the Islamic civilisation to European culture*[24], 1202 (1993) *Religious tolerance in a democratic society*[25], 1396 (1999) *Religion and democracy*[26], 1426 (1999) *European democracies facing up terrorism*[27], as well as its Resolution 1258 (2001), *Democracies facing terrorism*[28].

12. The European Parliament for its part tabled a report concerning *fundamentalism and the challenge to the European legal order* in October 1997. The draft Recommendation which it contains, includes a section dedicated to preventive measures[29]. Moreover, the Parliament considers that part of the funds for the EU's media programmes should be used to pay for projects to improve journalists' knowledge of religions, and Islam in particular, and to combat stereotyping. The text finally calls on politicians and public opinion in general not to confuse religious parties or movements which use peaceful and democratic means to achieve their objectives with fundamentalist movements which use violence and terrorism.

* * *

[24] Adopted on 19 September 1991 (11th sitting). The Assembly, inter alia, proposed preventive measures in the field of education (such as the creation of an Euro-Arab University following Recommendation 1032 (1986)), the media (production and broadcasting of programmes on Islamic culture), culture (such as cultural exchanges, exhibitions, conferences etc.) and multilateral co-operation (seminars on Islamic fundamentalism, the democratisation of the Islamic world, the compatibility of different forms of Islam with modern European society etc.) as well as administrative questions and everyday life (such as the twinning of towns or the encouragement of dialogue between Islamic communities and the competent authorities on issues like holy days, dress, food etc.). See in particular §§ 10-12.

[25] Adopted on 2 February 1993 (23rd sitting). The Assembly, inter alia, proposed preventive measures in the field of legal guarantees and their observance (especially following the rights indicated in Recommendation 1086 (1988), paragraph 10), education and exchanges (such as the establishment of a "religious history school-book conference", exchange programmes for students and other young people), information and "sensibilisation" (like the access to fundamental religious texts and related literature in public libraries) and research (for instance, stimulation of academic work in European universities on questions concerning religious tolerance). See in particular §§ 12, 15-16.

[26] Adopted on 27 January 1999 (5th sitting). The Assembly, inter alia, recommended preventive measures to promote better relations with and between religions (through a more systematic dialogue with religious and humanist leaders, theologians, philosophers and historians) or the cultural and social expression of religions (including religious buildings or traditions). See in particular §§ 9-14.

[27] Adopted on 23 September 1999 (30th sitting). The Assembly underlined inter alia that "*The prevention of terrorism also depends on education in democratic values and tolerance, with the eradication of the teaching of negative or hateful attitudes towards others and the development of a culture of peace in all individuals and social groups* (§ 9).

[28] Adopted on 26 September 2001 (28th sitting). "*(…) the Assembly believes that long-term prevention of terrorism must include a proper understanding of its social, economic, political and religious roots and of the individual's capacity for hatred. If these issues are properly addressed, it will be possible to seriously undermine the grass roots support for terrorists and their recruitment networks*" (§ 9).

[29] See in particular §§ 11-19. The European Parliament refers in particular to a preventive policy, which should incorporate a deliberate policy of integrating religious minorities, especially to improve their position on the labour market, increase their participation in consultative bodies in the production sector and in political activity.

Positive obligations of States

1. States are under a positive obligation to protect the human rights of everyone within their jurisdiction, as guaranteed by the Convention, especially the right to life such as guaranteed by its Article 2.

2. This obligation justifies the measures they may take in the fight against terrorism, providing that these measures respect human rights and the rule of law, while excluding any form of arbitrariness and subjecting them to an appropriate judicial control.

13. The duty to respect the right to life (Article 2 of the Convention), must be reiterated even in the fight against terrorism. Article 2 of the Convention does not exclude the possibility that the deliberate use of a lethal solution can be justified when it is "absolutely necessary" to prevent some sorts of crimes. This must be done, however, in very strict conditions so as to respect human life as much as possible, even with regard to persons suspected of preparing a terrorist attack.

"Against this background, in determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force."[30]

* * *

14. The following guidelines contain, as examples, several categories of measures that may be taken by States in the framework of their fight against terrorism and which must always be compatible with the requirements of respect for human rights and the rule of law. These measures may be linked to the immigration police (extradition, expulsion and return - *refoulement*); to prevention (measures of constraint outside an investigation and/or a judicial inquiry, or even a legal framework), such as the use of telephone tapping or under-cover agents, supervision of correspondence, searches, arrest, or in certain circumstances the use of arms by the security forces; (iii) to the judicial proceedings (the setting up of special courts, presumption of innocence, right to appeal, right to counsel, death penalty).

* * *

Extradition, expulsion and return (refoulement)

1. *Extradition is an essential procedure for efficient international co-operation in the fight against terrorism*

[30] *McCann and Others v. United Kingdom*, 27 September 1995, § 194. In this case, the Court, not convinced that the killing of three terrorists was a use of force not exceeding the aim of protecting persons against unlawful violence, considered that there had been a violation of article 2.

[…]

2. If a State has received a request for extradition, the requesting State must guarantee that:

(i) the person likely to be extradited will not be condemned to a death sentence;

(ii) in the event of such a sentencing, that it will not be carried out.

15. The obligation to respect the right to life must be reiterated (Article 2 of the Convention). In relation to the death penalty, it can legitimately be deduced from the *Soering v. the United Kingdom* judgment (7 July 1989, A No. 161) that the extradition of someone to a State where he/she risks the death penalty is forbidden. Accordingly, even if the judgment does not say *expressis verbis* that such an extradition is prohibited, this prohibition is drawn from the fact that the waiting for the execution of the sentence by the condemned person ("death row") constitutes an inhuman treatment, according to Article 3 of the Convention. It must also be recalled that the present tendency in Europe is towards the general abolition of the death penalty, in all circumstances (draft Protocol No. 13 to the Convention).

3. [It is not excluded that an extradition decision might exceptionally raise an issue under Article 6 of the Convention, in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country]

16. It seems that extradition could also be refused when, the person to be extradited risks suffering a flagrant denial of a fair trial in the requesting country. The Court underlined that it "*does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.*"[31]. It must, however, be pointed out that in the various cases examined the Court has not found a violation of the Convention in this respect.

4. [It is not excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention]

17. It seems that extradition should also be refused when the individual concerned runs the risk of being sentenced to life imprisonment without any possibility of early release, which may raise an issue under Article 3 of the European Convention on Human Rights. The Court underlined that "*it is (…) not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention (see Nivette, cited above, and*

[31] *Soering v. United Kingdom* (7 July 1989, A n° 161) § 113. Position confirmed by the Court in its judgment in the case *Drozd and Janousek v. France and Spain*, 26 June 1992, A No. 240, § 110 : "*As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 (art. 6) of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 (art. 6) would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice (see, mutatis mutandis, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 45, para. 113).*" and in its final decision on admissibility in the case *Einhorn v. France*, 16 October 2001, § 32.

also the Weeks v. the United Kingdom judgment of 2 March 1987, Series A n° 114, and Sawoniuk v. the United Kingdom (dec.), n° 63716/00, 29 May 2001)"[32].

5. 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 and degrading treatment. The same applies to expulsion.

18. Moreover, a concrete problem that States may have to confront is that of the competition between an asylum request and a demand for extradition. Article 7 of the draft General Convention on international terrorism must be noted in this respect: "*States Parties shall take appropriate measures, in conformity with the relevant provisions of national and international law, including international human rights law, for the purpose of ensuring that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offense referred to in article 2*".

19. It is also recalled that Article 1 F of the Convention on the Status of Refugees of 28 July 1951 provides : "*F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations*". An individual suspected of terrorism should therefore not be able to benefit from refugee status.

6. In all cases, the processing of the extradition, the expulsion or the refoulement, needs to be carried out with respect for the dignity of the person concerned, and avoiding any inhuman or degrading treatment.

20. *Refoulement* should be carried out with respect for human dignity even though in practice this principle may cause problems. The principle that must be respected in this context is that of proportionality between the use of force and the measure to be implemented.

21. It is absolutely prohibited to extradite or return an individual to a State in which he risks torture or inhuman and degrading treatment or punishment (Article 3 of the Convention). The fight against terrorism does not justify recourse to torture or inhuman and degrading treatment or punishment. The Court has recalled this absolute prohibition on many occasions, for example:

"*The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V, p. 1855, § 79). The nature of the offence allegedly committed by the applicant was therefore irrelevant for the purposes of Article 3.*"[33].

[32] *Einhorn v. France*, 16 October 2001, § 27.

[33] *Labita v. Italy*, 6 April 2000, § 119. See also *Ireland v. United Kingdom*, 18 January 1978, A n° 25, § 163; *Soering v. United Kingdom*, 7 July 1989, A n° 161, § 88; *Chahal v. United Kingdom*, 15 November 1996, § 79; *Aksoy v. Turkey*, 18 December 1996, § 62; *Aydin v. Turkey*, 25 September 1997, § 81; *Assenov and Others v. Bulgaria*, 28 October 1998, § 93; *Selmouni v. France*, 28 July 1999, § 95.

"*The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals*."[34]

Detention

1. A person deprived of his/her liberty for terrorism shall not, under any circumstances, and like any other person, be submitted to torture or inhuman or degrading treatment, such as total sensorial isolation. Furthermore, his/her right to have the legality of custody examined should not be subject to limitation in conformity with Article 5 para. 4 of the Convention, except in situations in which a State has made a declaration under Article 15 of the Convention.

22. According to the case law of the Court, it is clear that the nature of the crime is not relevant: "The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[35].

2. A person deprived of his/her liberty for terrorism shall, in principle, be treated like any other prisoner. The specific characteristics of the fight against terrorism can nevertheless require different treatment for such a person, particularly concerning:

(i) the regulations concerning communications between the lawyer and his/her client;

23. With regard to communication between a lawyer and his/her client, the case-law of the Court may be referred to, in particular a recent decision on inadmissibility (*Erdem v. Germany*, 5 July 2001) in which the Court recalls the possibility for the State, in exceptional circumstances, to intercept correspondence between a lawyer and his/her client sentenced for terrorist acts. It is therefore possible to take measures which depart from ordinary law (see case-law *Lüdi v. Switzerland*, 15 June 1992).

(ii) supervision of correspondence;

[…]

(iii) placing terrorists in specially secured quarters;

[…]

(iv) the separation of terrorists within the one prison or among different prisons;

24. With regard to the place of detention, the admissibility decision of the former European Commission of Human Rights, in the case *Venetucci v. Italy* (application no. 33830/96) of 2 March 1998, stated that: "*It must be recalled that the Convention does not*

[34] *Tomasi v. France*, 27 August 1992, § 115. See also *Ribitsch v. Austria*, 4 December 1995, § 38.

[35] *Chahal v. United Kingdom*, 15 November 1996, § 79; see also *V. v. United Kingdom*, 16 December 1999, § 69.

grant prisoners the right to choose the place of detention and that the separation from their family are inevitable consequences of their detention".

under the condition that the measure taken is proportionate to the goal to be attained.

Competent jurisdiction

Whatever courts may be called upon to judge terrorist acts, they must respect the criteria of Article 6 of the Convention (independent and impartial tribunal established by law).

25. The case-law of the Court states that the right to a fair trial is inherent to any democratic society. The Court recognises nevertheless that an effective fight against terrorism requires that some of the guarantees of a fair trial may be interpreted with some flexibility. Confronted with the need to examine the conformity with the Convention of certain types of investigations and trials, the Court has, for example, recognised that the use of anonymous witnesses is not always incompatible with the Convention[36]. In certain cases, like those which are linked to terrorism, witnesses must be protected against any possible risk of retaliation against them which may put their lives, their freedom or their safety in danger.

"the Court has recognised in principle that, provided that the rights of the defence are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities, for his own or his family's protection and so as not to impair his usefulness for future operations" [37]

26. The case-law of the Court insists upon the compensatory mechanisms to avoid that measures taken in the fight against terrorism do not take away the substance of the right to a fair trial. Therefore, if the possibility of non-disclosure of certain evidence to the defence exists, this needs to be counterbalanced by the procedures followed by the judicial authorities:

"*60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the Brandstetter v. Austria judgment of 28 August 1991, Series A no. 211, §§ 66, 67). In addition Article 6 § 1 requires, as indeed does English law (see paragraph 34 above), that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see the above-mentioned Edwards judgment, § 36).*

61. However, as the applicants recognised (see paragraph 54 above), the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the Doorson v. the Netherlands judgment of 26 March 1996, Reports of Judgments and Decisions 1996-II, § 70). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of

[36] See *Doorson v. The Netherlands*, 26 March 1996, §§ 69-70. The Doorson case concerned the fight against drug trafficking. The concluding comments of the Court can nevertheless be extended to the fight against terrorism. See also V*an Mechelen and others v. The Netherlands*, 23 April 1997, § 52.

[37] *Van Mechelen and others v. The Netherlands*, 23 April 1997, § 57.

another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (see the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, Reports 1997-III, § 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see the above-mentioned Doorson judgment, § 72 and the above-mentioned Van Mechelen and Others judgment, § 54).

62. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them (see the above-mentioned Edwards judgment, § 34). Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused." [38].

[…]

* * *

[38] *Rowe and Davies v. United Kingdom*, 16 February 2000, §§ 60-62.

Appendix IV : OTHER ELEMENTS THAT THE DH-S-TER PROPOSES TO EXAMINE DURING ITS NEXT MEETING (13-15 FEBRUARY 2002)

Preliminary Note

During its first meeting the DH-S-TER started to examine document DH-S-TER (2001) 2, as a basis for its work.

The present appendix contains the elements of this document which have not yet been examined and which the Group proposes to consider during its next meeting.

* * *

[…]

Preamble

[…]

Obligations of States [continuation]

[…]

1. The absolute prohibition to use torture or inhuman or degrading treatment or punishment (Article 3 of the Convention), even in the fight against terrorism, for example during questioning of the suspects, must be reiterated. The Court has recalled this absolute prohibition on many occasions, for example:

"*As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (…). The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V, p. 1855, § 79). The nature of the offence allegedly committed by the applicant was therefore irrelevant for the purposes of Article 3.*"[39].

"*The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals*."[40]

2. According to the case law of the Court, it is clear that the nature of the crime is not relevant: "*The Court is well aware of the immense difficulties faced by States in modern times*

[39] *Labita v. Italy*, 6 April 2000, § 119. See also *Ireland v. United Kingdom*, 18 January 1978, A n° 25, § 163; *Soering v. United Kingdom*, 7 July 1989, A n° 161, § 88; *Chahal v. United Kingdom*, 15 November 1996, § 79; *Aksoy v. Turkey*, 18 December 1996, § 62; *Aydin v. Turkey*, 25 September 1997, § 81; *Assenov and Others v. Bulgaria*, 28 October 1998, § 93; *Selmouni v. France*, 28 July 1999, § 95.

[40] *Tomasi v. France*, 27 August 1992, § 115. See also *Ribitsch v. Austria*, 4 December 1995, § 38.

in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[41].

[…]

Investigations

Limits to the methods used during the investigations

3. The protection provided by Article 8 of the Convention is also relevent in the context of the fight against terrorism. Investigations led by the authorities to fight against terrorism need to be carried out in conformity with the Convention, even if the Court accepts that the fight against terrorism may allow the use of specific methods:

"*Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime*."[42]

4. In the "Murray" judgment of 28 October 1994, the Court also accepted that the use of confidential information is essential in combating terrorist violence and the threat that it poses on citizens and to democratic society as a whole:

"*The Court would firstly reiterate its recognition that the use of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives of citizens and to democratic society as a whole (see also the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 23, para. 48). This does not mean, however, that the investigating authorities have carte blanche under Article 5 (art. 5) to arrest suspects for questioning, free from effective control by the domestic courts or by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (ibid., p. 23, para. 49).*"[43]

Arrests

Obligation to give reasons for arrests

No arrest without reasonable suspicion

5. The Court acknowledges that "reasonable" suspicion needs to form the basis of the arrest of a suspect. It adds that this feature depends upon all the circumstances, with terrorist crime falling into a specific category:

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[41] *Chahal v. United Kingdom*, 15 November 1996, § 79; see also *V. v. United Kingdom*, 16 December 1999, § 69.

[42] *Klass and Others v. Germany*, 6 September 1978, A n° 28, § 48.

[43] *Murray v. United Kingdom*, 28 October 1994, § 58.

"*32. The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1 (c) (art. 5-1-c). (…) [H]aving a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances. In this respect, terrorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge.*

(…) [T]he exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 § 1 (c) (art. 5-1-c) is impaired (…).

(…)

34. Certainly Article 5 § 1 (c) (art. 5-1-c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism (…). It follows that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity.

Nevertheless the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) (art. 5-1-c) has been secured. Consequently the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence."[44]

No discrimination or racism when making an arrest

[…]

Custody

Length of custody

6. The protection afforded by Article 5 of the Convention is also relevant here. There are limits linked to the arrest and detention of persons suspected of terrorist activities. The Court accepts that protecting the community against terrorism is a legitimate goal but that this cannot justify all measures. For instance, the fight against terrorism can justify the extension of police custody, but it cannot authorise that there is no judicial control at all over this custody, or, that judicial control is not prompt enough:

"*The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3 (art. 5-3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.*

The difficulties, alluded to by the Government, of judicial control over decisions to arrest and detain suspected terrorists may affect the manner of implementation of Article 5 para. 3 (art. 5-3), for example in calling for appropriate procedural precautions in view of the nature of the suspected offences. However, they cannot justify, under Article 5 para. 3 (art. 5-3), dispensing altogether with "prompt" judicial control."[45]

[44] *Fox, Campbell and Hartley v. United Kingdom*, 30 August 1990, §§ 32 and 34.
[45] *Brogan and Others v. United Kingdom*, 29 November 1998, A n° 145-B, § 61.

"*The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3 (art. 5-3).*"[46]

"*The Court recalls its decision in the case of Brogan and Others v. the United Kingdom (judgment of 29 November 1988, Series A no. 145-B, p. 33, para. 62), that a period of detention without judicial control of four days and six hours fell outside the strict constraints as to time permitted by Article 5 para. 3 (art. 5-3). It clearly follows that the period of fourteen or more days during which Mr Aksoy was detained without being brought before a judge or other judicial officer did not satisfy the requirement of "promptness".*"[47]

"*The Court has already accepted on several occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see the Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, p. 33, § 61, the Murray v. the United Kingdom judgment of 28 October 1994, Series A no. 300-A, p. 27, § 58, and the above-mentioned Aksoy judgment, p. 2282, § 78). This does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (see, mutatis mutandis, the above-mentioned Murray judgment, p. 27, § 58).*

What is at stake here is the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. Judicial control of interferences by the executive is an essential feature of the guarantee embodied in Article 5 § 3, which is intended to minimise the risk of arbitrariness and to secure the rule of law, "one of the fundamental principles of a democratic society …, which is expressly referred to in the Preamble to the Convention" (see the above-mentioned Brogan and Others judgment, p. 32, § 58, and the above-mentioned Aksoy judgment, p. 2282, § 76)."[48]

Means of obtaining confessions

7. "*The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.*"[49].

[…]

* * *

Possible derogations

8. Article 15 of the Convention gives a broad authorisation to contracting States to derogate from the obligations set forth by the Convention "*in time of war or other public*

[46] *Brogan and Others v. United Kingdom*, 29 November 1998, A n° 145-B, § 62. See also *Brannigan and Mc Bride v. United Kingdom*, 26 May 1993, § 58.

[47] *Aksoy v. Turkey*, 12 December 1996, § 66.

[48] *Sakik and Others v. Turkey*, 26 November 1997, § 44.

[49] *Chahal v. United Kingdom*, 15 November 1996, § 79; see also *V. v. United Kingdom*, 16 December 1999, § 69.

***emergency threatening the life of the nation*". This Article has been referred to by several States, notably in cases where they were confronted by terrorism.**

"*As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (…).*"[50]

9. Derogations are however limited by the text of Article 15 itself ("*No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7*" and "*to the extent strictly required by the exigencies of the situation*").

10. The Court was led to judge cases in which Article 15 was referred to by the defendant State. The Court affirmed therefore its jurisdiction to control the existence of a public emergency threatening the life of the nation: "*whereas it is for the Court to determine whether the conditions laid down in Article 15 (art. 15) for the exercise of the exceptional right of derogation have been fulfilled in the present case*"[51].

11. Examining a derogation on the basis of Article 15 in the "Brannigan and Mc Bride" case (26 May 1993), the Court agreed that this derogation was justified by the reinforcement and the impact of terrorism and that, when deciding to put someone in custody, against the opinion of the judicial authority, the Government did not exceed its margin of appreciation. It is not up to the Court to say what measures would best fit the emergency situations since it is the direct responsibility of the governments to weigh up the situation and to decide between towards efficient measures to fight against terrorism or the respect of individual rights:

**"*The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 78-79, para. 207).*

Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether inter alia the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision (ibid.). At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation."[52]**

12. However, even if the Court recognizes the existence of a situation that authorises the use of Article 15, it can condemn a State for a violation of the Convention (for instance, a 30 days long police custody is too long even if Article 15 is referred to)[53].

13. The general observation n° 29 of the UN Human Rights Committee[54] on Article 4 of the International Covenant on Civil and Political Rights (16 December 1966) need also to be taken into

[50] *Labita v. Italy*, 6 April 2000, § 119. See also *Ireland v. United Kingdom*, 18 January 1978, A n° 25, § 163; *Soering v. United Kingdom*, 7 July 1989, A n° 161, § 88; *Chahal v. United Kingdom*, 15 November 1996, § 79; *Aksoy v. Turkey*, 18 December 1996, § 62; *Aydin v. Turkey*, 25 September 1997, § 81; *Assenov and Others v. Bulgaria*, 28 October 1998, § 93; *Selmouni v. France*, 28 July 1999, § 95.

[51] *Lawless v. Ireland*, 1 July 1961, A n° 3, § 22.

[52] *Brannigan and Mc Bride v. United Kingdom*, 26 May 1993, § 43.

[53] See *Aksoy v. Turkey*, 18 December 1996.

consideration. This general observation tends to limit the authorised derogation to this Covenant, even in cases of exceptional circumstances.

* * *

[54] Adopted on 24 July 2001 at its 1950th meeting, see document CCPR/C/21/Rev.1/Add.11.

Appendix V : Terms of reference of the Group of Specialists on human rights and the fight against terrorism (DH-S-TER)

adopted by the CDDH
at its 52nd meeting (6-9 November 2001)

1. Name of committee: GROUP OF SPECIALISTS ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM (DH-S-TER)

2. Type of committee: Committee of experts

3. Source of terms of reference: Steering Committee for Human Rights (CDDH)

4. Terms of reference:

Under the authority of the CDDH, the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) will prepare guidelines, based on principles of human rights protection, that should guide the efforts of the member States in the fight against terrorism, with due respect for democracy and the rule of law.

In carrying out its terms of reference the DH-S-TER shall have due regard to the case-law of the European Court of Human Rights and relevant international work, particularly that carried out by the United Nations, the European Union and other international organisations.

The DH-S-TER shall draw up an interim activity report before 15 December 2001. Upon completing its work the DH-S-TER will prepare a final activity report for the attention of the CDDH. The Multidisciplinary Group on International Action against Terrorism (GMT) shall be kept informed of progress of the work of the DH-S-TER.

5. Membership:

The Group of specialists shall be composed as follows:

Belgium, France, Germany, Greece, Italy, Poland, the Russian Federation, Spain, Switzerland, Turkey and the United Kingdom.

The Council of Europe will bear the travel and subsistence expenses of eleven specialists for attendance at meetings of the Group. Other member States expressing an interest in the work of the Group may designate, at their own expense, specialists to participate in meetings of the Group.

6. Observers:

The European Commission and the Office of the United Nations High Commissioner for Human Rights shall be invited to designate a representative to participate as an observer.

7 Working structures and methods:

In carrying out its terms of reference the Group of Specialists shall consult all parties concerned by its work by all appropriate means. In particular, it may organise hearings of representatives of non-governmental organisations and written consultations.

8. Duration:

These terms of reference expire on 31 June 2002.