



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 16 April 2002
DH-S-TER(2002)008

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

2nd meeting, 13-15 February 2002

REPORT

TABLE OF CONTENTS

Introduction

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

Item 2: Follow-up to the activities of the Multidisciplinary Group on International Action against Terrorism (GMT)

Item 3: Exchange of views on the report by the consultant appointed by the Secretary General of the Council of Europe

Item 4: Hearing of national experts on issues linked to the suppression of terrorism

Item 5: Continuation of the global review with a view to the elaboration of 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

Item 6: Debate on the 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

Item 7: Draft opinion for submission to the CDDH

Point 8: Other business

APPENDICES

Appendix I: LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS

Appendix II: DRAFT AGENDA

Appendix III: Provisional draft for the guidelines

Appendix IV: Elements for the elaboration of the explanatory memorandum

Appendix V: Terms of reference for the elaboration of an opinion

* * *

Introduction

1. The Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) held its 2nd meeting in Strasbourg, Human Rights Building, from 13 to 15 February 2002 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*:
 - (i) continued preparing the guidelines covered by its terms of reference. The text adopted at the close of the meeting is reproduced in Appendix III;
 - (ii) identified elements to be included in the explanatory memorandum accompanying the guidelines. These are set out in Appendix IV;
 - (iii) held a hearing with national experts on issues linked to the fight against terrorism;
 - (iv) took note of the ad hoc terms of reference assigned by the Ministers' Deputies to [the CDDH](#) to prepare an opinion on [Parliamentary Assembly Recommendation 1550 \(2002\)](#) on combating terrorism and respect for human rights (item 7 on the agenda) (Appendix V)

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

4. See the introduction.

Item 2: Follow-up to the activities of the Multidisciplinary Group on International Action against Terrorism (GMT)

5. The Chair reported on the first meeting of the Multidisciplinary Group on International Action against Terrorism (12-14 December 2001, GMT (2001) 7 prov.), at which he had represented the CDDH. He first stated that Mr Philippe de KOSTER (Belgium) had been elected Chair of the GMT. He added that Ms Deniz AKCAY (Turkey), who also participates in the work of the DH-S-TER, was a member of the bureau of the GMT.
6. The Chair went on to say that the meeting had been opened by the Secretary General of the [Council of Europe](#), who had stressed the importance of the work to be done. Following a detailed examination of the terms of reference of the GMT, the participants had in turn presented the work currently being done within the Council of Europe and in other international organisations. The discussion had then focussed mainly on the group's working methods. Two working parties had been set up, the GMT-Rev and the GMT-Rap. The GMT-Rev would be responsible for reviewing the operation of, and considering the possibility of updating, Council of Europe international instruments applicable to the fight against terrorism, in particular the European Convention on the Suppression of Terrorism. The GMT-Rap would consider action that the Council of Europe might take in the fight against terrorism, regard being had to the work of other international bodies, and issue a draft opinion on preparation of a second protocol to the Convention on Cybercrime, which would also cover terrorist messages and their decoding.
7. These two working parties of the GMT would meet on 18 and 19 February 2002. The next plenary meeting of the GMT would take place just after on 20 and 21 February 2002. Mr Philippe BOILLAT would again represent the CDDH at these meetings.

Item 3: Exchange of views on the report by the consultant appointed by the Secretary General of the Council of Europe

8. The Group took note of the report "*The Principles of the [European Convention on Human Rights](#) and the Response of States to Terrorism*" prepared by Mr Colin WARBRICK, Director of the Human Rights Centre of the University of Durham (United Kingdom). The Chair pointed out that this report had been commissioned by the Secretary General of the Council of Europe. The Group was of the view that it contained some very useful elements for its work, in particular references to the case-law of the Court. This study should therefore be used as a working document, to fuel debate during the work on the guidelines and the explanatory memorandum.

9. The French expert pointed out that as the translation into French of this report was not yet available, she was unable to give her opinion on this document.

10. The Group asked the secretariat to ask Mr WARBRICK to present written comments on the draft guidelines and draft explanatory memorandum.

Item 4: Hearing of national experts on issues linked to the suppression of terrorism

101 As decided at the first meeting (26-28 November 2001, [DH-S-TER \(2001\) 3](#) def., §15), a hearing of national experts (from France, Germany, Italy, Sweden and the United Kingdom) on issues linked to the suppression of terrorism took place in the afternoon of Wednesday 13 February 2002.

12. The Chair reminded participants of the background to this hearing. In November 2001 the [Committee of Ministers](#) of the Council of Europe had requested the DH-S-TER to prepare guidelines, based on principles of human rights protection and respect for democracy and the rule of law, that should guide the efforts of the member states in the fight against terrorism. To ensure that the future guidelines took due account of the requirements of effective prevention and suppression of terrorism, the DH-S-TER, which was made up of specialists in human rights, had wished to hear the views of field experts (police and judiciary).

13. The main matters raised in the course of the hearing and the ensuing discussion were as follows:

(a) Terrorism was now taking new forms, which also posed new threats. Counter-terrorism activities must adapt to these changes.

- The motives underlying certain forms of terrorism were no longer political, but rather "pseudo-religious". In particular, this made it possible to recruit individuals who were ready to go as far as sacrificing their own lives, and this made their terrorist activities all the more dangerous and unpredictable.

- The objective had changed in some cases: Unlike "traditional" terrorism which has, in principle, "focused" aims (attacking specific interests or communities and seeking an immediate result), the "new" terrorism encountered today no longer seemed to have a clear objective. It therefore posed a permanent threat to everyone everywhere (confusion between globalisation and terrorism). This necessitated a co-ordinated counter-terrorist response at international level, which would be long-term in nature.

- Some of the resources used by terrorists had changed: Unlike traditional terrorism which was "identifiable", modern terrorism was mostly elusive in nature. It relied on international networks with a pernicious, changing structure, which were difficult to infiltrate. It often resorted to use of false identities through theft of identity papers. It also used commonplace resources (poste restante, terrorists who were humdrum individuals, blending into the background and then striking without warning), which made prevention a difficult task. At the same time, terrorists had advanced technical training and used modern communication methods. Organised crime (theft of bank documents, etc.) often went hand in hand with terrorism and provided it with a source of funds.

(b) This new terrorism constituted an escalating danger (huge growth in the number of potential victims; emergence of a lasting climate of insecurity), entailing changes in counter-terrorism strategies. In particular, specific legislation to combat terrorism must pursue long-term objectives, whereas such legislation was usually provisional in nature. Preventive measures (identity checks, etc.) could have negative implications for the exercise of public freedoms. In particular, the new security measure must take account of the problem of theft of identity papers by certain terrorists.

(c) The "proactive", preventive aspect of police work must be stepped up in accordance with national legislation adapted to the new state of affairs and intended to be long-lasting, since terrorism had become a permanent threat. This legislation must be sufficiently flexible to keep pace with future developments. At the same time, any emergency legislation must remain provisional.

(d) There was a need for co-ordination of anti-terrorism activities at a global level, including with regard to confiscation of terrorist groups' assets.

(e) It could not be said that anti-terrorist operations in Europe had a high rate of error or of "blunders". In particular, this concerned cases of mistaken identity or of homonymy. That said, there was a danger of abuse, particularly with regard to the gathering of intelligence and the implementation of preventive, coercive measures (searches, etc.). The question was whether, in the event of error, compensation should be awarded not only for material damage, but also for non-pecuniary damage. It was pointed out that the police sometimes issued press statements to the effect that the suspicions entertained concerning an individual or a group of persons had proved to be unfounded.

(f) Reference was made to the case of "reformed" terrorists, in particular in connection with the gathering of intelligence and evidence. Mention was made of the measures taken by certain states with regard to these former terrorists. For instance, they could only co-operate with the justice authorities over a period of six months. Once this time-limit was exceeded none of their statements could be used as evidence. Their statements could not in any case be the sole basis for a conviction; there must always be accompanying real evidence.

(g) On the subject of searches, which were always possible with a judge's permission, it was pointed out that in an anti-terrorism context they must be secret to ensure their effectiveness and permit possible arrests elsewhere. This might entail preventing the person concerned by the search from immediately contacting his or her lawyer.

(h) In some countries, the duration of police custody was identical for persons suspected of terrorist activities and any other suspect (two days). In other countries custody lasted two days in the latter case, and four days for terrorists. The police thought that four days was sometimes not enough, given the need to pursue complex investigations more often than not in a cross-border context (international networks).

(i) Reference was made to compulsory residence orders. These were a substitute for expelling a foreigner concerning whom a detention order could not be issued. They generally required the person concerned to remain within municipal boundaries, subject to regular verification of his or her presence (police surveillance, compulsory reporting to the police station, etc.).

(j) The term «reasonable suspicion», included in the guidelines, was a concept of indeterminate legal substance, like certain other legal concepts. It was sufficiently broad to allow states to adopt an interpretation suited to the specificities of the fight against terrorism in a given country at a given time. When there was a need to respond immediately to information about an imminent terrorist act, the police materially did not have the time to submit the information to careful scrutiny and would act in accordance with the reasonableness of the suspicion (sufficiently precise, plausible allegations). In this connection, the case-law of the Court specified that the margin of manoeuvre which states were allowed was greater where it was a matter of countering terrorism. The "reasonableness" of the suspicion must be assessed in the light of all the circumstances of the case under consideration. This assessment must nonetheless be based on objective elements such as the fact that the suspect had a previous conviction or was present in the country unlawfully.

(k) With regard to conditions of arrest, police custody and detention, it was stressed that prohibition of torture was absolute. In this connection, attention was drawn to psychological forms of torture (for example, complete isolation of a person for several days/weeks).

(l) The media and the fight against terrorism: The media could play a positive or negative role in the fight against terrorism. A specific problem arose with the not always correct information provided to the media, in exchange for payment, by victims or their relatives, which could hinder the conduct of an enquiry. Cases of misinformation by the media were also reported (misrepresentation of facts, often in an emotive manner; disproportionate value judgments, inciting hatred or the use of armed force as a riposte to terrorist acts, and so on). Attention was drawn to the need for media responsibility, without interfering with their editorial independence, and, at all events; for observance of a code of ethics.

* * *

14. At the end of the hearing, it was observed that the main difficulties in combating terrorism while showing due respect for human rights arose, above all, during the gathering of intelligence for preventive purposes, in connection with so-called "proactive" operations, during the implementation of coercive preventive measures, such as searches, or where undercover agents or telephone tapping were used.

15. The Chair thanked the participants. Their contributions, focussing on first-hand experience and reflecting different viewpoints (the police, the judiciary, academics), would be extremely valuable in the work of the DH-S-TER. They would help to ensure that the future guidelines took due account of the requirements of effective action to counter terrorism.

Item 5 : Continuation of the global review with a view to the elaboration of 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

16. The DH-S-TER continued to review the elements adopted at its first meeting and others proposed by the secretariat in consultation with the Chair (Document [DH-S-TER](#)

(2002) 1 prov). It bore in mind the observations made by the experts and by NGO representatives¹ (Document [DH-S-TER \(2002\) 6](#) and [DH-S-TER \(2002\) 6 addendum bil.](#)) and the report prepared by Mr Colin WARBRICK.

17. The Group first noted that the guidelines it was preparing were primarily intended for member states of the Council of Europe. They must therefore be read in the specific context of democratic European society and states governed by the rule of law, although it was desirable that [the guidelines](#) have a global influence and serve as a reference for any state no matter where. The Group accordingly thought it essential to specify that terrorism was a denial of human rights, especially since in democratic societies everyone had the means of putting forward their views. This meant that all acts of terrorism were unacceptable, whatever the underlying political motives - to be understood in the broadest sense, i.e. politics, strictly speaking, but also social, religious and even economic motives.

18. The Group also drew attention to the necessarily instructive and educational nature of the text, should be able to be read and understood on its own. It consequently decided to avoid making reference to relevant articles of the European Convention on Human Rights in the body of the guidelines, as far as possible. However, the explanatory memorandum would naturally mention the convention and the relevant case-law of the Court, as and when appropriate.

19. The Group considered that the guidelines were directed towards central state authorities, but also towards "field" authorities, such as members of the police or judges. It therefore expressed to wish that these guidelines be integrated in a kind of handbook or vade-mecum which would be translated into different languages of Council of Europe member states so that they may be distributed as widely as possible.

* * *

20. The discussion on some issues discussed within the Group are set out below.

Reference to relevant international instruments in the preamble

21. The group decided that the preamble should solely make mention of the European Convention on Human Rights and the Court's case-law, since the guidelines were principally based on these sources. The explanatory memorandum would mention other international instruments or source texts, such as the International Covenant on Civil and Political Rights, in specific instances, where appropriate.

Reparation for the consequences of terrorist acts

22. The DH-S-TER noted that the consequences of terrorist acts had a very high cost. It took the view that, as far as possible, this cost should not be borne by the state, but by the perpetrators of the acts themselves. For that reason it decided to amend point (e.) of the preamble, so as to include the idea that the persons convicted of terrorist offences be liable on their property for the consequences of these offences. The group also noted that its guideline on the *Right of property* broached the subject of seizure and confiscation of the property of persons or organisations convicted of terrorist acts.

Situation of victims of terrorist acts

¹ The following NGOs commented on the draft guidelines: AIRE Centre (Advice on Individual Rights in Europe), Amnesty International, Association for the Prevention of Torture (APT), Human Rights Watch, Minority Rights Group, *SOS Attentats*, and Quaker.

23. The DH-S-TER agreed to mention the subject of victims in the preamble to the guidelines, but also to prepare a specific guideline for inclusion in the body of the text. It noted that aid for victims was not confined to the issue of compensation (on this matter see the *European Convention on Compensation of Victims of Violent Crimes* of 24 November 1983), but that victims should also receive protection and special assistance. The idea to add a principle according to which victims could constitute a civil party, in order to start criminal proceedings, to follow them during the investigation and, if need be, to take part in the trial, was mentioned, with the aim of giving victims effective access to justice.

Collection of information by the police for preventive purposes

24. During the hearing attention was drawn to the need for the police to carry out a major intelligence gathering activity. This activity necessitated some room for manoeuvre, which could result in invasions of privacy. In view of the scale of modern terrorist networks, the activity must be coordinated at a trans-national level. The greatest risk was that the authorities concerned might divert information gathered for purposes other than the fight against terrorism.

25. The DH-S-TER thought it necessary to draft a guideline on gathering of intelligence in a preventive capacity, indicating the restrictions to be placed on this activity. It considered that there could be a risk of abuse during this proactive stage. It was pointed out that, in any event, supervision by a body external to the police force responsible for gathering the intelligence was necessary.

26. The exact wording of the guideline would be examined at the next meeting. To that end, the experts were requested to ask the relevant departments in their respective countries what restrictions they would be prepared to accept, with a view to protecting individual freedoms without endangering the effectiveness of the collection of intelligence necessary to combating terrorism.

Presumption of innocence

27. The DH-S-TER recognised that, in principle, everyone is assumed to be innocent, but that the right to presumption of innocence only appears when there is a charge, which is expressly mentioned in Article 6 of the European Convention on Human Rights: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". It therefore decided to integrate the line of presumption of innocence into guideline IX on legal proceedings.

28. Some experts underlined, however, that presumption of innocence must also be applied before there is a charge. They notably referred to the risk of the media lynching persons suspected of terrorist activities. Some experts considered that this aspect could be included in the guideline on freedom of expression. It was however decided to revert to this issue at the next meeting.

Proceedings held in absentia

29. The Group recognised that all members states of the Council of Europe did not necessarily know the system of proceedings held in absentia. Some experts, however, considered that there is a risk that a large number of trials could be held in the absence of the persons accused and that, in such an hypothesis, guarantees for a fair trial may not be respected.

Detention

30. The Group agreed that there are different kinds of deprivation of liberty: police custody, pre-trial detention of a suspected person and detention following a judgment by a court. Since police custody is a police detention, the Group decided to link the line on this issue with that on arrest. Pre-trial detention and detention following a judgment are situations linked to the judiciary. However, as these situations are different, the Group preferred that each of them be dealt with in a separate guideline, the one on pre-trial detention being included in the guideline on legal proceedings and the one on detention, after the guideline on penalties incurred.

Freedom to manifest one's religion or beliefs

31. The Group considered it essential to include a guideline recalling everyone's right to freedom to manifest his/her religion or belief. It understood that it might be legitimate to limit this freedom, for example for reasons linked to the good functioning of the prison where they are detained. The only restrictions that can exist to the freedom to manifest his/her religion or convictions are those indicated in Article 9, §2, of the European Convention on Human Rights.

Freedom of expression

32. In addition to the issue of media lynching of persons suspected of terrorist activities (see above), the Group raised the point concerning limitation to the freedom of expression of terrorists themselves with a view to protecting the population. The issue of propagation of terrorist messages in cyber-space was also mentioned.

33. The Group decided to come back to these issues at its next meeting, notably in the light of the comments of the Bureau of [the Steering Committee on the Mass Media \(CDMM\)](#).

Exchange of information between authorities (personal data)

34. This guideline echoes the Convention for the protection of individuals with regard to automatic processing of personal data, of 28 January 1981 (ETS No 108). Some members of the Group stated that there were risks of abuse with regard to data collected during inquiries linked to terrorism but then used for other purposes. Others were not convinced of the usefulness of such a guideline. It was therefore decided to come back to this issue at the next meeting, possibly by linking this guideline to line No V (Collection of information by the police for preventive purposes).

Freedom of movement

35. The DH-S-TER considered that a guideline stating, on the one hand, that the freedom of movement of a person suspected of terrorist activities may be limited and, on the other hand, that an appeal shall be available against such a decision, was not essential within the text currently being drawn up. It therefore decided not to include a guideline on the freedom of movement in its document.

Possible derogations

36. The Group considered that this will be the main issue for discussion at the next meeting. Delegations were therefore requested to consult their authorities for precisions on this issue and to transmit their positions to the Secretariat by e-mail.

* * *

37. The results of the DH-S-TER's work appear in Appendix III (provisional draft guidelines). This text will constitute a basis for discussions at the group's third meeting. To this end, participants should send any comments to the secretariat in writing by no later than 25 March 2002.

38. With a view to preparing the next meeting, the Group decided, moreover, to reflect, in particular over the wording of guidelines I, II and V. The current wording of guideline I (States' obligation to protect everyone against terrorism) has lost the idea according to which the obligation to protect fundamental rights arises from human rights themselves. As to the wording of guidelines II (Prohibition of arbitrariness) and V (Collection of information by the police for preventive purposes), the Chair noted that there is a reference to an "appropriate judicial supervision", in line II and to an "independent, external review" in line V. He feared that this might be confusing, if not contradictory.

Item 6: Debate on the 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

39. For lack of time, the DH-S-TER postponed discussion of this item to its next meeting.

Item 7: Draft opinion for submission to the CDDH

40. The DH-S-TER took note of the ad hoc terms of reference given by the Ministers' Deputies to the CDDH on 6 February 2002 to prepare, by 31 May 2002, an opinion on Parliamentary Assembly [Recommendation 1550 \(2002\)](#) on combating terrorism and respect for human rights. These terms of reference are reproduced in Appendix V.

41. The group decided to prepare a draft opinion at its third meeting (17-19 April 2002) for submission to members of the CDDH, for written comments, and to the Bureau of the CDDH for consideration and possible adoption at its 59th meeting (Paris, 30-31 May 2002).

Point 8 : Other business

42. After consultation with the Secretariat, the DH-S-TER decided to extend the next meeting by one day, so as to allow for the drafting work on the explanatory memorandum to be completed. The next meeting will therefore take place from Tuesday 16 to Friday 19 April 2002.

* * *

APPENDICES**Appendix I : LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS****BELGIUM / BELGIQUE**

M. Claude DEBRULLE, Directeur Général, Ministère de la Justice, Législation pénale et Droits de l'Homme, 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 Angelika LAITENBERGER, Staatsanwältin, Federal Ministry of Justice, Mohrenstrasse 37, 10117 BERLIN

Ms Lydia GLOWATZKI, Richterin, Verwaltungsgericht, Federal Ministry of Justice, Mohrenstrasse 37, 10117 BERLIN

GREECE/GRECE

Mr Emmanuel ROUCOUNAS, Professor, Academy of Athens, 28 Panepistimiou Str., ATHENS 10679

ITALY/ITALIE

M. Guido RAIMONDI, Magistrat, Cour de Cassation (Parquet général), Palais de Justice, Piazza Cavour, I-00199 ROME

POLAND/POLOGNE

Mr Krzysztof DRZEWICKI, Minister Counsel, Government Agent, 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, Président/Chairman, 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

Mrs 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

* * *

OBSERVERS/OBSERVATEURS

HOLY SEE/SAINT-SIEGE

M. Giorgio FILIBECK, Conseil Pontifical "Justice et Paix", I-00120 CITE DU VATICAN

European Commission / Commission européenne

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

United Nations High Commissioner for Human Rights / Haut Commissariat aux droits de l'homme des Nations Unies (HCHR)

/

Office for Democratic Institutions and Human Rights (ODIHR-OSCE)/Bureau des institutions démocratiques et des droits de l'homme (BIDDH-OSCE)

/

* * *

HEARING / AUDITION

13 February 2002

at 2.30 p.m.

FRANCE

M. Jacques POINAS, Chef de l'Unité de coordination de lutte anti-terroriste (UCLAT), Ministère de l'Intérieur, 11, rue des Saussaies, F-75008 PARIS

GERMANY/ALLEMAGNE

Mr Thomas DITTMANN, Federal Prosecutor, Federal Ministry of Justice, Mohrenstrasse 37, 10117 BERLIN

ITALY/ITALIE

M. Alberto CISTERNA, Magistrat de Cour d'Appel, Ministry of Justice, Via Arenula – ROMA

SWEDEN/SUEDE

Mr Magnus RANSTORP, Department of International Relations, University of St Andrews, FIFE, KY16 9AJ, United Kingdom

UNITED KINGDOM/ROYAUME-UNI

Mr Simon DAWSON, Terrorism Prevention Unit, Home Office, 50 Queen Anne's Gate, LONDON SW1H 9AT

* * *

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 Intergovernmental Cooperation 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 Michèle COGNARD, Administrative Assistant / Assistante administrative

Interpreters/interprètes

Mr Robert SZYMANSKI
Mr Christopher TYCZKA
Mr Derrick WORSDALE

* * *

Appendix II : DRAFT AGENDA

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

Item 2: Follow-up to the activities of the Multidisciplinary Group on International Action against Terrorism (GMT)

Working document

-
Report of the 1st meeting of the GMT (12 – 14 December 2001)
GMT (2001) 7 prov

Item 3: Exchange of views on the report of the consultant appointed by the Secretary General of the Council of Europe

Working document

Report of Mr Colin Warbrick on the principles of the European Convention on Human Rights and the response of States to terrorism

[DH-S-TER \(2002\) 2](#)

Item 4: Hearing of national experts on issues linked to the repression of terrorism (Wednesday 13 February, 2.30 pm – 5.30 pm)

Item 5: Continuation of the global review with a view to the elaboration of 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

Working documents

Report of the 1st meeting of the DH-S-TER (26 – 28 November 2001)
[DH-S-TER \(2001\) 3](#) def. Appendices III et IV

**Complementary elements for the elaboration of the guidelines
DH-S-TER (2002) 1 prov.**

Comments on the first preliminary elements for the elaboration of the guidelines
[DH-S-TER \(2002\) 6](#) and [DH-S-TER \(2002\) 6 addendum bil.](#)

**Elements for the elaboration of the explanatory memorandum
[DH-S-TER \(2002\) 7](#)**

Information documents

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](#)

The 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 6: Debate on the 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

Working document

General Comment No. 29 (state of emergency) of the Human Rights Committee of the United Nations of 31 August 2001

[DH-S-TER \(2002\) 3](#)

Item 7: Draft opinion for the intention of the CDDH

Working document

[Recommendation 1550 \(2002\)](#) and [Resolution 1271 \(2002\)](#) of the Parliamentary Assembly “Combating terrorism and respect for human rights” and Report of the Committee on Legal Affairs and Human Rights of the Assembly

[DH-S-TER \(2002\) 5](#)

Item 8: Other business

Information document

Derogation of the United Kingdom to the European Convention On Human Rights according to its Article 15

[DH-S-TER \(2002\) 4](#)

* * *

Appendix III : Provisional draft for the guidelines

Provisional draft guidelines

Preamble

The Committee of Ministers

[a.] Considering that terrorism is [an absolute denial of human rights] [a permanent source of human rights violations];

[b.] Condemning any act of terrorism, whatever its political reasoning, aimed at the democratic society of a State governed by the rule of law;

[c.] [Recalling that it is possible to lead an effective fight against terrorism whilst respecting human rights and the rule of law;

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

[e.] Stressing firmly that defending a democratic society requires that the suspected perpetrators, organisers and sponsors of terrorist attacks are brought to justice to answer for all the consequences, in particular criminal and civil, of their acts.

[.] Recalling the necessity for States to ensure that victims of terrorist acts, or their successors, can obtain [fair] compensation [within a reasonable time];

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

[g.] Convinced of 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;]

[.] Giving special consideration to [the European Convention for the Protection of Human Rights and Fundamental Freedoms](#) and the case-law of the [European Court of Human Rights](#);

adopts the following guidelines and invites member States to ensure that they are widely distributed among all authorities responsible for the fight against terrorism.

I

States' obligations to protect everyone against terrorism

States are under the obligation to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially their right to life. This obligation justifies the need for measures to combat terrorism in accordance with the present guidelines.

II

Prohibition of arbitrariness

All measures taken by States to fight terrorism must respect fundamental rights and the rule of law, while excluding any form of arbitrariness, notably any discriminatory or racist treatment, and subjecting such measures to appropriate judicial supervision.

III

Lawfulness of anti-terrorist measures

All legal instruments concerning the fight against terrorism shall define as precisely as possible any restrictions made to fundamental rights.

IV

Absolute prohibition of torture

The use of torture, inhuman or degrading treatment or punishment, shall be absolutely prohibited, in all circumstances, notably during the arrest, questioning and detention of a person suspected of terrorist activities or convicted of terrorism, irrespective of the nature of that person's acts.

V

Collection of police information for preventive purposes

[1. Collection and processing of police information for preventive purposes in the fight against terrorism may interfere with personal privacy solely in pursuit of the objective which the collection of information is intended to serve.

2. To that end, such collection of information must comply with the principles of proportionality, of the ultimate purpose and of confidentiality.

3. Compliance with these principles must be subject to independent, external review, possibly subsequent to the collection and processing of police information.

4. Anyone who is the victim of a serious breach of these principles shall be entitled to compensation.]

VI

Preventive coercive measures

1. Preventive coercive measures used in the fight against terrorism (in particular body searches, house searches, telephone tapping, control of correspondence, undercover agents, detention, ...) shall be provided for by law. It shall be possible to challenge the lawfulness of these measures.

2. The use of arms by the security forces shall be strictly proportionate to the aim of protecting persons against unlawful violence and counter-terrorist operations shall be planned and controlled by the authorities so as to minimise, as far as possible, recourse to lethal force.

VII

Arrest and Custody

1. A person suspected of terrorist activities may only be arrested if there are reasonable suspicions. He/she shall be informed of the reasons for the arrest.

2. A person suspected of terrorist activities shall not be held in police custody indefinitely.
3. Judicial review of the lawfulness of arrests and police custody shall be promptly carried out.

VIII

Regular supervision of pre-trial detention

A person suspected of terrorist activities detained pending trial shall be entitled to regular supervision of the lawfulness of his or her detention by a court.

IX

Presumption of innocence

Any person suspected of terrorist activities shall benefit from the presumption of innocence.

X

Legal proceedings

1. Any person suspected of terrorist activities shall have the right to a fair trial.
2. Any court called upon to try terrorist acts, whatever its nature, must be independent, impartial and established by law.
3. Any trial held in absentia must be fair, particularly with regard to the right to a fair trial.
4. The specificities of the fight against terrorism may nevertheless require that the usual procedure followed in trial proceedings be adapted, in particular with regard to:
 - (i) the free choice of counsel
 - (ii) contacts with counsel
 - (iii) free access to the case-file
 - (iv) the possible use of anonymous testimony during the proceedings

When the defence is faced with such obstacles, compensatory procedural mechanisms shall be set up so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

XI

Penalties incurred

1. *The penalties incurred by a person suspected of terrorist activities shall be provided for by law for any action or omission which constituted a criminal offence at the time when it was committed; no heavier penalty shall be imposed than the one that was applicable at the time when the criminal offence was committed.*
2. *Under no circumstances shall a person suspected of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it shall not be carried out.*

XII

Detention

1. A person deprived of his/her liberty for terrorism shall in all circumstances be treated humanely and with due respect for human dignity.
2. The specific characteristics of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorism be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to:
 - (i) the regulations concerning communications between counsel and his/her client;
 - (ii) placing terrorists in specially secured quarters;
 - (iii) the separation of terrorists within a prison or among different prisons,

on condition that the measure taken is proportionate to the goal to be achieved.

XIII

Asylum

The right to request and to obtain asylum is a human right. All requests for asylum shall be dealt with on an individual basis in accordance with a fair procedure, even if the applicant is suspected of terrorist activities. An appeal shall lie against the decision taken.

XIV

Extradition, expulsion and return (“refoulement”)

1. Extradition is an essential procedure for effective international co-operation in the fight against terrorism.
2. The extradition of a person to a country where he/she risks being sentenced to the death penalty shall not be granted, unless the State that has received the request for extradition has obtained a guarantee that
 - (i) the person whose extradition has been requested will not be sentenced to death;
 - (ii) in the event of such a sentence, it will not be carried out.
3. Extradition shall not be granted when there are serious, known grounds to believe that the person whose extradition has been requested has suffered or risks suffering a flagrant denial of a fair trial in the requesting country [or of being sentenced to life imprisonment without any possibility of release.]
4. 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.
5. No one shall be expelled from the territory of the State of which he/she is a national.
6. Collective expulsion of aliens is prohibited.
7. In all cases, the processing of the extradition, expulsion or return (“refoulement”) order must be carried out with respect for the dignity of the person concerned, and avoiding any inhuman or degrading treatment.

XV**Freedom of thought and conscience**

[...]

XVI**Freedom of expression**

[...]

XVII**Freedom of assembly and association**

[...]

XVIII**Right to property**

1. Access to the property of persons or organisations suspected of terrorist activities can be suspended or limited by the relevant authorities. The owners of the property shall have the possibility to challenge the lawfulness of such a decision. Acknowledgement, by the judicial authorities, that the suspension or limitation of access to the said property was improper shall lead to the award of appropriate compensation.

2. Property of illegal origin may be seized and confiscated by the competent authorities.

XIX**Exchange of information between authorities (personal data)**

[...]

XX**Freedom of movement**

The freedom of movement of a person suspected of terrorist activities may be limited. An appeal shall lie against such a decision.

XXI**Possible derogations**

1. In time of war or [exceptional] public emergency which threatens the life of the nation [and if a state of emergency has officially been proclaimed], a State may adopt measures temporarily derogating from certain obligations ensuing from the Convention and from the United Nations International Covenant on Civil and Political Rights, to the extent strictly required by the exigencies of the situation.

2. States may never, however, and whatever the acts of the person suspected of terrorist activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment, from the principle of legality of sentences and of measures, from the ban on the retrospective effect of criminal law, [and from freedom of thought, conscience and religion].

3. Moreover, States can never, even when relying on a state of war or an emergency threatening the life of the nation, justify acts prejudicial to humanitarian law and to mandatory standards of international law or non-observance of fundamental principles that guarantee a fair trial.
4. The circumstances which led to the adoption of such derogations need to be reassessed on a regular and frequent basis with the purpose of lifting these derogations as soon as these circumstances no longer exist.

XXII

Compensation for victims of terrorist acts

For reasons of equity and social solidarity, States should concern themselves with the situation of persons who have been the victims of terrorist acts and who suffered attacks to their person, their health or their property, as well as their successors. States shall ensure that they obtain fair compensation.

* * *

Appendix IV : Elements for the elaboration of the explanatory memorandum

Introduction:

This document has been elaborated by the Secretariat, in consultation with the President, for the discussion during the second meeting of the Group (13-15 February 2002). It replaces Item II of Appendices III to the report of the first meeting (document [DH-S-TER \(2001\) 3](#) def), the contents of which it develops and to which new elements have been added. This document should be considered as a provisional working document which does not, at this stage, affect the decisions taken during the first meeting of the DH-S-TER.

* * *

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^{2 3 4}. 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 background⁵.

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

3. The Court underlined on several occasions the balance between, on one hand, the defence of the institutions and of democracy, for the common interest, and, on the other hand,

² 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 report of the first meeting of the DH-S-TER (document [DH-S-TER \(2001\) 3](#) def, p. 35).

³ [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.

⁴ 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.

⁵ See below §§ 10-14.

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*”⁶.

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*”⁷.

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’*”⁸. (refer to the definition given by the European Union and to the work in process within the United Nations on the draft general convention on international terrorism). It is moreover advisable that the laws that States may take on terrorism give a clear definition of the conduct that is proscribed and that they do not unduly or inadvertently restrict human rights.

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

The Committee of Ministers:

[a.] Considering that terrorism is [anabsolute denial of human rights] [a permanent source of human rights violations]

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*”⁹.

[...]

⁶ *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.

⁷ *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.

⁸ Recommendation 1426 (1999), *European democracies facing up to terrorism* (23 September 1999), § 5.

⁹ Resolution 54/164, *Human Rights and terrorism*, adopted by the General Assembly, 17 December 1999.

[b.] Condemning any act of terrorism, whatever its political reasoning, aimed at the democratic society of a State governed by the rule of law;

[...]

[c.] [Recalling that it is possible to lead an effective fight whilst respecting human rights and the rule of law;

“the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate”¹⁰.

[...]

[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 *suspected* 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*”.

[...]

[.] *Recalling the necessity for States to ensure that victims of terrorist acts, or their successors, can obtain [fair] compensation [and within a reasonable time];*

[...]

[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*

¹⁰ *Klass and others v. Germany*, 6 September 1978, § 49.

*State to ensure effective protection against terrorism, respecting the rule of law and human rights (...)*¹¹.

[...]

[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)).

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*¹², [1202 \(1993\)](#) *Religious tolerance in a democratic society*¹³, [1396 \(1999\)](#) *Religion and democracy*¹⁴, [1426 \(1999\)](#) *European democracies facing up terrorism*¹⁵, as well as its Resolution 1258 (2001), *Democracies facing terrorism*¹⁶.

¹¹ Interim resolution DH (99) 434, *Human Rights action of the security forces in Turkey: Measures of a general character*.

¹² 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.

¹³ 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.

¹⁴ 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.

¹⁵ 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).

¹⁶ 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*

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 measures¹⁷. 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.

[...]

[.] *Giving special consideration to the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights*

Adopt the following guidelines and invites member States to ensure that they are widely distributed among all authorities responsible for the fight against terrorism.

[...]

I

Obligations of States to protect everyone against terrorism

13. The duty that States have to protect their populations against terrorism, in the respect of the right to life (Article 2 of the European Convention on Human Rights), must be reiterated. This duty need to be especially recalled when the State take measures, notably preventive measures of constraint (see under IV - Preventive measures of constraint).

II

Prohibition of arbitrariness

[...]

III

Lawfulness of anti-terrorist measures

[...]

III

Absolute prohibition of torture

14. The absolute prohibition to use torture or inhuman or degrading treatment or punishment (Article 3 of the Convention) must be reiterated. An efficient fight against terrorism can consequently never justify the recourse to such practices notably during the

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).

¹⁷ 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.

arrest and the questioning of the suspected persons. 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.”*¹⁸.

*“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.”*¹⁹

15. 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.”*²⁰.

[...]

* * *

16. 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).

* * *

V

Gathering of intelligence in a preventive capacity

[1. Collection and processing of police information for preventive purposes in the fight against terrorism may interfere with personal privacy solely in pursuit of the objective which

¹⁸ *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.

¹⁹ *Tomasi v. France*, 27 August 1992, § 115. See also *Ribitsch v. Austria*, 4 December 1995, § 38.

²⁰ *Chahal v. United Kingdom*, 15 November 1996, § 79; see also *V. v. United Kingdom*, 16 December 1999, § 69.

the collection of information is intended to serve.

2. *To that end, such collection of information must comply with the principles of proportionality, of the ultimate purpose and of confidentiality.*
3. *Compliance with these principles must be subject to independent, external review, possibly subsequent to the collection and processing of police information.*
4. *Anyone who is the victim of a serious breach of these principles shall be entitled to compensation.]*

IV

Preventive coercive measures

1. *Preventive coercive measures in the fight against terrorism (in particular body searches, house searches, telephone tapping, control of correspondence, under-cover agents, detention, ...) shall be provided by law (...). It shall be possible to challenge the lawfulness of these measures.*

17. A judicial control shall be available in all cases of use of preventive coercive measures. When possible, such a judicial control should be done before any use of preventive coercive measures. When the circumstances require it (urgency), this judicial control can be done *a posteriori*.

18. Investigations led by the authorities to fight against terrorism need to be carried out in conformity with the Convention, notably with its article 8, 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.”²¹

19. With regard to tapping, it must to be done in conformity with the provisions of Article 8 of the Convention, notably be done in accordance with the “law”. The Court, thus, recalled that: *“tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a “law” that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated (see the above-mentioned Kruslin and Huvig judgments, p. 23, § 33, and p. 55, § 32, respectively)”*²².

20. 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:

²¹ *Klass and Others v. Germany*, 6 September 1978, A n° 28, § 48.

²² *Kopp v. Switzerland*, 25 March 1998, § 72. See also *Huvig v. France*, 24 April 1990, §§ 34-35.

“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).”²³

[...]

2. *The use of arms by the security forces shall be strictly proportionate to the aim of protecting persons against unlawful violence and the anti-terrorist action shall be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.*

21. Article 2 of the Convention does not exclude the possibility that the deliberate use of a lethal solution can be justified when it is “absolutely necessary” to prevent some sorts of crimes. This must be done, however, in very strict conditions so as to respect human life as much as possible, even with regard to persons suspected of preparing a terrorist attack.

“Against this background, in determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.”²⁴

[...]

VII

Arrest and Custody

A person suspected of terrorist activities may only be arrested if there are reasonable suspicions. He/she shall be informed about the reasons for the arrest.

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

“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

²³ *Murray v. United Kingdom*, 28 October 1994, § 58.

²⁴ *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.

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."²⁵

[...]

2. *A person suspected of terrorist activities shall not be held in police custody indefinitely.*

3. *Judicial review of the lawfulness of arrests and police custody shall be promptly carried out.*

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

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

*The difficulties, alluded to by the Government, of judicial control over decisions to arrest and detain suspected terrorists may affect the manner of implementation of Article 5 para. 3 (art. 5-3), for example in calling for appropriate procedural precautions in view of the nature of the suspected offences. However, they cannot justify, under Article 5 para. 3 (art. 5-3), dispensing altogether with "prompt" judicial control."*²⁶

²⁵ *Fox, Campbell and Hartley v. United Kingdom*, 30 August 1990, §§ 32 and 34.

²⁶ *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).”*²⁷

“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”.”²⁸

“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).”*²⁹

[...]

VIII

Regular supervision of pre-trial detention

IX

Presumption of innocence

Any person suspected of terrorist activities shall benefit from the presumption of innocence.

24. Presumption of innocence is specifically mentioned in Article 6, paragraph 2, of the European Convention on Human Rights that states: *“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”*. This article therefore applies also to persons suspected of terrorist activities.

²⁷ *Brogan and Others v. United Kingdom*, 29 November 1998, A n° 145-B, § 62. See also *Brannigan and McBride v. United Kingdom*, 26 May 1993, § 58.

²⁸ *Aksoy v. Turkey*, 12 December 1996, § 66.

²⁹ *Sakik and Others v. Turkey*, 26 November 1997, § 44.

25. Moreover, “*the Court considers that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities*”³⁰. Accordingly, in its decision in *Alenet de Ribemont v. France*, the Court found that the public declaration made by the Minister of the Interior and by two high-ranking police officers referring to M. Alenet de Ribemont as the accomplice in a murder before his judgment “*was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. There has therefore been a breach of Article 6 para. 2*”³¹.

26. The protection of the presumption of innocence may, otherwise, moreover, be in contradiction with the freedom of expression, notably as concerns media coverage of terrorist actions and their “suspected” authors.

[...]

IX

Legal proceedings

1. *Any person suspected of terrorist activities shall have a fair trial.*

27. The right to a fair trial is acknowledged, for everyone, by Article 6 of the European Convention on Human Rights. The case-law of the Court states that the right to a fair trial is inherent to any democratic society.

[...]

2. *Whatever courts may be called upon to judge terrorist acts, they must be independent, impartial and established by law.*

28. Article 6 of the Convention does not forbid the creation of special tribunals to judge terrorist acts if these special tribunals meet the criteria set out in this article (independent and impartial tribunals established by law).

29. However, in the *Incal* case³², the Court considered that in Turkey, the National Security Courts do not satisfy the obligation of independence and impartiality because of the presence of a military judge in a court composed of three judges to deal with cases of terrorism involving the State security. Even if the status of the military judge is constitutionally guaranteed, the Court considered that the plaintiff could have reasonable doubts on the role played by the military judge, since he remained a regular soldier and that his future career prospects depended on decisions taken by his superiors. This case could therefore be used to question, on the same ground, the existence of military tribunals to judge terrorist acts.

[...]

3. *Any trial held in absentia must be fair, particularly with regard to the right to a fair trial.*

³⁰ *Alenet de Ribemont v. France*, 10 February 1995, § 36.

³¹ *Alenet de Ribemont v. France*, 10 February 1995, § 41.

³² *Incal v. Turkey*, 9 June 1998, §§ 65-73.

[...]

4. *The particular problems linked to the fight against terrorism may nevertheless require that the usual procedure followed in legal proceedings court, be adapted, in particular as concerns:*

- (i) *the free choice of counsel*
 - (ii) *contacts with the counsel*
 - (iii) *access to the case-file*
 - (iv) *the possible use of anonymous testimony during the proceedings*
- [...]

When the defence faces such obstacles, compensatory procedural mechanisms shall be set up so as to maintain the fairness of the proceedings proceedings and to ensure that procedural rights are not drained of theirt without substance.

30. The Court recognises that an effective fight against terrorism requires that some of the guarantees of a fair trial may be interpreted with some flexibility. Confronted with the need to examine the conformity with the Convention of certain types of investigations and trials, the Court has, for example, recognised that the use of anonymous witnesses is not always incompatible with the Convention³³. In certain cases, like those which are linked to terrorism, witnesses must be protected against any possible risk of retaliation against them which may put their lives, their freedom or their safety in danger.

“the Court has recognised in principle that, provided that the rights of the defence are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities, for his own or his family's protection and so as not to impair his usefulness for future operations”³⁴

31. The Court recognised that the interception of a letter between a prisoner – terrorist – and his lawyer is possible because of the personality of the prisoner:

“Il n'en demeure pas moins que la confidentialité de la correspondance entre un détenu et son défenseur constitue un droit fondamental pour un individu et touche directement les droits de la défense. C'est pourquoi, comme la Cour l'a énoncé plus haut, une dérogation à ce principe ne peut être autorisée que dans des cas exceptionnels et doit s'entourer de garanties adéquates et suffisantes contre les abus (voir aussi, mutatis mutandis, l'arrêt Klass précité, ibidem).”³⁵

32. 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 trial³⁶. 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:

³³ 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 *Van Mechelen and others v. The Netherlands*, 23 April 1997, § 52.

³⁴ *Van Mechelen and others v. The Netherlands*, 23 April 1997, § 57.

³⁵ *Erdem v. Germany*, 5 July 2001, § 65, text only available in French.

³⁶ See notably, *Chahal v. United Kingdom*, 15 November 1996, §§ 131 and 144, and *Van Mechelen and others v. The Netherlands*, 23 April 1997, § 54.

“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 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.”³⁷.

[...]

XI

Incurred penalties

1. *The penalties incurred by a person suspected of terrorist activities shall be provided for by law for any action or omission which constituted a criminal offence at the time when it was committed; no heavier penalty shall be imposed than was applicable at the time the criminal offence was committed.*

33. This guideline takes up the elements contained in Article 7 of the European Convention on Human Rights.

[...]

³⁷ *Rowe and Davies v. United Kingdom*, 16 February 2000, §§ 60-62.

2. *Under no circumstances, a person suspected of terrorist activities shall be sentenced to the death penalty; in the event of such a sentencing, it shall not be carried out.*

34. The present tendency in Europe is towards the general abolition of the death penalty, in all circumstances (draft Protocol No. 13 to the Convention). The States still having the death penalty within their legal arsenal have all agreed to a moratorium on the implementation of the penalty.

[...]

XII

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; in all circumstances, they shall be treated with humanity and with the respect inherent in every human being.*

35. 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.”*³⁸.

36. It is recalled that the practice of total sensory deprivation was condemned by the Court as being in violation with Article 3 of the Convention³⁹.

[...]

2. *The specificities of the fight against terrorism may nevertheless require that the usual procedure followed in trial proceedings be adapted, in particular with regard to:*

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

37. 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).

[...]

(iii) placing terrorists in specially secured quarters;

[...]

(iv) the separation of terrorists within the one prison or among different prisons⁴⁰;

³⁸ *Chahal v. United Kingdom*, 15 November 1996, § 79; see also *V. v. United Kingdom*, 16 December 1999, § 69.

³⁹ See *Ireland v. United Kingdom*, 18 January 1978, notably §§ 165-168.

⁴⁰ 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”*.

38. 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 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.

[...]

XIII ***Asylum***

The right to request for and to obtain asylum is a human right. All requests for asylum shall be dealt with on an individual basis in accordance with a fair procedure, even if the seeker is suspected of terrorist activities. It shall be possible to make an appeal against the decision taken.

[...]

XIV ***Extradition, expulsion and return (“refoulement”)***

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

2. *The extradition of a person to a country where he/she risks to be condemned to a death sentence shall not be granted, unless the State that has received the request for extradition has obtained a guarantee that*

the person whose extradition has been requested will not be sentenced to death;

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

39. 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 (see guideline “incurred penalties”).

[...]

3. *Extradition shall not be granted when there exist serious and known grounds that the person whose extradition has been requested has suffered or risks suffering a flagrant denial of a fair trial in the requesting country⁴¹ [or of being sentenced to life imprisonment without any possibility of early release⁴².]*

40. 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.”⁴³ 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.

41. 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 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)”⁴⁴.

[...]

4. *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 treatment⁴⁵. The same applies to expulsion.*

42. 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*

⁴¹ 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.

⁴² 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.

⁴³ *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.

⁴⁴ *Einhorn v. France*, 16 October 2001, § 27.

⁴⁵ For the attention of the members of DH-S-TER: : paragraph 1 of the previous “guideline” “request for asylum”.

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”.

43. 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 in respect of which there are “serious reasons” for considering that he/she has committed a terrorist act should therefore not be able to benefit from refugee status. These “serious reasons” may take the form of, notably, a confession by the person in question or the testimony of credible witnesses.

[...]

5. *No one shall be expelled from the territory of the State of which he/she is a national.*

44. This guideline takes up the principle contained in Article 3, paragraph 1, of [Protocol No 4](#) to the European Convention on Human Rights.

[...]

6. *Collective expulsion of aliens is prohibited.*

45. This guideline takes up the principle contained in Article 4 of Protocol No 4 to the European Convention on Human Rights.

46. The Court thus recalled that:

“collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group (see Andric v. Sweden, cited above)”⁴⁶.

[...]

7. *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.*

47. *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.

48. 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

⁴⁶ *Conka v. Belgium*, 5 February 2002, § 59.

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.”*⁴⁷

*“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.”*⁴⁸

49. When a State cannot extradite because of the protection that Article 3 of the Convention gives to the person concerned, it has the duty to judge this person (ref. To the *Aut judicare aut dedere* rule).

[...]

XV

Freedom of thought and conscience

[...]

50. The freedom of thought and conscience must be reaffirmed as a fundamental principle of every democratic society. The exercise of this freedom can be subject to certain limitations within the limits indicated in Article 9, paragraph 2 of the Convention.

[...]

XVI

Freedom of expression

[...]

51. The freedom of expression must be reaffirmed as a fundamental principle of every democratic society. The exercise of this freedom can be subject to certain formalities, conditions restrictions or penalties within the limits indicated in Article 10, paragraph 2 of the Convention. Incitement to violence can thus be prohibited.

52. The State must examine, with the representatives of mass media concerned, what could be the guidelines for media coverage of terrorist acts.

53. See *Purcell v. Ireland* DR 70/262: A balance must be established between defending the freedom of expression and protection against terrorism. The regulation adopted in application of the provision of the 1960 Act on radio transmission was considered as necessary in a democratic society. [check with case]

⁴⁷ *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.

⁴⁸ *Tomasi v. France*, 27 August 1992, § 115. See also *Ribitsch v. Austria*, 4 December 1995, § 38.

[...]

XVII

Freedom of assembly and association

[...]

54. The freedom of assembly and association must be reaffirmed as a fundamental principle of every democratic society. The exercise of this freedom can be subject to certain limitations within the limits indicated in Article 11, paragraph 2 of the Convention.

55. There is an important link between measures relating to freedom of assembly and those concerning freedom of expression (Article 10 of the Convention).

56. A clear distinction must be made by national authorities between political parties (or any other organisation of civil society) and terrorist organisations which over the objectives or some of the objectives of the former, using terrorism as a means of furthering these objectives. In such case, political parties cannot be held responsible for the actions of terrorist organisations, unless there is proof of active participation. (See the developments made by Mr Colin Warbrick, document [DH-S-TER \(2002\) 2](#), pp.21-22).

[...]

XVIII

Right of property

1. *Access to the property of persons or organisations suspected of terrorist activities can be suspended or limited by the relevant authorities. The owners of the property shall have the possibility to challenge the lawfulness of such a decision. The acknowledgement, by the judicial authorities, that the suspension or the limitation of the access to the said property was improper, shall lead to an appropriate compensation.*

2. *Property of illegal origin can be seized and confiscated by the competent authorities.*

57. See the United Nations Convention for the Suppression of the Financing of Terrorism.

58. The confiscation of property following a condemnation for criminal activity has been admitted by the Court⁴⁹.

[...]

XIX

Exchange of information between authorities (personal data)

[...]

[...]

XX

Freedom of movement

⁴⁹ See *Phillips v. United Kingdom*, 5 July 2001, in particular §§ 35 and 53.

The freedom of movement of a person suspected of terrorist activities may be limited. An appeal shall be available against such a decision.

60. This guideline is a derogation from the principle of the freedom of movement contained in Article 2 of Protocol No. 4 to the European Convention on Human Rights, in conformity with paragraph 3 of this provision:

“No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

61. In the case *Raimondo*, the Court considered that it was possible to limit the freedom of movement of a member of the mafia, in view of the threat the mafia constitutes to the *ordre public*⁵⁰. This decision should thus apply to analogous circumstances as regards terrorism.

[...]

XXI

Possible derogations

1. *In time of war or [exceptional] public emergency which threatens the life of the nation [and if emergency has officially been proclaimed], a State may adopt measures temporarily derogating from some obligations ensuing from the Convention and from the United Nations International Covenant on Civil and Political Rights, to the extent strictly required by the exigencies of the situation.*

2. *The States can nonetheless never, and whatever the acts of the person suspected of terrorist activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment, from the principle of legality of sentences and of measures, as well as from that of the ban of the criminal retroactivity.*

3. *Moreover, States can never, even when basing themselves on a time of war or an emergency threatening the life of the nation, justify acts prejudicial to humanitarian law and to mandatory standards of international law or non-observance of fundamental principles that guarantee a fair trial.*

4. *The circumstances which led to the adoption of such derogations need to be reassessed on a regular and frequent basis with the purpose of lifting these derogations as soon as these circumstances no longer exist.*

62. See *Lawless v. Ireland* (No 3, 1st July 1961, which indicates what are the parameters that permit to say which are the situations of “public emergency threatening the life of the nation”.

63. The Court acknowledges a large power of appreciation to the State to determine whether the measures derogating from the obligations of the Convention are the most appropriate or expedient:

“It is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the

⁵⁰ *Raimondo v. Italy*, 22 February 1994; see also *Guzzardi v. Italy*, 16 November 1980.

Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other (see the above-mentioned Ireland v. the United Kingdom judgment, Series A no. 25, p. 82, para. 214, and the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 23, para. 49)”.⁵¹

64. 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 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.

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

*“As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (...).”*⁵²

66. 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*”⁵³.

67. 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

⁵¹ *Brannigan and McBride v. United Kingdom*, 26 May 1993, § 59.

⁵² *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.

⁵³ *Lawless v. Ireland*, 1 July 1961, A n° 3, § 22.

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."⁵⁴

68. Concerning the length of the custody after arrest, and even if the Court recognizes the existence of a situation that authorises the use of Article 15, 7 days seem to be a length that satisfies the State obligations given the circumstances⁵⁵, but 30 days seem to be too long⁵⁶.

69. The general observation n° 29 of the UN Human Rights Committee⁵⁷ on Article 4 of the International Covenant on Civil and Political Rights (16 December 1966) need also to be taken into consideration. This general observation tends to limit the authorised derogation to this Covenant, even in cases of exceptional circumstances.

XXII

Compensation for victims of terrorist acts

For reasons of equity and social solidarity, States should concern themselves with the situation of persons who have been the victims of terrorist acts and who suffered attacks to their person, their health or their property, as well as their successors. States shall ensure that they obtain fair compensation.

* * *

⁵⁴ *Brannigan and Mc Bride v. United Kingdom*, 26 May 1993, § 43.

⁵⁵ See *Brannigan and Mc Bride v. United Kingdom*, 26 May 1993, §§ 58-60.

⁵⁶ See *Aksoy v. Turkey*, 18 December 1996, §§ 71-84.

⁵⁷ Adopted on 24 July 2001 at its 1950th meeting, see document CCPR/C/21/Rev.1/Add.11.

Appendix V : Terms of reference for the elaboration of an opinion

782nd meeting – 6 February 2002

Appendix 8

(item 3.1)

Decision No. CM/827/06022002

Ad hoc terms of reference

1. Name of Committee:

Steering Committee for Human Rights (CDDH)

2. Source:

Committee of Ministers

3. Completion date:

31 May 2002

4. Terms of Reference:

To give an opinion on Parliamentary Assembly Recommendation 1550 (2002) on Combating terrorism and respect for human rights.

5. Committee(s) informed of the terms of reference for information: