COUNCIL OF EUROPE CONSEIL DE L'EUROPE

.
Strasbourg, 24 April 2002
DH-S-TER(2002)010

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

_____

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

_____

3rd meeting, 16 - 19 April 2002

_____

REPORT

_____

Introduction

1. The Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) held its 3rd meeting in Strasbourg, Human Rights Building, from 16 to 19 April 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, the DH-S-TER drew up, *inter alia*:

(i) draft guidelines for the CDDH (item 3 and Appendix III and VII);
(ii) a draft reply to the GMT (item 4 and Appendix IV);
(iii) a draft opinion for the Bureau of the CDDH on Parliamentary Assembly Recommendation 1550(2002) (item 5 and Appendix V);
(iv) an information paper on its activities for the 110th session of the Committee of Ministers (Vilnius, 2-3 May 2002) (item 6 and Appendix VI).

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

4. See introduction. At the start of the meeting, the Chair reported on his recent interventions before, respectively, the Ministers' Deputies (10 April 2002; see item 6 below), the Multidisciplinary Group on international action against terrorism (GMT, 10-11 April 2002, see item 4 below) and the Bureau of the Steering Committee on the Mass Media (CDMM, 8 April 2002, see item 3 below, paragraph 9).

Item 2: Adoption of the report of the DH-S-TER's 2nd meeting

5. The Group formally adopted, unchanged, the report of its 2nd meeting (DH-S-TER(2002)8).

Item 3: 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

6. The Chair reminded participants that this meeting was the last opportunity to complete the drafting of the guidelines by the deadline set by the CDDH (30 June 2002). The Group would therefore have to concentrate on the wording of the guidelines and, for lack of time, give up the idea of drafting an explanatory memorandum. However, Appendix VII to this report contained collected extracts from the Court's case-law and international texts which had provided inspiration for the drafting of the guidelines. It would be for the CDDH to decide whether to include these collected texts in the final activity report (containing the guidelines) which it would address to the Committee of Ministers in accordance with its terms of reference.

7. The discussion took place in the light of, *inter alia*, the comments sent by experts (DH-S-TER(2002)9) and by NGO representatives (DH-S-TER(2002)14).

8. The DH-S-TER endeavoured to draw up the guidelines by consensus. However, some experts said that for the time being they had to reserve their position on the wording adopted for some of the guidelines, pending receipt of their authorities' views. It was understood that

some compromise versions adopted at this meeting might, if necessary, be discussed further by the CDDH.

Use of "shall" or "should"

9. The DH-S-TER felt that it would be up to the CDDH to decide whether the guidelines should be submitted to the Committee of Ministers in the future (*shall)* or conditional (*should*) tense.

Appropriateness of guidelines on fundamental freedoms

10. As for possible guidelines on several fundamental freedoms (of thought, conscience and religion; of expression and information; of assembly and association), the DH-S-TER held an in-depth discussion on the guarantees of these freedoms and on the possible restrictions that could be made to them by States in the fight against terrorism. While recognising that these issues are essential and particularly sensitive, the DH-S-TER was not in a position to formulate guidelines that would have an added value to, notably, the relevant provisions of the European Convention on Human Rights. It therefore considered that it was preferable to omit any reference to these issues in the guidelines, subject to other CDDH experts suggesting draft texts.

11. One expert noted however that the freedom of thought, of conscience and of religion is not exercised in the same way as the freedom of expression and information or the freedom of assembly and association. In fact, the International Covenant on Civil and Political Rights includes the freedom of thought, conscience and religion amongst the rights from which one cannot derogate. To insert this freedom in the second paragraph of guideline XV (*Possible derogations*) would constitute an added value to the current wording, which only reflects Article 15 of the Convention.

12. The DH-S-TER took note that the Steering Committee on the Mass Media (CDMM) is expected to send a draft text on the freedom of expression and information, possibly in the light of the draft already sent to the Group by the Bureau of the CDMM.

Appropriateness of evoking the risk of a flagrant denial of justice in the guideline relating to extradition

13. Some experts felt that, even if the European Court of Human Rights had not yet had the opportunity to give a ruling on this question, it would be appropriate to mention, among the reasons for non-extradition, the risk of suffering a flagrant denial of justice in the requesting state. They considered that it was very probable that the Court would rule along these lines, as it had already implied in the past, notably in a recent decision[1]. On the other hand, other experts preferred that this question should not be dealt with in the guidelines, in so far as the latter are to be seen as a reflection of existing case-law and that it would not be appropriate to anticipate the approach that the Court might take in this field. The DH-S-TER

[1] See final decision on admissibility in the case Einhorn v. France, 16 October 2001, §32. Consequently, these experts would like to include, in the current guideline XIII, a paragraph which could read as follows:

> *4. "When the person whose extradition has been requested argues in a convincing manner that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider if there are manifestly serious substantial grounds of such a denial of justice before deciding whether it is to grant extradition."*

therefore decided not to take a final position on this issue, on the understanding that it could be examined within the CDDH.

Appropriateness of a guideline relating to international communication of personal data between authorities responsible for the fight against terrorism

14. Some experts expressed the wish to include a guideline relating to the international communication of personal data between authorities responsible for the fight against terrorism[2]. Other experts, whilst agreeing on the importance of the question, considered that it was a particularly sensitive issue and that the guidelines were not an appropriate framework in which to address the matter thoroughly. The DH-S-TER therefore decided not to take a final position on this question, it being uderstood that it too, could be examined by the CDDH.

* * *

15. At the end of discussions, the DH-S-TER decided to transmit the draft guidelines to the CDDH as set out in Appendix III. In doing so, it considered that it has completed the terms of reference received from the CDDH in November 2001 (52nd meeting, CDDH (2001) 35, Appendix VIII).

16. The text prepared by the DH-S-TER will be sent to the experts and observers of the CDDH before the plenary for comment. Any comments were to be e-mailed to the Secretariat by 15 May 2002.

17. Finally, with regard to a possible explanatory memorandum which would accompany the guidelines, see paragraph 6 above and Appendix VII. It was agreed that the Secretariat, in consultation with the Chair, would carry out a last revision of the text set out in that Appendix, which had been used as a source in the preparation of the guidelines.

Item 4: Follow-up to the activities of the Multidisciplinary Group on International Action against Terrorism (GMT)

18. The Chair reported on his attendance at the meeting of the Multidisciplinary Group on International Action against Terrorism (GMT, 10-11 April 2002). He pointed out that, during the meeting, the GMT's Working Party responsible for reviewing the functioning of Council of Europe instruments applicable to the fight against terrorism (GMT-Rev) examined Article 8 of the Convention for the suppression of Terrorism (ETS 090). In this context, the possible inclusion in this Article of a new paragraph, relating to the refusal of mutual assistance for reasons founded on the respect for human rights, was raised. The GMT decided to request the

---

[2] These experts could accept a wording inspired from Principle 5 § 4 of Recommendation No R (87) 15 of the Committee of Minister to member States regulating the use of personal data in the police sector (17 September 1987). The wording could be as follows:

"The international communication of personal data between authorities responsible for the fight against terrorism should only be permissible:

(i) if there exists a clear legal provision under national or international law;
(ii) in the absence of such a provision, if the communication is necessary for the prevention of a serious and imminent danger or is necessary for the punishment of a serious criminal offence

and provided that domestic regulations for the protection of the person are not prejudiced and under the condition that the international communication of personal data does not run counter to the present guidelines".

DH-S-TER's opinion on the interest of such an addition to Article 8, notably in the light of the case law of the European Court of Human Rights. The GMT had asked if it could receive the DH-S-TER's opinion on this particularly complex issue as soon as possible, and in any event before its next meeting, in the first week of July 2002.

19. In following up this request, the DH-S-TER drafted the reply set out in Appendix IV; Opinions were however somewhat divided within the DH-S-TER, reason for which that the draft reply will be submitted to the Bureau of the CDDH for consideration during its meeting on 30-31 May 2002. It will then be up to the CDDH to decide whether it wishes to adopt it during its 53rd meeting (25-28 June 2002). The CDDH should therefore, if appropriate, be in a position to transmit its reply within the time limit set by the GMT.

Item 5: Recommendation 1550 (2002) and Resolution 1271 (2002) of the Parliamentary Assembly "Combating terrorism and respect for human rights" : Elaboration of a draft opinion for the attention of the Bureau of the CDDH

20. The DH-S-TER noted that the Ministers' Deputies, at their 782nd meeting (6 February 2002, item 3.1) gave ad hoc terms of reference to the CDDH to prepare, before 31 May 2002, an opinion on the above-mentioned Recommendation. To this end, the Group drew up a draft opinion. The text retained appears in Appendix V. It will be transmitted to members of the CDDH for any comments and to the Bureau of the CDDH for examination and possible adoption at its 59th meeting (Paris, 30-31 May 2002).

21. Any comments or observations should reach the Secretariat by e-mail before 15 May 2002.

Item 6: 110th Session of the Committee of Ministers (Vilnius, 2-3 May 2002)

22. At the request of the Secretariat of the Committee of Ministers, the DH-S-TER prepared an information note on its work which will be brought to the attention of the 110th session of the Committee of Ministers (Vilnius, 2-3 May 2002). The text retained is set out in Appendix VI.

Item 7: 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

23. The DH-S-TER did not address this item of the agenda, due to a lack of time.

Item 8: Other business

24. At the close of the proceedings, the DH-S-TER experts warmly congratulated the Chair, Mr Philippe BOILLAT (Switzerland), for the excellent manner in which he had conducted the Group's work.

* * *

Appendix I

LIST OF 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, Executive Assistant of the Federal Agent for Human Rights, Federal Ministry of Justice, Mohrenstrasse 37, 10117 BERLIN

GREECE/GRECE
Mr Emmanuel ROUCOUNAS**,** Professor, Academy of Athens, 28 Panepistimiou Str., ATHENS 10679

ITALY/ITALIE
Apologised/Excusé

POLAND/POLOGNE
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
Mr Kaan ESENER , Deputy to the Permanent Representative, Permanent Representation of Turkey to the Council of Europe, 23 Bd de l'Orangerie, F-67000 STRASBOURG

Mme Deniz AKCAY, Adjoint au Représentant Permanent de la Turquie auprès du Conseil de l'Europe, 23, boulevard de l'Orangerie, F-67000 STRASBOURG

Ms Didem KILISLIOĞLU, Legal Expert, Department of the Council of Europe and Human Rights, Ministry of Foreign Affairs, Avrupa Konseyi ve Insan Haklari Dairesi, Ziya Bey Caddesi 3. Sokak No: 20, BALGAT ANKARA 06520

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
Apologised/Excusé

United Nations High Commissioner for Human Rights / Haut Commissariat aux Droits de l'Homme des Nations Unies (HCHR)
Ms Mona RISHMAWI, Senior Adviser, United Nations Office of the High Commissioner for Human Rights, Palais Wilson, 52 rue des Paquis, CH-1211 Geneva 10

Office for Democratic Institutions and Human Rights (ODIHR-OSCE)/Bureau des institutions démocratiques et des droits de l'homme (BIDDH-OSCE)
Mr Denis PETIT, Legal Expert, Coordinator of "legislationsline", OSCE-ODIHR, Al. Ujazdowskie 19, 00-557 WARSAW (Poland)

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, Secretary of the DH-S-TER / Secrétaire du DH-S-TER, 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
Mme Cynera JAFFREY
Mr Derrick WORSDALE

* * *

Appendix II

AGENDA

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

Item 2: Adoption of the report of the 2nd meeting of the DH-S-TER

Working document

Draft report of the 2nd meeting of the DH-S-TER (13-15 February 2002)
DH-S-TER (2002) 8 prov

Item 3: 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.

Draft report of the 2nd meeting of the DH-S-TER (13-15 February 2002)
DH-S-TER (2002) 8 prov

Comments on the provisional draft guidelines – Comments sent by States
DH-S-TER (2002) 9

Comments on the provisional draft guidelines – Comments sent NGOs and others
DH-S-TER (2002) 14

Draft comments made by the DH-S-TER on the guidelines on Human Rights and the fight against terrorism
DH-S-TER (2002) 11

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

Working document

Report of the 2nd meeting of the GMT (20-21 February 2002)
GMT (2002) 3

(The report of the 3rd meeting of the GMT (9-12 April 2002) will not be available for the meeting of the DH-S-TER)

Item 5: Recommendation 1550 (2002) and Resolution 1271 (2002) of the Parliamentary Assembly "Combating terrorism and respect for human rights" : Elaboration of a draft opinion for the intention of the CDDH

Working documents

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

Elements for the draft opinion for the intention of the CDDH
DH-S-TER (2002) 12

Item 6: 110th Session of the Committee of Ministers (Vilnius, 2-3 May 2002)

Working document

Elements for a written note to present the work of the DH-S-TER with a view to the ministerial session in Vilnius on 2-3 May 2002
DH-S-TER (2002) 13

Item 7: 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[3]

Item 8: Other business

* * *

[3] Subject to time availability.

Appendix III

Draft guidelines

Preamble

The Committee of Ministers :

[a.] Considering that terrorism seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society;

[b.] Unequivocally condemning all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed;

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

[d.] Recalling that it is not only possible, but also absolutely necessary, to fight terrorism in the respect of human rights, of the rule of law and, where applicable, of international humanitarian law;

[e.] Recalling the need for States to do everything possible, and notably to co-operate, so that the suspected perpetrators, organisers and sponsors of terrorist acts are brought to justice to answer for all the consequences, in particular criminal and civil, of their acts;

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

[g.] Recalling the necessity for States, notably for reasons of equity and social solidarity, to ensure that victims of terrorist acts can obtain compensation;

[h.] Keeping in mind that the fight against terrorism implies long term measures with a view to prevent the causes of terrorism, by favouring, notably, cohesion in our societies and a multicultural and inter-religious dialogue;

[i.] Reaffirming in particular the relevance of the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights;

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

* * *

I

States' obligations to protect everyone against terrorism

States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially their right to life. This

positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.

II
Prohibition of arbitrariness

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, to the exclusion of any form of arbitrariness, as well as of any discriminatory or racist treatment, and must be the subject of appropriate supervision.

III
Lawfulness of anti-terrorist measures

1. All measures taken by States to combat terrorism must be lawful.

2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

IV
Absolute prohibition of torture

The use of torture or of inhuman or degrading treatment or punishment, shall be absolutely prohibited, in all circumstances, notably during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.

V
Collection and processing of personal data by any competent authority in the field of State security

Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular:

(i) are governed by appropriate provisions of domestic law;

(ii) are proportionate to the aim for which the collection and the processing were foreseen;

(iii) may be subject to supervision by an external independent authority.

VI
Measures which interfere and coercive measures

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

2. Measures taken to fight terrorism must be planned and controlled by the authorities so as to minimise, as far as possible, recourse to lethal force and, within this framework, the use of arms by the security forces shall be strictly proportionate to the aim of protecting persons against unlawful violence or to the necessity of carrying out a lawful arrest.

VII
Arrest and police custody

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

2. A person arrested or detained for terrorist activities shall be brought promptly before a judge. Police custody shall be of a reasonable period of time, the length of which shall be provided for by law.

3. A person arrested or detained for terrorist activities shall be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court.

VIII
Regular supervision of pre-trial detention

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

IX
Legal proceedings

1. A person accused of terrorist activities shall have the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law, including when the trial is held in his/her absence.

2. A person accused of terrorist activities shall benefit from the presumption of innocence.

3. The specificities of the fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to:

(i) the details of access to and of contacts with a counsel;

(ii) the details of access to the case-file;

(iii) the use of anonymous testimony.

4. Such restrictions to the right of defence shall be strictly proportional to their purpose, and compensatory measures to protect the interests of the accused shall be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

X
Penalties incurred

1. The penalties incurred by a person accused of terrorist activities 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 accused of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it shall not be carried out.

XI
Detention

A person deprived of his/her liberty for terrorist activities shall in all circumstances be treated with due respect for human dignity.

2. The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to:

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

(ii) placing terrorists in specially secured quarters;

(ii) 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.

XII
Asylum, return ("refoulement") and expulsion

1. All requests for asylum shall be dealt with on an individual basis. An effective remedy shall lie against the decision taken. However, when the State has serious grounds to believe that the person who seeks to be granted asylum has participated in terrorist activities, refugee status must be refused to that person.

2. It is the duty of a State that has received a request for asylum to ensure that the possible return ("*refoulement*") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman and degrading treatment. The same applies to expulsion.

3. Collective expulsion of aliens is prohibited.

4. In all cases, the enforcement of the expulsion or return ("*refoulement*") order must be carried out with respect for the physical integrity and for the dignity of the person concerned, avoiding any inhuman or degrading treatment.

XIII
Extradition

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

2. The extradition of a person to a country where he/she risks being sentenced to the death penalty 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 is serious reason to believe that:

(i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment;

(ii) the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person's position risks being prejudiced for any of these reasons.

XIV
Right to property

The use of the property of persons or organisations suspected of terrorist activities can be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property shall have the possibility to challenge the lawfulness of such a decision.

XV
Possible derogations

1. When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.

2. States may never, however, and whatever the acts of the person suspected of terrorist activities, or condemned for such 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 the ban on the retrospective effect of criminal law.

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

XVI
Respect of international humanitarian law and mandatory standards of international law

In their fight against terrorism, States can never act in breach of mandatory standards of international law and, where applicable, of international humanitarian law.

XVII
Compensation for victims of terrorist acts

When compensation is not fully available from other sources, notably through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the

State shall contribute to the compensation of the victims of attacks that took place on its territory, as far as their person or their health is concerned.

* * *

Appendix IV

Reply by the Group of Specialists of the CDDH on Human Rights and the Fight against Terrorism (DH-S-TER) to the request for consultation from the Multidisciplinary Group on International Action against Terrorism (GMT) on the possible revision of Article 8 of the European Convention for the Suppression of Terrorism (ETS No 090)

(Text adopted by the DH-S-TER at its 3rd meeting, 16-19 April 2002)

Preliminary note

At the 2nd meeting of the Multidisciplinary Group on International Action against Terrorism (GMT), its working party responsible for reviewing the functioning of Council of Europe instruments applicable to the fight against terrorism (GMT-Rev) examined Article 8 of the European Convention for the Suppression of Terrorism (ETS No 090). The possible inclusion in this article of a new paragraph, relating to the refusal of mutual assistance, was mentioned.

On a proposal by the GMT-Rev, the GMT decided to request the DH-S-TER's opinion on the usefulness of such an addition to Article 8, particularly in the light of the case-law of the European Court of Human Rights. The GMT asked the DH-S-TER to give it its opinion on this particularly complex issue as soon as possible, and in any event before the GMT's next meeting in the first week of July 2002.

In response to this request, the DH-S-TER drew up the present opinion at its 3rd meeting (16-19 April 2002).

* * *

1. The Group of Specialists of the CDDH on Human Rights and the Fight against Terrorism (DH-S-TER) discussed the possibility of refusing mutual assistance in criminal matters, which would be added to the present Article 8 of the European Convention for the Suppression of Terrorism (ETS No 090)[4] and would be justified by respect for human rights.

[4] Article 8 of Convention ETS No 090 reads as follows:

1 Contracting States shall afford one another the widest measure of mutual assistance in criminal matters in connection with proceedings brought in respect of the offences mentioned in Article 1 or 2. The law of the requested State concerning mutual assistance in criminal matters shall apply in all cases. Nevertheless this assistance may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

2 Nothing in this Convention shall be interpreted as imposing an obligation to afford mutual assistance if the requested State has substantial grounds for believing that the request for mutual assistance in respect of an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of these reasons.

3 The provisions of all treaties and arrangements concerning mutual assistance in criminal matters applicable between Contracting States, including the European Convention on Mutual Assistance in Criminal Matters, are modified as between Contracting States to the extent that they are incompatible with this Convention.

2. To date, the European Court of Human Rights has never had to rule on the conditions under which international mutual assistance in criminal matters might be refused.

3. At this stage in its discussion, and subject to the position to be adopted by the CDDH, the DH-S-TER takes the view that one cannot rule out the possibility of applying the rules governing extradition, by analogy, to international mutual assistance in criminal matters.

4. If this approach were to be adopted, the DH-S-TER feels that the draft guideline XIII (extradition), transmitted by the DH-S-TER to the CDDH for consideration and possible adoption might serve as a source of inspiration[5].

5. Opinions continue to differ within the DH-S-TER, however. That is why this reply will be addressed to the Bureau of the CDDH, which is to meet on 30-31 May 2002. It will ultimately be for the CDDH to decide whether it wishes to adopt a reply to this issue at its next meeting which will take place from 25 to 29 June 2002. The CDDH should therefore be in a position to transmit its reply, if at all, within the time-limit requested by the GMT.

* * *

[5] The wording of this draft guideline reads as follows:

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 is serious reason to believe that:

(i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment;

(ii) the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person's position risks being prejudiced for any of these reasons.

Appendix V

Elements for the draft opinion for the intention of the CDDH on Recommendation 1550 (2002) of the Parliamentary Assembly "Combating terrorism and respect for human rights"

(Text adopted by the DH-S-TER at its 3rd meeting, 16-19 April 2002)

Preliminary note:

At their 782nd meeting (6 February 2002, item 3.1) the Ministers' Deputies gave ad hoc terms of reference to the CDDH to prepare, by 31 May 2002, an opinion on Parliamentary Assembly Recommendation 1550 (2002) on combating terrorism and respect for human rights. The present draft opinion will be transmitted 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).

* * *

1. The Bureau of the Steering Committee for Human Rights (CDDH) notes with interest Recommendation 1550 (2002) of the Parliamentary Assembly "Combating terrorism and respect for human rights", which is the subject of the present opinion. It also notes Resolution 1271 (2002) of the Parliamentary Assembly on the same issue.

2. The Bureau of the CDDH firstly recalls that, in order to follow up a decision taken by the Ministers' Deputies at their 765 *bis* meeting (21 September 2001, item 2.1), the CDDH set up a Group of Specialists on Human Rights and the fight against terrorism (DH-S-TER) and instructed it to draw up 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. These guidelines are currently being finalised and will be adopted by the CDDH at its 53rd meeting (25-28 June 2002) and then transmitted to the Committee of Ministers.

3. Generally, the Bureau of the CDDH recalls that all acts, methods and practices of terrorism are unjustifiable and that States have the imperative duty to protect their populations against such acts. It also recalls that it is not only possible, but also absolutely necessary, to fight against terrorism in the respect of human rights, of the rule of law and, where applicable, of international humanitarian law. For more precise considerations on this issue, the Bureau of the CDDH invites the Parliamentary Assembly to refer to the text of the guidelines which will be adopted by the CDDH in June 2002.

4. In particular, in response to the concern of the Parliamentary Assembly on this matter (§ 7 of the Recommendation), it indicates that the guidelines, such as elaborated by the DH-S-TER, state that "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" (guideline n° XIII).

* * *

Appendix VI

Presentation of the work done by the Group of Specialists of the CDDH on Human Rights and the Fight against Terrorism (DH-S-TER) with a view to the 110th session of the Committee of Ministers (Vilnius, 2-3 May 2002)

(Text adopted by the DH-S-TER at its third meeting, on 16 April 2002)

1. Further to a decision adopted by the Ministers' Deputies on 21 September 2001, the Steering Committee for Human Rights (CDDH) decided to set up a Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER). This Group was instructed to "prepare guidelines based on principles of human rights protection, that should guide the efforts of the member States in the fight against terrorism, with due respect for democracy and the rule of law".

2. The DH-S-TER has met three times (26-28 November 2001, 13-15 February 2002 and 16-19 April 2002). It adopted draft guidelines, at its third and last meeting, and transmitted them to the CDDH for consideration and possible adoption at its 53rd meeting (25-28 June 2002). The CDDH should also adopt a document reflecting the international instruments and the case-law which inspired these guidelines. A final activity report containing the adopted texts will then be transmitted by the CDDH to the Ministers' Deputies.

* * *

3. The guidelines are to be included in the general perspective of the action of the Council of Europe against terrorism, recalled by the Secretary General in his report of 5 November 2001 (SG/Inf(2001)35).

4. The general principle that underlies these guidelines is that respect for human rights is not, in any circumstances, an obstacle to the fight against terrorism. On the contrary, the obligation for States to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, in particular the right to life, requires them to take efficient measures to fight against terrorism. These measures must however be reasonable and proportionate. A balance has to be found between the obligation to take protective measures against terrorism and that to defend rights and liberties. The response of truly democratic States to terrorism is the upholding of respect of human rights and of the rule of law.

5. The working method adopted by the DH-S-TER was, notably, to take account of the relevant international work and to strengthen cooperation with other international organisations. That is why the European Commission, the Office of the United Nations High Commissioner for Human Rights and the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe, were granted observer status with the DH-S-TER. Also, in order to have a more detailed picture of the main concerns linked to human rights and the fight against terrorism, the DH-S-TER held hearings of national experts on the suppression of terrorism as well as of representatives of NGOs. The results of these hearings were largely taken into consideration during the drafting of the guidelines. The NGOs were also regularly consulted for opinion on the draft guidelines.

6. The guidelines are principally based on the law of the European Convention on Human Rights, as interpreted by the European Court of Human Rights. They concentrate on fundamental aspects of the law in force and have an educational approach. It is true that they

are, above all, intended for member states of the Council of Europe. They must therefore be read in the specific context of the European continent, composed of States which are committed to respecting the rule of law, democracy and human rights. It would nevertheless be desirable that the guidelines have an influence beyond the European continent.

7. The guidelines start by recalling states' obligations to protect everyone against terrorism and, consequently, to recognize that the specificities of the fight against terrorism may require adaptation of the usual procedures. These guidelines, together with the relevant case-law of the European Court of Human Rights, aim to reconcile the requirements of defending society with those of safeguarding individual rights.

8. The guidelines then point out the limits which should be applied in the fight against terrorism. The guidelines focus on the following main aspects: the prohibition of arbitrariness, the respect of the right to life, the absolute prohibition of torture, inhuman or degrading treatment, the prohibition of the retroactivity of laws. These guidelines also deal with the issue of preventive measures used in the fight against terrorism, as well as that of arrest and police custody, and that of regular supervision of pre-trial detention. The guidelines then address the right to a fair trial and to the possible adaptation of the procedure followed in trial proceedings, as well as to the right to have the measures taken in the fight against terrorism controlled by the judiciary. They also concern the specific characteristics of the detention of persons deprived of their liberty for terrorist activities. Asylum, extradition, and more particularly the prohibition to extradite a person to a country where he/she risks being sentenced to the death penalty, are also mentioned in the guidelines. The issue of possible derogations to certain obligations ensuing, notably, from the European Convention, in time of war or public emergency which threatens the life of the nation, is also a guideline.

9. Particular attention is also devoted to the victims of terrorism and their families.

* * *

Appendix VII

Collection of texts of reference
used for the preparation of the draft guidelines

Preliminary note:
The present document will be revised by the Secretariat, in consultation with the Chair of the DH-S-TER in order to complete some elements and to improve the drafting.

* * *

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[6] [7] [8]. The main objective of these guidelines is not to deal with other important questions such as the causes and consequences of terrorism, which are simply mentioned in the Preamble to provide a background[9].

LEGAL BASIS

2. The specific situation of States parties to the ECHR should be recalled (Article 46 of the European Convention on Human Rights ("the Convention"): its Article 46 sets out the compulsory jurisdiction of the European Court of Human Rights ("the Court") and the supervision of the execution of its judgments by the Committee of Ministers). The case-law of the Court 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

[6] 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.

[7] 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.

[8] 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.

[9] See below §§ 9-15.

hand, the protection of individual rights: *"The Court agrees with the Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention"*[10].

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"*[11].

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'"*[12].

6. Article 1 of the European Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism gives a very precise definition that states:

…

"3. For the purposes of this Common Position, "terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aims of:

i. seriously intimidating a population, or

ii. unduly compelling a government or an international organisation to perform or abstain from performing any act, or

iii. seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:

a. attacks upon a person's life which may cause death;

b. attacks upon the physical integrity of a person;

c. kidnapping or hostage-taking;

d. causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the

---

[10] *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.

[11] *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.

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

continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;

e. seizure of aircraft, ships or other means of public or goods transport;

f. manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

g. release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;

h. interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;

i. threatening to commit any of the acts listed under (a) to (h);

j. directing a terrorist group;

k. participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, which knowledge of the fact that such participation will contribute to the criminal activities of the group.

For the purposes of this paragraph, "terrorist group" shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. "Structured group" means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."

7. The work in process within the United Nations on the draft general convention on international terrorism deal also on the issue of the definition of 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.

8. 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 seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society;

9. 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*"[13].

[…]

[b.] Unequivocally condemning all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed;

[…]

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

[…]

[d.] Recalling that it is not only possible, but also absolutely necessary, to fight terrorism in the respect of human rights, of the rule of law and, where applicable, of international humanitarian law;

10. The Cour stated:

"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"[14].

[…]

[e.] Recalling the need for States to do everything possible, and notably to co-operate, so that the suspected perpetrators, organisers and sponsors of terrorist acts are brought to justice to answer for all the consequences, in particular criminal and civil, of their acts;

11. The obligation to bring to justice suspected perpetrators, organisers and sponsors of terrorist acts is clearly indicated in different texts such as Resolution 1368 (2001) adopted by the Security Council at its 4370th meeting, on 12 September 2001 (extracts): "*The Security Council, (…) Reaffirming, the principles and purposes of the Charter of the United Nations, (…) 3. Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks (…)*". Resolution 56/1, *Condemnation of terrorist attacks in the United States of America*, adopted by the General Assembly, on 12 September 2001 (extracts): "*The General Assembly, Guided by the purposes and principles of*

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

[14] *Klass and others v. Germany*, 6 September 1978, § 49.

the Charter of the United Nations, (…) 3. Urgently calls for international cooperation to bring to justice the perpetrators, organizers and sponsors of the outrages of 11 September".

[…]

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

12. The former European Commission on Human Rights had also recalled the obligation of States to protect the life of individuals against terrorist threats (decisions of the Commission in cases concerning the United Kingdom, declared inadmissible as it has been considered that the United Kingdom had taken sufficient measures to protect the population). The Committee of Ministers has also recalled this duty : "*Stressing the duty of any democratic State to ensure effective protection against terrorism, respecting the rule of law and human rights (…)*"[15].

[…]

[g.] Recalling the necessity for States, notably for reasons of equity and social solidarity, to ensure that victims of terrorist acts can obtain compensation;

[…]

[h.] Keeping in mind that the fight against terrorism implies long term measures with a view to prevent the causes of terrorism, by favouring, notably, cohesion in our societies and a multicultural and inter-religious dialogue;

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

14. In order to fight against the causes of terrorism, it is also essential to promote multicultural and inter-religious dialogue. The Parliamentary Assembly has devoted a number of important documents to this issue, among which its Recommendations 1162 (1991) *Contribution of the Islamic civilisation to European culture*[16], 1202 (1993) *Religious*

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

[16] 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.

tolerance in a democratic society[17], 1396 (1999) *Religion and democracy*[18], 1426 (1999) *European democracies facing up terrorism*[19], as well as its Resolution 1258 (2001), *Democracies facing terrorism*[20].

[…]

[i.] Reaffirming in particular the relevance of the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights;

15. The Convention and the case-law of the Court are the main sources of the guidelines. However, other international sources were taken into account such as the International Covenant on Civil and Political Rights of 16 December 1966.

[…]

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 take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially their right to

[17] 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.

[18] 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.

[19] 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).

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

life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.

16. The duty that States have to protect their populations against terrorism, in the respect of the right to life (Article 2 of the Convention), must be reiterated. This duty need to be especially recalled when the State take measures, notably coercive measures (see under VI - *Coercive and interference measures*).

II
Prohibition of arbitrariness

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, to the exclusion of any form of arbitrariness, as well as of any discriminatory or racist treatment, and must be the subject of appropriate supervision.

17. The words "discriminatory treatment" are taken from the Political Declaration adopted by Ministers of Council of Europe member States on 13 October 2000 at the concluding session of the European Conference against Racism.

[…]

III
Lawfulness of anti-terrorist measures

1. All measures taken by States to combat terrorism must be lawful.

2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

[…]

IV
Absolute prohibition of torture

The use of torture or of 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 or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.

18. 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 arrest and the questioning of the suspected persons, which are stages when the risk is more important. 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."[21].

"*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.*"[22]

19. 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.*"[23].

[…]

* * *

20. 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 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; to the judicial proceedings (the setting up of special courts, presumption of innocence, right to appeal, right to counsel, death penalty); to the immigration police (extradition, return - *refoulement* and expulsion).

* * *

V
Collection and processing of personal data by any competent authority in the field of State security

Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere

[21] *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.

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

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

with the respect for private life only if such collection and processing, in particular:

(i) are governed by appropriate provisions of domestic law;

(ii) are proportionate to the aim for which the collection and the processing were foreseen;

(iii) may be subject to supervision by an external independent authority.

[…]

VI
Measures which interfere and coercive measures

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

21. 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*.

22. Investigations led by the authorities to fight 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*."[24]

23. 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)*"[25].

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

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

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

"The Court would firstly reiterate its recognition that the use of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives of citizens and to democratic society as a whole (see also the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 23, para. 48). This does not mean, however, that the investigating authorities have carte blanche under Article 5 (art. 5) to arrest suspects for questioning, free from effective control by the domestic courts or by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (ibid., p. 23, para. 49)."[26]

[…]

2. Measures taken to fight terrorism must be planned and controlled by the authorities so as to minimise, as far as possible, recourse to lethal force and, within this framework, the use of arms by the security forces shall be strictly proportionate to the aim of protecting persons against unlawful violence or to the necessity of carrying out a lawful arrest.

25. 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*."[27]

[…]

VII
Arrest and police 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.

26. 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:

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

[27] *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.

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

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

(…)

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

Nevertheless the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) (art. 5-1-c) has been secured. Consequently the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence."[28]

[…]

2. A person arrested or detained for terrorist activities shall be brought promptly before a judge. Police custody shall be of a reasonable period of time, the length of which shall be provided for by law.

3. A person arrested or detained for terrorist activities shall be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court.

27. 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:

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

"*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."[29]

"*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).*"[30]

"*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".*"[31]

"*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)."[32]

---

[29] *Brogan and Others v. United Kingdom*, 29 November 1998, A n° 145-B, § 61.

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

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

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

[…]

VIII
Regular supervision of pre-trial detention

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

[…]

IX
Legal proceedings

1. A person accused of terrorist activities shall have the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law, including when the trial is held in his/her absence.

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

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

30. However, in the *Incal* case[33], 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.

[…]

2. A person accused of terrorist activities shall benefit from the presumption of innocence.

31. 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.

[33] *Incal v. Turkey*, 9 June 1998, §§ 65-73.

32. 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*"[34]. Accordingly, in its decision in *Allenet 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. Allenet 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*"[35].

33. 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.

[…]

3. The specificities of the fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to:

(i) the details of access to and of contacts with a counsel;

(ii) the details of access to the case-file;

(iii) the use of anonymous testimony.

4. Such restrictions to the right of defence shall be strictly proportional to their purpose, and compensatory measures to protect the interests of the accused shall be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

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

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

---

[34] *Allenet de Ribemont v. France*, 10 February 1995, § 36.

[35] I*d.*, § 41.

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

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

35. 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)." [38]

36. The case-law of the Court insists upon the compensatory mechanisms to avoid that measures taken in the fight against terrorism do not take away the substance of the right to a fair trial[39]. Therefore, if the possibility of non-disclosure of certain evidence to the defence exists, this needs to be counterbalanced by the procedures followed by the judicial authorities:

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

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

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

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

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." [40].

[…]

X
Penalties incurred

1. The penalties incurred by a person accused 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.

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

[…]

2. Under no circumstances shall a person accused of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it shall not be carried out.

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

[…]

XI
Detention

1. A person deprived of his/her liberty for terrorist activities shall in all circumstances be treated with due respect for human dignity.

39. 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.*"[41].

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

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

40. It is recalled that the practice of total sensory deprivation was condemned by the Court as being in violation with Article 3 of the Convention[42].

[…]

2. The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to:

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

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

[…]

(ii) placing terrorists in specially secured quarters;

[…]

(i) the separation of terrorists within a prison or among different prisons,

42. 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*".

[…]

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

[…]

XII
Asylum, return ("refoulement") and expulsion

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

1. All requests for asylum shall be dealt with on an individual basis. An effective remedy shall lie against the decision taken. However, when the State has serious grounds to believe that the person who seeks to be granted asylum has participated in terrorist activities, refugee status must be refused to that person.

43. Article 14 of the Universal Declaration of Human Rights states: "*1. Everyone has the right to seek and enjoy in other countries asylum from persecution*".

[…]

2. It is the duty of a State that has received a request for asylum to ensure that the possible return ("*refoulement*") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman and degrading treatment. The same applies to expulsion.

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

45. 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.

[…]

3. Collective expulsion of aliens is prohibited.

46. This guideline takes up word by word the content of Article 4 of Protocol No 4 to the European Convention on Human Rights.

47. 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)"[43].

4. In all cases, the enforcement processing of the expulsion or return ("*refoulement*") order must be carried out with respect for the physical integrity and for the dignity of the person concerned, avoiding any inhuman or degrading treatment.

48. *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.

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

"*The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V, p. 1855, § 79). The nature of the offence allegedly committed by the applicant was therefore irrelevant for the purposes of Article 3.*"[44].

"*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.*"[45]

XIII
Extradition

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

2. The extradition of a person to a country where he/she risks being sentenced to the death penalty 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.

[43] *Conka v. Belgium*, 5 February 2002, § 59.

[44] *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.

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

50. 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 X, *Incurred Penalties*).

[…]

3. Extradition shall not be granted when there is serious reason to believe that:

(i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment;

(ii) the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person's position risks being prejudiced for any of these reasons.

51. It seems that extradition should be refused when the individual concerned runs the risk of being sentenced to life imprisonment without any possibility of early release, which may raise an issue under Article 3 of the European Convention on Human Rights. The Court underlined that "*it is (…) not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention (see Nivette, cited above, and also the Weeks v. the United Kingdom judgment of 2 March 1987, Series A n° 114, and Sawoniuk v. the United Kingdom (dec.), n° 63716/00, 29 May 2001)*"[46].

52. *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.

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

"*The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V, p. 1855, § 79). The nature of the offence*

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

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]

54. 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 (reference to the *Aut judicare aut dedere* rule).

[…]

XIV
Right to property

The use of the property of persons or organisations suspected of terrorist activities can be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property shall have the possibility to challenge the lawfulness of such a decision.

55. See notably Article 8 of the United Nations Convention for the Suppression of the Financing of Terrorism (New York, 10 January 2000).

56. The confiscation of property following a condemnation for criminal activity has been admitted by the Court[49].

[…]

XV
Possible derogations

1. When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.

[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.

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

2. States may never, however, and whatever the acts of the person suspected of terrorist activities, or condemned for such 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 the ban on the retrospective effect of criminal law.

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

57. 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".

58. 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 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)*".[50]

59. 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.

60. 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 (…).*"[51]

[50] *Brannigan and McBride v. United Kingdom*, 26 May 1993, § 59.

[51] *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.

61. 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*"[52].

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

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

Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether inter alia the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision (ibid.). At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation."[53]

63. Concerning the length of the custody after arrest, and even if the Court recognizes the existence of a situation that authorises the use of Article 15, 7 days seem to be a length that satisfies the State obligations given the circumstances[54], but 30 days seem to be too long[55].

64. The general observation n° 29 of the UN Human Rights Committee[56] 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.

[…]

---

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

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

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

[55] See *Aksoy v. Turkey*, 18 December 1996, §§ 71-84.

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

XVI
Respect of international humanitarian law and mandatory standards of international law

In their fight against terrorism, States can never act in breach of mandatory standards of international law and, where applicable, of international humanitarian law.

[…]

XVII
Compensation for victims of terrorist acts

When compensation is not fully available from other sources, notably through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State shall contribute to the compensation of the victims of attacks that took place on its territory as far as their person or their health is concerned.

65. First, see Article 2 of the European Convention on Compensation of Victims of Violent Crimes (Strasbourg, 24 November 1983, ETS No 116):

"*1. When compensation is not fully available from other sources the State shall contribute to compensate:*

a. those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;
b. b. the dependants of persons who have died as a result of such crime.
2. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished."

66. See also Article 8, §4, of the International Convention for the Suppression of the Financing of Terrorism (New York, 8 December 1999):

"*Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, sub paragraph (a) or (b), or their families.*"

[…]

* * *