PROCEEDINGS OF THE HIGH LEVEL SEMINAR

"PROTECTING HUMAN RIGHTS WHILE FIGHTING TERRORISM"

(Strasbourg, 13-14 June 2005)

Directorate General of Human Rights
Strasbourg, 2006

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Opening Session

Opening address

Mr Terry DAVIS
Secretary General of the Council of Europe

Mr Chairman, Excellencies, Ladies and Gentlemen,

Since the terrorist attacks of 11 September 2001, the fight against terrorism has been a top political priority for all of us, not only because of the suffering of the victims, but also because these attacks have been rightly perceived as a direct assault on the fundamental values of Human Rights, Democracy and the Rule of Law.

The Council of Europe lost no time in reacting to this attack. We immediately launched a range of initiatives, the central pillar of which was a set of Guidelines to help our member states to preserve our standards and principles of Human Rights in the response to terrorism.

These Guidelines were drafted by the Steering Committee for Human Rights (CDDH) who have organised this Seminar. They were adopted by the Committee of Ministers nearly 3 years ago, on 11 July 2002, and it is now an appropriate moment to assess the way in which they have been implemented at national level – which is the objective of this Seminar.

The terrorist attacks in Europe and elsewhere after September 11 highlighted the need to complement the first set of Guidelines by additional Guidelines on the protection of the victims of terrorist acts. These new guidelines were adopted by the Committee of Ministers on 2 March this year.

On the same day, 2 March, the Committee of Ministers adopted a Declaration on freedom of expression and information in the media in the context of the fight against terrorism, which confirmed the duty of the state to facilitate access to information and to ensure respect for editorial independence, even in times of crisis.

In May 2003, the European Convention on the Suppression of Terrorism of 1977 was amended by a Protocol, and two new legally binding instruments have now been added with the Council of Europe Convention on the Prevention of Terrorism and the Council of Europe Convention on the financing of terrorism, whose official title is the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. Both these new conventions were adopted on 3 May and opened for signature on 16 May in Warsaw, at the Summit of Council of Europe Heads of State and Government.

We have set up an impressive legal framework. Now the task is to put it into action, to make sure that the guidelines, declarations and provisions of the conventions are applied in practice. It is imperative for the protection of our values because there is too often a temptation for governments and parliaments in countries seen as the targets of terrorism to fight fire with fire, setting aside the legal safeguards which exist to protect Human Rights in a democratic state. Let me be clear about this: while the state has the right and the duty to search out and prosecute those who are responsible for terrorist acts and, better still, to prevent terrorist activities, it must not use any method. It must not resort to measures which undermine the very values it seeks to protect – and the very values the terrorists seek to destroy. For a state to react in such a way is to fall into the trap set by terrorism for democracy.

To quote the words of the European Court of Human Rights in 1978, expressed in the context of the Red Army Faction and Baader-Meinhof terrorism in Germany and reaffirmed since then each time the Court has dealt with cases involving anti-terrorist measures, we must not fall into the trap of – I quote – "undermining or even destroying democracy on the grounds of defending it".

This Seminar provides an excellent occasion to focus on the more worrying aspects of the fight against terrorism, reported by the media almost every day. Let me mention a few of them.

First, I am referring to practices, actual or proposed, which flout the absolute prohibition of torture and inhuman or degrading treatment. This includes what is euphemistically called "light forms of ill-treatment" or allowing evidence obtained under torture abroad to be used in the courts of our member states. As our Committee for the Prevention of Torture pointed out in its latest General report, any state authorising or not condemning such ill-treatments by its officials diminishes its standing in the eyes of the international community. The same can be said of a state which makes use of statements which officials of another country have obtained through resort to such acts.

I am also referring to Human Rights problems which sometimes arise in international judicial co-operation over extradition, where diplomatic assurances that the Human Rights of extradited persons will be respected are not always followed after extradition. I can also mention other worrying aspects, such as cases of the racist spin-off of legislation and policies targeting Muslims, the indefinite "detention" of suspected terrorists, or attempts to curtail media freedoms on so-called "security grounds".

The experience of the United Kingdom, one of the founding members of the Council of Europe, has shown how difficult it is to get it right in spite of having coped with terrorism for more than 30 years. Immediately following the atrocities of September 11, legislation was rushed through Parliament – legislation which has continued to be criticised by lawyers, judges and human rights NGOs and has been the subject of a critical report by a special Committee of Privy Counsellors (I declare my interest because I was a member of that Committee), negative decisions by domestic courts, a report by the Council of Europe's Committee for the Prevention of Torture and a report by our Commissioner for Human Rights.

Against this background of difficulties and experience, I can only say that although the two sets of Guidelines of the Committee of Ministers, which constitute the specific focus of this Seminar, are rightly regarded as a great achievement, they must not simply become a monument to be admired. It is absolutely necessary to make a critical assessment of their implementation by member states.

As national experts in the fight against terrorism, members of the CDDH, representatives of civil society, representatives of other international organisations – and I should like to use this opportunity to welcome the participation in this Seminar of Javier Ruperez, Executive Director of the UN Security Council Counter-Terrorism Committee – you are here for two days to do precisely that, to assess the implementation of the guidelines. You will have an opportunity to share experiences – good and bad – and perhaps conclude that there are some gaps in the Guidelines which should be filled, or that some existing Guidelines should be strengthened by making them more precise.

The Council of Europe is ready to help our member countries and the international community as a whole, wherever we can, to protect Human Rights while fighting terrorism. Our common task is not an easy one, but it is a challenge that we all must take up if we want to preserve our common values.

Challenges of the Seminar and content of the two sets of guidelines

Mr Philippe BOILLAT
Chair of the Steering Committee for Human Rights (CDDH) and former Chair of the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER)

It is a privilege and indeed a real pleasure to speak to you this morning, to present the issues covered by our Seminar and remind you of the content of the "Guidelines on human rights and the fight against terrorism" and the "Guidelines on the protection of victims of terrorist acts" adopted by the Committee of Ministers on 11 July 2002 and 2 March 2005 respectively. These guidelines will form the main basis for our discussions today and tomorrow morning.

In fact, contrary to what the title of my address suggests, I think it preferable to begin by looking at the two sets of Guidelines before moving on to the challenges of the Seminar, as defined by the Steering Committee for Human Rights.

I think it is a good idea to begin with a brief look at the general context in which the Guidelines on human rights and the fight against terrorism were drawn up. The Committee of Ministers, having condemned the terrorist outrages of 11 September 2001 in the strongest possible terms, reiterated its determination to combat all forms of terrorism by all appropriate means within the competence of the Council of Europe. It immediately set up a whole host of activities under the auspices of the Multidisciplinary Group on International Action against Terrorism (GMT), which has since become the CODEXTER, including the Protocol amending the Council of Europe's 1977 European Convention on the Suppression of Terrorism (ETS No. 190), which entered into force on 15 May 2003 with the aim of facilitating the extradition of terrorists by "depoliticising" terrorist offences. Other major instruments helping to step up the fight against terrorism have recently been

adopted by the Committee of Ministers: the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) and the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism (CETS No. 198), which were opened for signature at the 3rd Summit in Warsaw on 16 May 2005. There are also Committee of Ministers Recommendations to member states Rec(2005)9 on the protection of witnesses and collaborators of justice, Rec(2005)10 on "special investigation techniques" in relation to serious crimes including acts of terrorism and Rec(2005)7 on identity and travel documents and the fight against terrorism.

But alongside that determination, expressed quite unequivocally, to step up international cooperation in the fight against terrorism, the Council of Europe, rightly considered as the "Europe of values" and the "Europe of conscience", sought to demonstrate that it was possible, in combating terrorism, to reconcile the imperatives of protecting society and safeguarding the fundamental rights of individuals. It is to that end that the Guidelines were drawn up and adopted.

In this context, I would point out that certain matters, though fundamental from the human rights point of view in the fight against terrorism, are not dealt with in the Guidelines. In particular, I am thinking of the potential causes of terrorism, such as long-standing political conflicts, extreme poverty or social injustice and discrimination. The international community will have to make very serious efforts to resolve those problems if it wishes to truly eradicate terrorism.

There is no mention either of long-term measures aimed at preventing those causes, for example by stepping up North-South dialogue, fostering intercultural and inter-faith dialogue or heightening the inclusion of all in our societies. While not dealt with as such in the Guidelines, these questions or at least some of them are raised in the preamble to the Guidelines and form a kind of backdrop to it.

So the purpose of the Guidelines is primarily to draw out the boundaries not to be overstepped by states in any circumstances when combating terrorism. In other words, they put up safety barriers reminding states of the principles founded on human rights and the rule of law which must guide their actions in the fight against terrorism.

So what are the prime sources for these Guidelines?

First and foremost, of course, there is the European Convention on Human Rights, given this instrument's prime importance for European states. Then there is the wealth of Court case-law relating to terrorism. It must be remembered that the Convention and the Court's case-law are binding on the member states. Moreover, the states are subject to the authority of the Committee of Ministers where supervision of the execution of Court judgments is concerned.

Other instruments, operating at regional or universal level, have also provided inspiration, particularly the United Nations Covenant on civil and political rights and the observations of the Human rights committee set up under that Covenant; but I am also thinking here of the Convention relating to the status of refugees, the United Nations Convention for the suppression of the financing of terrorism or the European Convention on the compensation of victims of violent crimes.

In simplified terms we could say that, in a way, the drafters of the Guidelines have – if you will excuse the expression – distilled the essence of these various international instruments and, in particular, the case-law of the Court to formulate principles that are concise, practical, easily accessible and comprehensible. The document seeks to educate. As such, the Guidelines form a kind of practical handbook for framing policies, legislation and initiatives for combating terrorism that are effective and respect human rights at the same time. In them, the Committee of Ministers invites member states to ensure that they are widely disseminated among all authorities responsible for the fight against terrorism.

This text, which, it must be emphasised, is the first international legal text on human rights and the fight against terrorism, is obviously addressed first and foremost to the Council of Europe's 46 member states, and I am pleased to say that it has been consecrated by explicit references in two Court judgments, of 3 March 2003 and 12 May 2005.

Even so, the Guidelines could certainly be disseminated and provide inspiration beyond the European continent. Indeed, it is no accident that when addressing the OSCE in Vienna on 17 July 2002, Mary Robinson, then UN High Commissioner for human rights, invited all the states to implement the Guidelines since they should really be applied universally.

I think their content could be summarised in three main messages:

- firstly, in no circumstances must respect for human rights be regarded as an obstacle to effectively combating terrorism. I think it especially important to put this message across to both policy-makers and public opinion;

- it is not an obstacle but quite the opposite, and therein lies the second message: the case-law developed by the Court regarding positive obligations compels the states to take the necessary measures, including preventive measures, to protect individuals' fundamental rights when those rights, especially the right to life, are threatened by criminal actions. From this point of view, it may be said that an effective fight against terrorism draws its legitimacy from human rights protection;

- finally, and this is the third message, it is possible to reconcile the imperatives of public security with the safeguarding of individual fundamental rights. This is clear from the balanced case-law of the Court, which is fully aware of the necessities arising from effectively combating terrorism.

Before giving a run-down of the main Guidelines and making some general comments, I would point out that the terms "terrorism" and "terrorist act" are not defined in the Guidelines, which have taken a pragmatic approach along the lines of the European Court of Human Rights, which has consistently opted for a case-by-case approach.

The first of these Guidelines highlights the obligation of states to protect everyone against terrorism.

The Guidelines then reiterate certain fundamental principles inherent with the rule of law but which might be destabilised in the name of effectively combating terrorism, namely the prohibition of arbitrariness and any discriminatory treatment and the lawfulness of anti-terrorist measures.

It is furthermore stated that when a measure restricts fundamental rights, it must not only be necessary and proportionate to the aim pursued but also be defined as precisely as possible in law.

As for the most intrusive measures – such as body searches, telephone tapping or surveillance of correspondence – these must furthermore be subject to court supervision at some point.

The Guidelines firmly reiterate something that is taken for granted in our democratic societies but might be questioned by some given the atrocious nature of terrorist crimes, namely the absolute prohibition of torture, in all circumstances and irrespective of the nature of the acts that the person is suspected of or for which they were convicted. There can be no derogation from this absolute prohibition of torture or inhuman or degrading treatment, even in the event of war or public emergency threatening the life of the nation. This absolute prohibition covers every phase of the fight against terrorism, from prevention to punishment, without exception.

The Guidelines acknowledge that the deliberate use of lethal force may be justified in certain circumstances but they point out that the anti-terrorist measures ordered, particularly the use of arms by the security forces, must be planned and controlled by the authorities in order to minimise recourse to lethal force.

Concerning the penalties incurred, two fundamental principles are reiterated: provision in law for offences and sentences and no retrospective effect of criminal law.

The absolute prohibition of death sentences and the carrying out of such a sentence is also forcefully reiterated.

This prohibition finds a very practical application in the Guideline on extradition. The extradition of a person to a country where they risk being sentenced to the death penalty may not be granted unless the requested state obtains the guarantee that the individual to be extradited will not be sentenced to death or, if they are, that the sentence will not be carried out. Another restriction regarding extradition is the risk for the individual of suffering a flagrant denial of justice in the requesting state. On the other hand, the possibility that the individual to be extradited may be given an incompressible life sentence has not been regarded as an obstacle to extradition, as the Court has no confirmed case-law on this point. Nor has it been possible to settle another highly complex question that may have considerable practical ramifications: must the rules restricting extradition be applied by analogy to requests for international judicial assistance in the criminal field? These are issues that might be debated this afternoon in Workshop III.

It was also important for the Guidelines to stress that an individual accused of terrorist activities benefits, like any other accused person, from the presumption of innocence. Similarly, while the Guidelines do not prohibit specialised tribunals to judge terrorist acts as such, courts of this kind must in all cases be established by law and be impartial and independent.

The ongoing concern of the Court, as I have already mentioned, to reconcile the imperatives of protecting society and the safeguarding of individual rights is reflected in several of the Guidelines.

The fight against terrorism may provide justification for increasing the duration of custody but in no way exempts such custody from judicial supervision, which may take place later than usual but must nevertheless be prompt.

The imperatives linked to effectively combating terrorism may also constitute grounds for restricting certain rights of the defence such as arrangements for contact with counsel, access to the case-file and the use of anonymous testimony. What is important here is that such restrictions are strictly proportionate to their purpose, and that compensatory measures are taken to protect the interests of the accused so that procedural rights are not drained of their substance and the fairness of the proceedings is maintained.

States are therefore invited to find ways of ensuring that these rights, though restricted, are still meaningful and that, above all, the trial remains fair on the whole. Workshops I and II will certainly have an opportunity to look closely at these issues.

Finally, the Guidelines review the situations in which derogation may be made – temporarily and in quite exceptional circumstances – from the principles and fundamental rights I have just mentioned, namely when the fight against terrorism takes place in a situation of war or public emergency threatening the life of the nation. Even in those exceptional circumstances, there can be no question of derogating from core human rights. Moreover, in their fight against terrorism, states may never act in breach of peremptory norms of international law nor in breach of international humanitarian law, where applicable.

The Guidelines cover other major issues, which I will simply list at this point:

- The collection and processing of personal data by authorities responsible for state security, these being operations requiring inter alia supervision by an external independent authority;

- Conditions of detention, requiring that, in all circumstances, a person deprived of their liberty be treated with full respect for human dignity. Obviously – and it is perhaps worth reiterating after certain disgraceful acts widely reported in the media – this guideline covers the detention conditions of any person in preventive custody in the context of the fight against terrorism;

- Applications for asylum, which must in all events be dealt with on an individual basis and, where applicable, be covered by an effective remedy; this concerns respect for the principle of not returning a person to a dangerous situation in their country of origin;

- Finally, restrictions on the right to property, which must be covered by an effective remedy.

The last of these Guidelines mentions the victims of terrorist acts but only from the viewpoint of pecuniary compensation for harm to their person and health, which is no more than a reflection of the European Convention on the compensation of victims of violent crimes of 1983.

The dramatic events of last year, particularly in Spain and Russia, to mention just two states, clearly required a response from the Council of Europe bearing the mark of solidarity and national and international support over the suffering of victims of terrorist acts and their close family.

So the Guidelines on the protection of victims of terrorist acts adopted by the Committee of Ministers on 2 March 2005 follow on from the Guidelines on human rights and the fight against terrorism, with the prime aim of telling member states what means should be deployed to assist the victims of terrorist acts and their families. The Guidelines do not grant rights to victims of terrorist acts directly but establish the obligations incumbent on states. Use

of the imperative form is reserved for the obligations laid down in the Court's case-law, while other obligations are placed in the conditional form.

The Guidelines do not give an exhaustive definition of the notion of "victims", nor do they grant them a real "status". Under the Guidelines, victims are any person who has suffered direct physical or psychological harm as a result of a terrorist act, damage to property being excluded. In certain circumstances, their close family, within the meaning of the Court's case-law, are also considered as victims. It should also be pointed out that the granting of services and measures prescribed by the Guidelines is in no way dependent on the identification, arrest, prosecution or finding guilty of the perpetrator(s) of the terrorist act concerned and that any discriminatory or racist treatment of victims is obviously out of the question.

The first principle covering all the Guidelines requires states to treat victims of terrorist acts with due respect for their dignity and private and family life.

The main obligations on states are as follows:

- As soon as a terrorist act occurs, states should provide, as soon as possible, emergency assistance free of charge covering the immediate needs of the victims in medical, psychological, social and material terms. The victims so requesting should also benefit from spiritual assistance, which is often as important in such circumstances as material assistance;
- The states then commit to providing assistance in the longer term. This assistance, which may be necessary for several weeks, if not months or years, should cover the victims' medical, psychological, social and material needs. For obvious practical reasons, if the victim does not normally reside on the territory of the state where the terrorist act occurred, the state of residence should seek to ensure that the victim receives such assistance. In this connection, I would point out that states are asked to encourage specific training for those responsible for assisting victims;

- In the area of investigation and prosecution, states must launch an effective official investigation fully conforming to the Court's case-law where there have been victims of terrorist acts. The Court has emphasised that this obligation entails a requirement of promptness and reasonable diligence and that, within this framework, special attention must be paid to victims;

- Victims should also be duly considered in future criminal proceedings;

- The states are furthermore committed to guaranteeing effective access to the law and to justice for victims so that they may bring a civil action in support of their rights, and to providing them with legal aid where needed. All these questions are likely to be brought up again in greater detail in Workshop II;

- I now come to a crucial matter: compensation for victims. The principle of fair and appropriate compensation for damages suffered by victims is governed by two considerations, namely subsidiarity and territory. Firstly subsidiarity, in the sense that the obligation of states to compensate victims becomes effective only if compensation is not available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts. Then the territorial aspect comes in, with primary responsibility for compensating victims for direct physical or psychological harm lying firstly with the state on whose territory the terrorist act occurred. It should be pointed out here that this obligation applies with regard to any victim, irrespective of their nationality.

The Guidelines emphasise that compensation should be easily accessible to victims and, to this end, states should introduce a mechanism allowing compensation after a simple procedure and within a reasonable time.

Interestingly, the Guidelines encourage states to consider other forms of compensation than payments of money. The example of Spain, which, following the horrendous bomb attacks in Madrid,

regularised the situation of the victims who were illegally present on its territory, was frequently cited when this guideline was being prepared. There is likely to be strong focus on these questions in Workshop IV.

- States are also to make victims' lives easier by setting up appropriate contact points providing them with information, particularly concerning their rights, the existence of victim support bodies, and the possibility of obtaining assistance and practical and legal advice as well as redress or compensation. In this connection, the preamble recognises the important role of associations for the protection of victims of terrorist acts, which often spark and shape developments;

- Finally, states, while fully respecting freedom of expression, should encourage the media and journalists to adopt self-regulatory measures to guarantee the protection of the private and family life of victims in the framework of their news activities.

In the eyes of the Committee of Ministers these Guidelines are a minimum. It would be highly desirable for states to adopt more favourable services and measures than those described in the Guidelines. Indeed, some have already done so.

So now that I have reminded you of the content of these two sets of Guidelines, let me just talk about the challenges of this Seminar.

The Steering Committee for Human Rights thought that it would be useful, three years on from the adoption of the Guidelines on human rights and the fight against terrorism and with the adoption of the ones on protection of victims of terrorist acts on 2 March this year, to make an initial assessment of their implementation by member states, through exchanges of views between national counter-terrorism experts on the one hand and representatives of civil society and of victims in particular on the other hand.

So first we have to look at how the Guidelines, particularly those on human rights and the fight against terrorism, have been applied and exchange experiences. I am delighted to say in this context that

the states' interest in the Guidelines is illustrated by two facts: one is that they have been translated into ten languages, and the other is that the relevant sectors of the UN are now familiar with them.

We will then be noting any proposal to improve implementation of the Guidelines. In this way we hope that the Seminar's findings will provide food for thought not only in the Steering Committee for Human Rights but also in other competent Council of Europe bodies with a view to future efforts to step up the fight against terrorism while safeguarding individuals' rights and fundamental freedoms and improving the situation of victims.

I would like to express many thanks to the Secretariat for enabling us to bring together experts, specialists in counter-terrorist operations, police representatives, specialised departments of interior ministries, special services responsible for investigations, specialists on asylum and extradition, prison officials, security officials and judges who have had occasion to question presumed terrorists or witnesses. And of course we have representatives of civil society, non-governmental organisations, victim aid associations and national human rights institutions.

You will all have a chance to express your views very freely, and please do, in the four theme-based workshops this afternoon. There will be a Council of Europe publication featuring our findings but there are no plans to adopt a declaration or any other document at the close of the event.

One last, fundamental point is that the Seminar is to enable us to assess the practical application of the Guidelines and note proposals for improving their implementation. But our exchanges must in no way result in the Guidelines being called into question in order to lower the standards. The Guidelines are a compulsory minimum and there can be no question, under any pretext, of lowering the level of protection they offer.

I have one final observation by way of a conclusion.

Terrorist attacks are rightly perceived as a direct attack on the fundamental values of human rights, democracy and the rule of law. As the preface to the Guidelines on human rights and the fight against terrorism points out, "the temptation for governments and parliaments is to react at once with force, setting aside the legal safeguards which exist in a democratic state".

However, as the Court has pointed out, democracy must not be undermined or even destroyed on grounds of protecting it. These Guidelines seek to ward off the risk of drifting towards a police state. For truly democratic societies mindful of the rule of law, the best response to terrorism is to reiterate that the law must respond to violence and reason must respond to bloodthirsty folly. Otherwise the terrorists will have achieved their aim.

Panel:
Mainstreaming human rights in the fight against terrorism

Chaired by Mr Robert BADINTER, French senator, former Minister of Justice – Keeper of the Seals, former President of the Constitutional Council

Mr Joaquim DUARTE

Chair of the Committee of Ministers of the Council of Europe, Permanent Representative of Portugal to the Council of Europe

As Chair of the Committee of Ministers until November 2005, Portugal welcomes the major efforts made by the Council of Europe in the fight against terrorism. The relevant activities remain a priority for the organisation and the Portuguese Chairmanship wishes to keep up the efforts in this crucial area, with a particular emphasis on protecting human rights and fundamental freedoms while fighting terrorism.

Our top priority as Chair of the Committee of Ministers is promoting human rights, democracy and the rule of law. The theme of this seminar therefore ties in perfectly with that priority. When we set out our overall priorities, we stated that:

"Having allocated resources in accordance with this new threat, the Council of Europe has been contributing to this fight, which calls for an appropriate balance between the guarantee of full respect for human rights and fundamental freedoms as well as legitimate measures of legal co-operation. Portugal fully backs this approach and endorses the Guidelines on Human Rights and the Fight against Terrorism, which were adopted by the Council of Europe and represent the first ever international legal instrument on this issue."

Of course, it is also necessary to tackle the underlying causes of terrorism, although that is not directly related to the subject of our seminar. The Council of Europe has been working for many years in this area. Portugal believes it is necessary to continue these efforts and encourage discussion with a view to promoting intercultural and interfaith dialogue, education and awareness of shared values.

As the Committee of Ministers is the Council of Europe's decision-making body, it is responsible for adopting all the legal instruments, both binding and non-binding. That was also true, of course, of the guidelines we are considering here today and which will form the basis of our discussions in the workshops this afternoon.

The first set of Guidelines on human rights and the fight against terrorism was adopted by the Committee of Ministers on 11 July 2002. The guidelines reminded member states of the boundaries not to be crossed at a time when calls were being made for drastic measures at the expense of human rights in the aftermath of the attacks in New York on 11 September 2001. The guidelines rightly point out that effective efforts to combat terrorism on the one hand and the protection of human rights, democracy and the rule of law on the other are not incompatible; indeed, quite the contrary applies.

The attacks in Spain, Turkey and Russia reminded us, if there was any need, that Europe is not immune to terrorism and that we must redouble our efforts to protect our citizens and, more particularly, the victims of terrorist acts. In this connection, attention should be drawn to the drafting by the Council of Europe of the Guidelines on the Protection of Victims of Terrorist Acts, which the Committee of Ministers adopted on 2 March 2005. These new guidelines are an essential supplement to the 2002 guidelines and the two texts should be read together.

Naturally, the guidelines are mainly aimed at our member states but their content is universally applicable and we therefore hope they will serve as models for the international community as a whole. The participation of leading representatives of the United Nations, the OSCE and the European Union at this seminar would seem to confirm that view.

The Council of Europe has been active in combating terrorism for many years. Several of its member states have suffered the scourge and continue to do so. I will not repeat the list of the other anti-terrorism texts adopted by the Committee of Ministers in

addition to the guidelines, as the Secretary General went over them at the opening of the seminar. I would just underline that the work will be carried forward if we find any gaps in the existing texts.

Portugal strongly reiterated the importance it attaches to the fight against terrorism at the Third Summit of Council of Europe Heads of State and Government in Warsaw in May this year in signing two conventions which were opened for signature at the event: the Convention on the Prevention of Terrorism and the Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism.

My country is, of course, also active in other international organisations. In particular, during our chairmanship of the OSCE in 2002, we sought to increase the effectiveness of anti-terrorism efforts. It was under our chairmanship that the Charter on Preventing and Combating Terrorism was finalised and adopted. The Charter also makes it clear that human rights and the rule of law must be upheld in the fight against terrorism.

In conclusion, the Portuguese Chairmanship of the Committee of Ministers welcomes the holding of this seminar. I would urge you to display all the necessary realism and boldness for the guidelines to remain a benchmark. May they serve as models for shaping and implementing policies and legal frameworks for combating terrorism in all Council of Europe member states. And may Europe soon proclaim victory here.

I wish you a very successful seminar.

Mr Jean-Paul COSTA
Vice-president of the European Court of Human Rights

Placing human rights at the centre of the fight against terrorism – The viewpoint of a judge at the European Court of Human Rights

The European Court of Human Rights was faced with the problem of terrorism in its very first judgment, *Lawless v. Ireland* (1960-1961).

For forty years the Court's case-law has been concentrating on two main lines of thought: States have the duty to combat terrorism, which gives rise to certain obligations. In the inter-state case of *Ireland v. the United Kingdom* (1978), for instance, the Court stipulated that states were required to protect their populations from violence and terrorism.

States also have a duty to reconcile, as far as possible, human rights protection with the action they take against terrorism.

1) States are duty-bound to combat terrorism

– The Court has never defined terrorism as such, but it hasoften identified actual or suspected acts of terrorism:

- in Northern Ireland (inter-state case of *Ireland v. the United Kingdom*, 1978, Brogan, 1988, Brannigan and McBride, 1993); McCann, 1995 = special case of IRA members attempting to commit a bomb attack in Gibraltar)

- in the Basque Country (Etcheveste and Bidart v. France, 2002)

- in Catalonia (*Barbera Mességué and Jabardo v. Spain*, 1988)

- in Corsica (*Tomasi v. France*,1992)

- in Croatia (*Kutic v. Croatia*, 2002)

- in Kurdistan (a huge number of judgments in applications against Turkey)

- in Chechnya (Shamaev v. Georgia and the Russian Federation, 2005).

– The Court has always considered terrorism as a flagrant violation of human rights, at least implicitly, because it is the state's duty to combat terrorism:

- Combating terrorism is a legitimate aim that warrants state interference in such fields as private life and secrecy of correspondence, freedom of expression, freedom of the press, freedom of association and freedom of movement;

- However, states also have a positive obligation to protect their populations from terrorist (or indeed anti-terrorist) acts, including protecting the right to life (Article 2): cf. *LCB v. the United Kingdom*, 1998, *Kiliç v. Turkey*, 2000, Mahmut Kaya, 2000. The Court has further affirmed the right of access to the courts for victims of terrorism (Article 6): *Kutic v. Croatia*, 2002. So there are many positive obligations of a procedural kind (including the specific requirement of thorough and effective investigations involving the victims' families and friends);

- Lastly, action against terrorism constitutes one of the grounds of derogation to the obligations under the Convention, as set out in Article 15 (except in the cases of Articles 2, 3, 4 and 7). See the aforementioned judgments in the cases *Lawless v. Ireland*, *Ireland v. the United Kingdom*, *Brannigan and McBride v. the United Kingdom*, and also the judgment *Sekik v. Turkey*, 1997.

2) The Court endeavours to monitor the means by which states combat terrorism

a) generally:

– at procedural level (Articles 5, 6 and 7):

Brogan v. the United Kingdom: violation of Article 5 on the grounds of excessive length of police custody without appearance before a judge, viz 4 days and 6 hours;

Barbera Mességué and Jabardo v. Spain: the Supreme Court hearing was in breach of the right to a fair trial secured under Article 6;

Inçal v. Turkey: Article 6 was violated because of the composition of the National Security Courts having jurisdiction to try terrorist cases;

Brennan v. the United Kingdom, 2001: the presence of a police officer within hearing during the prisoner's first interview with his solicitor constituted a violation of Article 6;

Ecer and Zeyrek v. Turkey (2001): the Court found a violation of Article 7 because the persons accused of assisting the PKK were sentenced to a heavier penalty on the basis of legislation adopted subsequently to the facts.

– as to substantive rights:

- Article 2 is inviolable and therefore subject to the strongest possible protection;

- In the case of Article 3: idem (*Dikme v. Turkey*, *Aksoy v. Turkey*, 1996, *Aydin v. Turkey*, 1997): "the requirements of an investigation and the undeniable difficulties inherent in the fight against terrorist crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals" (Dikme, 2000, § 90);

- In the case of the other articles, the Court verifies the proportionality of the measures adopted; eg Article 10 on freedom of expression.

b) in connection with Article 15 of the Convention:

– The Court checks on the existence of circumstances justifying recourse to Article 15 (this has been its practice since Lawless);

– It also verifies the procedure for invoking Article 15 (1969 Report by the European Commission of Human Rights in the case of *Denmark, Norway, Sweden and the Netherlands v. Greece*);

– It verifies the material scope of Article 15 (excluding Articles 2, 3, 4 and 7);

– Lastly, it checks on the extent of the measures of derogation, which must not exceed the "extent strictly required") (cf. on this point the case of *Ireland v. the United Kingdom*).

c) Article 17 of the Convention has already been used to reject applications on the grounds of abuse of rights, eg in the case of Article 10 and freedom of expression (eg *Garaudy v. France*). However, it is unlikely to be applicable to Articles 2 and 3.

All in all, the Court's case-law may, paradoxically, seem overly favourable to terrorism, but it must be borne in mind that the Court's remit is to guarantee respect for human rights.

In conclusion:

1) The Court examines applications against states. The vast majority of applications concerning terrorism are submitted by persons who have been prosecuted for terrorism rather than by the victims; the European Court of Human Rights is not an international criminal court; terrorists are not defendants before the Court but applicants (which of course seems paradoxical).

2) The Court bases its action on the Convention, which protects the individual and universal rights shared by all human beings, thus including terrorists;

3) To accept too much from the state would be to pave the way for arbitrariness and escalation. Would such an approach be compatible with democracy, or even with efficiency?

Lastly, to implement the principle of proportionality in the fight against terrorism is to prioritise the long term over the short term, and reason over excess. Terrorism endeavours to undermine democracy and the rule of law: we must destroy it without falling for its game, defending human rights in order to avoid the trap set by the terrorists.

Mrs Gertraude KABELKA
Chair of the Committee of Experts on Terrorism (CODEXTER)

I.

1. First of all, I should like to thank the organisers of this High Level Seminar for having invited me, in my capacity as Chair of the Council of Europe's Committee of Experts on Terrorism (CODEXTER), to participate in this panel discussion on Mainstreaming human rights in the fight against terrorism. We all are aware of the delicate balance we have to strike when elaborating instruments designed to set guidelines for the daily practice in member states in the combat of terrorism – a balance between criminal prosecution as well as the defence of victims' rights on the one hand, and respect for the fundamental rights of the alleged offenders on the other hand, irrespective of the seriousness of the offences and of the question on which level and at which stage measures are to be taken by states.

2. Such specially grave and odious crimes as terrorist offences are do indeed call for an adequate reply – not only on domestic level but also through concerted steps of the international community. In addition, states are challenged to become more active in the preventive field – and here of course the necessity to maintain, without undue restrictions, the full range of guaranteed civil rights becomes a particularly crucial element for all considerations.

3. There is no need to stress, in the setting of this Seminar, the role and significance of human rights and fundamental freedoms for the Council of Europe (CoE): These values are the pillars on which the organisation is built, ever since it has been founded in 1949, and the European Convention for the Protection of Human Rights and Fundamental Freedoms with its Protocols is the backbone of the organisation in all its fields of activity. Any treaty negotiated and adopted within the CoE must be subject in contents, interpretation and implementation to the fundamental requirements of the European Convention on Human Rights – and it goes

without saying that this is in particular true for the criminal law instruments, including the new Council of Europe Convention on the prevention of terrorism which has recently been elaborated by the CODEXTER. I'll refer to that issue later on (cf. Chapter III).

II.

4. Before dealing with the Convention, let me at first briefly introduce the CODEXTER in general: In late 2002 it was created by the Committee of Ministers in order a) to make appropriate proposals on the implementation of priority issues already defined by its predecessor, the GMT (groupe multidisciplinaire contre le terrorisme) which had been founded as immediate answer of the CoE to the terrorist attacks in the USA on 11 September 2001, and b) to make proposals for new activities to intensify the CoE's action in the field of the fight against terrorism in general, including preventive measures, while preserving and promoting human rights and fundamental freedoms. It should be noted that this wording already encompasses the main issues of the committee's work: prevention of terrorism and human rights.

5. This original mandate, reinforced and slightly extended on 5 December 2003, also referred expressly to the standards of the CoE in the fields of human rights and the rule of law plus a number of legal sources, inter alia either emanating from the Parliamentary Assembly (PACE) – such as Resolution 1258 and Recommendation 1534, both of 26 September 2001 on Democracies facing Terrorism, and in particular Assembly Recommendation 1550 (2002) Combating Terrorism and Respect for Human Rights – or issued by the Committee of Ministers (CM) such as, above all, the Guidelines on Human Rights and the Fight against Terrorism, adopted on 11 July 2002 and one of the main working documents of this Seminar.

6. It is not for me to deal with the Guidelines in detail – this has already been done by the Chairman of the CDDH. I simply feel obliged to underline that this legal source has belonged to the most important reference documents for the work of the CODEXTER where, again and again, rather controversial debates were

conducted, on the basis of conflicting views exactly concerning the human rights issue vis-à-vis the necessity to reinforce the tools for the combat of terrorism.

7. Apart from the aforesaid sources I should mention that the CODEXTER is also obliged to take into account the work of three steering committees of the CoE, including the Steering Committee on Human Rights (CDDH). Our terms of reference, in the chapter on membership, provides for the participation of one representative each of those three steering committees, the CDCJ, the CDPC, and the CDDH. A number of international organisations may also send representatives to the CODEXTER meetings; among them the OSCE and the ICRC should be particularly mentioned in the given context. They both are playing an active role in the committee meetings.

8. Vice versa, the CODEXTER is sending observers to other bodies where it has been invited to do so – one of them has been the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) where the CODEXTER was represented by its 2nd Vice-president Martin Sorby of Norway. Thus our committee has closely followed the elaboration of the Guidelines on the Protection of Victims of Terrorist Acts, adopted on 2 March 2005 (another important reference document of the Seminar). Victims' rights forming one of the major concerns of the CODEXTER, our committee has also nominated observers to the Group of Specialists on Assistance to Victims and Prevention of Victimisation (PC-S-AV). Thus – and through co-operation with other committees – we are also coping with the task of CODEXTER to co-ordinate the different counter terrorism activities of the CoE. In this context it should also be mentioned that the CODEXTER is collecting "country profiles" of member states – and the European Union – which are published on the website of the CoE. They are designed to inform readers through very brief surveys about the legal, administrative and other measures taken in the respective countries in their fight against terrorism.

9. So much for the responsibilities of the CODEXTER in general. However: On 11 June 2004 the CM adopted revised specific terms of reference (ToR) for the CODEXTER instructing it, in addition to its original tasks, to elaborate proposals for one or more instruments (which could be legally binding or not) with specific scope dealing with existing lacunae in international law or action on the fight against terrorism. This revised mandate, again, drew essentially on the same reference documents as the original one had done, including those which are particularly relevant for the human rights issue.

10. That proves once more that the committee was bound, from the very outset and in all of its activities, to a strict observation of the human rights regime. It goes without saying that this aspect gained particular weight in the debates on a possible instrument of binding nature which resulted in the drafting and negotiating of the new Council of Europe Convention on the prevention of terrorism, adopted by the CM on 3 May and opened for signature in Warsaw on 16 May on occasion of the 3rd CoE Summit of Heads of state and Government. To date the Convention has been signed by 19 states.

III.

11. What is the background of this instrument, what are its novelties and how does it tackle the human rights issue?

A)

12. As to the background: Originally the CODEXTER had been tasked by the CM, inter alia, to examine whether or not a comprehensive European Convention against terrorism, open to observer states, or some elements of such a convention, which could be elaborated within the Council of Europe, might yield added value. After a thorough debate of the issue the CODEXTER could not reach a consensus on the question of whether or not the Council of Europe should elaborate a comprehensive convention on terrorism, but it agreed that a limited-scope instrument, dealing with the prevention of terrorism and covering existing lacunae in international law or action, could bring added value. At the same time, the committee identified a number of such gaps. This opinion was the basis for the aforementioned revised ToR.

13. In the course of the drafting and negotiating process, the CODEXTER not only took account of the documents relevant for human rights considerations, but was also in contact with the appropriate bodies of the CoE – and through them also to representatives of civil society outside the Council. Thus it took into consideration the opinion of the PACE, the Commissioner for Human Rights and a number of NGOs which it had received. Both the PACE and the Human Rights Commissioner of the CoE had been invited by the CM to submit their opinions, but whilst this is standard procedure with the Assembly, the Commissioner for Human Rights had been involved for the first time in concrete treaty negotiations. He on his behalf had been in contact with a number of NGOs who could through this channel participate in the process. Also, the CODEXTER was in direct contact with some NGOs such as Amnesty International, and it decided – after the first reading of the draft convention – to publish subsequent drafts on the CoE website in order to put representatives of civil society into the position to submit comments.

B)

14. As to the novelties of the Convention: Following its own findings the CODEXTER concentrated on the need to supplement the existing network of international treaties, the so-called acquis of 10 global conventions against terrorism, through the introduction of additional treaty obligations in the field of prevention. It is the express purpose of the Convention to enhance the efforts of Parties in preventing terrorism and its negative effects on the full enjoyment of human rights, in particular the right to life, both by measures to be taken at national level and through international co-operation. The Convention purports to achieve this objective, on the one hand, by establishing as criminal offences certain acts that may lead to the commission of terrorist offences, and, on the other hand, by reinforcing co-operation on prevention both internally, in the context of the definition of national prevention policies, and internationally.

15. The Convention as such does not define new terrorist offences in addition to those included in the aforementioned international conventions against terrorism to which it simply refers through Article 1 and a treaty list in the Annex. Rather, the Convention defines three new offences which are only connected with the possible perpetration of the aforementioned terrorist offences – "possible perpetration" meaning that it is irrelevant for an offence under this convention whether or not a real terrorist offence is later on committed. These new offences are: public provocation to commit a terrorist offence, recruitment for terrorism, and training for terrorism. Besides that, the Convention comprises provisions on national prevention policies and other legal tools to make the fight against terrorism more effective.But what is really new, besides the penalisation obligations in the field of prevention, is the stress on human rights safeguards.

C)

16. That leads me to the important question how the convention deals with the human rights issue. I may underline that this new criminal law instrument contains more safeguard clauses in this respect than any other comparable text – for the plain reason that the drafters were very well aware of the sensitive area the convention is covering. To strike the balance between the interests of states on the one hand, and of free individuals on the other hand, is a crucial aspect of the Convention, given that it deals with issues which are on the border between legitimate exercise of freedoms, such as freedom of speech, association or religion, and criminal behaviour.

17. Starting with the Preamble, the Convention comprises several provisions concerning the protection of human rights and fundamental freedoms both in respect of internal and international co-operation (including grounds for refusal of extradition and mutual assistance) on the one hand and as an integral part of the new criminalisation provisions (in the form of conditions and safeguards) on the other hand. It also contains a provision regarding the protection and compensation of victims of terrorism, because the human rights which must be respected are not only the rights

of those accused or convicted of terrorist offences, but also the rights of the victims, or potential victims, of such offences. Needless to add that the Convention does not affect the traditional rights of political refugees and of persons enjoying political asylum in accordance with other international undertakings to which the member states are Parties.

18. A comparison of the new Convention with the Guidelines on Human Rights and the Fight against Terrorism shows that all essential elements of the Guidelines were taken into account by the drafters of the Convention. Let me therefore refer in more detail to some of the conventional provisions:

19. I already mentioned the Preamble; its paragraphs which are relevant in our context read:

"Aware of the precarious situation faced by those who suffer from terrorism, and in this connection reaffirming their profound solidarity with the victims of terrorism and their families;

(...)

Recalling the need to strengthen the fight against terrorism and reaffirming that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms as well as other provisions of international law, including, where applicable, international humanitarian law;

Recognising that this Convention is not intended to affect established principles relating to freedom of expression and freedom of association;"

20. In the operative part of the Convention, at first Article 2 on the Purpose refers to the negative effects of terrorism on the full enjoyment of human rights, in particular the right to life (cf. supra paragraph 14).

21. Then, Article 3 on National prevention policies provides in its paragraph 1 that Parties shall prevent terrorist offences and their negative effects while respecting human rights obligations as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

22. But of course the penalisation provisions (Articles 5 to 7 and 9) have been the central issue of our concern, and here I must quote Article 12 on Conditions and safeguards as follows:

"1. Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

2. The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment."

23. Both in Articles 3 and 12 we find the words "where applicable" also in connection with the European Convention on Human Rights which definitely has to be applicable for all CoE member states. However, the Convention is designed to be open for the accession by non member states, and therefore it was necessary to insert this proviso.

24. Immediately after the central provision of Article 12 we find Article 13 on Protection, compensation and support for victims of terrorism, according to which each Party shall adopt such measures

as may be necessary to protect and support the victims of terrorism that has been committed within its own territory. These measures may include, through the appropriate national schemes and subject to domestic legislation, inter alia, financial assistance and compensation for victims of terrorism and their close family members.

I have to underline that this provision – which has to be read in connection with the respective paragraph of the Preamble – might seem to be a slightly foreign element in a convention on prevention, but is a result of the great importance the CODEXTER attached to the victims' issue because it always took into account that the human rights to which regard has to be had are not only the rights of those accused or convicted of acts of terrorism but also of the victims or potential victims of those acts.

25. Another provision particularly relevant for the human rights aspect is the Discrimination clause of Article 21:

"1. Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested Party has substantial grounds for believing that the request for extradition for offences set forth in Articles 5 to 7 and 9 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

2. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to torture or to inhuman or degrading treatment or punishment.

3. Nothing in this Convention shall be interpreted either as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to the death penalty or, where the law of the requested Party does not allow for life imprisonment, to life imprisonment without the possibility of parole, unless under applicable extradition treaties the requested

Party is under the obligation to extradite if the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be imposed or, where imposed, will not be carried out, or that the person concerned will not be subject to life imprisonment without the possibility of parole.

26. And, last but not least, Article 26 on the Effects of the Convention provides in its paragraph 4:

4. Nothing in this Convention shall affect other rights, obligations and responsibilities of a Party and individuals under international law, including international humanitarian law.

27. With this brief survey and the above quotations I hope that I was able to draw an overall picture of the human rights regime in the new CoE Convention on the prevention of terrorism. The time frame prevents me from going into further details, but I may refer to the fact that the new Council of Europe Convention on the prevention of terrorism is already listed in the Council's Treaty Series under CETS No. 196. Of course the CoE website also comprises the Explanatory Report to the Convention.

Mr Marc NEVE
2nd Vice president of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

In presenting the CPT's contribution on the theme that has brought us here today, I should like to highlight some particular aspects that guided us in our investigations throughout the various visits connected, directly or indirectly, with the protection of human rights in the fight against terrorism.

1. Ensuring compliance with the absolute ban on torture and inhuman or degrading treatment

From the very beginning, the absolute ban on torture and inhuman or degrading treatment has been constantly violated by the practices of numerous states throughout the world. What is more, some states are now openly calling into question the actual validity of the absolute nature of this prohibition.

Europe must be a bastion against initiatives designed to water down and/or undermine the ban on torture and inhuman or degrading treatment.

It is to be regretted that a firmer stand was not taken at the close of the recent Warsaw Summit, particularly in the light of the situation in Chechnya.[1]

Admittedly, now as in the past, it is important to strike a balance between individual rights and security considerations. Yet to ignore a principle as basic as the prohibition of torture and inhuman or degrading treatment is to open the way to steps that

1. See the public statements of 10 July 2001 and 10 July 2003 on the CPT's visits to the North Caucasus region (available on the committee's website: http://www.cpt.coe.int); as for the reports on the seven visits carried out since 2000, the Russian Federation has not yet agreed to their publication.

are likely to undermine the foundations of the democratic societies that have, in Europe, been able to develop with due regard for the rule of law. To take this path is nothing short of betraying our own values.

While I am on the subject, we cannot but bear in mind that information obtained in the wake of, or as a result of, ill-treatment can never be considered reliable. What is more, in the event of the use of torture or ill-treatment, there is an obvious risk that one day those who resorted to such practices will themselves be subjected to them, if they happen to be accused and arrested.

All in all, in the context of a strategy designed to ensure security, this is clearly an approach which, as such, is totally uncertain, risky and, in short, completely counter-productive, for it breeds insecurity.

2. A reminder of the importance of a number of fundamental guarantees

a. Fundamental guarantees in the event of arrest and police custody

Over the years the CPT has sought to make it clear that there are three fundamental safeguards that it is vital to apply as soon as someone is deprived of his or her liberty: the right of the person concerned to inform a third party of his or her choice of his or her detention; the right of access to a lawyer; and the right to ask to be examined by a doctor. The CPT believes that these rights are three fundamental safeguards against the ill-treatment of people in detention, which should apply from the very start of deprivation of liberty.

As pointed out in the numerous reports the committee has drafted over the years, however, it is understandable and acceptable that certain exceptions should be envisaged.

For instance, in the case of the right to be able to inform a third party of one's detention, the committee has always taken the view

that the exercise of this right could be delayed in exceptional circumstances. Such circumstances must, however, be clearly defined and strictly limited in time, and recourse to such exceptions must be surrounded by appropriate safeguards.

As for the right of access to a lawyer, it should be remembered that, in the CPT's experience, the period immediately following deprivation of liberty is that during which the risk of intimidation and physical ill-treatment is greatest. The opportunity for people held by the police to have rapid access to a lawyer during this period is therefore a fundamental safeguard against ill-treatment. The existence of such a possibility will have a deterrent effect on those inclined to ill-treat people in detention. In addition, a lawyer is well placed to take appropriate steps if ill-treatment is inflicted. There is, however, no reason why, if the lawyer chosen by the person concerned is not available or takes a long time to arrive, another lawyer, officially assigned by the competent body representing Bar concerned, should not be present.

As regards a request for a medical examination on the part of the person under arrest, here again, if the chosen doctor is unable to come, there is no reason not to call on another doctor independent of the authority responsible for the detention. The medical examination must, of course, take place out of earshot and, preferably, out of sight of police officers. In addition, the results of each examination, relevant statements by the arrested person and the doctor's conclusion should be formally recorded by the doctor and made available to the detainee and his or her lawyer.

b. The interrogation procedure

The context of what it has been agreed to call the fight against terrorism reminds us daily of the potential risk of ill-treatment when investigators are called on to intervene without having appropriate training or being guided by any specific rules, or when the provisions in question are unclear or ambiguous.

Interrogating people suspected of a criminal offence is a specialist activity that requires special training if it is to be carried out satisfactorily.

The elaboration of a code of conduct for the interrogation of people suspected of a criminal offence will make it considerably easier for members of the police to comply with the objective, which is to obtain accurate, reliable information in order to discover the truth about the matters covered by the investigation, and not to obtain a confession from someone already presumed guilty by the interrogators.

This, too, is one of the points that is constantly made in the CPT's reports.

Indeed, it is clear that a criminal system that advocates proof in the form of a confession may encourage investigators, who are often under pressure to obtain results, to resort to physical or psychological coercion or even ill-treatment and torture. It is therefore essential to introduce regulations governing methods of interrogation, particularly with regard to the duration of interrogations, places of interrogation, and so on.

It is also in this context that the committee has constantly advocated electronic (ie audio and/or video) recording of hearings by the police, as an important additional safeguard against ill-treatment. The introduction of such systems is now being envisaged in a growing number of Council of Europe countries. First of all, such measures clearly make it possible to provide a comprehensive and genuine record of the interrogation process and, secondly, they greatly facilitate enquiries in the event of allegations of ill-treatment.

c. The risks inherent in indefinite detention without charge

The recent report on the CPT's last visit to the United Kingdom[2] showed to what extent indefinite detention without charge in itself constituted a strategy that carried a high risk of ill-treatment.

So far, the committee has fortunately had to investigate this matter only in relation to the legislation applicable in the United Kingdom, the only Council of Europe country to have special legislation of this kind. We can only hope, of course, that such legislation will not be introduced anywhere else.

3. What use should be made of information obtained by third parties who had recourse to torture or ill-treatment?

On several occasions, the question has been raised as to what should be done with information obtained by third parties who had recourse to torture or ill-treatment. Can a state that has obtained such information use it? Would this not be indirectly legitimising the use of torture?

The CPT takes the view that the use of such information would be contrary to the spirit of international conventions prohibiting torture and inhuman or degrading treatment.

We shall be interested to see, in due course, what decision the United Kingdom House of Lords hands down in a case concerning the Anti-Terrorism, Crime and Security Act 2001.

It is of course important, however, that this prohibition should not simply be upheld after the event by the courts, but that such practices should be prohibited by explicit provisions at the actual time of the investigation.

4. Are "diplomatic assurances" a means of circumscribing the ban on torture?

The ongoing controversy over the use of "diplomatic assurances" in connection with deportation procedures clearly illustrates the potential conflict between a state's obligation to protect

2. Visit from 14 to 19 March 2004, published on 9 June 2005 under the reference CPT/Inf(2005)10 (available on the committee's website: http://www.cpt.coe.int).

its citizens against acts of terrorism and the need to safeguard fundamental values. The prohibition of torture and inhuman or degrading treatment encompasses an obligation not to send someone back to a country where there is serious reason to believe that he or she incurs a real risk of being subjected to such practices. In order to avoid such a risk in particular cases, some countries have chosen to seek assurances from the country of destination that the person concerned will not be ill-treated. This practice is far from new, but it has been in the limelight in recent years, as states seek increasingly to deport from their territory people considered a danger to national security. There is a growing fear that reliance on diplomatic assurances will provide a way of getting round the ban on torture and inhuman or degrading treatment or punishment.

The search for diplomatic assurances from countries with a poor record in the area of torture and ill-treatment gives particular cause for concern. Such a record does not necessarily mean that the person it is planned to deport will be personally exposed to a genuine risk of ill-treatment in the country in question: the specific circumstances of each case need to be taken into account before such an assessment can be made. If, however, it emerges that there is a genuine risk of ill-treatment, will diplomatic assurances from the authorities of a country where torture and ill-treatment are common practice ever provide adequate protection against this risk? There are those who argue – fairly convincingly – that, even assuming that the authorities in question genuinely supervise the services responsible for detaining the person in question (which is not necessarily the case), there is no guarantee that the assurances given will be honoured in practice. If these countries do not honour their obligations under the international human rights treaties that they have ratified, how can one be confident that they will honour assurances provided on a bilateral basis in a specific case?

There are others who reply that arrangements for supervising the treatment of a deportee after his or her return can be made if he or she is placed in detention. The CPT has an open mind about the issue, though the fact is that it has not, to date, seen convincing proposals for effective and viable arrangements of this kind. If they are to have the slightest chance of being effective, such arrange-

ments must obviously include a number of key safeguards, such as the right of qualified independent persons to visit the person in detention at any time, without notice, and talk to him or her without witnesses in a place of their choice. The arrangements should also provide for means of ensuring that immediate remedial measures are taken should it emerge that the assurances provided are not being honoured.

It should also be stressed that, before the person is sent back, it must be possible to challenge any deportation procedure involving diplomatic assurances before an independent authority, and that any appeal must suspend execution of the deportation measure. This is the only means of ensuring that the reliability of the arrangements envisaged in a particular case is rigorously examined, and examined in time.

The CPT intends to keep a close watch on developments in the practice of diplomatic assurances in the States Parties to the European Convention for the Prevention of Torture. The committee would also be pleased to contribute to any discussion on the subject at the Council of Europe. Indeed, the time seems ripe for a collective discussion of all the issues involved, so that we can ensure that current practices are fully in keeping with the obligations deriving from the ban on torture and inhuman or degrading treatment or punishment.

Mr Javier RUPEREZ
Executive Director of the UN Security Council Counter-Terrorism Committee (CTC)

Terrorism, with its utter lack of respect for the sanctity of human life, constitutes a gross violation of human rights. The report presented by the Secretary General's High Level Panel on Threats, Challenges and Change in 2004 reminds us that "terrorism attacks the values that lie at the heart of the Charter of the United Nations: respect for human rights; the rule of law; rule of war that protect civilians; tolerance among peoples and nations and the peaceful resolution of conflicts". The Secretary General himself in his address to the summit on democracy and terrorism held in Madrid on the 11 of March of this year endorsed the same thought by affirming that "terrorism is in itself a direct attack on human rights and the rule of law".

The Council of Europe has played a vital and multifaceted role in strengthening international action against terrorism while also ensuring the protection of fundamental principles of democracy and human rights in counter-terrorism efforts.

I particularly welcome, of course, the recent opening for signature of the Council's Convention on the Prevention of Terrorism, as well as the Convention on laundering of the proceeds of crime and on the financing of terrorism.

Mr. Chairman, we are here today, chiefly, to address the question of the protection of human rights while countering terrorism. The defense of human rights in counter-terrorism actions has been highlighted by the United Nations Secretary-General as one of the five pillars of the UN's new comprehensive counter-terrorism strategy and it is very much a part of our current thinking.

Let me quote what Kofi Annan had to say on this issue in his Madrid address on the tenth of March of this year. "We must defend human rights. I regret to say that international human rights experts, including those of the UN system, are unanimous in

finding that many measures states are currently adopting to counter terrorism infringe on human rights and fundamental freedoms. Human rights law makes ample provisions for counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist objectives – by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element."

Turning to the dimension of human rights within the Counter-Terrorism Committee/Counter-Terrorism Committee Executive Directorate (CTC/CTED) I should start by recalling the CTC policy on human rights. The CTC is mandated to monitor the implementation of resolution 1373. It is outside of our scope to monitor human rights performance against human rights conventions, whereas this is the mandate of other organizations and UN offices. Nevertheless, the CTC/CTED takes human rights into account in several manners:

- First, the CTC borrows the relevant paragraph on human rights from Resolution 1456 and includes it in its entire standard letters to remind member states that any measure they take to combat terrorism should comply with all their obligations under international law, in particular international human rights, refugee, and humanitarian law.

- Second, CTC/CTED's questions to member states aim primarily at having 'legislative' measures in place, whilst such ensure the maxim nullum poena sine lege (the legality principle) so as to bring perpetrators to justice in accordance with the rule of law and due process. In the absence of those measures, the CTC has in fact requested their adoption.

- Third, a Human Rights expert has been appointed. He will be responsible for providing advice on human rights, humanitarian law and asylum law in relation to counter-terrorism. He will represent the CTED in liaising with organizations representing victims of terrorism as well as with the various international organizations and Non-Governmental Organizations specialized in human rights, humanitarian law and asylum law.

- Furthermore, the CTED has developed a good working relationship with the Office of the High Commissioner for Human Rights. Moreover, I would also express our desire and willingness to cooperate and maintain a continuous dialogue in the near future with the 'Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' whose mandate has recently been established by Human Rights Commission's Resolution 2005/80.

What I can say is that we are steadily reinforcing the human rights dimension in our work and will continue to do so, consistently with the vision set out by the Secretary-General. For, counter-terrorism action that transgresses human rights will in the long run do a disservice to our common goal of eradicating the scourge of terrorism within a sustainable framework of democracy and rule of law. Rather, such transgressions will only aid terrorists themselves in their criminal efforts to undermine the institutions and the principles we all cherish and which the Council of Europe, among many others, defends. It is in this sense that respect for human rights in the context of counter-terrorism is a key element to a successful strategy, rather than a concern of mere peripheral importance. Lawful counter-terrorism actions strengthen law-abiding, democratic societies, and give us more real cause for hope in this struggle. We are all conscious of the imperative balance that we have to strike in this field. While respecting human rights and the rule of law we have to be able at the same time to successfully fight terrorism. A counter-terrorism policy which would disdain human rights would be as ill-guided as a human rights policy that would jeopardize the fight against terrorism.

This is one of the reasons why I would like to welcome the tremendous contributions of the Council of Europe on precisely this point. Your seminal Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers in 2002, remain one of the indispensable guideposts: a concise yet sweeping statement of principles to assist Governments in their policy-making in this area. In the same wave length, I would also like to acknowledge the recent Recommendations of the Committee of Ministers on the protection of witnesses and collaborators of justice, on Special Investigative Techniques, and on identity and travel documents.

I would like to mention also, in particular, the new Guidelines on the protection of victims of terrorists acts, adopted by the Committee of Ministers in March of this year, as well as the provision on this question contained at article 13 in the new Convention on the Prevention of Terrorism. As I am sure you know, Security Council resolution 1566, adopted in the wake of the atrocious terrorist act in Beslan in September 2004, broke new ground by establishing a working group that is charged, among other tasks, with investigating the possibility of establishing an international fund to compensate victims of terrorists acts and their families, which might be financed through voluntary contributions, and which could also consist in part of assets seized from terrorist organizations, their members and sponsors.

The Council of Europe's Guidelines go yet further, for instance, insisting that states on whose territories terrorist acts are committed must contribute to compensation for victims (when compensation from other sources is not available), and encouraging states also to consider other measures to mitigate the negative effects of terrorist acts on their victims. As is reflected in Security Council resolution 1566, this attention to the needs of victims of terrorism is a matter of deep international concern. Too often the question of the human rights of victims has vanished from the public agenda as the horror of terrorist acts fades into the past and policy-makers are pre-occupied with the (quite understandable) imperative to punish perpetrators and prevent further such atrocities. So I would like particularly to welcome the Council of Europe's emphasis on this critical dimension of the terrorism phenomenon.

Let me quote what the Secretary General said in his Madrid address about the victims of terrorism: "to all victims around the world, our words of sympathy can bring only hollow comfort. They know that no one who is so directly affected can truly share their grief. At least let us not exploit it. We must respect them. We must listen to them. We must do what we can to help them. We must resolve to do everything in our power to spare others from meeting their fate. Above all, we must not forget them".

Mr. Chairman, I will refrain from venturing further into specific human rights issues in these preliminary remarks. I would like to conclude by stressing once again that we at the CTED are committed to remaining up-to date on human rights developments in the field of counter-terrorism, in order to be properly informed in the exercise of our own mandate, and one of our main resources will undoubtedly continue to be the Council of Europe. As I mentioned earlier, we highly value the Council of Europe's partnership and, more precisely, its expertise on these matters and, as CTED Executive Director, I can assure you we will remain open to and keenly interested in a close working relationship in the time ahead.

Thank you very much.

Workshops

WORKSHOP I: RESPECT FOR HUMAN RIGHTS DURING THE INVESTIGATION AND DURING DETENTION

Chairperson: Mr Claude DEBRULLE, Director General, Belgian Ministry of Justice

Rapporteur: Prof. Emmanuel ROUCOUNAS, Academy of Athens

Analysis of the problem

It was pointed out that the European Court of Human Rights (the Court) in its judgments concerning terrorist acts, regularly includes at least one recital which underlines that the exceptional conditions constituted by acts of terrorism are demonstrated by preventive and repressive measures, but always within a democratic society and such as is necessary in the interests of national security and public order (Klass 1978). The main concern here is to prevent arbitrary acts (Sakik 1997). Nevertheless, the Court stresses that the states are not authorised to take any measure they wish and do not have "carte blanche" (Murray 1996). The issue lies in the framework of the measures adopted by states.

While they did not call this general principle into question, several speakers emphasised the special characteristics of efforts to combat terrorism and the need for preventive actions, some of which must be more invasive of privacy to be truly effective. To be compatible with the requirements of the protection of private life, those measures must be covered by a detailed "law" that is predictable and proportionate to the legitimate aim pursued (Kruslin 1990, Huvig 1990). This raises numerous practical issues, mentioned inter alia in Guidelines 5 and 6, as to how personal data are to be collected and processed.

The Workshop I participants discussed certain situations applying to information on planned or perpetrated terrorist acts, and the arrest and detention of the persons suspected of such acts. They addressed the following questions in particular.

Arrest, interrogation and absolute prohibition of the use of torture or inhuman or degrading treatment

It is clear that states have an imperative duty to protect populations from possible terrorist acts. Given such an eventuality, states would be irresponsible if they did not exploit all the available information, checking its reliability.

But public authorities have to consider the source of that information. In particular, can they take advantage of information provided by a third state (a state not participating in the European system) which obtained it through torture? And can they decide to detain someone on the basis of such information? The workshop concluded that confessions extracted under torture could in no circumstances constitute evidence for incriminating an individual.

Workshop I placed emphasis on the mandatory character of two provisions that admit of no exception in peacetime even when the life of the nation is in peril (Gezici 2005, Selmouni 1999), the one securing the right to life of every person subject to the jurisdiction of the state (Article 2 of the European Convention on Human Rights – ECHR) and the one prohibiting torture and inhuman or degrading treatment or punishment when a person is in the hands of the authorities (Article 3 ECHR).

Article 2 is to be interpreted and applied in such a way as to make these guaranties "practical and effective". The Court points out that where the authorities use lethal force everything depends on the circumstances; however, the terms "absolutely necessary" in Article 2 para. 2 indicate that a more stringent and binding criterion of necessity must be applied than the one normally used to determine whether the state's action is "necessary in a democratic society" (Mc Cann 1995). The force used must be strictly proportionate to the achievement of the legitimate aims pursued by the public authority; furthermore, measures must be taken to assess and prevent possible harm to civilians present on the scene (Isayeva, Yousupova, Bazayeva 2005).

As to the interpretation and application of Article 3, an arrested or detained person's position of vulnerability by definition makes it even more the duty of the authorities to protect him or her (Gültekin 2005). If it befalls the person to lose his/her life or to suffer any harm, bodily or other, the state is responsible unless it proves that the harm was not due to acts by its bodies (Ikincisoy 2004).

Diplomatic guarantees

In this connection, the discussion bore on the question of supervision of the guarantees given by a third state that, in the event of extradition, the person will not be subjected to torture or capital punishment. Alarming deficiencies have been found in this respect (see below); in any case, such "guarantees" should come from the authorities empowered to bind the third state at the international level.

Access to a lawyer (and also the rights of the defence) and the confidential nature of investigations

Access to a lawyer (and/or a doctor) or a witness

It was pointed out, inter alia by the representative of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), that the presence of a lawyer (and/or a doctor) or a witness during interrogation was also in the interest of the state concerned, and allowed to have evidence from a third person that there had been no ill-treatment.

There was discussion on the most appropriate time to request the assistance of a lawyer. Some pointed out that if such assistance was provided at the very beginning of the interrogation, this could diminish the interrogation's effectiveness. National legislations vary on this issue. The Court has not settled the question, but the Brennan judgment (2001) was cited in support of the idea that the guarantees under Article 6 of the ECHR may equally apply to the phase preceding the trial. Most of the views that were expressed were in favour of having a lawyer present as soon as possible.

Accusations and rights of the defence

The accused must be informed as to which acts lie behind the "plausible" suspicions hanging over him. But the question was raised as to whether, at the time of interrogation, the accused has to be informed of all the evidence on which accusations against him are based. The answer is yes, but this does not necessarily entail access to the entire file or the right to know the identity of the informants and witnesses where disclosing the data risks compromising national security and the individuals concerned. The Court's case-law shows that there are different ways in which states can fulfil this obligation to provide information to the accused.

Confidential nature of investigations and measures invading privacy

The Court's case-law was invoked with regard to the protection of privacy in accordance with Article 8 ECHR, and especially with regard to correspondence, phone tapping and "bugging" in the context of fighting serious crime (Vetter 2005), terrorism included. It was recalled that the stipulation of a statutory basis comprises both a law permitting such tapping, and a court practice (Kruslin 2000). The "law" must, in particular, be accessible, predictable as to the meaning and the nature of the applicable measures (Malone 1984) and an effective control over these measures must be available (Lambert 1998). In addition, the interception of communications to assist the police authorities must be necessary in a democratic society for upholding order and preventing criminal offences (Klass 1978, Malone 1984). The existence of adequate safeguards against abuses prevents a system of secret surveillance from undermining democracy on the ground of defending it (Rotaru 2000).

The Rapporteur said that in the Council of Europe framework two committees of experts had dealt with special investigation techniques in relation to acts of terrorism (PC-TI). The appropriate material was gathered with a view to developing common principles and improving international co-operation in this field. The outcome of the work was recently published under the title "Terro-

rism: Special investigation techniques", Council of Europe, Strasbourg, 2005. The replies of 37 member state governments to a questionnaire forwarded to them, published in an appendix, plainly demonstrate that practices diverge in the various countries.

Provisional detention

Plausible grounds for detention

The workshop stressed that a person could be arrested or detained only on plausible grounds for suspecting that they have committed an infringement. The facts are examined by domestic courts, but the Court, whose role is subsidiary in this respect (Mc Kerr 2000), takes the stance of an objective observer to assess them (Labita 1995, Peers 2001). In certain cases, the information supplied is not plausible. The requirement of plausibility depends on the circumstances, whether the police acted promptly (Fox & Campbell 1990) but that does not mean that the individual's guilt will necessarily have to be established during the investigation (Murray 1996, Ikincisoy 2004), nor that the identity of the witnesses be revealed (Kostovki 1997, Doorson 1996). In any case, the imperative to combat terrorism could not justify stretching the notion of "plausibility" to the point of undermining the substance of the guarantee in Article 5 of the ECHR. The referral of the file to the judicial body or the fact that the deprivation of liberty was "speedily" put to an end are considered in the context of the "diligence" to be shown by the police authorities in such cases. The "speed" requirement in the meaning of Article 5, para. 4 of the ECHR is assessed in accordance with the complexity of the case and of the behaviour of the applicant and of his/her counsellors (Rapacciuolo 2005).

Duration of custody

It was clear that the duration of custody varied, ranging from 24 to 72 hours and possible extension with or without authorisation. Although the Court has not settled this question and examines each case in the light of its own circumstances, it was pointed out that it considered, in one case, that detention without court authorisation

for 4 days and 6 hours violated Article 5(3), even when the aim was to protect the community against terrorist acts (Brogan 1998), when in another case it decided that the release after 3 days in custody met the requirement of the expression "promptly" used in this provision (Ikincisoy 2004).

So-called "administrative" measures

So-called "administrative measures" may delay the bringing of a case before the judicial authority. There was debate on the lawfulness of some such measures and it was said that they could be unlawful if they were not in keeping with the general spirit of Article 5 of the ECHR and the Guidelines.

The role assigned to victims during the investigation

The role of the victim in initiating and developing proceedings was assessed and compared between legal systems. Some experts expressed reservations over the possibility for individuals to initiate criminal proceedings for terrorism initiated by private individuals, while others said that this was possible in the legal system of their country. Legal cultures in that respect differ between states. In any case, it is consistently held by the Court that the victims' dependants (like the victims themselves) must be involved in the investigation procedures relating to terrorist acts in so far as is necessary for the protection of their legitimate interests (Güleç 1998, Gül 2000, Mc Kerr 2000, Isayeva 2005).

Good practices

The workshop chairperson encouraged the police representatives participating in the meeting to relate their practical experience. Their contribution was greatly appreciated.

In particular, the workshop noted that:

– in some states, all phases of the interrogation are recorded (video and sound) and, in most states, a report is drawn up in compliance with the requirements of the Court;

– in one state, a further practice is to allow access, at any time during detention, by "lay visitors" (as well as religious ministers) from the community of which the detainee is a member;

– in some states, a daily certificate must be issued by a doctor attesting that the detainee may be kept in detention;

– in other states, a medical certificate is necessary for any extension of provisional detention.

Possible shortcomings

The workshop participants wondered whether the Guidelines dealt adequately with the following aspects:

– the use of information obtained, in the country concerned or in a third country, using torture;

– the lack of guarantees of Article 6 of the ECHR in the phase preceding the trial, where individuals are most vulnerable and the risks of excesses are at their greatest;

– the lack of thorough and effective supervision of certain "diplomatic guarantees" when presumed terrorists are extradited, and the inadequate level of representation on the part of certain national authorities providing such guarantees;

– the length of detention without involvement of the judge, with some experts arguing that effective efforts to combat terrorism made it necessary to exceed the 24-hour limit set by certain legislations;

– the border-line between certain "administrative measures" and criminal procedure measures.

Suggestions for future activities

Workshop I wondered whether it might be necessary to:

– Introduce certain elements raised at the meeting into the Guidelines, for example as regards effective supervision of diplomatic guarantees. One speaker thought it necessary to move towards a specific legal instrument laying down the rules on this point;

– Set up a follow-up mechanism for monitoring implementation of the Guidelines operating on two levels: domestic and European. The European level could be coordinated by the Steering Committee for Human Rights and use information obtained by other Council of Europe bodies dealing with problems of terrorism, as well as information supplied by the member states. The states would be encouraged to set up cross-sectoral machinery for assessing the extent to which the Guidelines were known and applied at domestic level.

Finally, the workshop emphasised the benefit of translating the Guidelines into the different languages of the member states where the official English and French versions were not sufficient to ensure truly effective dissemination.

WORKSHOP II:
THE TRIAL: PROTECTING THE RIGHTS OF PERSONS UNDER SUSPICION AND THE PLACE OF THE VICTIM

Chairperson: Mr Abdülkadir KAYA, Former Deputy Director General, International Law and Foreign Relations Directorate, Turkish Ministry of Justice

Rapporteur: Prof. dr. Martin KUIJER, Dutch Ministry of Justice

Introduction

The fight against terrorism has a certain human rights value (the imperative duty to respect the right to life as positive obligation under Article 2 of the Convention, see the Osman case).

Procedural safeguards are important even though it could be acceptable to impose restrictions to other human rights in the fight against terrorism in a similar way as those existing under the paragraphs 2 of Articles 8 to 11 ECHR; there is also a link with present day conditions doctrine.

Certain more general problems were discussed:

No separate legal regimes

There was overall agreement that fair trial guarantees (in particular Articles 5 and 6 of the ECHR) should fully apply in judicial proceedings in the context of terrorism; there is no need for a special regime for terrorists or for special restrictions in terrorist trials. Turkey for example had until recently two procedures, one for ordinary crimes, another for terrorist offences. On top of ECHR-related problems this dual system did not prove to be as effective as planned and therefore it was abolished in the new criminal procedure code.

With some concern it was noted that there is a tendency to exclude terrorist trials from the scope of application of the EU Framework Decision on certain procedural rights in criminal proceedings throughout the European Union. As a matter of principle suspected terrorists should receive the same level of procedural guarantees as other suspected criminals. To do otherwise could prove to become an argument for terrorist ideology to claim that the democratic societies based on the Rule of Law impose dual standards.

The Guidelines should be applicable to all kinds of judicial proceedings.

The workshop noted the increased tendency in member states to adopt administrative measures, while the possibility cannot be totally excluded that this is partly done to "circumvent" the high procedural guarantees of criminal proceedings. The standards laid down in the Guidelines should be applicable to all sorts of proceedings in which a person is designated as a terrorist suspect (this also raises the question how exactly we should define a "suspect" in this regard). Also in administrative proceedings therefore a person should be able to enjoy full and effective access to court, including 'rights of the defence'.

It was suggested that the need to resort to administrative measures could be reduced by introducing new criminal offences such as the prohibition of incitement (apologie), recruitment and the preparation of terrorist attacks. However, there has been some criticism levelled against the criminalisation of preparatory acts. At the same time one has to acknowledge that countries – despite the introduction of these offences – still feel the need for the further introduction of administrative measures.

Good practices

With regard to the 2002 Guidelines on the restriction of the rights of the defence an example was quoted from the Netherlands. The use of intelligence materials in criminal trials will be made possible by way of adopting the system used for anonymous witnesses (Kostovski, Van Mechelen).

With regard to the 2005 Guidelines it was noted that several countries have already introduced the possibility for the victim to challenge a decision not to prosecute a person suspected of a terrorist act. In the Netherlands victims have a right to request re-examination of the decision not to prosecute (article 12 Code of criminal procedure). In other countries like Luxembourg victims can under certain circumstances summon a person to appear in court.

Lacunas

- The role of victims during a criminal trial: while it was accepted that victims should not enjoy full access to the case file in criminal proceedings, it was suggested that victims could be given the opportunity to file their observations before the criminal judge;
- The Guidelines could be clarified with regard to the question of the use of statements allegedly obtained under torture. The workshop agreed that to use evidence obtained under torture to secure criminal conviction is totally unacceptable. And this rule should not only apply to criminal trials but also to comparable administrative trials. However, the workshop did show more flexibility with regard to the use of such statements as a point of departure for "ordinary" investigations which could eventually lead to criminal convictions (a relaxation of the poisonous fruit doctrine);
- The Guidelines could clarify that part of the presumption of innocence is that politicians do not speak out on pending trials against suspected terrorists. The workshop noted with concern that there is an increasing tendency (perhaps due to the increased media attention) to comment on pending trials which negatively influences the right to a fair trial and the independence of the judiciary.

Suggestions

European level:

- Guideline VI (Administration of Justice) of the 2005 Guidelines on the protection of victims of terrorist acts: the sentence "strive to bring individuals suspected of terrorist

acts to justice" should be clarified in the sense that this does not mean that it opens the possibility of not bringing suspects of terrorists crimes to a court (e.g. administrative detention). Perhaps this could be explained in an explanatory memorandum;

- Guideline IX (Legal Proceedings) of the 2002 Guidelines on human rights and the fight against terrorism: the workshop could not come up with an example in which the right of access to counsel could be severely limited in terrorist trials without violating the ECHR case law. Therefore it was suggested to delete this possibility from the text of the guidelines;

- Attention could be given to the specific problems related to the use of UN lists. It has a negative impact on the presumption of innocence (a person listed has to prove that he is not a terrorist) and on the access to court (because which tribunal is able to provide judicial protection? A national court cannot get you off the list, and there is no proper international procedure). It was also proposed that not only the person designated as a terrorist suspect should enjoy access to court, but also a concerned third party (such as an innocent spouse or employer).

National level:

- Abandon the dual approach, in the sense that no separate legal regime should be introduced for the adjudication of suspected terrorists;

- Restraint with regard to the introduction of new administrative measures to fight terrorism. Instead investigative powers could be strengthened as long as effective judicial control would be guaranteed;

- Restraint for politicians to comment on pending criminal trials.

WORKSHOP III: THE SITUATION OF ALIENS SUSPECTED OF TERRORIST ACTIVITIES

Chairperson: Mr Gerald STABEROCK, Director of the Global Security and Rule of Law Programme, International Commission of Jurists

Rapporteur: Prof. Vojin DIMITRIJEVIC, Belgrade Center for Human Rights

The workshop concentrated on Guidelines II, XII and XIII of the Committee of Ministers Guidelines' on Human Rights and the Fight against Terrorism with the aim of identifying problems relating to the existing situation, possible good and bad practices and of formulating possible suggestions and recommendations for governments, the Council of Europe and other international organisations. The participants in the debate were aware that they were dealing with a particular aspect of the combat against terrorism where the rights of aliens are involved, that is persons who are normally vulnerable to some measures which do not affect nationals.

During the whole debate, participants were aware that possible discrimination, both direct and indirect, was a major threat to human rights because of the tendency to be under the influence of prejudice and stereotypes. In this respect, particular attention was drawn to ECRI's General Policy Recommendation No. 8 on Combating Racism while Fighting Terrorism (17 March 2004). In principle, participants thought that the current Guidelines were a reflection of European standards and customary international law and that there was no need to alter them; counter-terrorism measures cannot serve to question peremptory norms such as the absolute prohibition of torture and of the principle of non-refoulement. Most participants agreed that tendencies towards discrimination are not immediately visible in legislative acts but manifest themselves in the practice of law enforcement agencies, the media,

and public opinion. Concerns were expressed about the increasing use of categories such as race, nationality, religion, ethnic origin in counter-terrorism measures such as racial profiling, etc. Some participants indicated that authorities are facing novel situations, where some of the received wisdom is proven obsolete and what used to be clear categories have now become blurred. Doubts were expressed whether some of the solutions devised in the past are still feasible in practice today, such as the clean application of the principle of aut dedere aut judicare. There were even doubts as to whether the twelve or so anti-terrorist treaties have had any real impact, except as a tool to indirectly define terrorism.

Participants were aware of the need for concerted and effective action to prevent and combat terrorism, but measures which endanger the established principles of human rights protection should be carefully avoided. Special attention was given to the ways of co-operating in the combat against terrorism with states outside the circle of the members of the Council of Europe. It was noted that some of the problems faced with regard to extradition and mutual legal assistance in practice are caused by a lack of respect for fundamental human rights in a number of states outside the Council of Europe, e.g. the right to life, torture and inhuman treatment, flagrant denial of justice and other serious human rights violations. For members of the Council of Europe, the existence of the death penalty in these countries is a particular and major concern. In this context, the participants devoted considerable attention to the issue of diplomatic assurances accompanying extradition and expulsion decisions and the limitations placed by human rights law on the provisions of mutual legal assistance with countries outside the Council of Europe. Whereas asking for diplomatic assurances regarding the non-application of the death penalty, contained in the Guidelines, was understood and fully supported, doubts were expressed as to the legality and appropriateness of applying the same to guarantees regarding the international crime of torture or inhuman and degrading treatment and punishment.

The need to further study the issues related to mutual legal assistance, where there might be possible complicity involving human rights violations, was stressed by some participants; one of them quoted the considered practice of his country which approaches such situations strictly on a case by case basis, as being an example of good practice. In situations of doubt, such information would not be provided. It was particularly stressed that mutual legal assistance is only possible when the information to be provided will be used in normal proceedings before ordinary judicial organs guaranteeing a fair trial.

It was highlighted that the wider problem of combating racism is the collective responsibility of state authorities, civil society, the media, etc. The view of the majority was that the existing instruments governing the fight against terrorism are sufficient and that there was no need to hastily adopt new international treaties or standards. The problem does not lie in the legal provisions but in their implementation. All participants supported the suggestions that the guidelines be translated in all member countries, especially those who do not generally publish non-binding human rights instruments in their national language. It was also suggested that a compendium of existing Council of Europe texts, including relevant extracts from the reports of monitoring bodies, in particular ECRI, CPT, of the Commissioner for human rights, etc. be drawn up. States should also ensure follow-up to the Recommendations made on this issue by Council of Europe bodies.

Some participants noted the particular role that the Commissioner might play in analysing the implementation of the Guidelines.

WORKSHOP IV: PROTECTION OF THE VICTIMS OF TERRORIST ACTS

Chairperson: Mr Angel LOSSADA, Counter-Terrorism Division, Spanish Ministry of Foreign Affairs and Cooperation

Rapporteur: Prof. Wolfgang BENEDEK, University of Graz

The Workshop was composed of some 15 people. Participants were generally very appreciative of the Guidelines, which identify minimum standards, but also noted the sometimes restrictive approach and concepts which need further clarification and elaboration.

Nature of the problem / Identified gaps and lacunae

Participants noted that the Guidelines on the protection of victims are very recent (12 March 2005) and therefore it would be premature to discuss their implementation. But one could still discuss issues of interpretation and clarification as well as possible gaps. It was emphasised that these Guidelines are timely in view of European and international developments such as the European Council Framework Decision of 15 March 2001 on the *Standing of Victims in Criminal Proceedings* and the *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* (Human Rights Commission Resolution 2005/35). All these instruments show the emergence of a new victim-oriented perspective in dealing with criminal acts and human rights violations. Generally, the protection of victims forms part of the human rights dimension of the fight against terrorism.

A widely shared opinion was that the specificity of terrorism, meaning that persons are victimized on behalf of the state, calls for a specific response which may go beyond remedies for victims of

criminal acts in general. There is a duty by the society, the state and the international community to express solidarity towards the victims. The Guidelines were found to reflect the need for a specific approach towards victims of terrorism and as a basis for further measures. The Guidelines present a consensus on the topic at the time of adoption and might need to be clarified and developed further. In this context, it was pointed out that part of the Guidelines do reflect existing law.

It was recognised that the long term objective might be to develop binding instruments in this field, like a protocol to the Council of Europe Convention on the Prevention of Terrorism (16 May 2005), especially in view of the fact that Article 13 of the 2005 Convention deals with protection, compensation and support for victims of terrorist offences. However, the majority was of the view that this would be premature at the given time. Reference was also made to the Council of Europe Convention on Compensation of Victims of Violent Crimes of 24 November 1983 which never entered into force but is presently being explored for future action.

With regard to the concept of victim (Guideline I), it was emphasised that dependents should be included in this and the rights related to it should be available to them. Legal aid (Guideline V) should be understood in a comprehensive way ranging from criminal to civil law cases and including also the issue of compensation.

A gap was observed between the rights of victims and their actual implementation in state practice. Victims are often blocked from making use of their rights. As an example of good practice, in Spain both the victim and the interested party are given access to criminal and civil proceedings.

The main discussion was on the issue of compensation (Guideline VII) which should go beyond the narrow concept of damages. Consequently it should encompasses material as well as immaterial losses, as well as costs of treatment. The importance of paragraph 2 was emphasized, which speaks about a fair and appropriate mechanism in a simple procedure and within reasonable

time, which seems to suggest that victims will receive compensation without having to wait for possible confiscation of property of perpetrators. The main responsibility of the state in which the terrorist act happened was emphasized. However if this compensation should not be possible, alternative forms of compensation should be developed on the basis of cooperation and solidarity.

Examples of Good practices

Different models of financing compensation were discussed as good practices, for example: the French Guarantee Fund for victims of terrorist crimes financed by national participation on insurance contracts; the Spanish compensation mechanism; the Great Brittain compensation scheme, and the separate Northern Ireland scheme for victims of criminal offences; the Austrian scheme; etc. There was also the example of the German law on victims rights which provides that 5% of pecuniary fines are directed to the victims organisations. The compensation fund for victims in Latvia, which is in the process of being established, also addresses immediate needs of victims.

Suggestions for future activities

This led to a discussion on the possibility of a European Fund for the victims of terrorist acts. The task of this fund should go beyond financial compensation as it should also support awareness raising, training (for example of medical staff), support for victims associations and technical assistance measures. Compensation through such a fund could be limited to larger scale attacks and should take place on the basis of an independent and impartial mechanism. Generally, the role of victims organisations should receive greater attention.

There was a general agreement that a compilation of good legislation and practice as well as of the views of member states on possible obstacles in implementing the Guidelines should be done as one of the next steps – for example by way of a questionnaire which could also contribute to activating the Guidelines. There should be a thorough examination of national legislation on a

comparative basis. In this context, reference can be made to Recommendation 1677 (2004) of the Parliamentary Assembly calling on member states to create a forum of exchange of good practice and training experiences. This could also help identifying gaps in the Guidelines to be filled.

The Council of Europe should also take more account of what is done in other fora, such as the UN and the EU.

Finally, the Workshop was of the view that the work of the Council of Europe on the rights of victims should be continued, in particular also by addressing the various issues identified above.

Written interventions distributed during the seminar

Mr René VAN DER LINDEN
President of the Parliamentary Assembly
of the Council of Europe

First and foremost, terrorism is an attack upon democracy and human rights. But no matter how grave that attack might be, we must not forget what we are fighting for, even in the midst of the struggle. To introduce measures which themselves restrict democracy and human rights would be to leave the field of battle to the terrorists.

As a representative democratic body, the Assembly's work on terrorism has often been in response to particular terrorist attacks. Whilst such outrages naturally provoke heightened emotions for everyone, I am proud to be able to state that, even in the heat of the moment, the Assembly has always advocated full respect for human rights and the rule of law. This has never stopped us, however, from condemning terrorism in the strongest possible terms and urging stringent measures to be taken in response.

The Assembly was deeply concerned by the threat of international terrorism even before the attacks of 11 September 2001, and was fully aware of the potential tension between repressive measures taken in response and respect for human rights. Since 11 September, however, the intensity of the Assembly's activities has greatly increased, in line with those of the international community in general. In particular, we have adopted a total of 14 texts, including seven recommendations to the Committee of Ministers, four resolutions and three opinions on draft treaties. I wish to take this opportunity briefly to describe some of this work.

Perhaps the clearest declaration of our basic principles was made in Resolution 1400 of 2004 on the challenge of terrorism in Council of Europe member states. In this, the Assembly stated that "The protection of human rights plays a key role in the fight against terrorism. These rights are central to our credibility. Any violation of these rights weakens the international coalition in the fight against terrorism and drives new supporters into the hands of terrorists."

The Assembly is well aware that this is not the only aspect of the human rights dimension. Our work fully recognises the threat that terrorism itself poses to human rights in our democratic societies, as well as the duties that states therefore owe to their citizens. Resolution 1400 thus continued by stating that the basis of the fight against terrorism was "the absolute primacy of the fundamental and inalienable right to life, which implies the right to protection from terrorism and all other attacks on human life and health."

In addition to these statements of principle, the Assembly has repeatedly addressed certain specific issues. On several occasions we have called for a comprehensive Council of Europe convention on terrorism, along with a definition of what is meant by "terrorist act". Whilst the United Nations is making only slow progress on these issues, it is to be hoped that the call made by Secretary-General Annan in his 10th of March address to the International Summit on Democracy, Terrorism and Security will give fresh impetus to the process, both at UN level and within the Council of Europe.

At the same time, we are fully appreciative of the numerous valuable contributions already made by the Council of Europe. We have given detailed opinions on draft treaties, in particular the new Convention on the Prevention of Terrorism, in which we argued strongly for more visible provisions on respect for human rights. Equally, where we have noticed weaknesses in the Council of Europe's armoury, such as its effectiveness in fighting terrorism or respect for human rights, we have made specific proposals for improvements and additions. We have warmly welcomed the adoption of significant texts such as the Guidelines on human rights and the fight against terrorism, and have regularly called for wider ratification and more effective implementation of existing conventions, along with the lifting of any reservations. Thus all of the leading texts have received the support and encouragement of the Assembly prior to, during and following their adoption.

Finally, I should inform you that our work continues! Mr Valery Grebennikov, a Russian member of the Assembly, is currently preparing a report for the Committee on Legal Affairs and Human Rights entitled "respect for human rights in the fight against terrorism". I understand that he is present at your conference, and I have no doubt that he will find your proceedings immensely useful to his work.

There's an expression in English: "*if you can't beat them, join them*." But if we join with the terrorists in disrespecting human rights, then we have lost.

Mr Alvaro GIL-ROBLES
Commissioner for Human Rights of the Council of Europe

Introduction

This contribution to the high-level seminar "Protecting human rights while fighting terrorism" outlines the activities of the Commissioner for Human Rights (hereafter "the Commissioner") related to responses against terrorism. In particular, the paper refers to issues which are directly linked to the principles laid out in the Guidelines of the Committee of Ministers on human rights and the fight against terrorism of 11 July 2002 as well as on the protection of victims of terrorist acts of 2 March 2005, the practical application of which the seminar aims to gauge. Responses to terrorism have emerged as a major theme in the work of the Commissioner from the outset of his mandate in the context of his country visits, opinions, recommendations and awareness-raising activities.

States' obligation to protect everyone from terrorism

The threat of terrorism affects not only individual fundamental rights but also the free exercise of certain civil and political rights which are the foundation of every democracy. States are responsible for securing to everyone within their jurisdiction the rights and freedoms enshrined in the European Convention on Human Rights (ECHR). Consequently, the Commissioner has reaffirmed the obligation of governments to protect their populations and their institutions from terrorist acts on several occasions while acknowledging that responses to terrorism have good reasons to be robust and timely.[3]

3. Report of the Commissioner's visit to Spain and the Basque Country (CommDH(2001)12), Commissioner's Opinion on certain aspects of the United Kingdom's derogation from Article 5.1 ECHR in 2001 (CommDH (2002)7), Opinion on the draft Convention on the prevention of terrorism (CommDH(2005)1) and Report on his visit to the United Kingdom (CommDH(2005)6).

Terrorism is also a problem shared by all democratic states and one with an international dimension. There can therefore be no effective response to terrorism if this international dimension is not properly taken into account. States must act in concert, share information and experience, harmonise their legislation and co-operate in preventing terrorist acts and prosecuting their perpetrators. This is why the Commissioner has supported the idea of a general convention on terrorism and the preparation of the recently adopted Convention on the prevention of terrorism in particular.[4]

Lawfulness and proportionality of measures against terrorism

National and international responses to terrorism must be compatible with the rule of law and must not threaten the human rights acquis that constitutes the cornerstone of our democratic societies. Anti-terrorist measures often involve invasions of privacy, challenges to procedural safeguards and interference in the exercise of freedom of expression and association. They therefore call for strict legal safeguards. The Commissioner does not support the approach that advocates a "balance" between human rights and security issues. Protecting human rights is a precondition for any anti-terrorist measure. Such protection is therefore an integral part of such measures and is never incompatible with states' obligations to protect their citizens. The Commissioner also underlines the importance of strict proportionality of the measures taken against terrorism in view of the exigencies of a given situation. Furthermore, it is essential that legislation regarding anti-terrorist measures is formulated in a sufficiently precise manner to ensure legal certainty.[5]

4. Commissioner's Opinion on the draft Convention on the prevention of terrorism (CommDH(2005)1).
5. Commissioner's Opinion on the draft Convention on the prevention of terrorism (CommDH(2005)1), Opinion on certain aspects of the United Kingdom's derogation from Article 5.1 ECHR in 2001 (CommDH (2002)7) and Report on his visit to Turkey (CommDH(2003)15).

Absolute prohibition of torture and death penalty

The absolute prohibition of torture or of inhuman or degrading treatment or punishment guaranteed by the Article 3 of ECHR has to be applied in a coherent manner to all measures against terrorism. The Commissioner emphasises that this prohibition must apply when the removal of terrorist suspects to other countries is considered as well as in the use of evidence or information in any judicial proceedings. In the case of diplomatic assurances guaranteeing that expelled individuals would not be subjected to torture at their destination, the Commissioner maintains that they would not be sufficient to permit expulsions if any risk of torture would still be considered to remain. Given the extremely serious consequences at stake it would be vital that the deportation of foreigners on the basis of diplomatic assurances are subject to judicial scrutiny capable of taking all these elements, the content of the assurances, and the likelihood of their being respected into account. Moreover, a country cannot hand over a suspect to another country when the latter does not intend to respect the absolute ban on death penalty (Protocols 6 and 13 to the ECHR). The Commissioner insists that the abolition of the death penalty is essential to the establishment of a genuine modern democracy, which fully respects fundamental freedoms and rights.[6]

Detention and legal proceedings

The Commissioner firmly believes that the law should be upheld and that statutory procedure should be followed in respect of all detainees, whatever crime they are accused of. Accordingly, ordinary criminal prosecution must be the preferred means of tackling terrorist activity and limiting important rights. The Commissioner does not, however, exclude the possibility, under extraordinary circumstances, of certain exceptional measures being justified for the duration of, and in proportion to, the perceived terrorist threat.

6. Reports on the Commissioner's visits to the United Kingdom (CommDH(2005)6), Russian Federation (CommDH(2005)2) and Sweden (CommDH(2004)13), and Opinion on the draft Convention on the prevention of terrorism (CommDH(2005)1).

It is essential, however, that the necessary judicial guarantees apply to proceedings resulting in their application and that the legislation providing for such exceptional measures be subject to regular parliamentary review.[7]

Asylum and expulsion

Due to the absolute, incontrovertible nature of the guarantees set out in Article 3 of ECHR, the Commissioner maintains that foreigners, even when they pose a threat to national security, cannot be returned or expelled to a country where they may be subjected to inhuman treatment or torture. This applies to terrorist suspects as well although states also have an obligation not to offer a haven for terrorists. It is particularly important in such cases, where the risk of torture and ill-treatment is elevated, that proceedings leading to expulsion are surrounded by appropriate legal safeguards, at the very least a hearing before a judicial instance and right to appeal.[8]

Possible derogations

While the Commissioner considers that ordinary criminal prosecution is the preferred means of dealing with terrorist activity, he acknowledges that under extraordinary circumstances, which threaten the life of the nation, states may be compelled to derogate from a number of articles of ECHR as stipulated in Article 15 of the Convention. Such derogations must, nevertheless, be strictly proportional to the exigencies of the given situation and be subject to effective parliamentary scrutiny and judicial review at domestic level so as to respect the separation of powers and democratic governance. The European Court of Human Rights is ultimately competent to decide on the validity of derogations.[9]

7. Reports on the Commissioner's visits to the United Kingdom (CommDH(2005)6) and the Russian Federation (CommDH(2005)2).
8. Reports on the Commissioner's visits to Sweden (CommDH(2004)13) and Luxembourg (CommDH(2004)11).
9. Commissioner's Opinion on certain aspects of the United Kingdom's derogation from Article 5.1 ECHR in 2001 (CommDH (2002)7) and Report on his visit to the United Kingdom (CommDH(2005)6).

Protecting and compensating victims of terrorism

The Commissioner firmly believes that the victims of terrorist acts suffer the individual physical and psychological consequences of an attack that is actually aimed at the community as a whole, as represented by its democratic institutions. It is for that reason that the community, as represented by the state, has a duty of great solidarity towards the victims of terrorism that goes further than mere financial compensation for the damage suffered, even though terrorists and those who fund them remain entirely responsible for their actions. It would therefore be appropriate to go beyond assistance measures and recognise that victims have a genuine right to protection. The protection afforded to victims should, inter alia, include emergency and long-term assistance, psychological support, effective access to the law and the courts, access to information and the protection of victims' private and family lives, dignity and security, particularly when they co-operate with the courts.[10]

Furthermore, it should be acknowledged that measures taken by states against terrorism may have negative repercussions, extending beyond their intended impact, on individual persons to entire communities. Whilst strong measures may prove necessary to counter serious terrorist threats, their impact on certain communities should be an important consideration when deciding to adopt such measures and every effort must be made to avoid the victimisation of the vast majority of innocent individuals. What is essential is that the measures themselves are proportionate to the threat, objective in their criteria, respectful of all applicable rights and, on each individual application, justified on relevant, objective, and not purely racial or religious, grounds. The Commissioner attaches high importance to the efforts by states to compensate the population for harm suffered during anti-terrorism operations.[11]

10. Commissioner's Opinion on the draft Convention on the prevention of terrorism (CommDH(2005)1).
11. Reports on the Commissioner's visits to the United Kingdom (CommDH(2005)6) and Turkey (CommDH(2003)15).

Conclusions

Concluding remarks by Mr Egbert MYJER

General Rapporteur, Judge at the European Court of Human Rights

*"Against the call for so-called 'tough measures', few political leaders can find the strength and wisdom or indeed the support to fight terrorism while preserving the established human rights protective system. Repressive sirens will always call for 'new' harsh measures to meet these 'new' challenges from terrorism and few leaders have the toughness to 'hold the fort' in such circumstances" (*Judge ECourtHR John Hedigan*)*

I. Introduction

To begin with, a few remarks about the context of our debates at this seminar.

First: as far as Europe is concerned, terrorism did not start on 11 September 2001: the European Convention on the Suppression of Terrorism dates back from 1977. And, as we were reminded by the Court's Vice-President Jean-Paul Costa, even the very first judgment of ECourtHR (*Lawless v. Ireland*, 1 July 1961) dealt with a person who was arrested and kept in detention because he was a member of the IRA and was suspected of being engaged in activities prejudicial to the conservation of public peace and order or to the security of the state. A long line of other cases have followed in which the Court had to pronounce on the conformity with the ECHR of various kinds of anti-terrorism measures; this line goes from IRA terrorism via the Turkish cases relating to the PKK up to the very recent Chamber judgments against the Russian Federation concerning operations in Chechnya.

The ECHR (and the Protocols thereto) contains legal human rights standards which shall be secured to everyone within the jurisdiction of the High Contracting Parties (Art. 1).

Everyone means everyone: not just criminals and the like. In the case-law of the ECourtHR (*Osman v. UK*, 28 October 1998): States have a positive obligation to protect the life of their citizens. They

should do all that could be reasonably expected from them to avoid a real and immediate risk to life of which they have or ought to have knowledge. The same applies to the protection of other rights. I daresay that the ECHR obliges the states to ensure that citizens can live without any fear that their life or goods will be at stake. In that respect I recall that Freedom from Fear is one of the Four Freedoms mentioned in Roosevelt's famous speech.

However, states are not allowed to combat terrorism at all costs. As Secretary General Terry Davis said at the opening of our Seminar: States must not use just any method, they may not resort to measures which undermine the very values they seek to protect. They sometimes have to balance competing human rights interests, that is the protection of society against terrorist threats and the fundamental rights of individuals, including persons suspected or convicted of terrorist activities. Robert Badinter rightly spoke of a dual threat which terrorism poses for Human Rights: a direct threat posed by acts of terrorism and an indirect threat because anti-terror measures themselves risk violating human rights.

When speaking of this dual threat to human rights, it is in my view important to keep in mind the fundamental distinction between the responsibility of states to abide by their obligations under international human rights law and, on the other hand, the criminal law- responsibilities of non-state actors, be it under national or under international criminal law. Atrocities committed by non-state actors form no justification whatsoever for state responses which violate its human rights obligations. In this connection I personally find it unhelpful and even risky to speak of human rights violations by terrorists, precisely because such language may well be abused as a strategic tool to seek to justify just any repressive measures.

The ECourtHR has repeatedly acknowledged that it is well aware that states may face immense difficulties in protecting their citizens from terrorist violence. However, they have to respect the provisions of the ECHR – even in extraordinary situations of public emergency there is no "human-rights-free area" (Art. 15).

Immediately after the attacks of 11 September 2001 the Committee of Ministers adopted a Declaration on the fight against international terrorism. On 8 November 2001 they elaborated that their approach would combine three main strands:

– intensifying legal co-operation to combat terrorism;

– whilst safeguarding fundamental rights (measures must remain consistent with the requirements of democracy, the rule of law and human rights); and

– investing in democracy (wide intercultural dialogue, to find greater cohesion and reduce the risks of misunderstanding)

The second strand resulted in the adoption (on 11 July 2002) of the Guidelines on human rights and the fight against terrorism and (on 2 March 2005) of Guidelines on the protection of victims of terrorist acts.

As Philippe Boillat reminded us, the first set of Guidelines is mainly based on the ECHR and the Court's case-law. They therefore reflect legally binding minimum standards, which cannot be lowered.

The purpose of this Seminar was very simple: to evaluate the implementation of the Guidelines and, in the light of that evaluation, to identify areas where any further action at national or European level would be useful or necessary. It has been said, rightly, that it is still too early to assess the implementation of the 2nd set of Guidelines, which were adopted only 3 months ago. Nonetheless, some interesting ideas have emerged on the question of the protection of victims, which I will deal with separately towards the end of this report.

As a final introductory comment, I recall that it was agreed that there should be no Final declaration to be adopted at this Seminar. My report this morning therefore has a more modest ambition: to sum up some main points, ideas and proposals that have come up in our plenary and working group sessions. At the same time, I

cannot and will not try to duplicate the work of our rapporteurs from the four workshops who have done such an excellent job earlier this morning.

II. The 2002 Guidelines: issues discussed (problems, good practices, missing elements in the Guidelines) and proposals made

Some general points were briefly discussed, such as the idea of transforming the 2002 Guidelines into a binding legal instrument or the proposal for an additional Protocol to the ECHR on a human right to be protected from terrorism. The first received little support since the Guidelines already reflect "hard law", and drawing up an additional Protocol was considered unnecessary in view of the Court's case-law on positive obligations, notably the Osman judgment which I mentioned earlier.

Among the substantive issues and problems discussed, I noted the following in particular which merit further attention:

- The need for enhanced control over and transparency of detention of suspects during the interrogation phase (eg by independent medical control before and after interrogation; by keeping, in line with the Court's case-law, a register/ records of detention data, etc); the issue of access to a lawyer: a specially designated counsel with security clearance or counsel of one's own choosing? In this context, I would stress that there is no contradiction between the Court's case-law and CPT recommendations concerning the presence of a lawyer during police interviews. For the CPT, this is a matter of prevention of ill-treatment; for the Court the question is one of the rights of the defence. In its Brennan judgment of 16 October 2001, the Court said that such a presence of a lawyer (like making videorecordings of police interviews) is a very useful measure even if it is not an indispensable precondition of fairness within the meaning of Article 6 ECHR;

- The need to elaborate on the guideline on the prohibition of torture: by explicitly including the "fruit of the poisonous tree" doctrine in relation to the admissibility of evidence in court proceedings (cf. UNCAT), in relation to the establishment of a "reasonable suspicion", and in relation to decisions to grant extradition on the basis of information provided by the requesting state. In this context: for the first time in modern criminal history we now witness persistent rumours of information obtained under torture, especially in so-called "ticking bomb situations", or obtained under prolonged adverse detention conditions;

- Rights of the defence: more precision, in particular as regards disclosure and vis-à-vis anonymous witnesses (cf. Court's case-law);

- The problem of so-called administrative detention: it was recalled that detention of a person is only allowed in the cases mentioned in Article 5 ECHR and with the full safeguards and controls provided in that provision, in particular those of judicial control and powers to release;

- Extradition issues: better/tighter control of facts presented by requesting state; the problem of diplomatic assurances and their status, which may very well not be reliable; need for CoE member states to make their own informed assessment, subject to judicial control, about the existence of a real risk of proscribed treatment in the receiving country (whether or not assurances have been received from that country); furthermore, the question of monitoring the situation after removal was raised in this context;

- Increasing pressure on (the principle of independence of) courts as a result of statements by politicians/authorities capable of interfering with the administration of justice;

- Mention was also made of a tendency to create special legal regimes for trials against persons suspect of terrorist activities. From the point of view of the ECHR and the Guide-

lines, there is no problem with this as long as the fair trial guarantees of the ECHR are fully respected in all cases and applied without discrimination;

- Problems caused by international "blacklisting" of suspected terrorists: there should be remedies for the individuals concerned; depending on the effects of such listings, access to a court may indeed also be a requirement of the ECHR;

- Finally, concerns were expressed about risks and tendencies of stereotyping and discriminatory practices in member states, both in public opinion and in the daily practice of law enforcement. Here ECRI's recommendations are a strong reminder of the need to work actively to preserve a climate of tolerance. But there are also clear legal obligations in this field: discrimination per se is a hard-law human rights issue, especially since the entry into force of Protocol No. 12 to the ECHR on the 1st of April this year.

But there were not only problems: let me mention just two of the more positive signals I noted:

- Application of the Strasbourg case-law by domestic courts, of which the House of Lords judgement of December 2004 is a well-known example. Nonetheless, some serious questions remain, as we have seen from the recent reports by the CPT and the Commissioner on Human Rights;

- Many countries (perhaps one could even speak of the "silent majority") have not considered it necessary to resort to extraordinary measures, in derogation from their normal criminal law system, in order to combat terrorism. As we have seen, the ECHR does indeed leave room for effective measures such as special investigation techniques and certain restrictions on the right of the defence, within the framework of ordinary criminal law. In this respect, it was suggested that the timely adoption of the 2002 Guidelines has probably had a beneficial preventive effect.

Some of the solutions to the problems identified may well be: drawing up supplementary guidelines to fill gaps or to elaborate existing guidelines in greater detail. It would be important for the competent Council of Europe bodies to look into this question.

In addition and more generally: a lot of useful further work can be done, both at national and at European level by the Council of Europe:

National level:

- Disseminate and translate the Guidelines within the member states: also by handing out copies to persons suspected of terrorist activities upon their arrest;

- Adequate training of professional sectors concerned (police, security forces) in the preparation and conduct of operations involving the use of force and in conducting effective investigations in Article 2 and 3 ECHR issues, in accordance with the Court's case-law;

- Following up on the very useful recommendations formulated by ECRI, notably its General Policy Recommendation on Combating Racism while fighting terrorism, and by the CPT, notably on important measures to prevent ill-treatment during police custody (video recording of interrogations, presence of a lawyer);

- Review the compatibility of domestic law and practice with the Guidelines (this is in fact already an obligation of states under the ECHR!!);

Council of Europe level:

- Continue the exchange of good practices; offer assistance and training in the implementation of the Guidelines for relevant specific categories of professionals in member states;

- Ensure that the human rights dimension is fully integrated in any future legal instruments to combat terrorism, by submitting draft instruments to the CDDH for opinion at an early stage and making it possible for human rights NGOs to provide direct input into the process;

- Ensure a regular review of the implementation of the Guidelines, for example in the framework of the CDDH, based on information provided by states and other sources such as NGOs;

- Ensure good coordination and cooperation with the EU and other international organisations, especially the United Nations and the OSCE. In my view, the Council of Europe approach is rather unique and it surely deserves better attention whenever counter-terrorism strategies and policies are discussed in other fora.

III. Discussion of the 2nd set of Guidelines (protection of victims) and proposals made

Also in relation to the Guidelines on the protection of victims, the proposal was made to transform them into a legally binding text. There was a general reaction that, while it could be a long-term objective to work towards a Convention on the protection of victims of terrorist acts, it would be premature to start now. The priority now is to collect information about national law and practice, which seems to be evolving in an encouraging way. Compiling such information could be a very useful task for the Council of Europe.

Some examples of good practice were already noted, such as the creation of national compensation funds.

Furthermore, the interesting idea was floated of setting up a European Fund for the Victims of Terrorist Attacks, possibly with a broad mandate which goes beyond immediate relief. Such a step would be a strong expression of solidarity between the member states and their populations and merits further examination by the

Committee of Ministers. After all, the Council of Europe already has a somewhat similar instrument in the area of major natural and technological disasters.

IV. Final comments : Who's Afraid of Human Rights?

(very free quote from Edward Albee's play)

"Terrorists are afraid of human rights" (Former Parliamentary Assembly President Peter Schieder)

In other words: democratic states respectful of the rule of law should not be afraid of human rights. In the fight against terrorism as elsewhere, human rights protection is a necessity and this protection also means: protecting our societies from any racist backlashes which may well occur in the current climate.

This brings me back to an important point I mentioned at the beginning. The Council of Europe's approach to fighting terrorism is a comprehensive one. This also applies to the human rights side of the equation. Over and above the Court's case-law and the Guidelines – which I repeat only constitute minimum standards which states are free to surpass – member states should give close attention to recommendations made by other bodies such as ECRI, the CPT and the Commissioner for Human Rights. More often than not, by following their recommendations, states will in fact be preventing human rights problems which might otherwise have led to findings of violations by the Court.

Upholding human rights in this fight against terrorism is first and foremost a matter of upholding our values against those who seek to destroy them. But in addition, as several distinguished speakers have pointed out, there is nothing more counterproductive than to fight fire with fire, to give terrorist the perfect pretext for martyrdom and for making accusations of democracies using double standards. Such a course of action would only contribute to creating fertile breeding grounds for further radicalisation and recruitment of future terrorists. That is not the way to go. As we have heard yesterday and today, there are many other roads open to us that will lead us to a brighter and more secure future.

Thank you for your attention.

Appendices

Appendix I: Programme of the Seminar

Monday 13 June 2005

9.15 am: Welcome and registration of the participants

10.00 am: **Opening of the Seminar:**
Mr Terry DAVIS, Secretary General of the Council of Europe

10.15 am: **Seminar objectives and content of the two sets of Guidelines:**
Mr Philippe BOILLAT, Chair of the Steering Committee for Human Rights (CDDH) and former Chair of the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER)

10.45 am: Coffee break

11.15 am: **Panel Mainstreaming human rights in the fight against terrorism, with:**
Chairperson: Mr Robert BADINTER, French senator, former Minister of Justice – Keeper of the Seals, former President of the Constitutional Council

Participants:

- Mr Joaquim DUARTE, Chair of the Ministers' Deputies of the Council of Europe, Permanent Representative of Portugal to the Council of Europe
- Mr Jean-Paul COSTA, Vice-president of the European Court of Human Rights
- Mrs Gertraude KABELKA, Chair of the Committee of Experts on Terrorism (CODEXTER)
- Mr Marc NEVE, 2nd Vice president of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)
- Mr. Javier RUPEREZ, Executive Director of the U.N. Security Council Counter-Terrorism Committee (CTC)

Discussion

1.00 pm: End of the morning session

3.00 pm: *Workshops*

Workshop I: **Respect for human rights during the investigation and during detention**

Chairperson: Mr Claude DEBRULLE, Director General, Belgian Ministry of Justice
Rapporteur: Prof. Emmanuel ROUCOUNAS, Academy of Athens

Workshop II: **The trial: Protecting the rights of persons under suspicion and the place of the victim**

Chairperson: Mr Abdülkadir KAYA, Former Deputy Director General, International Law and Foreign Relations Directorate, Turkish Ministry of Justice
Rapporteur: Prof. dr. Martin KUIJER, Dutch Ministry of Justice

Workshop III: **The situation of aliens suspected of terrorist activities**

Chairperson: Mr Gerald STABEROCK, Director of the Global Security and Rule of Law Programme, International Commission of Jurists
Rapporteur: Prof. Vojin DIMITRIJEVIC, Belgrade Center for Human Rights

Workshop IV: **Protection of the victims of terrorist acts**

Chairperson: Mr Angel LOSSADA, Counter-Terrorism Division, Spanish Ministry of Foreign Affairs and Cooperation
Rapporteur: Prof. Wolfgang BENEDEK, University of Graz

4.15 pm: Coffee break

4.45 pm: Continuation of workshops

6.00 pm: End of the work for the day

6.15 pm: Reception at the Blue Restaurant of the Council of Europe

Tuesday 14 June 2005

9.30 am: Reports on the workshops

10.30 am: **Discussion**

11.00 am: Coffee break

11.30 am: **Concluding remarks**

Mr Egbert MYJER, Judge at the European Court of Human Rights: **Strengthening the protection of human rights while fighting terrorism: better implementation of the Guidelines and prospects for the future (Possible new activities to be carried out by the Council of Europe)**

12.15 am: Discussion

1.00 pm: Closing of the Seminar

Appendix II: List of participants

MEMBER STATES OF THE COUNCIL OF EUROPE

Albania

Ms Gjin GJONI, Judge of Tirana Court

Mr Sokol PUTO, Government Agent, Legal Representative Office at International Human Rights Organisations, Ministry of Foreign Affairs

Andorra

M[lle] Gemma CANO, Adjointe au Représentant Permanent

M. Andreu JORDI, Officier des Affaires Multilatérales du Ministère des affaires étrangères

Armenia

M. Saténik ABGARIAN, Directeur du Département juridique a.i., Ministère des affaires étrangères de la République d'Arménie,

M[me] Larisa ALAVERDYAN, Human Rights Defender of the Republic of Armenia

Mr Mher MARGARYAN, Acting Head of United Nations Division, International Organizations Department, Ministry of Foreign Affairs

Austria

Mr Wolfgang BENEDEK, Professor, University of Graz

Mr Martin KREUTNER, Mag. Iur., MSc, Federal Ministry of the Interior

Ms Ingrid SIESS-SCHERZ, Head of Division for International Affairs and General Administrative Affairs, Federal Chancellery, Constitutional Service

Azerbaijan

Mr Farhad VAHABOV, Head of Administration, Ministry of National Security

Belgium

Mr Claude DEBRULLE, Director General, Belgian Ministry of Justice

M[me] Julie DUTRY, Attachée, Service public Fédéral Justice

M. Charles GHISLAIN, Ambassadeur, Représentant Permanent de la Belgique auprès du Conseil de l'Europe

M^me^ Isabelle NIEDLISPACHER, Attachée, Direction Générale de la Législation et des Libertés et Droits Fondamentaux

M. Michel PEETERMANS, Représentant Permanent Adjoint de la Belgique auprès du Conseil de l'Europe

Bosnia and Herzegovina

Apologised

Bulgaria

Apologised

Croatia

Mrs Vesna BATISTIC KOS, Deputy Permanent Representative, Permanent Representation of Croatia to the Council of Europe

Mrs Darija DRETAR, Associate in the Human Rights Department, Ministry of Foreign Affairs and European Integration

Mrs Dubravka ŠIMONOVIC, Government Agent, Head of Human Rights Department, Ministry of Foreign Affairs

Cyprus

Ms Maro CLERIDES-TSIAPPAS, Government Agent Representative, Senior Counsel for the Republic in Charge of Individual Rights/Freedoms (International Aspect), Legal Service of the Republic of Cyprus

Mr Marios LYSSIOTIS, Ambassador, Permanent Representative, Cyprus Permanent Delegation

Mr Iakovos PAPAKOSTAS, Assistant Chief of Police, Cyprus Police

Czech Republic

Ms Vera JERÁBKOVÁ, Director of the Human Rights Department, Ministry of Foreign Affairs

Denmark

Ms Dorit BORGAARD, Legal adviser, Danish Ministry of Justice, Human Rights division

Estonia

Mr Erik HARREMOES, Special Counsellor, Permanent Representation of Estonia to the Council of Europe

Ms Mai HION, Director of Human Rights Division, Legal Department, Ministry of Foreign Affairs

Mr Sven SIHVART, Superintendent of the Security Police Board

Finland

Mr Erkki HÄMÄLÄINEN, Senior Specialist, National Bureau of Investigation

Mr Arto KOSONEN, Government Agent, Director, Legal Department, Ministry for Foreign Affairs

France

M. Robert BADINTER, Sénateur, ancien Ministre de la Justice – Garde des Sceaux, ancien Président du Conseil Constitutionnel

M. Jacques POINAS, Conseiller technique au cabinet du Directeur Général de la Police Nationale

Georgia

Mr Konstantin KORKELIA, First Deputy Minister of Justice, Ministry of Justice

Germany

Mrs Dr. Almut WITTLING-VOGEL, Permanent Deputy Agent of the Government of the Federal Republic of Germany, Federal Ministry of Justice

Greece

Mr Emmanuel ROUCOUNAS, Professor, Academy of Athens

Mr Nicolaos TSAMADOS, Deputy Permanent Representative, Permanent Representation of Greece to the Council of Europe

Mr Constantin YEROCOSTOPOULOS, Ambassador, Permanent Representative of Greece to the Council of Europe

Hungary

Apologised/Excusé

Iceland

Ms Ragna ÁRNADÓTTIR, Director of Legal Affairs, Ministry of Justice

Ireland

Mr Ronan GARGAN, Deputy Permanent Representative of Ireland to the Council of Europe

Ms Emer KILCULLEN, Assistant Legal Adviser, Legal Division, Department of Foreign Affairs

Italy

M. Vitaliano ESPOSITO, Agent du Gouvernement, Premier Avocat Général, Cour de Cassation

Latvia

Mr Edgars PURIŅŠ, Deputy State Secretary, Ministry of Justice

Ms Inga REINE, Government Agent, Representative of the Government of Latvia before International Human Rights Organizations, Ministry of Foreign Affairs

Liechtenstein

Apologised

Lithuania

Mrs Elvyra BALTUTYTĖ, Agent of the Government of the Republic of Lithuania to the European Court of Human Rights, Ministry of Justice

Mrs Lina URBAITĖ, Assistant to the Government Agent before the European Court of Human rights, Ministry of Justice

Mr Dainius ŽALIMAS, Legal Adviser to the minister, Ministry of National Defence

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