Guidelines on human rights and the fight against terrorism

adopted by the Committee of Ministers on 11 July 2002
at the 804th meeting of the Ministers' Deputies

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Preface

Since the terrorist attacks of 11 September 2001, the fight against terrorism has become a top political priority. In addition to the sufferings caused and the threats posed to our society for the future, the attacks have been perceived as a direct assault on the fundamental values of human rights, democracy and the rule of law which are our shared heritage.

The Council of Europe lost no time in reacting. It immediately set up a range of initiatives, both on the legal front and in terms of prevention, the central pillar of which was the drawing up of guidelines to help States strike the right note in their responses to terrorism. The temptation for governments and parliaments in countries suffering from terrorist action is to fight fire with fire, setting aside the legal safeguards that exist in a democratic state. But let us be clear about this: while the State has the right to employ to the full its arsenal of legal weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would only undermine the fundamental values they seek to protect. For a State to react in such a way would be to fall into the trap set by terrorism for democracy and the rule of law.

It is precisely in situations of crisis, such as those brought about by terrorism, that respect for human rights is even more important, and that even greater vigilance is called for.

At the same time, as I have continually stressed since the attacks, the need to respect human rights is in no circumstances an obstacle to the efficient fight against terrorism. It is perfectly possible to reconcile the requirements of defending society and the preservation of fundamental rights and freedoms. The guidelines presented here are intended precisely to aid States in finding the right balance. They are designed to serve as a realistic, practical guide for anti-terrorist policies, legislation and operations which are both effective and respectful of human rights.

These guidelines are the first international legal text on human rights and the fight against terrorism. In adopting them on 11 July 2002, the Committee of Ministers considered it of the utmost importance that they be known and applied by all authorities responsible for the fight against terrorism, both in the member States of the Council of Europe and in those States that are associated with the work of the Council of Europe as observers.

This is the purpose of this publication, which will, I believe, constitute a key reference for all those involved in the fight against terrorism.

Walter Schwimmer
Secretary General, Council of Europe
September 2002

Guidelines

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

adopted by the Committee of Ministers on 11 July 2002
at the 804th meeting of the Ministers' Deputies

Preamble

The Committee of Ministers,

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

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

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

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

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

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

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

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

[i] Reaffirming States' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights;

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

I. States' obligation to protect everyone against terrorism

States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.

II. Prohibition of arbitrariness

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

III. Lawfulness of anti-terrorist measures

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

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

IV. Absolute prohibition of torture

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

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

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

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

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

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

VI. Measures which interfere with privacy

1. Measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and use of undercover agents) must be provided for by law. It must be possible to challenge the lawfulness of these measures before a court.

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

VII. Arrest and police custody

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

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

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

VIII. Regular supervision of pre-trial detention

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

IX. Legal proceedings

1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law.

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

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

(i) the arrangements for access to and contacts with counsel;

(ii) the arrangements for access to the case-file;

(iii) the use of anonymous testimony.

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

X. Penalties incurred

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

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

XI. Detention

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

2. The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more

severe restrictions than those applied to other prisoners, in particular with regard to:

(i) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client;

(ii) placing persons deprived of their liberty for terrorist activities in specially secured quarters;

(iii) the separation of such persons within a prison or among different prisons,

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

XII. Asylum, return ("refoulement") and expulsion

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

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

3. Collective expulsion of aliens is prohibited.

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

XIII. Extradition

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

2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:

(i) the person whose extradition has been requested will not be sentenced to death; or

(ii) in the event of such a sentence being imposed, it will not be carried out.

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

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

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

4. When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.

XIV. Right to property

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

XV. Possible derogations

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

2. States may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law.

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

XVI. Respect for peremptory norms of international law and for international humanitarian law

In their fight against terrorism, States may never act in breach of peremptory norms of international law nor in breach of international humanitarian law, where applicable.

XVII. Compensation for victims of terrorist acts

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

Texts of reference

used for the preparation of the guidelines
on human rights and the fight against terrorism

Preliminary note

This document was prepared by the Secretariat, in co-operation with the Chairman of the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER). **It is not meant to be taken as an explanatory report or memorandum of the guidelines.**

Aim of the guidelines

The guidelines concentrate mainly on the limits to be considered and that States should not go beyond, under any circumstances, in their legitimate fight against terrorism.[1] [2] The main objective of these guidelines is not to deal with other important questions such as the causes and consequences of terrorism or measures which might prevent it, which are nevertheless mentioned in the Preamble to provide a background.[3]

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1. The Group of Specialists on Democratic Strategies for dealing with Movements threatening Human Rights (DH-S-DEM) has not failed to confirm the well-foundedness of this approach :
   "On the one hand, it is necessary for a democratic society to take certain measures of a preventative or repressive nature to protect itself against threats to the very values and principles on which that society is based. On the other hand, public authorities (the legislature, the courts, the administrative authorities) are under a legal obligation, also when taking measures in this area, to respect the human rights and fundamental freedoms set out in the European Convention on Human Rights and other instruments to which the member States are bound".
   See document DH-S-DEM (99) 4 Addendum, para. 16.
2. The European Court of Human Rights has also supported this approach:
   "The Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate", Klass and Others v. Germany, 6 September 1978, Series A no. 28, para. 49.
3. See below, p. 18.

Legal basis

The specific situation of States parties to the European Convention on Human Rights ("the Convention") should be recalled: its Article 46 sets out the compulsory jurisdiction of the European Court of Human Rights ("the Court") and the supervision of the execution of its judgments by the Committee of Ministers). The Convention and the case-law of the Court are thus a primary source for defining guidelines for the fight against terrorism. Other sources such as the UN Covenant on Civil and Political Rights and the observations of the United Nations Human Rights Committee should however also be mentioned.

General considerations

The Court underlined on several occasions the balance between, on one hand, the defence of the institutions and of democracy, for the common interest, and, on the other hand, the protection of individual rights:

> "The Court agrees with the Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention".[4]

The Court also takes into account the specificities linked to an effective fight against terrorism:

> "The Court is prepared to take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism".[5]

Definition. Neither the Convention nor the case-law of the Court gives a definition of terrorism. The Court always preferred to adopt a case by case approach. For its part, the Parliamentary Assembly

> "considers an act of terrorism to be 'any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public'."[6]

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4. Klass and Others v. Germany, 6 September 1978, Series A no. 28, para. 59. See also Brogan and Others v. the United Kingdom, 29 November 1999, Series A no. 145-B, para. 48.
5. Incal v. Turkey, 9 June 1998, para. 58. See also the cases Ireland v. the United Kingdom, 18 January 1978, Series A no. 25, paras. 11 and following, Aksoy v. Turkey, 18 December 1996, paras. 70 and 84; Zana v. Turkey, 25 November 1997, paras. 59-60; and, United Communist Party of Turkey and Others v. Turkey, 30 November 1998, para. 59.
6. Recommendation 1426 (1999), European democracies facing up to terrorism (23 September 1999), para. 5.

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

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

i. seriously intimidating a population, or

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

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

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

b. attacks upon the physical integrity of a person;

c. kidnapping or hostage-taking;

d. causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;

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

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

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

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

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

j. directing a terrorist group;

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

For the purposes of this paragraph, 'terrorist group' shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. "Structured group" means a group that is not randomly formed

for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."

The work in process within the United Nations on the draft general convention on international terrorism also seeks to define terrorism or a terrorist act.

Preamble

The Committee of Ministers,

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

The General Assembly of the United Nations recognises that terrorist acts are

"activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and having adverse consequences for the economic and social development of States".[7]

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

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

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

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

The obligation to bring to justice suspected perpetrators, organisers and sponsors of terrorist acts is clearly indicated in different texts such as Resolution 1368 (2001) adopted by the Security Council at its 4370th meeting, on 12 September 2001 (extracts):

"The Security Council, […] Reaffirming the principles and purposes of the Charter of the United Nations, […] 3. Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks […]".

Resolution 56/1, Condemnation of terrorist attacks in the United States of America, adopted by the General Assembly on 12 September 2001 (extracts):

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

"The General Assembly, Guided by the purposes and principles of the Charter of the United Nations, […] 3. Urgently calls for international cooperation to bring to justice the perpetrators, organizers and sponsors of the outrages of 11 September".

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

The Committee of Ministers has stressed

"the duty of any democratic State to ensure effective protection against terrorism, respecting the rule of law and human rights […]".[8]

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

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

It is essential to fight against the causes of terrorism in order to prevent new terrorist acts. In this regard, one may recall Resolution 1258 (2001) of the Parliamentary Assembly, Democracies facing terrorism (26 September 2001), in which the Assembly calls upon States to

"renew and generously resource their commitment to pursue economic, social and political policies designed to secure democracy, justice, human rights and well-being for all people throughout the world" (17 (viii)).

In order to fight against the causes of terrorism, it is also essential to promote multicultural and inter-religious dialogue. The Parliamentary Assembly has devoted a number of important documents to this issue, among which its Recommendations 1162 (1991) Contribution of the Islamic civilisation to European culture,[9] 1202 (1993) Religious tolerance in a democratic

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

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

society,[10] 1396 (1999) Religion and democracy,[11] 1426 (1999) European democracies facing terrorism,[12] as well as its Resolution 1258 (2001), Democracies facing terrorism.[13] The Secretary General of the Council of Europe has also highlighted the importance of multicultural and inter-religious dialogue in the long-term fight against terrorism.[14]

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

I. States' obligation to protect everyone against terrorism

States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.

The Court indicated that:

"the first sentence of Article 2 para. 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B. v. the United Kingdom* judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, p. 1403, para. 36). This obligation […] may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (*Osman v. the*

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

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

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

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

14. See "The aftermath of September 11: Multicultural and Inter-religious Dialogue – Document of the Secretary General", Information Documents SG/Inf (2001) 40 Rev.2, 6 December 2001.

United Kingdom judgment of 28 October 1998, Reports 1998-VIII, para. 115; *Kiliç v. Turkey*, Appl. No. 22492/93, (Sect. 1) ECHR 2000-III, paras. 62 and 76)."[15]

II. Prohibition of arbitrariness

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

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

III. Lawfulness of anti-terrorist measures

1. **All measures taken by States to combat terrorism must be lawful.**
2. **When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.**

IV. Absolute prohibition of torture

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

The Court has recalled the absolute prohibition to use torture or inhuman or degrading treatment or punishment (Article 3 of the Convention) on many occasions, for example:

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

15. Pretty v. the United Kingdom, 29 April 2002, para. 38.

The nature of the offence allegedly committed by the applicant was therefore irrelevant for the purposes of Article 3."[16]

"The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals."[17]

According to the case-law of the Court, it is clear that the nature of the crime is not relevant:

"The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.".[18]

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

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

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

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

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

As concerns the collection and processing of personal data, the Court stated for the first time that:

"No provision of domestic law, however, lays down any limits on the exercise of those powers. Thus, for instance, domestic law does not define the kind of information that may be recorded, the categories of people against whom surveillance measures such as gathering and keeping information may be taken, the circumstances in which such measures may be taken or the procedure to be followed. Similarly, the Law does not

16. Labita v. Italy, 6 April 2000, para. 119. See also Ireland v. the United Kingdom, 18 January 1978, Series A no. 25, para. 163; Soering v. the United Kingdom, 7 July 1989, Series A no. 161, para. 88; Chahal v. the United Kingdom, 15 November 1996, para. 79; Aksoy v. Turkey, 18 December 1996, para. 62; Aydin v. Turkey, 25 September 1997, para. 81; Assenov and Others v. Bulgaria, 28 October 1998, para. 93; Selmouni v. France, 28 July 1999, para. 95.

17. Tomasi v. France, 27 August 1992, para. 115. See also Ribitsch v. Austria, 4 December 1995, para. 38.

18. Chahal v. the United Kingdom, 15 November 1996, para. 79; see also V. v. the United Kingdom, 16 December 1999, para. 69.

lay down limits on the age of information held or the length of time for which it may be kept.

[…]

The Court notes that this section contains no explicit, detailed provision concerning the persons authorised to consult the files, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained.

[…] It also notes that although section 2 of the Law empowers the relevant authorities to permit interferences necessary to prevent and counteract threats to national security, the ground allowing such interferences is not laid down with sufficient precision".[19]

VI. Measures which interfere with privacy

1. **Measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and use of undercover agents) must be provided for by law. It must be possible to challenge the lawfulness of these measures before a court.**

The Court accepts that the fight against terrorism may allow the use of specific methods:

"Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime."[20]

With regard to tapping, it must to be done in conformity with the provisions of Article 8 of the Convention, notably be done in accordance with the "law". The Court, thus, recalled that:

"tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more

19. Rotaru v. Romania, 4 May 2000, paras. 57-58.

20. Klass and Others v. Germany, 6 September 1978, Series A no. 28, para. 48.

sophisticated (see the above-mentioned *Kruslin* and *Huvig* judgments, p. 23, para. 33, and p. 55, para. 32, respectively)".[21]

The Court also accepted that the use of confidential information is essential in combating terrorist violence and the threat that it poses on citizens and to democratic society as a whole:

"The Court would firstly reiterate its recognition that the use of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives of citizens and to democratic society as a whole (see also the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 23, para. 48). This does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts or by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (*ibid.*, p. 23, para. 49)."[22]

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

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

"Against this background, in determining whether the force used was compatible with Article 2, the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force."[23]

VII. Arrest and police custody

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

21. Kopp v. Switzerland, 25 March 1998, para. 72. See also Huvig v. France, 24 April 1990, paras. 34-35.

22. Murray v. the United Kingdom, 28 October 1994, para. 58.

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

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

> "32. The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 para. 1 (c). […] [H]aving a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances. In this respect, terrorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge.
>
> […] [T]he exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5 para. 1 (c) is impaired […].
>
> […]
>
> 34. Certainly Article 5 para. 1 (c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism […]. It follows that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity.
>
> Nevertheless the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 para. 1 (c) has been secured. Consequently the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence."[24]

2. **A person arrested or detained for terrorist activities shall be brought promptly before a judge. Police custody shall be of a reasonable period of time, the length of which must be provided for by law.**
3. **A person arrested or detained for terrorist activities must be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court.**

24. Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, paras. 32 and 34.

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

> "The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3, keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.
>
> The difficulties, alluded to by the Government, of judicial control over decisions to arrest and detain suspected terrorists may affect the manner of implementation of Article 5 para. 3, for example in calling for appropriate procedural precautions in view of the nature of the suspected offences. However, they cannot justify, under Article 5 para. 3, dispensing altogether with "prompt" judicial control."[25]

> "The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3."[26]

> "The Court recalls its decision in the case of *Brogan and Others v. the United Kingdom* (judgment of 29 November 1988, Series A no. 145-B, p. 33, para. 62), that a period of detention without judicial control of four days and six hours fell outside the strict constraints as to time permitted by Article 5 para. 3. It clearly follows that the period of fourteen or more days during which Mr Aksoy was detained without being brought before a judge or other judicial officer did not satisfy the requirement of 'promptness'."[27]

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

25. Brogan and Others v. the United Kingdom, 29 November 1998, Series A no. 145-B, para. 61.

26. Brogan and Others v. the United Kingdom, 29 November 1998, Series A no. 145-B, para. 62. See also Brannigan and Mc Bride v. the United Kingdom, 26 May 1993, para. 58.

27. Aksoy v. Turkey, 12 December 1996, para. 66.

institutions, whenever they choose to assert that terrorism is involved (see, *mutatis mutandis*, the above-mentioned *Murray* judgment, p. 27, para. 58).

What is at stake here is the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. Judicial control of interferences by the executive is an essential feature of the guarantee embodied in Article 5 para. 3, which is intended to minimise the risk of arbitrariness and to secure the rule of law, 'one of the fundamental principles of a democratic society …, which is expressly referred to in the Preamble to the Convention' (see the above-mentioned *Brogan and Others* judgment, p. 32, para. 58, and the above-mentioned *Aksoy* judgment, p. 2282, para. 76)."[28]

VIII. Regular supervision of pre-trial detention

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

IX. Legal proceedings

1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law .

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

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

"The Court reiterates that in order to establish whether a tribunal can be considered 'independent' for the purposes of Article 6 para. 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, the *Findlay v. the United Kingdom* judgment of 25 February 1997, Reports 1997-I, p. 281, para. 73).

As to the condition of 'impartialit'y within the meaning of that provision, there are two tests to be applied: the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. […] (see,

28. Sakik and Others v. Turkey, 26 November 1997, para. 44.

mutatis mutandis, the *Gautrin and Others v. France* judgment of 20 May 1998, Reports 1998-III, pp. 1030-31, para. 58)."[29]

"Its (the Court's) task is not to determine *in abstracto* whether it was necessary to set up such courts (special courts) in a Contracting State or to review the relevant practice, but to ascertain whether the manner in which one of them functioned infringed the applicant's right to a fair trial. […] In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (see, among other authorities, the *Hauschildt v. Denmark* judgment of 24 May 1989, Series A no. 154, p. 21, para. 48, the *Thorgeir Thorgeirson* judgment cited above, p. 23, para. 51, and the *Pullar v. the United Kingdom* judgment of 10 June 1996, Reports 1996-III, p. 794, para. 38). In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see, *mutatis mutandis*, the *Hauschildt* judgment cited above, p. 21, para. 48, and the *Gautrin and Others* judgment cited above, pp. 1030–31, para. 58).

[…] [T]he Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces. It follows that the applicant could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case."[30]

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

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

Moreover,

"the Court considers that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities".[31]

Accordingly, the Court found that the public declaration made by a Minister of the Interior and by two high-ranking police officers referring to somebody as the accomplice in a murder before his judgment

29. Incal v. Turkey, 9 June 1998, para. 65.
30. Incal v. Turkey, 9 June 1998, paras. 70-72.
31. Allenet de Ribemont v. France, 10 February 1995, para. 36.

"was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. There has therefore been a breach of Article 6 para. 2".[32]

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

(i) the arrangements for access to and contacts with counsel;

(ii) the arrangements for access to the case-file;

(iii) the use of anonymous testimony.

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

The Court recognises that an effective fight against terrorism requires that some of the guarantees of a fair trial may be interpreted with some flexibility. Confronted with the need to examine the conformity with the Convention of certain types of investigations and trials, the Court has, for example, recognised that the use of anonymous witnesses is not always incompatible with the Convention.[33] In certain cases, like those which are linked to terrorism, witnesses must be protected against any possible risk of retaliation against them which may put their lives, their freedom or their safety in danger.

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

The Court recognised that the interception of a letter between a prisoner – terrorist – and his lawyer is possible in certain circumstances:

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

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32. *Id.*, para. 41.

33. See Doorson v. the Netherlands, 26 March 1996, paras. 69-70. The Doorson case concerned the fight against drug trafficking. The concluding comments of the Court can nevertheless be extended to the fight against terrorism. See also Van Mechelen and Others v. the Netherlands, 23 April 1997, para. 52.

34. Van Mechelen and Others v. the Netherlands, 23 April 1997, para. 57.

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

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

> "60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the *Brandstetter v. Austria* judgment of 28 August 1991, Series A no. 211, paras. 66, 67). In addition Article 6 para. 1 requires, as indeed does English law (see paragraph 34 above), that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see the above-mentioned *Edwards* judgment, para. 36).
>
> 61. However, as the applicants recognised (see paragraph 54 above), the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the *Doorson v. the Netherlands* judgment of 26 March 1996, Reports of Judgments and Decisions 1996-II, para. 70). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 para. 1 (see the *Van Mechelen and Others v. the Netherlands* judgment of 23 April 1997, Reports 1997-III, para. 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see the above-mentioned *Doorson* judgment, para. 72 and the above-mentioned *Van Mechelen and Others* judgment, para. 54).
>
> 62. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them (see the above-mentioned *Edwards* judgment, para. 34). Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of

36. See notably, Chahal v. the United Kingdom, 15 November 1996, paras. 131 and 144, and Van Mechelen and Others v. the Netherlands, 23 April 1997, para. 54.

adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused."[37]

X. Penalties incurred

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

This guideline takes up the elements contained in Article 7 of the European Convention on Human Rights. The Court recalled that:

"The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see the *S. W. and C.R. v. the United Kingdom* judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41-42, para. 35, and pp. 68-69, para. 33 respectively)."[38]

"The Court recalls that, according to its case-law, Article 7 embodies, inter alia, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence and the sanctions provided for it must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

When speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see the *Cantoni v. France* judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1627, para. 29, and the *S. W. and C.R. v. the United Kingdom* judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41-42, para. 35, and pp. 68-69, para. 33, respectively)."[39]

37. Rowe and Davies v. the United Kingdom, 16 February 2000, paras. 60-62.
38. Ecer and Zeyrek v. Turkey, 27 February 2001, para. 29.
39. Baskaya and Okçuoglu v. Turkey, 8 July 1999, para. 36.

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

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

XI. Detention

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

According to the case-law of the Court, it is clear that the nature of the crime is not relevant:

> "The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.".[40]

It is recalled that the practice of total sensory deprivation was condemned by the Court as being in violation with Article 3 of the Convention.[41]

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

(i) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client;

With regard to communication between a lawyer and his/her client, the case-law of the Court may be referred to, in particular a recent decision on inadmissibility in which the Court recalls the possibility for the State, in exceptional circumstances, to intercept correspondence between a lawyer and his/her client sentenced for terrorist acts. It is therefore possible to take measures which depart from ordinary law:

> "65. Il n'en demeure pas moins que la confidentialité de la correspondance entre un détenu et son défenseur constitue un droit fondamental pour un individu et touche directement les droits de la défense. C'est pourquoi, comme la Cour l'a énoncé plus haut, une dérogation à ce principe ne peut être autorisée que dans des cas exception-

40. Chahal v. the United Kingdom, 15 November 1996, para. 79; see also V. v. the United Kingdom, 16 December 1999, para. 69.

41. See Ireland v. the United Kingdom, 18 January 1978, notably paras. 165-168.

nels et doit s'entourer de garanties adéquates et suffisantes contre les abus (voir aussi, *mutatis mutandis*, l'arrêt *Klass* précité, *ibidem*).

66. Or le procès contre des cadres du PKK se situe dans le contexte exceptionnel de la lutte contre le terrorisme sous toutes ses formes. Par ailleurs, il paraissait légitime pour les autorités allemandes de veiller à ce que le procès se déroule dans les meilleures conditions de sécurité, compte tenu de l'importante communauté turque, dont beaucoup de membres sont d'origine kurde, résidant en Allemagne.

67. La Cour relève ensuite que la disposition en question est rédigée de manière très précise, puisqu'elle spécifie la catégorie de personnes dont la correspondance doit être soumise à contrôle, à savoir les détenus soupçonnés d'appartenir à une organisation terroriste au sens de l'article 129a du code pénal. De plus, cette mesure, à caractère exceptionnel puisqu'elle déroge à la règle générale de la confidentialité de la correspondance entre un détenu et son défenseur, est assortie d'un certain nombre de garanties : contrairement à d'autres affaires devant la Cour, où l'ouverture du courrier était effectuée par les autorités pénitentiaires (voir notamment les arrêts *Campbell*, et *Fell et Campbell* précités), en l'espèce, le pouvoir de contrôle est exercé par un magistrat indépendant, qui ne doit avoir aucun lien avec l'instruction, et qui doit garder le secret sur les informations dont il prend ainsi connaissance. Enfin, il ne s'agit que d'un contrôle restreint, puisque le détenu peut librement s'entretenir oralement avec son défenseur ; certes, ce dernier ne peut lui remettre des pièce écrites ou d'autres objets, mais il peut porter à la connaissance du détenu les informations contenues dans les documents écrits.

68. Par ailleurs, la Cour rappelle qu'une certaine forme de conciliation entre les impératifs de la défense de la société démocratique et ceux de la sauvegarde des droits individuels est inhérente au système de la Convention (voir, *mutatis mutandis*, l'arrêt *Klass* précité, p. 28, para. 59).

69. Eu égard à la menace présentée par le terrorisme sous toutes ses formes (voir la décision de la Commission dans l'affaire *Bader, Meins, Meinhof et Grundmann c/ Allemagne* du 30 mai 1975, Requête nº 6166/75), des garanties dont est entouré le contrôle de la correspondance en l'espèce et de la marge d'appréciation dont dispose l'Etat, la Cour conclut que l'ingérence litigieuse n'était pas disproportionnée par rapport aux buts légitimes poursuivis."[42]

(ii) placing persons deprived of their liberty for terrorist activities in specially secured quarters;

(iii) the separation of such persons within a prison or among dif ferent prisons,

With regard to the place of detention, the former European Commission of Human Rights indicated that:

42. Erdem v. Germany, 5 July 2001, paras. 65-69. The text of this judgment is available in French only. See also Lüdi v. Switzerland, 15 June 1992.

"It must be recalled that the Convention does not grant prisoners the right to choose the place of detention and that the separation from their family are inevitable consequences of their detention".[43]

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

"[…] the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is 'necessary in a democratic society' regard may be had to the State's margin of appreciation (see, amongst other authorities, *The Sunday Times v. the United Kingdom (No. 2)* judgment of 26 November 1991, Series A no. 217, pp. 28-29, para. 50)."[44]

XII. Asylum, return ("refoulement") and expulsion

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

Article 14 of the Universal Declaration of Human Rights states:

"1. Everyone has the right to seek and enjoy in other countries asylum from persecution".

Moreover, a concrete problem that States may have to confront is that of the competition between an asylum request and a demand for extradition. Article 7 of the draft General Convention on international terrorism must be noted in this respect:

"States Parties shall take appropriate measures, in conformity with the relevant provisions of national and international law, including international human rights law, for the purpose of ensuring that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offense referred to in Article 2".

It is also recalled that Article 1 F of the Convention on the Status of Refugees of 28 July 1951 provides:

"F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that (*a*) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (*b*) He has commit-

43. Venetucci v. Italy (Appl. No. 33830/96), Decision as to admissibility, 2 March 1998.

44. Campbell v. the United Kingdom, 25 March 1992, Series A no. 233, para. 44.

ted a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (*c*) He has been guilty of acts contrary to the purposes and principles of the United Nations".

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

3. Collective expulsion of aliens is prohibited.

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

The Court thus recalled that:

"collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group (see Andric v. Sweden, cited above)"[45].

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

See the comments made in paragraph 15 above and the case-law references there mentioned.

XIII. Extradition

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

2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:

(i) the person whose extradition has been requested will not be sentenced to death; or

(ii) in the event of such a sentence being imposed, it will not be carried out.

In relation to the death penalty, it can legitimately be deduced from the case-law of the Court that the extradition of someone to a State where he/she risks the death penalty is forbidden.[46] Accordingly, even if the judgment does not say *expressis verbis* that such an extradition is prohibited, this prohibition is drawn from the fact that the waiting for the execution of the sen-

45. Conka v. Belgium, 5 February 2002, para. 59.

46. See Soering v. the United Kingdom, 7 July 1989, Series A no. 161.

tence by the condemned person ("death row") constitutes an inhuman treatment, according to Article 3 of the Convention. It must also be recalled that the present tendency in Europe is towards the general abolition of the death penalty, in all circumstances (see guideline X, *Penalties incurred*).

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

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

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

As concerns the absolute prohibition to extradite or return an individual to a State in which he risks torture or inhuman and degrading treatment or punishment see above, para. 44.

4. When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.

The Court underlined that it

> does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."[47]

Article 5 of the European Convention for the suppression of terrorism[48] states:

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

The explanatory report indicates:

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

48. ETS No. 90, 27 January 1977.

"50. If, in a given case, the requested State has substantial grounds for believing that the real purpose of an extradition request, made for one of the offences mentioned in Article 1 or 2, is to enable the requesting State to prosecute or punish the person concerned for the political opinions he holds, the requested State may refuse extradition.

The same applies where the requested State has substantial grounds for believing that the person's position may be prejudiced for political or any of the other reasons mentioned in Article 5. **This would be the case, for instance, if the person to be extradited would, in the requesting State, be deprived of the rights of defence as they are guaranteed by the European Convention on Human Rights**."[49]

Moreover, it seems that extradition should be refused when the individual concerned runs the risk of being sentenced to life imprisonment without any possibility of early release, which may raise an issue under Article 3 of the European Convention on Human Rights. The Court underlined that

"it is […] not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention (see *Nivette*, cited above, and also the *Weeks v. the United Kingdom* judgment of 2 March 1987, Series A no. 114, and *Sawoniuk v. the United Kingdom* (dec.), Appl. No. 63716/00, 29 May 2001)".[50]

XIV. Right to property

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

See notably Article 8 of the United Nations Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999):

"1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in Article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in Article 2 and the proceeds derived from such offences.

49. Emphasis added.

50. Einhorn v. France, 16 October 2001, para. 27.

3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

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

5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith."

The confiscation of property following a condemnation for criminal activity has been admitted by the Court.[51]

XV. Possible derogations

1. When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.
2. States may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law.
3. The circumstances which led to the adoption of such derogations need to be reassessed on a regular basis with the purpose of lifting these derogations as soon as these circumstances no longer exist.

The Court has indicated some of the parameters that permit to say which are the situations of "public emergency threatening the life of the nation".[52]

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

51. See Phillips v. the United Kingdom, 5 July 2001, in particular paras. 35 and 53.
52. See Lawless v. Ireland, Series A no. 3, 1 July 1961.

"It is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other (see the above-mentioned *Ireland v. the United Kingdom* judgment, Series A no. 25, p. 82, para. 214, and the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 23, para. 49)".[53]

Article 15 of the Convention gives an authorisation to contracting States to derogate from the obligations set forth by the Convention "in time of war or other public emergency threatening the life of the nation".

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

"As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 para. 2 even in the event of a public emergency threatening the life of the nation […]."[54]

The Court was led to judge cases in which Article 15 was referred to by the defendant State. The Court affirmed therefore its jurisdiction to control the existence of a public emergency threatening the life of the nation:

"whereas it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case".[55]

Examining a derogation on the basis of Article 15, the Court agreed that this derogation was justified by the reinforcement and the impact of terrorism and that, when deciding to put someone in custody, against the opinion of the judicial authority, the Government did not exceed its margin of appreciation. It is not up to the Court to say what measures would best fit the emergency situations since it is the direct responsibility of the governments to weigh up the

53. Brannigan and McBride v. the United Kingdom, 26 May 1993, para. 59.

54. Labita v. Italy, 6 April 2000, para. 119. See also Ireland v. the United Kingdom, 18 January 1978, Series A no. 25, para. 163; Soering v. the United Kingdom, 7 July 1989, Series A no. 161, para. 88; Chahal v. the United Kingdom, 15 November 1996, para. 79; Aksoy v. Turkey, 18 December 1996, para. 62; Aydin v. Turkey, 25 September 1997, para. 81; Assenov and Others v. Bulgaria, 28 October 1998, para. 93; Selmouni v. France, 28 July 1999, para. 95.

55. Lawless v. Ireland, 1 July 1961, A no. 3, para. 22.

situation and to decide between towards efficient measures to fight against terrorism or the respect of individual rights:

> "The Court recalls that it falls to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, pp. 78-79, para. 207).
>
> Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision (*ibid.*). At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation."[56]

Concerning the length of the custody after arrest, and even if the Court recognizes the existence of a situation that authorises the use of Article 15, seven days seems to be a length that satisfies the State obligations given the circumstances,[57] but thirty days seems to be too long.[58]

General comment No. 29 of the UN Human Rights Committee[59] on Article 4 of the International Covenant on Civil and Political Rights (16 December 1966) need also to be taken into consideration. This general observation tends to limit the authorised derogation to this Covenant, even in cases of exceptional circumstances.

XVI. Respect for peremptory norms of international law and for international humanitarian law

In their fight against terrorism, States may never act in breach of peremptory norms of international law nor in breach international humanitarian law , where applicable.

56. Brannigan and Mc Bride v. the United Kingdom, 26 May 1993, para. 43.
57. See Brannigan and McBride v. the United Kingdom, 26 May 1993, paras. 58-60.
58. See *Aksoy v. Turkey*, 18 December 1996, paras. 71-84.
59. Adopted on 24 July 2001 at its 1950th meeting. See document CCPR/C/21/Rev.1/Add. 11.

XVII. Compensation for victims of terrorist acts

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

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

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

a. those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;

b. the dependants of persons who have died as a result of such crime.

2. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished."

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

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

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