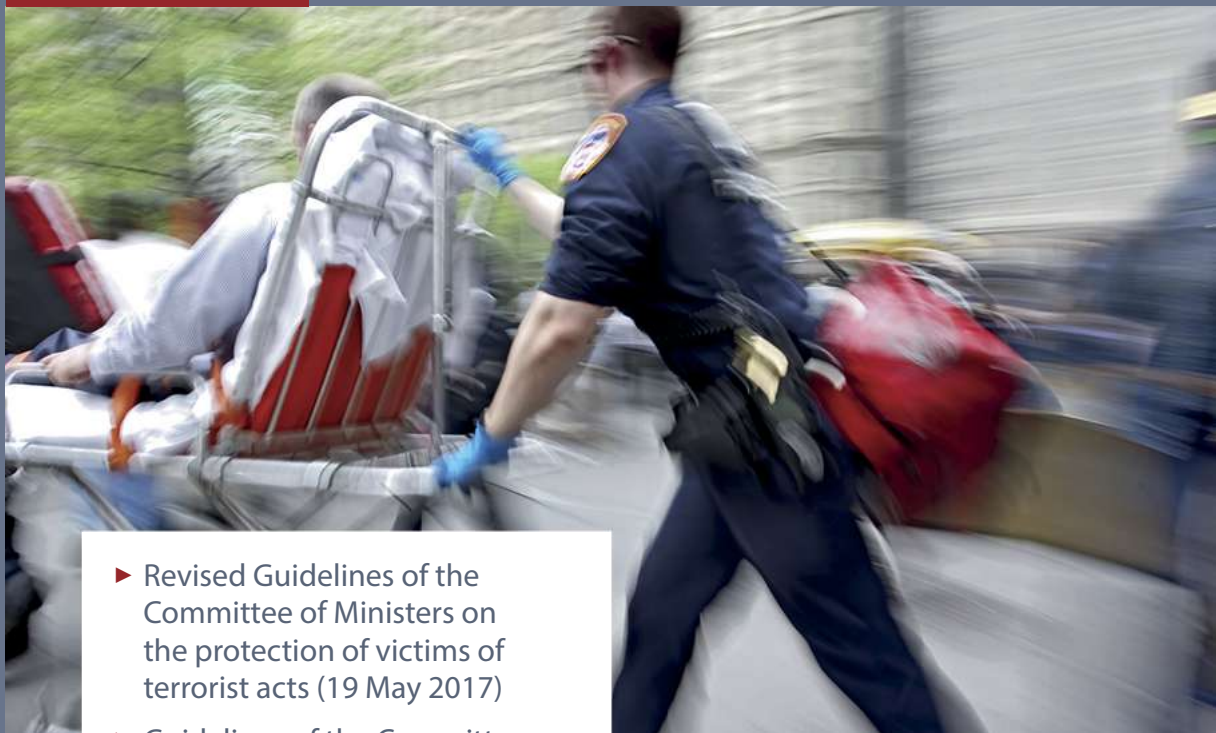


PROTECTION OF VICTIMS OF TERRORIST ACTS



- ▶ Revised Guidelines of the Committee of Ministers on the protection of victims of terrorist acts (19 May 2017)
- ▶ Guidelines of the Committee of Ministers on human rights and the fight against terrorism (11 July 2002)
- ▶ Proceedings of the High-Level Seminar «Protecting human rights while fighting terrorism» (13-14 June 2005)

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

HUMAN RIGHTS AND TERRORISM

COUNCIL OF EUROPE REVISED GUIDELINES

Council of Europe

French edition:

*Droits de l'homme et terrorisme –
Lignes directrices révisées
du Conseil de l'Europe*

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Revised Guidelines of the Committee of Ministers of the Council of Europe on the protection of victims of terrorist acts

*adopted by the Committee of Ministers
at its 127th Session, Nicosia, 19 May 2017*

Preamble

The Committee of Ministers,

- [a] Considering that terrorism seriously jeopardises human rights, threatens democracy, aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society and challenges the aspiration of everyone to live free from fear;
- [b] Unequivocally condemning all acts of terrorism as criminal and unjustifiable, wherever and by whoever committed;
- [c] Recognising the suffering endured by the victims of terrorist acts and their close family and considering that these persons must be shown national and international solidarity and support;
- [d] Underlining States' obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life;
- [e] Recalling also that all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding all forms of arbitrariness and discriminatory treatment, and must be subject to appropriate supervision, and reaffirming member States' obligation to respect, in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), and abide by the final judgments of the European Court of Human Rights to which they are parties;
- [f] Reaffirming the Guidelines on Human Rights and the Fight against Terrorism, adopted on 11 July 2002 at the 804th meeting of the Ministers' Deputies, as a permanent and universal reference;
- [g] Underlining that the effects of terrorism on victims and their close family members require at national level the implementation of an efficient protection policy, financial assistance and compensation for victims in light particularly of Article 13 of the Council of Europe Convention on the Prevention of Terrorism

(Warsaw, 16 May 2005, CETS No. 196), including, in an appropriate way, the societal recognition of the suffering of victims and the maintenance of the duty of remembrance;

- [h] Recalling the Guidelines on the Protection of Victims of Terrorist Acts, adopted on 2nd March 2005 at the 917th meeting of the Ministers' Deputies and wishing to revise them as a response to all forms of terrorism;
- [i] Recalling the United Nations Office on Drugs and Crime handbook of 2012 *The Criminal Justice Response to Support Victims of Acts of Terrorism*;
- [j] Recognising the important role of associations for the protection of victims;
- [k] Having regard to the work carried out by the Steering Committee for Human Rights (CDDH) which, apart from a Revised Text of the Guidelines, produced also a background paper to them, in consultation with the Committee of Experts on Terrorism (CODEXTER);
- [l] Adopts the following revised Guidelines on the protection of victims of terrorist acts which shall replace the ones adopted on the same subject-matter on 2 March 2005, and invites member States to use them as a practical tool in order to address the above challenges in the light of all forms of terrorism and towards ensuring better protection of human rights and fundamental freedoms;
- [m] Invites the governments of the member States to ensure that the revised guidelines are widely translated and disseminated among all authorities responsible for the fight against terrorism and for the protection of the victims, as well as among representatives of civil society.

I. Purpose of the Guidelines on the protection of victims of terrorist acts

The present Guidelines aim at recalling the measures to be taken by the member States in order to support and protect the fundamental rights of any person who has suffered direct physical or psychological harm as a result of a terrorist act, and, in appropriate circumstances, of their close family. These persons are considered victims for the purposes of these Guidelines.

II. Principles

1. States should have an appropriate legal and administrative framework including suitable internal structures, in order for victims of terrorist acts (hereafter "the victims") to benefit from the services and measures prescribed by these Guidelines.

2. The granting of these services and measures should exclude all forms of arbitrariness, as well as any discriminatory treatment and should not depend on the identification, arrest, prosecution or conviction of the perpetrator of the terrorist act.
3. States must respect the dignity and the private and family life of victims.

III. Emergency assistance

In order to cover the immediate needs of victims, States should ensure that appropriate (medical, psychological, social and material) emergency assistance is available free of charge to them; they should also facilitate access to spiritual assistance for victims at their request.

IV. Information

1. States should give information to victims relating to the act from which they have suffered, except where victims indicate that they do not wish to receive such information.
2. For this purpose, States should:
 - a. set up appropriate information contact points for the victims, concerning in particular their rights, the existence of support bodies, and the possibility of obtaining assistance, practical and legal advice as well as redress or compensation;
 - b. ensure that victims are provided with appropriate information in particular about the investigations, the final decision concerning prosecution, the date and place of the hearings, any opportunity in that context to introduce an action for damages, and the conditions under which they may acquaint themselves with the decisions handed down.

V. Continuing assistance

1. States should provide for appropriate continuing medical, psychological, social and material assistance for victims. This assistance should ensure that victims are able, as far as is practicable, to resume the normal course of their activities and lives which they enjoyed before the terrorist act.
2. If the victim does not normally reside on the territory of the State where the terrorist act occurred, that State should co-operate with the State of residence in ensuring that the victim receives such assistance.

VI. Investigation and prosecution

1. States must effectively investigate terrorist acts without delay, particularly where there have been victims.
2. In this framework, special attention should be paid to victims without it being necessary for them to have made a formal complaint.
3. States should ensure that their investigators receive specific victim-sensitive training on the needs of victims.
4. States should, in accordance with their national legislation, strive to bring individuals suspected of terrorist acts to justice and obtain a decision from a competent, independent and impartial tribunal within a reasonable time.
5. In cases where, as a result of an investigation, it is decided not to take action to prosecute a suspected perpetrator of a terrorist act, States should ensure that victims are able to ask for a review of this decision by a competent authority.
6. States should ensure that the position of victims is adequately recognised in criminal proceedings.

VII. Effective access to the law and to justice

States must provide effective access to the law and to justice for victims by providing the right of access to competent courts in order to bring a civil action in support of their rights, including legal assistance and interpretation as required to this end.

VIII. Compensation

1. Victims should receive fair, appropriate and timely compensation for the damages which they suffered. When compensation is not available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State on the territory of which the terrorist act happened should contribute to the compensation of victims for direct physical or psychological harm, irrespective of their nationality. To this end States could consider the creation of specific funds, if they do not already exist.
2. Compensation should be easily accessible to victims, irrespective of nationality. To this end, the State on the territory of which the terrorist act took place should introduce a mechanism allowing for fair and appropriate compensation, after a simple procedure and within a reasonable time.
3. States whose nationals are victims of a terrorist act on the territory of another State should also encourage administrative co-operation with the competent authorities of that State to facilitate access to compensation for their nationals.

4. Apart from the payment of pecuniary compensation, States are encouraged to consider, depending on the circumstances, taking other measures to mitigate the harmful consequences of the terrorist act suffered by the victims.

IX. Protection of private and family life

1. States should take appropriate steps to avoid as far as possible undermining respect for the private and family life of victims, in particular when carrying out investigations or providing assistance after the terrorist act as well as within the framework of proceedings initiated by victims.
2. States should, where appropriate, and in full compliance with the principle of freedom of expression, encourage the media and journalists to adopt self-regulatory measures in order to ensure the protection of the private and family life of victims in the framework of their information and awareness-raising activities.
3. States must ensure that victims have an effective remedy where they raise an arguable claim that their right to respect for their private and family life has been violated.

X. Protection of dignity and security

1. At all stages of the proceedings, victims should be treated in a manner which gives due consideration to their personal situation, their rights and their dignity.
2. States must ensure the protection and security of victims and take measures, where appropriate, to protect their identity, in particular where they appear as witnesses.

XI. Specific training for persons working with victims

States should encourage specific training for persons working with victims, and grant the necessary resources to that effect.

XII. Raising public awareness and involving victims

States are encouraged to:

- a. take measures, in an appropriate way, in order to attain societal recognition and remembrance of victims;
- b. facilitate the involvement of representatives of the victims of terrorist acts in raising public awareness.

XIII. Co-operation with civil society

States are encouraged to co-operate with and facilitate as much as possible the actions of civil society representatives, and especially those of the associations for the protection of victims.

XIV. Increased protection

Nothing in these Guidelines prevents States from providing services and adopting measures more favourable than those described in these Guidelines.

Background paper

used for the preparation of the revised guidelines on the protection of victims of terrorist acts

This background paper, prepared by the Steering Committee for Human Rights (CDDH) in consultation with the Committee of Experts on Terrorism (CODEXTER), is not an explanatory report of the revised Guidelines.

The Committee of Ministers, upon adopting the revised Guidelines, wished to draw the background paper to the attention of member States and decided that information contained therein could be updated regularly as appropriate.

Preamble

The Committee of Ministers,

- [a] Considering that terrorism seriously jeopardises human rights, threatens democracy, aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society and challenges the ideals of everyone to live free from fear;

1. The first part of this paragraph repeats paragraph [a] of the Preamble of the 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 (hereafter "Guidelines of July 2002"). The phrase "free from fear" finds its origin in the second paragraph of the Preamble of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in its resolution 217 A (III) of 10 December 1948.

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

2. The wording repeats that of paragraph [b] of the Preamble of the Guidelines of July 2002.

- [c] Recognising the suffering endured by the victims of terrorist acts and their close family and considering that these persons must be shown national and international solidarity and support;

- [d] Underlining States' obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life;

3. The wording of paragraph [d] repeats in part that of Guideline I (States' obligation to protect everyone against terrorism) of July 2002 which states that: "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."

[e] Recalling also that all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding all forms of arbitrariness and discriminatory treatment, and must be subject to appropriate supervision, and reaffirming member States' obligation to respect, in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), and abide by the final judgments of the European Court of Human Rights to which they are parties;

4. The wording of paragraph [e] repeats Guideline II of July 2002 and, in part, that of paragraph [i] of the Preamble of the Guidelines of July 2002.
5. In this context, the European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 8 on Combating Racism while Fighting Terrorism of 17 March 2004 should be recalled.

[f] Reaffirming the Guidelines on Human Rights and the Fight against Terrorism, adopted on 11 July 2002 at the 804th meeting of the Ministers' Deputies, as a permanent and universal reference;

[g] Underlining that the effects of terrorism on victims and their close family members require at national level the implementation of an efficient protection policy, financial assistance and compensation for victims in light particularly of Article 13 of the Council of Europe Convention on the Prevention of Terrorism (Warsaw, 16 May 2005, CETS No. 196), including, in an appropriate way, the societal recognition of the suffering of victims and the maintenance of the duty of remembrance;

6. In his report *The fight against violent extremism and radicalisation leading to terrorism* (CM(2016)64) presented at the 126th Session of the Committee of Ministers (Sofia, 18 May 2016), the Secretary General indicated an interest in raising public awareness of the need for [societal] recognition of victims, including the role of the media. The Secretary General further pointed out the interest of a revision of the Guidelines on the Protection of Victims of Terrorist Acts, adopted by the Committee of Ministers on 2 March 2005, in order to incorporate additional elements in light of the new face of terrorism. To this end, the Secretary General mentioned the following four lines of action:
 - a. Implementing a general legal framework to assist victims;
 - b. Providing assistance to victims in legal proceedings;
 - c. Raising public awareness of the need for societal recognition of victims, including the role of the media;
 - d. Involving victims of terrorism in the fight against terrorism.

- [h] Recalling the Guidelines on the Protection of Victims of Terrorist Acts, adopted on 2nd March 2005 at the 917th meeting of the Ministers' Deputies and wishing to revise them as a response to all forms of terrorism;
- [i] Recalling the United Nations Office on Drugs and Crime handbook of 2012 *The Criminal Justice Response to Support Victims of Acts of Terrorism*;
- [j] Recognising the important role of associations for the protection of victims;

7. **With regard to the United Nations, the Good *Practices in Supporting Victims of Terrorism within the Criminal Justice Framework* of February 2016 (thereafter “Good practices of February 2016”) state that “States should promote and support civil society and non-governmental organizations involved in providing support to victims of terrorism within the criminal justice system.”**

- [k] Having regard to the work carried out by the Steering Committee for Human Rights (CDDH) which, apart from a Revised Text of the Guidelines, produced also a background paper to them, in consultation with the Committee of Experts on Terrorism (CODEXTER);
- [l] Adopts the following revised Guidelines on the Protection of Victims of Terrorist Acts which shall replace the ones adopted on the same subject-matter on 2 March 2005, and invites member States to use them as a practical tool in order to address the above challenges in the light of all forms of terrorism and towards ensuring better protection of human rights and fundamental freedoms;
- [m] Invites the governments of the member States to ensure that the revised guidelines are widely translated and disseminated among all authorities responsible for the fight against terrorism and for the protection of the victims, as well as among representatives of civil society.

8. **The terms “invites member States to implement them and ensure that they are widely disseminated among all authorities responsible for the fight against terrorism” are taken from the last sentence of the Preamble to the Guidelines of July 2002.**

I. Purpose of the Guidelines on the protection of victims of terrorist acts

The present Guidelines aim at recalling the measures to be taken by the member States in order to support and protect the fundamental rights of any person who has suffered direct physical or psychological harm as a result of a terrorist act, and, in appropriate circumstances, of their close family. These persons are considered victims for the purposes of these Guidelines.

9. ***Recommendation 1426 (1999)* of the Parliamentary Assembly of the Council of Europe on *European democracies facing up to terrorism* of 23 September 1999, asked that the Committee of Ministers “consider the incorporation of the principle of fuller protection for victims of terrorist acts at both national and international level”.**

10. *Recommendation 1677 (2004)* of the Parliamentary Assembly on the *Challenge of terrorism in Council of Europe member States* of 6 October 2004 asked the Committee of Ministers to “finalise as soon as possible the elaboration of guidelines on the rights of victims and the corresponding duties of member States to provide all necessary assistance and to create a forum for the exchange of good practice and training experiences between member States”. *Resolution 1677 (2004)* of the Parliamentary Assembly on the same topic called on “the national parliaments to (i.) adopt an integrated and co-ordinated approach to countering terrorism at all its stages, including drawing up a legislative framework aimed at: (...) (d.) protecting, rehabilitating and compensating victims of terrorist acts”.
11. Moreover, *Resolution No. 1 on Combating international terrorism*, adopted by the Ministers at the 24th Conference of European Ministers of Justice (Moscow, 4-5 October 2001) invited the Committee of Ministers to “c) (review) existing or, where necessary, (adopt) new rules concerning: (...) iv. the improvement of the protection, support and compensation of victims of terrorist acts and their families”. *Resolution No. 1 on Combating terrorism* adopted by the Ministers at the 25th Conference of European Ministers of Justice (Sofia, 9-10 October 2003) reiterated this invitation.
12. Paragraph 1 of *the European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 8 on Combating Racism while Fighting Terrorism* of 17 March 2004 recommends to governments of member States “to take all adequate measures, especially through international co-operation, (...) to support the victims of terrorism (...)”.
13. As concerns the protection of fundamental rights, it is worth mentioning paragraph [i] of the Preamble of the July 2002 Guidelines which states that “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;”
14. Finally, in his report *The fight against violent extremism and radicalisation leading to terrorism* (CM(2016)64) presented at the 126th Session of the Committee of Ministers (Sofia, 18 May 2016), the Secretary General of the Council of Europe, Mr. Thorbjørn JAGLAND, indicated an interest in revising the Guidelines on the protection of victims of terrorist acts adopted by the Committee of Ministers on 2 March 2005, in order to incorporate additional elements in light of the new face

of terrorism. To this end, the Secretary General proposed in his report the four lines of action already mentioned in this background paper (see comments on Preamble (g)).

II. Principles

1. States should have an appropriate legal and administrative framework including suitable internal structures, in order for victims of terrorist acts (hereafter "the victims") to benefit from the services and measures prescribed by these Guidelines.
15. Some member States have put in place the following specific structures:
 - (i) *rapid identification procedures* for the bodies of victims (centralisation of identifying elements, and their verification) so as to inform and return bodies to the families concerned, while taking into full consideration the key issues arising in this context, particularly psychological trauma;
 - (ii) *a service for designating "victim" correspondents* within the investigating department and the public prosecution service, in order to facilitate the collection of information and to produce, on that basis, a single list of victims present at the time and place of the terrorist act;
 - (iii) *a confidential and free reception and support service for victims* through multi-disciplinary teams, taking full account of the specificity and seriousness of the acts and the damage suffered. In particular, these teams are led and co-ordinated in real time by a suitable body or bodies providing assistance to victims. This body is also in charge of setting up an appropriate single telephone helpline for victims;
 - (iv) *a network of local "terrorism" correspondents working in tandem with victim support associations*. Each correspondent would *inter alia* be required to:
 - a. identify all of the partners coming to the assistance of victims;
 - b. set up and manage an appropriate network of contacts;
 - c. liaise with the coordinating authority and the public prosecution service;
 - d. co-ordinate and/or take action in support of the continuing assistance provided in co-operation with the victim support associations.
 - (v) *local committees to follow-up on victims and information points*;
 - (vi) *access to translation or interpretation services*, where appropriate free of charge, that are necessary for effective interaction with responsible agencies from another State.
 16. Different approaches may be required for the situation of victims of terrorist acts within the territory of the country and nationals who have suffered such acts abroad.

17. Concerning the protection of people from possible terrorist acts, it is worth recalling Guideline I of July 2002 (*States' obligation to protect everyone against terrorism*) which states that "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."

2. The granting of these services and measures should exclude all forms of arbitrariness, as well as any discriminatory treatment and should not depend on the identification, arrest, prosecution or conviction of the perpetrator of the terrorist act.

18. Paragraph 2 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted on 29 November 1985 by the General Assembly of the United Nations (A/RES/40/34) states that: "A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted [...]"

3. States must respect the dignity and the private and family life of victims.

19. Paragraph 4 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted on 29 November 1985 by the General Assembly of the United Nations (A/RES/40/34) specifies that: "Victims should be treated with compassion and respect for their dignity. [...]"
20. Article 2, paragraph 1, of the Council of the European Union Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) states that: "Each Member State [...] shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings".
21. With regard to the United Nations, the Good Practices of February 2016 state that: "Victim safety is paramount. Risks to the safety of victims should be assessed throughout the investigation and prosecution, and, where necessary, States should take measures to protect victims during their participation in the criminal justice system".

III. Emergency assistance

In order to cover the immediate needs of the victims, States should ensure that appropriate (medical, psychological, social and material) emergency assistance is available free of charge to them; they should also facilitate access to spiritual assistance for victims at their request.

22. Paragraph 4 of Recommendation No. R (87) 21 of the Committee of Ministers to member States on assistance to victims and the prevention of victimisation recommends that the governments of member States “ensure that victims and their families, especially those who are most vulnerable, receive in particular [...] emergency help to meet immediate needs [...]”.
23. The word “assistance” was preferred to the word “help” in particular because it is used in several articles of the European Social Charter (Revised) (CETS No. 163, of 3 May 1996): see for example Article 13 “Right to social and medical assistance”.
24. Even if the text of the European Convention of Human Rights does not expressly mention the right to health care nor the right to medical assistance, the Court has clearly indicated that, in certain cases, the State can have an obligation to provide appropriate medical assistance so as not to risk violation of Article 2 of the Convention (Right to life) or Article 3 (Prohibition of torture).
25. In its decision *Ilhan v. Turkey* of 27 June 2000, para 76: “The Court observes that these three cases¹ concerned the positive obligation on the State to protect the life of the individual from third parties or from the risk of illness under the first sentence of Article 2 § 1.”
26. The Court reiterated its position in its decision *Berktaş v. Turkey* of 1 March 2001, para. 154.
27. In its decision on admissibility no. 65653/01 in the case *Nitecki v. Poland* of 21 March 2002, the Court recalled that: “The Court recalls that the first sentence of Article 2 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. It cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 2 (see *Powell v. the United Kingdom* [decision], no. 45305/99, 4.5.2000).

1. *Osman v. the United Kingdom* (decision of 28 October 1998), *Yaşa v. Turkey* (decision of 2 September 1998) and *L.C.B. v. the United Kingdom* (decision of 9 June 1998).

IV. Information

1. States should give information to victims relating to the act from which they have suffered, except where victims indicate that they do not wish to receive such information.
28. The Court recognises that, in certain circumstances, a family member of a “disappeared person” may suffer inhuman treatment, within the meaning of Article 3 of the Convention, if the State authorities remain silent despite attempts to obtain information about the disappeared person. Thus, in the case *Cyprus v. Turkey* of 10 May 2001, §§ 156-157, “156. [...] The Court recalls that the question whether a family member of a “disappeared person” is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation. Relevant elements will include [...] the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. [...] 157. [...] For the Court, the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3.”
2. For this purpose, States should:
 - a. set up appropriate information contact points for the victims, concerning in particular their rights, the existence of support bodies, and the possibility of obtaining assistance, practical and legal advice as well as redress or compensation;
29. Paragraph 2 of Recommendation No. R (85) 11 of the Committee of Ministers to member States on the position of the victim in the framework of criminal law and procedure states that “the police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and State compensation”.
30. Paragraph 4 of Recommendation No. R (87) 21 of the Committee of Ministers to member States on assistance to victims and the prevention of victimisation provides that the governments of member States “ensure that victims and their families, especially those who are most vulnerable, receive in particular (...) information on the victim's rights”.

- b. ensure that victims are provided with appropriate information in particular about the investigations, the final decision concerning prosecution, the date and place of the hearings, any opportunity in that context to introduce an action for damages, and the conditions under which they may acquaint themselves with the decisions handed down.

31. Paragraph 3 of Committee of Ministers Recommendation No. R (85) 11 to member States on the position of the victim in the framework of criminal law and procedure states that “the victim should be able to obtain information on the outcome of the police investigation”.
32. Paragraph 6 of this same Recommendation adds that “the victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information”.
33. Paragraph 9 of Committee of Ministers Recommendation No. R (85) 11 to member States on the position of the victim in the framework of criminal law and procedure states that “the victim should be informed of: the date and place of a hearing concerning an offence which caused him suffering; his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice; how he can find out the outcome of the case”.
34. Finally, Article 4 of the Council of the European Union Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) on the “Right to receive information” specifies in particular that “Member States shall take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victim if necessary”.

V. Continuing assistance

1. States should provide for appropriate continuing medical, psychological, social and material assistance for victims. This assistance should ensure that victims are able, as far as is practicable, to resume the normal course of their activities and lives which they enjoyed before the terrorist act.
35. Paragraph 4 of Committee of Ministers Recommendation No. R (87) 21 to member States on assistance to victims and the prevention of victimisation recommends that governments of member States “ensure that victims and their families, especially those who are most vulnerable, receive in particular (...) continuing medical, psychological, social and material help”.
 36. It is also worth mentioning Paragraph 14 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted on 29 November 1985 by the General Assembly of the United Nations (A/RES/40/34), states that:

“Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.”

37. Finally, in terms of continuing assistance, some member States have put in place measures to ensure the social integration of victims who have suffered direct physical or psychological harm as a result of a terrorist act by:
- (i) facilitating their reintegration on the labour market, especially concerning access to employment or reorganising their working conditions due to their physical and psychological situation after the terrorist attack;
 - (ii) ensuring their appropriate housing conditions and sufficient income;
 - (iii) Granting victims with disabilities privileged access to public transport in order to promote their mobility and sociability.

2. If the victim does not normally reside on the territory of the State where the terrorist act occurred, that State should co-operate with the State of residence in ensuring that the victim receives such assistance.

38. With regard to the United Nations, the Good Practices of February 2016 state that: “States should ensure that their embassies, consulates and other international diplomatic posts are able to provide effective assistance and support to their nationals who might become victims of terrorism abroad, and have the capacity to co-operate with key government and private sector counterparts and actors.”

VI. Investigation and prosecution

1. States must effectively investigate terrorist acts without delay, particularly where there have been victims.

39. The Court recognises that there should be an official investigation when individuals have been killed as a result of the use of force and that this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. In the case *Ulku Ekinci v. Turkey*, 16 July 2002, § 144 it indicates that “The Court recalls that, according to its case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. This obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the competent investiga-

tion authority. The mere fact that the authorities were informed of the killing of the applicant's husband gave rise ipso facto to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death (cf. *Tanrikulu v. Turkey* [GC], no. 23763/94, §§ 101 and 103, ECHR 1999-IV). The nature and degree of scrutiny which satisfies the minimum threshold of an investigation's effectiveness depends on the circumstances of each particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (cf. *Velikova v. Bulgaria*, no. 41488/98, § 80, ECHR 2000-VI)."

40. In the case *Tepe v. Turkey*, 9 May 2003, § 195 the Court indicates that "Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure (see *Kaya*, cited above, pp. 330-31, § 107)."
41. Moreover, the Court recognises that the investigation must be led with promptness and reasonable expedition. In the case *Finucane v. United Kingdom*, of 1 July 2003, para. 70, it indicates that "A requirement of promptness and reasonable expedition is implicit in this context (see *Yaşa v. Turkey*, judgment of 2 September 1998, Reports 1998-IV, pp. 2439-2440, §§ 102-104; *Cakıcı v. Turkey* [GC], no. 23657/94, ECHR 1999-IV, §§ 80, 87 and 106; *Tanrikulu v. Turkey*, cited above, § 109; *Mahmut Kaya v. Turkey*, no. 22535/93, ECHR 2000-III, §§ 106-107). While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, for example, *Hugh Jordan v. the United Kingdom*, cited above, §§ 108, 136 140)."

2. In this framework, special attention should be paid to victims without it being necessary for them to have made a formal complaint.
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42. In the case *Finogenov v. Russia* of 4 June 2012, para. 270, the Court indicates that "To be "effective", an investigation should meet several basic requirements, formulated in the Court's case-law under Articles 2 and 3 of the Convention: it should be thorough (see *Assenov and Others v. Bulgaria*, 28 October 1998, §§ 103 et seq., Reports 1998-VIII; see also, *mutatis mutandis*, *Salman v. Turkey*, cited above, § 106, ECHR 2000-VII; *Tanrikulu v. Turkey* [GC], no. 23763/94, §§ 104 et seq., ECHR 1999-IV; and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000), expedient (see *Labita v. Italy* [GC], no. 26772/95, §§ 133 et seq., ECHR 2000-IV; *Timurtaş v. Turkey* cited above, § 89; *Tekin v. Turkey*, 9 June 1998, § 67,

Reports 1998-IV; and *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001), and independent (see *Öğür v. Turkey*, [GC], no. 21954/93, §§ 91-92, ECHR 1999-III; see also *Mehmet Emin Yüksel v. Turkey*, no. 40154/98, § 37, 20 July 2004; and *Güleç v. Turkey*, 27 July 1998, §§ 80-82, *Reports* 1998-IV); and the materials and conclusions of the investigation should be sufficiently accessible for the relatives of the victims (see *Oğur v. Turkey* [GC], no. 21594/93, § 92, ECHR 1999-III, and *Khadzhialiyev and Others v. Russia*, no. 3013/04, § 106, 6 November 2008), to the extent it does not seriously undermine its efficiency.”

43. The Court recognises that the close family of a deceased victim must be involved in the investigation to the extent necessary to safeguard his or her legitimate interests, failing which this investigation could not be considered “effective”. Thus, in the case *Slimani v. France* of 27 July 2004, para. 32 and 47 the Court indicates that: [The text of this judgment is available in French only] “32. (...) Dans le même type d'affaires, la Cour a souligné qu'il doit y avoir un élément suffisant de contrôle public de l'enquête ou de ses résultats pour garantir que les responsables aient à rendre des comptes, tant en pratique qu'en théorie. Elle a précisé que, si le degré de contrôle public requis peut varier d'une affaire à l'autre, les proches de la victime doivent, dans tous les cas, être associés à la procédure dans la mesure nécessaire à la sauvegarde de leurs intérêts légitimes (voir, notamment, l'arrêt *Hugh Jordan c. Royaume-Uni* du 4 mai 2001, no 24746/94, § 109 et les arrêts, précités, *McKerr*, § 115 et *Edwards*, § 73) ; elle estime qu'il doit en aller ainsi dès lorsqu'une personne décède entre les mains d'autorités.” “47. Il n'en reste pas moins que, comme la Cour l'a précédemment souligné, dans tous les cas où un détenu décède dans des conditions suspectes, l'article 2 met à la charge des autorités l'obligation de conduire d'office, dès que l'affaire est portée à leur attention, une « enquête officielle et effective » de nature à permettre d'établir les causes de la mort et d'identifier les éventuels responsables de celle-ci et d'aboutir à leur punition : les autorités ne sauraient laisser aux proches du défunt l'initiative de déposer une plainte formelle ou d'assumer la responsabilité d'une procédure d'enquête. Or à cela il faut ajouter qu'une telle enquête ne saurait être qualifiée d'« effective » que si, notamment, les proches de la victime sont impliqués dans la procédure de manière propre à permettre la sauvegarde de leurs intérêts légitimes (paragraphe 29-32 ci-dessus). Selon la Cour, exiger que les proches du défunt déposent une plainte avec constitution de partie civile pour pouvoir être impliqués dans la procédure d'enquête contredirait ces principes. Elle estime que, dès lors qu'elles ont connaissance d'un décès intervenu dans des conditions suspectes, les autorités doivent, d'office, mener une enquête, à laquelle les proches du défunt doivent, d'office également, être associés.”
44. In the case *McKerr v. United Kingdom* of 4 May 2001, para 148 and 159-160 the Court indicates that: “148. (...) The Court considers that the right of the family of the deceased whose death is under investigation to participate in the procee-

dings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events. The Court is not persuaded that the applicant's interests as next-of-kin were fairly or adequately protected in this respect." "159. (...) the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, the various procedures provide for the necessary safeguards in an accessible and effective manner. In the present case, the available procedures have not struck the right balance." "160. The Court would observe that the shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumour. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. A lack of such procedures will only add fuel to fears of sinister motivations, as is illustrated, inter alia, by the submissions made by the applicant concerning the alleged shoot-to-kill policy."

45. With regard to the European Union, Article 10, paragraph 1, of the Council Framework Decision of 13 June 2002 on combating terrorism specifies that: "Member States shall ensure that investigation into, or prosecution of, offences covered by this Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed on the territory of the Member State."

<ol style="list-style-type: none"> 3. States should ensure that their investigators receive specific victim-sensitive training on the needs of victims.
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46. With regard to the United Nations, the Good Practices of February 2016 state that: "States should ensure that investigators, prosecutors and any other professionals dealing with victims receive specific victim-sensitive training on the needs of victims, strategies for appropriately dealing with them and the need to prevent secondary victimisation."

<ol style="list-style-type: none"> 4. States should, in accordance with their national legislation, strive to bring individuals suspected of terrorist acts to justice and obtain a decision from a competent, independent and impartial tribunal within a reasonable time. 5. In cases where, as a result of an investigation, it is decided not to take action to prosecute a suspected perpetrator of a terrorist act, States should ensure that victims are able to ask for a review of this decision by a competent authority. 6. States should ensure that the position of victims is adequately recognised in criminal proceedings.

47. The Court recognises that victims should be taken into consideration in criminal proceedings, in addition to their right to bring civil proceedings in order to secure at least symbolic reparation or to protect a civil right. In the case *Perez v.*

France, 12 February 2004 (Grand Chamber), §§ 70-72 the Court indicates that: "70. The Court (...) notes that the Convention does not confer any right, as demanded by the applicant, to "private revenge" or to an *actio popularis*. Thus, the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently: it must be indissociable from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a "good reputation" (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p.13, § 27; *Helmers*, cited above, p. 14, § 27; and *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, p. 78, § 58)." "72. (In addition, the Court notes) the need to safeguard victims' rights and their proper place in criminal proceedings. Simply because the requirements inherent in the concept of a "fair trial" are not necessarily the same in disputes about civil rights and obligations as they are in cases involving criminal trials, as evidenced by the fact that for civil disputes there are no detailed provisions similar to those in Article 6 §§ 2 and 3 (see *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, p. 19, § 32) does not mean that the Court can ignore the plight of victims and downgrade their rights. [...] Lastly, the Court draws attention for information to the text of Recommendations R (83) 7, R (85) 11 and R (87) 21 of the Committee of Ministers (see paragraphs 26-28 above), which clearly specify the rights which victims may assert in the context of criminal law and procedure."

48. As indicated above by the Court, Recommendations Nos. R (83) 7, R (85) 11 and R (87) 21 of the Committee of Ministers recognise a number of rights that victims may claim under criminal law and in criminal proceedings. In particular, paragraph 29 of Recommendation No R (83) 7 of the Committee of Ministers to member States on participation of the public in crime policy provides that the governments of member States should assist victims by "establishing an efficient system of legal aid for victims so that they may have access to justice in all circumstances". Furthermore, paragraph 4 of Recommendation No. R (87) 21 of the Committee of Ministers to member States on assistance to victims and the prevention of victimisation states that the governments of member States "ensure that victims and their families, especially those who are most vulnerable, receive in particular (...) assistance during the criminal process, with due respect to the defence".
49. Article 6 (Specific assistance to the victim) of the Council of the European Union Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) specifies: "Each Member State shall ensure that victims have access to advice as referred to in Article 4(1)(f)(iii), provided free of charge where warranted, concerning their role in the proceedings and, where appropriate, legal aid as referred to in Article 4(1)(f)(ii), when it is possible for them to have the status of parties to criminal proceedings".

50. Paragraph 6 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted on 29 November 1985 by the General Assembly of the United Nations (A/RES/40/34) mentions that: “The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.”
51. Finally, with regard to the United Nations, the Good Practices of February 2016 state that: “States should ensure that prosecutors trained in dealing with victims of terrorism are included in multidisciplinary teams, in which all members have been vetted for security purposes, to work with investigators, in order to increase the likelihood of successful prosecution outcomes and improved outcomes for victims.”
52. Inspired by the Guidance document related to the transposition and implementation of directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, the Good Practices of February 2016 also state that: “States should develop a procedure in their own national laws or criminal procedural codes whereby victims are entitled to ask for a review of a decision not to prosecute.”

VII. Effective access to the law and to justice

States must provide effective access to the law and to justice for victims of terrorist acts by providing the right of access to competent courts in order to bring a civil action in support of their rights, including legal assistance and interpretation as required to this end.

53. The expression “effective access to the law and to justice” has been taken from Recommendation No. R (93) 1 of the Committee of Ministers to member States on effective access to the law and to justice for the very poor. Principles laid down in Recommendation No. R (81) 7 of the Committee of Ministers on measures facilitating access to justice are applicable, *mutatis mutandis*, to victims of terrorist acts and should be implemented by all member States.

54. It is worth mentioning Paragraph 6 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (A/RES/40/34) adopted on 29 November 1985 by the General Assembly of the United Nations, which states that: “6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; (b) allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (c) providing proper assistance to victims throughout the legal process; (d) taking measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; (e) avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.”
55. Finally, with regard to the United Nations, the Good Practices of February 2016 state that: “States should ensure that victims are promptly informed of their right to access to justice, the avenues available to them and related services (e.g., interpretation, legal advice). Such services should be provided at no cost to the victim. Where necessary, States should provide interpretation of court proceedings at no cost to victims or their next of kin. Victims of their next of kin should be provided with legal aid at no cost to facilitate their representation in court proceedings.”

VIII. Compensation

1. Victims should receive fair, appropriate and timely compensation for the damages which they suffered. When compensation is not available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State on the territory of which the terrorist act happened should contribute to the compensation of victims for direct physical or psychological harm, irrespective of their nationality. To this end States could consider the creation of specific funds, if they do not already exist.
56. Guideline No. XVII of July 2002 (Compensation for victims of terrorist acts) recalls that: “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.”
 57. Resolution 2002/35 of the United Nations Commission on Human Rights entitled Human rights and terrorism “welcomes the report of the Secretary-General (A/56/190), and invites him to continue to seek the views of Member States on the

implications of terrorism in all its forms and manifestations for the full enjoyment of all human rights and fundamental freedoms and on how the needs and concerns of victims of terrorism might be addressed, including through the possible establishment of a voluntary fund for the victims of terrorism, as well as on ways and means to rehabilitate the victims of terrorism and to reintegrate them into society, with a view to incorporating his findings in his reports to the Commission and the General Assembly”.

58. Moreover, in its resolution 1566(2004) adopted at its 5053rd meeting on 8 October 2004, the United Nations Security Council “10. Requests further the working group, established under paragraph 9 to consider the possibility of establishing an international fund to compensate victims of terrorist acts and their families, which might be financed through voluntary contributions, which could consist in part of assets seized from terrorist organizations, their members and sponsors, and submit its recommendations to the Council”.
59. Finally, with regard to compensation, it is useful to recall Article 75 of the Statute of the International Criminal Court: “(1) The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. (2) The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79. (3) Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States. (4) In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1. (5) A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article. (6) Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.”

2. Compensation should be easily accessible to victims, irrespective of nationality. To this end, the State on the territory of which the terrorist act took place should introduce a mechanism allowing for fair and appropriate compensation, after a simple procedure and within a reasonable time.
3. States whose nationals are victims of a terrorist act on the territory of another State should also encourage administrative co-operation with the competent authorities of that State to facilitate access to compensation for their nationals.
4. Apart from the payment of pecuniary compensation, States are encouraged to consider, depending on the circumstances, taking other measures to mitigate the harmful consequences of the terrorist act suffered by the victims.

60. Paragraph 11 of the European Union Council Directive 2004/80/CE of 29 April 2004 relating to compensation to crime victims states that: “A system of co-operation between authorities of the Member States should be introduced to facilitate access to compensation in cases where the crime was committed in a Member State other than that of the victim’s residence”.
61. With regard to the United Nations, the Good Practices of February 2016 state that “States should consider establishing national victims’ funds, resourced by proceeds derived from assets seized in accordance with legislative provisions from persons convicted of serious crimes related to terrorism or legal entities that have been restrained and forfeited, having been found civilly liable for financing terrorist activities” and that “States should consider other means of resourcing a publicly administered fund for victims of terrorism (e.g., levies on life insurance policies or fines assessed or imposed by the courts when sentencing for criminal convictions).”

IX. Protection of private and family life

1. States should take appropriate steps to avoid as far as possible undermining respect for the private and family life of victims, in particular when carrying out investigations or providing assistance after the terrorist act as well as within the framework of proceedings initiated by victims.
62. Paragraph 8 of Recommendation No. R (85) 11 of the Committee of Ministers to member States on the position of the victim in the framework of criminal law and procedure specifies that “at all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity.”
 63. Paragraph 9 of Recommendation No. R (87) 21 of the Committee of Ministers to member States on assistance to victims and the prevention of victimisation calls on the governments of member States to “take steps to prevent victim assistance services from disclosing personal information regarding victims, without their consent, to third parties”.

64. In the context of the United Nations, paragraph 6, d) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted on 29 November 1985 by the General Assembly (A/RES/40/34) states that: “The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (. . .) (d) Taking measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;”

2. States should, where appropriate, and in full compliance with the principle of freedom of expression, encourage the media and journalists to adopt self-regulatory measures in order to ensure the protection of the private and family life of victims in the framework of their information and awareness-raising activities.
3. States must ensure that victims have an effective remedy where they raise an arguable claim that their right to respect for their private and family life has been violated.

65. Recommendation No. (97) 19 of the Committee of Ministers to member States on the portrayal of violence in the electronic media and Recommendation No. (99) 5 on the protection of privacy on the Internet should be mentioned in this context.

66. With regard to the United Nations, the Good Practices of February 2016 state that “States should encourage the media to adopt self-regulatory measures to ensure victim-sensitive coverage (e.g., media guidelines or standards developed by the industry in consultation with the Government, civil society and victim support professionals).”

X. Protection of dignity and security

1. At all stages of the proceedings, victims should be treated in a manner which gives due consideration to their personal situation, their rights and their dignity.

67. The first paragraph is partly inspired by paragraph 8 of Recommendation No. R (85) 11 of the Committee of Ministers to member States on the position of the victim in the framework of criminal law and procedure which specifies that “at all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity.”

2. States must ensure the protection and security of victims and take measures, where appropriate, to protect their identity, in particular where they appear as witnesses.

68. Paragraph 6, d) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted on 29 November 1985 by the General Assembly of the United Nations (A/RES/40/34) states that: “The responsiveness

of judicial and administrative processes to the needs of victims should be facilitated by: (...) (d) Taking measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;”

XI. Specific training for persons working with victims

States should encourage specific training for persons working with victims, and grant the necessary resources to that effect.

69. Paragraph 11 of the preamble of the Council of the European Union Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) provides that “suitable and adequate training should be given to persons coming into contact with victims, as this is essential both for victims and for achieving the purposes of proceedings”. Article 14 (Training for personnel involved in proceedings or otherwise in contact with victims) of this same framework decision specifies: “(1) Through its public services or by funding victim support organisations, each Member State shall encourage initiatives enabling personnel involved in proceedings or otherwise in contact with victims to receive suitable training with particular reference to the needs of the most vulnerable groups. (2) Paragraph 1 shall apply in particular to police officers and legal practitioners.”
70. Paragraph 16 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted on 29 November 1985 by the General Assembly of the United Nations (A/RES/40/34) states that: “Police, justice, health, social service and other personnel concerned should receive training to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid.”

XII. Raising public awareness and involving victims

States are encouraged to:

- a. take measures, in an appropriate way, in order to attain societal recognition and remembrance of victims;
 - b. facilitate the involvement of representatives of the victims of terrorist acts in raising public awareness.
71. Some member States have put in place the following specific structures (1) while fully complying with the principle of freedom of expression, encourage the media and journalists to contribute to such recognition; (2) involve the media and journalists in specific tasks aimed at raising awareness of the vulnerability of victims, their needs and the potential risk of secondary victimisation; (3) consider measures ensuring that educational programmes, in particular, those in the secondary education, contribute to the societal recognition of victims, by the dissemination of factual information on their situation and, when appropriate,

by giving to victims who so wish the possibility to testify; (4) recognise publicly the suffering of victims and pay them public tribute through *inter alia* (a) the presentation of an award; (b) the erection of a public memorial ; c) the establishment of foundations aiming at commemorating the memory of victims by enabling an awareness-raising of various sectors of society through conferences, exhibitions or any other appropriate means enabling the awareness-raising of the public opinion.

72. With regard to the United Nations, the Good Practices of February 2016 state that: “States should involve the media in other specific tasks aimed at raising awareness of the vulnerability of victims, their needs and the potential risk of secondary victimisation. States should ensure that victims are provided with information when dealing with the media.

XIII. Co-operation with civil society

States are encouraged to co-operate with and facilitate as much as possible the actions of civil society representatives, and especially those of the associations for the protection of victims.

73. With regard to the United Nations, the Good Practices of February 2016 state that: “States should promote and support civil society and non-governmental organizations involved in providing support to victims of terrorism within the criminal justice system.”
74. The Good Practices of February 2016 state also that: “States should work closely with civil society organisations, including recognised and active non-governmental organisations working with victims of crime, in particular in policymaking initiatives, information and awareness-raising campaigns, research and education programmes, and training, as well as in monitoring and evaluating the impact of measures to support and protect victims of terrorism.” Finally, they specify that “States should support the actions of victims’ associations and civil society to highlight the human cost of terrorism, for example through public displays.”

XIV. Increased protection

Nothing in these Guidelines prevents States from providing services and adopting measures more favourable than those described in these Guidelines.

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 re-questing 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.^{2, 3} 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.⁴

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2. 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.
 3. 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.
 4. See below, p. 16.

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”.⁵

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”.⁶

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

5. *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.

6. *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.

subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public'.⁷

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.

7. Recommendation 1426 (1999), European democracies facing up to terrorism (23 September 1999), para. 5.

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”.⁸

- [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 [...]”.

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

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

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

[f] Reaffirming the imperative duty of States to protect 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 [...]”.⁹

[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,¹⁰ 1202 (1993)

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9. Interim resolution DH (99) 434, Human Rights action of the security forces in Turkey: Measures of a general character.
 10. 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 multi-lateral 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.

Religious tolerance in a democratic society,¹¹ 1396 (1999) Religion and democracy,¹² 1426 (1999) European democracies facing terrorism,¹³ as well as its Resolution 1258 (2001), Democracies facing terrorism.¹⁴ 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.¹⁵

[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.

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11. 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.
 12. 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.
 13. 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).
 14. 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).
 15. 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.

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 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).”¹⁶

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 punish-

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

ment. 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). The nature of the offence allegedly committed by the applicant was therefore irrelevant for the purposes of Article 3.”¹⁷

“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.”¹⁸

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.”¹⁹

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:

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17. *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.
 18. *Tomasi v. France*, 27 August 1992, para. 115. See also *Ribitsch v. Austria*, 4 December 1995, para. 38.
 19. *Chahal v. the United Kingdom*, 15 November 1996, para. 79; see also *V. v. the United Kingdom*, 16 December 1999, para. 69.

“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 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”.²⁰

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.”²¹

With regard to tapping, it must 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:

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

21. *Klass and Others v. Germany*, 6 September 1978, Series A No. 28, para. 48.

“tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a ‘law’ that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated (see the above-mentioned *Kruslin and Huvig* judgments, p. 23, para. 33, and p. 55, para. 32, respectively)”.²²

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).”²³

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.”²⁴

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22. *Kopp v. Switzerland*, 25 March 1998, para. 72. See also *Huvig v. France*, 24 April 1990, paras. 34-35.
 23. *Murray v. the United Kingdom*, 28 October 1994, para. 58.
 24. *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.

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.

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.”²⁵

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

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| 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. |

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.”²⁶

“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.”²⁷

“The Court recalls its decision in the case of *Brogan and Others v. the United Kingdom* (judgment of 29 November 1988, Series A No. 145-B, p. 33, para. 62), that a period of detention without judicial control of four days and six hours fell outside the strict constraints as to time permitted by Article 5 para. 3. It clearly follows that the period of fourteen or more days during which Mr Aksoy was detained without being brought before a judge or other judicial officer did not satisfy the requirement of ‘promptness’.”²⁸

26. *Brogan and Others v. the United Kingdom*, 29 November 1998, Series A No. 145-B, para. 61.

27. *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.

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

“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 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).²⁹

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 criteria 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

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

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 ‘impartiality 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, *mutatis mutandis*, the *Gautrin and Others v. France* judgment of 20 May 1998, Reports 1998-III, pp. 1030-31, para. 58).³⁰

“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.”³¹

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.

30. *Incal v. Turkey*, 9 June 1998, para. 65.

31. *Incal v. Turkey*, 9 June 1998, paras. 70-72.

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”.³²

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

“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”.³³

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.³⁴ 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”³⁵

32. *Alenet de Ribemont v. France*, 10 February 1995, para. 36.

33. *Id.*, para. 41.

34. 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.

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

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*).”³⁶

The case-law of the Court insists upon the compensatory mechanisms to avoid that measures taken in the fight against terrorism do not take away the substance of the right to a fair trial.³⁷ 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

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

37. 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.

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 adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused."³⁸

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.

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)."³⁹

"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.

38. *Rowe and Davies v. the United Kingdom*, 16 February 2000, paras. 60-62.

39. *Ecer and Zeyrek v. Turkey*, 27 February 2001, para. 29.

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).⁴⁰

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."⁴¹

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

2. The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to:
 - (i) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client;

40. *Baskaya and Okçuoglu v. Turkey*, 8 July 1999, para. 36.

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

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

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 exceptionnels 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 pièces 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 n° 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."⁴³

- (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,

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

"It must be recalled that the Convention does not grant prisoners the right to choose the place of detention and that the separation from their family are inevitable consequences of their detention".⁴⁴

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)."⁴⁵

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".

43. *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.

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

45. *Campbell v. the United Kingdom*, 25 March 1992, Series A No. 233, para. 44.

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

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

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

“F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations”.

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)”⁴⁶.

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

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.⁴⁷ Accordingly, even if the judgment does not say *expressis verbis* that such an extradition is prohibited, this prohibition is drawn from the fact that the waiting for the execution of the sentence by the condemned person (“death row”) constitutes an inhuman treatment, according to Article 3 of the Convention. It must also be recalled that the present tendency in Europe is towards the general abolition of the death penalty, in all circumstances (see guideline X, 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 page 45 “IV. Absolute prohibition of torture”.

47. See *Soering v. the United Kingdom*, 7 July 1989, Series A No. 161.

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.”⁴⁸

Article 5 of the European Convention for the suppression of terrorism⁴⁹ 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:

“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 she 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.”⁵⁰

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48. *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.

49. ETS No. 90, 27 January 1977.
50. Emphasis added.

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)”⁵¹.

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.

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.”

51. *Einhorn v. France*, 16 October 2001, para. 27.

The confiscation of property following a condemnation for criminal activity has been admitted by the Court.⁵²

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”.⁵³

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

“It is not the Court’s role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other (see the above-mentioned *Ireland v. the United Kingdom* judgment, Series A No. 25, p. 82, para. 214, and the *Klass and Others v. Germany* judgment of 6 September 1978, Series A No. 28, p. 23, para. 49)”.⁵⁴

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”.

52. See *Phillips v. the United Kingdom*, 5 July 2001, in particular paras. 35 and 53.

53. See *Lawless v. Ireland*, Series A No. 3, 1 July 1961.

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

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 [...]”⁵⁵

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”.⁵⁶

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 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

55. *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.

56. *Lawless v. Ireland*, 1 July 1961, A No. 3, para. 22.

(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.⁵⁷

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,⁵⁸ but thirty days seems to be too long.⁵⁹

General comment No. 29 of the UN Human Rights Committee⁶⁰ 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.

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;

57. *Brannigan and Mc Bride v. the United Kingdom*, 26 May 1993, para. 43.

58. See *Brannigan and McBride v. the United Kingdom*, 26 May 1993, paras. 58-60.

59. See *Aksoy v. Turkey*, 18 December 1996, paras. 71-84.

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

- 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,

Proceedings of the High Level Seminar “Protecting human rights while fighting terrorism”

(Strasbourg, 13-14 June 2005)

Opening Session

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 has often 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.⁶¹

61. 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.

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 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 there-

fore 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 envi-

saged 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 Kingdom⁶² 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.

62. 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>).

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 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 arrangements 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 guarantees “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 "Terrorism: 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 (Rapaciuolo 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 (Ikincisooy 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.

Lacunae

- 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 moni-

toring 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 encompass 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 Britain 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.⁶³

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.⁶⁴

63. 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).

64. Commissioner’s Opinion on the draft Convention on the prevention of terrorism (CommDH(2005)1).

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.⁶⁵

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.⁶⁶

65. 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).

66. 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).

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. 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.⁶⁷

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.⁶⁸

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.⁶⁹

67. Reports on the Commissioner's visits to the United Kingdom (CommDH(2005)6) and the Russian Federation (CommDH(2005)2).

68. Reports on the Commissioner's visits to Sweden (CommDH(2004)13) and Luxembourg (CommDH(2004)11).

69. 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.⁷⁰

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.⁷¹

70. Commissioner's Opinion on the draft Convention on the prevention of terrorism (CommDH(2005)1).

71. 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 ECourHR 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 ECourHR (*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 ECourHR (*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 ECtHR 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 Guidelines, 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 BATISTIĆ 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 ŠIMONOVIĆ 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

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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

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

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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

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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

Mr Skirgaile ŽALIMIENĖ, Deputy Director General, European Law Department under the Ministry of Justice

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Mr Zdzislaw GALICKI, Professor, Ministry of the Interior

Ms Paulina PIASECKA, Expert in the Unit for Terrorism Matters, Ministry of Interior and Administration

Portugal

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M. Joaquim DUARTE, Président des Délégués des Ministres du Conseil de l'Europe, Représentant Permanent du Portugal auprès du Conseil de l'Europe

M. António FIGUEIRA, Adjoint au Représentant Permanent, Mission du Portugal auprès du Conseil de l'Europe

Romania

Mr Danes NARCISA, Prosecutor

Russian Federation

Mr Yury BERESTNEV, Senior legal Adviser, Administration of the President of the Russian Federation

M. Vladislav ERMAKOV, Conseiller du Département de la coopération humanitaire et des droits de l'homme, Ministère des affaires étrangères

M^{me} Veronika MILINCHUK, Adjoint du Chef de la Direction du Parquet Général, Parquet Général de la Fédération de Russie

Mr Vladimir PARSHIKOV, Director, Department of Humanitarian Cooperation and Human Rights, Ministry of Foreign Affairs

Ms Sofia ZAKHAROVA, Attaché of the Department on New Challenges and Threats, Ministry of Foreign Affairs

San Marino

Apologised

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Ms Dusanka DIVJAK-TOMIĆ, Minister Counsellor, Permanent Representation of Serbia and Montenegro to the Council of Europe

Mr Zoran JANKOVIĆ, Minister Counsellor, Permanent Representation of Serbia and Montenegro to the Council of Europe

Mr Zeljko TOMOVIĆ, Adviser to the Minister, Ministry of Justice of Montenegro

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Slovak Republic

Mr Martin BARTON, Expert, Ministry of Foreign Affairs

Mr Igor GREXA, Legal Adviser, Ministry of Foreign Affairs

Slovenia

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Mr Antonio VERCHER NOGUERA, Public prosecutor, Supreme Court

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Ms Inger KALMERBORN, Senior Legal Advisor, Government Agent, Ministry for Foreign Affairs

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Mr Trpe STOJANOVSKI, Ministry of the Interior

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Ms Didem AKPAK, Legal expert in the Ministry of Foreign Affairs, Deputy Directorate General for Council of Europe and Human Rights

Ms Ülkü GÜLER, Rapporteur judge in the Ministry of Justice

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

Mr Yavuz ÖZDEMİR, Security director in the Ministry of Interior

Ukraine

M. Valerii DEMIANETS, Conseiller de la Direction des nouveaux défis et menaces, Ministère des affaires étrangères

Mr Viacheslav YATSIUK, Deputy Head, Foreign Policy Directorate, Administration of the President of Ukraine

United Kingdom

Mr Ravdeep PABLA, Home Office

Mr Greg PURSER, Detective Chief Inspector, Metropolitan Police

Dr Jill TAN, Home Office

Mr Derek WALTON, Legal Counsellor, Foreign and Commonwealth Office

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Holy See

R.P. Bernard BOUJON , s.j.

United States of America

Mr Christopher DAVIS, U.S. Consul General, Deputy Permanent Observer to the Council of Europe, U.S. Consulate General

Ms Kari JOHNSTONE, Foreign Affairs Officer, Bureau of Democracy, Human Rights and Labor, U.S. Department of State

Ms Cassandra LOVEJOY, Intern, U.S. Consulate General

Canada

Apologised

Japan

M. Naoyuki IWAI, Consul, Attorney, Consulat Général du Japon

M^{me} Françoise Nadia RICHER, assistante, Consulat Général du Japon

Mexico

M^{me} Ana Rocío ARIZMENDI, Adjoint à l'Observateur Permanent

Republic of Belarus

Mr Valery KAVALEUSKI, Counsellor, Division for Human Rights, Department for Humanitarian Cooperation and Human Rights, Ministry of Foreign Affairs

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Mrs Lindsay YOUNGS, Assistante administrative principale, Division Médias

Secretariat of the Seminar

(see below)

Committee of Experts on Terrorism (CODEXTER)

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European Commission against Racism and Intolerance (ECRI)

M^{me} Işıl GACHET, Secrétaire Exécutive

European Commission for the Efficiency of Justice (CEPEJ)

M. Stéphane LEYENBERGER, Secrétaire de la CEPEJ

M. Mario REMUS, Membre, représentant de la CEPEJ au CODEXTER

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M. Marc NEVE, 2e Vice-Président

European Committee on Crime Problems (CDPC)

Mr Branislav BOHÁČIK, Director, Division for Judicial Co-operation in Criminal Matters, Ministry of Justice of the Slovak Republic

OTHER INTERNATIONAL ORGANISATIONS

United Nations Counter-Terrorism Committee (CTC)

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Mr Javier RUPEREZ, Executive Director of the UN Security Council Counter-Terrorism Committee

United Nations Sub-Commission on the Promotion and Protection of Human Rights

Mrs Kalliopi KOUFA, University Professor / Director, Institute of Public International Law and International Relations

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Office for Democratic Institutions and Human Rights (ODIHR-OSCE)

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European Commission

Ms Kararzyna GRZYBOWSKA-CUADRAT, DG Justice, Freedom and Security

NON-GOVERNMENTAL ORGANISATIONS (NGOs) AND CIVIL SOCIETY

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Ms Jill HEINE, Legal Adviser, International Secretariat

Ms Halya KOWALSKY GOWAN, Deputy Director of Amnesty International's Europe and Central Asia program

Belgrade Center for Human Rights

Prof. Vojin DIMITRIJEVIC

International Commission of Jurists (ICJ)

Mr Gerald STABEROCK, Director of the Global Security and Rule of Law Programme

European Group of National Institutions on Promotion and Protection of Human Rights

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International Antiterrorism Unity (IAU)

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Ms Caroline FOSTER, Trainee

Ms Marina ZAKHAROVA, Trainee

Mr Paul HARVEY, Trainee

The effects of terrorism on the victims and their close family members require national implementation of an efficient protection policy, financial assistance and compensation for victims, including, in an appropriate manner, the societal recognition of the suffering of victims alongside a duty to remember. Bearing this objective in mind, the Committee of Ministers of the Council of Europe adopted, on 19 May 2017, its revised Guidelines on the protection of victims of terrorist acts. They appear in this publication together with the Guidelines on human rights and the fight against terrorism (11 July 2002) as well as the proceedings of the High-Level Seminar on this issue, organised by the Council of Europe (13-14 June 2005).

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