

# Report

## Analysis Report

### Counter-Terrorism versus Human Rights: The Key to Compatibility

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*"We should all be clear that there is no trade-off  
between effective action against terrorism and the protection of human rights.  
On the contrary, I believe that, in the long term, we shall find that human rights,  
along with democracy and social justice, are one of the best prophylactics against terrorism."*

Kofi Annan, Secretary-General of the United Nations,  
Speech to the members of the Security Council on 18 January 2002

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### INTRODUCTION

The problem of terrorism is unfortunately not a new one.<sup>1</sup> But for some years now the terrorist threat has increased and spread throughout the world. Although the terrorist attacks of 11 September 2002 against the United States in Pennsylvania, the World Trade Center in New York and the Pentagon in Virginia are striking because of the horrifying number of their victims (3,000 people), they are however all the more remarkable on account of the unprecedented series of anti-terrorist measures they unleashed.<sup>2</sup>

As the go-between for the 191 Member States of the United Nations, on 28 September 2001 the Security Council reacted first by adopting Resolution 1373 which established the basic principles for combating terrorism. In the months that followed, the passing of anti-terrorist laws spread throughout the world like wildfire: on 26 October 2001 the United States passed the *Patriot Act*;<sup>3</sup> on 14 December, the United Kingdom passed the *Anti-terrorism, Crime and Security Act*; the *Anti-terrorism Act* (Bill C-36) entered into force at the same time in Canada... However, although at national level and following Resolution 1373, many States passed or announced measures to combat terrorism, some of these measures or initiatives became, and still are, a cause for concern to the international bodies and mechanisms for protecting human rights both globally and at regional and national level.

At a time when the President of the United States, George W. Bush, attempted to prevent the passing of a law prohibiting recourse to cruel, inhuman and degrading treatment against suspected terrorists, when people were being regularly transferred for interrogation to countries known to practise torture systematically during interrogations and when

suspected perpetrators of terrorist acts are more and more frequently tried according to exceptional proceedings, it is more necessary than ever to take stock of the key to compatibility between human rights and anti-terrorist measures.

With regard to these abuses, Ms Kalliopi K. Koufa, Special Rapporteur on terrorism and human rights,<sup>4</sup> quite rightly wrote that, “[Since] the events of 11 September 2001, acts of terrorism throughout the world have escalated, especially related to a number of other crisis situations in [various] ‘hot spots’. Responses to terrorism have themselves been dramatic, sometimes undertaken with a sense of panic or emergency. In fact, there still exists a tone of ‘close-to-panic’ reaction in much of the political and legal activity relating to terrorism ... And ‘close-to-panic’ reactions may have serious implications for international and human rights law, as well as humanitarian law.”<sup>5</sup>

One of the aims of this report is to analyse attacks on international human rights law<sup>6</sup> that have been brought about by the various measures taken to combat terrorism. At its sixtieth session in March 2004, the United Nations Commission on Human Rights decided to nominate an independent expert who would report to the High Commissioner for Human Rights on the compatibility of the demands of the international law on human rights with those of the measures for combating terrorism. This was partly to respond to the demand of several non-governmental organisations for the protection of human rights, including the International Federation for Human Rights (FIDH). In March 2005, at its sixty-first session, the United Nations Human Rights Commission decided to go further and to create the post of Special Rapporteur on the

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1. See the website for “UN Action against terrorism”: <http://www.un.org/terrorism/>. For references to Internet sites containing chronologies and lists of countries affected by terrorist attacks and the number of deaths caused by them, see also: <http://www.un.org/depts/dhl/resources/terrorism/elinks.htm>

2. For a list of international and regional legal instruments relating to the suppression of terrorism see: <http://www.fidh.org/IMG/pdf/terroinstru11f.pdf>

3. The full heading is “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.”

4. Ms Kalliopi K. Koufa is the UN Special Rapporteur on Terrorism and Human Rights for the Sub-Commission on the Promotion and Protection of Human Rights.

5. UN Documents E/CN.4/Sub.2/2002/35, of 17 July 2002, paragraph 59.

6. International human rights law is defined as a set of international rules established by treaty or custom creating rights inherent in every person as a consequence of being human. Apart from the substantive provisions of the Universal Declaration of Human Rights (1948), the principal conventional sources of the international law of human rights are the Convention Relating to the Status of Refugees (1951), the International Covenants on Economic, Social and Cultural Rights (1966) and on Civil and Political Rights (1966), as well as the Conventions on Genocide (1948), the Elimination of Racial Discrimination (1965), Discrimination Against Women (1979), Torture (1984), the Rights of the Child (1989), on the Protection of the Rights of Migrant Workers and Members of their Family (1990). The principal regional instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Declaration of the Rights and Duties of Man (1948), the American Convention on Human Rights (1969), and the African Charter of Human and Peoples’ Rights (1981).

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promotion and protection of human rights and fundamental freedoms in the fight against terrorism. This post, which replaced that of the independent expert, has been given a wider mandate enabling recommendations to be made directly to the States that violate human rights in the name of the fight against terrorism.

At the thirty-fifth Congress of the FIDH, that took place in Quito also in March 2004, the Federation wished in particular to contribute to the work of the post that the Commission was to appoint; this is why it was decided to draw up this report on human rights and the measures for combating terrorism.

In producing this document, the FIDH wishes to draw attention to the dangers that anti-terrorist laws and practices are bringing to bear on the observance of fundamental rights.<sup>7</sup> Knowledge of these dangers is of immediate interest to all recipients of this report, who are involved in one way or another in promoting, drafting, passing and monitoring these laws. It is vital that, if the work of all those involved is to be as effective as possible, they understand fully the range of problems posed by these measures. This means understanding and being able to anticipate the most serious effects that these measures have on the observance of fundamental rights that are universally recognised and have been asserted time and again by the whole of the international community since the adoption of the Universal Declaration of Human Rights in 1948. Kofi Annan, the Secretary-General of the United Nations, emphasised to the members of the Security Council in January 2002 that anti-terrorist laws must be compatible with human rights and democratic principles if the fight against other acts of terrorism is to succeed.

Above all, demonstrating this compatibility is one of the main aims of this report which is not simply a formal denunciation; on the contrary, it offers key structuring for reconciling two spheres that have all the means of complementing each other without losing their respective efficiency. Indeed, respect for human rights and the fight against terrorism are compatible. The antagonistic approach towards them is in practice damaging both to the fight against terrorism and to the respect of

fundamental freedoms, and it must be stopped. It is therefore in the interest of all those involved in the fight against terrorism to understand what this key structuring is that should lead to the satisfaction of aims and the respect of all the principles at stake.

Far from being an obstacle, the demand that counter-terrorism measures are respectful of fundamental rights will result in greater admissibility and efficiency. Whether it be for political, religious or social motives, terrorism results in, and some-times is ultimately aimed at, annihilating the principles of democracy, freedom and humanity. A departure from these values in the fight against those whose sole aim is to destroy them, amounts to helping those people and backing them in their aversion to the universal standards on the basis of which our societies, whether global, regional, national or local, are organised. In the words of the President of the European Committee for the Prevention of Torture and Cruel, Inhuman or Degrading Punishment or Treatment: *"this would be to sink to the level of the terrorist and could only undermine the foundations of our democratic societies. Civilised nations must avoid the trap of abandoning civilised values."*<sup>8</sup>

This report begins with an introduction concerning a controversial question: whether we can really speak of "war" against terror, which would involve the application of the law of armed conflicts. If the answer is no, we are reminded of the danger of such a description as regards the respect of human rights. Next, in part one, we shall show that key structuring exists to ensure that respect for fundamental rights is compatible with the fight against terrorism. For this, it is essential to distinguish *derogations* from *limitations* to these fundamental rights and to explain to what extent international treaties and international jurisprudence recognise them. In part two, after raising the problem posed by the absence of a definition of terrorism with regard to the principle of legality, we shall analyse the legal categories that are especially threatened by the various anti-terrorist measures as well as the precise instances where a specific exception to or limitation of each of these rights may be allowed or prohibited, namely: the right to life and the problems connected with arrest and detention;

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7. See in particular earlier publications of the FIDH on this subject: "Les autorités marocaines à l'épreuve du terrorisme : la tentation de l'arbitraire", February 2004, [http://www.fidh.org/article.php3?id\\_article=512](http://www.fidh.org/article.php3?id_article=512); Report by the FIDH, "Post September 11 era and subsequent attempts to suspend human rights and international humanitarian law in the South and East of the Mediterranean," April 2004, [http://www.fidh.org/article.php3?id\\_article=1134](http://www.fidh.org/article.php3?id_article=1134); Report by the FIDH, "IN MALA FIDE: Freedoms of expression, association and assembly in Pakistan," January 2005, [http://www.fidh.org/article.php3?id\\_article=2178](http://www.fidh.org/article.php3?id_article=2178); Report by the FIDH, "Malaysia, 'The Boa Constrictor': Silencing Human Rights Defenders," April 2003, [http://www.fidh.org/article.php3?id\\_article=122](http://www.fidh.org/article.php3?id_article=122); Report by the FIDH, "Colombia: La 'Seguridad Democrática': Desconoce los derechos humanos y socava las bases del Estado de Derecho," May 2004, [http://www.fidh.org/article.php3?id\\_article=2216](http://www.fidh.org/article.php3?id_article=2216).

8. Statement by the President of the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment (CPT) to the Ministers' Deputies on 4 October 2001, Council of Europe Document CPT/Inf (2001) 24 [FR].

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the right to a fair trial; guarantees on the respect for privacy; freedoms of expression and of assembly; the right to private property; and finally, problems relating to the rights of migrants, refugees and to extradition. For reasons of clarity, we have

concentrated on these essential categories. However, although the question of discrimination is not dealt with in a specific section, its presence is nonetheless always in the background.

## **Introduction: The Concept of the “War on Terror” and the Distinction between International Humanitarian Law and International Human Rights Law**

Whether the fight against terrorism is pursued in the context of an armed conflict or in peacetime, or whether it is waged against armed forces or civilians, the role of international law is to guarantee the enjoyment of a minimum of fundamental rights that may only be departed from, if need be, in a defined context and that are known to everyone involved in this “crusade” against terrorism. These fundamental rights, depending on the circumstances, fall within the scope of international humanitarian law, international human rights law or a mixture of both.

### **1. Does International Humanitarian Law Apply to the “War on Terror”?**

Given the constant use of the metaphor “war on terror” to describe the fight against terrorism, it is essential to get to the bottom of what this expression entails. According to the definition given to it by the International Committee of the Red Cross, “International humanitarian law is the branch of international law that applies when a situation of armed violence degenerates into an international or non-international armed conflict.” [free translation]<sup>9</sup> Therefore, terrorism and consequently the fight against terrorism are only governed by international humanitarian law, by its nature a *lex specialis*, when such activities reach the level of an armed conflict and only in this case. It should be explained that such circumstances do not necessarily mean that international human rights law is suspended since it applies without distinction in wartime as in peacetime. Given the nature of the situations for which it has been created, international humanitarian law sometimes has a direct influence on assessing the requirements of international human rights law. As soon as it is called upon, there are repercussions.

With regard to the foregoing, the first question to be asked is whether the “war on terror” is really a war, that is to say an armed conflict in the legal sense of the term. According to humanitarian law, a fundamental element of the concept of armed conflict is the existence of warring “parties.” In an international armed conflict, the parties to the conflict are two or more States (or States and national liberation movements), whilst in a non-international armed conflict, the parties may be either a State and armed groups (for example, rebel forces), or simply armed groups. In both cases, the parties to an armed conflict have a military training as well as a more or less structured organisation and command. They are supposed to be able to respect and make others respect humanitarian law.

The war engaged by the coalition led by the United States in Afghanistan in October 2001 was clearly a war in the original meaning of the term. As the ICRC, the official guardian of the Geneva Conventions, explains: “*the Geneva Conventions of 1949 and the rules of customary international law were in all respects applicable to this international armed conflict between, on the one hand, the coalition led by the United States and on the other, Afghanistan.*” [free translation]<sup>10</sup> Moreover, this viewpoint is broadly accepted by the doctrine, “*The American armed forces have begun an armed conflict on Afghan soil, directed not only against the Al Qaeda targets, but also against the Taliban. For this last reason at least, these hostilities should be described as international armed conflict. (...) it is therefore right that President Bush recognises, by his decision of 7 February 2002, that the Geneva Conventions apply to hostilities in Afghanistan.*” [free translation]<sup>11</sup>

On the other hand, the question has been raised as to whether the attacks of 11 September 2001, violent and terrible though they were, constitute acts of war triggering the start of an armed conflict. Incidentally, could the attacks of 11 September

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9. “Le droit international humanitaire est la branche du droit international applicable lorsqu’une situation de violence armée dégénère en conflit armé, qu’il soit international ou non international”, in *Droit International Humanitaire : questions et réponses*, International Committee of the Red Cross, 15 May 2004, p. 1, available on the ICRC website: [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/section\\_ihl\\_in\\_brief?OpenDocument#](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/section_ihl_in_brief?OpenDocument#) (quotation from the French page: <http://www.icrc.org/Web/fre/sitefre0.nsf/html/SYYGFR>). The principal treaties of international humanitarian law applicable to armed conflicts are the four Geneva Conventions of 1949 and their two additional Protocols of 1977.

10. “*Les Conventions de Genève de 1949 et les règles du droit international coutumier étaient en tous points applicables à ce conflit armé international opposant, d’une part, la coalition menée par les États-Unis et de l’autre, l’Afghanistan.*” in *Droit International Humanitaire : questions et réponses*, op. cit., p. 3.

11. “Les forces armées américaines ont commencé un conflit armé sur le sol afghan, dirigé non seulement contre des cibles d’Al-Qaïda, mais également contre les Talibans. Pour cette dernière raison tout au moins, ces hostilités doivent être qualifiées de conflit armé international. (...) c’est donc à juste titre que le Président Bush reconnaît, par sa décision du 7 février 2002, l’applicabilité des Conventions de Genève aux hostilités en Afghanistan.” Sassòli, M., “La ‘guerre contre le terrorisme’, le droit international humanitaire et le statut de prisonnier de guerre”, *The Canadian Yearbook of international law*, vol. 39, 2001, pp. 11-12.

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be deemed to fall within the context of an international armed conflict between Al Qaeda and the United States? Certainly, the terrorist network had previously committed attacks against American interests, in particular against the World Trade Center and on the U.S.S. Cole in 1993, or against the American embassies and the Khobar Towers respectively in Kenya, Tanzania and Saudi Arabia, and the United States had carried out counter-attacks in the Sudan and in Afghanistan. Nevertheless, these attacks are not sufficient to constitute an armed conflict that had been going on before 11 September 2001. *"In times of war everyone is more alert as to possible threats to the own nation which could result in harm for oneself or others but although there had been earlier confrontations between U.S. and Al Qaeda there had been no fighting on 10 September 2001, 9 September, etc., since the last Cruise Missile attacks against a pharmaceutical plant in Sudan and Al Qaeda Training Camp in Afghanistan in the wake of the East African Embassy Bombings. Consequently the victims of the 9/11 attacks could assume that the confrontation had ended, especially because on 9/11 the relations between the U.S. and Al Qaeda were not governed by international humanitarian law."*<sup>12</sup>

The next question then is whether the attacks could, in themselves, constitute a non-international armed conflict. It is true, as Marco Sassòli explains, that there is no doubt they are sufficiently violent to be described as hostilities. Nevertheless, the question remains as to whether a single concerted act of extreme violence constitutes in itself an armed conflict. Moreover, the ICRC which is arguing none-the-less for a very wide application of article 3 common to the four Geneva Conventions, requires *"hostilities pitting 'armed forces' against each other."* [free translation]<sup>13</sup> In this respect, even if Al Qaeda could be considered as an armed force, one might well be reluctant to consider the 19 suicide members involved in these attacks as an "armed force."<sup>14</sup> Although there is a triggering of the conflict justifying the application of international humanitarian law, the assertion that the United States is waging "war" against terror should not serve to justify acts that, without this description, would be illegal under international law. However, the use of the term "war" by the American administration

does not seem to be just a metaphor.<sup>15</sup> In fact, the American administration continues to proclaim that its war against terror is global, extending well beyond traditional battlefields. The US President, George W. Bush, did in fact warn the international community on 29 September 2001: *"Our war on terror will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan."* If the arguments of the Bush administration are to be believed, the Al Qaeda network, and any other terrorist network, should not be seen as part of a criminal organisation, which would involve the application of customary domestic and international law, but rather as types of rebellions that have declared war on the United States by perpetrating attacks. But we have seen that it is difficult to consider the attacks of 11 September as constituting an armed conflict. Furthermore, the "war on terror" will only come to an end when terror is completely eradicated so it would appear to be a war without end.

But, as the Special Rapporteur of the United Nations Sub-Commission of Human Rights on Terrorism and Human rights noted, taking a stand on the question amounts to believing a problem is solved when it is not. *"The novel question of whether a State can be at war with a terrorist group or a multinational criminal organisation was never raised prior to 11 September 2001. In the post-11 September 2001 period, [it] was raised, and is even contentious."*<sup>16</sup>

The criteria developed, through time, by the ICRC, regarding the applicability of the Geneva Conventions were worked out according to traditional conflicts and are not therefore wholly adapted to the new phenomenon of global terrorism and its repression. The position of the ICRC is significant: *"Humanitarian law recognises two categories of armed conflict—international and non-international. Generally, when a State resorts to force against another State (for example, when the "war on terror" involves such use of force, as in the recent US and allied invasion of Afghanistan) the international law on international armed conflict applies. When the "war on terror" amounts to the use of armed force within a State, between that State and a rebel group, or between rebel groups within*

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12. Kirchner, S., *The Case of the "detainees" in Camp X-Ray at the U.S. Naval Base in Guantánamo Bay (Cuba before the Inter-American Commission on Human Rights)*, Justus Liebig University, Human Rights Network International, Germany, July 2003, p. 15.

13. Pictet, J., S., *The Geneva Conventions of 12 August 1949, Commentary*, vol. 3, ICRC, Geneva, 1958, p. 43.

14. Sassòli, M., *op. cit.*, p. 10.

15. *"This language stretches the meaning of the word 'war'. If Washington means 'war' metaphorically, as when it speaks of the war on drugs, the rhetoric would be uncontroversial—a mere hortatory device designed to rally support to an important cause. But the administration seems to think of the war on terrorism quite literally—as a real war—and that has worrying implications."*, Roth, K., *Drawing the Line: War Rules and Law Enforcement Rules in the Fight against Terrorism*, Human Rights Watch, January 2004, p. 1.

16. Koufa, K., K., *Terrorism and Human Rights*, Second Interim Report, Economic and Social Council, see United Nations documents E/CN.4/Sub.2/2002/35, p. 21.



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the State, the situation may amount to non-international armed conflict in the following cases:

a) if hostilities rise to a certain level and/or are protracted beyond what is known as mere internal disturbances or sporadic riots;

b) if parties can be defined and identified;

c) if the territorial bounds of the conflict can be identified and defined; and

d) if the beginning and end of the conflict can be defined and identified. In the absence of these defining characteristics of either international or non-international armed conflict, humanitarian law is not applicable.”<sup>17</sup>

Following these principles, it is clear that the conditions have not been satisfied for an armed conflict between the Al Qaeda network and the United States of America. Is this classic definition of the scope of international humanitarian law no longer topical? Does the fight against terrorism require a revision of this definition? Not according to the ICRC which says, “*The phrase ‘war on terror’ is a rhetorical device having no legal significance. There is no more logic to the automatic application of the laws of armed conflict to the ‘war on terror’ than there is to the ‘war on drugs’, ‘war on poverty’ or ‘war on cancer.’ Thus, blanket criticism of the law of armed conflict for its failure to cover terrorism, per se, is akin to assailing the specialised law of corporations for its failure to address all business disputes.*”<sup>18</sup>

It is also doubtful whether these groups and networks can be defined as “parties” to a conflict in the international humanitarian law sense. Furthermore, most of the measures undertaken by the States to prevent or repress terrorist acts cannot be assimilated to acts of war. Measures such as intelligence gathering, police and judicial co-operation, extradition, criminal sanctions, financial investigations, freezing of assets or diplomatic and financial pressure on States accused of supporting or sheltering terrorist suspects are not generally thought of as acts of war.

The ICRC concludes that, “*Terrorism is a phenomenon. But, war cannot be waged either in practice or from a legal viewpoint against a phenomenon. It is only possible to fight an identifiable party to a conflict. For all these reasons it would be more judicious to speak of the ‘fight against terrorism’ rather than the ‘war on terror’ as the former is multifaceted.*” [free translation]<sup>19</sup>

Nonetheless, there is frequent reliance upon the applicability of the Geneva Conventions in the context of the “war on terror.”

## **2. The Legal Implications of a “War” on Terror**

In order to understand the insistence by the administration of the United States that the “war on terror” is governed by international humanitarian law on armed conflicts and the dangers for the observance of human rights that this entails, it is useful to analyse the implications of this. It should be noted that the protections provided by international human rights law always apply in wartime as in peacetime. The situation of the Al Qaeda members who took part in the preparation of the attacks of 11 September but who were not caught fighting during the hostilities that followed in Afghanistan, can be used as an example. We have seen that the attacks perpetrated on American territory did not constitute, in themselves, acts of war. It follows therefore that the perpetrators of this terrorist act cannot be liable under humanitarian law. On the contrary, they must be arrested, extradited and sentenced for their crime by the United States in accordance with the relevant criminal law in force in this country and the rules governing international judicial co-operation.

Nevertheless, the American administration denies this factual situation and claims that the law of armed conflicts applies and the powers it confers, in particular the power to detain persons at least until hostilities cease, in other words, until the complete eradication of terrorism.<sup>20</sup> This being the case, it also becomes competent to sentence them, in special military commissions, for war crimes and crimes against humanity

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17. Rona, G., *When is a “war” not a “war”? The proper role of the law on armed conflicts and the “global war on terror,”* International Committee of the Red Cross, 16 March 2004, pp. 1-2.

18. Rona, G., *op. cit.*, p. 1.

19. “*Le terrorisme est un phénomène. Or, tant dans la pratique que du point de vue juridique, on ne peut pas livrer une guerre contre un phénomène. On peut seulement combattre une partie identifiable à un conflit. Pour toutes ces raisons, il serait plus judicieux de parler de ‘lutte contre le terrorisme’ plutôt que de ‘guerre contre le terrorisme’, la première revêtant de multiples facettes.*” *Droit International Humanitaire : questions et réponses*, *op. cit.*, p. 3.

20. Haynes, W., J., *Enemy Combatants, Memorandum, Council on Foreign Relations*, p. 1, available on the website: [www.cfr.org](http://www.cfr.org).

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perpetrated by them in violation of international humanitarian law. As it happens, the setting up of these special military commissions was authorised on the basis of a presidential decree (*Executive Order on Military Trials for People Accused of Terrorism*) signed by President Bush on 13 November 2001.<sup>21</sup> These commissions are equivalent to military tribunals and have jurisdiction to impose the death penalty, following a secret procedure and without any right of appeal for the defendant.

Moreover, it is the President himself who has discretionary power to decide whether a person falls within the jurisdiction of these special commissions, solely on the basis of being suspected of perpetrating or participating in terrorist acts. In addition, persons have been arrested or even “selectively” shot down in circumstances not related to the armed conflict in Afghanistan as in the cases of Jose Padilla and Ali Saleh Kahlah al-Marri,<sup>22</sup> who were declared “enemy combatants” by the American president, claiming the right to keep them in detention without charge and without a trial for the duration of the war on terror, a war that can never end. The question that should be asked is whether the American government's description of “warrior” is truthful.

Even if they are in fact guilty, are they not then criminals? As Kenneth Roth very rightly suggests, simply disclosing the implications of such a description shows how dangerous it is. *“The Bush administration has asserted that the two men planned to wage war against the United States and therefore can be considered de facto soldiers. But if that is the case, then under war rules, the two men could have been shot on sight, regardless of any immediate danger they posed. Padilla could have been gunned down as he stepped off his plane at O'Hare, al-Marri as he left his home in Peoria. That, after all, is what it means to be a combatant in time of war. (...) Of course, the Bush administration has not proposed summarily killing them; it plans to detain them indefinitely. But if Padilla and al-Marri are not enemy combatants for the purpose of being shot, they should not be enemy combatants for the purpose of being detained, either. The one conclusion necessarily implies the other.”*<sup>23</sup>

Nevertheless, the Bush administration does not seem to want to recognise such a restriction on its right to make use of

murderous measures against terrorists. In fact, it has not, for example, produced any justification for the assassination of Qaed Salim Sinan al-Harethi in the Yemen in 2002, an assassination that also led to the death of five other people. Although in the case of this lieutenant of Bin Laden, who was supposedly involved in the attack on the U.S.S. Cole, it was difficult to conceive of other alternatives, what could have exempted the American administration from justifying its act of murder is not clear. This example which can be compared with the assassinations of Palestinians suspected of being terrorists by the Israeli government, clearly demonstrates the risk of abuse that might result from applying the law of armed conflicts to persons suspected of terrorist activities.

However, the problem does not end there. When the law of armed conflicts is applied in the fight against terrorism, there is a considerably greater risk of sentencing innocent people in secret. *“The secrecy of terrorist investigations, with little opportunity for public scrutiny, only compounds the problem. If law enforcement rules are used, a mistaken arrest can be rectified at a public trial. But if war rules apply, the government is never obliged to prove a suspect's guilt. Instead, a supposed terrorist can be held for however long it takes to win the ‘war’ against terrorism—potentially for life—with relatively little public oversight. And the consequences of error are even graver if the supposed combatant is killed, as was al-Harethi. Such mistakes are an inevitable hazard of the traditional battlefield, where quick life-and-death decisions must be made. But when there is no such urgency, prudence and humanity dictate applying law enforcement rules.”*<sup>24</sup>

Moreover, there are cases, this time outside the United States, where the claim that humanitarian law applies is even less valid. For example, in October 2001, Washington arrested six Algerians in Bosnia. At the outset, the American government wanted to apply the rules of customary law and was pleased to ensure their arrest. But later, following a three month investigation, the Supreme Court of Bosnia ordered the release of the suspects for lack of proof. Instead of producing the additional evidence, the American administration surreptitiously decided that the law of armed conflicts was applicable. It put pressure on the Bosnian government to hand over the six men for transfer to the naval base at Guantanamo without the

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21. The text of the presidential decree is available at the following internet address: [www.derechos.org/nizkor/Terror/miltrial.html](http://www.derechos.org/nizkor/Terror/miltrial.html).

22. The former, an American citizen, was arrested by American federal agents in May 2002 at Chicago's O'Hare airport when he was returning from Pakistan, allegedly to make a reconnaissance with the aim of later planting a radiological bomb. The latter, al-Marri, a student from Qatar, was arrested at his house in Peoria, in Illinois, under suspicion of being a “sleeper,” a non-active terrorist accomplice, ready to be called up at any time to help launch new attacks.

23. Roth, K., *The Law of War in the War on Terror*, Foreign Affairs, January/February 2004.

24. Roth, K., *op. cit.*, p. 4.

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intervention of a judge. Consequently, it seems that Washington has taken the liberty of applying the law as it pleases, moving from one set of governing rules to another in order to get what it wants.

Similarly, in June 2003, Washington insisted on the return of five persons suspected of belonging to Al Qaeda who were under investigation in Malawi. The five men were then sent to a secret place, not to be sentenced but to be interrogated. When this move triggered riots in Malawi, the suspects were released a month later in the Sudan without any proof being discovered by the United States that they were part of a terrorist network. These examples are unfortunately not the only ones and will no doubt not be the last in such a context as terror.

### **3. The Application of International Human Rights Law to the “Fight” against Terrorism**

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions aptly summed up the general application of international human rights law, even during armed conflict: *“It is now well recognized that the protection offered by international human rights law and international humanitarian law are coextensive, and that both bodies of law apply simul-*

*taneously unless there is a conflict between them. In the case of a conflict, the lex specialis should be applied but only to the extent that the situation at hand involves a conflict between the principles applicable under the two international legal regimes. The International Court of Justice has explicitly rejected the argument that the International Covenant on Civil and Political Rights was directed only to the protection of human rights in peacetime.”*<sup>25</sup> (...) *“It follows that the application of international humanitarian law to an international or non-international armed conflict does not exclude the application of human rights law. The two bodies of law are in fact complementary and not mutually exclusive.”*<sup>26</sup>

Regarding the “war against terrorism,” we hold that the numerous arguments briefly summarised above lead to the conclusion that it is not an armed conflict in the legal sense. Moreover, the anti-terrorist legislations have mainly been designed to be applicable in peacetime. In this report, therefore, we shall make no further reference to humanitarian law. In any case international human rights law itself provides for possible derogations to the recognised rights when a crisis situation arises that places the life of the nation in danger. Numerous governments have made use of such a possibility, among them Algeria, Argentina, Chile, Colombia, Peru, Poland, Russia, and also the United Kingdom. From several points of view it is appropriate to analyse and understand the legal frameworks that make such derogations or limitations possible.

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25. Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, E/CN.4/2005/7, 22 December 2004, para. 50.

26. *Ibid.*, para. 52. The Special Rapporteur concludes: *“the existence of an armed conflict does not per se render the Covenant [the International Covenant on Civil and Political Rights] inapplicable in the territory of a State party. The Human Rights Committee has held that a State party can be held responsible for violations of rights under the Covenant where the violations are perpetrated by authorized agents of the State on foreign territory, whether with the acquiescence of the Government of [the foreign State] or in opposition to it,”* *ibid.*, para. 46.

## **Part I - The Key to Achieving Compatibility between the Fight against Terrorism and Human Rights**

For a long time it has often been said, erroneously, that human rights are an obstacle to the fight against terrorism, and that governments, despite their desire to ensure the security of the population, are up against the obstacle of human rights. Defenders of fundamental rights who denounce anti-terrorist measures that take little account of human rights are made out to be idealists, saboteurs, or even traitors. In numerous countries where the fight against terrorism is diverted from its primary goal in order to repress all forms of opposition, such criticism springs more from the desire to silence political opponents and human rights defenders than from the need for effective means to tackle the terrorist threat.

The conceptual link between terrorism and human rights has always figured prominently in the debate on terrorism, especially in recent years. In the climate of fear and insecurity engendered by the 9/11 attacks the conceptual link has taken on added importance. More than ever, terrorism and human rights are intrinsically linked. It is generally recognised that terrorism has a dual impact on human rights; such a duality is somewhat paradoxical. In 1999 this was clearly shown by Mrs. Kalliopi K. Koufa in her preliminary report: *"Thus, it is clear that there is a close link between terrorism and the enjoyment of human rights and freedoms. This link is seen directly when groups or individuals resort to acts of terrorism and, in so doing, kill or injure individuals, deprive them of their freedom, destroy their property, or use threats and intimidation to sow fear. The link can be seen indirectly when a State's response to terrorism leads to the adoption of policies and practices that exceed the bounds of what is per-missible under international law and result in human rights violations, such as extrajudicial executions, torture, unfair trials and other acts of unlawful repression, that violate the human rights not only of the terrorists but of innocent civilians."*<sup>27</sup>

There is therefore on the one hand a direct effect, terrorism being itself a pure and simple violation of human rights, to start with the right to life and to physical integrity. *"...Actually, there is probably not a single human right exempt from the impact of terrorism,"*<sup>28</sup> as the Special Rapporteur on human rights and terrorism of the UN Sub-Commission on the protection and promotion of human rights remarked even before the 9/11 attacks. Furthermore, the devastating effect of terrorism is all-embracing, and does not only affect human rights in the limited sense, but also the very foundations of democracy and the rule of law.<sup>29</sup>

Terrorism has a second impact on human rights, which despite being indirect is equally dramatic. Because of its destructive violence, which causes fear and anxiety among the population, and the difficulty of countering it, terrorism incites governments to take drastic measures that only too often disregard, to a greater or lesser degree, human rights, thereby undermining the very foundations of our democratic societies. What is still more alarming is that in those States that are least democratically inclined a third effect of terrorism on human rights can be felt, when governments use the need to combat terrorism as an excuse to incriminate political opponents and to silence those who might put them in an embarrassing position, including human rights defenders. This is all the more true today as terrorist violence is increasing.

States not only have the right, they also have the duty to take appropriate measures against terrorism. The precedents set by international and regional human rights courts clearly show such an obligation on the part of States to protect the persons under their authority against all threats, in particular terrorist threats.<sup>30</sup>

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27. Koufa, Kalliopi, K. *Terrorism and human rights*, Preliminary report, 7 June 1999, p. 8.

28. Koufa, Kalliopi, K., *Terrorism and human rights*, Preliminary report, 27 June 2001, p. 28, UN document E/CN.4/Sub.2/2001/31.

29. See resolution 2001/37 of 23 April 2001 of the UN Commission on Human Rights, which condemns all acts, methods and practices of terrorism *"as acts 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 the rule of law and having adverse consequences for the economic and social development of the State."*

30. In the UN system, the Committee on Human Rights (*Delgado Paez v. Colombia*, Case No. 195/1985, Views adopted on 12 July 1990) and the Committee on the elimination of discrimination against women (A/54/38, para. 78 (1995) both reminded States of their obligations to take all reasonable measures to protect the life of persons. In the *Kiliç v. Turkey* ruling the European Court of Human Rights also recalled such obligations under article 2§1 of the European Convention on Human Rights and Fundamental Freedoms (28 March, para. 62). The same obligations exist in the Inter-American system, which insists on the need to always react in accordance with the Rule of Law. (*Asencios Lindo et al.*, Case 11.182, Report No. 49/00, Annual Report of the IACHR 1999, para. 58).

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It would be a mistake to consider human rights defenders to be in opposition to the effectiveness of the fight against terrorism. As pointed out by Olivier de Schutter: *“it is the same persons (human rights defenders) who, if a State failed to react to a terrorist threat while attacks increased and a climate of terror set in, would be the first to denounce the passivity of the authorities.”*<sup>31</sup> For it is obvious that their goals are the same as those of governments wishing to eradicate terrorism, contrary to what is sometimes alleged. Conversely, the aim of governments is not to harm human rights, at least in the majority of democratic States, because, as pointed out by the Secretary General of the Council of Europe, *“the aim of the fight against terrorism is to protect fundamental Human Rights, not to undermine them.”*<sup>32</sup>

The dilemma between the fight against terrorism and respect for human rights is not new, and has already given rise to numerous developments in the human rights system. These developments stress the compatibility of the two struggles through the doctrines of derogations and limitations laid down within the human rights system. *“If there is a question of dilemmas in combating terrorism, these dilemmas can be phrased in terms of the application of various human rights. ... [T]he international regulations concerning the protection of human rights themselves provide to a great extent, the guidelines for resolving the questions concerning the acceptable and unacceptable measures in the fight against terrorism.”*<sup>33</sup>

In response to the mandatory nature of the fight against terrorism, the mechanisms for protecting human rights include the possibility of a temporary limitation of certain non-absolute rights in special situations that warrant such derogations. The precedents developed by the various human rights tribunals and commissions leave no doubt as to the conditions under which such derogations apply. Furthermore, the same case law has always recognised that States enjoyed some margin of appreciation in interpreting their obligations, which means that they are free to introduce certain “restrictions” of less formal a nature than legal provisions, when this is required by certain imperative necessities, such as respect for more

absolute rights. The instruments for the protection of human rights take into account the fact that human rights have to be *adaptable*. On the other hand, human rights organisations refuse to accept that the new terrorist threat can denature the principles of human rights, which required costly and strenuous efforts to develop. Far from being a utopian mutiny, refusing to accept a weakening of human rights is in fact a legitimate act of intransigence that highlights the safeguards provided by human rights.

In simple terms, therefore, the real question is whether one can infringe the most fundamental requirements of human rights—beyond what the law permits—in order to ensure respect for them. Despite the fact that the reasoning may seem prosaic, it seems to us that the answer is no, because otherwise the result would be the opposite of what one is trying to achieve, as the fundamental principles are meant to be universally and at all times applicable. Even worse, denying human rights in the fight against terrorism would not restore security, but would be bound to increase insecurity. Mary Robinson, when she was UN High Commissioner for Human Rights, was very much to the point when she reminded members of the Commission on Human Rights that *“An effective international strategy to counter-terrorism should use human rights as its unifying framework. The suggestion that human rights violations are permissible in certain circumstances is wrong. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends. International human rights and humanitarian law define the boundaries of permissible political and military conduct. A reckless approach towards human life and liberty undermines counter-terrorism measures.”*<sup>34</sup>

And it is precisely where there is lack of respect for human dignity and for the protection of human rights that terrorism develops. Combating terrorists by violating human rights would be tantamount to accepting the fact that to obtain respect for one’s own rights one must necessarily disregard those of others.<sup>35</sup> As the UN Secretary General warned us: *“(…) to sacri-*

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31. De Schutter, O., “La convention européenne des droits de l’Homme à l’épreuve de la lutte contre le terrorisme”, in Bribosia, E. et Weyembergh, A., *Lutte contre le terrorisme et droits fondamentaux, Droit et Justice*, Bruylant, 2002, p. 90.

32. Press release of the Secretary General of the Council of Europe, “The Secretary General of the Council of Europe calls for caution in adopting antiterrorist legislation,” 14 November 2001.

33. Declaration of the Netherlands Helsinki Committee on the Fight Against Terrorism and the Protection of Human Rights - A Resolvable Conflict, International Helsinki Federation for Human Rights, 17 septembre 2003, The Hague, p. 2.

34. *Human rights: A unifying framework*, Report of the United Nations High Commissioner for Human Rights, 27 February 2002, para. 5; see UN document E/CN.4/2002/18.

35. See International Centre for Human Rights and Democratic Development, *Promoting Human Rights and Democracy in a Context of Terrorism*, Report of the “groupe de réflexion,” 30 May 2002, Ottawa, p. 42.

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*... sacrifice freedom or the principles of law within States—or to start new conflicts between States in the name of the fight against terrorism—amounts to giving terrorists a victory that none of their acts could ever achieve. (...) the risk is that in our concern for security we should find ourselves sacrificing essential freedoms, which would weaken our common security instead of strengthening it, and would thereby erode our democratic*

*method of government from within.”<sup>36</sup>*

It should also be recalled that it is the States that developed human rights, which they undertook internationally to respect.<sup>37</sup> And so respect for human rights and the permissible derogations and limitations is the ultimate framework in which such abuses can be prevented and corrected.

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36. Annan, K, “The fight against the terrorist threat calls for a strengthening of the role of the United Nations,” Press release before the Security Council, 20 January 2003, UN document SG/SM/8583.

37. “(...) the mechanisms designed to defend Human Rights were made by the States for the States. The defence of Human Rights is one of their prerogatives as well as an obligation,” Khan, I, Secretary General of Amnesty International, *Round table: Anti-terrorism and Human Rights, a Summit for another world*, Annemasse, 31 May 2003, p. 2.

## **Chapter 1: The Conditions under which Derogations to Human Rights Apply**

One of the main features of the fight against terrorism is the frequency with which States invoke exceptional powers. Most international and regional treaties on the protection of human rights contain derogation and limitation provisions concerning certain rights, which are to be used in exceptional circumstances. Nevertheless, although exceptional measures are permissible, they must be based on the principles of legality, temporality, proportionality and necessity; they cannot restrict intangible rights (for which no derogation is possible) recognised as such in international law in conventional texts, case law and customary law.

### **1. The Implementation Conditions of a System of Derogations**

Article 4 of the International Covenant on Civil and Political Rights (the Covenant) constitutes the legal foundation which States invoke to make use of their power to derogate to certain provisions. It reads as follows: *“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”*

In its General Comment No. 29 on public emergencies, the Human Rights Committee recalled the essential principles of the doctrine concerning measures derogating from human rights under Article 4 of the Covenant.<sup>38</sup> Five important elements constitute the conditions of application of Article 4, and call for some explanations.

#### **A public emergency that threatens the life of the nation**

The first requirement is that there should be a *“public emergency”* that *“threatens the life of the nation.”* According to the experts who drew up the Siracusa Principles on the Limitation and Derogation provisions in international law,<sup>39</sup> a threat to the life of a nation is one which: *“(a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.”*<sup>40</sup> These are in fact the criteria to which human rights protection mechanisms refer in assessing the threat.

On the occasion of its ruling on the Lawless case, the European Court of Human Rights considered that the terms of Article 15 of the European Convention on Human Rights had the same meaning as those of Article 4 of the Covenant. The Court defined the *“public emergency threatening the life of the nation”* as being *“an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”*<sup>41</sup> The European Commission of Human Rights added that a *“public emergency”* cannot be considered to *“threaten the life of the nation”* unless the following features are present:

1. *It must be actual or imminent.*
2. *Its effects must involve the whole nation.*
3. *The continuance of the organized life of the community must be threatened.*
4. *The crisis or danger must be exceptional in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.*<sup>42</sup>

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38. United Nations Human Rights Committee, General Comment No. 29, document CCPR/C/21/Rev.1/Add.11, of 31 August 2001, paragraphs 2, 4 and 6.

39. The Siracusa Principles were drawn up in 1984 during a two-day conference of 31 distinguished experts in international law, with a view to defining more precisely the international law approach to derogations and limitations.

40. The Siracusa Principles on the Limitation and Derogation provisions in the International Covenant on Civil and Political Rights, Human Rights Quarterly, vol. 7, No. 1 (1985), principle 39.

41. European Court of Human Rights, Lawless case (Merits), Judgment of 1 July 1961, series A, No. 3, para. 28.

42. European Commission of Human Rights, Report of the Commission, 12a Yearbook Eur. Conv. Human Rights (1969), para. 153.

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Concerning the first characteristic, academics have concluded, on the basis of the general definition of “*imminent*,” that to be covered by Article 15 of the European Convention on Human Rights a crisis should “*if not actually exist, be on the verge of breaking out at any moment*.”<sup>43</sup> The Court therefore considered that potential dangers that would only occur weeks, or even months later, are categorically excluded.<sup>44</sup> The public emergency must be proclaimed “*by an official act*.” The Human Rights Committee noted in its comment on Article 4 that this condition, far from being a minor one, was in fact essential. It added: “*When proclaiming a state of emergency... States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers*.”<sup>45</sup>

In addition, members of the United Nations Organisation are requested to inform the Secretary General, and the other bodies of the organisation, whenever a state of public emergency is declared, and to indicate the special and temporary measures taken.

### **A proportional response...**

The third condition laid down by Article 4 of the Covenant is that of proportionality. Measures taken in the framework of a state of emergency must be taken “*to the strict degree required by the situation*.” It is therefore apparent that even if a State succeeds in justifying a state of emergency, that does not mean that it is free to take any type of measure. The Human Rights Committee emphasised that it is not enough to show that the measures are warranted by the requirements of an exceptional situation; they must also be shown to be strictly necessary.<sup>46</sup> This requirement also covers several aspects of the measure adopted: “*This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency*.”<sup>47</sup> Finally, principle 54 of the Siracusa Principles recalls, for its part, the object and the nature of the principle of strict necessity.<sup>48</sup>

### **... in accordance with the international obligations of the State**

The fourth condition requires that the measures adopted should not be *incompatible with the other obligations under international law*. Therefore when a State party has ratified an international agreement that contains a clause that is more restrictive than the one in the Covenant, even perhaps providing no possibility of any derogation whatsoever, such a convention may constitute a further restriction to the freedom of action of the State in question.<sup>49</sup>

### **Non discriminatory measures**

The final condition is the condemnation of any discrimination on the basis of race, colour, sex, language, religion or social origin resulting from a derogation. The Human Rights Committee noted that even if the principle of non-discrimination specified in Article 26 of the Covenant is not considered to be a right to which there can be no derogation, certain aspects of the right are intangible, and in particular in the framework of Article 4, which specifies the conditions to be fulfilled in order to derogate from other rights.<sup>50</sup>

At the UN World Conference against Racism, held in Durban, South Africa, in August 2001, States went further, recognising that there could be no derogation to the principle of non-discrimination.

## **2. Assessment of the Conditions under which Derogations Are Exercised**

The exceptional nature of derogatory measures requires that, as the Committee of Ministers of the Council of Europe emphasised: “*the circumstances which led to the adoption of such derogations ... be reassessed on a regular basis with the purpose of lifting these derogations as soon as these circum-*

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43. Svensson-McCarthy, A.-L., *The International Law of Human Rights and States of Exception*, The Hague: Martinus Nijhoff Publishers, 1998, p. 299.

44. *Ibidem*, p. 299.

45. Human Rights Committee, General Comment No. 29, *op. cit.*, para. 2.

46. “This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation”, Human Rights Committee, General Comment No. 29, *op. cit.*, para. 5.

47. *Ibidem*, para. 4.

48. Siracusa Principles, principle 54.

49. “Particularly relevant in this connection are humanitarian law treaties because they apply in time of war: a state which purports to derogate from obligations under the Covenant which are required also by such other treaty would be violating both agreements.” Buergethal, *To respect...*, p. 82.

50. Human Rights Committee, General Comment No. 29, para. 8.

51. Committee of Ministers of the Council of Europe, *Guidelines on human rights and the fight against terrorism*, *op. cit.*, p. 12.



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stances no longer exist.”<sup>51</sup> There are several interpretative instruments that must be taken into consideration in assessing the reasons put forward by a State to justify a derogation. Article 5 § 1 of the Covenant stipulates that: “*Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.*”

This provision means that the rights and powers granted for certain purposes cannot be used for illegal purposes or purposes contrary to the aims of the Covenant. Article 5 § 1 calls for a careful scrutiny of the motives behind a decision to derogate from a right, and enables subjective as well as objective criteria to be taken into account in determining whether the derogation is in accordance with the requirements of the Covenant.<sup>52</sup>

The European Court of Human Rights generally considers that States can be allowed a margin of appreciation in determining whether there is a public emergency and whether the measures adopted are appropriate.<sup>53</sup> This margin of appreciation doctrine has been widely criticised by numerous experts who feel it to be overcautious, weakening the Court’s power and duty of supervision.<sup>54</sup> For it is precisely in emergency situations, when States have recourse to derogatory procedures, that a high level of judicial supervision is particularly necessary.<sup>55</sup>

However, although the European Court has shown some degree of tolerance towards States in its rulings in relation to Article 15 of the Convention, it has clearly stated: “*States do not enjoy unlimited power in this respect. The Court ... is empowered to rule on whether 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.*”<sup>56</sup> The Court’s precedents show that the greater the derogation, the less the Court will be inclined to grant States a margin of appreciation, and that it will carry out a careful scrutiny of the conformity of the emergency measures with the States’ international obligations.

### 3. “Non-Derogable” Rights

Naturally, some rights are so inherent in the respect for the life and dignity of the person that no derogations can be granted. These rights, be they explicitly protected by a human rights convention, customary law and thus incumbent on all States or peremptory norms under international law, are never subject to derogation, even in a state of emergency threatening the life of the nation.

The Covenant explicitly identifies a number of these “non-derogable” rights. Article 4 § 2 mentions the right to life (Art. 6), the right not to be subjected to cruel, inhuman or degrading punishment or treatment (Art. 7), the right not to be held in slavery or servitude (Art. 8), the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (Art. 11), the prohibition on retroactive criminal law (Art. 15), the right to recognition as a person before the law (Art. 16), the right to freedom of thought, conscience and religion (Art. 18).

However, the Human Rights Committee has clearly established that this list of non-derogable rights is not exhaustive. “[T]he category of peremptory norms extends beyond the list of non-derogable provisions as given in Article 4, paragraph 2. States parties may in no circumstances invoke Article 4 of the Covenant as a justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.”<sup>57</sup> Thus the Committee even listed a number of rights which, although not mentioned in Article 4 § 2, may not be derogated. These include, among others, the right of the person deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person, certain elements of the rights of persons belonging to an ethnic minority, and the prohibition on war propaganda or national, racial or religious hate speech inciting to discrimination and/or violence.<sup>58</sup> In the final declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in August and September 2001,

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52. Buergethal, *op. cit.*, p. 87. In this respect, the European Commission on Human Rights explains: “Stipulations such as Article 4 [of the Covenant], which authorizes the states parties to derogate from their obligations, must therefore be viewed as applicable only in rare and exceptional circumstances and, as Article 5(1) plainly indicates, are never to be used in a manner calculated to destroy the rights which the Covenant recognizes,” *ibidem*, p. 91.

53. European Court of Human Rights, *Brannigan and McBride v. United Kingdom*, Judgment of 26 May 1993, series A, No. 258-B, para. 43.

54. *Ireland v. United Kingdom*, Judgment of 18 January 1978, series A, No. 25, para. 207.

55. Gross, O., and Ní Aoláin, F., “From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights”, *Human Rights Quarterly*, vol. 23, No. 3 (August 2001), pp. 628-629.

56. *Ireland v. United Kingdom*, para. 207.

57. *Ibidem*, para. 11.

58. *Ibidem*, para. 13.

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the non-derogable nature of the principle of non-discrimination was affirmed.<sup>59</sup>

The American Convention on Human Rights expressly includes “judicial guarantees essential for the protection of [non-derogable] rights,” whereas the Covenant does not do so explicitly. However, the United Nations Human Rights Committee felt that judicial oversight should be considered a non-derogable right because it is always necessary to take into consideration the other obligations of international law.<sup>60</sup> The Committee noted that certain judicial procedural guarantees are non-derogable because they are even provided for in situations of armed conflict, which are exceptional by definition.<sup>61</sup> The Inter-American Court of Human Rights, called upon to examine the effect of a state of emergency based on terrorist activities, allowed temporary derogations from certain freedoms. However, it also formally rejected the possibility of derogating from certain fundamental rights.<sup>62</sup> It included in this category, among other rights, the right to life and the right to a fair trial,<sup>63</sup> the right to *habeas corpus* and *amparo* judicial review.<sup>64</sup> The European Court of Human Rights adopted a very strict jurisprudence with regard to the rights it considers as non-derogable, especially with respect to the prohibition of torture and inhuman and degrading treatment, which are absolutely non-derogable under all circumstances, even, the Court states explicitly, within the context of the fight against terrorism: “*Even in the most difficult circumstances.*”<sup>65</sup> Finally, the African Charter of Human and Peoples’ Rights does not contain a derogation clause. Hence restrictions on rights and freedoms contained in the Charter may not be justified on grounds of emergency or any other circumstances.<sup>66</sup>

The use of the provisions relating to states of emergency in the framework of the fight against terrorism raises a number of concerns, as expressed in particular by the Human Rights Committee. The latter mentioned the case of countries in which the existence or the life of the nation is not threatened<sup>67</sup> and cases where states of emergency had been abusively maintained in force over many years.<sup>68</sup> It also pointed out that in some instances, the circumstances under which a state of emergency may be declared are too poorly defined by law, and can be used to restrict rights in an unjustifiable manner.<sup>69</sup> It also deplored cases in which the state of emergency had not been officially or legally proclaimed and in which, for that reason, no additional measures to protect human rights had been adopted.<sup>70</sup>

Nevertheless it is essential to ensure that emergency measures that are taken do comply with the international obligations of States. It is therefore necessary to verify the extent to which anti-terrorist legislation constitutes a derogation of fundamental rights and, when this is the case, to ensure that such measures meet all the conditions set out in international treaties, i.e. in particular that they are exceptional, strictly proportional to the imminent threat to the nation, temporary and that they do not violate either the non-derogable rights recognised by the human rights system or the objectives of the treaties. When these conditions are not met and the situation is not sufficiently serious to justify a state of emergency for the purposes of Article 4 of the Covenant, it is still possible for the State to introduce limitations to these rights, which are a lesser degree of derogations as such.

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59. “... no derogation from the prohibition of racial discrimination, genocide, the crime of apartheid and slavery is permitted, as defined in the obligations under the relevant human rights instruments,” Durban Declaration and Action Programme, available at <http://www.unhchr.ch/pdf/Durban.pdf>.

60. Digest of jurisprudence of the UN and regional organizations on the protection of human rights while countering terrorism, p. 18. Available on the document website of the United Nations Human Rights Committee.

61. “Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant,” Human Rights Committee, General Comment No. 29, para. 15 & 16.

62. “Article 27(2) provides that certain categories of rights may not be suspended under any circumstances. Hence, rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency.” I/A Court H.R., Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations*, January 30, 1987 (para. 21).

63. Inter-American Commission on Human Rights, Report on the Human Rights Situation in Argentina, 11 April 1980, OAS/Ser.L/V/II.49, page 26.

64. Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, paragraph 42; Advisory Opinion OC-9/87 of 6 October 1987, paragraphs 30 and 41.

65. *Aksoy v. Turkey*, ECHR, 18 December 1996 (para. 62)

66. Grounds for restrictions are listed in Article 27 § 2 which stipulates that the rights provided for in the Charter: “shall be exercised with due regard to the rights of others, collective security, morality and common interest.” The African Commission stated that the Charter must be interpreted in such a way as to neutralise the negative effects of these provisions that may restrict a number of important points in the Charter. It stated “that the ‘recovery provisions’ [‘dispositions de récupérations’] should not be interpreted against the principles of the Charter,” Jagwanth, S. and Soltau, F., “Terrorism and Human Rights in Africa”, *op. cit.*

67. See CCPR/C/79/Add. 76.

68. See CCPR/C/79/Add. 81 and 93.

69. See CCPR/C/79/Add. 78 and 90.

70. See CCPR/C/79/Add. 54, 78 and 109.

## Chapter 2: Limiting Human Rights

When a State faces a situation which is not sufficiently urgent to justify the introduction of a state of emergency, but does require balancing the rights of the individual with the public interest or the proper functioning of the society, or balancing competing individual rights, it may still limit the human rights provided for in several treaties.

Although a State is not required to show proof of a state of emergency to justify a limitation, certain conditions must nevertheless be met in order for the limitation to be permitted. As in the case of derogations, limitations are by nature exceptional and must be interpreted restrictively. States may have recourse to limitations only in the limited circumstances provided for in the Covenant and in other treaties protecting human rights.

The provisions regarding limitations in the Covenant are derived from Article 29 § 2 of the Universal Declaration of Human Rights which stipulates that: *“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”*<sup>71</sup> In the Covenant, unlike the Universal Declaration of Human Rights, the doctrine regarding limitations is not contained in a single article but occurs throughout the text and is thus specific to each provision. The limitations of certain rights permitted by the Covenant must have one of the following objectives: protection of national security, public safety, public order, morality or public health, and in certain cases to protect the rights and freedoms of others.<sup>72</sup> With regard to the subject under discussion, it is appropriate to explore the theory of limitations to human rights invoked on grounds of national security, public safety and public order.

### Limitations on grounds of “national security”

First, according to the Covenant, national security may justify, among other things, limitation of liberty of movement and freedom to choose residence (Article 12 § 3); exclusion of the

press and the public from all or part of a trial (Article 14 § 1); restrictions on freedom of expression (Article 19 § 3); a limitation on the right of peaceful assembly (Article 21); a limitation on freedom of association and on the right to form or join a trade union (Article 22). In fact, all the limitation clauses in the Covenant provide that national security may be invoked as a justification of a limitation, except on the freedom to manifest one’s religion or beliefs (Article 18 § 3).

The term “security” has been interpreted by legal theorists as *“the protection of territorial integrity and political independence against foreign force or threats of forces.”*<sup>73</sup> According to the Siracusa Principles, limitations may not be imposed to respond to a local or isolated threat.<sup>74</sup> Moreover, the framers of the Principles issue a cautionary warning: *“The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.”*<sup>75</sup>

### Limitations on grounds of “public safety”

Secondly, “public safety” may, under certain circumstances, provide a justification for limitations on freedom of thought, conscience and religion (Article 18); freedom of peaceful assembly (Article 21); and freedom of association (Article 22). Public safety is however difficult to define. It is clear in any case that the term is not synonymous with “public order,” given that the Covenant sometimes mentions both terms as grounds for limitation and sometimes mentions only one of the two.<sup>76</sup> A similar interpretation was given by the framers of the Siracusa Principles, Principle 33 of which provides that: *“Public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.”*

### Limitations on grounds of “public order”

Thirdly, like “national security,” “public order” may be invoked as grounds for legal limitation of liberty of movement and freedom

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71. Kiss, A. C., “Permissible Limitations on Rights,” p. 290 in *The International Bill of Rights: The Covenant on Civil and Political Rights*, Louis Henkin, ed. (New York: Columbia University Press, 1981).

72. *Ibidem*, p. 293.

73. Kiss, “Permissible Limitations...,” *op. cit.*, p. 297.

74. Siracusa Principles, principle 30.

75. Siracusa Principles, principle 32.

76. Kiss, A., “Permissible Limitations...,” *op. cit.*, p. 298. A review of the discussions in the Third Commission during the drafting of the Covenant shows, with respect to public safety, that “rights guaranteed by the Covenant may be restricted if their exercise involves danger to the safety of persons, to their life, bodily integrity, or health,” *ibidem*, p. 298 quoting 14 GAOR Annexes, UN docs. A/4299 (1959), p. 7.

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to choose residence (Article 12); exclusion of the press and the public from all or part of a trial (Article 14 § 1), limitation of freedom of thought, conscience and religion (Article 18 § 3); limitation of freedom of expression (Article 19); limitation of freedom of assembly (Article 21) and association (Article 22).

The experts have admitted that the term “public order” is imprecise and that its meaning is particularly ambiguous in certain legal orders. During the drafting of the Covenant, it was emphasised that the French term “ordre public” is not equivalent to the English term “public order” or its Spanish counterpart “orden público.” Thus the final version of the Covenant includes both the English term and the French language term. A review of French jurisprudence explains that: “ordre public includes the existence and the functioning of the state organization, which not only allows it to maintain peace and order in the country but ensures the common welfare by satisfying collective needs and protecting human rights.”<sup>77</sup> That being the case, the concept of “public order” permits limitations on certain human rights in the name of public welfare and the social organization of society. The Siracusa Principles explain in Principle 22: “The expression ‘public order’ (ordre public) as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).”<sup>78</sup>

Moreover, during the debates that led to the Siracusa Principles, the Committee of Experts arrived at the conclusion that public order may serve as a justification for limitation on human rights only if there is a sufficiently serious threat to public order. In addition to legitimate grounds, a series of conditions must be met in order to justify a limitation on human rights.

### **A national legal basis: the principle of legality**

All the limitation clauses contained in the Covenant, with the exception of Article 14 § 1, require that the restrictions be based on national law. Specific references to national law occur in a variety of wordings, such as “provided by law,” “required by law” or “in accordance with law,” but it is generally recognised that these terms are very close in meaning, so that the principle of

legality must always be respected.<sup>79</sup> This rule is also provided for in the Siracusa Principles.<sup>80</sup>

The European Convention on Human Rights includes the same principle and the Court adds: “[T]he ‘law’ concerned must also fulfil the requirements of accessibility and foreseeability, including protection against arbitrariness.”<sup>81</sup>

### **Limitations “necessary in a democratic society”**

According to the Covenant, limitations on the rights to a public trial (Article 14) and freedom of peaceful assembly (Article 22) are only permitted when they are “necessary in a democratic society.” Although not defined in the Covenant, this reference is included in order to provide protection from arbitrary actions by the State. The Human Rights Committee also considered that it was not only up to the State to determine whether a limitation is “necessary in a democratic society,” but also up to the justice system. In order to determine whether a limitation is necessary, the Committee applies, in particular, the principle of proportionality.

The jurisprudence of the European Court of Human Rights has interpreted the concept of “necessary in a democratic society” as implying, among other things, that this limitation is proportional to a legitimate goal and that it meets a “pressing social need.” Thus, even when the European Court agrees to consider the limitation as legal and meeting a national security need, it asks about the strict necessity in order to meet the objective sought. Nevertheless, even though the Court has ruled that the limitation rules require strict interpretation, it also applies the doctrine of the margin of appreciation to this state of exception. In matters of national security, for example, it has been relatively conciliatory. In the *Leander vs. Sweden* case, the Court rules that States have a broad margin of appreciation of States in this context.<sup>82</sup>

Finally, the concept of “democratic society” is understood as meaning a system of government which accommodates human rights and civil liberties and which has machinery to ensure that they are complied with.<sup>83</sup>

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77. *Ibidem*, p. 301.

78. Siracusa Principles, principle 22.

79. See Lockwood, Bert. B., Finn, J. Jr. and Jubinsky, G., “Working Paper for the Committee of Experts on Limitation Provisions,” *Human Rights Quarterly*, vol. 7, No. 1 (1985), p. 45.

80. Siracusa Principles, principle 15: “No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.”

81. Svensson-McCarthy, A.-L., *op. cit.*, p. 75.

82. European Court of Human Rights, *Leander v. Sweden*, Judgment of 26 March 1987, series A, No. 116, para. 59.

83. As stated in the Siracusa Principles: “While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition,” Principle 21.

## **Part II - Analysis of Counter-Terrorism Policies' Compliance with International Human Rights Standards**

We have seen that the allegation that human rights were not compatible with the fight against terrorism was not justified. Human rights are not an impediment to counter-terrorism policies but rather a framework to it. Yet states have adopted counter-terrorism measures that often violate fundamental human rights. The aim of this chapter is to bring out the main points of friction between human rights and anti-terrorism laws since some of the many internationally recognised rights and liberties are particularly easy to sweep aside when legal and administrative provisions are introduced for security reasons as part of the fight against terrorism.

In general, regardless of the human rights defence mechanism being considered, current doctrines and jurisprudence readily agree that the main rights and freedoms that are violated or that are likely to be so in the name of anti-terrorism, can be

grouped under the following main themes: 1) guarantees related to arrest and detention, 2) guarantees related to conditions of trial, 3) guarantees related to respect for private life, 4) guarantees related to freedom of expression and information, 5) guarantees related to private property, and 6) guarantees granted to immigrants, refugees and asylum seekers.

These categories include a series of rights and obligations for the states, whose responsibility includes defining a legal framework that, if not respected when applied to terrorism-repression measures, will contribute to further expanding the phenomena that it was meant to contain. Nevertheless, as we already saw, the human rights system is somewhat flexible since it relieves the States, under certain circumstances and conditions, of the obligation to abide by some of these requirements.

### **Chapter 1: The Definition of Terrorism vs. the Principle of Legality**

One overarching rule in criminal and universal law found in human rights treaties<sup>84</sup> is the principle of the legality of crime and punishment (*nullum crimen, nulla poena sine lege*) according to which no crime can be committed and no punishment can be meted out in the absence of penal law. This means that criminal behaviour can only be considered as an offence if it has been defined as such by law at an earlier date (the prohibition of *ex post facto* laws). The definition must be sufficiently precise to avoid any arbitrary application.<sup>85</sup>

Thus the Universal Declaration on Human Rights states, in Article 11 § 2, that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” The U.N. Special Rapporteur on the independence of judges and lawyers condemned legal definitions that were vague or imprecise and that left room for the criminalisation of acts deemed legitimate and/or legal by international law on the grounds that they were contrary to international human rights law and “general conditions prescribed in international law.”<sup>86</sup>

The European Court on Human Rights also defined the scope of the principle of legality. According to the Court’s interpretation, “(...) an offence must be clearly defined in law (...). This condition 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 liable.” Similarly, the Inter-American Commission on Human Rights also condemns penal incriminations “defined in terms that are vague or imprecise.”<sup>87</sup>

Unfortunately these criticisms are generally applicable to definitions of terrorism that are given in most national and international law. In many cases, the legislation prohibits a series of acts without providing an overall definition of terrorism, also international treaties state that no derogation to the principle of legality may be admitted, regardless of circumstances: state of emergency or time of war.<sup>88</sup>

For several decades, governments and experts have been trying to work out an international definition of terrorism that respects the requirements of the principle of legality and

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84. Article 15 of the International Covenant on Civil and Political Rights; Article 7 of the European Convention on Human Rights, Article 9 of the American Convention on Human Rights, and Article 7 of the African Charter on Human and Peoples’ Rights.

85. Report of the Secretary General, Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, United Nations document A/58/266 of 8 August 2003, p. 13.

86. U.N. Special Rapporteur on the Independence of Judges and Lawyers, U.N. document E/CN.4/1998/39/Add.1, paragraph 129.

87. Inter-American Commission on Human Rights, *Informe Anual de la Comisión Interamericana de Derechos Humanos*, 1983-1984, p. 85, § 7.

88. Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights specifically prohibits derogation from the principle of legality.

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would be ideologically neutral. All these attempts have failed. In 1996, the United Nations General Assembly, in application of Resolution 51/210, created a Special Committee, whose mandate was to elaborate several international instruments against terrorism.<sup>89</sup> The Committee tried to prepare a general convention on international terrorism on the basis of a much-revised draft submitted by India in 1996.

The difficulties in reaching a broadly accepted definition of the crime of terrorism are just as much political and ideological as juridical.<sup>90</sup> The problem was accurately summarised by the Special Rapporteur of the U.N. Sub-Commission on Human Rights: *"It may be that the definitional problem is the major factor in the controversy regarding terrorism. This is all the more true when considering the high political stakes attendant upon the task of definition. For the term terrorism is emotive and highly loaded politically. It is habitually accompanied by an implicit negative judgment and is used selectively. In this connection, some writers have aptly underlined a tendency amongst commentators in the field to mix definitions with value judgments and either qualify as terrorism violent activity or behaviour which they are opposed to or, conversely, reject the use of the term when it relates to activities and situations which they approve of. Hence, the famous phrase 'one man's terrorist is another man's freedom fighter.'"*<sup>91</sup>

In this situation, it is very difficult to reach agreement on the essential questions underlying the definition of terrorism. The lawmakers have great difficulty in distinguishing the boundary between terrorism and "the legitimate combat of people to exercise their right to self-determination and legitimate defence when faced with aggression and occupation," and equally as concerns recognition of State terrorism.<sup>92</sup>

The International Commission of Jurists pointed to the even more serious problem that there was no real consensus on the principle for formulating a broad legal definition of terrorism.<sup>93</sup> Certain delegations asked whether the technique of defining specific acts of terrorism would not be more adequate from a

legal point of view.<sup>94</sup> In any case, the result of this plethora of concepts is a lack of clarity and precision.

The risk is that certain crimes or offences be incorporated in the category of terrorist act that, by nature, do not belong there. To take a precise example, the U.N. Committee on Human Rights has stated that the definition of terrorism in national law is so broad that *"it encompasses a wide range of acts of differing gravity."*<sup>95</sup> As the International Helsinki Federation for Human Rights warned, the imprecision of the definition of terrorism also creates the risk that a crime or an offence committed in a political context be considered as a terrorist act.<sup>96</sup>

The FIDH supported the efforts made by the United Nations Secretary General during preparations for the summit meeting held on the 60th anniversary of the UN, urging that a definition of terrorism be finalised and a convention be adopted. The proposal made by the High Level Panel – and reiterated by Kofi Annan – is the most interesting proposal at this stage.

Terrorism is defined as: *"any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004) that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."*<sup>97</sup>

But this definition does not alleviate apprehension caused by the vague character of the description which states "by its nature or context." Certain national laws use ambiguous definitions that often make it possible to criminalise legal forms of the exercise of fundamental freedoms (such as the right to freedom of assembly or expression), peaceful political and social opposition and lawful acts. Hence, people can be accused of terrorism for having expressed opinions that are similar to those expressed by real terrorists or for having

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89. See Resolution of the U.N. General Assembly No. 51/210 of 17 December 1996.

90. See International Commission of Jurists, *Terrorism and Human Rights*, Occasional papers No. 2, April 2002, p. 34.

91. Koufa, Kalliopi K., *Terrorism and Human Rights*, Progress Report, UN document E/CN.4/Sub.2/2001/31, 27 June 2001, para. 25, p. 8.

92. Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Fifth session (12-23 February 2001), A/56/37.

93. International Commission of Jurists, *op. cit.*, p.35.

94. United Nations Document A/56/37, paragraph 15.

95. CCPR/C/79/Add.23, paragraph 8.

96. International Helsinki Federation for Human Rights, *op. cit.*, pp. 64-65.

97. See report by the Secretary General's high level panel on threats, challenges and changes <http://www.un.org/secureworld/>, and the Open Letter the FIDH sent to the U.N. Secretary General, Kofi Annan, concerning Chap. VI, devoted to terrorism, dated 7 December 2004: [http://www.fidh.org/article.php3?id\\_article=2106](http://www.fidh.org/article.php3?id_article=2106).

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associated with terrorist organisations without being aware of the organisations' clandestine activities. Furthermore, we have seen that according to international law, the authorised limits to human rights are not meant to be applicable temporarily or only under special circumstances, yet there is a major risk that without clear definitions, they may be used unlawfully against persons and situations that do not fit into their scope of applications. Olivier de Schutter specifically noted this with regard to additional rights granted to investigators to fight terrorism.<sup>98</sup>

During the last few years, certain states have been developing new "techniques" that include the drawing up of official lists of groups deemed to be terrorists. Belonging to or collaborating with a so-called terrorist group becomes a crime, *ipso facto*, which is a kind of national indictment.<sup>99</sup> Mrs. Kalliopi K. Koufa had already referred to this technique and its serious implications before September 11th, 2001.<sup>100</sup> Numerous human rights are flouted, starting with the principle of the presumption of innocence and the right to defence, and also a series of fundamental freedoms. These brief observations are further developed in the analysis by Olivier de Schutter who points to three other effects of violations of the principle of legality.<sup>101</sup>

The first effect, referred to as "*the windfall effect*," relates to the specific characteristics of counter-terrorism measures and "*the ease with which States can succumb and lose sight of the exceptional character and the limits to the phenomenon that they are combating, and then embraces, in the name of the fight against terrorism, other forms of crime that have nothing in common with it. The windfall effect means extending the field of application of anti-terrorism measures beyond their original scope.*"

He calls the second effect the "*discrimination effect*," referring to the uncertainty that enshrouds the threat of terrorism and leads to increased discrimination and a feeling of anguish. "*In times of uncertainty, discrimination has certain advantages that are hard to feel indifferent about. Radical uncertainty that we have to confront—the term 'nebulous terrorist' translates our*

*disarray rather well—, combined with the importance of the stakes related to the fight against terrorism lead us to 'shifting the problem.'* As U. Beck, one of the most keen observers of the modern notion of risk said: '*As the number of dangers multiply, the risk society spontaneously tends to evolve into a scapegoat society, but remains politically inactive. Suddenly general anxiety is no longer provoked by the threats but by the people who convey them.*'<sup>102</sup> *The invisibility of terrorism is reflected in the visibility of categories such as the Middle East or Islam that are all the more vulnerable since the terrorist, the real target, continues to remain elusive.*"

Lastly, Olivier de Schutter brings out the "*contamination effect*" which stems from the confusion between the ideology of the terrorist action and the ideology of the demands and opinions defended especially by the terrorists. "*The terrorist act is usually accompanied by a political, ideological or religious message. This grafts it onto certain causes. There are social groups that defend these causes, but they do it by exercising their right to freedom of expression, assembly or association or through a religious manifestation. The contamination effect is the result of the States' attempts to impose restrictions on these freedoms, which may be used to justify terrorist activities. Although it is legitimate and, in a certain way, necessary, to separate terrorism from its sources of support, even when it adopts a legal facade, it is not, on the other hand, acceptable that certain demands go unheard or that the opinions of certain communities cannot be represented only because these demands or opinions are also put forth by the perpetrators of terrorist attacks who thereby seek to make their fight seem legitimate.*"

It is clear that the—unsolved—problem of defining terrorism is resulting directly in the violation of the principle of legality and several other human rights which can turn innocent persons into victims. The non-respect for the principle of legality sets off a chain reaction that aggravates the effects of this violation. Laws must give definitions and clearly describe fields of application otherwise there is a risk of not only infringing upon the fundamental freedoms of all citizens but also of being ineffective when it comes to fighting terrorism.

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98. De Schutter, O., *op. cit.*, p. 90.

99. International Commission of Jurists, *op. cit.*, p. 48.

100. U.N. Document E/CN.4/Sub.2/2001/31, of 27 June 2001, paragraph 111.

101. De Schutter, O., *op. cit.*, pp. 140-151.

102. Beck, U., *The Risk Society. Towards a new modernity*, translated from Fr trans. by L. Bernardi, Aubier, Paris, 2001, p. 138.

## Chapter 2: Guarantees Relative to Arrest and Detention

The above mentioned guarantees are especially connected to three sub-categories of rights: the right to life, the right not to be arbitrarily detained, and the right not to be subjected to torture or to cruel, inhuman or degrading treatment.

### 1. The Right to Life

If the right to life is not respected, the other rights and freedoms cannot be effectively guaranteed or exercised; this is clearly stated in Article 3 of the Universal Declaration, Article 6 of the Covenant, Article 2 of the European Convention, Article 4 of the American Convention and Article 4 of the African Charter of Human and People's Rights.

There can be no derogation to the right to life, under any circumstances, even in cases of emergency.

In relation to guarantees connected to arrest and detention, the right to life is especially important for two reasons. It prohibits arbitrary deprivation of life (summary or arbitrary executions) on the one hand and, on the other, it sets the conditions in which the death sentence can be applied in countries that have not yet abolished it (this latter problem will also be considered in the section on the right to a fair trial and the right to be defended). Thus the United Nations Committee on Human Rights expressed concern about the use of weapons by combatants against persons presumed to be terrorists, which caused a large number of deaths.<sup>103</sup>

According to the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *"Empowering Governments to identify and kill 'known terrorists' places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted. While it is portrayed as a limited 'exception' to international norms, it actually creates the potential for an endless expansion of the*

*relevant category to include any enemies of the State, social misfits, political opponents, or others. And it makes a mockery of whatever accountability mechanisms may have otherwise constrained or exposed such illegal action under either humanitarian or human rights law."*<sup>104</sup> These concerns are far from unfounded, as we recently saw on 22 July 2005 when 8 bullets killed an innocent person who was wrongfully thought to be a terrorist in the London Underground, where British police had adopted a *shoot-to-kill policy* to cope with the risk of suicide attacks. Despite the tragedy, Scotland Yard has not reconsidered its *shoot-to-kill policy*, which is still being applied at the time of the publication of this report.

In its report *Terrorism and Human Rights*, the Inter-American Commission on Human Rights stipulates, referring to case law: *"[I]n situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations. This includes, for example, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate. (...) Unless such exigencies exist, however, the use of lethal force may constitute an arbitrary deprivation of life or a summary execution; that is to say, the use of lethal force must be necessary as having been justified by a state's right to protect the security of all. The means that can be used by the state while protecting its security or that of its citizens are not unlimited, however. To the contrary, as specified by the Court, 'regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends.'*"<sup>105</sup>

It is noteworthy that a certain number of States have recently adopted anti-terrorist legislation that includes capital punishment, while international law tends towards the abolition thereof—in other words, discourages its application to new crimes for which it was not prescribed in the past.

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103. See CCPR/C/79/Add. 54.

104. Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, E/CN.4/2005/7, 22 December 2004, para. 41.

105. Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, See document of the Organization of American States OAS/Ser.L/V/II.116, Doc. 5, rev. 1 corr., 22 October 2002, paras. 86-89, citing Neira Alegria Case, I/A Court H.R., Judgment of January 19, 1995 (paras. 74-75).



## **2. Prohibition of Arbitrary Arrest and Detention, and the Right of Habeas Corpus**

Personal freedom is the corner stone of any society based on the rule of law. The right to freedom specially demands that a person not be arrested or detained by a State without a legitimate motive, i.e. arbitrarily,<sup>106</sup> and that a person has the right to contest the legality of his detention by virtue of a principle known as *habeas corpus*.<sup>107</sup>

There are other rights that contribute to protecting the principle of freedom and personal security such as the right to be informed about the reason for one's detention<sup>108</sup> and the right to be judged within a reasonable time period or, if not, the right to be released.<sup>109</sup> Administrative detention must remain an exceptional measure, be strictly time-limited and be subject to frequent and regular judicial supervision.<sup>110</sup>

This category of law is strongly affected by the legal and administrative measures adopted within the framework of the fight against terrorism. Governments are increasing the number of arbitrary arrests, extending the time that detainees are held incommunicado, and excluding the intervention of judicial authorities, thus showing an apparent lack of confidence in the capacity of their laws and courts to judge and condemn terrorists. The Human Rights Commission in its General Comment No. 29 on 'States of Emergency', (Art. 4 of the Covenant) indicated that arbitrary deprivation of freedom is never a valid legal derogation.<sup>111</sup>

In general, the Committee relied on the principle that preventive detention should be exceptional and as brief as possible,<sup>112</sup> and that preventive detention in secret could be a violation of the right not to be submitted to torture or to cruel, inhuman or degrading treatment, and of rights inherent in the regular procedures set out in Articles 9 and 14 of the Covenant.

The European Court of Human Rights has often seized the opportunity to spell out the contents of laws on the deprivation of liberty. In two cases concerning persons suspected of terrorist activities, the Court asserted that measures that deprived a person of his freedom were not justified except if taken to lead an arrested person to the competent judicial authorities, regardless of whether the person was suspected of committing or intending to commit an offence.<sup>113</sup> A few years later, the Court stated that an arrest was only compatible with Article 5 (1) (c) of the European Convention on Human Rights if there were sufficient objective indices to make the suspicions against the arrested person plausible.<sup>114</sup>

The Inter-American Court of Human Rights repeated several times that "(...) *no one may be deprived of his personal liberty except for reasons, or in cases or circumstances expressly described in the law (material aspect), but, moreover, with strict adherence to the procedures objectively defined by it (formal aspect).*"<sup>115</sup>

As concerns administrative detention, it is important to emphasise the points made in General Comment No. 8 of the Committee on Human Rights: "*if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.*"<sup>116</sup>

Furthermore, the Inter-American Commission for Human Rights warned against the dangers of extended authority to apply administrative detention, specifying that for the executive powers

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106. Article 9, § 1 ICCPR; 5, § 1 ECHR ; 6 ACHPR and 7, § 3 ACHR.

107. Principle stipulated in Article 9, § 3 ICCPR; 5, § 4 ECHR and 7, § 6 ACHR.

108. Article 9, § 2 ICCPR; 5, § 2 ECHR and 7, § 4 ACHR.

109. Article 9, § 3 ICCPR; 5, § 3 ECHR and 7, § 5 ACHR.

110. International Commission of Jurists, *Berlin Declaration. ICJ Declaration on the defence of human rights and the state of law in combating terrorism*, adopted on 28 August 2004, para 6 p. 3.

111. U.N. Documents CCPR/C/21/Rev.1/Add.11, of 31 August 2001, para. 11.

112. See HRI/GEN/1/Rev.6, chap. II, General Comments No. 8, para. 3. It states that extended preventive detention is a *de facto* violation of right to presumption of innocents. See *Annual Report of the Inter-American Commission of Human Rights 1997*, case 11.205, Report No. 2/97, the *Bronstein* case and *Annual Report of the Inter-American Commission of Human Rights 1995*, case 11.245, Report No. 12/96, the *Gimenez* case.

113. European Court of Human Rights, Judgement of 1 July 1961, the *Lawless* case (Fond), Series A No. 3, paragraph 14, Ruling of 18 January 1978, Series A No. 25, *Ireland v. United Kingdom*.

114. European Court of Human Rights, Ruling of 30 August 1990, the *Fox et al. v. United Kingdom* case, Series A No. 182, paragraph 32.

115. Ruling of 21 January 1994, the *Gangaram Panday* case, Series C No. 16, paragraph 47 and Ruling of 12 November 1997, the *Suárez Rosero* case, Series C No. 35, paragraph 43.

116. General Comment No. 8, The person's rights to freedom and security (Article 9), paragraph 4.

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to exercise judicial powers countered the fundamental principle of all democracies that upholds separation of powers.<sup>117</sup> The Commission also indicated that “(...) there is no norm in the international juridical order that justifies extended detention, on the basis of exceptional powers, and all the more so, maintaining persons in prison without charging them for presumed violations of the law on national security or other types of law and without their being able to enjoy the guarantees of a fair and equitable trial.”<sup>118</sup>

Finally, concerning the right to habeas corpus, i.e. the possibility to bring the legality of one’s detention before the court, numerous examples show that in the context of the fight against terrorism, this principle is often flouted.<sup>119</sup>

Although in case of deprivation of freedom, rights like habeas corpus are not explicitly included in the list of intangible rights in the Covenant, the Committee for Human Rights in its General Comment No. 29 on state of emergency, considered that in practice, the right to habeas corpus was a non-derogable right since it served to ensure protection of the intangible right: “Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation (to guarantee useful recourse) under article 2, paragraph 3.”<sup>120</sup> The Committee stipulated that with regard to continued, preventive detention, legality must be reviewed by an independent, impartial tribunal and that the access of the ICRC to all detention centres, especially in the event of armed conflict, must be guaranteed.<sup>121</sup> The European Court of Human Rights pointed out that the special nature of the anti-terrorism activities did not release the states from judicial control and that the state was not free to arrest suspects without applying judicial procedure.<sup>122</sup> The Court explains that: “Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body

competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information... (...) The individual must be able to challenge the executive’s assertion that national security is at stake. While the executive’s assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of ‘national security’ that is unlawful or contrary to common sense and arbitrary. (...) Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.”<sup>123</sup>

The inter-American human rights system adopted a similar position on the non-derogability of habeas corpus. “The Court is of the opinion, unanimously, [t]hat the ‘essential’ judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), amparo, and any other effective remedy before judges or competent tribunals (Art. 25(1)), which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention.”<sup>124</sup> The Inter-American Court of Human Rights justified its opinion by bringing out the importance of habeas corpus with regard to the very history of the continent over which it has jurisdiction.<sup>125</sup> Despite the constantly reiterated importance which the main human rights bodies give to habeas corpus, and all the guarantees related to detention, these rights are far from being universally respected, in particular in the context of the fight against terrorism.

### **3. Prohibition of Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment<sup>126</sup> and Conditions of Detention<sup>127</sup>**

In the report submitted to the 57th Session of the General Assembly, the UN Special Rapporteur on Torture and other forms of punishment or cruel, inhuman or degrading treatment

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117. Inter-American Commission of Human Rights, *Diez años de actividades, 1971-1981*, Organisation of American States, Washington, 1982, page 319.

118. *Ibid.*, page 320.

119. International Commission of Jurists, *op. cit.*, p. 65.

120. See U.N. Documents CCPR/C/21/Rev.1/Add.11, 31 August 2001, paragraphs 13, 14 and 16.

121. See U.N. Documents CCPR/C/79/Add. 81, para. 27 (1997).

122. *Ocalan v. Turkey*, ECHR, 12 March 2003 (para. 106).

123. *Al-Nashif v. Bulgaria*, ECHR, 20 June 2002 (paras. 94, 123-124).

124. I/A Court H.R., Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, October 6, 1987 (paras. 25, 41).

125. *Ibid.*, paras. 35-36, 40.

126. Article 7 ICCPR ; article 3 ECHR and article 5, para. 2 ACHR.

127. Article 10 ICCPR; article 5, para. 2 ACHR.

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recognised that, according to the information on the measures for combating terrorism which he had received, the provisions of some new national anti-terrorism laws did not necessarily offer the necessary legal guarantee on the prevention of torture and other forms of ill-treatment recognized by international human rights law.<sup>126</sup> There even seems to be a tendency towards a denial of the absolute need for prohibition of punishment or cruel, inhuman or degrading treatment on the one hand and a tendency towards the re-emergence of the utilitarian point of view which justifies the use of torture as part of the fight against terrorism on the other hand.<sup>129</sup>

In this context, we should quote the U.N. definition of torture which says that: *“the term ‘torture’ means any act by which severe punishment or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such punishment or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include punishment or suffering arising only from, inherent in or incidental to lawful sanctions.”*<sup>130</sup>

It should be noted that a certain strand of opinion has now emerged, saying that although there must be no departure from the prohibition of torture, cruel inhuman or degrading treatment or punishment should not be completely prohibited, and that therefore, it could be used in certain exceptional circumstances. According to some States, certain modern methods of interrogation used, such as depriving a person of sleep, submission to noise and/or extreme temperatures and forced posture are not acts of torture, but “only” some form of cruel, inhuman or degrading treatment. Naturally, this perception is totally flawed and it creates an unjustified hierarchy between two forms of behaviour which are equally prohibited by international treaties.

As the Committee on Human Rights has reaffirmed: *“even in situations of public emergency, such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.”*<sup>131</sup> Following the attacks of September 11, 2001, the Committee against Torture reiterated this opinion.<sup>132</sup> The UN Special Rapporteur on torture and other forms of punishment or cruel, inhuman or degrading treatment specified: *“While being aware of the threats posed by terrorism and recognizing the duty of States to protect their citizens and the security of the State against such threats, the Special Rapporteur would like to reiterate that the absolute nature of the prohibition of torture and other forms of ill-treatment means that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.”*<sup>133</sup> *“...no executive, legislative, administrative or judicial measure authorizing recourse to torture and cruel, inhuman or degrading treatment or punishment can be considered as lawful under international law and, therefore, any measure of that kind would engage the State’s responsibility, whether it be an act of torture directly committed by, or at the instigation of, or with the consent or acquiescence of a public official or any other person acting in an official capacity on behalf of that State. A head of State, also in his or her capacity as commander-in chief, should therefore not authorize his or her subordinates to use torture, or guarantee immunity to the authors and co-authors of and accomplices to torture...”*<sup>134</sup>

The Special Rapporteur once again formally denounced attempts by governments to consider certain methods of interrogation, such as threatening with death or depriving a person of his/her basic human needs, as being “only” tantamount to cruel, inhuman or degrading treatment.<sup>135</sup> The European Court of Human Rights has also confirmed that the prohibition of

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126. Article 7 ICCPR ; article 3 ECHR and article 5, para. 2 ACHR.

127. Article 10 ICCPR; article 5, para. 2 ACHR.

128. See UN documents A/57/173, para. 5.

129. Association for the Prevention of Torture, *Counter-terrorism: why torture and ill-treatment can never be justified*, Oct. 2003, p. 1.

130. Article 1-2 UNCAT.

131. General Comment No. 20, 10/3/1992 (para 3).

132. Declaration of the Committee against Torture of 26 November 2001, see document CAT/C/XXVII/Misc.7, p. 1.

133. Report of the Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment or punishment, A/59/324, Sept. 2004, para. 14.

134. *Ibid.*, para. 15.

135. *Ibid.*, para. 16.

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torture and other forms of punishment or cruel, inhuman or degrading treatment was not likely to be subject to any derogation, not even with the threat of terrorism.<sup>136</sup> Now, some have gone so far as to make recurrent proposals for torture to become lawful under extreme circumstances, particularly since the events of September 11, 2001. However, these proposals are irrelevant, since the prohibition of torture and other forms of inhuman or degrading treatment or punishment is an absolute prohibition. The dangers of such a utilitarian claim can be very easily discerned.

A corollary of the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment under international human rights law is that *“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”*<sup>137</sup> Although not formally mentioned in the Covenant, there is no possibility of derogation from this provision and States are under a firm obligation to comply with this provision, as reaffirmed by the Committee on Human Rights.<sup>138</sup>

After reminding States of their obligation to respect human dignity under any circumstances, the Council of Europe went on to explain: *“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.”*<sup>139</sup>

The acceptable minimum standards of detention are set out in the *“United Nations Standard Minimum Rules for the Treatment of Prisoners,”*<sup>140</sup> although they do not have binding force. These rules stipulate, among others, that prisoners should be registered at the detention centre; furthermore, prisoners who have not yet been sentenced benefit from the presumption of innocence, they should be separated from those who have been sentenced they should be allowed to have visits from their family and friends, they should be allowed to practise their religion and, last but not least, they should be allowed to enjoy one hour of free exercise outside, unless they are already subjected to some sort of work outdoors.

The Committee on Human Rights has for instance observed a violation of such rights in connection with a case in which a person who was accused of terrorism had stayed in secret detention for nine months before being sent to trial and being sentenced. That person hadn't had the right to see a counsel until at least nine months after his arrest or any contact with his family for nearly two years while he had to stay in solitary confinement for 23 hours a day.<sup>141</sup>

Based on the same type of example, the European Court of Human Rights also took the opportunity to speak out on the standards of a form of detention which respects human dignity and concluded that *“...complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason (...).”*<sup>142</sup>

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136. *Labita vs. Italy*, 6 March 2000, Collection of judgments and decisions 2000-IV, para. 119.

137. Article 10 ICCPR and article 5, para. 2 ACHR.

138. See document CCPR/C/21/Rev.1/Add.11, para. 13.

139. Council of Europe, *Human rights and the fight against terrorism - The Council of Europe Guidelines* adopted by the Committee of Ministers on 11 July 2002, p. 12.

140. United Nations Standard Minimum Rules for the Treatment of Prisoners, approved by Resolution 663 C (XXIV) of the Economic and Social Council of the United Nations of 31 July 1957 and by Resolution 2076 (LXII) of 13 May 1977.

141. Case no. 577/1994 in *Protection of Human Rights and Fundamental Freedoms in the Fight against Terrorism*, Report by the Secretary General, 8 August 2003, see document of the UN General Assembly A/58/266, p.13. In another case, the UN Working Group on Arbitrary Detention considers that “secret detention without judgment [of the five detainees suspected of acts of terrorism] constitutes a violation of their fundamental rights. The authorities should have handed them over to an impartial court which has jurisdiction over this matter, providing the evidence of the alleged acts, or released them immediately if the evidence could not be submitted.” Hence, this was considered to be a case of arbitrary detention. Opinion 10/2004 (Malaysia) adopted on 28 May 2004.

142. *Ocalan vs. Turkey*, ECHR, 12 March 2003 (para. 231- 232).

## Chapter 3: Fair Trial Guarantees

Fair trial guarantees, which are a fundamental principle of all regional and international human rights instruments, recognize the right of any human being to a fair trial in public by an independent and impartial court, previously established by the law, within a reasonable timeframe.<sup>143</sup> In addition, those awaiting judgment enjoy a certain number of rights related to the procedure in order to ensure a fair trial. These rights include, above all, the right to the presumption of innocence;<sup>144</sup> a person's right to defend himself or herself on his/her own or to get assistance from a lawyer, as well as the right to have the necessary time and facilities to prepare the defence;<sup>145</sup> the right not to be forced to present evidence against oneself or to admit one's own responsibility;<sup>146</sup> and finally, the right to appeal against the sentence to a higher court.<sup>147</sup>

The Committee on Human Rights has more specifically focused on various aspects of the right to a fair trial in terrorist cases. The Committee has declared that, even though it is not part of those rights which are not likely to be subject to derogation, as mentioned in Article 4 of the Covenant, some provisions contained in article 14 on the right to a fair trial must be implemented by States, even in a state of emergency. One of these provisions is the presumption of innocence, as well as the fundamental guarantees related to the right to a fair trial, which is inherent in the principles of lawfulness and primacy of the law. The Committee also stressed that, even in times of war or of state of emergency, individuals may only be brought to justice and be sentenced for a criminal offence in courts.<sup>148</sup>

### 1. Military Tribunals and Special Tribunals

The reminder on the jurisdiction of ordinary courts is very relevant, given the frequent practice of States to resort to military or other special tribunals to bring individuals to justice for alleged acts of terrorism—and that is extremely preoccupying. Such proceedings stand in complete contradiction to the

principle of independence and impartiality of the judiciary, as the Committee on Human Rights has pointed out. The latter criticized those types of trials in which the accused are judged by the military forces who had proceeded to their arrest and accusation, with members of those military tribunals being officers in active service and without there being any provision allowing a review of those accusations by a higher court.<sup>149</sup> Consequently, the Committee demanded that civilians be brought to trial by regular courts in all cases and that any laws or provisions to the contrary should be amended.<sup>150</sup>

The principles on the Independence of the Magistrature actually make reference to the “natural judge”: “A basic principle of the independence of the judiciary is that every person shall have the right to be heard by regular courts, following procedures previously established by law.”<sup>151</sup> In addition, the Commission on Human Rights, in its Resolution No. 1989/32, made the recommendation to States that they should take on board the principles listed in the *Draft Declaration on the Independence of Justice* (known as the Singhvi Declaration), which says in its article 5 that: “(b) no special tribunal has been established to deal with cases which are normally within the jurisdiction of ordinary courts; [...] (e) In the case of exceptional danger to the general public, the State shall make sure that civilians accused of criminal offences, regardless of their nature, shall be judged by civil courts.”<sup>152</sup> (Emphasis added)

Hence, as far as criminal courts are concerned, the Committee on Human Rights has recommended several times that the legislation of several States should be amended, in order for civilians to be judged by civil courts only and not by military tribunals.

The UN Working Group on arbitrary detention is of the opinion that “if some form of military justice is to continue to exist, it should observe four rules: (a) It should be incompetent to try civilians; (b) It should be incompetent to try military personnel

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143. Article 14, para. 1 ICCPR; article 6, para. 1 ECHR and article 8, para. 1 ACHR.

144. Article 14, para. 2 ICCPR; article 6, para. 2 ECHR and article 8, para. 2 ACHR.

145. Article 14, para. 3 (b) ICCPR; article 6, para. 3 (b) & (c) ECHR and article 8, (c) & (d) ACHR.

146. Article 14, para. 3 (g) ICCPR and 8, para. 2 (g) ACHR.

147. Article 14, para. 5 ICCPR; Protocol 7, art. 2 ECHR and 8, para. 2 (h) ACHR

148. See CCPR/C/21/Rev.1/add.11 of 31 August 2001 and HRI/GEN/1, Rev. 6, Chap. II, General Observation No 13.

149. See CCPR/C/79/Add. 67 and 76.

150. See CCPR/C/79/Add. 78 and 79.

151. Principle No. 5.

152. United Nations, E/CN.4/Sub.2/1998/Add.1. The United Nations Commission on Human Rights recommended in Resolution 1989/32 that member States be mindful of the principles listed in that document.

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*if the victims include civilians; (c) It should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime; and (d) It should be prohibited imposing the death penalty under any circumstances.*"<sup>153</sup>

Hence, these criteria should be those applied to anti-terrorist measures that stipulate that the perpetrators of acts of terrorism should be sentenced.

The opinion of the Inter-American Court converges with the opinions of the different bodies of the United Nations. *"A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create (...) [t]ribunals that do not use the duly established procedures of the legal process (...) to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.*"<sup>154</sup>

Hence, according to the Inter-American Commission on Human Rights, a special military tribunal is not an independent and impartial tribunal, as it is subordinate to the Ministry of Defence, i.e. to the Executive.<sup>155</sup> However, there is one exception to this rule, although this is limited by very clear-cut conditions. According to its doctrine, *"... the procedures must recognize the minimum guarantees established by international law, which includes the non-discrimination between citizens and those who are subject to the jurisdiction of a State, an independent judge, the right to defence, free choice of counsel and access to evidence as well as the principle of judgment given after due hearing of the parties.*"<sup>156</sup> These main principles have been laid down in the United Nations Principles on Human Rights in military justice which were adopted by the Sub-Commission on Human Rights in June 2005.<sup>157</sup>

The same goes for the African Commission on Human and Peoples' Rights. When the Dakar Declaration and Recommendations were made, the Commission noted in its resolution on the right to a fair trial and to assistance by a lawyer that: *"In many African countries Military Courts and Special Tribunals exist alongside regular judicial institutions. The purpose of*

*Military Courts is to determine offences of a pure military nature committed by military personnel. While exercising this function, Military Courts are required to respect fair trial standards. They should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, Special Tribunals should not try offences that fall within the jurisdiction of regular courts.*"<sup>158</sup>

These fundamental principles have been laid down in the Draft Principles on the Administration of Justice by Military Tribunals, which the United Nations Sub-Commission on Human Rights decided to hand over to the United Nations Commission on Human Rights for scrutiny in August 2005.<sup>159</sup> Following the example of the rules applicable to military tribunals, special tribunals must comply with the provisions of article 14 of the Covenant, although it should be noted that, as the Committee on Human Rights has done, *"ever so often, when such tribunals are established, this is in order to allow the implementation of those [rules] which are not in accordance with ordinary standards of the judiciary.*"<sup>160</sup>

## **2. Exceptional Procedures**

Finally, another frequent and preoccupying practice of States in combating terrorism is that they try to introduce rules of procedure which allow the anonymity of witnesses, the secrecy of evidence, and, sometimes even the anonymity of judges, prosecutors and court officers. These trials conducted by "faceless judges," as they are called, have been strongly denounced by all the human rights bodies on the grounds that they constitute a violation of a number of fair trial guarantees. Hence, the Committee on Human Rights, in a decision on a person brought to justice and sentenced for acts of terrorism by a special tribunal with so-called "faceless judges," has considered these tribunals to be grossly incompatible with article 14 of the Covenant in its entirety.<sup>161</sup>

In the same way, the Inter-American Commission on Human Rights has considered that systems of "faceless judiciary"

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153. Report of the Working Group on arbitrary detention, E/CN.4/1999/63, 18 December 1998, para. 80.

154. *Castillo Petruzzi et al. Case*, I/A Court H.R., Judgment of May 30, 1999 (para. 128-131, 172).

155. *Annual Report of the Inter-American Commission on Human Rights 1994*, document of the Organization of American States (OAS) / Sr.L/V/II.88, doc. 9, Rev. 1995.

156. Resolution on "Terrorism and Human Rights" of 12 December 2001.

157. "Administration of Justice, Rule of Law and Democracy," E/CN.4/Sub.2/2005/9, 16 June 2005.

158. *Media Rights Agenda Case*, Comm No. 224/98, 14th Annual Activity Report 2000-2001 (para. 59-62). The Commission has thus considered that the judgment passed by a military tribunal had been a breach of article 7 (1 (d) [of the Charter], as the composition of the tribunal, which was set up following the unrest (Special Tribunals), Decree No. 2 of 1987, was at the discretion of the Executive power.

159. E/CN.4/Sub.2/2005/9.

160. United Nations Committee on Human Rights, General Observation No.13, para. 4. (free translation)

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were contrary to the right to an independent and impartial tribunal and that they were a transgression of legal guarantees.<sup>162</sup> Its critics also did not fail to criticise the anonymity of witnesses, which often goes hand in hand with that of judges, which constitutes a breach of the provisions contained in article 8 sec. 2 f) of the American Convention.<sup>163</sup> It should be pointed out that the European Court of Human Rights has adopted a slightly more lenient position on the problems of anonymous witnesses and the secrecy of evidence. The latter may, for instance, be submitted and heard. Nevertheless, the Court is of the opinion that a person cannot be sentenced exclusively or in a decisive manner on the grounds of evidence which was not the subject of a controversial debate, either on inquiry or during the trial.<sup>164</sup> In the same way, the Court is not against the use of “faceless” witnesses *per se*; however, those witnesses must be subject to due hearing of the parties before order is given and may not form an exclusive or decisive basis on which the judgment is made.<sup>165</sup>

Finally, apart from the doubts about the impartiality and independence of different judicial systems put in place for bringing terrorists to justice, the UN Committee on Human Rights has also been concerned about counter-terrorist measures preventing detainees from having access to counsel as soon as they were arrested. The Committee did quote, for example, the case where the accused could stay for 48 hours before they were allowed to contact a lawyer, considering that the need for such a measure needed to be justified in view of the obligations contained in articles 9 and 14

of the Covenant, especially when there were less stringent measures to achieve the same goals.<sup>166</sup> The Committee, as the Committee Against Torture,<sup>167</sup> has also insisted on the importance of the right of the accused to appeal against their sentence and their penalty to an independent higher court in accordance with the law.<sup>168</sup> And finally, we should form the tenuous link between these guarantees for a fair trial and the absolute principle of the right to life.

In fact, there are some circumstances in which the respect for the former is all the more important as it is a pre-condition for the respect for the latter. As the Committee on Human Rights has indicated in its General Observation No. 29, since the right to life cannot be subject to derogation, any imposition of capital punishment (even in a state of emergency) must be in accordance with the provisions of the Covenant, even those on guaranteed proceedings and on the right to a fair trial.<sup>169</sup> A judgment was passed by the European Court of Human Rights on the same subject on 12 March 2003. “*It also follows from the requirement in Article 2 section 1 [right to life] that the deprivation of life be pursuant to the ‘execution of a sentence of a court’, that the ‘court’ which imposes the penalty be an independent and impartial tribunal within the meaning of the Court’s case law (...) and that the most rigorous standards of fairness are observed in the criminal proceedings both at first instance and on appeal. Since the execution of the death penalty is irreversible, it can only be through the application of such standards that an arbitrary and unlawful taking of life can be avoided...*”<sup>170</sup>

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161. Decision of 6 November 1997, Communication No. 577/1994, Víctor Alfredo Polay Campos vs. Peru, United Nations document CCPR/C/61/D/577/1994, of 9 January 1998, para. 8.4. and 8.8.

162. “*The right of anyone who has been accused in criminal proceedings to know who their judge is and to determine the subjective competence of that judge is a fundamental right. The secret identity of judges deprives the accused of this fundamental right and constitutes, over and above that, his/her right to be judged by an independent and impartial court.*” Segundo Informe sobre la situación de Derechos Humanos en Perú (Second Report on the Human Rights Situation in Peru), OAS/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para.s 103, 104 and 110 (original in Spanish, free translation).

163. IACHR, OAS/Ser.L/V/II.102/Doc. 9, rev. 1, 26 February 1999 (para. 121-25).

164. Judgment of 14 December 1999, *A.M. vs. Italy*.

165. Judgment of 26 March 1996, *Doorson vs. Netherlands*.

166. Protection of Human Rights and Fundamental Freedoms in the Fight against Terrorism, Report by the UN Secretary General, *op. cit.*, p. 14.

167. CAT/C/XXIX/Misc.4, para. 6 (2002).

168. See CCPR/C/79/Add. 61 and 80.

169. See CCPR/C/21/Rev. 1/Add. 11.

170. *Ocalan c. Turkey*, ECHR, 12 March 2003, para. 202-203, 207.

## Chapter 4: Guarantees on the Respect for Private Life

The right to the respect for privacy is another basic principle of all human rights instruments.<sup>171</sup> Irrespective of the form in which this right is couched, its aim is to protect the respect for the right to private and family life, a home and communications, by prohibiting arbitrary or unlawful interference or intermeddling by public authorities. The International Covenant on Civil and Political Rights and the American Convention on Human Rights include, in addition, in their articles 17 and 11 respectively, any unlawful attacks on a person's honour and reputation. In fact, the rights on "privacy" are closely linked to the freedom of expression, the freedom of assembly, the freedom of movement, the freedom of thought and the freedom of religion. Hence, the absence of private life almost inevitably leads to the absence of freedom.<sup>172</sup>

However, this does not mean that the right to private life is an absolute right, since, according to the International Covenant on Civil and Political Rights, interference with a person's private life by public authorities is permitted on the condition that it does not constitute "arbitrary or unlawful" interference.<sup>173</sup> ("arbitrary or abusive" according to the Inter-American Court<sup>174</sup>).

Finally, the European Convention on Human Rights allows departures from the law, if this is necessary "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."<sup>175</sup> Hence, the European Court of Human Rights has admitted that "in view of an exceptional situation [the threat of terrorism], the existence of legal provisions conferring powers of discreet surveillance of correspondence, postal mailings and telecommunications is necessary for the protection of national security and/or the defence of public order and the prevention of criminal offences in a democratic society."<sup>176</sup> However, in this case, the Court has only exempted the defender State on the grounds that it has made compensation for the restrictions of the right to the

respect for privacy and the secrecy of correspondence by establishing new, unprecedented control mechanisms and by presenting certain guarantees for pluralism and for independence. However, it should be noted that in some subsequent cases where such measures were taken to counter other forms of crime, the Court called for more comprehensive guarantees relating to the proceedings, in order to prevent any abuse on the part of the States.<sup>177</sup>

The legal provisions and the jurisprudence as regards restrictions and derogations of the right to privacy are all the more relevant with the fight against terrorism as, as Olivier de Schutter puts it, the latter "has been the preferred place for the development of so-called 'special' methods of investigation as well as active research" carried out without the persons targeted being aware of it.<sup>178</sup>

The problem is not so much the development of special new methods of investigation which constitute interference with a person's privacy, but rather the alteration of the perception that one was establishing clear-cut borderlines between personal privacy and State security. Such an alteration of our perception of this balance has led to the adoption of new legislation resulting in less protection of a person's private life, but without increasing, as a result, the protection against abuse of these new powers.<sup>179</sup>

Another special method of investigation is intelligence by processing files with personal data. The inclusion of this type of activity in the area of application of the right to privacy is only implicit and falls within the jurisdiction of the courts. In fact, the principal treaties on human rights do not mention personal data in their articles. However, the Commission on Civil Liberties, Justice and Interior Affairs of the European Parliament has nevertheless considered that this area was covered by the right to private and family life.<sup>180</sup> Moreover, specific Conventions and Charters impose restrictions on the

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171. Article 17 ICCPR ; article 8, para. 1 ECHR and article 11, para. 2 ACHR.

172. See International Helsinki Federation for Human Rights, *op. cit.*, p. 184.

173. Article 17 ICCPR.

174. Article 11, para. 3 ACHR.

175. Article 8, para. 2 ECHR.

176. See *Klass and others vs. Fed. Republic of Germany* of 6 September 1978, para. 48, European Court of Human Rights.(free translation).

177. *Malone vs. United Kingdom*, European Court of Human Rights, Judgment of 28 August 1984, series A, No. 82; *Leander vs. Sweden*, Judgment of 26 March 1987, para. 60 and *Kruslin vs. France & Huvig vs. France*, Judgment of 24 April 1990, series A, No. 176-A and B.

178. De Schutter, *op. cit.*, pp. 99-100.

179. See International Helsinki Federation for Human Rights, *op. cit.*, p. 184.

180. European Parliament on Citizen's Freedoms and Rights, Justice and Home Affairs, *Freedom, Security and Justice: An Agenda for Europe*, available on the following website: [http://www.europarl.eu.int/comparl/libe/elsj/charter/art08/default\\_en.htm](http://www.europarl.eu.int/comparl/libe/elsj/charter/art08/default_en.htm).



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processing of personal data.<sup>181</sup> As far as the processing of personal data is concerned, the development of the jurisprudence of the European Court of Human Rights is particularly interesting. In March 1987, in the *Leander* judgment, which we have already mentioned, the Court had concluded on the applicability of article 8 of the ECHR to the secret police register. In May 2000, when the judgement in the *Rotaru* case was passed, the Court affirmed for the first time, and unequivocally, that article 8 of the Convention offered protection as regards the processing of personal data, and this irrespective of whether this data was “personal” or not, i.e. even if the data gathered on an individual are about activities which he/she had voluntarily made public or of which he/she had, in any case, not intended to protect the confidentiality.<sup>182</sup>

The protection as regards the gathering and processing of these data has thus been considerably extended. However,

the possibility of derogation remains no less intact, particularly in favour of intelligence services in charge of combating terrorism. The importance of their activities is sufficient to legitimize certain well-defined derogations, since, as Oliver de Schutter puts it, intelligence in combating terrorism is crucial.<sup>183</sup>

Nevertheless, one way in which personal data is actually used and which raises many questions as regards the respect for human rights, is the compiling of “terrorist profiles” on the basis of characteristics such as nationality, religion, age, education, place of birth, psycho-sociological characteristics or marital status. This example, which presents a multitude of dangers, is sufficient proof of the inherent danger in the gathering and processing of data on individuals by the State and, thus, perfectly shows the need for setting up rules and regulations for such activities.

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181. As an example, see the Convention on the Protection of Persons as regards the automated processing of personal data (S.T.E., No. 108), signed in Strasbourg on 28 January 1981 and article 8 of the Charter of Fundamental Rights of the European Union.

182. *Rotaru vs. Romania* of 4 May 2000, para. 57, European Court of Human Rights.

183. De Schutter, *op. cit.*, pp. 110-111.

## Chapter 5: Freedom of Expression and Information

The protection of freedom of expression and information, which is a key element of any democratic society, is largely covered by international human rights Law. For instance, article 19 of the International Covenant on Civil and Political Rights says that “1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” These principles can also be found in other international treaties.<sup>184</sup>

It should be noted that the European Convention does not cover the right to “research” information as part of the protection it guarantees for the freedom of expression and information. Nevertheless, this does not allow us to conclude that this right is not recognized, as is demonstrated by the importance which the European Court of Human Rights attributes to the right to information in its jurisprudence. As far as article 10 in its entirety is concerned, the Court attributes a special status to it when it says that it “constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.”<sup>185</sup>

Beyond this European particularity, the freedom of expression comprises the right to information, i.e. receiving and disclosing information in all cases. The freedom of information is, in fact, crucial for the enjoyment of the freedom of expression. This link between access to information and the freedom of expression was highlighted in the joint Declaration of the Special Rapporteur of the United Nations on the freedom of expression, the Representative of OSCE on the freedom of the press and the Special Rapporteur of the OAS (Organisation of American States) on the freedom of the press: “Implicit in freedom of expression is the public’s right to open access to

information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.”<sup>186</sup> This highlights the importance of the freedom and the independence of the press which is linked to the freedom of expression and the right to information.<sup>187</sup>

The European Court of Human Rights has specified that there is no democracy without pluralism and that, consequently, the freedom of expression is a fundamental right.<sup>188</sup> In spite of this crucial role in the democratic process, however, conscious of the influence that ideas or concepts may have, human rights instruments have nevertheless built-in possibilities of restricting the freedom of expression.<sup>189</sup> Thus, according to article 19 section 3 of the Covenant: “The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

Even though it provides for a broader range of motives for derogation, article 10, section 2 of the European Convention of Human Rights offers a similar possibility which is also subject to the crucial condition of “lawfulness.” Afterwards, the Court makes restrictions to the freedom of expression subject to close scrutiny, which goes beyond that of the restriction of other rights, by considering that such a restriction must be motivated in a convincing way.<sup>190</sup>

Thus, for instance, it only admits with great difficulty the censure of criticism of governments: “... there is little scope under Article 10 section 2 of the Convention for restrictions on political speech or on debate on questions of public interest.

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184. The American Convention on Human Rights offers similar protection: “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.” (article 13 para. 1); as does the European Convention on Human Rights: “Everyone shall have the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (...)” (article 11 para. 1); and the African Charter of Human and Peoples’ Rights: “1. Every individual shall have the right to receive information; 2. Every individual shall have the right to express and disseminate his opinions within the law.” (article 9)

185. *Handyside c. Royaume-Uni*, European Court of Human Rights, November 1976.

186. Mendel, T., *National Security vs. Openness*, ARTICLE 19, February 2003, available on the website: <http://www.maxwell.syr.edu/campbell/opengov/>.

187. OSCE Moscow document, para. 26.

188. *The United Communist Party of Turkey and Others vs. Turkey*, ECHR, 30 January 1998 (para. 43) ; *The Socialist Party and Others vs. Turkey*, 25 May 1998 (para. 41); *Freedom and Democracy Party (OZDEP) vs. Turkey*, 8 December 1999 (para. 37).

189. Article 19, para. 3 ICCPR; article 10, para. 2 ECHR and article 13, para. 2 and 5 ACHR.

190. *Sunday Times vs. United Kingdom* (No. 2), European Court of Human Rights, 26 November 1991, series A, No. 217.

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*Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.*"<sup>191</sup>

The Inter-American Court of Human Rights, which is in charge of ensuring the implementation of this Convention, considers it to be more restrictive in terms of derogation from the freedom of expression than the other human rights treaties,<sup>192</sup> although it should be pointed out that the Inter-American Commission on Human Rights, for its part, has argued about the fact that some erosion of the right to freedom of expression may prove necessary in combating terrorism, in the interest of "protecting public order or national security."<sup>193</sup>

Finally, when an opinion was rendered on the decision of one government in favour of the imprisonment of political opponents, justifying it with the threat that they constituted to national security and independence, the African Commission on Human and Peoples' Rights considered that there had been a violation of freedom of expression: "*the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law... The Government here has imposed a blanket restriction on the freedom of expression. This constitutes a violation of the spirit of article 9.2.*"<sup>194</sup>

One relevant and complex issue for our statements is the problem of speeches encouraging hatred and incitement to violence. Admittedly, the assessment of the legitimacy of a censure of this type of speech is highly delicate. The International Covenant on Civil and Political Rights formally stipulates a restriction to freedom of expression as regards this type of speech, as article 20, para. 2, stipulates that "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall*

*be prohibited by law.*" The jurisprudence of the European Court of Human Rights also indicates that in certain circumstances, hostile speeches may be subject to restrictions by virtue of article 10 section 2 of the Convention, and the State shall be given greater scope for evaluation.<sup>195</sup> In the *Sürek* case, the majority of members of the Court agreed with Turkey for having imposed a fine on an editor who was about to publish letters on the war in South-Eastern Turkey, which were deemed to stir hatred among the Kurdish population.<sup>196</sup> On the other hand, in the *Jersild* case, the Court has considered legal proceedings against a journalist and a Programme Director for having broadcasted a documentary on television which contained interviews in which racist opinions were being voiced as disproportionate.<sup>197</sup>

In fact, as judge John Hedigan summarised it: "*A line that is difficult to draw is the one between support of terrorism and support for the cause which has produced terrorists among its supporters who may find it difficult if not impossible to support the authorities against the terrorists on their own side.*"<sup>198</sup> However, the impact of the fight against terrorism on the freedom of expression is not limited to the prohibition of speech condoning and advocating for acts of terrorism to be committed.

The fight against terrorism has always incited certain States to adopt legislation authorising government interference with the media in the context of combating terrorism, but even more so since the tragic events of September 11, 2001. Others put pressure on journalists in order to prevent them from voicing criticism and to stop them from going to prisons, trials or to war zones or to restrict their access to them. The right of inspection of the general public on government measures is partially restricted, if not made virtually inexistent by some States. The inviolability of the secrecy of journalist sources is also jeopardized, both directly by new laws restricting witnesses from cooperating in investigations linked to

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191. *Sener vs. Turkey*, ECHR, 18 July 2000 (para. 40).

192. "The foregoing analysis (...) shows the extremely high value that the [American] Convention attributes to the freedom of expression. A comparison of Article 13 with the relevant provisions of the European Convention (Article 10) and the Covenant (Article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas," I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, November 13, 1985 (paras. 50, 70).

193. Inter-American Commission on Human Rights of the Organization of American States, *Report on terrorism and Human Rights*, Washington D.C., 2002, p. 192.

194. Amnesty International, Loosli Bachelard Committee, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa case, Comm. No. 48/90, 50/91, 52/91, 89/93, 13th Annual Activity Report 1999-2000 (paras. 78-80).

195. *Sener vs. Turkey*, *op. cit.*, para. 40.

196. *Sürek c. Turquie* (No. 1), Judgment of 8 July 1999, European Court of Human Rights.

197. *Jersild c. Danemark*, Judgment of 24 September 1994, European Court of Human Rights, series A, No. 298.

198. Hedigan, J., *Human Rights and Counter Terrorism: The approach of the European Court of Human Rights*, available on the website: [http://www.icj.org/IMG/pdf/Friday\\_24\\_October\\_Morning.pdf](http://www.icj.org/IMG/pdf/Friday_24_October_Morning.pdf).

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terrorism and indirectly by extending the government's powers of surveillance and investigation. In fact, there is not one aspect of the freedom of expression which does not have to suffer from the consequences of combating terrorism, whether it is the right to express oneself or to research, gather or pass on information.<sup>199</sup>

In fact, a restriction of the freedom of expression as such may be acceptable in some contexts, especially when this freedom is used by proselytism to make propaganda for xenophobic ideas and/or to stir up violence, although this possibility must remain circumscribed with the limits imposed by the minimum standards which are democratically acceptable. Now, as the Global P.E.N. Report shows, considering local, regional and global contexts, *"two things have happened simultaneously in the past two years since September 11."*

*"1. Freedom of Expression has in many countries been threatened as a result of a global wave of new anti-terrorism laws, agreements and decrees passed at both national, regional and international levels.*

*2. Partly as a result of 1, an 'anti-terror climate' has emerged*

*which serves as a façade behind which governments can hide their stifling of legitimate dissent, whether using the new laws or not."*<sup>200</sup>

Nevertheless, this second danger, i.e. the repression of peaceful and democratic expression, had already been denounced by P.E.N. in 1998 during an intervention before the United Nations Commission on Human Rights, above all the fact that some measures related to security and anti-terrorism were unfairly applied to writers and journalists.<sup>201</sup>

An analysis of six-monthly lists of P.E.N. cases actually reveals that at global level, over the last few decades, national security and the fight against terrorism are among the first reasons named to justify the imprisonment of writers and journalists.<sup>202</sup>

In conclusion, it is important to note that the fight against terrorism does not only constitute a violation of the freedom of expression and information; it also has a devastating impact on the freedom of assembly, the freedom of association<sup>203</sup> and, above all, in the case of religious groups or organisations, the freedom of thought, the freedom of conscience and religious freedom.

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199. See FIDH Report *"IN MALA FIDE": Freedoms of expression, association and assembly in Pakistan*, January 2005, available on the FIDH website: [http://www.fidh.org/article.php3?id\\_article=2178](http://www.fidh.org/article.php3?id_article=2178).

200. International P.E.N. Writers in Prison Committee, *Anti-terrorism, writers and the freedom of expression*, London, November 2003, p. 14.

201. Reported in the UN press release HR/CN/841 of 2 April 1998.

202. International P.E.N. Writers in Prison Committee, *op. cit.*, p. 13.

203. See particularly Annual Reports of the Observatory for the Protection of Human Rights Defenders 2001, 2002, 2003 and 2004, a joint programme of the FIDH and OMCT, [http://www.fidh.org/rubrique.php3?id\\_rubrique=336](http://www.fidh.org/rubrique.php3?id_rubrique=336).

## Chapter 6: The Right to Ownership of Property

Unlike the rights previously discussed, not all human rights treaties provide for the right to own property. The Covenant, for example, makes no mention of it. The First Protocol of the European Convention on Human Rights<sup>204</sup> (ECHR) and the American Convention on Human Rights do provide for it, as does the Copenhagen Document of the Organization for Security and Cooperation in Europe (OSCE).<sup>205</sup>

According to these regional norms, under specific circumstances, the possession of a right to own private property is subject to legitimate restrictions on the part of the State. Consequently, a person can be deprived of their property rights for reasons of “general interest” (ECHR/OSCE) or “public utility or social interest” (American Convention) under the condition that the restriction imposed is in compliance with the law.<sup>206</sup> The second paragraph of the First Protocol of the ECHR authorizes the State to control the use of property in the general interest.<sup>207</sup> The two factors that are central to the canceling or suspension of ownership rights are that it must comply with the law and it must be in the name of general interest. Any measure that would restrict the right of property ownership but does not comply with these two conditions is disproportionate and unacceptable. Complete and peaceful exercise of ownership rights can only be guaranteed, however, when it is possible to go before courts and tribunals and call into question any decision made by the State that would interfere with the exercise of said rights.<sup>208</sup>

If these means of recourse are available, the security of the nation constitutes, without a doubt, a legitimate reason to limit ownership rights. Financial resources are necessary for the preparation and perpetration of acts of terrorism. Reducing the financial resources of groups involved in terrorism is indeed a very efficient measure.

Moreover, prosecuting persons who finance terrorist acts and depriving them of their property are measures favored by the United Nations, and even more so since the September 11, 2001 attacks. The UN committee in charge of blocking finan-

cing for Ousama Ben Laden, Al-Qaeda and the Talibans have since doubled their efforts to create a list of persons and organizations with links to these parties and thus facilitate international exchange on the adoption of financial measures.

The creation of such a list is not disputable. What is disputable however, is the fact that no special efforts are made to ensure that the persons on the list are not there by mistake and that when such a case arises nothing is done to lessen the negative consequences that being included in such a list has on their private and professional lives. In fact, the process and criteria used to determine who is put on the list lack considerably of transparency. The names of individuals and organizations on the list were made public immediately, without anyone being given the possibility to contest, mechanisms to unblock emergency funds were inadequate, and it was not until August 2002 that the decision for inclusion in the list could be appealed.

Unfortunately, the United Nations was not the only organization making decisions. Numerous regional organizations and governments drew up lists and adopted additional financial measures. They were encouraged to do so by the Security Council, in Resolution 1373 (2001) in which no protective measures were outlined. This type of process should be banned. Persons must have the ability to call into question the legitimacy of this type of measure and be able to dispose of adequate financial resources to do so. In many cases, the designation of a person or organization suspected of having contributed to financing acts of terrorism is based on secret evidence, making it very difficult to refute accusations. Even in cases where persons wrongly targeted for these measures manage to regain control of their frozen assets or manage to get their name stricken from the list of persons suspected of providing financial support to terrorists, it is frequently too late. The damage caused by the accusations, which in most cases are made public, is irreparable. In the case of a charitable institution, the extent of the damage may well mean the end of the organization.

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204. Article 1 of the First Protocol of the ECHR and article 21, § 1 ECHR.

205. OSCE Copenhagen Document, paragraph. 9.6.

206. Article 1 of the First Protocol of the ECHR; article 21, § 2 ECHR and paragraph 9.6. of the OSCE Copenhagen Document. The Copenhagen Document and the ECHR put forward an additional requirement: compliance with international law.

207. *Air Canada vs. United Kingdom*, Decision of the 5th of May 1995, Series A, No. 316-A.

208. See Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, see OAE document, *op. cit.*, part III, section G, 2, paragraph 367.

## **Chapter 7: Guarantees for Non-Nationals Relative to “Non-Refoulement,” Extradition and Deportation**

### **Asylum Seekers**

One of the major principles of international law which is quite frequently brought up in the debate on the relationship between terrorism and human rights is the non-return of asylum seekers. This principle appears in article 33 § 1 of the UN Convention and Protocol Relating to the Status of Refugees and stipulates that “No Contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>209</sup> The convention does however establish a certain number of reasons for which a person may be returned. Article 33, paragraph 2 of the same convention stipulates that while it is forbidden to force a refugee to return to a country where he may be the object of persecution this does not apply to a refugee for, “[...] whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” This clause, however, can only be invoked under extremely exceptional circumstances. In order for it to be applicable, a direct link must exist between the presence of the refugee in the country in question and the security threat to that same country.<sup>210</sup>

The principle of non-return has special status in international law on refugees. The Inter-American Commission on Human Rights, citing the Cartagena Declaration on Refugees, pointed out that the principle of non-return is a cornerstone of the international protection of refugees and constitutes a principle of *jus cogens*.<sup>211</sup>

In addition to violating this essential principle, many governments have reinforced immigration policies and border controls; they flout the rights of refugees and asylum seekers by linking immigration to their security concerns. During the course of the last two decades, and especially since Septem-

ber 11, the vast majority of States have made the criteria used to grant asylum even more restrictive, limiting access to asylum granting procedures and reinforcing border controls and thus incurring the risk of violating the rights of refugees. States are under the obligation to offer protection to persons attempting to escape persecution and to treat asylum seekers and refugees humanely and without discrimination.

Article 14 of the Universal Declaration of Human Rights states that, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” This right, however, cannot, in principle, be invoked if the persecution in question is the consequence of non-political crimes or acts, such as acts of terrorism, which are contrary to the goals and principles of the United Nations.

Despite all of these safeguards, an individual can, in certain situations, be refused the status of refugee when there is serious reason to believe that he may have committed ordinary or extraordinary crimes or to protect the country from persons who represent a threat to national security.<sup>212</sup> Notwithstanding, exclusion from the status must be exceptional and restrictively applied. As the UN High Commission for Refugees (UNHCR) has pointed out, “[...] in view of the seriousness of the issues and the consequences of an incorrect decision, the application of any exclusion clause should continue to be individually assessed, based on available evidence, and conform to basic standards of fairness and justice [...]” and “[...] should be located within the refugee status determination process, albeit taking place in specially tailored procedures for exclusion.”<sup>213</sup> Of even greater relevance to our argument is the conclusion drawn by the UNHCR regarding involvement: what is required is the individual’s personal involvement and his having full knowledge of events.<sup>214</sup>

According to article 32 of the 1951 UN Convention on Refugees, a refugee can be deported from the country which has granted him asylum for reasons linked to national security.<sup>215</sup> But here again, the decision has to comply with all internatio-

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209. The UN Convention Relating to the Status of Refugees, adopted on 26 July 1951, is available at: <http://www.unhcr.ch/cgi-bin/texis/vtx/home>.

210. Human Rights Watch, *Human Rights Implications of European Union Internal Security Proposals and Measures in the Aftermath of the 11 September Attacks in the United States*, November 2001, available at: <http://www.hrw.org/press/2001/11/eusecurity.htm>.

211. *Annual Report of the Inter-American Commission on Human Rights 1984-1985*, OEA/Ser.L/V/II.66, Doc. 10 Rev. 1, 1st October 1985.

212. Article 1, § F(a-c) of the 1951 UN Convention Relating to the Status of Refugees.

213. UNHCR, *Addressing Security Concerns without Undermining Refugee Protection - UNHCR’s perspective*, *op. cit.*, paragraph 16.

214. UNHCR, *idem*, paragraph 17.

215. Article 32, § 1 of the 1951 UN Convention on Refugees.

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nally recognized procedures. The UNHCR has emphasized that the threat to national security posed by the individual must be greater than the threat of persecution in the country of return. Consequently, *“expulsion decisions must be reached in accordance with due process of law which substantiates the security threat and allows the individual to provide any evidence which might counter the allegations.”*

The effective exercise of the right to asylum requires case by case evaluation of seekers’ petitions. Case by case evaluation should ideally be centered on the objective evaluation of the basis of the petition and should be carried out in accordance with fair procedures that guarantee basic procedural rights and due process, such as the right to legal counsel, the right to be heard, and the right to appeal the decision.<sup>216</sup> Of particular interest is the fact that the right of asylum can be invoked regardless of the manner the individual entered the country, be it legally or illegally.<sup>217</sup> Consequently, the UNHCR declared that, *“[...] the summary rejection of asylum seekers at borders or points of entry may amount to refoulement.”*<sup>218</sup> Additionally, an asylum seeker cannot be detained in custody while his case is being examined.<sup>219</sup> A State only has the right to detain an asylum seeker under exceptional circumstances which must be covered by the law. The Convention on Refugees also stipulates that States shall not restrict the movements of asylum seekers,<sup>220</sup> and all asylum seekers must be able to enjoy an acceptable standard of living throughout the entire asylum process.

What emerges from the general prohibition of discrimination in international human rights law is that no asylum seeker can be discriminated against or deprived of his right to effective procedures because of race, religion, nationality, or political opinion.<sup>221</sup>

Bearing this in mind, the UNHCR has expressed concerns regarding the tendency of states to adopt policies and apply asylum procedures in ways that discriminate against individuals, such as putting asylum seekers and terrorists into the same category. *“Equating asylum with the provision of a safe haven for terrorists is not only legally wrong and unsupported by facts, but it vilifies refugees in the public mind and exposes persons of particular races or religions to discrimination and hate-based harassment.”*<sup>222</sup>

### **The Prohibition to Return a Person to a Country where He or She Runs the Risk of Torture or of Cruel, Inhuman and Degrading Treatment**

Many of the treaties on terrorism and/or extradition procedures include the “Irish clause.” According to this clause, also contained in the European Convention for the Suppression of Terrorism, a State cannot extradite a person if he, *“[...] has substantial grounds for believing that a request for extradition for an ordinary criminal offence 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.”*<sup>223</sup> The last part of this provision should be interpreted so that it covers cases where the person to be extradited would be deprived of the rights of defense in the requesting State.<sup>224</sup>

In its *Guidelines on human rights and the fight against terrorism*, the Council of Europe states that, *“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*

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216. Article 14 PIDC; article 6 ECHR; paragraph 13.9 OSCE Vienna Document and paragraph 5 of the OSCE Copenhagen Document.

217. Article 31 of the 1951 UN Convention on Refugees specifically forbids that States apply sentences, *“[...]on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life of freedom was threatened in the sense of article 1 [of the Convention], enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”*

218. UNHCR, *Addressing Security Concerns without Undermining Refugee Protection - UNHCR’s perspective*, October 2001.

219. UNHCR, *Refugee Protection: A Guide to International Refugee Law*, Chapter 5 (Providing Alternatives to Detention and Protecting Refugees Against Discrimination), December 2001.

220. Article 26: *“Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.”* Moreover, as far as asylum seekers who entered the country illegally are concerned article 31 § 2 stipulates, *“The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.”*

221. See Article 3 UN Convention on Refugees. While art. 3 does not explicitly apply to asylum seekers, the provisions which are not specifically related to legal residency may be interpreted as applying to them. See UNHCR, *Recommendations as regards harmonisation of reception standards for asylum seekers in the European Union*, July 2000.

222. UNHCR press release, “Ten refugee protection concerns...”

223. Article 3 § 2 of the European Convention on Extradition, adopted 13 December 1957.

224. Council of Europe, *Explanatory Report on the European Convention on the Suppression of Terrorism*, (ETS No. 090), available at: <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.

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*justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.*"<sup>225</sup>

While the conventions of terrorism do not establish the absolute obligation to extradite, they are based on the principle of *aut dedere aut judicare*. According to this principle, if a person suspected of acts of terrorism in a third country cannot be extradited without being exposed to serious threat of torture or other serious human rights violations, he can be prosecuted and sentenced by the courts of the third state.

According to the requirements of international law on extradition procedures, a state can refuse to extradite if the crime for which the extradition has been requested is punishable by death according to the criminal code in the country requesting extradition, unless the requesting country can guarantee that the death penalty will not be applied.<sup>226</sup> Additionally, the States that have ratified Protocol 6 of the European Convention on Human Rights are under the obligation to not extradite persons to countries where the person can be sentenced to death<sup>227, 228</sup>

Most of the major human right treaties enshrine this principle; they prohibit the forceful return of persons to countries where they may be exposed to torture or to cruel, inhumane, or degrading punishment or treatment. The UN Convention Against Torture specifically stipulates that "*No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*"<sup>229</sup> While neither the American nor the European Convention contains specific provision in this area, both treaties acknowledge that torture is one of the conditions that would lead to systematic denial of an extradition request. This was confirmed by the UN Human Rights Committee and the European Court of Human Rights in their interpretation of the prohibition on returning persons as being inherent to the articles relative to the prohibition of torture or

cruel, inhuman or degrading treatment or punishment (article 7 of the Covenant and article 3 of the ECHR).<sup>230</sup> According to the European Court of Human Rights, "[...] whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 [...] if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."<sup>231</sup> This position is shared by the Inter-American Court on Human Rights, "*The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from returning the person where substantial grounds of a real risk of inhuman treatment are at issue.*"<sup>232</sup> In other words, the prohibition to return a person to a country where he could be victim of torture or cruel, inhuman, and degrading treatment or punishment is absolute and is considered to be part of international customary law. This means that all States, whether or not they are parties to human rights treaties and/or refugee treaties which enshrine the principle of non-return/non-extradition cannot return or extradite a person to a country where his life or safety would be endangered.<sup>233</sup>

Despite everything that been exposed above, one is forced to admit that this principle is no longer enshrined in the fight against terrorism, especially after the events of September 11, which understandably instilled the feelings of insecurity that led to fear of foreigners and discriminatory practices. Since then, suspected terrorists are being extradited, unscrupulously, to countries where human rights violations are serious and systematic. Moreover, deportation and "*refoulement*" are frequently used to avoid restrictive extradition procedures.

Refugees and asylum seekers suffer from being put in the same category as terrorists. Security Council Resolution 1373,

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225. Council of Europe, *Guidelines on human rights and the fight against terrorism*, 11 July 2002, point XIII, § 4, available at: [http://www.coe.int/T/E/Human\\_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf).

226. See article 11 of the European Convention on Extradition or article 4 of the UN Model Treaty on Extradition.

227. Protocol 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 28 April 1983, available at: <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>.

228. Council of Europe Guidelines on terrorism and human rights also recommend to take into consideration the application of the death penalty in the country requesting extradition as grounds to deny the request. Council of Europe, *Guidelines on human rights and the fight against terrorism*, *op. cit.*, point XIII, §2.

229. Article 3 of the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment, 10 December 1984, available at: [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm).

230. International Commission of Jurists, *Counter-Terrorism and Human Rights*, *op. cit.*, p. 82. See *Soering vs. The United Kingdom*, European Court of Human Rights.

231. European Court of Human Rights, *Chahal vs. The United Kingdom*, ECHR, 15 November 1996 (paragraph 80).

232. Inter-American Court of Human Rights, OAE/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000 (paragraphs 70 and 154).

233. UNHCR, *Refugee Protection: A Guide to International Refugee Law*, December 2001.



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which was adopted two weeks after the attacks on New York and Washington, is a perfect example of the sentiment that led to the confusion. The resolution effectively asks States to “Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.”<sup>234</sup> While the objective may be entirely justified, the risks inherent to these recommendations are evident. Proof of this are the transgressions committed by governments who, in their efforts to keep terrorists from using established protection rights, adopted a series of measures that compromise their international human rights obligations and in particular the principle of non-return.

Consequently, the UN Human Rights Committee pointed out the risks States run when implementing the directives in Resolution 1373. “The Committee recognizes that the security

*requirements relating to the events of the 11 September 2001 have given rise to efforts by [the State party] to take legislative and other measures to implement Security Council resolution 1373 (2001). The Committee, however, expresses its concern that the impact of such measures or changes in policy on [the State party’s] obligations under the Covenant may not have been fully considered. The Committee is concerned about possible negative effects of the new legislation and practices on asylum-seekers, including by ‘removing the immigration risk offshore’ and in the absence of monitoring mechanisms with regard to the expulsion of those suspected of terrorism to their countries of origin which, despite assurances that their human rights would be respected, could pose risks to the personal safety and lives of the persons expelled (articles 6 and 7 of the Covenant).”<sup>235</sup> The Human Rights Committee reminded States of the obligation to ensure that the measures taken to implement Security Council Resolution 1373 (2001) were compatible with the International Covenant on Civil and Political Rights.*

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234. UN Security Council document S/RES/1373 (2001), adopted 28 September 2001.

235. UN Human Rights Committee document CCPR/CO/75/NZL, paragraph 11 (2002).

## CONCLUSIONS AND RECOMMENDATIONS

The idea that counter-terrorism measures and human rights are irreconcilable is absolutely unjustifiable. International human rights and the jurisprudence of monitoring organizations acknowledge and provide for well defined legal frameworks where rights can be adapted to the dangers that threaten nations, without altering the nature of these rights. Furthermore, counter-terrorism legislation that protects human rights and the rule of law would be proof that States refuse to fall into the trap of flouting the fundamental and democratic principles that underpin their powers—the same principles that terrorists do not abide by and wish to annihilate.

Today, however, counter-terrorism measures which have been taken throughout the world, mainly since the heinous attacks of September 11th, are far from meeting States' international obligations in the areas of human rights and fundamental freedoms. In recent years, international and regional human rights bodies, non-governmental organizations and organizations of families of victims who have suffered grievous violations have continuously declared that these violations are a source of great concern.

### **The FIDH is particularly concerned by the following:**

1. The systematic reference made to a “war” on terrorism by the United States; this term is entirely inappropriate because the term “armed conflict,” as defined by international humanitarian law, cannot be applied to the situation that exist between the US and the targeted terrorists networks.

2. The absence of an international term for terrorism leads to a series of related violations of rights and obligations, starting with the principle of the legality of rights and penalties and the application of counter-terrorism measures to ordinary citizens.

3. Although human rights treaties and international jurisprudence provide for measures that permit States to derogate to or limit certain fundamental rights, these universally recognized instruments are virtually systematically flouted by counter-terrorism legislation and practices.

4. The most serious violations of human rights brought about by unscrupulous counter-terrorism measures are detrimental to the very basis of these rights, in particular:

- Violations of the principle of prohibition of arbitrary arrest and detention, which includes the intangible right to life, to

contest one's detention, the right to not be tortured, and to not be submitted to other cruel, inhuman or degrading treatment or punishment;

- Violations of the right of all persons to a fair, public, and timely hearing presided by an independent and impartial tribunal established by the law, which is flouted by the creation of military courts or exceptional tribunals to judge persons alleged of participating in terrorist acts;

- Violations, through arbitrary or illegal interference and incursions by the State in every person's right to privacy;

- Violations of freedom of expression and information, principles which are the cornerstone of democracies;

- Violations of the right to private property; and finally

- Violations, in increasingly greater numbers, of the principle of non-return for asylum seekers or to not be expelled to a country where one may be subjected to torture or cruel, inhuman or degrading treatment or punishment.

### **The FIDH recommends the following:**

#### **To States:**

- Promptly finalize the UN project for an international convention on a clear and exhaustive definition of what constitutes terrorism, in particular so that the field of application for counter-terrorism measures can be circumscribed;

- Adopt and transpose into national law all human rights treaties;

- Ensure that counter-terrorism laws and their methods of application, comply completely with their regional and international human rights obligations;

- Ensure that the principles and jurisprudence relative to derogations and limitations of human rights are only applied in exceptional circumstances;

- Involve civil society in the drafting of the reports that each State transmits to the Counter-Terrorism Committee.

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**To the Counter-Terrorism Committee established by Security Council Resolution 1373 (2001):**

- Play an active role, in collaboration with the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, recently appointed, and the United Nations High Commissioner on Human Rights to ensure that when States draft, adopt and implement counter-terrorism measures, that are in compliance with Security Council Resolution 1373 (2001), they uphold their international human rights obligations;
- Systematically promote to States the necessary compatibility of human rights with the fight on terrorism;
- Remind States of their rights and obligations when they seek to temporarily override or restrict fundamental rights with the aim of combating terrorism;
- Request that States, in the report they each provide to the Committee, demonstrate the compatibility of the measures they have taken with their human rights obligations, this should include the methods for implementing the measures; and
- Present the compatibility of the measures before the Security Council and disclose the Committee's conclusions on the matter.

# FIDH represents 141 Human Rights organisations

## 141 organisations

- Albania**-Albanian Human Rights Group  
**Algeria**-Ligue algérienne de défense des droits de l'Homme  
**Algeria**-Ligue algérienne des droits de l'Homme  
**Argentina**-Centro de Estudios Legales y Sociales  
**Argentina**-Comite de Accion Juridica  
**Argentina**-Liga Argentina por los Derechos del Hombre  
**Austria**-Österreichische Liga für Menschenrechte  
**Azerbaijan**-Human Rights Center of Azerbaijan  
**Bahrain**-Bahrain Human Rights Society  
**Bangladesh**-Odhikar  
**Belarus**-Human Rights Center Viasna  
**Belgium**-Liga Voor Menschenrechten  
**Belgium**-Ligue des droits de l'Homme  
**Benin**-Ligue pour la défense des droits de l'Homme au Bénin  
**Bhutan**-People's Forum for Human Rights in Bhutan (Nepal)  
**Bolivia**-Asamblea Permanente de los Derechos Humanos de Bolivia  
**Brazil**-Centro de Justicia Global  
**Brazil**-Movimento Nacional de Direitos Humanos  
**Burkina Faso**-Mouvement burkinabé des droits de l'Homme & des peuples  
**Burundi**-Ligue burundaise des droits de l'Homme  
**Cambodia**-Cambodian Human Rights and Development Association  
**Cambodia**-Ligue cambodienne de défense des droits de l'Homme  
**Cameroon**-Maison des droits de l'Homme  
**Cameroon**-Ligue camerounaise des droits de l'Homme (France)  
**Canada**-Ligue des droits et des libertés du Québec  
**Central African Republic**-Ligue centrafricaine des droits de l'Homme  
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**Chad**-Ligue tchadienne des droits de l'Homme  
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**Democratic Republic of Congo**-Association africaine des droits de l'Homme  
**Democratic Republic of Congo**-Groupe Lotus  
**Djibouti**-Ligue djiboutienne des droits humains  
**Ecuador**-Centro de Derechos Economicos y Sociales  
**Ecuador**-Comisión Ecuemenica de Derechos Humanos  
**Ecuador**-Fundación Regional de Asesoría en Derechos Humanos  
**Egypt**-Egyptian Organization for Human Rights  
**Egypt**-Human Rights Association for the Assistance of Prisoners  
**El Salvador**-Comisión de Derechos Humanos de El Salvador  
**Ethiopia**-Ethiopian Human Rights Council  
**European Union**-FIDH AE  
**Finland**-Finnish League for Human Rights  
**France**-Ligue des droits de l'Homme et du citoyen  
**French Polynesia**-Ligue polynésienne des droits humains  
**Georgia**-Human Rights Information and Documentation Center  
**Germany**-Internationale Liga für Menschenrechte  
**Greece**-Ligue hellénique des droits de l'Homme  
**Guatemala**-Centro Para la Accion Legal en Derechos Humanos  
**Guatemala**-Comisión de Derechos Humanos de Guatemala  
**Guinea**-Organisation guinéenne pour la défense des droits de l'Homme  
**Guinea Bissau**-Liga Guineense dos Direitos do Homen  
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**Iran (France)**-Ligue de défense des droits de l'Homme en Iran  
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**Israel**-Adalah  
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**Libya**-Libyan League for Human Rights (Switzerland)  
**Lithuania**-Lithuanian Human Rights Association  
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**Palestine**-Palestinian Centre for Human Rights  
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**South Africa**-Human Rights Committee of South Africa  
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**Spain**-Federación de Asociaciones de Defensa y Promoción de los Derechos Humanos  
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