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Terrorisme et Droits de l'Homme

Terrorismo y Derechos Humanos

Terrorism and Human Rights

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Terrorism and human rights

"We could, of course, set them at large without a hearing. But it has cost unmeasured thousands of American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear."

Robert H. Jackson[1]

1 The Avalon Project: International Conference on Military Trials: London, 1945 - Report to President Roosevelt by Mr. Justice Jackson, June 6, 1945; http://www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm.

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Introduction*

Terrorism, especially in the current international context, is generally viewed from a highly ideological and political, even emotional and manipulative, perspective. This is poignantly illustrated in the expression, "One man's terrorist is another man's freedom fighter". As Jean-Marie Domenach points out: "the word [terrorism] has been established by the vocabulary of propaganda".[2] This being said, the problem of terrorism remains a very real, albeit ill-defined and constantly shifting issue.

The reactions to the events of 11 September 2001 in New York and the forces that have since taken shape in the fight against terrorism are deeply preoccupying. The anti-terrorist measures adopted in several countries, the draft domestic legislation put forward, the renewal of momentum for a Comprehensive Convention against International Terrorism, the plan to introduce a European arrest warrant, etc., are all sources of concern, for in several cases they are at variance with and in some cases they transgress human rights and the principles of international law.

Although certain countries face a very real terrorist threat, the measures they adopt often infringe human rights and undermine principles of international law. In other cases there is no real threat, but the anti-terrorist fight is used as a pretext to adopt measures aimed at restricting liberties and muzzling political and social opposition. International law and the case-law of human rights treaty bodies and courts contain valuable indications on the type of measures that may be adopted to counteract terrorist acts within the framework of the rule of law, the circumstances in which they may adopted and the conditions in which they are to be implemented.

Under international law, States have an undeniable right and duty to fight and repress criminal acts, including those which by their nature, objectives

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* The original version of this paper is in French. This English translation contains some modifications for reasons of style and some analyses in the original of criminal law concepts peculiar to civil law systems have been omitted.

2 Cited in Michel Veuthey, Guérilla et droit humanitaire, ICRC, Geneva, 1983, p. 148.

or means used are said to be terrorist acts. They must do so, however, within the framework of the rule of law and in compliance with international law, in particular international human rights law and international humanitarian law. They may not derogate from certain basic principles, in particular of criminal law and international law. The odious and particularly serious nature of certain terrorist acts cannot be used as a pretext by States to fail to fulfil their international human rights obligations, especially when non-derogable rights are at stake. In the words of the Council of Europe Secretary General, "The anti-terrorism fight is aimed to protect basic human rights and democracy, not to undermine them".[3]

The aim of this paper is to provide information legal issues relating to the definition of terrorism and measures taken to combat it. It is intended for governments, magistrates and other members of the judicial system, inter-governmental and non-governmental organisations, legal practitioners and human rights defenders. It discusses the following points: international terrorism (Section A), the draft Comprehensive Convention against International Terrorism (Section B), and the national fight against terrorism from the human rights perspective (Section C). Section A presents a historical overview of attempts to achieve a definition of "international terrorism", the purpose being to show the legal difficulties and obstacles encountered by the international community in this endeavour. Section B highlights several aspects of the draft Comprehensive Convention on International Terrorism that are at variance with existing international law, so as to alert the international community. Section C reviews international case-law dealing with the compatibility, or lack thereof, of national anti-terrorist measures with the provisions of human rights treaties on the administration of justice.

The International Commission of Jurists trusts that this paper will be given due consideration by States, with a view to ensuring that the anti-terrorist measures they adopt, nationally and internationally, are in conformity with international human rights law and the rule of law.

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3 Press release, "Council of Europe Secretary General calls for prudence in adoption of anti-terror laws", 14 November 2001.

A. International terrorism

Although the international community has condemned "international terrorism" on countless occasions, there is no consensus on what constitutes that crime. States, legal scholars and the legal community have tried – for decades and in vain – to agree on a definition that is legally acceptable in terms of how criminal law characterises offences. Over one hundred definitions have been proposed.[4]

1. The 1937 Geneva Convention

The 1937 Geneva Convention for the Prevention and Punishment of Terrorism, drafted by the League of Nations, was the first attempt to codify a definition of terrorism. This proved difficult, and it was therefore decided that the text should include a general definition of the crime of terrorism and a limited list of acts qualified as terrorism. The Geneva Convention thus defined terrorism as: "All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public". Articles 2 and 3 criminalised specific acts and forms of participation in those acts.

The general definition and the list of specific acts were the object of harsh criticism.[5] Certain authors considered the definitions of the specific acts too vague. Others considered that terrorism did not aim to create a state of terror, but rather that terror was a means of committing acts whose aim was political, ideological or criminal. The Geneva Convention made no distinction between "national" and "international" terrorism.

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4 See A.P. Schmid, Political terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature, North-Holland Publishing Co., Amsterdam, 1983, pp. 119-152

5 See *inter alia* Yearbook of the International Law Commission, 1985, Volume II, Part one, document A/CN.4/SER.A/1985/Add.1 (Part.1), paras. 138-148.

The Convention never entered into force, as not enough States ratified it.

2. The International Law Commission

The International Law Commission (ILC) tackled the issue of terrorism in 1954, while deliberating the draft *Code of Crimes Against the Peace and the Security of Mankind*. The 1954 draft treated terrorism as a crime against peace. It picked up where the 1937 Geneva Convention had left off, focusing on the general definition of terrorism and the criminalisation of specific acts.[6] The focus was on State terrorism, however, where the active and passive subjects of the crime are States.

The ILC then turned to consideration of the crime of "international terrorism", i.e. both State and individual terrorism.[7] The 1990 version of the draft *Code of Crimes against the Peace and Security of Mankind* criminalised "international terrorism", defining it in Article 24 of the draft.[8] By 1995, however, the ILC had still not reached a consensus.[9] Several members stressed in particular the difficulty of defining the crime of terrorism with the accuracy required by criminal law.[10] Others commented that terrorism *per se* was not a crime against peace and the security of mankind, but that only certain acts of terrorism were international crimes. The ILC nevertheless considered that international terrorism could be deemed a crime against

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6 See *inter alia Ibid.*, paras. 124 ff. The definition and the list of criminal acts are to be found on page 85.

7 See Yearbook of the International Law Commission, 1990, Volume II, Part two, pp. 28-29.

8 See Report of the International Law Commission on the work of its forty-third session, 29 April to 19 July 1991, Supplement No. 10 (A/46/10), Article 24, p. 268.

9 See Report of the International Law Commission on the work of its forty-seventh session, 2 May to 21 July 1995, Supplement No. 10 (A/50/10), Commentary on Article 24, paras. 105 ff.

10 In this respect, see also the Report on the draft *Code of Crimes Against the Peace and the Security of Mankind* by Special Rapporteur Doudou Thiam, in Yearbook of the International Law Commission, 1985, *op. cit.*, paras. 124-154.

11 See Report of the International Law Commission on the work of its forty-seventh session, *op. cit.*, commentary on Article 24, para. 106.

peace and the security of mankind when the acts of terrorism were especially serious and systematic, and that in that context they could be termed crimes against humanity.[11]

Additionally, there is no consensus on precisely how the crime of international terrorism could threaten international peace and security. The *Declaration on Measures to Eliminate International Terrorism,*[12] adopted by the United Nations General Assembly in 1994, simply considers that terrorist acts "may pose a threat to international peace and security". More recently, numerous delegations to the Ad Hoc Committee on international terrorism, established by General Assembly resolution 51/210, considered that "international terrorism" posed a "threat to peace and international security".[13] However, others qualified the scope of this assertion. India, for example, in its working paper on the draft Comprehensive Convention against International Terrorism, stated that "acts, methods and practices of terrorism […] may pose a threat to international peace and security".[14]

In the light of those difficulties, the 1996 version of the draft *Code of Crimes against the Peace and Security of Mankind* did not include "international terrorism" as a specific or independent crime. The ILC nevertheless decided to include "acts of terrorism" among the acts constituting war

12 Resolution 49/60 of 9 December 1994.

13 See, for example, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Supplement No. 37 (A/55/37), para. 16.

14 United Nations General Assembly, Sixth Committee, Measures to eliminate international terrorism: Report of the Working Group, Fifty-fifth session, A/C.6/55/L.2,19 October 2000, p. 9.

15 "Acts committed in violation of international humanitarian law applicable in armed conflict not of an international character", Article 20.f.iv of the 1996 draft.

16 Article 4.2.d. of Protocol II states that: "…the following acts against [civilians and combatants hors de combat] shall remain prohibited at any time and in any place whatsoever: […] acts of terrorism". See Report of the International Law Commission on the work of its forty-eighth session, 6 May to 26 July 1996, Supplement No. 10 (A/51/10), commentary on Article 20.

crimes.[15] The ILC proposal did not define "acts of terrorism" but simply used the same words as Article 4.2.d. of Geneva Protocol II (*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*) 1977.[16] Protocol II, for its part, also fails to define – in the conditions required by criminal law – "acts of terrorism".[17]

3. The Rome Statute of the International Criminal Court and the ad hoc Tribunals

The issue of terrorism was raised during the preparatory work on the *Statute of the International Criminal Court*. The ILC proposed that certain acts of terrorism, already criminalised in treaties, be included in an annex listing the crimes over which the Court had jurisdiction.[18] The ILC proposal qualified those acts as especially serious crimes that are international in scope. They included, *inter alia,* the unlawful capture of aircraft under the 1970 Hague Convention and the crimes defined in the 1971 Montreal Convention. In its 1998 draft, the Preparatory Committee proposed an article, "Crimes of terrorism", dividing crimes of terrorism into two categories

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17 In its *Commentary* on Protocol II, Article 4.2.d, the ICRC states: "The prohibition of acts of terrorism is based on Article 33 of the Fourth Convention. The ICRC draft prohibited 'acts of terrorism in the form of acts of violence committed against those persons' (i.e., against protected persons). The formula which was finally adopted is simpler and more general and therefore extends the scope of the prohibition. In fact, the prohibition of acts of terrorism, with no further detail, covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect. It should be mentioned that acts or threats of violence which are aimed at terrorizing the civilian population, constitute a special type of terrorism and are the object of a specific prohibition in Article 13 '(Protection of the civilian population)', para. 2"; Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, para. 4538.

18 Article 20.e of the draft. See Report by the Preparatory Committee for the Establishment of an International Criminal Court, Volume II (Compilation of proposals), Supplement No. 22A (United Nations document A/51/22), pp. 56 and 301-302.

19 Report by the Preparatory Committee for the Establishment of an International Criminal Court, document A/CONF.183/2/Add.1, 1998, p. 28.

(acts of violence of a nature to cause terror and the use of certain weapons to commit acts of indiscriminate violence) and referred to other conventions, notably those of The Hague and Montreal, with regard to acts of terrorism that had already been criminalised.[19] Neither proposal appears in the Rome Statute. The ILC draft also included "acts of terrorism" in its list of war crimes, as serious violations of the laws and customs of war, but did not define them.[20] The Preparatory Committee's draft made no explicit reference to this, and neither did the Statute of the International Criminal Court incorporate the ILC's proposal.

Article 5 of the Rome Statute states: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole". During the preparatory work on the Rome Statute, several States thought that the crimes under The Hague and the Montreal Conventions were "perhaps less serious" than war crimes, genocide and crimes against humanity, and that including them could "trivialise" the role of the future international court.[21] Mrs. Christine Van den Wyngart, *ad hoc* judge of the International Court of Justice in *Congo v. Belgium*, quite rightly pointed out that "the most serious crimes in the eyes of international criminal law (core crimes) [are] war crimes, genocide and crimes against humanity".[22]

The Statute of the International Criminal Tribunal for the Former Yugoslavia includes neither terrorism nor terrorist acts in the list of crimes over which the Tribunal has jurisdiction. However, Article 4 of the Statute of

20 Report by the Preparatory Committee for the Establishment of an International Criminal Court, *op. cit.*, p. 62.

21 Report by the Preparatory Committee for the Establishment of an International Criminal Court, Supplement No. 22 (A/50/22), para. 81.

22 http://www.icj-cij.org/cijwww/cij/cdocket/ccobe/ccobeorders/ccobe_corder_declaration wyngaert_20001208.htm (French original only).

the International Criminal Tribunal for Rwanda, entitled "Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II", includes "acts of terrorism" in the list of violations the Tribunal may prosecute, but does not define them.

4. The United Nations special committees on terrorism

Following the failure of the draft Convention for the Prevention and Repression of Certain Acts of Terrorism,[23] submitted by the United States of America in 1972, and the grave events at the Munich Olympic Games, the United Nations General Assembly established several special committees to study international terrorism: the *Ad Hoc* Committee on International Terrorism, set up pursuant to resolution 3034 (XXVII) on 18 September 1972, the *Ad Hoc* Committee established pursuant to resolution 31/103 of 15 December 1976 to draft the International Convention against the Taking of Hostages, and the *Ad Hoc* Committee set up pursuant to resolution 51/210 of 17 December 1996 to draft the International Convention for the Suppression of Terrorist Bombings and, subsequently, other conventions dealing with international terrorism (see Section B).

The work of the *Ad Hoc* Committee over several decades illustrates how difficult it is to obtain a consensus on the legal definition of the crime of international terrorism,[24] especially with regard to interpretations that would include struggles of national liberation and resistance against foreign occu-

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23 United Nations document A/C.6/L.850.

24 See *inter alia* Report of the Ad Hoc Committee on International Terrorism, Supplement No. 37, A/34/37, paras. 88 ff.

25 See *inter alia Ibid.*, paras. 16, 23, 30 and 31.

26 See for example Observations submitted by the States under General Assembly resolution 3034 (XXVII) – Analytical study by the Secretary-General, A/AC.160/2, 22 June 1973.

pation or aggression, or which extend the definition to legitimate forms of political or social opposition.[25] The following elements of the definition were referred to during discussions: the international character of the acts, their motives, perpetrators and victims. There was, however, no consensus on the nature or scope of those elements.[26] Thus, for example, certain States believed that only States and intergovernmental organisations could be victims, whereas other delegations referred to innocent people or civilians.

The possible confusion with struggles for national liberation and resistance against foreign occupation or aggression was also the focus of the debate when negotiating an international convention against the taking of hostages. The *International Convention against the Taking of Hostages* therefore includes a clause incorporating the effects of the Geneva Conventions and their Additional Protocols.[27]

5. The United Nations Terrorism Prevention Branch

The Terrorism Prevention Branch, an arm of the United Nations Office for Drug Control and Crime Prevention, observing that "[t]he UN Member States still have no agreed-upon definition",28 suggests that the definition of terrorism be drafted using the existing consensus on what constitutes war crimes as a point of departure. The Branch's web page states: "If the core of war crimes - deliberate attacks on civilians, hostage taking and the killing of

27 See Article 12 of the International Convention against the Taking of Hostages 1979.

28 See http://undcp.org/terrorism_definitions.html.

29 See http://undcp.org/terrorism_definitions.html.

30 See http://undcp.org/terrorism_definitions.html.

31 See for example Eric David, Principes du droit des conflits armés, Ed. Bruylant, First edition, Brussels, 1994, para. 4.113, p. 596.

prisoners - is extended to peacetime, we could simply define acts of terrorism as 'peacetime equivalents of war crimes'".[29] The statement "Act of Terrorism = Peacetime Equivalent of War Crime" is only a legal short-cut, of course,[30] and the definition *stricto sensu* has yet apparently to be established. But it could nevertheless lead to an impasse. If the "equation" is reversed, certain terrorist acts or acts that are unlawful in time of peace but lawful in war[31] would not be covered by the definition.

6. The United Nations General Assembly

Terrorism is discussed in numerous United Nations General Assembly resolutions. None of them define the crime of international terrorism in legal terms. However, several provide an operational definition, or rather an empirical description. They express a consensus on the political and moral condemnation of terrorism and recall the general obligations of States; they reject including legitimate forms of violence under international law as terrorism. They include: resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (1970); resolution 2734 (XXV), *Declaration on the Strengthening of International Security* (1970); resolution 36/103, *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States* (1981); and resolution 42/22, *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International*

32 Resolution 49/60 of 9 December 1994.

33 Article 3 of the Declaration.

34 Resolutions 51/210 (1996), 52/165 (1997), 53/108 (1998), 54/110 (1999) and 55/158 (2000).

Relations (1987).

In its *Declaration on Measures to Eliminate International Terrorism*,[32] the General Assembly provides an operational definition of terrorism: "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons".[33] That definition was reiterated in other General Assembly resolutions,[34] all of which condemn

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35 Catherine Bourges-Habif, "*Le terrorisme international*", in H. Ascencio, E. Decaux and A. Pellet, Droit international pénal, Ed. A. Pedone, Paris, 2000, Chapter 35, para. 18.

36 Universal treaties: Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963; Convention on the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the United Nations General Assembly on 14 December 1973; International Convention against the Taking of Hostages, adopted by the United Nations General Assembly on 17 December 1979; Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991; International Convention for the Suppression of Terrorist Bombings, adopted by the United Nations General Assembly on 15 December 1997 (not yet in force); International Convention for the Suppression of the Financing of Terrorism, adopted by the United Nations General Assembly on 9 December 1999 (not yet in force). Regional treaties: Arab Convention on the Suppression of Terrorism, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998; Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou on 1 July 1999 (not yet in force); European Convention on the Suppression of Terrorism, concluded at Strasbourg on 27 January 1977; Convention of the Organization of American States to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance, concluded at Washington, D.C., on 2 February 1971; the Organization of African Unity Convention on the Prevention and Combating of Terrorism adopted at Algiers on 14 July 1999 (not yet in force); SAARC Regional Convention on Suppression of Terrorism, signed at Kathmandu on 4 November 1987; Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, done at Minsk on 4 June 1999.

"all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed". Beyond that consensus, however, the fact remains that there is no legal definition of international terrorism.

7. Specific terrorist acts

In the absence of a consensus on the general definition of international terrorism, both at the United Nations and regionally, specific terrorist acts have been criminalised instead. This is a "sectorial" approach in which terrorism is a "multiform offence",[35] as evidenced by the twenty conventions in existence.[36] As Mrs. Kalliopi K. Koufa, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, pointed out in her working paper on terrorism and human rights:

> "All these anti-terrorist conventions are characterized by the criminalization of the acts they cover regardless of whether in a particular case they could be described as terrorism, and by the requirement that Member States either extradite or submit the case of the alleged perpetrator to its authorities for prosecution (the principle of *aut dedere aut judicare*)."[37]

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37 Working paper on terrorism and human rights, E/CN.4/Sub.2/1997/28, 26 June 1997, para. 10.

38 See *inter alia* Article 7 of the Hague Convention on the Suppression of Unlawful Seizure of Aircraft; Article 7 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; Article 8 of the International Convention against the Taking of Hostages; Articles 6, 7 and 8 of the International Convention for the Suppression of Terrorist Bombings; and Article 7.4 of the International Convention for the Suppression of the Financing of Terrorism.

39 See Sixth Committee, United Nations General Assembly, Measures to eliminate international terrorism: Report of the Working Group, Fifty-second session, A/C.6/52/L.3, 10 October 1997.

To be more accurate, the conventions relating to terrorist acts that lay down the principle *aut dedere aut judicare* do so in non-absolute terms, i.e. the exercise of jurisdiction by a third country is conditional on refusal to extradite the alleged offender.[38] The deliberations on the draft *International Convention for the Suppression of Terrorist Bombings* brought to light the unease felt by several delegations at the application of the principle of universal jurisdiction to this kind terrorism. Most delegations would have preferred to include the principle *aut dedere aut judicare*. Some delegations even suggested that the principle should be worded so as not to give rise to an obligation to extradite if the legislation of the State concerned did not authorise extradition in certain circumstances.[39] That was the solution adopted for the Convention.

8. International humanitarian law

One of the thornier aspects of drafting a general definition of terrorism and, to a lesser degree, the definitions of specific offences, was and continues to be the acts committed during an international or internal armed conflict. As Mrs. Kalliopi K. Koufa, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, points out:

> "An obvious reason to distinguish clearly armed conflict from terrorism is because the law of armed conflict (and humanitarian law) automatically comes into effect when there is an armed conflict. This body of law has long-settled definitions, as well as clear obligations, regarding all aspects of military conduct involving both military operations and weaponry (The Hague law) and the protection of victims of armed conflict (Geneva law). Under the law of armed conflict, acts of war are not chargeable as either criminal or terrorist acts. Most impor-

40 Terrorism and human rights - Progress report prepared by the Special Rapporteur, E/CN.4/Sub.2/2001/31, 27 June 2001, para. 72.

> tantly, there are clear obligations regarding their enforcement, not the least of which is to respect humanitarian law in all circumstances. Thus it is necessary to distinguish war from terrorism and acts of war from acts of terrorism."[40]

Article 33 of the Fourth Geneva Convention prohibits "all measures […] of terrorism" against protected persons. Article 51.2 of Additional Protocol I prohibits "[a]cts or threats of violence, the primary purpose of which is to spread terror among the civilian population". The ICRC states: "there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage."[41]

Protocol II prohibits "acts of terrorism"[42] at all times against protected persons. The prohibition is extended to "acts directed against installations which would cause victims as a side-effect" (such as aerial attacks).[43] Protocol II, like Article 51.2 of Protocol I, prohibits acts or threats of violence whose purpose is to spread terror among the civilian population.[44] In the words of the ICRC: "Article 13 codifies the general principle that protection is due to the civilian population against the dangers of hostilities, already recognized by customary international law and by the laws of war as a whole. This principle is translated into a specific rule […], with the absolute prohibition of direct attacks and of acts or threats of violence committed with a view to spreading terror. […] Acts or threats of violence the

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41 Commentary, *op. cit.* Protocol I, Article 51, para. 1940.

42 Article 4.2.2.

43 Commentary, *op. cit.*, Protocol II, Article 4, para. 4538.

44 Article 13, Additional Protocol II.

45 Commentary, *op. cit.*, Protocol II, Article 13, paras. 4761, 4785 and 4786.

primary purpose of which is to spread terror among the civilian population are prohibited. Attacks aimed at terrorizing are just one type of attack, but they are particularly reprehensible. Attempts have been made for a long time to prohibit such attacks, for they are frequent and inflict particularly cruel suffering upon the civilian population. Thus the Draft Rules of Aerial Warfare, prepared in The Hague in 1922, already prohibited such attacks. Air raids have often been used as a means of terrorizing the population, but these are not the only methods. For this reason the text contains a much broader expression, namely 'acts or threats of violence' so as to cover all possible circumstances. […] Any attack is likely to intimidate the civilian population. The attacks or threats concerned here are therefore those, the primary purpose of which is to spread terror".[45]

However, as Pietro Verri says, the notion of terrorism does not apply to attacks against combatants and military objectives provided that they are carried out by combatants using lawful means.[46] In addition, the ICRC recalls that: "civilians lose their right to protection under the whole of Part IV if they take part in hostilities, and throughout the duration of such participation."[47] It should also be noted that military objectives that may be attacked are not limited to military installations as such and that, in addition, collateral loss of civilian life and objects is not prohibited provided that it is not excessive in relation to the military advantage gained by the destruction of the object attacked. Thus, an act said to constitute terrorism in peacetime may be lawful under international humanitarian law.[48]

46 Pietro Verri, Dictionary of the International Law of Armed Conflict, ICRC, Geneva, 1992, p. 114.

47 Commentary, *op. cit.*, para. 4761.

48 Eric David, *op. cit.*, p. 566, para. 4.113.

49 For these authors, the notion "crime of *jus cogens*" refers to crimes that violate the rules of jus cogens and for which there exists an obligation erga omnes to prosecute. See Cherif Bassiouni, "International crimes: *jus cogens* and obligation *erga omnes*" in Law Contemporary Problems - Accountability for International Crimes and Serious Violations of Fundamental Human Rights, School of Law / Duke University, Vol. 59, Autumn 1996, No. 4, pp. 63 ff.

9. International customary law

The events of 11 September 2001 in New York revived a long-standing issue: is terrorism a crime under international customary law? Or, as suggested by some authors, is it a crime of *jus cogens*[49] and therefore subject to the principle of universal jurisdiction?

After 11 September, there was a widespread outcry that the events of that day constituted "international terrorism". But that classification was based on political considerations rather than international criminal law. The use of this expression, which is obviously not a valid criminal law definition, satisfies the need to stigmatise the events of 11 September. Some people consider those events to be a crime of international terrorism and therefore, by analogy with the crime of piracy, a crime of *jus cogens* subject to the principle of universal jurisdiction. Others consider them as a crime of international terrorism and therefore, also by analogy, tantamount to a crime against humanity. The United Nations High Commissioner for Human Rights and Human Rights Watch, for their part, consider that the events constitute a crime against humanity, given the massive or widespread character of the murders, but do not consider that terrorism *per se* constitutes a crime against humanity.

In the present state of international law, it would be difficult to affirm that "international terrorism" or any "terrorist act" is generally speaking *per se* a crime against humanity and/or a crime under international customary law. Certain specific "terrorist acts" are crimes under international customary law, for example, the violation of the rules set forth in Article 3 common to the Geneva Conventions, but it cannot be said that all "terrorist acts" – as

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50 Cherif Bassiouni, "*Projet de Code pénal international*" in Revue internationale de droit pénal, 52nd Year, 1 and 2 Quarter 1981, p. 67.

51 Robert A. Friedlander, "*Projet de Code pénal international*", *op. cit.*, 3 and 4 Quarters 1981, p. 400.

52 See Report of the International Law Commission on the work of its thirty-sixth session, 7 May to 27 July 1984, Supplement No. 10 (A/39/10), para. 62. See also Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, Droit international public, 5th edition, L.G.D.G., Paris, 1994, para. 427, p. 622.

defined in the treaties relating to terrorism – are *per se* crimes under international customary law.

a) Terrorism and piracy

Certain authors assert that the hijacking of aircraft is a form of piracy, for "it […] bears a resemblance to that crime".[50] Others maintain that in the absence of a general definition of international terrorism, "the alternative would be to declare international terrorism as an enemy of humanity like pirates and piracy in customary international law".[51]

Piracy on the high seas has long been universally recognised as a crime under international customary law.[52] The 1958 *Geneva Convention on the High Seas* and the 1982 *United Nations Convention on the Law of the Sea* codified the crime of piracy on the high seas, but they established no specific rule in respect of the *aut dedere aut judicare* principle. It is by virtue of international customary law that the principle of *aut dedere aut judicare* is recognised in respect of piracy on the high seas.[53]

The *United Nations Convention on the Law of the Sea* characterised as a criminal offence the highjacking of an aircraft on the high seas or in "a place outside the jurisdiction of any State" (Article 101.a.ii). There is apparently no consensus on whether the hijacking of an aircraft is a crime under international customary law. Cherif Bassiouni, in his commentary on Article XI of the 1979 draft International Criminal Code proposed by the *Association internationale de droit pénale,* which reiterated the criminal offences contained in the 1970 Hague Convention and the 1971 Montreal Convention, wrote that the criminal nature of what he termed "aerial piracy" was "becoming one of the new norms of international customary law".[54] However, there are different forms of hijacking: on the high seas, in "a place

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53 Cherif Bassiouni, *op. cit.*, p. 67.

54 *Ibid.*, p. 145.

55 See Report of the International Law Commission on the work of its thirty-sixth session, *op. cit.*, para. 62.

outside the jurisdiction of any State", within the borders of a State, etc.It also seems unlikely that there will be a consensus on defining acts of hijacking as crimes that "threaten the security of mankind", even though they are considered international crimes.[55]

b) Terrorism and crimes against humanity

In the present state of international law, it cannot be said that "international terrorism" or all specific "terrorist acts" are *per se* crimes against humanity.

It can be said, however, that a crime against humanity can be committed by means of a terrorist act or the use of terror. The point was conceded by several ILC members in 1995, during their deliberations on the draft *Code of Crimes against the Peace and Security of Mankind*, in respect of terrorist acts that were especially serious or massive in nature.[56] Whether such an event is qualified as a crime against humanity will depend on whether the necessary constituent elements are present, namely, the systematic or widespread commission of acts such as murder, torture etc..

There are two legal possibilities for categorising terrorist acts. The first is that the act comprises several criminal offences. In this case the facts will be complex, with one offender perpetrating a number of offences for a variety of criminal aims.[57] The second possibility is a combination of acts amount-

56 See Report of the International Law Commission on the work of its forty-seventh session, *op. cit.*, para. 105.

57 Guisseppe Bettiol, Dirrito penale, 5th ed., Ed. Priulla, Palermo, 1962, p. 506; Eugenio Cuello Callon, Derecho penal, 13th edition, Ed. Bosch, Barcelona, 1980, p. 637; Sebastian Soler, Derecho penal argentino, Tipográfica-Editora Argentina, Buenos Aires, 1956, Vol. II, p. 315; Alfonso Reyes Echandía, Derecho penal – parte general, Universidad Externado de Colombia, Bogota, 1979, pp. 188-197; Enrique Bacigalupo, Manual de derecho penal - Parte general, Ed. Temis-ILANUD, Bogotá, 1984, pp. 238 ff.

58 *Ibid.* and G. Stefani, G. Levasseur and B. Bouloc, Droit pénal général, 13th edition, Dalloz, Paris, 1987, para. 596, pp. 628-629.

59 Eric David, *op. cit.*, para. 4.113, p. 596 (French original).

ing to one crime. This is characterised by the existence of one actor undertaking several acts with the same specific intent..[58]" Under this possibility, the terrorist acts would be "absorbed" into the main crime, the crime against humanity, as elements of *actus reus* and circumstances needed.

Neither possibility automatically assimilates the crime of terrorism, still less "international terrorism" with crimes against humanity. Analysing facts in the context of distinct and separate offences is quite standard, as was done by the Nuremberg Tribunal in relation to war crimes and crimes against humanity. On this topic, Eric David has said that an event that constitutes a war crime can also constitute another international offence, such as an act of terrorism (1977 *European Convention on the Suppression of Terrorism*) or an attack against the safety of civil aviation (1971 Montreal Convention). He then points out that "the opposite - that any act of terrorism is a war crime – does not hold true".[59] The same applies *mutatis mutandis* for crimes against humanity committed by means of terrorist acts.

It must not be forgotten that crimes against humanity are crimes under international customary law and that the Rome Statute defines them for the purpose of the exercise of jurisdiction of the future International Criminal Court. Crimes against humanity are therefore not limited to the definition contained in Article 7 of the Rome Statute, as is confirmed in Articles 10 and 22.3 of the Statute.

B. The Comprehensive Convention on International Terrorism

In 1996, the United Nations General Assembly established an *Ad Hoc* Committee, the resolution 51/210 Committee, to draw up several international instruments against terrorism, in particular a comprehensive convention on terrorism.[60] The *Ad Hoc* Committee approached that task on the basis of a draft submitted by India in 1996 and amended in 2000,[61] and established a Working Group for that purpose. The Working Group's deliberations intersect with those of the Sixth Committee Working Group on measures to eliminate international terrorism.

The discussions that have taken place since 2000 illustrate once again how difficult it is, politically, ideologically and legally, to define the crime of international terrorism. Several aspects are problematic, in particular all those dealing with the clear distinction between terrorism and the "legitimate struggle for national liberation, self-determination and independence of all peoples under colonial and other forms of alien domination and foreign occupation".[62] Several delegations have insisted on the need to specify what constitutes a crime of international terrorism and to distinguish it from forms of legitimate struggle carried out in the exercise of the right to self-determination and independence.[63] Another difficult aspect is the concept of State terrorism.[64] These difficulties are not to be underestimated, for there is apparently no consensus on the principle itself of drafting a comprehensive

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60 United Nations General Assembly resolution 51/210, 17 December 1996.

61 Letter dated 1 November 1996 from the Permanent Representative of India to the United Nations addressed to the Secretary-General, A/C.6/51/6, and Measures to eliminate international terrorism, Fifty-fifth session, *op. cit.*

62 Measures to eliminate international terrorism: Fifty-fifth session, op.cit., Annex IV, para. 2. See *inter alia* the proposal made by Malaysia on behalf of the Islamic Conference Organization. See also Côte d'Ivoire's proposal in Report of the *Ad Hoc* Committee established by General Assembly resolution 51/210 of 17 December 1996, *Fifth session*, A/56/37. In the same document, see paras. 10, 12, 13 and 14.

63 Report of the *Ad Hoc* Committee established by General Assembly resolution 51/210 of 17 December 1996, Fourth Session, A/55/37.

64 Report of the *Ad Hoc* Committee, Fifth session, *op. cit.*, para. 15.

legal definition of terrorism, and certain delegations have wondered whether it would not be legally more judicious to only define specific acts of terrorism.[65]

The draft Comprehensive Convention on International Terrorism, at the current stage of deliberations,[66] is a source of concern from several points of view.

1. The definition of the crime of international terrorism

Article 2 of the Indian draft, as revised in 2000, contains a definition characterising as crimes of international terrorism two types of conduct "when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act".[67] The first kind of criminal conduct is defined as the unlawful and intentional commission, by any means, of an act that causes "death or serious bodily injury to any person". The second is the unlawful and intentional commission, by any means, of an act causing "serious damage to public or private property, a place of public use, a State or government facility, a public transportation system, or an infrastructure facility; or […] damage to property, places, facilities, or systems […] resulting or likely to result in major economic loss". The draft also criminalises attempted offences and forms of participation in the crime, in particular any form of contribution, without being more specific.

During the negotiations, several proposals and modifications were put forward for the definition of the crime of terrorism,[68] again illustrating how

65 *Ibid.*, para. 9.

66 Measures to eliminate international terrorism: Report of the Working Group, Fifty-sixth session, A/C.6/56/L.9, 29 October 2001; Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Sixth Session (28 January-1 February 2002) GA Official Records, Fifty-seventh session, Supplement No.37 (A/57/37).

67 Measures to eliminate international terrorism, Fifty-fith session, *op. cit.*, p. 8.

68 Notably by Colombia, Côte d'Ivoire, Australia, Belgium, Bolivia, Costa Rica, Chile, Malaysia on behalf of the Organization of the Islamic Conference, and Austria.

difficult it is to establish such a definition. The Coordinator finally submitted an unofficial text in October 2001, for future discussion.[69] That text reiterates the Indian definition with certain changes. It divides the acts causing "serious damage" into two categories, the first comprising those causing "[s]erious damage to public or private property" *inter alia*, the second referring to "damage" to such property "resulting or likely to result in major economic loss". The Coordinator's text also refers to a new offence: the terrorist threat, i.e. "a credible and serious threat to commit" one of three specific acts of terrorism (death or serious bodily injury; damage to certain property; damage resulting or likely to result in major economic loss).

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69 Measures to eliminate international terrorism, Fifty-sixth session, *op. cit.*, pp. 14 and 15: Article 2:

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
   (a) Death or serious bodily injury to any person; or
   (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
   (c) Damage to property, places, facilities, or systems referred to in para. 1 (b) of this article, resulting or likely to result in major economic loss,

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in para. 1 of this article.
3. Any person also commits an offence if that person attempts to commit an offence as set forth in para. 1 of this article.
4. Any person also commits an offence if that person:
   (a) Participates as an accomplice in an offence as set forth in para. 1, 2 or 3 of this article;
   (b) Organizes or directs others to commit an offence as set forth in para. 1, 2 or 3 of this article; or
   (c) Contributes to the commission of one or more offences as set forth in para. 1, 2 or 3 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
      (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in para. 1 of this article; or
      (ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in para. 1 of this article.

The Coordinator's proposal gives rise to numerous problems, especially with regard to how an offence is characterised as a crime under criminal law. Article 2 of the Coordinator's unofficial text contains many elements that are contrary to the principle of legality, for they do not constitute a strict and precise definition of the offences. Expressions such as "serious damage" (Art. 2.1.b), "major economic loss" (Art. 2.1.c), "nature or context" (Art. 2.1) and "credible and serious" (Art. 2.2) are vague, imprecise and equivocal.

Article 2 of the Coordinator's text defines the intent to commit an offence in terms ("by its nature or context") that suggest that intent depends on the "functionality" of the crime and not on the offender's intent (*mens rea*). It is therefore a first step towards the principle of strict liability, as opposed to the general principle of criminal law that requires subjective responsibility.

Lastly, Article 2.4.c of the Coordinator's unofficial text makes it an offence to "contribute". The notion of contribution is imprecise, and it is unclear whether it refers to forms of criminal participation, such as aiding and abetting, or other legal notions such as criminal "conspiracy".

The *nullum crimen sine lege* principle is a universal and well-established principle of justice, which applies both on the domestic level and for the definition of offences in international criminal law treaties. It is embodied *inter alia* in human rights treaties,[70] while the Rome Statute of the International Criminal Court considers it as a general principle of criminal law.

The principle of legality implies that the definition of criminal offences, or their characterisation as criminal offences, must be precise, unequivocal and unambiguous.[71] The ILC states: "criminal law establishes rules of conduct which individuals must respect".[72] The *nullum crimen sine lege*

70 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.

71 European Court of Human Rights, Judgment (Merits and just satisfaction) of 25 May 1993, *Case of Kokkinakis v. Greece*, A260-A, para. 52.

72 Report of the International Law Commission on the work of its forty-eighth session, *op. cit.*, p. 90.

principle has its corollary in the principle whereby criminal law must be strictly interpreted while interpretation by analogy is forbidden. For example, Article 22.2 of the Rome Statute provides that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy". It is worth mentioning that the *nullum crimen sine lege* principle formed the basis for the definition of the elements of crimes under the Statute.

Therefore, any ambiguous, vague or imprecise definition of a criminal offence is contrary to the *nullum crimen sine lege* principle. As stressed by the United Nations Special Rapporteur on the independence of judges and lawyers, legal definitions which are vague and imprecise are contrary to international human rights law and to "the general conditions provided by international law".[73] When such definition allows the characterisation as a criminal offence of acts which are not prohibited by international human rights law or international humanitarian law, they are at variance with the principle of legality.

2. The draft Convention and international humanitarian law

Articles 1.2 and 18.2 of the draft Convention[74] raise serious problems in respect of the application of international humanitarian law. Article 18.2 excludes the armed forces from the scope of the Convention. Although Article 18.2 refers simply to "armed forces", by virtue of Article 1.2 this expression must be construed as referring to "the armed forces of a State".[75] The draft does not exclude, however, non-State parties to a non-international

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73 *Report of the Special Rapporteur on the independence of judges and lawyers – Mission to Peru*, E/CN.4/1998/39/Add.1, 19 February 1998, para. 129. See also *Concluding observations of the Human Rights Committee (Macau): Portugal*, CCPR/C/79/Add.115, 4 November 1999, para. 12 and *Concluding Observations of the Human Rights Committee: People's Democratic Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14.

74 Measures to eliminate international terrorism, Fifty-sixth session, *op. cit.*

75 Measures to eliminate international terrorism, Fifty-fifth session, *op. cit.*, p. 8.

armed conflict[76] and movements "fighting against colonial domination and alien occupation and against racist régimes".[77] This implies that all acts committed by the said parties and movements during armed conflicts are considered as crimes under international law, whether or not they are permissible under international humanitarian law. This runs counter to the provisions of international humanitarian law and allows acts that are permitted by the 1949 Geneva Conventions and their Additional Protocols to be characterised as offences. Indeed, Protocol II to the Geneva Conventions urges parties to a non-international armed conflict to endeavour to grant amnesties for actions that are not war crimes, crimes against humanity or genocide. This is regularly done in practice by governments subsequent to an internal armed conflict, including by States not party to Geneva Protocol II. The effect of the draft Convention as it stands would, therefore, be not only contrary to international humanitarian law, but also fundamentally change the current status of international law in relation to the recognition of governments.

International humanitarian law defines unlawful acts, notably with regard to terrorism.[78] As we saw earlier, in international and internal armed conflicts, the prohibition of acts of terrorism is not general, but aimed at

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76 See Article 3 common to the 1949 Geneva Conventions and Article 1 of Additional Protocol II.

77 Article 1.4 of Additional Protocol I. These are movements fighting for the right to self-determination established by the United Nations Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. They are not just any national liberation movements but those recognised as fighting colonial domination, foreign occupation or racist regimes. The conditions in which such struggles are viewed as legitimate in the eyes of international law are governed by several United Nations General Assembly resolutions. For example, in resolution 2105 (XX), of 20 December 1965, the General Assembly recognises the legitimacy of the struggle waged by peoples under colonial domination to exercise their right to self-determination and independence. In resolution 3103 (XXVIII), of 12 December 1973, entitled "Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes", the General Assembly spelled out the legal status of national liberation movement fighters.

78 See Article 3 common to the Geneva Conventions, Article 33 of the Fourth Geneva Convention, Article 51 of Additional Protocol I, and Articles 4 and 13 of Additional Protocol II.

protecting the civilian population and other protected persons. The prohibition of terrorist acts does not apply to attacks against combatants using permissible means of combat.

In order to be in conformity with international humanitarian law, the future Comprehensive Convention on International Terrorism should exclude from its scope of application all parties to a conflict, that is, both government armed forces and members of armed opposition groups, as understood under Article 3 common to the Geneva Conventions, as well as movements "fighting against colonial domination and alien occupation and against racist régimes". Indeed, some international instruments provide for the exclusion of these categories from their scope of application.[79] The draft Convention should be worded in such a way as to clearly exclude all parties to an international or non-international armed conflict from the scope of application of the Convention. Specifically, Articles 1 and 18 should refer to "the parties to a conflict within the meaning of Article 3 common to the Geneva Conventions and their Additional Protocols", rather than only to "the armed forces of a State".

3. The principle of *non-refoulement*

Article 15 of the draft Convention refers to the principle of *non-refoulement*. Although it adopts a similar wording to that of other treaties on extradition and terrorism,[80] this provision, rather than simply reaffirming the principle of *non-refoulement,* reproduces the "Irish clause" of the European Convention on Extradition, adding a reference to "ethnic origin" as a possible reason for prosecution. This renders Article 15 at variance with international human rights law and international refugee law.

79 See, in particular, Article 12 of the International Convention against the Taking of Hostages.

80 The International Convention against the Taking of Hostages (Art. 9), the European Convention on Extradition (Art. 3), the European Convention for the Repression of Terrorism (Art. 5), and the Inter-American Convention on Extradition (Art. 4.5) include a general provision on *non-refoulement*.

On the one hand, Article 15 of the draft Convention prohibits *refoulement* as long as there are “substantial grounds for believing” that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion. Since Article 33 of the *Convention relating to the Status of Refugees* does not require the existence of “substantial grounds for believing”, this condition, as established by Article 15, diminishes the protection granted by the *Convention relating to the Status of Refugees.*

On the other hand, Article 15 does not take into account the provisions of international human rights law concerning *non-refoulement,*[81] and thereby limits the scope of the principle. International human rights law prohibits any form of *refoulement* whenever there exists a danger that the person in question may be subjected to torture, forced disappearance or arbitrary deprivation of life. For example, Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* provides that “[n]o 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”. Although the *International Covenant on Civil and Political Rights* does not contain any specific provision on the principle of *non-refoulement*, the Human Rights Committee, in its *General Comment No. 20* (para. 9), declared, in the context of torture and ill-treatment, that this prohibition must be considered as being implicit in Article 7 of the Covenant.

81 See Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3.1 of the Declaration on Territorial Asylum, Article 8 of the Declaration on the Protection of All Persons from Enforced Disappearances, and Principle 5 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. See also Article 22.8 of the American Convention on Human Rights and Article 13.4 of the Inter-American Convention to Prevent and Punish Torture.

4. Safeguards against impunity

Article 18 of the draft Convention raises the problem of the Convention's scope. The draft text excludes the armed forces. Besides the fact that all the parties to the conflict should be excluded, and not just the armed forces of a State, the draft Convention, specifically Article 18, should comprise safeguards against impunity. Exclusion from the scope of application of the Convention should not be interpreted as a "licence" to commit unlawful acts, in particular those constituting international crimes.

During the Working Group's discussions of the draft Convention, a number of States proposed that Article 18 include a provision whereby "[n]othing in this article condones or makes lawful otherwise unlawful acts, or precludes prosecution under other laws". The Working Group of October 2001 did not adopt this, although it appears to have been reinserted by the Working Group of January 2002. This proposal should not only be maintained but indeed enhanced with an explicit reference to international crimes.

C. Human rights
and the repression of terrorism

Under international law, every State has the right and the duty to combat and repress crimes, in particular criminal acts which, by their nature, goals or means used are characterised as terrorist acts. In doing so, however, States must respect the rule of law and the principles of criminal law and international law, in particular international human rights law. As reaffirmed by the United Nations Commission on Human Rights, "all measures to counter terrorism must be in strict conformity with international law, including international human rights standards".[82]

I. Issues related to the repression of terrorism

Experience has shown that the States often have recourse, when repressing terrorist acts, to legislation, methods and practices that are contrary to international human rights law, affecting in particular non-derogable rights. The case-law of human rights treaty bodies and mechanisms contain a wealth of examples. They also, however, indicate the kind of measures that may be adopted to counteract terrorist acts within the framework of the rule of law and respect for human rights, the circumstances in which they may be adopted and the conditions in which they are to be implemented. In this context, the case-law, country observations, recommendations and general comments of the Human Rights Committee are of great value. The Committee, which is made up of 18 experts from all parts of the world, oversees the application by States of the *International Covenant on Civil and Political Rights*, the main universal treaty on such rights. This is why the ICJ considers its observations and recommendations to be especially noteworthy.

82 Resolution 2001/37 of 23 April 2001, preambular paragraph 20. See also resolutions 2000/30, 1999/27 and 1998/47 of the Commission on Human Rights.

The adoption on 28 September 2001 of Security Council resolution 1371 (2001) calling on the Member States of the United Nations to take several measures, both national and international, to combat terrorism, renews a long-standing challenge: guaranteeing that the fight against terrorism is conducted in accordance with international human rights law and the principles of the rule of law.

In certain countries, the measures adopted to fight terrorism have undermined the very foundations of the rule of law, such as the separation of powers and the principle of legality. For example, the Inter-American Commission on Human Rights, reviewing a series of measures adopted in Peru by Alberto Fujimori's government, the consequence of which was to militarise the court system, considered that such measures impaired the rule of law and undermined the principle of effective separation of the branches of government.[83] Anti-terrorist measures that undermine the principles of the rule of law – such as the principles of legality, of effective separation of powers and of the subordination of the armed forces to the civilian authorities – are at variance with international human rights law. The United Nations Human Rights Committee recently recalled that the "principles of legality and the rule of law [are] inherent in the [International] Covenant [on Civil and Political Rights]".[84]

The measures and practices adopted to "fight terrorism" frequently give rise to numerous problems in terms of human rights and the administration of justice. All too often, they are incompatible with international standards. This was underscored by the United Nations Special Rapporteur on the independence and impartiality of the judiciary:

> "The scourge of terrorism has also given rise to anti-terrorism measures which often present problems for judicial independence or the independence of the legal profession. As in the case of states of emergency, one feature of anti-terrorism measures

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83 Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 238.

84 *General Comment No. 29 - States of Emergency (article 4)*, CCPR/C /21/Rev.1 /Add.11, 31 August 2001, para. 16.

has been the creation of special courts. In some countries, procedural requirements of the measures constitute clear interferences with the lawyer-client relationship, for example, interferences with confidentiality. Other measures, such as the increasingly broadly applied technique of hooding judges in order to protect them from reprisals, raise larger questions of due process which may have some bearing on the notions of judicial independence and impartiality. Some standard-setting may be required in this area."[85]

The administration of justice is not the only thing affected. The measures and practices adopted to "fight terrorism" also often give rise to numerous problems concerning asylum law and procedures, the principle of non-discrimination, the right to protection from unlawful interference with privacy, the home and correspondence, to name but a few. This paper does not intend to establish an exhaustive list of the main human rights issues raised by anti-terrorist measures, but will concentrate on those concerning the administration of justice.

1. Definitions of the crime of "terrorism"

The *nullum crimen sine lege, nulla poena* principle is universally recognised in human rights treaties.[86] It implies that the definitions of criminal offences must be precise, unequivocal and unambiguous,[87] and that criminal law, whether national or international, cannot be applied retroactively. It has its corollary in the principle whereby criminal law must be strictly interpreted while interpretation by analogy is forbidden.[88] It follows therefrom that any ambiguous, vague or imprecise legal definition, or a definition that

85 *Report of the Special Rapporteur on the Independence and impartiality of the judiciary*, E/CN.4/1995/39, 6 February 1995, para. 60.

86 See footnote 75.

87 See footnote 76.

88 The principle and its corollaries apply to both national and international criminal law. See page 16 on Article 22.2 of the Rome Statute.

criminalises acts that are permitted and/or lawful under international law, are contrary to international human rights law and to "the general conditions provided by international law".[89]

Unfortunately, when it comes to terrorism, domestic legislation frequently relies on vague, ambiguous and imprecise definitions whereby it is possible to criminalise legitimate forms of exercising fundamental liberties, peaceful political and/or social opposition and lawful acts. This point has been raised more than once by the Human Rights Committee in its country observations.[90] For example, in respect of an anti-terrorist law, it considered that the "definition of terrorism contained in that law is so broad that it encompasses a wide range of acts of differing gravity. [In the Committee's opinion,] the definition in question should be reviewed by the Egyptian authorities and stated much more precisely, especially in view of the fact that it enlarges the number of offences which are punishable with the death penalty."[91] The Committee further considered that "Decree Law 25 475 [of Peru] contains a very broad definition of terrorism under which innocent persons have been and remain detained."[92]

The Inter-American Commission on Human Rights considers that the law is arbitrarily applied when criminal offences are described in vague or imprecise terms, making it impossible to ascertain beforehand what constitutes punishable conduct.[93] In the Commission's view, the Peruvian definition of the crime of terrorism is vague and imprecise and therefore undermines the principle of legality which is inherent in criminal law and whose purpose is to guarantee the safety of the individual by enabling him or her to know what actions give rise to criminal liability.[94]

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89 See footnote 78.

90 See, for example, *Concluding Observations of the Human Rights Committee: Algeria*, CCPR/C/79/Add.115, 18 August 1998, para. 12.

91 *Concluding observations of the Human Rights Committee: Egypt*, CCPR/C/79/Add.23, 9 August 1993, para. 8.

92 *Concluding observations of the Human Rights Committee: Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 12.

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

94 Second Report on the Situation of Human Rights in Peru, *op. cit.*, para. 80.

In recent years, a new "technique" has appeared whereby the authorities of certain States have drawn up official lists of so-called terrorist groups. Membership in and collaboration with any one of those groups is *ipso facto* a crime. This is a sort of national criminalisation. The "technique" presents its own problems, as stated by Mrs. Kalliopi K. Koufa, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights:

> "Some of [the legislation] includes provisions in which groups are put on an official terrorist list, frequently with no analysis of the particulars of the situation or the nature of the group. Those groups and others espousing similar views but uninvolved with the groups concerned may face severe consequences. […] judicial proceedings to challenge this false labelling or to defend a person charged with an offence under such anti-terrorism legislation may leave room for serious negation of a wide range of procedural rights."[95]

Although there have been few precedents, it is important to note that the European Court of Human Rights has specified that Article 5 of the *European Convention on Human Rights* does not authorise the arrest of a person on suspicion of planning to commit an offence only because that person is one of a group of individuals recognised as dangerous and likely to commit criminal acts.[96]

2. States of emergency

Emergency powers are often invoked in the fight against terrorism.[97] While certain limits and derogations are permitted during a state of

95 *Terrorism and human rights – Progress report prepared by the Special Rapporteur*, *op. cit.*, para. 111.

96 European Court of Human Rights, Judgment (Merits and just satisfaction) of 6 November 1980, *Case of Guzzardi v. Italie*, A39, para. 102.

97 See Reservations, declarations, notifications and objections relating to the International Covenant on Civil and Political Rights and the Optional Protocols thereto, CCPR/C/2/Rev. 4, 24 August 1994.

emergency, they must be based on the principles of legality, proportionality and necessity and be of limited duration; they may not affect rights that are non-derogable under treaty or customary law. This was recalled by the Human Rights Committee in its *General Comment No. 29, States of Emergency*:

> "Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; […] The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation […] A fundamental requirement for any measures derogating from the Covenant […], is that such measures are limited to the extent strictly required by the exigencies of the situation 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. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. […] Furthermore, article 4, paragraph 1, requires that no measure derogating from the

> provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. […] Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole."[98]

The Human Rights Committee has examined the use of emergency powers as an anti-terrorist measure in its country observations. For example, it expressed its "deep concern at the recent [Colombian] proposals for constitutional reform aiming at suppressing time-limits on states of emergency, eliminating the powers of the Constitutional Court to review the declaration of a state of emergency, conceding functions of the judicial police to military authorities, adding new circumstances under which a state of emergency may be declared, and reducing the powers of the Attorney-General's Office and the Public Prosecutor's Office to investigate human rights abuses and the conduct of members of the military, respectively. If these texts were to be adopted, they would raise serious difficulties with regard to article 4 of the Covenant."[99] In its observations on the United Kingdom of Great Britain and Northern Ireland, the Committee noted "with concern that the State Party, in seeking *inter alia* to give effect to its obligations to combat terrorist activities pursuant to Resolution 1373 of the Security Council, is considering the adoption of legislative measures which may have potentially far-reaching effects on rights guaranteed in the Covenant, and which, in the State Party's view, may require derogations from human rights obligations. The State Party should ensure that any measures it undertakes in this regard are in full compliance with the provisions of the Covenant, including, when

98 *General Comment No. 29*, *op. cit.*, paras. 2, 4 and 6.

99 *Concluding Observations of the Human Rights Committee: Colombia*, CCPR/C/79/Add.76, 3 May 1997, para. 23.

applicable, the provisions on derogation contained in article 4 of the Covenant."[100] Regarding another country, the Committee remained "concerned at the continuing reliance on special powers under legislation such as the Armed Forces (Special Powers) Act, the Public Safety Act and the National Security Act in areas declared to be disturbed, [and emphasised] that terrorism should be fought with means that are compatible with the Covenant."[101]

In *Lawless v. Ireland*, the European Court of Human Rights ruled that detention without trial, on the basis of emergency legislation and in violation of Article 5 of the *European Convention on Human Rights*, of an Irish national suspected of having engaged in activities against State security, was covered by the right of derogation under Article 15 of the Convention. It acknowledged that the situation in the Republic of Ireland at the time was characterised by the presence on the territory of that State of a secret army "engaged in unconstitutional activities and using violence to attain its purposes", that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland "with its neighbour", and that there was a steady and alarming increase in terrorist activities. This situation constituted a public emergency threatening the life of the nation, and therefore recourse to Article 15 was justified.[102] It ruled that the measures taken by the Irish Government were strictly proportional to the gravity of the situation, noting that the "the ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order". This was because "the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups was meeting with great difficulties caused by the military, secret and terrorist character of those groups and the fear they created among the

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100 *Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, CCPR/CO/73/UK;CCPR/CO/73/UKOT, 5 November 2001, para. 6.

101 *Concluding observations of the Human Rights Committee: India*, CCPR/C/79/Add.81, 4 August 1997, para. 18.

102 European Court of Human Rights, Judgment (Merits) of 1 July 1961, *Case of Lawless v. Ireland*, A3, para. 28.

population" and because the operational activities of those groups were carried out essentially abroad.[103]

In *Ireland v. The United Kingdom*, the Court also observed the existence in Northern Ireland of a situation that was especially threatening for the life of the nation. It ruled that, although the measures of "extrajudicial" deprivation of liberty adopted by the British Government towards persons suspected of subversive activities were absolutely required by the situation, taking account also of the margin of appreciation left to the United Kingdom to decide which measures to take against terrorism, that situation did not justify certain inhuman and degrading practices employed by the British authorities.[104] The Court noted in particular that the arrest of a person who was in no way suspected of a crime or offence or of activities prejudicial to peace and order, for the sole purpose of obtaining information, was in this case justified by the need to guarantee witness safety.[105] In the same case, the European Commission of Human Rights also concluded that the adoption of "extrajudicial" measures of deprivation of liberty by the British Government had been justified by the situation in Northern Ireland, notably the impossibility for the judicial system to function properly because of witness intimidation by terrorist groups.[106] The European Court of Human Rights also recognised that the United Kingdom was entitled to invoke the derogation under Article 15 of the Convention in *Brannigan and McBride v. The United Kingdom*. In that case, the Court, having recognised that States had a wide margin of appreciation to assess the changing requirements of an emergency situation,[107] acknowledged that the scope and effects of terrorist violence in Northern Ireland and the special difficulties inherent in investigating and repressing that kind of crime had impelled the British Government temporarily to extend the period of detention without judicial control.[108]

103 *Ibid.*, para. 36.

104 European Court of Human Rights, Judgment (Merits and just satisfaction) of 18 January 1978, *Case of Ireland v. The United Kingdom*, A25, paras. 163 and 214.

105 *Ibid.*, para. 212.

106 *Report of the Commission in Application No. 5310/71, Ireland v. United Kingdom*, 25 January 1976, Series B, No. 23-I, p. 97.

107 European Court of Human Rights, Judgment (Merits) of 26 May 1993, *Case of Brannigan and McBride v. The United Kingdom*, A 258-B, para. 43.

108 *Ibid.*, paras. 47, 54 and 59.

In *Aksoy v. Turkey*, the Court observed that PKK terrorist activity in south-east Turkey had created a public emergency that threatened the life of the nation and could justify recourse to derogation under Article 15 of the Convention.[109] However, with regard to the actual measures taken, the Court considered that the Turkish Government had not "adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable".[110]

In its considerations on the effect of a state of emergency imposed because of terrorist activity, the Inter-American Commission on Human Rights acknowledged that certain threats to public order by persons who have recourse to violence could, because of their extent, justify temporary curtailment of liberties, but it specified that certain fundamental rights could in no event be suspended, as for example the right to life and to a fair trial.[111] The Inter-American Court of Human Rights considered that *habeas corpus* and the right of *amparo* were non-derogable rights that could not be suspended, even during a state of emergency.[112]

It needs to be stressed that, if a state of emergency has not been declared, authorities may not derogate from their human rights obligations. They are bound to respect human rights in full, and may only apply the limitations to certain freedoms (e.g. assembly) that are provided for within each treaty provision relating to each right.[113]

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109 European Court of Human Rights, Judgment (Merits and just satisfaction) of 18 December 1996, *Case of Aksoy v. Turkey*, Reports 1996-VI, No. 26, para. 70.

110 *Ibid.*, para. 78.

111 Inter-American Commission on Human Rights, *Informe sobre la situación de los derechos humanos en Argentina*, 11 April 1980, OEA/Ser.L/V/II.49, p. 26. See also the resolution adopted by the Commission during the 1968 session, OEA/Ser.L/V/II.19 Doc. 32, p. 61, paras. e) and f).

112 Inter-American Court of Human Rights, *Advisory Opinion OC-8/87 of 30 January 1987*, para. 42, and *Advisory Opinion OC-9/87 of 6 October 1987*, paras. 30 and 41.

113 In addition, the States party to the International Covenant on Civil and Political Rights, to the European Convention on Human Rights and to the American Convention on Human Rights must inform the body stipulated in the relevant treaty of the declaration of a state of emergency.

3. Deprivation of liberty

Unless a state of emergency is lawfully declared, States have an obligation of strict compliance with all international standards concerning persons deprived of their liberty.[114] There can be no derogation from those standards, no matter how odious or serious the crime concerned. Certain limits are allowed in their application, but only within the framework provided within the treaty provisions themselves. By the same token, certain limits or derogations are allowed during a state of emergency, but only on the basis of the principles of legality, proportionality and necessity; they may not be taken in relation to non-derogable rights, may not undermine humane treatment and must include safeguards against arbitrary treatment. In its *General Comment No. 29, States of Emergency,* the Human Rights Committee observed that:

> "States parties may in no circumstances invoke article 4 of the Covenant as 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."[115]

It also observed that:

> "(a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee

114 See in particular: the International Covenant on Civil and Political Rights (Arts. 2, 4, 9 and 10); the Convention on the Rights of the Child (Art. 37); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 15); the Standard Minimum Rules for the Treatment of Prisoners; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the Code of Conduct for Law Enforcement Officials; the Guidelines on the Role of Prosecutors; the Basic Principles on the Independence of the Judiciary; the Declaration on the Protection of All Persons from Enforced Disappearances; the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

> believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10.
>
> "(b) The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law."[116]

Persons deprived of their liberty must be held in official places of detention and the authorities must keep a record of their identities.[117] With regard to communication between persons deprived of their liberty and their counsel, the *United Nations Basic Principles on the Role of Lawyers* stipulate that:

> "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."[118]

In its country observations, the Human Rights Committee has examined the compatibility of "anti-terrorist" measures for the deprivation of liberty, either on court order or in the form of administrative detention, with the provisions of *the International Covenant of Civil and Political Rights*. For

116 *Ibid.*, para. 13.

117 Article 10.1 of the Declaration on the Protection of All Persons from Enforced Disappearances, Rule 7 of the Standard Minimum Rules for the Treatment of Prisoners, Principles 20 and 29 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and Rules 7 and 8 of the European Prison Rules.

118 Principe 8 of the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba), from 27 August to 7 September 1990.

example, it expressed concern "at the maintenance on a continuous basis of special legislation [in Spain] under which persons suspected of belonging to or collaborating with armed groups may be detained incommunicado for up to five days, […]. The Committee emphasize[d] that these provisions are not in conformity with articles 9 and 14 of the Covenant. Again in regard to those two articles of the Covenant, the Committee note[d] with concern that the duration of pre-trial detention can continue for several years and that the maximum duration of such detention is determined according to the applicable penalty. The Committee […] urge[d] the State party to abandon the use of secret detention and invite[d] it to reduce the duration of pre-trial detention and to stop using duration of the applicable penalty as a criterion for determining the maximum duration of pre-trial detention."[119]

The Committee also expressed concern about "the continued application of the anti-terrorist laws of 2 September 1986 and 16 December 1992 [in France] which provide for a centralized court with prosecutors having special powers of arrest, search and prolonged detention in police custody for up to four days (twice the normal length), and according to which an accused does not have the same rights in the determination of guilt as in the ordinary courts. The Committee [was] furthermore concerned that the accused has no right to contact a lawyer during the initial 72 hours of detention in police custody [and] that there is no appeal provided for against the decisions of the special court. […] Therefore, in the circumstances: the Committee [recommended] that anti-terrorist laws, which appear to be necessary to combat terrorism, be brought fully into conformity with the requirements of articles 9 and 14 of the Covenant."[120] In respect of India, the Committee noted with concern "that, although the Terrorist and Disruptive Activities (Prevention) Act has lapsed, 1,600 people remain in detention under its provisions. Therefore: the Committee recommend[ed] that measures be taken to ensure either the early trial of these people or their release.

119 *Concluding observations of the Human Rights Committee: Spain*, CCPR/C/79/Add.61, 3 April 1996, paras. 12 and 18.

120 *Concluding observations of the Human Rights Committee: France*, CCPR/C/79/Add.80, 4 August 1997, para. 23.

It [was] also concerned that there are legislative proposals to reintroduce parts of the Act and that this could lead to further violations of the Covenant".[121]

Noting that the placement of prisoners in segregation in Israel involved substantial isolation and could be extended over long periods of time, the Committee recalled "its General Comment 20 (44) in which it noted that prolonged solitary confinement of a detained or imprisoned person may violate article 7. [It recommended] that efforts be made to avoid prolonged isolation of segregated prisoners." The Committee remained concerned that "persons may still be held for long and apparently indefinite periods of time in custody without trial. It [was] also concerned that Palestinians detained by Israeli military order in the occupied territories do not have the same rights to judicial review as persons detained in Israel under ordinary law. A specific concern of the Committee [was] that at least some of the persons kept in administrative detention for reasons of State security [...] do not personally threaten State security but are kept as 'bargaining chips' in order to promote negotiations with other parties on releasing detained Israeli soldiers or the bodies of deceased soldiers. The Committee consider[d] the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency. The Committee [took] due note that Israel has derogated from article 9 of the Covenant. The Committee stresse[d], however, that a State party may not depart from the requirement of effective judicial review of detention. The Committee recommend[d] that the application of detention be brought within the strict requirements of the Covenant and that effective judicial review be made mandatory."[122]

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121 *India*, *op. cit.*, para. 25.

122 *Concluding observations of the Human Rights Committee: Israel*, CCPR/C/79/Add.93, 18 August 1998, paras. 20 and 21.

In its observations on Peru, the Human Rights Committee stated that "urgent measures should be taken to strictly limit incommunicado detention. Provisions should be made in the Penal Code to criminalize acts that are committed for the purpose of inflicting pain, without prejudice as to whether those acts result in permanent injury. […] The duration of preventive detention should be reasonable and any arrested person should be brought promptly before a judge."[123]

With regard to prolonged periods of detention, the Committee considered that "the powers under the provisions [in the United Kingdom of Great Britain and Northern Ireland] permitting infringements of civil liberties, such as of extended periods of detention without charge […] are excessive."[124] It also noted "with concern that, under the General Terrorism Act 2000, suspects may be detained for 48 hours without access to a lawyer if the police suspect that such access would lead, for example, to interference with evidence or alerting another suspect. Particularly in circumstances where these powers have not been used in England and Wales for several years, where their compatibility with articles 9 and 14 *inter alia* is suspect, and where other less intrusive means for achieving the same ends exist, the Committee consider[ed] that the State Party ha[d] failed to justify these powers. The State Party should review these powers in the light of the Committee's views."[125]

In a decision concerning a man who had been tried and convicted for terrorist acts in Peru, the Human Rights Committee considered that the prohibition "to speak or to write to anyone", in particular his lawyer, during preventive detention and the fact that he had been held "in an unlit cell for 23 and a half hours a day in freezing temperatures" constituted a violation of Article 10.1 of the Covenant.[126] In the Committee's opinion, the

123 *Peru*, *op. cit.*, paras. 23 and 24.

124 *Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, A/50/40, 3 October 1995, para. 418.

125 *Great Britain and Northern Ireland*, *op. cit.*, 2001, para. 19.

126 Decision of 6 November 1997 in *Victor Alfredo Polay Campos v. Peru, in Communication No. 577/1994: Peru*, CCPR/C/61/D/577/1994, 9 January 1998, para. 8.4.

"total isolation of Mr. Polay Campos for a period of a year and the restrictions placed on correspondence between him and his family constitute inhuman treatment within the meaning of article 7 and are inconsistent with the standards of human treatment required under article 10, paragraph 1, of the Covenant."[127]

The European Court of Human Rights has affirmed, in two cases concerning persons suspected of terrorist activity, that deprivation of liberty is justified only when such deprivation is effected for the purpose of bringing the person arrested before the competent judicial authority, irrespective of whether that person is reasonably suspected of having committed an offence or of planning to commit one.[128] More recently, the Court specified that for an arrest to be compatible with Article 5.1.c of the *European Convention on Human Rights*, it must be based on a reasonable suspicion, which presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. The Court emphasised that although the exigencies of dealing with terrorist crime meant that the "reasonableness" of the suspicion could not always be judged by the same standards as those applied in dealing with conventional crime, they could not "justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5.1.c is impaired".[129]

The Inter-American Court of Human Rights has recalled on more than one occasion that "no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law …and, furthermore, subject to strict adherence to the procedures objectively set forth in that law …".[130]

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127 *Ibid.*, para. 8.6.

128 European Court of Human Rights, Judgment (Merits) of 1 July 1961, *op. cit.*, para. 14, and Judgment (Merits and just satisfaction) of 18 January 1978, *op. cit.*

129 European Court of Human Rights, Judgment (Merits) of 30 August 1990, *Case of Fox, Campbell and Hartley v. The United Kingdom*, A182, para. 32.

130 Inter-American Court of Human Rights, Judgment of 21 January 1994, *Gangaram Panday case*, para. 47. See also Judgment of 12 November 1997, *Suárez Rosero case*, para. 43.

With regard to administrative detention, it is worth noting the observation of the Human Rights Committee in *General Comment No. 8* that: "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".[131]

The European Court of Human Rights has consistently underscored that, when derogating under Article 15 of the *European Convention on Human Rights*, the administrative detention of persons suspected of terrorist activity had to go hand-in-hand with a minimum of safeguards against arbitrary detention. In the *Lawless* case, the Court ruled that detention without trial, provided for by the Offences against the State (Amendment) Act 1940, was strictly required by the exigencies of the situation in the country. The Court took account the fact that the 1940 Act "was subject to a number of safeguards designed to prevent abuses in the operation of the system of administrative detention" (i.e. parliamentary oversight, the possibility to refer the case to a "Detention Commission" that could order the detainee's release, the undertaking to release any detainee who undertook to respect the Constitution and the law).[132] In *Ireland v. The United Kingdom*, the Court observed that when the British Government had adopted measures of "extrajudicial" deprivation of liberty, it had provided a minimum of safeguards in order to avoid abuse on the part of the executive.[133] In *Brannigan and McBride v. The United Kingdom*, the Court also considered that the existence of effective safeguards against abuse and incommunicado detention was a factor contributing to the lawfulness of the measure of

131 *General Comment 8 - Right to liberty and security of persons (article 9)*, 30 June 1982, para. 4.

132 European Court of Human Rights, Judgment (Merits) of 1 July 1961, *op. cit.*, para. 37.

133 European Court of Human Rights, Judgment (Merits and just satisfaction) of 18 January 1978, *op. cit.*, para. 218.

derogation taken by the British Government.[134] However, in *Aksoy v. Turkey*, the Court concluded that the applicant's arrest and detention for 14 days under Turkish anti-terrorist legislation, without being brought before a court, was not required by the public emergency threatening the life of the nation created by PKK terrorist activity in south-east Turkey. It based its conclusion *inter alia* on the fact that insufficient safeguards were available to the applicant: "In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him".[135]

The Inter-American Commission on Human Rights, for its part, specified that the consequence of maintaining that the executive can indefinitely extend the detention of a person without bringing him or her before a court is to transform it into the judicial power and to put an end to the separation of powers, which is one of the characteristics of the democratic system.[136] It recalled that there is no international legal rule to justify prolonged detention on the basis of emergency powers, certainly not to keep behind bars people against whom no charges have been laid for presumed violations of national security or other laws and who are not ensured access to a fair trial.[137]

The Committee against Torture has also discussed the issue.[138] With regard to the "failure to provide for counsel to be present during interrogation in Northern Ireland for terrorist-related offences", in the United Kingdom of Great Britain and Northern Ireland, the Committee recommended "[e]xtending the taping of interrogations to all cases and not merely those that do not involve terrorist-related activities and in any event to permit lawyers to be present at interrogations in all cases".[139]

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134 European Court of Human Rights, Judgment (Merits) of 26 May 1993, *op. cit.*, paras. 61-65.

135 European Court of Human Rights, Judgment (Merits and just satisfaction) of 18 December 1996, *op. cit.*, para. 83.

136 Inter-American Commission on Human Rights, Diez años de actividades 1971-1981, Organization of American States, Washington, D.C., 1982, p. 319 of the Spanish original.

137 *Ibid.*, p. 320 of the Spanish original.

138 See *inter alia, Concluding Observations of the Committee against Torture: Sri Lanka*, A/53/44, 19 May 1998, paras. 243-257.

4. *Habeas Corpus*

One of the most common anti-terrorist measures is to limit or suspend the right of remedy via a procedure such as *habeas corpus*, in particular with regard to deprivation of liberty. Although that right is not explicitly mentioned in the list of non-derogable rights contained in the *International Covenant on Civil and Political Rights*, the Human Rights Committee, in its *General Comment No. 29, States of Emergency,* observed that:

> "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. 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, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective […] The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency […] 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."[140]

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139 *Concluding Observations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland*, A/51/44, 9 July 1996, para. 65.e.

140 *General Comment No. 29*, *op. cit.*, paras. 14 and 16.

The non-derogable nature of *Habeas corpus* is also recognised in several international declarations.[141] Resolution 1992/35 of the United Nations Commission on Human Rights, entitled *Habeas corpus*, urged States to maintain *Habeas corpus* even during a state of emergency. The Inter-American Court of Human Rights ruled that, in order to protect non-derogable rights, the right to judicial review , such as *Habeas corpus*, was itself non-derogable.[142]

The Human Rights Committee has examined issues relating to the limitation or suspension of remedies such as *Habeas corpus* in its country observations. For example, it expressed concern that "the undetermined detention which may be ordered by the Secretary of the Ministry of Defence violates the Covenant, particularly when such detention can be challenged only one year after detention. In view of this, the Committee remains concerned about the effectiveness of the habeas corpus remedy in respect of those arrested under the Prevention of Terrorism Act."[143]

In *Brannigan and McBride v. The United Kingdom,* the European Court of Human Rights ruled that the British Government's decision temporarily to extend the period of detention did not undermine the right of the applicants (two suspected IRA members) to *habeas corpus*, which the Court considered a basic safeguard against abuse.[144]

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141 See Principle 32 of the Body of Principle for the Protection of All Persons under Any Form of Detention or Imprisonment, and Article 9 of the Declaration on the Protection of All Persons from Enforced Disappearances.

142 Inter-American Court of Human Rights, *Advisory Opinion OC-8/87 of 30 January 1987*, "Habeas corpus in emergency situations", and *Advisory Opinion OC-9/87 of 6 October 1987*, "Judicial guarantees in states of emergency".

143 *Concluding Observations of the Human Rights Committee: Sri Lanka*, A/50/40, 3 October 1995, para. 452.

144 European Court of Human Rights, Judgment of 26 May 1993 (Merits), *op. cit.*, para. 63.

5. The right to an independent and impartial tribunal

It is not uncommon for States to bring the alleged perpetrators of terrorist acts before special courts or military tribunals. The Basic Principles on the Independence of the Judiciary allude to the principle of natural justice when they state: "[e]veryone shall have the right to be tried by ordinary courts or tribunals using established legal procedures".[145] In resolution 1989/32, the Commission on Human Rights recommended that States take account the principles listed in the draft Universal Declaration on the Independence of Justice, Article 5 of which stipulates that:

> "(b) No ad hoc tribunals shall be established to dispace jurisdiction properly vested in the courts; […]
>
> (e) In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts..."[146]

The Human Rights Committee, for its part, has also specified that even in time of war or during a state of emergency, "only a court of law may try and convict a person for a criminal offence".[147]

With regard to military criminal tribunals, the Human Rights Committee has on several occasions recommended in its country observations that legislation be modified so that civilians are tried by civilian courts and not by military tribunals. For example, the Committee expressed concern about the "broad scope of the jurisdiction of military courts in Lebanon, especially its extension beyond disciplinary matters and its application to civilians. It [also expressed concern] about the procedures followed by these military courts, as well as the lack of supervision of the military courts' procedures

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145 Principle 5.

146 The "Singhvi Declaration", prepared by the Special Rapporteur, Mr.L.M.Singhvi, entrusted by the UN Economic and Social Council to prepare a report on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities decided in 1988 to refer the report to the UN Human Rights Commission.

147 *General Comment 29*, *op. cit.*, para. 16.

and verdicts by the ordinary courts. The [Committee recommended that] the State party should review the jurisdiction of the military courts and transfer the competence of military courts, in all trials concerning civilians and in all cases concerning the violation of human rights by members of the military, to the ordinary courts."[148]

On another occasion, the Committee expressed "its deepest concern about [Peru's] ..Decree Law 25 659, cases of treason are tried by military courts, regardless of whether the defendant is a civilian or a member of the military or security forces. In this connection, the Committee expresse[d] its deep concern that persons accused of treason are being tried by the same military force that detained and charged them, that the members of the military courts are active duty officers, that most of them have not received any legal training and that there is no provision for sentences to be reviewed by a higher tribunal. Those shortcomings raise serious doubts about the independence and impartiality of the judges of military courts. The Committee emphasize[d] that trials of non-military persons should be conducted in civilian courts before an independent and impartial judiciary."[149]

With regard to Slovakia, the Committee noted "with concern that civilians may be tried by military courts in certain cases, including betrayal of State secrets, espionage and State security. [It recommended] that the Criminal Code be amended so as to prohibit the trial of civilians by military tribunals in any circumstances."[150] The Committee also noted "with concern that military courts have broad jurisdiction [in Uzbekistan]. It is not confined to criminal cases involving members of the armed forces but also covers civil and criminal cases when, in the opinion of the executive, the exceptional circumstances of a particular case do not allow the operation of the courts of general jurisdiction […] [The Committee recommended that] the State party should adopt the necessary legislative measures to restrict the jurisdiction of the military courts to trial of members of the military accused

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148 *Concluding observations of the Human Rights Committee: Lebanon*, CCPR/C/79/Add.78, 1 April 1997, para. 14.

149 *Peru*, *op. cit.*, para. 12.

150 *Concluding observations of the Human Rights Committee: Slovakia*, CCPR/C/79/Add.79, 4 August 1997, para. 20.

of military offences."[151] In its observations on Syria[152] and Kuwait,[153] the Committee considered that the prosecution of civilians by military tribunals was incompatible with Article 14 of the International Covenant on Civil and Political Rights.

In the view of the Special Rapporteur on the independence of judges and lawyers:

> "In regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice".[154]

The United Nations Working Group on Arbitrary Detention considered 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 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 from imposing the death penalty under any circumstances."[155]

In *Incal v. Turkey*, the European Court of Human Rights ruled that the presence of a military judge on the State Security Court was contrary to the principles of independence and impartiality, which are essential prerequisites for a fair trial.[156] In *Findlay v. The United Kingdom*, it found that the

151 *Concluding observations of the Human Rights Committee: Uzbekistan*, CCPR/CO/71/UZB, 26 April 2001, para. 15.

152 *Concluding observations of the Human Rights Committee: Syrian Arab Republic*, CCPR/CO/71/SYR, 24 April 2001, para. 17.

153 *Concluding observations of the Human Rights Committee: Kuwait*, CCPR/CO/69/KWT, 19 July 2000, para. 10.

154 *Report of the Special Rapporteur on the independence of judges and lawyers*, *op. cit.*, para. 78.

155 *Report of the Working Group on Arbitrary Detention*, E/CN.4/1999/63, 18 December 1998, para. 80.

156 Cited in Opinion No. 35/1999 (Turkey) concerning Abdullah Öcalan, adopted on 2 December 1999, in Civil And Political Rights, Including Questions Of Torture And Detention: Opinions adopted by the Working Group on Arbitrary Detention, United Nations document E/CN.4/2001/14/Add.1, 9 November 2000.

applicant's court-martial was neither independent nor impartial because its members were subordinate in rank to the convening officer, who also acted as "confirming officer" and who could modify whatever sentence was handed down.[157]

In a case relating to civilians tried for terrorist acts by a military tribunal, the Inter-American Court of Human Rights considered that the prosecution of civilians by a military tribunal violated the right to a fair trial and was at variance with the principle of the right to be heard by regulary courts.[158] The Inter-American Commission on Human Rights has consistently held that military tribunals did not meet the requirements of independence and impartiality called for in the *American Declaration of the Rights and Duties of Man* and the *American Convention on Human Rights*.[159] According to the Commission, a special military tribunal cannot be independent or impartial since it is subordinate to the minister of defence, i.e. the executive.[160] The Commission has also long held that the prosecution of civilians, notably for political offences, by military tribunals violates the right to an independent and impartial tribunal.[161] In its recent resolution on terrorism and human rights, the Commission affirmed that according to own jurisprudence:

> "military courts may not try civilians, except when no civilian courts exist or where trial by such courts is materially impossible. Even under such circumstances, the IACHR has pointed out that the trial must respect the minimum guarantees established under international law, which include non-

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157 European Court of Human Rights, Judgment (Merits and just satisfaction) of 25 February 1997, *Case of Findlay v. The United Kingdom*, Reports 1997-I, No. 30, paras. 74-77.

158 Decision of 30 May 1999, *Castillo Petruzzi et al v. Peru*, paragraphe 129. See also the decision of 17 September 1997, *Loaya Tamayo v. Peru*, Series C, No. 33, para. 61.

159 Cited in E/CN.4/Sub.2/1992/Add.2, para. 103.

160 Annual Report 1994 – Inter-American Commission on Human Rights, Organization of American States document OEA/Sr.L/V/II.88, doc. 9, Rev. 1995.

161 See *inter alia* Report on the Situation of Human Rights in the Republic of Nicaragua, cited in E/CN.4/Sub.2/1992/Add.2, para. 103; Report on the Situation of Human Rights in the Republic of Colombia, OEA/Ser.L/V/II.53, doc. 22, 30 June 1981; Report on Chile, OEA/Ser.1/V/II/17.

discrimination between citizens and others who find themselves under the jurisdiction of a State, an impartial judge, the right to be assisted by freely-chosen counsel, and access by defendants to evidence brought against them together with the opportunity to contest it."[162]

With regard to special tribunals, the Human Rights Committee specifies that such tribunals must conform to the provisions of Article 14 of the *International Covenant on Civil and Political Rights*.[163] It nevertheless goes on to say that "[q]uite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice".[164] It has observed, for example, that:

> "The [Irish] law establishing the Special Criminal Court does not specify clearly the cases which are to be assigned to that Court but leaves it to the broadly defined discretion of the Director of Public Prosecutions (DPP). [...] The application of the Act raises problems of compatibility with articles 9 and 14, paragraph 3 (g), of the Covenant. The Committee regrets that legal assistance and advice may not be available until a person has been charged. […] Steps should be taken to end the jurisdiction of the Special Criminal Court and to ensure that all criminal procedures are brought into compliance with articles 9 and 14 of the Covenant."[165]

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162 Resolution "Terrorism and Human Rights", of 12 December 2001.

163 *General Comment 13 - Equality before the courts and the right to a fair and public hearing by an independent court established by law* (Art. 14), 13 April 1984, para. 4.

164 *Ibid.*

165 *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Ireland*, Report of the Human Rights Committee, A/55/40, Vol. I, 2000, paras. 436 and 437.

6. Judicial guarantees

When repressing offences, including terrorist acts, international standards on legal guarantees and the administration of justice[166] must be strictly observed. Any limitations (such as *in camera* hearings) are only allowed within the framework provided by international human rights law. In *General Comment No. 29, States of Emergency* , the Human Rights Committee states that:

> "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance […] by deviating from fundamental principles of fair trial, including the presumption of innocence."[167]

It subsequently states that:

> "Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. […] 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."[168]

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166 In particular: Articles 2, 4, 14 and 15 of the International Covenant on Civil and Political Rights; Article 37 of the Convention on the Rights of the Child; Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment; the Guidelines on the Role of Prosecutors; the Basic Principles on the Independence of the Judiciary.

167 *General Comment No. 29*, *op. cit.*, para. 11.

168 *General Comment No. 29*, *op. cit.*, *Ibid.*, para. 16.

In its country observations, the Human Rights Committee has examined the compatibility of "anti-terrorist" measures that restrict judicial guarantees with the *International Covenant on Civil and Political Rights*. For example, it expressed "concern at the maintenance on a continuous basis of special legislation [in Spain] under which persons suspected of belonging to or collaborating with armed groups may be detained incommunicado for up to five days, may not have a lawyer of their own choosing and are judged by the *Audiencia Nacional* without possibility of appeal. The Committee emphasize[d] that these provisions are not in conformity with articles 9 and 14 of the Covenant. [It recommended] that the legislative provisions, which state that persons accused of acts of terrorism or suspected of collaborating with such persons may not choose their lawyer, […] be rescinded."[169]

The Committee also expressed concern "about the continued application [in France] of the anti-terrorist laws of 2 September 1986 and 16 December 1992 which provide for a centralized court with prosecutors having special powers of arrest, search and prolonged detention in police custody for up to four days (twice the normal length), and according to which an accused does not have the same rights in the determination of guilt as in the ordinary courts. The Committee [was] furthermore concerned that the accused has no right to contact a lawyer during the initial 72 hours of detention in police custody. [It was] concerned that there is no appeal provided for against the decisions of the special court. […] Therefore, in the circumstances: the Committee [recommended] that anti-terrorist laws, which appear to be necessary to combat terrorism, be brought fully into conformity with the requirements of articles 9 and 14 of the Covenant."[170]

With regard to Colombia, the Committee was concerned "that the military and members of security or other forces allegedly continue to exercise special powers over civilians and civilian authorities, including judicial authorities, granted to them through the establishment of Special Public Order Zones by decrees no longer in force. The Committee [was]

169 *Spain*, *op. cit.*

170 *France*, *op. cit.*

particularly concerned by the fact that the military exercise the functions of investigation, arrest, detention and interrogation."[171]

With regard to Ireland, the Committee expressed concern "at the continuing operation of the Offences Against the State Act, that the periods of detention without charge under the Act have been increased, that persons may be arrested on suspicion of being about to commit an offence, and that the majority of persons arrested are never charged with an offence. It [was] concerned that, in circumstances covered by the Act, failure to respond to questions may constitute evidence supporting the offence of belonging to a prohibited organization. The application of the Act raises problems of compatibility with articles 9 and 14, paragraph 3 (g), of the Covenant. The Committee regret[ted] that legal assistance and advice may not be available until a person has been charged. [It recommended that steps] be taken to end the jurisdiction of the Special Criminal Court and to ensure that all criminal procedures are brought into compliance with articles 9 and 14 of the Covenant."[172] In the Committee's view, "the powers under the provisions permitting infringements of civil liberties [in the United Kingdom of Great Britain and Northern Ireland], such as of extended periods of detention without charge or access to legal advisers, entry into private property without judicial warrant, imposition of exclusion orders within the United Kingdom, etc., are excessive".[173] The Committee also noted "with concern that the provisions of the Criminal Justice and Public Order Act of 1994, which extended the legislation originally applicable in Northern Ireland, whereby inferences may be drawn from the silence of persons accused of crimes, violates various provisions in article 14 of the Covenant, despite the range of safeguards built into the legislation and the rules enacted thereunder."[174]

Concerning interrogation in prison, the Committee, having noted "that under the [Israeli] guidelines for the conduct of interrogation of suspected

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171 *Colombia*, *op. cit.*, para. 19.

172 *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Ireland*, *op. cit.*

173 *United Kingdom of Great Britain and Northern Ireland*, *op. cit.*, 1995.

174 *Ibid.*, para. 424.

terrorists authority may be given to the security service to use ‘moderate physical pressure’ to obtain information considered crucial to the ‘protection of life’ […] that the part of the report of the Landau Commission that lists and describes authorized methods of applying pressure remains classified [and that] the methods of handcuffing, hooding, shaking and sleep deprivation have been and continue to be used as interrogation techniques, either alone or in combination”, was of the view “that the guidelines can give rise to abuse and that the use of these methods constitutes a violation of article 7 of the Covenant in any circumstances. [It urged] the State party to cease using the methods referred to above. If legislation is to be enacted for the purpose of authorizing interrogation techniques, such a law should explicitly prohibit all forms of treatment prohibited by article 7.”[175]

A common practice is to introduce court proceedings that allow anonymous witnesses, secret evidence and at times “faceless” judges, prosecutors and other court officials. In the Committee’s view, the Colombian judicial system, “which provides for faceless judges and anonymous witnesses, does not comply with article 14 of the Covenant, particularly paragraph 3 (b) and (e), and the Committee’s General Comment 13 (21)”.176 With regard to Peru, the Committee considered that Decree Law 25 475 “establishes a system of trial by ‘faceless judges’, in which the defendants do not know who the judges are who are trying them and are denied public trials, and which places serious impediments, in law and in fact, to the possibility for defendants to prepare their defence and communicate with their lawyers. [The Committee urged] that the system of ‘faceless judges’ be abolished and that public trials for all defendants, including those charged with terrorist-related activities, be reinstated immediately. The Government of Peru should ensure that all trials are conducted with full respect for the safeguards of fair trial provided by article 14 of the Covenant, including in particular the right to communicate with counsel and the right to have time and facilities to prepare the defence and the right to have the conviction reviewed.”[177]

175 *Israel*, *op. cit.*, para. 19.

176 *Colombia*, *op. cit.*, para. 21.

177 *Peru*, *op. cit.*, paras. 12 and 19.

In a decision concerning a person tried and convicted for terrorist acts by a special "faceless" tribunal in Peru, the Human Rights Committee ruled that "trials by special tribunals composed of anonymous judges are incompatible with article 14 of the Covenant".[178] It went on to say that:

> "the defendants do not know who the judges trying them are and unacceptable impediments are created to their preparation of their defence and communication with their lawyers. Moreover, this system fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that the tribunal must be, and be seen to be, independent and impartial. In a system of trial by 'faceless judges', neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established ad hoc, may comprise serving members of the armed forces. In the Committee's opinion, such a system also fails to safeguard the presumption of innocence, which is guaranteed by article 14, paragraph 2. In the circumstances of the case, the Committee concludes that paragraphs 1, 2 and 3 (b) and (d) of article 14 of the Covenant were violated."[179]

The Committee against Torture has also examined the issue. It pointed out that the Peruvian legislation "intended to repress acts of terrorism does not meet the requirements of international agreements concerning a fair, just and impartial trial with minimum safeguards for the rights of the accused (for example, 'faceless' judges, serious limitations on the right of defence, lack of opportunity to take proceedings before a court, extension of the period of secret detention, etc.)."[180]

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178 Decision of 6 November 1997 in *Victor Alfredo Polay Campos v. Peru*, *op. cit.*, para. 8.8. See also Decision of 6 July 2000 in *María Sybila Arredondo v. Peru*, in *Communication No. 688/1996*, CCPR/C/69/D/688/1996, 14 August 2000, para. 11.

179 *Ibid.*

180 *Concluding Observations of the Committee against Torture: Peru*, A/50/44, 26 July 1995, para. 68.

The use in Colombia and Peru of "faceless" judges, "secret" evidence and "anonymous" witnesses under anti-terrorist legislation has been vigorously and quite rightly criticised by the Special Rapporteur on the independence of judges and lawyers.[181]

In *Ireland v. The United Kingdom,* the British Government told the European Commission on Human Rights that it was justified to have recourse to administrative detention *inter alia* because, in view of the situation in Northern Ireland, there would continue to be some dangerous terrorists against whom it would not be possible to obtain convictions by any form of criminal trial appropriate for a court of law.[182] The Commission recalled that point when it listed the reasons justifying a derogation. It expressed its approval of the government's reluctance to try and potentially convict someone without the normal judicial procedures, even in an emergency; hence its preference for administrative detention.[183]

The Inter-American Commission on Human Rights has ruled that "faceless" justice contravenes the right to an independent and impartial tribunal and flouts legal guarantees. In respect of Peru it stated:

> "The characteristics of this system of secret justice […] constitute a flagrant violation of the guarantee essential to due process, to be judged by an independent and impartial judge or court […] as well as the guarantee regarding publicity for criminal trials[…]. In this regard, the Commission stated in its 1993 Report on the Situation of Human Rights in Peru: 'It has been said that if no one knows the identity of the presiding judges, then nothing can be said about their impartiality and independence. This in itself is questionable, given the measures adopted by the Executive Power in relation to the Judiciary since April 5.' In addition, pursuant to Article 13(h)

181 *Reports of the Special Rapporteur on the independence of judges and lawyers – Mission to Peru, op. cit., and Mission to Colombia*, E/CN.4/1998/39/Add.2, 30 March 1998.

182 European Commission on Human Rights, Application No. 5310/71, *op. cit.*, p. 59.

183 *Ibid.*, p. 101.

> of Decree Law No. 25 475, it is not legal in terrorism proceedings for judges or justice auxiliaries to recuse themselves. [...] Certainly, the right to know who is sitting in judgment, to determine his or her subjective competence, i.e. to determine whether a judge is covered by one of the grounds of disqualification or recusal, is a basic guarantee. The anonymity of the judges strips the accused of that basic guarantee, and also violates his right to be judged by an impartial court [The Commission considered] that this type of proceeding violates the fundamental right to due process of law, i.e., the right of every person to be heard, with proper guarantees, in any criminal accusation against him or her; to be presumed innocent until their guilt has been proven; to receive prior and detailed communication of the charges and to receive adequate time and resources for preparing the defense, all of which are guarantees expressly set forth at Article 8 of the American Convention".[184]

In the Commission's view, the system of "faceless" justice in Colombia does not provide adequate due process guarantees for criminal defendants. The Commission specified: "[t]he anonymity of the prosecutors, judges and witnesses deprives the defendant of the basic guarantees of justice. [...] Because the defendant does not know who is judging or accusing him, he cannot know whether that person is qualified to do so. Nor may he know whether there exists any basis to request recusal of these authorities based on incompetence or lack of impartiality. As a result, the defendant cannot be guaranteed trial by a competent, independent and impartial court [...]. The defendant is also prevented from carrying out any effective examination of the witnesses against him."[185]

The European Court of Human Rights has a more qualified position on anonymous witnesses and secret evidence. It nevertheless considers that a

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184 Second Report on the Situation of Human Rights in Peru, *op. cit.*, paras. 103, 104 and 113.

185 Third Report on the Situation on Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, paras. 121 - 124.

person cannot be conclusively convicted on the sole basis of evidence that he or she was not given the opportunity to refute during the investigation or in court.[186] The Court does not reject the use of anonymous witnesses *per se*; the defendant must, however, be given the opportunity to question them and they cannot constitute the only or decisive element of conviction.[187]

Another routine anti-terrorist and anti-serious crime measure is to grant the armed forces the authority to act as judicial police or examining magistrates. The Human Rights Committee has on several occasions expressed concern at the fact that this happens.[188] It recommended that Bolivia and Colombia take measures to ensure that the judicial police answer to the judicial authorities. The Committee against Torture made the same recommendation to Ecuador.[189]

The Inter-American Commission on Human Rights has on several occasions criticised the fact that the armed forces were given judicial authority and has underscored that the practice leads to serious human rights violations.[190]

186 European Court of Human Rights, Judgment (Merits and just satisfaction) of 14 December 1999, *Case of A.M. v. Italy*, Reports of Judgments and Decisions 1999-IX.

187 European Court of Human Rights, Judgment (Merits) of 20 November 1989, *Case of Kostovski v. The Netherlands*,A166; Judgment (Merits and just satisfaction) of 15 June 1992, *Case of Lüdi v. Switzerland,* A238; Judgment (Merits) of 26 March 1996, *Case of Doorson v. The Netherlands*, Reports 1996-II; Judgment (Merits and just satisfaction) of 23 April 1992, *Case of Van Mechelen and others v. The Netherlands*, Reports 1997-III.

188 *France*, *op. cit.*, paras. 16ff; *Concluding Observations of the Human Rights Committee: Bolivia*, CCPR/C/79/Add. 74, 1 May 1997, paras. 17 and 34; *Colombia*, *op. cit.*, para. 19.

189 *Concluding Observations of the Committee against Torture: Ecuador,* A/49/44, 15 November 1993, para. 105.

190 Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, para. 35; Report on the Situation of Human Rights in Brazil, 1997, para. 86; Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.83, Doc. 31, 12 March 1993, para. 24; Second Report on the Situation of Human Rights in Peru, *op. cit.*, para. 210; Fifth Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.111, Doc. 21, rev., 6 April 2001, para. 31; Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993.

7. Refoulement, extradition and deportation

Co-operation between States, in particular on extradition, is a key factor in the prosecution of the perpetrators of terrorist acts. Some States, however, employ deportation and/or *refoulement* to get around extradition procedures, using methods that are not in conformity with international law, in particular the *International Covenant of Civil and Political Rights*.[191] In that respect, the Human Rights Committee observed that:

> "Before expelling an alien, the State party should provide him or her with sufficient safeguards and an effective remedy, in conformity with article 13 of the Covenant. The State party is urged to consider the adoption of legislation governing the expulsion of aliens, which should be consistent with the principle of *non-refoulement*."[192]

In a decision concerning the deportation of an alleged ETA member from France to Spain, the Committee against Torture declared that France had violated Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment*, ruling that:

> "The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police, without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That meant that a detainee's rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully

191 *General Comment 15 - The position of aliens under the Covenant*, 11 April 1986.

192 *People's Democratic Republic of Korea*, *op. cit.*, para. 21.

respect the rights and fundamental freedoms of the individuals concerned."[193]

Other States use extradition procedures that do not conform to the provisions of criminal law and international human rights law. Some of them argue that since terrorism is not considered a political crime by extradition treaties, the principle of *non-refoulement*, which is recognised in several human rights treaties[194] and in several declarations,[195] does not apply. Although the *International Covenant on Civil and Political Rights* contains no explicit provision on the subject, the Human Rights Committee considered, in its *General Comment No. 20* (para. 9), with regard to torture and ill-treatment, that this obligation was inherent in Article 7 of the Covenant. It expressed concern at Canada's position that "compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment. The Committee refer[red] to its General Comment on article 7 and recommend[ed] that Canada revise this policy in order to comply with the requirements of article 7 and to meet its obligation never to expel, extradite, deport or otherwise remove a person to a place where treatment or punishment that is contrary to article 7 is a substantial risk."[196]

The Inter-American Commission on Human Rights, citing the *Cartagena Declaration* on Refugees, underscored the fact that *non-*

193 Decision of 9 November 1999 in *Josu Arkauz Arana v. France*, in Communication No. 63/1997, CAT/C/23/D/63/1997, 5 June 2000, para. 11.5.

194 Article 33 of the Convention relating to the Status of Refugees; Article IV of the Organization of American States Convention on Territorial Asylum; Article 22.8 of the American Convention on Human Rights; Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment; Article 13.4 of the Inter-American Convention to Prevent and Punish Torture.

195 Article 3.1 of the Declaration on Territorial Asylum; Article 8 of the Declaration on the Protection of All Persons from Enforced Disappearances; Principle 5 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

196 *Concluding observations of the Human Rights Committee: Canada*, CCPR/C/79/Add. 105, 7 April 1999, para. 13.

refoulement was the cornerstone of international protection for refugees and a principle of *jus cogens*.[197]

The European Court of Human Rights holds that a State party's conduct would be incompatible with the principles underlying the *European Convention on Human Rights* if it surrendered "a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intention of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article".[198] The Court applied the same principle to the deportation of asylum-seekers to a third State in which they risked exposure to torture or to inhuman or degrading treatment or punishment.[199]

The principle of *non-refoulement* is also mentioned in several treaties on extradition and/or terrorism.[200] Although those treaties stipulate that terrorist acts are non-political in terms of extradition, meaning that those committing them can be extradited, they also provide for *non-refoulement*. However, as mentioned above in Section B.3, treaties on extradition and/or terrorism, rather than fully establish the principle of *non-refoulement*, reproduce the "Irish clause", whereby there is no obligation to "extradite if the requested

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197 Informe annual de la Comisión Interamericana de Derechos Humanos 1984-1985, OEA/Ser.L/V/II.66, Doc. 10 rev. 1, 1 October 1985.

198 European Court of Human Rights, Judgment (Merits and just satisfaction) of 7 July 1989, *Case of Soering v. The United Kingdom*, A61, para. 88.

199 European Court of Human Rights, Judgment (Merits) of 20 March 1991, *Case of Cruz Varas and others v. Sweden*, A201, para. 69; Judgment (Merits) of 30 October 1991, *Case of Vilvarajah and others v. The United Kingdom*, A205.

200 Article 9 of the International Convention against the Taking of Hostages, Article 3 of the European Convention on Extradition, Article 5 of the European Convention on the Suppression of Terrorism, and Article 4.5 of the Inter-American Convention on Extradition contain a general clause on *non-refoulement*. See also the Model Treaty on Extradition adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Art. 3).

State has substantial grounds for believing that the request for extradition […] has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion […]".[201] This limits the scope of the principle of *non-refoulement*, as those treaties do not fully reiterate the provisions of international human rights law.[202]

It cannot be argued that the principle of *non-refoulement* could lead to impunity, for, although the conventions on terrorism do not establish an absolute obligation to extradite, they do incorporate the principle of *aut dedere aut judicare*. Therefore, the alleged perpetrator of a terrorist act who is in the territory of a third State, but whose extradition could expose him to a serious risk of torture or other serious human rights violations, can be prosecuted by the courts of that State.

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201 Article 5 of the European Convention for the Suppression of Terrorism. See also P. Weis, "Asylum and terrorism", The Review, International Commission of Jurists, No. 19, December 1977, pp. 37 ff.

202 See *inter alia* Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, Article 3.1 of the Declaration on Territorial Asylum, Article 8 of the Declaration on the Protection of All Persons from Enforced Disappearances, and Principle 5 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. See also Article 22.8 of the American Convention on Human Rights and Article 13.4 of the Inter-American Convention to Prevent and Punish Torture.

II. BASIC CRITERIA TO BE RESPECTED IN THE FIGHT AGAINST TERRORISM

When repressing terrorist acts, States must abide by certain basic principles of criminal law and international law, in spite of the odious and particularly serious nature of certain terrorist acts. As the United Nations General Assembly reaffirmed in its 1999 resolution, "Human rights and terrorism", "all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards".[203] Thus, in the administration of justice and in the fight against terrorism, States must observe the following minimum criteria:

- The primacy of the rule of law and of international human rights obligations. Generally speaking, any anti-terrorist measure must be implemented in strict compliance with international human rights obligations and the rule of law.
- State of emergency. The declaration of a state of emergency and the use of emergency powers to counter terrorist acts must be in accordance with international law. The emergency powers must be strictly limited to the temporary needs of the situation, conform in particular to the principles of legality, proportionality and necessity, and provide safeguards against arbitrary treatment and abuse. No derogation is permitted from non-derogable rights, nor any modification to the independent and impartial nature of the judicial system and the principle of effective separation of powers.
- Non-derogable rights. At all times and in all circumstances, fundamental rights and freedoms, recognised as non-derogable in treaty or customary law, must be maintained and guaranteed. They include:

  - the prohibition of torture and ill-treatment (meaning that any measures such as "necessary physical pressure" must be prohibited);

203 Resolution 54/164 of 17 December 1999, last preambular paragraph.

- the prohibition of discrimination based solely on race, colour, sex, language, political opinion, religion or social origin;
- the prohibition of arbitrary deprivation of life;
- the prohibition of arbitrary deprivation of liberty (meaning that unofficial and incommunicado detention must be prohibited);
- the right to an independent and impartial tribunal, the presumption of innocence and judicial guarantees;
- the principle of legality with regard to crimes and punishment;
- the right to a judicial remedy to contest the lawfulness of any deprivation of liberty (*Habeas corpus*);
- the effective existence of a judicial remedy against any human rights violation.

• Criminal offences. Criminal offences must be defined in precise and strict terms. No circumstances allow for vague, ambiguous or imprecise definitions or the criminalisation of legitimate and lawful acts under international human rights law and international humanitarian law. The retroactive application of criminal law is also prohibited.

• Independent and impartial tribunals. Tribunals repressing terrorist acts must be independent, impartial and have the required jurisdiction. In no circumstances may alleged offenders be tried by non-judicial bodies (such as executive commissions with "judicial" functions) and, in the case of civilian offenders, by military tribunals.

• Court proceedings. No one may be convicted of a crime unless tried by an independent and impartial tribunal providing basic judicial guarantees, in particular, the right:

- to be presumed innocent until proved guilty, and to be treated accordingly;
- to be informed as swiftly as possible, in a language the offender understands and in detail, of the charges;

- to appoint counsel of the offender's choice;
- to have the time and facilities required to prepare a defence and to communicate with counsel;
- to be tried without undue delay;
- to be present at the trial;
- to question prosecution witnesses and to call and question defence witnesses in the same conditions as prosecution witnesses;
- not to be forced to incriminate oneself or to admit guilt;
- to appeal to a higher court in the event of a conviction;
- to respect for the principle of *non bis in idem*.

- Deprivation of liberty. Detained persons must be held in official places of detention and a record kept of their identities, to which their lawyers and families must have access. Any form of prolonged preventive detention (including remand custody and administrative detention) and of solitary confinement must be prohibited. In all circumstances, persons deprived of their liberty must have the right to a remedy such as the *Habeas corpus* procedure and to communicate with their lawyers. All measures of deprivation of liberty must be placed under judicial control, even in the event of administrative detention.
- Criminal investigations. Criminal investigations must be carried out under judicial control. Judicial police powers must not be granted to the military.
- Deportation, extradition and *refoulement*. Any deportation or extradition procedure must comply with international human rights law, in particular the right to an effective remedy, and must respect the principle of *non-refoulement*.
- Right to protection from unlawful interference with privacy, home and correspondence. Measures adopted during investigations and affecting

respect for the offender's privacy, home and correspondence, such as searches and interception of correspondence, must be taken within the framework of the law and under judicial control.