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Terrorism and Human Rights

Terrorism presents a global threat to democracy, the rule of law, human rights, peace and security. It also constitutes an attack on mankind's most fundamental value: the right to a life lived in peace, freedom and dignity. The terrorists' intentional, indiscriminate killing of civilians is a cynical denial of the respect for the sanctity of life. Everyone has the right to life, liberty and security of person, as the Universal Declaration of Human Rights rightly states. Acts of terrorism are under no circumstances justifiable by considerations of a political, philosophical, religious or other similar nature. Terrorism resembles to totalitarianism in the sense that whoever kills an innocent citizen in order to impose his/her views follows a totalitarian ideology. [1]

Since the adoption of the Universal Declaration of Human Rights, and for the first time in human history, the international community has been committed to respect human rights. States have become committed ever since to respecting fundamental rights, as defined by a number of other international instruments that have been successively adopted, both at international level (the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, or the 1987 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); and at the European level (*in primis* the European Convention on Human Rights [hereinafter, ECHR], but also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment).

As movement around the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that terrorist crimes be prevented and that persons who are suspected of having committed very serious crimes and are suspected of having acted from abroad, or who have

[1] See, Hannah Arendt: *Le système totalitaire*, Editions du Seuil, Paris, 1958 (repr. 1972); Erich Fromm: *The Fear of Freedom*, Routledge and Kegan Paul, Basingstoke, 1942 (repr. 1960); Carl J. Friedrich and Zbigniew K. Brzezinski: *Totalitarian Dictatorship and Autocracy*, Harvard University Press, Cambridge, Ma., 1956 (2nd ed. 1967); Michael Curtis: *Totalitarianism*, Transaction Publishers, 1979; Steven P. Soper: *Totalitarianism: A Conceptual Approach*, University Press of America, 1985; Hans Buchheim, Totalitarian Rule, Wesleyan University Press, Middletown, Ct., 1968 (tr. 1987); Abbot Gleason: *Totalitarianism: The Inner History of the Cold War*, Oxford University Press, 1995.

fled abroad should be brought to justice. Conversely, the establishment of safe havens for persons who are preparing terrorist crimes or who are suspected of having committed any other serious crime would not only result in danger for the State harbouring the protected person but also tend to undermine the foundations of extradition. [2]

However, this does not mean that in the fight against terrorism we should legalise the suppression of fundamental rights and the protecting instruments guaranteeing their respect.

1. ANTITERRORIST MEASURES TAKEN IN THE AFTERMATH OF SEPTEMBER 11, 2001

In response to the events of September 11, 2001, the «antiterrorist policy» both at international and national levels has gradually led to the restriction –or even the suppression, in many cases– of human rights.

Immediately after the events, States turned their attention to the re-evaluation of their security. [3] They have *inter alia* increased the powers of law enforcement and intelligence institutions, including the power to interrogate and detain persons, to intercept private communications and to conduct searches of private homes and personal property without the normal procedural safeguards; they have tightened border controls that impede access to their territory and adopted new, restrictive asylum and immigration measures that limited access for *bona fide* asylum seekers; and they have authorized various registration and profiling schemes appearing to target certain groups solely because of their race, ethnicity or religion. In three words: they have initiated a «preliminary antiterrorist war» situation. [4]

However, many of the measures that have been adopted appear to be disproportionate to the threats posed, or alien to the goal of enhancing national security. Moreover, a number of these measures violated fundamental human rights that the States were committed to uphold, some which were considered as non-derogable rights even in times of emergency. Among the measures taken in the name of security were secret arrests; dubious conditions of detention; inhibition of free contact with the defendant's lawyer; extraordinary military courts; freezing of accounts for individuals or organizations that were supposed to relate with terrorism.

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2 European Court of Human Rights: *Soering v. the United Kingdom* judgment of 7 July 1989, p. 35, § 89.

3 See, International Helsinki Federation for Human Rights: *Report on Anti-terrorism Measures, Security and Human Rights Developments in Europe, Central Asia and North America in the Aftermath of September 11, April 2003*.

4 See, W. Benedek & Alice Yotopoulos-Marangopoulos (eds.): *Anti-terrorist Measures and Human Rights*, Martinus Nijhoff, Leiden/Boston, 2004.

The US, which has strong traditions of ensuring due process and fair trials to criminal defendants, has placed a large number of persons in the legal limbo of Guantanamo Bay, [5] Cuba –outside the jurisdiction of any state and unable to avail themselves of even the most basic due process guarantees accorded to prisoners of war–. Suspects inside the US have been detained on immigration charges, as material witnesses, or designated «enemy combatants», in order to deny them due process rights. The speed with which the Bush administration abandoned any pretence of a presumption of innocence, the right to counsel and to challenge the lawfulness of detention for those held at Guantanamo and inside Afghanistan was particularly troubling, as were reports suggesting that so-called «stress and duress» methods –such as keeping prisoners naked, forcing them to maintain uncomfortable positions for hours on end, sleep deprivation and disorientation– were used during the interrogation of detainees, despite being prohibited under international law. Similarly, although the US had a proud history of multiculturalism and strong anti-discrimination laws, it also started using widespread racial profiling as a tool in its campaign against terrorism.

The United Kingdom, which already prior to September 11 had one of the strongest anti-terror laws in Europe, [6] arrested more than a dozen suspects under the new powers allowing it to detain indefinitely, without charge or trial, persons suspected of terrorism. Germany [7] has weakened privacy safeguards that were built up over decades, and carried out nationwide computer profiling of men of Muslim faith or Arab descent, demanding access to private and public computer databases. In Belarus, a new anti-terror law has given security forces virtually unlimited rights to enter homes and businesses and search persons and property without the need for court permission. While in Russia, a new anti-extremism law was so vaguely formulated that it could be used to restrict virtually any anti-government protest.

As a result, international human rights standards, which have been so painstakingly developed since World War II, have become vulnerable to being eroded by the pressures exerted by the anti-terrorism campaign.

Of course, human rights Conventions provide for the possibility of limitations and derogations of their content in times of crisis, recognizing that some emergencies are of such a serious nature that States may need to have access to additional tools to counter them. However, at the same time, States have accepted that their power cannot be absolute, even during emergencies, and

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5 See, the European Parliament Resolution of 4 February 2009 on the return and resettlement of the Guantánamo detention facility inmates, *OJ* C 67E , 18.3.2010, pp. 91-93.

6 For the UK anti-terrorist legislation see: the UK Terrorist Act 2000 and the 2001 Anti-Terrorism Crime and Security Bill (available on-line at *http://jurist.law.pitt.edu/terrorism/terrorism3a.htm*); the Prevention of Terrorism Act 2005 (available on-line at *http://www.opsi.gov.uk/acts/acts2005/ ukpga_20050002_en_1*) and the 2006 Terrorism Act (available on-line at *http://www.opsi.gov.uk/acts/ acts2006/pdf/ukpga_20060011_en.pdf).*

7 See, Dirk Haubrich: «September 11. Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared», *Government and Opposition* No. 38 (2003), pp. 3-28.

have thus established procedural and substantive conditions for the exercise of emergency powers, accompanied by international or regional oversight.

We should stress that any antiterrorism campaign that undermines human rights is both morally bankrupt and self-defeating.

Many States took prompt action to freeze the assets of persons and groups identified on the UN list of terrorist organizations. [8] However, these efforts have not been accompanied by the necessary procedural safeguards: the process and criteria used to add names to the list lacked transparency, individuals and organizations have been immediately named publicly without any opportunity to review their inclusion, mechanisms to apply for the emergency release of funds were inadequate, and there was no mechanism to appeal inclusion on the list. [9]

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8 The UN list was established by Resolution 1373/2001 adopted on the 28.09.2001 by the Security Council under Chapter 7 of the UN Charter. For the list established in Europe see the Council Regulation 2580/2001 adopted on 27.12.2001 (EEC, L 344, 28-12-2001) related to the restrictive measures against persons and entities in order to fight terrorism, as amended, and the Council Regulation 881/2002 of 27.05.2002, providing for enforcement of financial sanctions against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, as amended. See, Commission Regulation (EU) No. 787/2010 of 03.09.2010 amending for the 134th time Council Regulation (EC) No. 881/2002 (OJ L 234, 04.09.2010, pp. 11-13).

9 The European Court of First Instance in two nearly identical judgments –*Yusuf* and *Kadi* (21 September 2005)–, considered whether it was barred from exercising jurisdiction over Regulation No. 881/2002 (adopted pursuant to Security Council resolutions establishing the 1267 sanctions regime) because to do so would mean engaging in an indirect review of the Security Council resolutions which the Regulation meant to implement and which left no discretion to the Community. By contrast, the Court notably chose not to discuss its possible lack of competence to review the Common Positions of the EU Council which the challenged Regulation sought, in the first place, to implement. The Court conceded that the EU Council enjoyed broad discretion when updating the list, but found itself otherwise competent to conduct a full review of the decision by which the applicant's name was added. Noting that the restrictions imposed by the Council on the right to a fair hearing should be offset by a strict judicial review, it held that the absence of information regarding the circumstances leading to the inclusion in the list not only infringed the applicant's right to a fair hearing but also his right to effective judicial protection, since lacking such information the Court was incapable of reviewing the lawfulness of the decision. Consequently, the decision was annulled. European Court of First Instance, *Yusuf and Al Barakaat International Foundation v. Council of the European Union and the Commission of the European Communities*, Case T-306/01; *Kadi v. Council of the European Union and the Commission of the European Communities*, Case T-315/01. See also, *Ayadi v. Council of the European Union*, Case T-253/02; *Hassan* v. *Council of the European Union and Commission of the European Communities,* Case T-49/04, available on-line at *http://curia.europa.eu/*.

On 29 November 2006, the Sanctions Committee amended its listing guidelines, requiring States to provide more detailed information on the reasons why individuals or entities should be listed and providing for a review mechanism for names that have been on the list for at least four years without update. On 19 December 2006, Security Council Resolution 1730 created a focal point within the UN Secretariat responsible for processing submissions by listed persons requesting the lifting of sanctions. Although this enables affected persons to submit petitions directly and independently of diplomatic protection through their governments, it does not give them the right to participate in the review process, nor does it constitute an

States have also adopted new legislation and proposals affecting privacy since September 11. Search and surveillance powers have been enhanced and judicial oversight over them has been weakened. Time limits for the retention of telecommunications traffic data have been extended, and safeguards on the collection of and access to personal data have been weakened at both national and regional levels. Government agencies have demanded increasing amounts of personal data from airline passengers, foreign nationals, students and asylum seekers, but there has been no corresponding increase in protections against its misuse. In addition, information gathered through the use of extraordinary powers granted for the conduct of terrorist investigations has not been restricted to use in those investigations.

Some States have also restricted freedom of expression in general and freedom of the media in particular since September 11. Some have passed legislation permitting state interference in media organizations during anti-terrorism efforts, put pressure on media outlets to refrain from critical reporting and blocked or restricted journalists' access to prisoners, court proceedings and war zones. The public's right to know about the activities of its government has been curbed in several States, and, in some cases, the inviolability of journalists' sources has been placed at risk.

Furthermore, efforts to limit asylum and immigration have gained a newfound legitimacy since September 11 with damaging consequences for refugee protection. [10] Illegal immigration and a lax control of asylum procedures were commonly viewed as presenting a security risk, and security arguments have been used to justify more restrictive measures toward asylum seekers, refugees and migrants. States have applied increasingly tough border control policies and removed undocumented migrants, often without adequate procedural safeguards, at an increasing rate. What is more, thenceforward a number of States have been willing to extradite, expel or exclude individuals from their territory, even if there is a real threat that the person is being sent to a situation where he or she will face torture or cruel, inhuman or degrading treatment or indefinite detention without trial. Some of these measures have unduly blocked access to asylum procedures and increased the incidents of *refoulement*, in violation of governments' obligation to provide protection to those fleeing persecution.

Finally, some States have used the post-September security environment as a pretext to further target and repress non-violent domestic opposition. [11] This is particularly true in Central Asia, where even before September 11 governments were aggressively persecuting those perceived as religious and political critics of the government, although the large majority of these groups advocate non-violent

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independent review mechanism. Removal from the list is still possible only with the consent of all governments represented in the Committee. For a comparative analysis of the US, UK, UN and EU terrorist lists see *www.statewatch.org/terrorlists/listsbground.html*.

10 See Executive Committee of the High Commissioner's Programme, Fifty-second Session, Note on International Protection, 13.09.2001, A/AC.96/951.

11 Costas Douzinas: *The End of Human Rights*, Routledge, London, 2000.

change. Because of their geographical proximity to Afghanistan, the governments of Central Asia have benefited from closer relations with the US and other Western governments, which refrained from criticizing their poor human rights record in the immediate aftermath of September 11 and more recently have voiced muted concern, but without attaching consequences to their criticism.

2. RESPONSE TO THE ANTITERRORIST MEASURES RESTRICTING HUMAN RIGHTS

Unfortunately in the name of security the rulers of the world have preferred to suppress fundamental human rights (*habeas corpus*, fair trial, etc.) adopting new methods of investigation through the use of torture and inhuman and degrading behavior. Europe was not exempt of responsibility in this evolution, since it is well known that it even bared the abduction of suspects from its territory who ended up in Guantanamo or in other secret prisons held in European countries. [12]

Fortunately enough, we are present now in the development of a response in favor of human rights. [13] National courts of the US and of Great Britain have demanded the closure of Guantanamo and declare the incompetence of extraordinary military committees to judge «suspects» of terrorism.

On July 11, 2002 the Committee of Ministers of the Council of Europe [14] adopted a series of guidelines on human rights and the fight against terrorism stressing that torture and other forms of inhuman and degrading behavior should be strictly forbidden, as well as the sentence of a terrorist to death penalty.

In 2006 the European Commission for Democracy through Law (the Venice Commission) of the Council of Europe has gave an opinion on the international legal obligations of Council of Europe member States, under human rights and general international law, in respect of secret detention facilities and inter-state transport of prisoners. [15] It reminded that the European Convention on Human Rights does not, in principle, prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of

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12 See the European Parliament Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI), *OJ* C 287E , 29.11.2007, pp. 309-333); and below the 2006 opinion of the European Commission for Democracy through Law (Venice Commission) of the Council of Europe.

13 Helen Duffy: *The "War on Terror" and the Framework of International Law*, Cambridge University Press, Cambridge, 2005.

14 Council of Europe, Directorate General of Human Rights: *Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on July 11, 2002 at the 804th meeting of the Ministers' Deputies.*

15 *Opinion No. 363/2005 of the European Commission for Democracy through Law (Venice Commission) of the Council of Europe adopted at its 66th plenary session, related to the international obligations of the member States in respect to secret detention facilities*, Strasbourg, 17.03.2006, CDL-AD (2006) 009.

bringing suspects of serious crimes to justice, provided that it does not interfere with any of the rights or freedoms recognised in the ECHR. [16]

The Commission stressed that detention should always be lawful and in accordance with a procedure prescribed by law.

> «In the European Court of Human Rights' view, the requirement of lawfulness means that both domestic law and the ECHR should be respected. The possible reasons for detention are exhaustively enumerated in Article 5 (1) ECHR. Paragraph 1 (c) of Article 5 permits "the lawful arrest or detention of a person effected for the purpose of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so", while paragraph (f) of Article 5 permits "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition". A detention for any reason other than those listed in Article 5 § 1 is unlawful and thus a violation of a human right.»

Under Article 1 of the ECHR, «The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention». [17] According to the European Court of Human Rights, the notion of «jurisdiction» is primarily territorial. It does, however, exceptionally extend to certain other cases, such as acts of public authority performed abroad by diplomatic or consular representatives of the State, or by an occupying force; acts performed on board of vessels flying the State flag or on aircraft or spacecraft registered there. Even if there is a presumption that jurisdiction is exercised by the State throughout its territory, States may also be held accountable for human rights violations occurring outside their territory in certain situations. [18]

The Commission concluded its 2006 opinion that Council of Europe member States are under an obligation to fight terrorism, but in doing so they should safeguard human rights. [19]

Council of Europe member States are under an international legal obligation to secure that everyone within their jurisdiction (para. 146 of the opinion) enjoy internationally agreed fundamental rights, including –and notably– that they are not unlawfully deprived of their personal freedom and are not subjected to torture

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16 European Court of Human Rights: *Stocké v. Germany*, 12.10.1989, Series A No. 199, opinion of the Commission, p. 24, § 169.

17 Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment similarly states that «Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction».

19 See, European Court of Human Rights, *Issa v. Turkey* judgment of 06.11.2004, §§ 71-74; International Court of Justice, Advisory Opinion on legal consequences of the construction of a wall in the occupied Palestinian territory, 09.07.2004, § 109. See also the views adopted by the Human Rights Committee on 29.07.1981 in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, Nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively. See, Inter-American Commission on Human Rights, *Coard v. US*, Case 10.951, Report No. 109/99, 29.09.1999, § 37, and *Alejandre Cuba,* Case 11.589, Report No. 86/99 29.09.1999, § 23.

and inhuman and degrading treatment, including in breach of the prohibition to extradite or deport where there exists a risk of torture or ill-treatment. This obligation may also be violated by acquiescence or connivance in the conduct of foreign agents. There exists in particular a positive duty to investigate into substantiated claims of breaches of fundamental rights by foreign agents, particularly in case of allegations of torture or unacknowledged detention (para 155).

Council of Europe member States are bound by numerous multilateral and bilateral treaties in different fields, such as collective self-defence, international civil aviation and military bases. The obligations arising out of these treaties do not prevent States from complying with their human rights obligations. These treaties should be interpreted and applied in a manner consistent with the Parties' human rights obligations. Indeed, an implied condition of any agreement is that, in carrying it out, the States will act in conformity with international law, in particular human rights law.

The Venice Commission considered that there is room to interpret and apply the different applicable treaties in a manner that is compatible with the principle of respect for fundamental rights and Council of Europe member States should do so.

3. NON-DEROGABLE RIGHTS

There is a core group of rights from which there can never be derogation, even in times of emergency threatening the life of the nation, either because derogation from these rights is specifically prohibited by relevant human rights conventions, because the rights at issue are customary rules of international law and therefore binding on all States or are peremptory norms of international law, or because derogation from such rights could never be justified in times of emergency.

The International Covenant on Civil and Political Rights [20] [hereinafter, ICCPR] specifically identifies a number of rights from which there can never be derogation. Article 4(2) provides that there can be no derogation from:

- The right to life (article 6).
- The right not to be subject to torture, cruel, inhuman or degrading treatment or punishment (article 7).
- The right not to be held in slavery or servitude (article 8).
- The prohibition against imprisonment merely for failure to fulfill a contractual obligation (article 11).

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[20] Adopted by the UN General Assembly on December 16, 1966 and in force from March 23, 1976. As of September 2010the Covenant had 72 signatories and 166 parties. See *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en*

- The prohibition against the retroactive application of criminal law (article 15).
- The right to be recognized as a person before the law (article 16).
- The right to freedom of thought, conscience and religion (article 18).

The ICCPR recognizes that there may be public emergencies that are so serious as to warrant state derogation from some of the rights in the Covenant on an exceptional and temporary basis. The ICCPR, however, sets out procedural and substantive limitations on when derogations are permissible and what measures may be appropriate in such circumstances.

Most importantly, the Covenant sets out a number of rights from which there can be no derogation at any time, even in public emergencies that threaten the life of the nation.

The ICCPR also provides for certain limitations on enumerated rights in situations that do not rise to the level of a state of emergency, but that require a certain balancing between the rights of individuals and the common interest and good functioning of society and/or a balancing between competing rights of individuals.

Of course together with the ICCPR one should not neglect the protection deriving from other human rights texts such as the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Treaty on European Union; the Treaty establishing the European Community (EC Treaty); the Charter of Fundamental Rights of the European Union (the Charter) and the national constitutions of the Member States, which they confer on individuals guarantees in the field of privacy, data protection, non-discrimination and free movement.

4. VAGUE, ARBITRARY AND OVERLY BROAD DEFINITIONS OF TERRORISM

Concerns are posed in the way international and national texts define terrorist acts and terrorist groups when they establish criminal liability for terrorist offences, using either vague or imprecise language that leaves doubts as to the acts being prohibited, or excessively broad definitions that may encompass acts few would regard as terrorism.

Vaguely worded legal definitions violate the fundamental principle of legality and lend themselves to arbitrary enforcement. [21] Vague and/or overly broad definitions of terrorism involve a fundamental measure of uncertainty and risk criminalizing conduct that has nothing whatsoever to do with terrorism. These definitions may result in interpretations that unduly restrict the legitimate exercise of basic civil rights such as freedom of expression, association and assembly. What

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21 Christian Walter [et al.] (eds.): *Terrorism as a Challenge for National and International Law: Security versus Liberty?,* Springer, Berlin, 2004; Ibrahim Warde: *The Price of Fear: Al-Qaeda and the Truth Behind the Financial War on Terror*, I. B. Tauris, London, New York, 2007.

is more, these definitions lend themselves to selective application against opposition groups on the basis of political considerations. [22] As a consequence, the definitions set a troublesome example for authoritarian regimes. In another worrying trend, such laws have been introduced through fast-track legislative processes that have granted little time for parliamentary scrutiny and public debate.

For decades governments and legal scholars have attempted to elaborate an international definition of terrorism that meets the requirements imposed by the principle of legality and at the same time is ideologically neutral. However, all these attempts have failed for many years.

It has to be noticed until 2001, the measures adopted by the UN Security Council addressing terrorist threats to peace and security, did not contain any definition of «terrorism». However, after September 2001, the problems of definition became acute, since the Council adopted general legislative measures against terrorism –with serious legal consequences– without defining it. The Council has encouraged States to unilaterally define terrorism in national law, permitting wide and divergent definitions. A non-binding Council definition of late 2004 fails to remedy the serious difficulties caused by the lack of an operative definition in Council practice. [23]

According to the International Helsinki Federation for Human Rights [24]

> «No consensus has been reached regarding whether a definition of terrorism should cover state terrorism and where the line is to be drawn between terrorism and legitimate struggles against oppression.»

At present, it has to be noted that almost all Criminal Codes in Europe regulate most of the listed forms of participation in the context of a general terrorist act rather than in the concrete context of individual international or regional conventions. Many countries do not even refer to the concrete act of terrorism but penalise various types of participation randomly as general forms of collaboration. [25]

Definitions of terrorism often include not only a description of who may be a perpetrator, who may be a target of terrorist violence (the public, the government, property etc.), and the character of the acts, but also attempt to set out what the motivations of the perpetrators may be in carrying out terrorist violence, and thus what makes them different from ordinary criminals. This tends

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22 See, Michael Stohl & George A. Lopez (eds.): The State as Terrorist: the Dynamics of Governmental Violence and Repression, Greenwood Press, Westport, Ct., 1984.

23 Ben Saul: «Definition of "Terrorism" in the UN Security Council: 1985–2004», *Chinese Journal of International Law* No. 4/1 (2005), pp. 141-166.

24 International Helsinki Federation for Human Rights: *Report on Anti-terrorism Measures…*, cit.

25 For South-Eastern Europe, see the *2005 Report of Stability Pact for South Eastern Europe, Assessing the implementation of international and European Anti-Terrorism instruments in South-East Europe.*

to be particularly problematic in that it invariably involves a value judgment about the ideological or political goals of the perpetrators. The UN Special Rapporteur on Terrorism [26] has noted:

> «It may be that the definitional problem is the major factor in the controversy regarding terrorism. This is all the more true when considering the high political stakes attendant upon the task of definition. For the term terrorism is emotive and highly loaded politically. It is habitually accompanied by an implicit negative judgment and is used selectively. In this connection, some writers have aptly underlined a tendency amongst commentators in the field to mix definitions with value judgments and either qualify as terrorism violent activity or behaviour which they are opposed to or, conversely, reject the use of the term when it relates to activities and situations which they approve of [27]. Hence, the famous phrase "one man's terrorist is another man's freedom fighter"».

Given the lack of international agreement as to what constitutes terrorism, the term «terrorism» is frequently used especially to target political opponents. As stated in the report of the special UN working group on counter-terrorism policy [28] «labeling opponents or adversaries as terrorists offers a time-tested technique to de-legitimize and demonize them».

5. TERRORISM AND ORGANISED CRIME

There is often a nexus between terrorism and organized crime, including drug trafficking. Links between terrorist organizations and drug traffickers [29] take many forms, ranging from facilitation of their activities –protection, transportation, and taxation– to direct trafficking by the terrorist organization itself in order to finance its own activities.

Traffickers and terrorists have similar logistical needs in terms of material and the covert movement of goods, people and money. They both act by using the same methods with every other form of organized crime: forgery, blackmail, illegal use of arms, violence, and other forms of coercion. [30]

Relationships between drug traffickers and terrorists benefit both. Drug traffickers benefit from the terrorists' military skills, weapons supply, and access to clandestine organizations. Terrorists gain a source of revenue and expertise in

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26 See, on-line, *www2.ohchr.org/english/issues/terrorism/rapporteur/srchr.htm*

27 See K. Bannelier, Th. Christakis, O. Corten & B. Delcourt (eds.) : *Le droit international face au terrorisme après le 11 septembre 2001,* Ed. Pedone [Col. « Cahiers internationaux » No 17], Paris, 2002.

28 Report of the Policy Working Group on the United Nations and Terrorism, Annex to A/57/273, S/2002/875.

29 See Antonio Maria Costa: «L'opium du terrorism», *Le Monde* of 18.09.08. Available on-line at *www.afghana.org/1015/index.php?option=com_content&task=view&id=307 &Itemid=42*

30 See, UNODC's Strategy on the prevention of terrorism for 2008-2011. Available on-line at *www.unodc.org/unodc/en/terrorism/the-role-of-unodc-in-terrorism-prevention.html?ref=menuside.*

illicit transfer and laundering of proceeds from illicit transactions. [31] Both groups bring corrupt officials whose services provide mutual benefits, such as greater access to fraudulent documents, including passports and customs papers. Drug traffickers may also gain considerable freedom of movement when they operate in conjunction with terrorists who control large amounts of territory.

Terrorist groups and drug trafficking organizations increasingly rely on cell structures to accomplish their respective goals. While there may be a strong central leadership, day-to-day operations are carried out by members of compartmentalized cells. This structure enhances security by providing a degree of separation between the leadership and the rank-and-file. In addition, terrorists and drug traffickers use similar means to conceal profits and fund-raising. They use informal transfer systems and also rely on bulk cash smuggling, multiple accounts, and front organizations to launder money. Both groups make use of fraudulent documents, including passports and other identification and customs documents to smuggle goods and weapons. They both fully exploit their networks of trusted couriers and contacts to conduct business. In addition, they use multiple cell phones and are careful about what they say on the phone to increase communications security.

The methods used for moving and laundering money for general criminal purposes are similar to those used to move money to support terrorist activities. It is no secret which countries and jurisdictions have poorly regulated banking structures, and both terrorist organizations and drug trafficking groups have made use of online transfers and accounts that do not require disclosure of owners.

This is the reason why at international level the efforts have been simultaneously focused in combating organized crime together with terrorism. Organized crime is a sophisticated and innovative form of crime (involving economic, financial and technological sectors among others). As a consequence, sophisticated and innovative approaches against crime have become a necessity. [32] The 2000 UN Convention against Transnational Organized Crime [33] aims also at terrorist organizations. The Convention which uses the term «organized criminal groups» can be considered as the most important effort until today in the field of finding a mutually accepted definition on organized crime.

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31 See, William C. Gilmore: *Dirty Money. The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (3rd ed.), Council of Europe, 2004.

32 See, Council of Europe: *Crime Analysis, Organised crime – Best practice survey No. 4,* PC-S-CO (2002) 2E, 22/7/2002. Following the 2nd Summit of Heads of State and Government and the 21st Conference of European Ministers of Justice, corruption, organized crime and the laundering of the proceeds of crime were pinpointed as new threats to the security of citizens and the foundations of democracy. As a result, action to curb and eliminate these problems has become one of the Council of Europe's priorities. Its work in this area has three main emphases: laying down standards, monitoring their application and also the effectiveness of national measures, and providing assistance, mainly for new member States and applicant countries.

33 The United Nations Convention against Transnational Organized Crime was adopted by the General Assembly resolution 55/25 of 15.11.2000, opened for signature in Palermo, Italy, on 12-15.12.2000 and entered into force on 29.09.2003.

According to Art.2 (a) of the TOC Convention an «Organized criminal group» is defined as

> «The structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.»

We should also stress that terrorism can often be financed from legitimately obtained income. Charitable contributions, for example, can be major sources of funding, with Non-Governmental Organisations having been the focus of much investigative work over recent years. [34] Informal money transfer systems can also be vulnerable to use by terrorists and terrorist organisations. Terrorists are also often dependent upon the proceeds of crime.

Like ordinary fraudsters and money launderers, today's terrorists are transnational in their outlook and operate across global networks. In that effect, all efforts at national and international levels aim at adopting the necessary legislation to criminalise not only money laundering, but terrorist financing as well. The 1999 UN Convention for the Suppression of Terrorist Financing as well as –at the European level– the 2005 Council of Europe Convention with the same objective are amongst vital instruments in the fight against terrorism.

6. ANTITERRORISM MEASURES TAKEN AT THE INTERNATIONAL AND REGIONAL LEVELS

6.1 Measures taken at the international level

6.1.1 *UN instruments against terrorism*

An important part of a concerted international effort to combat terrorism in all its forms and manifestations is the establishment of the necessary international legal framework for the prevention and suppression of terrorism.

The international community's response to terrorism has begun long before September 11, 2001. Over the past four decades, the international community has adopted a comprehensive legal framework covering a wide range of activities relating to terrorism in the form of twelve universal legal instruments relating to the prevention and suppression of international terrorism, the so-called «12 universal UN Conventions»: [35]

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34 For instance NGOs providing humanitarian and development funds to the Palestinian Authority have been listed as funding terrorist activities by Israel. See, «Norwegian Funding for Politicized NGOs», on-line at *www.ngo-monitor.org/article/norwegian_funding_for_politicized_ngos*

35 The respective Conventions and Protocols are available on-line at *www.un.org/terrorism* an at *www.unodc.org/unodc/en/terrorism_conventions.html*

• The 1963 Convention on Offences and Certain Other Acts Committed on board Aircraft (in force: 04.12.1969);
• The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (in force: 14.10.1971);
• The 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (in force: 26.01.1973);
• The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (in force: 20.02.1977);
• The 1980 Convention on the Physical Protection of Nuclear Material (in force: 08.02.1987);
• The 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International civil Aviation (in force: 06.08.1989);
• The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (in force: 01.03.1992);
• The 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (in force: 01.03.1992);
• The 1991 Convention on the Making of Plastic Explosives for the Purpose of Detection (in force: 21.06.1998);
• The 1997 International Convention for the Suppression of Terrorist Bombings (in force: 23.05.2001) and the
• The 1999 Convention for the Suppression of Terrorist Financing (in force: 10.04.2002).

A thirteenth instrument, the International Convention for the Suppression of Acts of Nuclear terrorism has been adopted by the General Assembly and was opened for signature on September 14, 2005. [36]

The above-mentioned Conventions remain a crucial part of the international community's fight against terrorism (even if not yet ratified by all member States). [37]

Of the 12 universal Anti-Terrorism instruments, eight Conventions and two related protocols provide a definition of the respective offences. Typically the format in instruments comprises four elements:

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36 Compare: *www.unodc.org/unodc/en/terrorism_co nvention_overview.html*

37 See also the UN Counter Terrorism On-line Handbook at *www.un.org/terrorism/cthandbook/index.html*. The United Nations Counter-Terrorism Online Handbook is an initiative that arose from the call of the United Nations Global Counter-Terrorism Strategy (A/RES/60/288) for the Counter-Terrorism Implementation Task Force (CTITF), established by the UN Secretary-General in 2005, to «ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system». The composition of the Task Force includes entities (25 and 5 observers) that deal exclusively with development work, conflict prevention and counter-terrorism, the rule of law and human rights protection; http://www.un.org/terrorism/cttaskforce.shtml.

• A definition of a particular type of terrorist activity as an offence under the Convention;
• A requirement to penalize that conduct under domestic law;
• An identification of certain bases (i.e. country of registration of ship or vessel, territoriality, nationality) upon which the Parties responsible are required to establish jurisdiction over the defined offence and
• The creation of further jurisdictional obligation regarding prosecution, extradition etc. (principle of «no safe havens for terrorists»).

Extradition is a connective link between the different instruments. It is an accepted principle in international extradition law that political offences may not give rise to extradition. Since no precise definition of a political offence exists in international law, it is usually up to the requested country to determine whether a given offence is political or not. According to the penal UN Conventions, since 1970 the defined *criminal* offences shall be deemed to be extraditable ones, meaning that they should not be treated as *political* offences.

Since the early 1990s, the UN Security Council has adopted a number of resolutions declaring acts of international terrorism a threat to peace and security in the world and imposing sanctions on regimes found to support terrorism, including the Taliban regime in Afghanistan.

In the aftermath of September 11, the Security Council's action in the field of counterterrorism has reached a new level. On September 12, 2001, the Security Council adopted Resolution 1368, which called on the international community to «redouble its efforts» to prevent and suppress terrorist acts. Then, on September 28, 2001, the Security Council adopted Resolution 1373, [38] under chapter 7 of the UN Charter. Resolution 1373, which has been deemed one of the most wide-ranging Security Council resolutions ever, called upon all States to take a range of measures to combat terrorism, including measures to suppress the financing of terrorism, to prevent those involved in terrorism from enjoying a safe haven within their territories and to ensure that those involved in terrorism are brought to justice. The reason behind this is that, many States have only either limited or incomplete jurisdiction over crimes committed abroad. Hence, it shall be provided, if prosecution is not fully possible or desired to extradite the suspect.

The Resolution 1373 declared acts, methods and practices of terrorism contrary to the purposes and principles of the United Nations. The Council in the same resolution emphasized the need for enhanced coordination of national and international efforts in order to strengthen a global response.

Although the measures contemplated in Resolution 1373 have potentially far-reaching implications for the protection of human rights, the resolution did not

38 *http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement*

make adequate reference to member States' obligations to comply with international human rights standards in the fight against terrorism. [39]

Due to logistical preparations of terrorist attacks, most of the offenders have different helpers to support them, either before, during, or even after committing the crime. Most of the UN Conventions against international terrorism require not only the criminalisation of the respective acts but also the criminalisation of participation as an accomplice. Many require also that other specific forms of participation be criminalised, such as organising, directing or contributing in any other way. According to the UNODC legislative guide to the universal antiterrorism Conventions and protocols the publication of the Commonwealth Secretariat entitled *Model Legislative Provisions on Measures to Combat Terrorism* serves as a good interpretation as to how the mandatory requirement of Resolution 1373 can be implemented correctly. Part III of that publication lists 16 specified types of forms of participation related to terrorist acts. Following this example, which according to the UNODC guide would satisfy the criminalisation requirements of all UN counter terrorism instruments, this study extracted 12 types of participation to be analysed in the legislation of South Eastern Europe, which included organising a terrorist attack; planning; financing; participating; supporting; facilitating; recruiting; inciting; supplying; conspiring; and holding membership in a terrorist organization.

On September 8, 2010, the UN General Assembly adopted a resolution on the United Nations Global Counter-Terrorism Strategy. [40] In that resolution, adopted by consensus, the Member States reiterated their strong and unequivocal condemnation of terrorism in all its forms and manifestations, «by whomever, wherever, and for whatever purposes».

The resolution reaffirmed the primary responsibility of Member States in implementing the Strategy, which was adopted in 2006 and remains the strategic framework and practical guidance on joint international efforts to counter terrorism. It also recognized further the need to enhance the important role the United Nations, including the Counter-Terrorism Implementation Task Force, played, along with other international and regional organizations, in facilitating and promoting coordination and coherence to that end at national, regional and global levels.

The Member States also reaffirmed support for the Strategy's four pillars: tackling the conditions conducive to the spread of terrorism; preventing and combating terrorism; building States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard; and ensuring respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.

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[39] See, also, UN Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols to the provisions in the respective Criminal Codes:, available on-line at *www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf*

[40] Document A/64/L.69; available on-line at *www.un.org/News/Press/docs/2010/ga10977.doc.htm.*

6.1.2 The Financial Action Task Force on Money Laundering

The Financial Action Task Force on Money Laundering [hereinafter, FATF] [41] has played an important role in developing international standards with respect to the financing of terrorism.

In response to mounting concern over money laundering, the FATF was established by the G-7 Summit held in Paris in 1989. Recognising the threat posed to the banking system and to financial institutions, the G-7 Heads of State or Government and President of the European Commission convened the Task Force from the G-7 member States, the European Commission, and eight other countries. Although the FATF Secretariat is based at the OECD, the FATF itself, being an independent international body, is not a part of OECD. [42]

The Task Force was given the responsibility of examining money laundering techniques and trends, reviewing the action which had already been taken at a national or international level, and setting out the measures that still needed to be taken to combat money laundering. In April 1990, less than one year after its creation, the FATF issued a report containing a set of Forty Recommendations, which provide a comprehensive plan of action needed to fight against money laundering.

During 1991 and 1992, the FATF expanded its membership from the original 16 to 28 members. Since then FATF has continued to examine the methods used to launder criminal proceeds and has completed two rounds of mutual evaluations of its member countries and jurisdictions. It has also updated the Forty Recommendations to reflect the changes which have occurred in money laundering and has sought to encourage other countries around the world to adopt anti-money laundering measures.

The Forty Recommendations set out the framework for anti-money laundering efforts and are designed for universal application. They provide a complete set of counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation.

Though not a binding international convention, many countries in the world have made a political commitment to combat money laundering by implementing the Forty Recommendations.

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41 *http://www.fatf-gafi.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1,00.html*

42 Several regional or international bodies such as the APG (Asia/Pacific Group on Money Laundering); the CFATF (Caribbean Financial Action Task Force); the ESAAMLG (Eastern and Southern Africa Anti-Money Laundering Group); the GAFISUD (Financial Action Task Force for South America); the MONEYVAL Committee of the Council of Europe (the Select Committee of experts on the evaluation of anti-money laundering measures); the OGBS (Offshore Group of Banking Supervisors) and the MENAFATF (Middle East & North Africa Financial Action Task Force), either exclusively or as part of their work, perform similar tasks for their members as the FATF.

Initially developed in 1990, the Recommendations were revised for the first time in 1996 to take into account changes in money laundering trends and to anticipate potential future threats. In 2003, the FATF completed a thorough review and update of the Forty Recommendations. In October 2001 the FATF expanded its mandate to deal with the issue of the financing of terrorism, and took the important step of creating the Eight Special Recommendations on Terrorist Financing. These Recommendations contain a set of measures aimed at combating the funding of terrorist acts and terrorist organisations, and are complementary to the Forty Recommendations. [43]

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[43] According to the 2003 Recommendations of FATF:
Rec. No. 1: «Countries should criminalise money laundering on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and the United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention).»
Rec. No. 3: «Countries should adopt measures similar to those set forth in the Vienna and Palermo Conventions, including legislative measures, to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties.»
Rec. No. 5: «Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names.
Financial institutions should undertake customer due diligence measures, including identifying and verifying the identity of their customers, when establishing business relations (etc) .»
Rec. No. 10: «Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic or international, to enable them to comply swiftly with information requests from the competent authorities.»
Rec. No. 12: «The customer due diligence and record-keeping requirements set out in Recommendations 5, 6, and 8 to 11 apply to designated non-financial businesses and professions in the following situations:
a) Casinos –when customers engage in financial transactions equal to or above the applicable designated threshold.
b) Real estate agents –when they are involved in transactions for their client concerning the buying and selling of real estate.
c) Dealers in precious metals and dealers in precious stones –when they engage in any cash transaction with a customer equal to or above the applicable designated threshold.
d) Lawyers, notaries, other independent legal professionals and accountants –when they prepare for or carry out transactions for their client concerning the following activities:
– buying and selling of real estate;
– managing of client money, securities or other assets;
– management of bank, savings or securities accounts;
– organisation of contributions for the creation, operation or management of companies;
– creation, operation or management of legal persons or arrangements, and buying and selling of business entities.
e) Trust and company service providers when they prepare for or carry out transactions for a client concerning the activities listed in the definition in the Glossary.»
Rec. No. 35: «Countries should take immediate steps to become party to and implement fully the Vienna Convention, the Palermo Convention, and the 1999 United Nations

After the tragic events that took place in the United States on 11 September 2001, governments world-wide called for an immediate and co-ordinated effort to detect and prevent the misuse of the international financial system by terrorists. The European Union Finance and Economics Ministers and the G-7 Finance Ministers suggested, for example, that such an initiative be pursued in the framework of measures already taken by the international community to combat money laundering.

At an extraordinary plenary meeting on the financing of terrorism held in Washington, DC, in October 2001, the FATF thus expanded its mission beyond money laundering to focus its energy and expertise on a world-wide effort to combat terrorist financing.

Recognising the vital importance of taking action to combat the financing of terrorism, the FATF has agreed nine more Recommendations, [44] which, when combined with the FATF Forty Recommendations on money laundering, set out the basic framework to detect, prevent and suppress the financing of terrorism and terrorist acts. The 40+9 Recommendations, together with their interpretative notes, provide the international standards for combating money laundering and terrorist financing.

6.2 European Union measures against terrorism

The Treaty of Nice (2001) has underlined that a condition for the creation of area of freedom, justice and security is the approach of criminal legislation of member States related to all forms of serious crimes, in particular organized crime, terrorism and trafficking in human beings. One of the first goals of the EU was to adopt severe sanctions against those who activate in terrorist acts and other severe forms of crimes. [45] In that respect helped a lot EUROPOL's extension of competences on organised crime based on Art. 30 of the Treaty of EU. At the same time, the creation of EUROJUST, has contributed to the effective

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International Convention for the Suppression of the Financing of Terrorism. Countries are also encouraged to ratify and implement other relevant international conventions, such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the 2002 Inter-American Convention against Terrorism.»

44 See, FATF: IX Special Recommendations, October 2001 (incorporating all subsequent amendments until February 2008); available on-line at *www.fatf-gafi.org/document/9/0,3343,en_32250379_32236920_34032073_1_1_1_1,00.html.*

45 See, Valsamis Mitsilegas and Bill Gilmore: «The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards», *International and Comparative Law Quarterly* No. 56 (2007), pp. 119-140; Maria O'Neill: «A Critical Analysis of the EU Legal Provisions on Terrorism», *Terrorism & Political Violence* No. 20 (2008), pp. 26-48.

persecution of transnational organized crime [46] by accelerating the horizontal action through judicial cooperation.

On May 5, 2005 the European Commission set the Hague Programme which comprised ten priorities [47] against terrorism and organised crime, valid until 2009.

The implementation of the EU Counter Terrorism Strategy [48] has been a high priority for the EU Presidencies. In the wake of the terrorist attacks of London (7 July 2005) and Madrid (11 March 2004) and of several prevented attacks it emerged that the terrorism threat in Europe is permanent and real. The Union is confronted with informal loose networks of unpredictable extremists operating inside and outside of its borders. In this regard, special attention has been given to the link between organised crime and terrorism. It is well known now that the Madrid bombings, for example, were financed by drug trafficking. [49] Generally accepted is that the Balkans can be considered to be one of the major widely used transit region for drug trafficking and other serious crimes (the so-called Balkan route). [50]

But the need to fight terrorism in Europe is not only of theoretical nature. The collapse of Communism in the former Yugoslavia and the USSR allowed for re-islamisation of many Muslim communities in the new born democracies. This nourished recruitment and indoctrination as illustrated by terrorist organisations like Al Qaeda, Muslim Brotherhood and others.

The EU's strategy on combating terrorist financing was adopted by the European Council in December 2004. The strategy provided an overview of what was done so far and identified areas for future action. A few key points were:

> • Action to counter terrorist financing needs to be better targeted based on an intelligence-led approach and improved information sharing within Governments and between Governments and the private sector.
> • More effective interaction between intelligence/security services, Financial Intelligence Units (FIUs) and other competent government bodies, public prosecutors and other law enforcement bodies, financial supervisors and private sector financial institutions is essential to ensure that investigations

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46 Monica den Boer (ed.): *Organised Crime: A Catalyst in the Europeanisation of National Police and Prosecution Agencies?,* European Institute of Public Administration, Maastricht, 2002; Nikos Passas (ed.): *Organized Crime,* Dartmouth Publ., Aldershot, 1995.

47 The Hague program has set the priorities for an area of Freedom, Justice and Security, as adopted by the Council on 4-5.11.2004 and turned them into concrete actions setting a timetable for their implementation. It recognised ten important fields of action among which terrorism and organized crime were counted. This was considered as the cornerstone for the objectives of the Commission until 2010.

48 See, on-line, *http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf*

49 See, on-line, *http://www.cnn.com/2005/WORLD/europe/05/24/spain.arrests/index.html*

50 See, on-line, *http://www.europol.eu.int/publications/SeriousCrimeOverviews/2005/organised%20illegal%20immigration2005.pdf*

are properly targeted and that evidence from these investigations feeds into the judicial process.
• All Governments should allow their FIUs to share information internationally in the framework of the Egmont Group.
• Governments should ensure appropriate legislation, expertise and funding for financial investigation as a law enforcement technique and an integral part of all law enforcement and/or judicial investigations of terrorist suspects.

Among the European Union efforts to combat terrorism we could mention the following:

• Common Action 96/610/JHA on the establishment of a repertory of specific anti-terrorist knowledge.
• Common Action 94/428/JHA on the creation of a European judicial network.
• Common Action 98/733/JHA related to the criminalisation of participation in a criminal organization.
• Recommendation of 06.12.2001 of the Council for the establishment of a list of common evaluation of threats aimed against high public officials visiting Europe (*OJEC* C 356, 14.12.2001).
• Common position 2001/931 of the Council of 27.12.2001 on the implementation of specific measures for the fight against terrorism (*OJEC* L 344, 28.12.2001).
• Council Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban.
• Framework-Decision of 13.06.2002 (*OJEC* L 190/1, p.18.07.2002).
• Framework-Decision 2002/475/JHA of the Council on the fight against terrorism (*OJEC* L 164, 22.06.2002).
• Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism (COM/2007/0650 final - CNS 2007/0236).
• Decision 2003/48/JHA of the Council of 19.12.2002 related to the implementation of specific measures of judicial and police cooperation for the fight against terrorism according to the common position 2001/931 (*OJEC* L 16, 22.1.1003).
• Regulation 2580/2001/JHA of the Council of 27.12.2001 on the implementation of specific restrictive measures directed against certain persons and entities with a view to combating terrorism (of the measures contained in the common position 2001/931) as amended;
• Council Decision 2008/583/EC of 15.07.2008 implementing Article 2(3) of Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/868/EC (*OJ* L 188, 16.07.2008).

• Council Common Position 2008/347/CFSP of 29.04.2008 amending Common Position 2007/871/CFSP updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism.
• Decision 2004/306/JHA of the Council of 02.04.2004 (*OJEC* L 99, 03.04.2004) on the implementation of Art. 2 para 3 of the Regulation 2580/2001.
• EU Directive 2001/97/EK on money laundering including terrorist financing.
• European Parliament legislative resolution of 14.11.2007 on the proposal for a directive of the European Parliament and of the Council amending Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, as regards the implementing powers conferred on the Commission (COM(2006)0906 - C6-0022/2007 - 2006/0281(COD), *OJ* C 282E, 06.11.2008, pp. 321-321).
• Council Decision 2008/616/JHA of 23.06.2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, (*OJ* L 210, 06.08.2008).
• Council Common Position 2008/586/CFSP of 15.07.2008 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2007/871/CFSP, (*OJ* L 188, 16.07.2008).
• Council Decision of 12.02.2007 establishing for the period 2007 to 2013, as part of General Programme on Security and Safeguarding Liberties, the Specific Programme Prevention, Preparedness and Consequence Management of terrorism and other Security related risks (*OJ* L 58, 24.02.2007).
• Agreement of the Council of 15.02.2007 for the integration of the Prum Treaty of 27.05.2005 on the enforcement and acceleration of exchange of information between 7 EU member States. [51]
• 2009/62/EC: Council Decision of 26.01.2009 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2008/583/EC (*OJ* L 23, 27.01.2009, pp. 25-29).
• EU–US Agreement on the processing and transfer of Passenger Name Record (PNR) data, 23-26.07.2007, (*OJ* L 204, 04.08.2007, p. 18).
• EU and PNR data European Parliament Resolution of 20.11.2008 on the proposal for a Council framework decision on the use of Passenger Name

51 It has to be stressed that this last agreement comprises the creation of a bank of DNA and fingerprints and the taking of measures for the prevention of terrorist acts. In that effect, the EU violates fundamental human rights such as the presumption of innocence, since it renders all citizens potential suspects of terrorist acts.

Record (PNR) [52] for law enforcement purposes (*OJ* C 16E, 22.01.2010, pp. 44-49).

• Council Decision 2009/796/JHA of 04.06.2009 amending Decision 2002/956/JHA setting up a European Network for the Protection of Public Figures (*OJ* L 283, 30.10.2009, pp. 62-62).

• Council Common Position 2009/468/CFSP of 15.06.2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2009/67/CFSP (*OJ* L 151, 16.06.2009, pp. 45-50).

• Council Framework Decision 2008/919/JHA of 28.11.2008 amending Framework Decision 2002/475/JHA on combating terrorism (*OJ* L 330, 09.12.2008, pp. 21-23).

• Council Decision 2008/615/JHA of 23.06.2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (*OJ* L 210, 06.08.2008, pp. 1-11).

• Directive 2008/20/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, as regards the implementing powers conferred on the Commission (*OJ* L 76, 19.03.2008, pp. 46-47).

• Council recommendation of 06.12.2007 concerning a Handbook for police and security authorities concerning cooperation at major events with an international dimension (*OJ* C 314, 22.12.2007, pp. 4-21).

• Commission Regulation (EU) No 787/2010 of 03.09.2010 amending for the 134th time Council Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban (*OJ* L 234, 04.09.2010, pp. 11-13).

• Council Implementing Regulation (EU) No. 610/2010 of 12.07.2010 implementing Article 2(3) of Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) No 1285/2009 (*OJ* L 178, 13.07.2010, pp. 1-4).

• Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (*OJ* L 195, 27.07.2010, pp. 5-14).

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52 On the concerns about eventual infringements to the right of data protection, the right to privacy and to non-discrimination from the use of PRN system see, Evelien Brouwer: «The EU Passenger Name Record (PRN) System and Human Rights: Transferring Passengers Data or Transferring Freedom?», *Center for European Policy Studies Working Document* No. 320 (2009); (available on-line at *www.ceps.eu*).

It has to be noticed that the EU decided on March 25/26, 2004 the creation of a European judicial archive against terrorism, in which all criminal prosecutions for terrorism should be registered as well as sentences related to terrorism and financing of terrorism. At the same time, a Coordinator for the antiterrorist action of the EU was mandated.

The EU has also adopted Regulation No. 1889/2005 [53] on controls of cash movements. This is particularly important as the greater the efficiency of measures adopted by financial institutions to prevent terrorist financing transactions, the greater the incentive for terrorists to use cash. The EU regulation imposes controls on the cross-border movement of amounts greater than 10,000 euros. This compares with much higher sums which can be legitimately transferred in cash between other countries of the world.

Regarding asset freezing, the action taken by EU in this field derives from an obligation for all member States of the UN, pursuant to UNSCRs 1267, 1373 and related resolutions. The EU has established two lists of individuals or groups designated as being involved in terrorist acts whose assets should be frozen. The first was established pursuant to Security Council resolution 1267 (1999) and transposes into EU law the list established by the UN Security Council in accordance with this and subsequent resolutions. The second was established by the Council following the adoption of UNSC Resolution 1373 (2001). This resolution obliges all States to deny all forms of financial support for terrorists. Since Resolution 1373 does not establish a list of terrorists, the EU has developed its own system in order to list terrorist individuals, groups or entities not on the UN's 1267 list. Effective freezing action needs designations that are based on solid intelligence and information from competent authorities which comply with the agreed criteria for freezing. This is the case whether those designations are being decided by the UN in the 1267 Committee, or by the EU itself for terrorist individuals, groups and entities not linked to Al Qaeda and the Taliban. This requires enhanced information sharing both within and between States, while respecting legal safeguards.

Listing –especially of groups– clearly has an important political and psychological impact. Furthermore, sanctions measures have reduced the possibilities for terrorists and terrorist organisations to misuse the financial sector and have made it more difficult for organisations to raise and move funds. All countries should make sure they have the legal instruments to freeze assets of persons and entities designated by the UN's 1267 Sanctions Committee.

Technical assistance is also critical to help third countries implement international counter-terrorist standards. For example, assistance may be required in establishing and implementing effective freezing regimes and in setting up Financial Intelligence Units, training of their staff and development of IT systems and investigation methods. The joint strategy invites Member States and the Commission to devote increased resources to enhancing capacities for countering

53 In application since June 15, 2007.

terrorist financing, in co-operation with other donors, notably the UN, the IMF and the World Bank. This is an area where the EU has a lot to offer in terms of experience and expertise.

It is hard to tell if an attack might have been aborted because of problems with accessing funding. It is difficult to prove a negative. But we do know that because of increased monitoring of the international banking system, terrorists are increasingly being forced to use couriers to move money around the world, and some have been arrested with concerted international action. Restricting the space in which the terrorists can operate, even at the lowest levels of their organisation, helps to degrade their ability to plan and carry out attacks.

6.3 Council of Europe measures against terrorism

The Council of Europe started working on terrorism in the 1970s but stepped up its efforts in 2001 after the terrorist attacks of September 11, 2001.

As a regional organisation, the Council of Europe is committed to facilitating the implementation of United Nations (UN) Security Council Resolutions 1373(2001) and 1624 (2005) and of the UN Global Counter-Terrorism Strategy. It does this by providing a forum for discussing and adopting regional standards and best practicees and by providing assistance to its member States in improving their counter-terrorism capabilities.

The Council of Europe has taken a three-pronged approach to the fight against terrorism: [54]

> • *Strengthening legal action against terrorism* by creating a judicial framework that allows substantial international co-operation among judicial authorities; increasing signatures and ratifications of relevant instruments and encouraging member States to reconsider existing reservations; rapidly increasing the efficiency of the relevant international and European instruments; reinforcing the various forms of mutual co-operation in the criminal field; stepping up the fight against money laundering and cybercrime;and securing just compensation for victims of terrorism.
> • *Safeguarding fundamental values* by building on the fundamental principle that it is both possible and necessary to fight terrorism while respecting human rights, fundamental freedoms and the rule of law; and ensuring that these key values are taken into account in its response to terrorism and in that of its member States. The Organisation's main institutions, such as the Parliamentary Assembly and the Congress of Local and Regional Authorities, and its more specialised bodies, such as the European Commission against Racism and Intolerance (ECRI), the European Committee for the Prevention of Torture and Inhuman or Degrading

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54 See, Council of Europe: *The fight against terrorism*, Council of Europe standards (4th edition), 2007.

Treatment or Punishment (CPT), and the Commissioner for Human Rights, are all dedicated to this objective.

• *Addressing the causes of terrorism* by exploring ways to reduce the tensions existing in today's societies (see the conclusions of the Council of Europe conference «Why terrorism? Addressing the Conditions Conducive to the Spread of Terrorism» held in Strasbourg in 2007); promoting inter-cultural and inter-religious dialogue (see the Council of Europe's White Paper on Intercultural Dialogue of 2008); carrying out activities in the fields of education, youth and the media; ensuring the protection of minorities; fighting intolerance, racism and social exclusion, thereby weakening the sources of discontent that may fuel terrorism.

Within two months from the events in the United States, the Council of Europe began to implement a plan of action, which resulted in the adoption of an important set of international instruments. [55]

The Council of Europe has produced several international instruments [56] and recommendations relating to the fight against terrorism, including three international treaties dealing with the suppression of terrorism, [57] the prevention of terrorism [58] and money laundering and terrorist financing; [59] and three recommendations of the Committee of Ministers to member States relating to special investigation techniques, protection of witnesses and collaborators of justice, and questions of identity documents which arise in connection with terrorism. [60]

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55 Activities in this field are carried out by the Committee of Experts on Terrorism (CODEXTER) which brings together governmental experts. CODEXTER is also responsible for coordinating and following up the activities of the Council of Europe against terrorism. See: *www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/.*

Country reports on the legal and institutional capacity of Council of Europe members and observer States to fight terrorism are available on-line at the Council of Europe's website at *www.coe.int/gmt.*

56 See, Stability Pact for South Eastern Europe: *Assessing the implementation of international and European Anti-Terrorism instruments in South-East Europe*, 2005.

57 European Convention on the Suppression of Terrorism (ETS 90 of 27.01.1977) with its Amending Protocol (ETS 190 of 15.05.2003).

58 European Convention on the Prevention of Terrorism (ETS No. 196 of 16.05.2005, into force on 1 June 2007).

59 European Convention on Laundering, Search, Seizure, Confiscation of the Proceeds from Crime (ETS 141 of 08.11.1990) and Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS No. 198 of 16.05.2005, into force on 1 May 2008). The Convention of 2005 updates and expands on the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime to take into account the need to deprive terrorists and other criminal groups of their assets and funds as the key to successful preventive and repressive measures and, ultimately, to disrupting their activities.

60 Recommendation Rec (2005) 10 of the Committee of Ministers to member States on «special investigation techniques» in relation to serious crimes including acts of terrorism;

An additional set of standards aimed specifically at safeguarding human rights and fundamental freedoms has been produced after 2001, namely the Guidelines on Human Rights and the Fight Against Terrorism (2002), a Policy Recommendation on Combating Racism While Fighting Terrorism (2004), the additional Guidelines on the Protection of Victims of Terrorist Acts (2005) and a Declaration on Freedom of expression and information in the media in the context of the fight against terrorism (2005).

It has to be noticed that a series of other texts can be applicable in terrorism such as the Council of Europe Conventions on Extradition (ETS 24 of 13.12.1957) and its two additional Protocols (ETS 86 of 15.10.1975 and ETS 98 of 17.3.1978); the Convention on Mutual Legal Assistance in Criminal Matters (ETS 30 of 20.04.1959) with its two additional Protocols (ETS 99 of 17.03.1978 and ETS 182 of 08.11.2001); the Convention on the Transfer of Proceedings in Criminal Matters (ETS 73 of 15.05.1972); and the Convention on Cybercrime (ETS 185 of 23.11.2001) with its additional Protocol (ETS 189 of 28.01.2003).

The 1977 European Convention on the Suppression of Terrorism (ETS 90 of 27.01.1977) was designed to facilitate the extradition of terrorists by listing offences (namely acts of particular gravity, hijacking of aircraft, kidnapping and taking of hostages, etc.) that should not be considered as political offences.

It expressly provided that nothing in the Convention shall be interpreted as imposing an obligation upon a Party to extradite a person who might then be prosecuted or punished solely on the grounds of race, religion, nationality or political opinion.

The 2003 Protocol amending the Convention (adopted on the 15.05.2003) introduced the following significant changes:

- A substantial extension of the list of offences which may never be regarded as political or politically motivated, to include all offences covered by the UN anti-terrorist conventions.
- The introduction of a simplified amendment procedure allowing new offences to be added to the list.
- The opening of the Convention to observer States and, subject to a Committee of Ministers' decision, to other non-member States.
- The possibility of refusing to extradite offenders to countries where they risk the death penalty, torture or life imprisonment without parole.
- A significant reduction in the possibility of refusing extradition on the basis of reservations to the Convention with the implementation of a specific follow-up procedure applicable to such refusals and to the follow-up of any obligation under the Convention as amended.

Recommendation Rec (2005) 09 of the Committee of Ministers to member States on the protection of witnesses and collaborators of justice; Recommendation Rec (2005) 07 of the Committee of Ministers to member States on identity and travel documents and the fight against terrorism.

6.3.1 *Committee of Ministers' texts*

• Declaration on terrorism (1978).
• Tripartite declaration on terrorist acts (1986).
• Resolution (74) 3 on international terrorism.
• Recommendation No. R (82) 1 concerning international co-operation in the prosecution and punishment of acts of terrorism.
• Recommendation Rec (2001) 11 concerning guiding principles on the fight against organised crime.
• Declaration on the fight against international terrorism (2001).
• Guidelines on human rights and the fight against terrorism (2002).
• Guidelines on the protection of victims of terrorist acts (2005).
• Declaration on freedom of expression and information in the media in the context of the fight against terrorism (2005).
• Recommendation Rec (2005) 7 concerning identity and travel documents and the fight against terrorism.
• Recommendation Rec (2005) 9 on the protection of witnesses and collaborators of justice.
• Recommendation Rec (2005) 10 on «special investigation techniques» in relation to serious crimes including acts of terrorism.
• Recommendation Rec (2006) 8 of the Committee of Ministers to member States on assistance to crime victims.
• Recommendation Rec (2007) 1 of the Committee of Ministers to member States regarding co-operation against terrorism between the Council of Europe and its member States, and the International Criminal Police Organization (ICPO – Interpol).
• Freedom of expression in times of crisis: the Council of Europe guidelines (2008).

6.3.2 *Parliamentary Assembly Recommendations and Resolutions*

• Recommendations 684 (1972) and 703 (1973) on international terrorism.
• Recommendation 852 (1979) on terrorism in Europe.
• Recommendation 916 (1981) on the Conference on «Defence of democracy against terrorism in Europe – Tasks and problems» (Strasbourg, 12-14.12.1980).
• Recommendations 941 (1982) and 982 (1984) on the defence of democracy against terrorism in Europe.
• Recommendation 1024 (1986) and Resolution 863 (1986) on the European response to international terrorism.
• Recommendation 1170 (1991) on strengthening the European Convention on the Suppression of Terrorism.

• Recommendation 1199 (1992) on the fight against international terrorism in Europe.
• Recommendation 1132 (1997) on the organisation of a parliamentary conference to reinforce democratic systems in Europe and co-operation in the fight against terrorism.
• Recommendation 1426 (1999) and Order 555 (1999) on European democracies facing up to terrorism.
• Recommendation 1534 (2001) and Resolution 1258 (2001) on democracies facing terrorism.
• Recommendation 1550 (2002) and Resolution 1271 (2002) on combating terrorism and respect for human rights.
• Recommendation 1549 (2002) on air transport and terrorism: how to enhance security.
• Recommendation 1584 (2002) on the need for intensified international co-operation to neutralise funds for terrorist purposes.
• Recommendation 1644 (2004) on terrorism: a threat to democracies.
• Resolution 1367 (2004) on bioterrorism: a serious threat for citizens' health.
• Resolution 1400 (2004) on the challenge of terrorism in Council of Europe member States.
• Recommendation 1677 (2004) on the challenge of terrorism in Council of Europe member States.
• Recommendation 1687 (2004) on combating terrorism through culture.
• Recommendation 1706 (2005) on media and terrorism.
• Recommendation 1713 (2005) on the democratic oversight of the security sector in member States.
• Resolution 1507 (2006) and Recommendation 1754 (2006) on alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member States.

6.3.3 *Congress of Local and Regional Authorities*

• Recommendation 134 (2003)
• Resolution 159 (2003) on tackling terrorism –the role and responsibilities of local authorities.

7. CONCLUSION

It is obvious that a great effort has been carried out at the international and regional levels to fight terrorism which nowadays seems to be characterised by its international deployment. However, it is at least strange that most of international law norms suffer from a lack of determinative clarity on the issue of terrorism as if it could not really be defined or as if the criteria set for the definition were

expressly left loose. Thus, groups fighting for the freedom of their country –and since yesterday possibly being recognized under the Geneva Convention as refugees– are not considered as fighting for a legal cause, but may be treated as common terrorists. At the same time, this legitimizes international intervention in the name of peace.

The concern is that legitimate forms of dissent in democracies are being cut back. This anti-terrorist rage has led at both international and national levels to the adoption of measures that restrict freedom of expression. The climate of fear of speech is spreading so quickly, that is almost impossible to stand independent and speak openly without risking being qualified as «friend of the enemies» or even «assisting» them.

It seems as if the environment around the issue of terrorism has prepared the way for a *de facto* legitimization of rules and clauses not yet officially legitimized by international law, but nevertheless accepted already in the international community. The measures taken and the entire attitude created in the aftermath of 9/11 show that the terrorist is not considered as any other criminal and –what is more– he is not considered as a human being entitled to rights. This approach has given ground to the formation of the *criminal law of the enemy*, as sustained by Jakobs, [61] where the enemy is not or cannot be clearly defined. And in that case, if there are no clear standards as who the enemy is, there is a risk to see as enemy whoever stands against the interests of the State (whatever these may be). However, the State –even in the name of security– should in no case treat a category of people as enemies deprived of fundamental rights and exclude them entirely from society. The violation of rights and obligations regulated by the law can result to sanctions, but it can never lead to the loss of the quality of a human being (person), because this remains always inalterable.

As Levy [62] had already predicted in the seventies, terrorism will lead to the alteration of ordinary people, of citizens, who will be given more State power in order to spy to each other, to eavesdrop and to denounce others in the name of security. Unfortunately, in the name of security we all have already been forcibly turned into a world of informers.

The Universal Declaration of Human Rights has defined peace –together with freedom and justice– as its objectives setting the human rights as cornerstones. As a consequence, it is our obligation and our duty to support constantly its full respect and see that no derogation will take place under any circumstances. In order to achieve this goal we should reinforce the right of civil society to actively participate in every decision-making authority in regard to human rights and in particular antiterrorist policy.

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61 See, Günther Jakobs: «Terroristen als Personen im Recht?», *Zeitschrift für die gesamte Strafrechtswissenschaft* No. 117 (2005), p. 839.

62 Robert-Henri Levy: «Socialism and Barbarism», in *The Violence, International Congress on Psychoanalysis,* Ed. Chatzinokoli, 1979.