

E.U. NETWORK OF INDEPENDENT EXPERTS IN FUNDAMENTAL RIGHTS
(CFR-CDF)

**THE BALANCE BETWEEN FREEDOM AND SECURITY IN THE RESPONSE BY
THE EUROPEAN UNION AND ITS MEMBER STATES TO THE TERRORIST
THREATS**

This Thematic Comment has been drafted upon request of the European Commission, Unit A5, “Citizenship, Charter of fundamental rights, Racism, Xenophobia, Daphne program”, of DG Justice and Home Affairs. It has been submitted on March 31 2003 , by the EU network of independent experts in fundamental rights (CFR-CDF). This Thematic Comment does not reflect an opinion of the European Commission nor does it bind it.

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TABLE OF CONTENTS

TABLE OF CONTENTS	5
THE BALANCE BETWEEN FREEDOM AND SECURITY IN THE RESPONSE BY THE EUROPEAN UNION AND ITS MEMBER STATES TO THE TERRORIST THREAT	7
Introduction	7
I. The charge of terrorism.....	11
II. Mutual recognition of criminal justice rulings by Member States.....	16
III. Cooperation with the United States.....	19
IV. Extension of the powers of investigation, surveillance and prosecution	20
IV.1. Establishment of profiles of suspected authors of terrorist acts	21
IV.2 Transmission of personal data from the European Union to the United States	21
Personal data related to Airlines traffic	21
Data held by Europol.....	23
IV.3 Intensification of the monitoring of communications.....	25
IV.4 Extension of the powers of the law enforcement services	27
Extension of the powers of the intelligence services	27
Criminal investigation methods borrowed from those used by intelligence services.....	29
Special procedures for prosecution of terrorist offences	31
Reorganisation of law enforcement services	33
Deprivation of liberty	34
V. Restrictive application of legislation on the residence of foreigners.....	37
VI. Elimination of the finance of terrorism	40
VI.1. Freezing of assets upstream of notification of offences	40
VI.2 Confiscation of crime-related property	46
VII. General conclusions	51

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Introduction

More than a year after the terrorist attacks on New York and Washington on 11 September 2001, the Network of Independent Experts on Fundamental Rights felt that it would be useful to report on all the measures taken by institutions of the European Union as well as by its Member States in response to the terrorist threat from the point of view of the compatibility of these measures with the requirements of fundamental rights.

Terrorism constitutes a serious breach of human rights, and must therefore be fought. Nevertheless, the characteristics of terrorism and in particular the seriousness of the breaches in question, the organized nature of this type of crime and its international dimension have given rise to responses by the States whose compliance with fundamental rights is sometimes questionable; the difficulties can be summarised as follows.

1. Neither international legal instruments¹, nor the framework decision of the Council on 13 June 2002 concerning the fight against terrorism² have really succeeded in overcoming the difficulties traditionally encountered when attempting to give a definition of terrorism which describes its specificity, compared to other forms of organised crime in relation to all its possible forms. However, a sufficiently exact definition of the offence of terrorism is a prerequisite not only for a specific indictment, but also for the application of specific procedural rules, particularly in the context of the inquiry or the investigation, and even more so for special forms of detention; otherwise the measures adopted in fighting terrorism will lack clear legal basis, potentially bringing into question their lawfulness³. This difficulty is the subject of point I of this Comment.

2. Terrorism and organised crime have in common the fact that they are not the work of isolated individuals, but of criminal organisations. The organised nature of this type of crime implies that States are inclined to make the membership of such organisations an offence, indicting individuals for their relations with certain groups, regardless of the possible participation by these individuals in the commission of other offences and possibly regardless of any breach already committed. This trend has

¹ See Convention on Offences and Certain Other Acts Committed on Board Aircraft, (Tokyo, 14 September 1963), Convention on Illegal Capture of Aircraft, (The Hague, 16 December 1970), Suppression of Unlawful Acts Against the Safety of Civil Aviation, (Montreal on 23 September 1971), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973. Convention on the Physical Protection of Nuclear Material (Vienna, 3 March 1990), 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 (Montreal, 24 February 1988), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, (Rome, 10 March 1988), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, (Rome, 10 March 1988), International Convention on the Marking of Plastic Explosives for the Suppression of Terrorist Bombings (adopted by the General Assembly of the United Nations on 15 December 1997), International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999). It is also important to mention Resolution 1373, adopted by the United Nations Security Council on 28 September 2001, which is one of the pillars of the international legal order, with the 12 international conventions and protocols mentioned above, for the prevention and suppression of terrorism. Finally, work currently going forward in the United Nations on a draft "Comprehensive Convention on International Terrorism" is also attempting to define terrorism or an act of terrorism. See K. Bannelier, T. Christakis, O. Corten and B. Delcourt (coordinator), *Le droit international face au terrorisme*, Ed. A. Pedone, Paris, 2003.

² OJ L 164 du 22.6.2002, p. 3.

³ Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism at the 804th meeting of Delegates, 11 July 2002, principle III (legality of antiterrorist measures).

already existed for several years⁴ and additional developments took place during the period under review. These developments are also dealt with in Point I of this Comment.

3. Because of their international dimension, the phenomena of terrorism and organised crime can only be effectively be dealt with through international cooperation (II and III below). However, the intensification of cooperation among States which have differing standards on the subject of fundamental rights, puts the said rights at risk; for example, when certain private data are communicated between States which have different levels of data protection, or when extradition or transfers between States are facilitated to the detriment of the guarantee of non-liability to the death penalty, to torture or inhuman or degrading treatment or deprivation of the right to a fair trial which must be given to every individual. In addition, the international dimension of this phenomenon can threaten the free movement of persons, and potentially the right of asylum, particularly when certain States are considered as possibly sheltering potential terrorists. This can encourage discriminatory attitudes towards people of certain nationalities or certain religious convictions⁵.

4. Given the seriousness of the offences in question, States have tended to infiltrate terrorist organisations and increasingly to use special methods of investigation such as infiltration by agents, monitoring and intercepting communications. These techniques, which the police took over from intelligence and security services, constitute potential threats to privacy, particularly when they are used proactively, that is to say, before an actual offence has been found. Measures extending the powers of investigation, whether they consist in increasing the use of certain techniques of inquiry, in extending existing powers or in adopting exceptional procedures justified for the sake of the fight against terrorism, will be considered in point IV of this Comment.

5. Taking into account the terrorist threat can lead to a restrictive application of laws on stays by foreigners, including the use of the exclusion clause in Article 1 F) of the Geneva Convention of 18 July 1951 on the status of refugees, and to changes in the rules on extradition⁶. Point V of this Comment will be devoted to this question.

⁴ On incrimination of organised crime in **Belgium**, resulting from the law of 10 January 1999, see Roggen, "La loi du 10 janvier 1999 relative aux organisations criminelles", *Rev. dr. pén.*, 1999, p. 1135. Similarly, in **Greece**, Parliament has adopted a law on organised crime even before the events of 11 September, that does not target terrorist acts directly; it refers to a broader phenomenon but it could apply to such acts. (Νόμος 2928/27.6.2001 (ΦΕΚ Α' 141), "Τροποποίηση των διατάξεων του Π.Κ. και του Κ.Π.Δ. και άλλες διατάξεις για την προστασία του πολίτη από αξιόποινες πράξεις εγκληματικών οργανώσεων" (Law No. 2928/27.6.2001 (OJ A' 141), "amendment of the provisions of the Criminal Code and the Criminal Procedure Code and other provisions for the protection of the citizen from punishable acts of criminal organisations"). Further to the National Committee for Human Rights' recent opinion on the proposal for a law, denouncing the incompatibility of some aspects with Articles 5 and 6 of the ECHR (text in Report 2001, National Committee for Human Rights, Athens, official publication, 2002, p. 157 and thereafter, adopted in plenary on 3 May 2001), the final text was amended appropriately. In 2002, arrests and indictment of the presumptive members of the terrorist organisation "17 September", active in Greece since 1975, were made on the basis of the law on organised crime. The trial will begin in March 2003.

⁵ We can mention that in **Germany**, the conditions for the prohibition of foreign associations have been considerable extended through further modifications of the Act concerning Associations (voy. § 14 Act concerning Associations in the wording of Art. 9 Act for the Fight Against Terrorism) E.g. new reasons for prohibition are the impairment or threat of Germans and foreigners friendly living together, the supported or recommended use of force as a means for asserting political or religious interests. The restrictive requirements of art. 9 (2) Basic Law to prohibit associations ("whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding") apply to associations whose members or leaders are all or predominant Germans or citizens of the Union. The Act concerning Associations contained a regulation concerning religious communities and associations: those that make it their business to commonly cultivate a belief are not regarded as associations in the sense of the Act concerning Associations (§ 2 (2) Nr.3). This so called religious privilege was now struck off (First Act for Modification of the Act concerning Associations of 4 Dec 2001 (BGBl. 2001 I p. 3319)). The concept of the legislator has it that even those associations may now be prohibited on condition of Art. 9 (2) Basic Law. It is here a difficult question if the cancellation of the religious privilege is compatible with the right to freedom of religion and if so which are the boundaries. See L. Michael, *Verbote von Religionsgemeinschaften*, *Juristenzeitung* 2002, pp. 482-491. – In any case, on 12 Dec 2001, a few days after the law modification became effective, the Minister for the Interior prohibited the association „Kalifatsstaat“ which was striving for a "State of God" in Turkey.

⁶ The Committee of Ministers of the Council of Europe formally approved the Protocol amending the Convention on the suppression of terrorism of 1977 on 13 February 2003. Among other things, the new Protocol allows for considerable extension of the list of offences to be "depoliticised" and the opening of the convention to Observer States of the Council of

6. The fight against the financing of terrorism, particularly in the context defined by the United Nations Convention for the suppression of the financing of terrorism of 9 December 1999 has given rise to many initiatives since the attacks on 11 September 2001, including the criminalisation of finance of terrorism, the freezing of assets upstream of a criminal trial and the use all of the specific penalty of confiscation. These measures will be considered in point VI of the Comment.

This Thematic Comment sets out the initiatives of the European Union and its Member States in response to the terrorist threat deriving from the attacks on 11 September 2001, using the specific guidelines included in fundamental rights as a criterion of assessment. The present Comment begins from a grid of specific readings which constitute fundamental rights. The idea is not to reiterate the standards of fundamental rights in the field of measures of fighting terrorism. These standards are known and they were quite recently mentioned in the Guidelines issued by the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism. These guidelines were approved by the Committee of Ministers of the Council of Europe on 11 July 2002 and adopted on 15 July 2002 by the Delegates of the Ministers of Foreign Affairs of the Council of Europe. They affirm the obligation of States to protect all persons against terrorism, as well as the prohibition of arbitrary action, the need for the legality of any anti-terrorist measures taken by States and a complete prohibition of torture. They also set a legal framework in particular for the gathering and processing of private data, measures of interference in private life, arrest, police detention and pre-trial detention, judicial procedures, extradition and the compensation of victims. This Thematic Comment does not concern either a revision or a development of these standards. It aims to update certain points, which require particular vigilance on the adoption of measures to fight terrorism, given the content of the initiatives, which were taken during the period of reference.

In the European Union, the risk to fundamental rights posed by the adoption of measures to fight terrorism are all the greater since democratic and juridical controls are still very inadequate in the current institutional balance, particularly in the context of headings V and VI of the Treaty on European Union. The deliberate choice by Member States to base an important part of the Union's response on the second pillar of the Treaty in particular the adoption of common positions as a tool for the measures as specific the drawing up of lists of terrorist organisations or the exchange of information, in addition to a growing number of "anti-terrorist" clauses in agreements with non-Member States, deprives parliamentary institution of all sources of information and possibility of action⁷. The lack of democratic legitimacy of these measures is all the greater, since a large part of the fight against terrorism takes place in the context of implementing international commitments and positions decided within the United Nations Organisation, reducing further the option of parliamentary control over inter-governmental options. Several of the measures adopted by Member States in response to the terrorist threat were implemented in execution of Resolution 1373 (2001) adopted on 28 September 2001 by the United Nations Security Council determining the strategies for fighting terrorism by every available means, including its financing. Common Position 2001/930/CESP on the fight against terrorism⁸, Common Position 2001/931/CESP on the application of specific measures to

Europe. In addition, capital punishment, torture and prison sentences without the possibility of reduction of the sentence are added as reasons to refuse extradition. The Protocol will be open for signature on 15 May 2003 on the occasion of the 112th session of the Committee of Ministers. It will take effect simultaneously for all parties to the Convention. For the complete text of the Protocol and explanatory report see: <http://www.coe.int/gmt/>.

⁷ See: European Parliament Resolution of 7 February 2002 on Council Decision of 27 December 2001 on the fighting terrorism, OJ C 284 of 21.11 to 2002, p. 313.

⁸ OJ L 344 of 28.12.2001, p. 90. Article 14 of this position provides that the Member States should become parties to international conventions and protocols on terrorism listed in an annex as quickly as possible. This gave rise to a certain number of ratifications and signatures of these texts by the Member States. On 24 September 2001, Austria signed the International Convention for the Suppression of the Financing of Terrorism, adopted on the 9 December 1999 by the General Assembly of the United Nations; it ratified the convention on 15 April 2002. Finland, that had already signed, respectively in 1998 and in 2000, the International Convention for the Suppression of Terrorist Bombings of 15 December 1997 and the International Convention for the Suppression of the Financing of Terrorism, ratified the two texts on 27 and 28 June 2002, and immediately adopted legislative measures in compliance with these conventions (law No. 372 and laws No. 558 and 559, including an amendment to Chapter 34 of the Criminal Code providing for incrimination of financing of terrorism). In July 2002, Germany ratified the International Convention for the Suppression of Terrorist Bombings of 15 December 1997 (see law of 2 Oct. 2002, BCBI. 2002 II, p. 2506). In Greece, Parliament adopted law No. 303/2002 ratifying the International

combat terrorism⁹ and in respect of the freezing of assets, Council Regulation 2580/2001 of 27 December 2001; specific restrictive measures directed against certain persons and bodies with a view to fighting terrorism¹⁰ were adopted within the European Union on the basis of this resolution. Decision 2001/927/EC of 27 December 2001, establishing the lists stipulated in this regulation, was made on the basis of Article 2 § 3 of the Regulation. Point VI of this Comment will analyse this problem in greater detail.

This lack of democratic control contrasts sharply with the stake, which these measures represent from the viewpoint of fundamental rights. And this is reinforced further still when, like in Belgium, the houses of parliament eliminated from the debates on the transposition measures to be adopted.¹¹ Because rights as fundamental as the right to the presumption of innocence, or to access to a Court, are questioned here, given the consequences for a person or an organisation through their inclusion in the list based on Decision 2001/927/EC referred to earlier, the right to protection of privacy in the processing of private data, which is particularly threatened by the intensification of the exchange of such data (see points III and IV of the Comments), or more generally, the rights to the respect of privacy and the right of the defence, are subject to restrictions by the new so-called "special" methods of inquiry (point IV).

Given this context, this Thematic Comment wishes to draw attention to certain problems, which can arise from the viewpoint of the respect of fundamental rights laid down in the Charter of Fundamental Rights of the European Union by the measures adopted by the Member States in the context of the fight against terrorism. This has two objectives; on the one hand, throwing light on the options which national parliaments will have on transposing the framework decisions of the Council on the fight against terrorism¹² into national legislation and on the European arrest warrant and surrender procedures between Member States¹³, and then, on each occasion they are called on to exercise control over the adoption of measures presented as a response to the terrorist threat. On the other hand, it aims to make it easier for States to learn from one another, by comparing national experience on the most appropriate response to this threat. The independent experts on fundamental rights are in fact convinced that the effectiveness of steps to fight terrorism cannot be measured by the extent of the restrictions which these steps impose on fundamental freedoms. In other words, the increase in security is not inversely proportional to the restriction of freedom; on the contrary, certain practices minimise the scope of restrictions on fundamental rights, whilst offering a high level of effectiveness.

Convention for the Suppression of Financing of Terrorism; on 5 July 2002, a proposal for a law on ratification of the International Convention for the Suppression of Terrorist Bombings of 15 December 1997 was submitted to Parliament – it has not yet been adopted. In Luxembourg, proposal for a law No. 4954 on the approval of the International Convention for the Suppression of the Financing of Terrorism was submitted on 16 May 2002; it has not yet been ratified. In Sweden, the International Convention for the Suppression of the Financing of Terrorism took effect on 6 July 2002. Certain initiatives to implement this last convention are discussed in Point VI of this Comment.

⁹ OJ L 344 of 28.12.2001, p. 93.

¹⁰ OJ L 344 of 28.12.2001, p. 70.

¹¹ On 27 February 2003, the House of Representatives voted a proposal for a law on the implementation of restrictive measures adopted by the Council of the European Union against certain persons and organisations (doc. 50. 2210/001), authorising the Executive to take, by interim decrees, the measures needed to implement the common actions and positions adopted under Articles 12, 14 and 15 of the Treaty on European Union and for cases treated under Articles 60 § 1, 301 and 308 of the EC treaty. As the text was not commented by the Senate, it will come into force in the near future. By adopting this text, **Belgium** ensures that the implementation of the asset-freezing measures will be carried out, in the same way it has done since a law of 11 May 1996 for the embargo decided by United Nations Security Council.

¹² This text should be transposed by 31 December 2002. This is going forward in several Member States.

¹³ Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, OJ L 190 of 18.7.2002, p. 1. Participation in a criminal organisation and terrorism are the first two offences in a list of offences that, if they are punishable in a Member State will give rise to surrender pursuant to a European arrest warrant without verification of the double criminality of the act. See Article 2 § 2.

I. The charge of terrorism

When the "terrorist" offence is given special legal treatment in criminal procedure, in particular by the use of certain special inquiry methods, or leads to special or particularly serious sanctions, it must be defined sufficiently precisely: the principle of lawfulness in criminal matters requires this. Moreover, since the international phenomenon of terrorism requires increased international cooperation, the States concerned must agree on a common definition of terrorism. However, a review of developments during the period under review does not make it possible to conclude that from this point of view, all the difficulties have been overcome.

The framework decision on combating terrorism of 13 June 2002¹⁴, which has been considerably amended since the time when the initial text was drawn up by the European Commission on 19 September 2001¹⁵, puts forward a harmonised definition of terrorism. However this definition as such is not adequate to meet the requirement of lawfulness¹⁶. To describe certain common law offences such as terrorism, the elements contained in the framework decision itself refer to the *degree of seriousness* which these offences exhibit: "given their nature or context, (*these offences*) may seriously damage a country or an international organization", or *their object*, that being to: "seriously intimidating the population, unduly compelling a Government or international organisation to perform or abstain from performing any act, seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation"¹⁷.

These aspects do not define the common law offence of terrorism with adequate precision¹⁸. By saying in a general way, that "...this framework decision shall not have the effect of altering the obligation to respect the fundamental rights and fundamental legal principles enshrined in Article 6 of the Treaty on European Union", the 10th recital of the framework decision of 13 June 2002 on fighting terrorism specifies, that "...nothing in this framework decision shall be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, the freedoms of assembly, of association or of expression, including the right of all to form and to join with others in trade unions for the protection of their interests and the related right to demonstrate". In the declaration attached to the framework decision, Member States specifically mention the case of those who have worked to maintain or re-establish democratic values, as is stated to have been was the case in World War II¹⁹. A reference to a subjective assessment at a moment when the regulation endeavoured to define the offence objectively, illustrates the difficulties encountered in defining the offence of terrorism, in order to apply special treatment to the said offence which differs from that applied to common law offences.

Under these circumstances, it is crucial for the Member States, in the method in which they transpose this framework decision into national legislation, to take into account of the need to palliate these uncertainties, which continue to affect the definition of a terrorist offence. For these reasons, it is desirable, notwithstanding the urgency of adopting measures to deal with the terrorist threat, to organise a parliamentary debate to develop the best possible text, and, during the drafting of the text, compliance with the requirements of fundamental rights should be the subject of an independent assessment.

¹⁴ Article 31 e) provides for the gradual adoption of measures setting up minimum rules concerning the elements that constitute criminal offenses and sanctions applicable notably in the field of terrorism. At the time of the adoption of the framework-decision, six Member States already had specific legislation on the question (E, F, I, D, UK, P).

¹⁵ COM (2001)521 final du 19 septembre 2001.

¹⁶ See Article 7 of the ECHR, Article 15 of the International Covenant on the Civil and Political Rights and Article 49 of the Charter of Fundamental Rights of the European Union. ERHR, judgments S.W. and C.R. vs. United Kingdom of 22 November 1995, Series A n° 335-B and 335-C, § 35 and § 33. The European Court of Justice has also underlined the importance of this principle: C.J.E.C., 12 December 1996, Criminal Procedure vs. X, C-74/95 and C-129/95; ECJ, 9 July 1981, Grandrand Frères, 169/80, ECR p. 1931.

¹⁷ Article 1 of the framework decision.

¹⁸ The lack of precision is even clearer when the framework decision requires the States to criminalise management or participation in activities of a "terrorist group" (Article 2 § 2 of the framework decision), or when it identifies the "threat" of carrying out a terrorist act as a terrorist offense (Article 1 § 1,i of the framework decision).

¹⁹ Declaration 109/02, Annex I of doc. 11532/02 of 22 August 2002, p. 19.

*Incrimination of terrorism by the transposition of the framework Council decision of 13 June 2002 on fighting terrorism*²⁰

The paragraphs which follow give what is still only a partial report on the status of incrimination of terrorism, stating where applicable the progress of the transposition of the framework decision by Member States into national legislation

In **Austria**, Articles 278b to 278d have been added to the Criminal Code to incorporate incrimination of terrorism, while Article 64 of the Code has been amended to provide for extra-territorial jurisdiction of Austrian Courts to try this kind of offence²¹. Section 278b contains a definition of the term 'terrorist organisation'²² which is modelled after the Council framework decision, providing for up to ten years imprisonment for members of such organisations, whereas section 278c increases the maximum sentence for a catalogue of various offences when committed within the framework of a terrorist organisation by half of the sentence otherwise threatened, however, in no case to more than 20 years. The financing of terrorism and provision of terrorist resources is dealt with in section 278d, according to which a sentence ranging from 6 months to 5 years can be imposed.

In **Denmark**, following the 11 September 2001 situation, a number of measures to counter-balance terrorism have been adopted by the Danish government (*legislative package*)²³. Due to the fast process of elaboration and adoption of this package, Denmark may be in violation of its international legal obligations, especially under the 1951 Geneva Convention or the European Convention on Human Rights. A definition of terrorism has been included in the Penal Code ; it is borrowed from the Framework Decision of 13 June 2002 and has not remedied the vagueness of the definition contained in that Framework Decision.

In **Belgium**, the government has submitted a draft law on terrorist offences to the House of Representatives on 14 March 2003²⁴. The draft law adapts the Criminal Code to make Belgian legislation comply with the framework decision by defining "terrorist" offences and the concept of a "terrorist group". In addition, it introduces heavy sanctions and grants extra-territorial jurisdiction to Belgian courts to try alleged perpetrators of terrorist acts.

In **Greece**, the process of incorporating the framework decision of 13 June 2002 into national legislation is progressing well, but has not yet concluded. (The offence of terrorism was, however, already recognized by the Greek law of 27 June 2001).

In **Finland**, the measures to incorporate the framework decision into national legislation are not yet in force. A Government proposal²⁵ for an Act on incorporating provisions concerning terrorism into the *Penal Code (Rikoslaki, Act no 39 of 1889)* and the *Coercive Measures Act (pakkokeinolaki, Act No*

²⁰ Transposition by the Member States should be done before 31 December 2002.

²¹ See Federal Law Gazette (BGBl) I N° 134/2002. Article 9 § 1 on the framework decision of 13 June 2002 lays down the cases under which each Member State must establish its jurisdiction with regard to terrorist offences. Among these cases is one in which the perpetrator of the offense is one of its nationals or residents, independently of the place where the offense was committed.

²² It has been argued that this definition would be broad enough to cover well established organisations such as Greenpeace; even if this were theoretically true, it is far from realistic that any judge would adopt such interpretation.

²³ Lov (2002:378) om ændring af straffeloven, retsplejeloven, lov om konkurrence- og forbrugerforhold på telemarkedet, våbenloven, udleveringsloven samt lov om udlevering af lovovertrædere til Finland, Island, Norge og Sverige [Law (2002:378) changing Act regarding the Penal Code, Act on Administration of Justice, the Telecommunication Competition and Consumer Act, Order on the weapons and explosives Act, Extradition Act and The Extradition Act regarding Finland, Island, Norway and Sweden].

²⁴ Proposal for a law on terrorist offences, 14 March 2003, DOC 502364/001. See also the Opinion of the Council of State No 34.362/4 of 27 January 2003; legislation section, fourth chamber, request for an opinion by the Minister of Justice on a preliminary proposal for a law "on terrorist offences". The Council of State scrupulously analyzed the admissibility of the first version of the project with regard to the lawfulness of the incriminations, recalling that the circumstance that the national provision takes inspiration from a European standard does not exempt it from the application of Article 7 of the Convention. In this sense see ECHR, judgment *Cantoni vs. France* of 15 November 1996, § 30.

²⁵ HE terrorismia koskeviksi rikoslain ja pakkokeinolain muutoksiksi. See also PeVL 48/2002vp.

450 of 1987), implementing Council Framework Decision of 13 June 2002 on combating terrorism, was approved by Parliament on 8 January 2003. When the relevant Government bill seeking to implement the framework decision of 13 June 2002 was before the Constitutional Law Committee of Parliament, several academic experts of constitutional law and criminal law heard by the Committee expressed their concern regarding the compatibility of the bill with fundamental rights and human rights, notably the principle of legality in criminal cases (Section 8), freedom of expression (Section 12) and freedom of assembly and freedom of association (Section 13). In its Opinion, the Constitutional Law Committee required several changes to be made to the bill for the purpose of guaranteeing the appropriate observance of fundamental rights and, accordingly, enabling the enactment of the bill through an ordinary procedure for legislative enactments.²⁶ On the particular subject of membership of a terrorist group, on 21 January 2003, Parliament finally approved the Government bill²⁷ suggesting that participation in the activities of a criminal organisation be punishable by law. According to the Government, the bill was inspired by the International Convention on the Elimination of All Forms Racial Discrimination, on the one hand, and Joint Action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member State of the European Union, on the other hand.

In **Sweden**, the Parliament approved the European Council's Framework Decision on Combating Terrorism on 29 May 2002.²⁸ In consequence, the draft of a new act on the crime terrorism was approved by the Government on 4 December 2002, which was subsequently referred to the Council on Legislation for review.²⁹ It is expected that the Parliament will take a decision on the new legislation (Act on punishment for terrorist crimes) at the beginning of the year 2003. The Swedish Government makes it clear that the proposal under review will fulfil the requirements of foreseeability and accessibility of a law according to international standards. Thus, in its view the definition of a terrorist crime shall be formulated with sufficient precision to enable the addressee to know what he is expected to do or not to do. Nevertheless, it has been argued that the existing provisions in the Criminal Code of relevance could without any obstacle be adapted for that purpose.³⁰ In their view the proposed act suffers in the same way as the above-mentioned Framework Decision from ambiguity, surrounding *e.g.*, the subjective requirements. A wide definition together with the proposal to remove from the Act on Special Control of Aliens the exception for non-expulsion for political crimes (§ 1, 2nd part) implies that greater number of aliens risk being expelled in the future on the basis of considering them as a threat to the national security. As one specially problematic area has, thus, been identified the absence of a clear dividing line between the crime terrorism and politically motivated crimes.³¹ The potential for abuse of power by the public authorities is, in other words, great.

In the **Netherlands**, the *Wetsvoorstel terroristische misdrijven* [Crimes of Terrorism Bill] was submitted to Parliament on 28 June 2002.³² Once the Bill enters into force, membership of or participation in a criminal organisation the purpose of which is to commit crimes of terrorism will be

²⁶ See Opinion of the Constitutional Law Committee PeVL 48/2002vp.

²⁷ Hallituksen esitys 183/1999vp rikollisjärjestöjen toimintaan osallistumisen säätämisestä rangaistavaksi.

²⁸ Prop. 2001/02:135 Sveriges antagande av rambeslut om bekämpande av terrorism. See also SOU 2002:98, Internationella brott och svensk jurisdiktion.

²⁹ Ds 2002:35 Straffansvar för terroristbrott, pp. 81-86. A great number of amendments to various existing laws of relevance to the issue of terrorism shall enter into force on 1 January 2003. What is regarded as a terrorist crime will, for example, have consequences for the asylum determination procedure since both the Aliens Act and the Special Control Act will be amended so that they shall comprise a reference to the Act on punishment for terrorist crimes.

Mention should be made here that the Government has established an investigative commission to review, *inter alia*, whether the current legislative system in an appropriate way enables public authorities to prevent and combat terrorist acts (Dir. 2001:120). Its conclusions shall be published no later than 31 March 2003 (Dir. 2002:134) Kommittédirektiv, Tilläggsdirektiv till 11 septemberutredningen (Ju 2001:13).

³⁰ Frivilligorganisationernas fond för mänskliga rättigheter, Svenska Helsingforskommittén för Mänskliga Rättigheter, Betänkande Ds 2002:35 "Straffansvar för terroristbrott", Yttrande 4 October 2002, p. 4.

³¹ See the reference made by Petter Ljunggren to a statement delivered by the International Commission of Jurists on this issue, *Lagförslag mot terrorism möter hård kritik "Lagen leder till godtycke"*, Amnesty Press no. 4, Stockholm December 2002, p. 22.

³² *Kamerstukken II*, 28463, no. 1 *et seq.*

punishable by up to eight years' imprisonment, or 15 years in the case of its founder, leader or administrator. A later amendment, introduced on 17 December 2002, clarifies that one who provides financial or other material support to a terrorist organisation, will be regarded as "participating" in that organisation and hence criminally liable.³³ In addition, the Bill provides that the maximum sentences for serious crimes may be increased by 50% if these crimes were committed with a terrorist aim.

In December 2002 the **Irish Government** published the *Criminal Justice (Terrorist Offences) Bill, 2002*³⁴ the principal purpose of which is to give effect in Irish law to the EU Framework Decision on Combating Terrorism, but also to the International Convention Against the Taking of Hostages, the Convention on Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, the International Convention for the Suppression of Terrorist Bombings (section 8-11 of the Bill)³⁵ and the International Convention for the Suppression of the Financing of Terrorism (section 12-44). The measures contained in the Criminal Justice (Terrorist Offences) Bill, 2002 should be seen as supplementing those contained in the Offences Against the State Acts, 1939-1998.³⁶ The Bill also adapts the model of anti-organised crime legislation to the national and international counter-terrorist context by replicating provisions of the Criminal Justice Act, 1994 and the Proceeds of Crime Act, 1996. Sections 6(5) and (6) make provision for a rebuttable presumption in certain circumstances in relation to the intent required for the purposes of committing the offence of engaging in or attempting to engage in terrorist activity. The Criminal Justice (Terrorist Offences) Bill, 2002 introduced a special procedure not included in the framework decision: Subsection (5) provides that where a person is proved to have committed, or to have attempted to commit, an act that constitutes an offence specified in the relevant Schedule and the court is satisfied, having regard to all the circumstances, that it is reasonable to assume that the act was committed with the required intent, the person will be presumed to have committed the act with such intent unless the contrary is shown. The specified circumstances which a court may take into account are set out in Subsection (6) as follows : whether the act created or was likely to create a collective danger to the lives or the physical integrity of persons; whether the act caused or was likely to cause serious damage to a state or international organisation; whether the act caused or was likely to result in major economic loss; and any other matters that a court considers relevant.

France has not yet transposed the Council framework decision of 13 June 2002 on fighting terrorism into national legislation, but had already adopted the law of 15 November 2001 on day-to-day security³⁷, which widens the definition of a terrorist act in Article 33 to include money laundering and insider offences (the description of this concept has also been broadened), and also creates a new charge of financing a terrorist undertaking³⁸. Moreover, on 10 December 2002 the orientations of the

³³ *Kamerstukken II*, 28463, no. 7.

³⁴ For the full text of the Bill and Explanatory Memorandum see: www.irlgov.ie. Parliamentary debates on this legislation can also be accessed at this address.

³⁵ Ireland signed this Convention on 29th May, 1998. The International Convention Against the Taking of Hostages and the Convention on the Protection and Punishment of Crimes against Internationally Protected Persons are no longer open for signature but may be acceded to following the enactment of the Criminal Justice (Terrorist Offences) Bill, 2002.

³⁶ This body of legislation (and, in particular, its provision for a non-jury Special Criminal Court) has already been the subject of serious criticism, on a number of occasions, by the UN Human Rights Committee. While the existence of such legislation might be understandable by reference to the historical experience of political violence in Ireland circumstances have changed significantly since the mid-1990's. It was in that spirit that this legislation was subject to a thorough review (on foot of a commitment contained in the Belfast Agreement of 1998) by a government-appointed committee which reported in April 2002. Cf. *The Report of the Committee to Review the Offences Against the State acts, 1939-1998 and Related Matters*, (Dublin: Government Publications, 2002). This report is also referred to as "The Hederman Report" as the Committee was chaired by Mr. Justice Anthony Hederman (a former member of the Irish Supreme Court) who dissented from the main findings of the Report. Although the final report resulting from that review (the Hederman Report) did not propose repeal or, indeed, fundamental reform of the Offences Against the State Acts some modest suggestions for improving the operation of the Acts were made. None of these have been acted upon and the measures contained in the 2002 Bill – which extend significantly certain provisions of the Offences Against the State Acts and other pieces of legislation – are open to criticism on a number of grounds.

³⁷ Law No. 1-1062, JOFG of 16 November 2001, p. 18215. See below with regard to the other provisions introduced by this law.

³⁸ Chapter VS of the law concerning provisions reinforcing the fight against terrorism, that introduces exceptional measures, has a duration of application limited to 31 December 2003. Before expiration of this deadline, the Government must bring an

preliminary draft law on fighting organised crime were laid down. This wording intends to place a large number of offences into the category of "organised crime", an extensive concept which can involve as few as two or three people, an example of the risk of confusing two types of delinquency that has led to an extension of the principles needed to fight terrorism to crimes for which a waiver of common law is not necessary.

In **Germany**, the initial draft Law on fighting terrorism (*Terrorismusbekämpfungsgesetz*), deliberated by an emergency process in the *Bundesrat*³⁹, has been the object of a great deal of substantial criticism during a Public Hearing carried out by the Committee for Home Affairs of the Bundestag (notwithstanding the general conditions accelerating the discussion which the Opposition criticized)⁴⁰, and from the Federal Data Protection Commissioner⁴¹; the law which came into force on 1 January 2002 has been considerably amended⁴². In criminal law, up to now the criminal offence rule "Formation of Terrorist Associations" existed in section 129a Strafgesetzbuch [Penal Code]. Now it is complemented with the criminal offence rule "Criminal and Terrorist Associations in Foreign Countries" in section 129b Penal Code.⁴³

In **Italy**, the new Article 270b of the Criminal Code⁴⁴, which now concerns "associations active in terrorism, even international, or the subversion of the democratic order" criminalises the promotion, formation, organisation, management or financing of such associations, providing for heavy prison sentences of from 5 to 10 years. The new article 270c of the Criminal Code provides for a heavy prison sentence of up to four years to those who give assistance to members of an association, without directly or indirectly belonging to it. These amendments to the Criminal Code preceded framework decision of 13 June 2002 but they do not represent the transposition into Italian legislation.

The legislative response of the **United Kingdom** to the perceived threat to it from international terrorism is to be found in its adoption of the *Anti-terrorism, Crime and Security Act 2001*. This wide-ranging law builds on existing legislation but the provisions in it were said to be intended to deal specifically with the situation that arose in the light of the attacks in the United States on 11 September 2001. This Act was adopted pursuant to a regular parliamentary procedure but with the relatively short period. Although the Act is permanent, provision has been made for it to be reviewed in its entirety within two years of its enactment and an adverse report on any particular provision would lead to it ceasing to have effect (s 122)⁴⁵. The definition of terrorism has been the object of a great deal of

evaluation report on the application of all of the measures before the Parliament. Article 33 on criminal sanctions for acts of terrorism is included in the law No. 2002-1138 of 9 September 2002 on the orientation and programming of Justice, however, so continuity is ensured.

³⁹ According to the possibility provided by Article 76 § 2 of the Basic Law, Grundgesetz, that results in reducing the debates from six weeks to three weeks.

⁴⁰ The opposition criticized that a regular discussion was impossible because of the short-termed presentation of multiple amendments by the coalition; see Bericht des Innenausschusses [Report of the Committee on Home Affairs], Bundestags-Drucksache 14/7864, p.8.

⁴¹ A summary critical assessment of the Act for the Fight Against Terrorism can be found in B. Hirsch, "Terror und Antiterror – Zur Beratung des Terrorismusbekämpfungsgesetzes im Deutschen Bundestag am 14. Dezember 2001", in: T. Müller-Heidelberg u.a. (ed.), *Grundrechte-Report 2002 - Zur Lage der Bürger- und Menschenrechte in Deutschland*, p. 15-26. – See also documentation of the Deutsches Institut für Menschenrechte, Berlin, „Menschenrechtliche Erfordernisse bei der Bekämpfung des Terrorismus“, 2002. [„Human Rights requirements in fighting against terrorism“]

⁴² Gesetz zur Bekämpfung des internationalen Terrorismus [Act for the Fight Against International Terrorism] from 9 January 2002 (BGBl. 2002 I p.361) <BGBl. = Bundesgesetzblatt, *Federal Law Gazette*. It contains modifications of 17 acts and 6 statutory instruments.

⁴³ Vierunddreißigstes Strafrechtsänderungsgesetz [Thirty-fourth Modification of the Penal Code] – section 129b StGB of 22 August 2002 (BGBl. 2002 I p. 3390).

⁴⁴ Introduced by the Decree-law of 18 October 2001 n° 374 (converted with amendments into the law of 15 December 2001 n° 438) : *Disposizioni urgenti per contrastare il terrorismo internazionale*

⁴⁵ Only the extended power of arrest and detention of suspected international terrorists was not adopted on an indefinite basis, being made operative in the first instance for a fifteen-month period but with provision for its renewal by Parliament for up to a year at a time until 10 November 2006 (s 29). There is also provision for the operation of this power to be reviewed before the end of each period for which it is in force (s 28). The power has been the subject of a derogation made under Article 15 of the European Convention on Human Rights (see below, Point IV of the Comment).

criticism by the Joint Committee on Human Rights, which was concerned about the potential for arbitrariness of this definition⁴⁶.

A review of the measures adopted by the Member States for the transposition of the Council framework decision of 13 June 2002 on combating terrorism shows that the States' transposition measures have not solved the problem of the imprecise definition in this instrument – for the most part, the definition of terrorism given in the framework decision is simply reproduced in national criminal law. Still, it is important to recall, that the Member States remain bound by the principle of lawfulness of offenses and sentences set down in Article 7 of the European Convention of Human Rights when they implement an instrument of the European Union⁴⁷. According to the European Court of Human Rights, this provision means that an individual should be able to know from the wording of the pertinent clause, with the help of the courts for its interpretation where need be, for what acts and omissions he/she can be held liable⁴⁸. In addition, since qualifying an offence as "terrorist" justifies the use of special methods of inquiry (point IV of the Comment below) that entail major interference in private life, the distinction between "terrorist" offences and other offences must be sufficiently precise to meet the condition of lawfulness to which the legitimacy of this interference is subject. This is not the case when the distinction between two offences is described exclusively by the gravity of their consequences and the objective of the perpetrator.

II. Mutual recognition of criminal justice rulings by Member States

The framework decision on the European arrest warrant and surrender procedures between Member States of 13 June 2002⁴⁹ provides that the offence of belonging to a criminal organisation and of terrorism shall result in extradition on the basis of the European arrest warrant, *without control of double criminal liability*, if they are punished in the Member State which issued the arrest warrant, by imprisonment or detention of at least three years, as defined by the Member State which issued the arrest warrant (article 2, par. 2).

Mutual recognition of criminal sentences, of which the framework decision on the European arrest warrant is the first manifestation, is based on the idea of mutual confidence of States which are required to comply with the same standards of fundamental rights. The preamble provides two safeguards. The refusal to extradite a person can be justified "...when there are objective reasons to believe that the arrest warrant in question was issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation⁵⁰". Next, given that "...the mechanism of the European arrest warrant is based on a high level of confidence between Member States", implementation can be suspended in the event of serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, according to the procedure stipulated in Article 7 of the Treaty⁵¹.

These precautions are nevertheless still less than would have been desirable from the viewpoint of compliance with fundamental rights. The details that have been mentioned do not appear in the operative part of the wording, but only in the recitals, which underlines their precariousness. Admittedly article 1 § 3 of the framework decision provides that "...this framework decision shall not

⁴⁶ Also see the Human Rights Commissioner of the Council of Europe, opinion 1/2002 and 26 August 2002 -- the exemption to Article 5 § 1 ECHR, adopted by the United Kingdom in 2001, Dov. Comm DH (2002) (noting that the broad definition of terrorist organizations enables the British law to apply to individuals who may have no relation with the emergency situation that is that the origin of the legislation and in virtue of which the rights of this individual guaranteed by the Convention may be jeopardized).

⁴⁷ ECHR, judgment *Cantoni vs. France* of 15 November 1996, ECR 1996-V, p.1627, § 30.

⁴⁸ ECHR, judgment *Kokkinakis vs. Greece* of 25 May 1993, Series A 260-A, § 52, ECHR, judgment *S.W. vs. the United Kingdom* of 22 November 1995, Series A n° 335-B, § 35; ECHR judgments *Streletz, Kessler and Krenz vs. Germany* and *K-H W vs. Germany* of 22 March 2001, respectively § 50 and § 45.

⁴⁹ Framework decision of the Council of 13 June 2002 on the European arrest warrant and procedures for surrender between Member States, OJ L 190 of 18.7.2002 page 1. This instrument must be transposed by 31 December 2003.

⁵⁰ Recital 12, par. 1.

⁵¹ Recital 10.

have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles enshrined in Article 6 of the Treaty on European Union". A more explicit affirmation would, however have been desirable, stipulating that the absence of guarantees of compliance with rights in the State issuing the arrest warrant could for instance be a legitimate reason for refusal to surrender. The affirmation of the principle that appears in Article 1 § 3 of the framework decision at this time is not likely to compensate for its weakness, when it is restricted to the affirmation in the preamble that the Council must "determine" a serious and persistent breach in fundamental rights which shall bind the State in question pending action by the Council. Nevertheless, whilst the implementation of a European arrest warrant takes place on individual basis, the determination set down in the context of Article 7 to the Treaty of European Union is made on the general basis of compliance by Member State with the principle of Article 6 of the Treaty on European Union, and should only be used in exceptional cases of "serious and persistent breach" of these principles by a State. It should nevertheless be remembered that the obligations imposed on the Member States of the Union, particularly by the European Convention of Human Rights, are not limited to prohibiting the surrender of a person to the authorities of a State which is guilty of a breach of this magnitude as determined by the Council.

The body of the text of the framework decision of 13 June 2002 on the European arrest warrant and procedures for extradition between the Member States mentions a certain number of exceptions. The framework decision lays down provisions barring the issue of a European arrest warrant from resulting in a breach of the principle *non bis in idem*⁵². It also provides that the surrendering State shall not be obliged to execute the arrest warrant if, under its own national law, the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based⁵³. It also provides that the receiving State can be required to provide certain guarantees to the surrendering State, particularly in certain cases of a decision rendered in absentia⁵⁴ or when the laws of the State which issued the arrest warrant provide that the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life imprisonment⁵⁵.

The framework decision is also specifically concerned with the protection of certain rights which could be brought into question by surrender procedures; amnesty is taken into consideration, as well as age⁵⁶ and the statute of limitation⁵⁷; the rights of the person against whom the arrest warrant has been issued are expressly governed by Article 11 under conditions in compliance with the European Convention of Human Rights in the matter of the rights of persons in detention⁵⁸, and their right to information⁵⁹ and translation, as well as to assistance of counsel and of an interpreter⁶⁰. As already noted, the implementation of extradition can be temporarily postponed for humanitarian reasons.⁶¹ All these numerous guarantees demonstrate that the authors of the framework decision concerning European arrest warrants and surrender procedures between Member States are concerned that this

⁵² Article 3, 2).

⁵³ Article 3, 3)

⁵⁴ Article 5, 1)

⁵⁵ The European Court of Human Rights does not exclude that the condemnation of a person to an incompressible life sentence can raise questions from the standpoint of Article 3 of the Convention: ECHR, judgment *Weeks vs. United Kingdom* of 2 March 1987, Series A No. 114 and court decisions (3rd section) of 29 May 2001 in the case *Sawoniuk vs. United Kingdom* (pl. 63716/00) and of 16 October 2001 in the case *Einhorn vs. France* (pl. 7155/01). Also see Council of Europe, and General Report on the treatment of detainees in long-term detention, Subcommittee No. XXV of the European Committee for criminal problems, Council of Europe Publications, 1997, and Resolution (76) 2 on the treatment of detainees in long-term detention adopted by the Committee Ministers of the Council of Europe after this study.

⁵⁶ Article 3 § 3.

⁵⁷ Article 4 § 4.

⁵⁸ ECHR, judgment *Brogan and others vs. United Kingdom* of 29 November 1988, Series A n°145-B, §62. See also ECHR, judgment *Brannigan and Mc Bride vs. United Kingdom* of 26 May 1993, Series A n°258-B §58. ECHR, judgment *Aksoy vs. Turkey* of 12 December 1996 ECR.1996-VI §66; ECHR judgment *Sakik and others vs. Turkey* of 26 November 1997. ECR.1997-VII, § 44

⁵⁹ ECHR *Fox, Campbell and Hartley vs. United Kingdom* of 30 August 1990, Series A n°182, §§ 32 and 34.

⁶⁰ Article 11 § 2.

⁶¹ Article 26 § 4.

type of judicial cooperation should not breach the fundamental rights of the person concerned. Nevertheless, these guarantees protect these rights only partially. The priority of the international obligations of the Member States, which result from the treaties on fundamental rights of which they are signatories, over the obligations of mutual assistance imposed by the framework decision, should have been explicitly stated to avoid any ambiguity on the point. Since the wording of the framework decision does not as such provide this guarantee, it is important for Member States take this into account when transposing the decision into their legislations.

In fact, the exceptions which the framework decision provides to the obligation to surrender, do not cover all situations where, by surrendering a person for the execution of a judgment or for prosecution, the surrendering State may render itself internationally responsible in the context of the Human Rights, as described below: according to well-established legal precedent (since 1989) of the European Court of Human Rights; the surrender of a foreigner by a Member State may raise problems with regard to Article 3, and therefore render the State in question responsible under the Convention, when there are serious reasons and evidence to show that the person in question genuinely risks treatment contrary to Article 3 if he/she is surrendered to the country of destination. In such a case, the provision implies the obligation of not surrendering the person in question to that country.⁶² Recital 13 of the Preamble of the framework decision of 13 June 2002 restates this aim, but the provision of the framework decision is not equally explicit (except for delaying the surrender of the person for compelling humanitarian reasons: Article 23 § 4). In addition, the prohibition of subjecting the person concerned to the risk of capital punishment, torture, inhuman or degrading sentences or treatment, does not cover all the prohibitions by the European Convention of Human Rights in the case of deportation. In particular, a prohibition of deportation is also required when the person to be deported is at risks of "...a flagrant denial of justice" in the State to which he/she is to be deported⁶³.

In the current state of the law of the European Union, a Member State's refusal to implement the obligation of cooperation that is normally required under the framework decision on the European arrest warrant of 13 June 2002 can be justified by its concern for complying with the obligation to respect fundamental rights. But in uncertain situations, where the risk of violation is not clearly established, a State will hesitate to refuse to surrender someone to the Member State issuing the warrant. The weakness of the mechanisms for requiring a State to meet this obligation, and the political nature of some of these mechanisms due to the limits of the jurisdiction of the Court of Justice of the Communities European under the procedure for references a for preliminary ruling⁶⁴, does not does not provide a solution this difficult – on the contrary it is an additional handicap: only under exceptional circumstances does the Court of Justice of European Communities exercise control on the lawfulness of this refusal. So in most situations, on the contrary, there is a risk of seeing political treatment, within the Council, of what in fact are legal questions dealing with protection due to fundamental rights in the legal order of the European Union and the obligation of the Member States to the respect international treaties on human rights to which they are a party even in the execution of their obligations within the European Union.

⁶² See ECHR *Soering vs. United Kingdom* of 7 July 1989, Series A n° 161, p. 35, §§ 90-91, *Cruz Varas et autres vs. Sweden* of 20 March 1991 Series A n° 201, p. 28, §§ 69-70; *Chahal vs. United Kingdom* of 15 November 1996, *Record* 1996-VS, N° 22, p. 1853-1855, §§ 73-74, 79 and 80⁶²; *Ahmed vs. Austria* of 17 December 1996, *Record* 1996-VI, N° 26, p. 2206, § 39; *H.L.R. vs. France* of 29 April 1997, *Record* 1997-III, N° 36, p. 757, §§ 33-34 et *D. vs. United Kingdom* of 2 May 1997, *Record* 1997-III, N° 37, § 46

⁶³ See ECHR judgment *Drozdz and Janousek vs. France and Spain* of 26 June 1992, Series A n°240, § 110; ECHR (3^{re} sect.), *S. Einhorn vs. France* (pl. n° 71555/01), of 16 October 2001, §§ 32-33).

⁶⁴ Article 35 § 7 of the TEU provides that each Member States can introduce an action for failure to meet obligations against another Member State, when it has not been possible to settle the dispute between them in the Council within six months following the introduction of the matter by one of the Members. Action for failure to meet obligations lodged by a State can concern the interpretation or application of any act adopted on the basis of Article 34 § 2 TEU. The European Commission does not have competence to introduce an action for failure to meet obligations against a Member State under the law of the European Union. Article 35 TEU also provides that the European Court of Justice can be given jurisdiction to make such a ruling, by means of a preliminary reference from the national courts of the Member States, under conditions set by each Member State for its own courts. (Also see the Declaration on Article K7 of the Treaty of European Union, annexed thereto).

III. Cooperation with the United States

The demands of the fight against terrorism have led to an intensification of cooperation with non-Member States and in particular, the United States, in order to respond to the trans-national nature of the terrorist threat. A strengthening of this cooperation can endanger the protection of fundamental rights when the standards, which prevail in these States, are at a lower level than those which prevail in the European Union. Judicial cooperation with the United States, and a request for communication of personal data represent a good illustration of this. Point III of the Comment deals exclusively with judicial cooperation, the question of exchange of private data being considered in Point IV.

The difficulties which arise on the subject of concluding a judicial cooperation agreement with the United States, particularly from the point of view of compliance with fundamental rights, are summarised by the European Parliament in its resolution on judicial cooperation between the European Union and the United States of America in the field of the anti-terrorist fight adopted at the end of 2001⁶⁵. The limits of the actions of the Union are defined on the basis of the fundamental principles given in Article 6 of the Treaty on European Union and on the United Nations Convention on torture, the Geneva Convention on the status of refugees of 28 July 1951, the European Convention of Human Rights and its protocol No. 6 abolishing capital punishment, and rules concerning the protection of data⁶⁶. This mandatory restriction of the actions of the Union explains the problems of negotiating a formal agreement on judicial cooperation in criminal matters and extradition on the basis of Article 24 and 38 of the Treaty, in reply to the request made by the United States. The negotiation mandate, which the European Union entrusted to the presidency has therefore marked the limits of this exercise and in particular, it will be subject to a further provision of guarantees on the non-implementation of capital punishment and on the maintenance of existing constitutional guarantees on sentences of life imprisonment⁶⁷.

The JHA Council of 19 December 2002 has made some progress⁶⁸, particularly on the question of the extradition of nationals to the United States, which is a constitutional rule in several Member States. Nevertheless, the subject is particularly complex from both the political and the technical points of view. Politically, it is not certain that unanimity of the States of the Union is as firm as it may appear on cooperation on criminal cases under conditions which are contrary to fundamental rights. The fact that there is a bilateral judicial relationship between the U.S.A and certain Member States, means that the United States could be granted their requests through this relationship under conditions equivalent to those that would result from an agreement with the European Union. The limits set by the aforementioned resolution could then be circumvented to the detriment of individual rights.

>From the technical point of view, obstacles are still numerous. They could lead to an exploration of new solutions, such as, for example, temporary extradition. However, each of the States in question would have to overcome the obstacle of judicial cooperation in criminal cases between the European Union and United States, due to the continued existence of capital punishment in the latter country, with the result that European States which cooperate with United States, risk being held internationally responsible if a death penalty resulted.

Two prominent episodes in 2002 bear witness to this difficulty, which has already arisen in the context of bilateral judicial cooperation on criminal cases between the United States and certain Member States of the Union. The first episode originated in the refusal by France to cooperate with the United

⁶⁵ OJ C 177 E/288

⁶⁶ Convention for the protection of the individual with regard to automatic processing of personal data included in the Council of Europe on 28 January 1981; Directive 95/46/EC of the European Parliament and other, Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. OJ L 281, 23/11/1995 p. 31; Directive 97/66/E.C. of 15 December 1997 (O.J. L24 of 30.01.1998, p. 1) now rescinded and replaced by Directive 2002/58/E.C. of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), (OJ L 201 of 31.7.2002, p. 37).

⁶⁷ Conclusions of the JHA Council of 25 and 26 April 2002, doc. 7991/02 (press 104) p. 13.

⁶⁸ Conclusions of the JHA Council, doc. 15691/02 (Press 404), p. 8.

States in the case of Zacarias Moussaoui, a French citizen who might have been sentenced to death for alleged participation in the events of 11 September 2001 until the American judicial authorities made a commitment by means of a letter dated 25 November 2002 to the effect that documents and information provided by France would not be taken into account in pronouncing the death sentence⁶⁹. The second episode is the adoption in Finland by the Parliamentary Constitutional Law Committee of an opinion on a government proposal for an Act on the processing of personal data by the police (HE 93/2002vp laiksi henkilötietojen käsittelystä poliisitoimessa ja eräiksi siihen liittyviksi laeiksi)⁷⁰. In this Opinion, the Constitutional Law Committee noted that the general prerequisite of the transfer of personal data to outside the European Union (or the European Economic Area) is that the country in question guarantees an adequate level of data protection. The Committee referred to Article 25 of the Data Protection Directive (95/46/EC) and paragraph 1 of Section 10 of the Constitution of Finland. According to the latter provision, “more detailed provisions on the protection of personal data are laid down by an Act”. In practice, these “more detailed provisions” are laid down by Personal Data Act (Act No 523/1999). The Committee noted that the transfer of personal data is only possible in accordance with the relevant provisions laid down by the Personal Data Act (see especially Chapter 5 of this Act). In particular, the Committee referred to paragraph 4 of Section 9 of the Constitution, providing that “[a] foreigner shall not be deported, extradited or returned to another country, if in consequence he or she is in danger of a death sentence, torture or other treatment violating human dignity.” According to the Committee, the interpretive effect of this provision entailed that personal data shall not be transferred if it is processed for the purpose of sentencing a death sentence or executing it.

It is important to keep in mind that the Member States of the European Union, which are party to the European Convention of Human Rights, are bound to comply with that instrument, including in the context of interState Cooperation that they choose to enact with nonmember States. The States party to the European Convention of Human Rights cannot of course impose the rules of that convention on nonmember States or territories. But consistent case law of the European Court of Human Rights considers that the contracting States of the Convention must refrain from assisting States with which they reinforce their judicial cooperation, if it appears that this could cause an individual to run the risk of infringement of his/her fundamental rights, including the case of flagrant denial of Justice⁷¹.

IV. Extension of the powers of investigation, surveillance and prosecution

In 2002, the European Union and its Member States made several initiatives to facilitate the tracing and prosecution of suspected authors of terrorist acts, or the improvement of coordination between those involved in fighting terrorism, both the police and magistrates. These initiatives are extremely varied, although they involve restrictions on the fundamental rights of individuals for the sake of the needs of security. These rights are, in particular, the right to respect of private life, the rights of the defence in the context of a criminal procedure, and the right to freedom and security.

These developments are looked at under five headings. The Comment reviews, in turn, the establishment of profiles of the suspected authors of terrorist acts (IV.1), transmission of private data from the European Union to the United States (IV.2), surveillance of electronic communications within the European Union (IV.3) and the extension of the powers of law enforcement services (IV.4). A special paragraph is devoted to the exemption that the United Kingdom has notified, in virtue of Article 15 of the European Convention of Human Rights, concerning the detention of foreigners suspected of having relations with terrorist organizations, without possibility of trial or extradition (IV.5). The diversity of these themes should not cloud the consistency of the current evolution.

⁶⁹ See notably the Internet site of the League of Human Rights, for criticism of the attitude of the French authorities in this affair: www.ldh-france.assoc.fr.

⁷⁰ This bill will repeal the current Act on the Personal Data Files of the Police (Act No 509 of 1995).

⁷¹ ECHR (2nd section) judgment of *Pelligrini vs. Italy* (pl. N° 30882/96) of 20 July 2001, § 40.

IV.1. Establishment of profiles of suspected authors of terrorist acts

The session of the JHA Council on 28 and 29 November 2002⁷² issued a recommendation on developing "terrorist profiles"⁷³. This concerned the identification of terrorist targets and organizations and the collection of data in cooperation with Europol. Nevertheless, however pertinent and urgent the desire to improve the analysis of terrorist crime might be, the definition of these "profiles" opens the door to a serious threat to the freedom of the public which cannot be precluded by a mere promise of "compatibility" with fundamental rights⁷⁴. The inclusion of elements of identification such as "nationality", "education" or "family situation" in these profiles no doubt requires much greater care, particularly since there is an explicit relationship between these profiles and the policy on immigration. At the present stage, the procedures for the development these terrorist profiles appear insufficient in terms of the accuracy and reliability of information, which is taken into account, notwithstanding its confidentiality, which cannot justify a total absence of control.

This risk was immediately obvious in the Spanish draft decision creating a standard form concerning violent and radical groups "linked to terrorism"⁷⁵, an initiative which fortunately differentiates the respective rights to expression and demonstration guaranteed by national law and listed among the principles in Article 6 of the Treaty on European Union.

The development of terrorist profiles on the basis of characteristics such as nationality, age, education, birthplace, "psycho-sociological characteristics", or family situation – all elements which appear in the recommendation on developing terrorist profiles – in order to identify terrorists before the execution of terrorist acts and in cooperation with the immigration services and the police to prevent or reveal the presence of terrorists in the territory of Member States – presents a major risk of discrimination. The development of these profiles for operational purposes can only be accepted in the presence of a fair, statistically significant demonstration of the relations between these characteristics and the risk of terrorism, a demonstration that has not been made at this time.

IV.2 Transmission of personal data from the European Union to the United States

Personal data related to Airlines traffic

The American authorities insist on the transmission of personal data processed within the European Union to the United States. The question of knowing how this transmission could take place without adversely affecting the private life of the persons concerned, arose in 2000 in a very different context.

Following the attacks of 11 September 2001, the United States enacted several legislative measures (Aviation and Transportation Security Act 2001; Enhanced Border Security and Visa Entry Reform Act 2002) requiring airlines on pain of fines, to transmit certain personal data to the Commissioner of Customs and to the Immigration Naturalization Services. These services can also give other federal authorities access to the data. The data in question relate to passengers and members of the crew of flights crossing the United States, both entering and leaving.⁷⁶

⁷² JHA Council of 28 and 28 November 2002, doc. 14817/02 (press 875), Annex II p. 21. Surprisingly, this recommendation does not appear in the summary of the conclusions.

⁷³ Doc. 11/11858/02.

⁷⁴ Recital 7.

⁷⁵ Doc. 557112/02 of 13 February 2002.

⁷⁶ More particularly, the Aviation Transportation Security act of 19 November 2001 can be pinpointed in that it requires all airlines operating intercontinental flights landing in the United States to provide information on passengers and crew by means of the APIS system, (Advanced Passenger Information System) which was designed to reduce waiting lines at American Customs. Therefore the (limited) data appearing on the passengers' passport and landing card are communicated to Customs before arrival. This information is required 15 minutes before takeoff. The Enhanced Border Security Act provides that "airlines flying to the USA must supply a list of personal information on passengers 15 minutes after the flight has taken off – PNR with personal details and accommodation addresses in USA and any other information categories the Attorney

On 24 October 2002, the "Article 29" Data Protection Working Party gave a particularly well documented opinion No. 6/2002 on the consistency of Directive 95/46/EC of 24 October 1995 with the obligation imposed on airlines by the United States authorities⁷⁷. Its opinion begins with the observation that the personal data the transmission of which is being required (PNR) exceeds that which is strictly necessary for identifying persons since, in addition to the name, address, date of birth and flight particulars, they include information such as: the date of booking the ticket, name of the travel agent, financial data, information on previous flights made by the passenger, the passenger's philosophical convictions and his/her ethnic group, his place of work, etc.

The "Article 29" Working Party concluded that airlines required to give this information were facing a dilemma; they are required to act in compliance with Directive 95/46/EC, but, on the other hand, if they do not meet the requirements of the American authorities, they run the risk of fines and of being refused the right to land in United States. The Working Party felt that under these circumstances the processing of personal data involving gathering data from passengers and their transmission, could only be accepted if the Member States of the European Union adopted measures involving certain restrictions on the rights laid down in Directive 95/46/EC, using the option provided by Article 13 of this instrument. In addition, it felt that having APIS transmit the required data to the United States could only be acceptable under Directive 95/46/EC, subject to the condition of certain guarantees being given by the State receiving the data, which American law does not at present provide.

The "Article 29" Working Party concluded that "...though it was developed in the context of terrorist atrocities, the APIS system would lead to a routine and disproportionate disclosure of information by airlines which are subject to the requirements of Directive 95/46/CE". It therefore calls for the adoption of a common approach by Member States of the European Union, both on the adoption of measures restricting the personal rights recognized by Directive 95/46/EC as authorized by Article 13 of that Directive, and on negotiations with the United States of a certain number of guarantees in the processing and security of personal data transmitted to the relevant authorities of that country, so that the airlines shall not have contradictory obligations imposed on them.

On 17 and 18 February 2003, the European Commission finally concluded an agreement with the relevant United States authority (U.S. Customs) whereby any airline operating transatlantic flights is required to communicate the identities and personal data of passengers to American Customs before takeoff.⁷⁸ On 12 March of the same year, the European Parliament nevertheless expressed its disappointment with the contents of the agreement and the procedure for its adoption; 414 votes to 44 were cast in favour of a draft resolution of the European Parliament Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (LIBE)⁷⁹. This resolution mentions criticisms of the agreement which had already been identified by the "Article 29" Working Party in the aforementioned Opinion.⁸⁰

General of the USA decides to add in the future". The PNR (Passenger Name Record) is therefore added to the APIS. It includes the generic name given to the files created by the airlines for each journey and passenger booked. They are stored in the airlines reservation departure control databases. PNR allows all the different agents within the air industry (from the travel agent and computer reservation systems (CRS) to the carrier and handling agent at the airports) to recognise each passenger and have access to all relevant information related to his/her journey: departure and return flights, special services onboard required (food), medical information if needed, etc.).

⁷⁷ Opinion 6/2002 on transmission of Passenger Manifest Information and other data from Airlines to the United States, 24 October 2002, 11647/02/EN

⁷⁸ Joint statement between the European Commission and US Customs, agreed on 17-18 February 2003, supplemented by a statement by the US Customs of 4 March 2003 making undertaking of sensitive data. These documents are available at the following addresses:

http://www.Europa.eu.int/comm/external_relation/us/intro/pnr.htm;

or

http://www.europa.eu.int/comm/internal_market/en/dataprot/adequacy/declaration_pnr_en.pdf.

⁷⁹ European Parliament, Motion for a resolution on transfer of personal data by airlines to the US immigration service, draft of 6 March 2003 (B5-0000/2003) and text adopted on 11 March 2003 (B5-187/2003). For the position of the European Commission, see speech No. 03/125 by F. Bolkenstein, member of the European Commission in charge of internal market and taxation of 12 March 2002: Airlines passenger data transfers from the EU to date United States (Passenger Name Record). The reproduction of the oral proceedings during this European Parliament plenary meeting can be found at <http://www.statewatch.org/news/2003/mar/12epvote.htm>

⁸⁰ Of particular concern is the uncertainty about the persons to whom the data are sent, the fact that certain data collected are not necessary (relevance criterion), an absence of indications on the time limit of storage, the absence of the right to

It refers to the incompatibility of the agreement with Article 25 of Directive 95/46/EC, which provides that the transmission of personal data to a non-member State shall be subject to compliance with specific conditions, including an adequate level of protection in the country to which the data are sent, not provided in the United States⁸¹. In its letter of 3 March 2003 addressed to the President of the European Parliament LIBE Committee, the chairman of the "Article 29" Data Protection Working Party doubted that the national supervisory authorities would fail to make use of personal data supplied by airlines, which breached national data protection legislation and Article 25 of Directive 95/46/EC.

Under Article 25 of Directive 95/46/EC, the transfer of personal data to a third country for processing can only take place if the third country in question provides an adequate level of protection. There are doubts at this time about whether the protection offered by the United States is adequate. In any case, the decision of the European Commission adopted under Article 25 § 6 of Directive 95/46/EC, according to which processing of personal data in the United States offers sufficient guarantees, can only be accepted within the limits imposed by Article 8 of the Charter of Fundamental Rights of European Union, by Article 8 of the European Convention of Human Rights and by the Council of Europe for Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. In the absence of full compliance with the principles of pertinence and proportionality, and a right to correction to the benefit of the individual whose personal data is transferred, there is a real risk of infringement of these various guarantees.

Data held by Europol

The question of transmission of personal data to the police also arose concerning data held by the European Police Office (Europol). On 27 March 2000, the European Council authorised the director of Europol to begin negotiations on agreements with non-Member States. It made this authorisation subject to compliance with a strict procedure, where this cooperation could result in the transmission of personal data⁸², in particular those based on the opinion of the Joint Supervisory Board⁸³. A certain number of agreements providing for this type of data exchange were formalised without major problems (Interpol, Norway, Iceland ...).

Following the events of 11 September 2001, the question of concluding this type of agreement with the United States at the request of the US authorities, was at the centre of particularly delicate problems within the European Union, to a point that a partial agreement had to be concluded first between Europol and the United States excluding transmission of private data from the agreement⁸⁴. Article 18 of the Europol Convention⁸⁵ states that Europol is free to transmit personal data recorded by its services to non-Member States subject to several conditions, in particular the existence of an

correct the data. A complaint can be filed, but any modification is left to the discretion of the American Customs. Data on bookings by the passenger also appear to be available to the American Customs, since apparently the agreement authorises direct access of the Customs to the airlines reservations system. In this case, this transmission would go beyond American requirements, which only call for communication 15 minutes before and after takeoff. According to certain information, this communication is required at least one hour before the takeoff of the aircraft, which indicates that the American authorities reserve the right to refuse to let a given passenger board the plane

⁸¹ It should be noted that American legislation itself is being criticized, in particular by the Electronic Privacy Information Center (EPIC). See data presentation by C. Laurant in the European Parliament public seminar of 25 March 2003: "Data protection since 11 September 2001: what strategy for Europe?"

⁸² Council Act of 12 March 1999 for the rules governing the transmission of personal data by Europol to third-party States and third-party bodies making these rules (OJ C 88 of 30.3.1999, p. 1). It was amended on 13 June 2002 by Council decision (OJ C150 of 22.6.2002, p. 1).

⁸³ The Joint Supervisory Board monitors compliance with the rights of the person and the legality of the transmission of data issued by Europol (Article 24.2 and 7 of the Europol Convention). Persons feeling adversely affected can submit their case to the Board (Article 24.4 of the Europol Convention).

⁸⁴ The partial agreement was concluded on 6 December 2001. The Europol Joint Supervisory Board (which was not properly consulted on the agreement in accordance with the Europol Convention) argued that there was no legal basis for such an agreement in the Convention, which only contained rules governing "full" cooperation agreements.

⁸⁵ Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union on the establishment of a European Police Office (Europol Convention) OJ C 316 , 27/11/1995, p. 1.

adequate level of protection of private data within the receiving State. Here, it is legitimate to express doubt about the quality the guarantees which the United States can offer. The US have not ratified Convention 108 of the Council of Europe of 28 January 1981 for the protection of persons with reference to the automatic processing of private data⁸⁶. The federal nature of the United States moreover renders uncertain the extent of the distribution of the information in question⁸⁷.

Other criticisms have however been made, which led to parliamentary reservations by a certain number of Member States (France, the Netherlands, United Kingdom)⁸⁸. In essence, the criticism has been as follows: (i) the agreement lacks any provision specifically addressing data protection ; (ii) the agreement fails to guarantee the right of access to data by data subjects as set out in EU, international and national rules, and expressed in Article 8(2) of the EU Charter of Rights ; (iii) nor does it respect the international obligations applying to EU Member States and the EC rules on data protection which require there to be an independent authority, not merely one with the 'appropriate' degree of independence as in the proposed Treaty. This is expressly stated in Article 8(3) of the EU Charter of Rights ; (iv) the agreement flouts the international rules severely restricting processing of data in certain 'sensitive' categories, as set out in Article 6 of the agreement. There is thus a risk that Europol will either transmit its information or receive American information which violates the rules on processing of sensitive data ; (v) there is no power for the European Court of Justice to rule on the validity or interpretation of such treaties and there is no procedure for public review of the application of such treaties. Nor is the European Parliament consulted about the conclusion of such agreements and there is no requirement of national parliamentary ratification.

Despite these difficulties, the session of the JHA Council on 19 December 2002 finally approved the text of a draft agreement. The proposal guarantees protection of information of a racial, political and religious nature; this will only be provided in a strictly necessary context and the State having provided the information shall be in decisive control. Nevertheless, the request for special agreements with many American agencies put forward by certain Member States to cover the risk of uncontrolled distribution, was not granted by the United States⁸⁹; only one agreement will be signed by the Director of Europol which will allow data to be provided at all levels, which seems questionable even if the Union has included a clause denying its responsibility⁹⁰.

Article 18 of the Europol Convention adopted by Act of Council on 26 July 1995⁹¹ defines the conditions under which Europol can transmit personal data recorded by its services to third party States or bodies. But the conditions set by Article 18, including the conditions by which an adequate level of data protection is guaranteed by the nonmember State or body, must be interpreted taking into account the general requirements of Article 8 of the Charter of Fundamental Rights of the European Union, as well as Article 8 of the European Convention of Human Rights and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. From the standpoint of these provisions, and particularly Article 8 § 3 of the Charter of Fundamental Rights, the absence of an independent supervisory authority competent for controlling transmission of data by Europol and the treatment of that data by the United States authorities gives grounds for particular concern.

⁸⁶ Article 23 of this Convention allows for joining by States which are not members of the Council of Europe.

⁸⁷ See for example Statewatch analysis No. 15 ' The exchange of personal data between Europol and the USA, by S. Peers. The Chairman of the Joint Supervisory Board pointed out that if the Union wanted to apply to the USA the same criteria as those applicable to the countries of Central and Eastern Europe on their accession to the Union, the agreement would have to be refused in respect of the United States, because that State does not offer sufficient guarantees (report of the Delegation for the European Union to the French Senate, communication of Mr. Alex Turk, Chairman of the Joint Supervisory Board of Europol, on the proposed agreement between United States and Europol on the exchange of personal data (E. 2141)).

⁸⁸ For an overview, see e.g. <http://www.statewatch.org/news/2002/nov/analy15.pdf>

⁸⁹ Articles 7 and 12.

⁹⁰ Article 11.

⁹¹ O.J. C 316 of 27.11.19950, p. 1.

IV.3 Intensification of the monitoring of communications

On 14 December 2001, the "Article 29" Data Protection Working Party gave an Opinion No. 10/2001 on the need for a balanced approach to the fight against terrorism, in which it expresses concern on the growing criminalisation of certain types of behaviour associated with computerised society and the growing number of breaches of individual right to the respect of private life, such as retention of data on telecommunications by the operators concerned.

Directive 2002/58/EC of the European Parliament and the Council of 12 July 2002 on the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)⁹² provides that "...Member States may ... adopt legislative steps providing for the retention of data for a limited period, justified on the grounds laid down in this paragraph (safeguarding national security, defence, public security and the prevention, investigation, detection and prosecution of criminal offences, or the unauthorised use of the electronic communication (see article 15 § 1 of the Directive). Under this provision, these restrictions on private life can only be imposed within the limits of compliance with fundamental rights, and in particular with the respect of private life, as guaranteed by Directive 95/46/EC.

In July 2002, the non-governmental organisation Statewatch, published a draft framework decision under the terms of which Member States of the European Union would require telecommunications operators to retain the data on their traffic for a minimum of 12 months and a maximum of 24 months, in order to give access to this data to the authorities responsible for verifying the effective application of the law⁹³. Following the publication of this proposal, the European Commissioners for data protection expressed doubts about the legitimacy and lawfulness of this type of measure. They expressed the view that: "...where traffic data are to be retained in specific cases, there must be a demonstrable need, the period of retention must be as short as possible and the practice must be clearly regulated by law in such a way as to provide adequate safeguards against illegal access and other abuses. A systematic retention of every type of traffic data for a period of one year or more would be clearly disproportionate and therefore in any event unacceptable.⁹⁴ The "Article 29" Data Protection Working Party supported this view in its Opinion 5/2002 issued on 11 October 2002⁹⁵.

In the action plan which it adopted following the attacks of 11 September, the Council invited the European Commission to make "...proposals for ensuring that law enforcement authorities are able to investigate criminal acts involving the use of electronic communications systems and to take legal measures against their perpetrators"⁹⁶. In its ruling of 19 December 2002, the Justice and Home Affairs Council reiterated this request, emphasizing the need gradually to arrive at a harmonisation of national legislation by Member States in the area of the retention of traffic information in order to facilitate cooperation between the judicial and the police systems of Member States and to ensure that the ability of the public authorities of Member States to react shall match the mobility of communications and the use of modern means of communication by criminal networks. At this time, emphasis is being placed on the need for a dialogue with the sectors in question, rather than on the harmonisation of legislation, in particular in order to take into account the cost to the telecommunications industry and Internet of the obligation to retain traffic data⁹⁷.

⁹² OJ L 201 of 31.7.2002, p. 37.

⁹³ Statewatch analysis n° 11: Surveillance of telecommunications; retention of data to be compulsory.

⁹⁴ Declaration of the European Commissioner for data protection adopted at the Cardiff international conference (9-11 September 2002), on the mandatory systematic conservation of telecommunications traffic data

⁹⁵ 11818/02/EN/final, WP 64.

⁹⁶ Conclusion of the extraordinary session of the Council of 20 September 2001, item 4 p. 6, doc. 12019/01 (press 327)

⁹⁷ See 15691/02 (Press 404).

Retention of traffic data: varying attitudes by Member States

The heat of the debate of the question of the retention of traffic data is not surprising. The subjects of data protection and information systems appear to be crucial problems in the fight against terrorism⁹⁸. At the level of the Member States, an increasing number of initiatives are being taken in this field. For example

In **Belgium**, there is no doubt that uncertainties regarding the legality of this kind of systematic mandatory retention of traffic data for such long periods have delayed the *implementation of Article 109c E of the Law of 21 March 1991 on the reform of certain public economic enterprises* (the so-called "Belgacom law")⁹⁹. Article 109c E was added to this law by Law of 28 November 2000 on computer crime. It provides that the government shall introduce the obligations of telecommunications network operators and telecommunications service providers to record and retain data on calls made via telecommunications, and data on the identification of users of telecommunications services, for a certain length of time, not less than 12 months, with a view to the investigation and prosecution of criminal offences. The declaration by the European Data Protection Commissioners on personal data made at the international conference in Cardiff (9-11 September 2002) considers that the mandatory systematic retention of data on the use of all means of telecommunications for a period of one year or longer, should be regarded as disproportionate and unacceptable.

In **France** on the other hand, *Articles L 32-3-1 and L 32-3-2 of the Post and Telecommunications Code* provide that for the purposes of research, identification, prosecution of criminal offences and form the sole purpose of making information available to the judicial authority as far as is necessary, it is possible to defer for a maximum period of one year, operations tending to delete or to render anonymous certain categories of technical data relating to communications¹⁰⁰. The categories of data concerned and the period for retaining them are determined after hearing the opinion of the CNIL. It is specified that the data retained and processed only concern the identification of persons using telecommunication services and the technical characteristics of communications provided by the services (the duration of communications, the destination of calls and medium used: traffic data) and not the contents of the correspondence exchanged nor the information consulted in any form whatsoever, within these communications.

In the **United Kingdom**, the *Anti-terrorism, Crime and Security Act 2001* creates a legal basis for the retention by communications providers of data about their customers' communications so that they can be accessed by security, intelligence and law enforcement agencies under existing legislative powers.

In **Denmark**, a legal basis has been created by the so-called anti-terror package¹⁰¹ to lay down an obligation on telecommunication suppliers to register and store information on telecommunication traffic.

⁹⁸ The proposal for a framework decision of the Council on attacks aimed at information systems (COM(2002) 170 final of 19 April 2002, OJ C 203E of 27.8.2002) again underlines the need for a response to computer crime corresponding to the principles of Chapters II and IV of the Charter Fundamental Rights (recital 19), without, however, mentioning all the implications that would result.

⁹⁹ The technical difficulty and economic issues of this subject and also explain why implementation measures have not been taken to date.

¹⁰⁰ Articles added by Article 29 of the law of 15 November 2001 on day-to-day security (law No. 2001-1062, JORF of 60 November 2001, p. 18215). It is pointed out that these provisions are applicable only to 31 December 2003, but they will probably be extended by the proposal for a law on national security (Article 17) until 31 December 2005.

¹⁰¹ Lov (2002:378) om ændring af straffeloven, retsplejeloven, lov om konkurrence- og forbrugerforhold på telemarkedet, våbenloven, udleveringsloven samt lov om udlevering af lovovertrædere til Finland, Island, Norge og Sverige [Law (2002:378) changing Act regarding the Penal Code, Act on Administration of Justice, the Telecommunication Competition and Consumer Act, Order on the weapons and explosives Act, Extradition Act and The Extradition Act regarding Finland, Island, Norway and Sweden].

In **Germany**, the *Telekommunikations-Überwachungsverordnung [Decree for keeping Telecommunications under Surveillance]*¹⁰² was issued following the attacks of 11 September 2001. Among others, its purpose is to regulate the requirements for the telecommunications services' technical equipments so that the permissible surveillance measures may take place

IV.4 Extension of the powers of the law enforcement services

Extension of the powers of the intelligence services

Although the link with the fight against terrorism within national borders is at best an indirect one, attention should be drawn to certain situations where intelligence services of the armed forces of Member States of the European Union have been given additional powers of surveillance. The exercise of these powers can certainly have an impact on the right to respect of private life and the secrecy of communications.

In **Belgium**, a draft law amending Articles 42 and 44 of the Law 30 November 1998 governing intelligence and security services, and Article 259b of the Criminal Code was submitted to the House of Representatives on 9 October 2002. The text adopted without amendment by the House in plenary session on 18 December 2002 is at present being reviewed by the Senate. Article 259b was added to the Criminal Code by the Law of 30 June 1994 dealing with the tapping of telecommunications, obtaining information and recording private communications and telecommunications. It expressly fines or punishes by imprisonment any public agent who, in particular, "...intentionally listens with the help of any apparatus or allows someone else to listen, learns or allows someone else to learn, records or allows someone else to record, private communications or telecommunications during a transmission in which he/she is not involved, without the consent of all the participants in these communications or telecommunications" (Art. 259b § 1,1°)", or who installs or has someone else install a device of any kind in order to commit one of these breaches (Art.259bis, § 1,2°). Article 259 b of the Criminal Code, introduced by Art. 44 of the Law 30 November 1998 governing intelligence and security services, represents an exception to these rules for the benefit of the armed forces general intelligence and security services, stating that the prohibitions do not apply "...to receiving, tapping, obtaining information or recording [by these services] for military purposes, military radio communications from abroad. The government draft law enacted by the House of Representatives extends the exception enjoyed by the armed forces general intelligence and security services, to "...all forms of communications from abroad" and not only for military purposes, but also "...for reasons of security and protection of our troops and those of our allies during missions abroad and of our citizens domiciled abroad" (Article 2 of the draft law as enacted by the House, amending Article 259b, § 5 of the Criminal Code). The possibility recognized for the armed forces general intelligence and security service to tap communications is therefore extended to all modern means of communications, such as portable telephones, e-mail, satellite communications, insofar as these communications come from abroad and they are sent to a person in or outside Belgium. Although the government initiative is presented as a means of following up the circumstances of the death of Belgian soldiers in Rwanda in April 1994, it was promoted by the need for Belgium to contribute effectively to international cooperation and the fight against terrorism.

The compatibility of the initial draft with the right to respect of private life concerning the interception of communications deserves careful examination. In an Opinion (No. 09/2002) given on its own initiative on 28 February 2002 on what was a preliminary proposal for a law, the Commission on protection of private life, being in agreement with the recommendation issued on 3 May 1999 by the "Article 29" Data Protection Working Party on respect of private life in the context of the interception of communications, specifically stressed that the excessively vague definition of the conditions of the interception of communications by the armed forces general intelligence and security services did not respect the requirement of specificity which can be deduced from the case law of the European Court

¹⁰² Decree about the Technical and Organisational Realisation of Measures for keeping Telecommunications under Surveillance of 22 Jan 2002 (BGBl. I p. 458).

of Human Rights on the subject of Article 8 of the European Convention on Human Rights; where an extensive exploratory or general surveillance of communications is prohibited – the circumstances under which interception can take place and the conditions to which it is subject must be identified with sufficient precision. The same Opinion stressed the need for subjecting the interception of communications to a supervisory authority, possessing the required independence and impartiality and having the capacity to prohibit or require the termination of all interception of communications, which do not meet legal requirements. The legislation section of the Council of State had already made a declaration to this effect in Opinion No. 32.623/4 of 28 January 2002. In addition, the Council of State has ruled that given that Law of 30 November 1998 governing intelligence and security services should encourage cooperation between intelligence services and judicial authorities, including the communication of data (Articles 19 and 20), the extension of the authority of the armed forces general intelligence and security service authorising it to listen to, receive, learn and record any form of communication from abroad, creates the risk of circumventing Belgium's international obligations from the viewpoint of mutual judicial cooperation and could adversely affect the admissibility of the elements of proof collected¹⁰³.

Amendments to the initial preliminary proposal for a law resulting from these opinions take into account the first two concerns expressed, namely, the conditions regulating the interception of communications from abroad were somewhat tightened with reference to the tasks which Article 11 of the Law of 30 November 1998 allocated to the general intelligence and security service; in particular, it is now provided that interception of communications by the service shall be subject to the control of the Standing Committee for the control of the intelligence service (called the "Standing Committee R"). The Standing Committee R, created by the Law of 18 July 1991 governing the surveillance of police and intelligence services consisting of three members appointed by the Senate and presided over by a magistrate, has the task of inquiring into the internal activities, methods, rules and directives of the intelligence services, and into the documents regulating the conduct of their members, and particularly of ascertaining whether the intelligence services comply with fundamental individual rights. The proposal for a law amending Articles 42 and 44 of the Law of 30 November 1998 governing the intelligence and security services, gives this control committee decision-making powers; it is informed about the interceptions and is able to stop them at any time (Article 600 of the proposal providing for the insertion of a new Art. 44c into the Law of 30 November 1998). On the other hand, it does not appear that the objections raised by the Council of State concerning the compatibility of the project with the sovereignty of other States and the obligations of international judicial cooperation have been met.

In **Austria** a recent amendment¹⁰⁴ to the *Military Powers Act* authorised the military intelligence services to request from telecommunication providers free of charge information on the name, address, and the phone number of a certain connection. Additionally, they were given the right to request from competent authorities the issuance of fake documents that veil the holder's true identity in order to prepare or execute hidden investigations in the fulfilment of their intelligence tasks. For any individual case the Defence Minister shall determine in a special order the purpose and scope of these documents and any actual use shall be duly documented.

¹⁰³ The Council of State expressed another concern in addition to these two, namely, respect of the sovereignty of a foreign State which might militate against allowing these authoritative acts, resulting from a power of constraint possessed by executive or judicial authorities, to be carried out by organs of the Belgian State on the territory of a foreign State by another State. The Council of State referred to Recommendation No. R (95) 13 by the Committee of Ministers of the Council of Europe to the Member States, according to which cross-border searches of a network, conducted by the authorities responsible for an investigation, without the authorisation of the relevant authorities of the country where the data are stored, "...could constitute a breach of sovereignty and of international law, and a partial distortion of the traditional system of the judicial assistance"

¹⁰⁴ Federal Law Gazette (BGBl.) I No. 103/2002. This Act was not primarily enacted to combat terrorism but the powers contained therein may well be used in that specific field.

In **Germany**, especially the competencies of the secret services¹⁰⁵ and of the Federal Criminal Police Office (BKA)¹⁰⁶ were extended. In particular, the *Federal Office for the Protection of the Constitution (BfV)* – similar to the Federal Intelligence Service and the Military Counterintelligence – gained far-reaching new authorities,¹⁰⁷ which are as well entitled to the Länder-Offices for the Protection of the Constitution. In an isolated case and under certain circumstances, the BfV is allowed to make inquiries at banks, financial services and financial companies, airlines as well as postal and telecommunications services to reveal the financial and personal background of international terrorist networks. In this connection technical means may also be used to locate an active mobile phone and to determine the device and card number (so called IMSI-Catcher). The BKA is allowed to raise data directly at all public or non-public institutions without first contacting the police authorities in the federal states.¹⁰⁸

Criminal investigation methods borrowed from those used by intelligence services

In **Belgium**, the law on special search methods and some other methods of inquiry enacted on 6 January 2003¹⁰⁹ has probably benefited from an accelerated legislative process due to the legislators' concern to authorise special practices and in particular to detect and effectively fight the terrorist threat. The law provides a legal framework¹¹⁰ for several methods used by the police for inquiries or investigations which were borrowed from intelligence services; this concerns "special search methods" including observation, infiltration and the use of informants; "other methods of inquiry" include the interception of mail, direct telephone tapping, discreet visual control, deferred intervention and collection of data on bank accounts and banking transactions.

These methods involve a particularly high risk of breaching the right to respect of private life, or the rights of the defence. If the objective, which justifies the use of special search techniques, is the fight against terrorism and organised crime, the scope of application of the new law providing for the use of these methods is much wider. The law could have limited the offences (associated with major or organised crime) for which special search methods can be used. Instead, the new law refers, now to a minimum cutoff point of one year's imprisonment (offences punished by one year of imprisonment or a longer sentence can be investigated by resorting to observation by any technical means, interception of mail, collection of banking data), and now to the list of offences for which telephone tapping is authorised by Article 90c of the Criminal Investigation Code. In addition, certain methods of inquiry regulated by law can also be used for any offence (observation without the use of technical means, the use of informants, deferred intervention).

Three essential concerns have been expressed about the law on special search methods and other methods of inquiry¹¹¹. The first concern deals with the proactive use of special search methods. The

¹⁰⁵ Secret services are:

Bundesamt für Verfassungsschutz (BfV) [Federal Office for the Protection of the Constitution]. The BfV is the federal authority charged with the protection of the free democratic basic order, the duration and security of the Federal Government and the Federal States. On the federal level, it is assigned to collect and evaluate relevant informations. It cooperates with the corresponding state agencies.

Bundesnachrichtendienst (BND) [Federal Intelligence Service]. The BND collects and evaluates the relevant information to gain knowledge about foreign countries which is significant for the foreign and security policy of the Federal Republic of Germany.

Militärischer Abschirmdienst (MAD) [Military Counterintelligence]. The MAD is the authority charged with the protection of the constitution concerning the Bundeswehr [the armed forces].

¹⁰⁶ The BKA is the central office for police information and communications and for the criminal police. It supports the national police forces and the police in the federal states with the prevention and prosecution of petty crimes with cross-border, international or otherwise relevant significance.

¹⁰⁷ Art. 1-3 Act for the Fight Against Terrorism: Modifications of the Act for the Protection of the Constitution, the MAD Act and the BND Act.

¹⁰⁸ Art. 10: Modifications of the Federal Criminal Police Office Act.

¹⁰⁹ The text was adopted by the Senate in a plenary session on 12 December 2002, after it had been adopted by the House of Representatives on 20 July 2002.

¹¹⁰ These methods had been regulated to date by unpublished circulars (ministerial circulars of 24 April 1990 and 5 March 1992 on special search techniques to fight serious or organised crime.

¹¹¹ During parliamentary deliberations, other concerns were expressed, particularly with regard to compliance with the principles of proportionality and subsidiarity in the use of special search methods and other police inquiry methods, a

option of using special search methods where no breach has been committed to date, but where there are serious indications that an infringement could be committed, confers a particularly wide scope.¹¹² This can be a problem from the viewpoint of the requirement of foreseeability, which is one of the conditions of lawfulness that must be respected in any interference with the right of individuals to respect of private life. If this limit is not borne in mind, the borderline between a police investigation and activities typical of intelligence service could unknowingly be crossed.

The second concern is that the risk of police provocation is definitely increased by the use of infiltration in a proactive context¹¹³. Although the European Court of Human Rights accepts the use of infiltration in principle,¹¹⁴ it has ruled that there is no fair trial, when the elements used to incriminate the accused have been collected as a result of police provocation, implying that in the absence of infiltration by agents, a criminal offence was provoked, which would not otherwise have been committed¹¹⁵. Yet, although Art. 47d introduced into the criminal investigation code by the new law provides that "...in the context of the carrying out of special search methods, a police officer cannot incite a suspect to commit offences other than those that he/she had the intention to commit", otherwise the prosecution is inadmissible, the concept of prohibited police provocation is more restrictive than that found in the case-law of the European Court of Human Rights; as pointed out by the legislative section of the Council of State in its Opinion of 21 December 2001, this provision confirms the existence of case-law of the Supreme Court of Appeal of Belgium which has held that provocation is not present where "...the criminal intent by a person has not been due to any influence of an undercover agent", where the latter only "...creates the opportunity to commit the punishable act under conditions such that the police are in a position to observe its performance"¹¹⁶. The consistency of this case-law with the requirements of European Court of the Human Rights based on Article 6 § 1 of the European Convention of Human Rights is uncertain. In addition, its principle has been challenged in legal literature¹¹⁷; the judgment in the *Texeira de Castro* case by the European Court of Human Rights appears to rule that provocation exists only where there is no evidence that the offence would have been committed in the absence of police infiltration, even if no form of pressure was exercised on the accused encouraging him/her to commit the offence. Lastly, the report submitted to the King's Prosecutor on the infiltration operation appears in a separate confidential file and in the report attached to the criminal file, the Court police officer responsible for the infiltration operation is relieved of the obligation of mentioning any element which could "...compromise the technical means and the police inquiry techniques used to ensure the security and the anonymity of the informants and the police officers responsible for infiltration". (Art. 47i, § 2, on the Investigation Code introduced by the new law). This confidentiality constitutes an important restriction on the rights the defence of the accused, particularly when the latter must show that he/she was the victim of police provocation, presupposing that the defence must have access to information about the conditions under which the infiltration operation, which is being challenged had taken place.

requirement which has still not been explicitly stated by law, and to the definition of the conditions under which not only police officers, but also civilians who provide direct aid or assistance needed for the execution of the the police task or who had contributed to infiltration (Article 47e, § 2, of the Criminal Investigation Code), may commit offences in the context of their missions, under the condition that the offences are not more serious than the offences for which the methods are implemented and remain proportional to the objective pursued.

¹¹² These can be implemented to prosecute the perpetrators of offenses, to search for, collect, record and process data and information on the basis of serious indications that punishable offenses will be committed or have been committed, whether they are known or not (article 47ter, § 1, par. 2 of the CIC).

¹¹³ See Article 47octies, § 1 defining infiltration as the act, for a police officer, of maintaining lasting relations under a fictive identity, with one or several persons for whom *there are serious indications that they commit or will commit offenses* as part of the criminal organisation in the meaning of Article 324bis of the Criminal Code or crimes or offenses under Article 90ter §§ 2 to 4 (our emphasis)

¹¹⁴ ECHR, judgment *Lüdi vs. Switzerland* of 15 June 1962, Series A n° 238.

¹¹⁵ ECHR, judgment *Texeira de Castro vs. Portugal* of 9 June 1998, ECR 1998-IV, p 1463, § 63, ECDH, Dec. *Calabro vs. Italy and Germany* (pl. n° 59895/00) of 21 March 2002.

¹¹⁶ Cass. 5 February 1985n *Gaddum, Pas.*, 1985, 690; Cass. 7 February 1979, *Salerno, Pas.* 1979, I, 665.

¹¹⁷ F. Kutty, "Lorsque Strasbourg déclare que la provocation policière vicie ab initio et définitivement tout procès pénal", *J.L.M.B.*, 1998, p. 1155.

Lastly, the third concern is that the new law on special search methods and some other methods of inquiry places the use of these methods under the control of the prosecution (King's Prosecutor) whereas in Belgium, under the law of criminal procedure, the investigating judge is the person who guarantees respect of rights and freedoms of individuals; the investigating judge, who is looking for evidence for and against the accused, must normally verify the lawfulness of the evidence and the fairness with which it was collected under the terms of Art. 56 § 1 of the Code of Criminal Investigation¹¹⁸. This shift gives particular cause for concern, in that the prosecution does not have the means of closely following a police investigation leading to the probability that the police will in fact have considerable freedom of conduct.

In the **Netherlands**, early January 2003, a Task force from the Ministry of Justice called for relaxation of the rules on exchange and storage of information by police services. In their view, the *Wet politieregisters* [Police Registers Act] was too narrow to allow for an adequate response to terrorist threats. The Task forces advocated the creation of 'theme registers' where information could be stored about individuals and groups, including people who were not suspected of any criminal offence, who might be involved in the preparation or commission of crime, such as terrorism.¹¹⁹ In a reaction, the chairman of the *College bescherming persoonsgegevens* (CBP) [Dutch Data Protection Authority] voiced his disagreement with the Task force's proposal. In his view the risk of abuse would be too large, whereas the existing powers were already sufficient.¹²⁰

In **Italy**, Decree-Law of 18 October 2001 No. 374 (enacted with amendments as Law of 15 December 2001 No. 438) on urgent provisions concerning terrorism, includes provisions on criminal procedure, particularly on the preventive tapping of communications. It sets specific standards governing undercover activities of the judicial police¹²¹.

Special procedures for prosecution of terrorist offences

A specific dimension of the reaction of the States coping with the terrorist threat resides in separating common law criminal procedure from special criminal procedure on certain particularly serious offences such as terrorism. This specificity is noted both from the viewpoint of the organisation of the prosecuting authorities and from that of compliance with the rights of the defence during the criminal procedure¹²².

In **Belgium**, on 21 May 2002, the Law of 21 June 2001 came into force, amending certain provisions on federal prosecutions¹²³. This law creates a federal prosecution qualified to deal with cases throughout the national territory, headed by a federal prosecutor and consisting of a maximum of 18 federal magistrates. Article 7 of the law on 21 June 2001 introduces Article 144c into the judicial code, stipulating that the prosecution can be brought by the federal prosecution, where it shall promote "good administration of justice", in order to prosecute offences characterised either by their nature or by their geographic scope. This is particularly the case of offences:

- associated with a habitual activity consisting of promoting the entry or residence of a foreigner by exercising constraint on him or abusing his vulnerable situation, or by

¹¹⁸ See opinion No. 32.973/2 of 19 December 2001 given by the Council of State, part V, and the hearing of Judge D. Vandermeersch by the Justice Committee of the House of Representatives, on the proposal for a law concerning special search methods and some other inquiry methods, report submitted in the name of the Justice Committee, *Ch.*, ord. sess. 2001-2002, doc. 1668/013, p. 129

¹¹⁹ *Staatscourant* 2002, no. 5, p. 1.

¹²⁰ *Staatscourant* 2002, no. 6, p. 1.

¹²¹ Exceptional procedures were not used for the adoption of the new standards: a decree law enacted by the Government followed by its incorporation into law by Parliament is a usual instrument for making amendments in criminal matters

¹²² Several developments in national legislations in 2002 are referred to in the annual report of the situation of fundamental rights that the European Union, under Article 48 of the Charter.

¹²³ *B.M.* 20 July 2001. This law completes the law of 22 December 1998 on the vertical integration of prosecution, federal prosecution and the Council of King's Prosecutors (*B.M.*, 10 February 1999). See. Masset, "Le parquet fédéral est arrivé : plus-value pour le ministère public", *J.T.*, 2002, p. 121.

participating in an association exercising this activity (trafficking in human beings; article 77b §§ 2 of the Law of 15 December 1980 on access to the territory, residents, stay by and deportation of foreigners; even non-habitual treatment of foreigners can be pursued by federal prosecution, given the international dimension of this form of crime);

- committed with violence against persons or material interests, for ideological or political reasons, with the aim of achieving objectives by terror, intimidation or threats" (article 144c Jud code, 2°);
- offences which largely involve several sectors, or which have an international dimension, particularly those of organised crime" (article 144c Jud code, 3°) (the Council of State criticised the lack of precision of the law on this point; Opinion mentioned above, p. 13);
- offences against the prohibition of conspiracy and association with criminal organisations (articles 322 to 326 of the Criminal Code).

The creation of a federal prosecution in Belgium does not only target terrorist offences and the law antedates the attacks of 11 September 2001. Nevertheless, a question of principle is raised by this law: special treatment of terrorist offenses as opposed to common law offences, while the distinction between the two is still obscure. On examining the draft law, the Belgian Council of State criticised the very wide, imprecise wording of the definition of a terrorist offence, which does not make it possible, in the Council's opinion, to identify exactly which offences can be dealt with by federal prosecution¹²⁴.

In France, the Law of 15 November 2001 on day-to-day security¹²⁵ provides for a certain number of waivers of the Code of Criminal Procedure in order to optimise the effectiveness of the fight against terrorism:

- on the decision of the judge on freedom and detention on the petition of the public prosecutor, the police can carry out searches and domiciliary visits and the seizure of any documentary evidence without the permission of the person in whose home they take place. The searches and domiciliary visits can be made on premises other than those used as dwellings and outside the legal hours on the authorisation of the judge of freedom and detention¹²⁶;
- judicial police officers and agents, as well as customs agents and authorised security agents, acting under the supervision of judicial police officers can search persons, luggage, freight, packages, goods, aircraft, vehicles and ships at airports and ports, in order to strengthen the safety of these places (Article 25 and 26);
- the new article 706-71 of the Code of Criminal Procedure (introduced by article 32 of the law on day-to-day security) also provides for the use of means of telecommunication during the procedure. It stipulates that "...when the needs of the investigation justify it, the hearing or questioning of a person and a confrontation between several persons can be made in several places on the territory of the Republic linked by means of telecommunications, ensuring the confidentiality of the transmission". The guarantees for the person questioned in that way appear to be satisfactory, in that the means of telecommunication ensure confidentiality of the transmission; the presence of an interpreter and the drawing up of minutes in each place is provided. These provisions are "...also applicable to simultaneous provision at one point in the territory of the Republic and at another point located abroad, of mutual assistance requested by foreign judicial authorities or mutual assistance executed abroad at the request of French judicial authorities".

Articles 24 to 26, which initially provided for a term ending on 31 December 2003, will be extended to 31 December 2005 by means of Article 17 of the proposal for a law on national security, if

¹²⁴ Opinion of the Council of State, *Doc. parl.*, Ch., 2000-2001, doc. n° 0897/002, p. 13.9

¹²⁵ Law 2001-1062, JORF on 16 November 2001, p. 18215

¹²⁶ Art. 24, *ibid*, the exact wording of which is: « le juge des libertés et de la détention du tribunal de grande instance peut, à la requête du procureur de la République, autoriser, par **décision écrite et motivée** ... à procéder à des perquisitions... » (the Judge of freedom and detention of the Regional Court can, on the request of the public prosecutor, authorise, by a **written justified decision** ... searches to proceed ...

applicable¹²⁷. This proposal extends Article 27 of the law on day-to-day security which authorises bodily searches by palpation for security purposes, with the express consent of the person in question, in cases of serious threat to public security. Article 32 of the law on day-to-day security on the use of means of telecommunication during the criminal procedures is repeated in Law 2002-1138 of 9 September 2002 on orientation and programming of justice. By extending or repeating these provisions, exceptional measures are being normalised with the risk of delaying the submission to parliament of the report on the assessment of the application of these measures.

It is also important to mention the preliminary draft law on the fight against organised crime, the orientations of which were specified in a note from the chancellery on December 2002. This preliminary proposal provides for giving important powers to the police and to the prosecution, while significantly reducing the discussion before the investigating judge. However, the person investigated has little opportunity to prove his innocence at the time of the inquiry, called preliminary, which is left to the discretion of the public prosecutor, in that the person in question is not informed of the existence of the inquiry. The procedure is secret, non-adversarial and of unlimited duration. This strengthening of the powers of the prosecution leads to a significant imbalance between the defence and the powers conducting the inquiry, which may indicate a shift towards an accusatory type of procedure.

In **Italy**, Law 438/2001 amending article 270b of the **Criminal Code**¹²⁸, increased the minimum sentence to five years and the maximum to 10 years¹²⁹ with significant effects on the criminal procedure; firstly, the offence described in Article 270b of the Criminal Code now belongs to the category of offences for which arrest by flagrante delicto is authorised. Secondly, the maximum duration for preliminary investigations is increased to two years, while the decision to extend this duration need not be communicated to the person in question for reasons of confidentiality of the inquiry.

Lastly, it should be noted that both Greek and Spanish legislation restricts the choice of a lawyer by a person suspected of terrorist activity¹³⁰.

Reorganisation of law enforcement services

One of the results of the need to respond to the terrorist threat has been the reorganisation of intelligence and law enforcement services, to ensure their effective operation.

In **Austria**, although the competence of the services responsible for fighting terrorism has not been extended, they have been reorganised. The fight against terrorism was hitherto carried out by two departments of the state police service within the Federal Ministry of the Interior, whose main tasks were general observation and descriptive analysis. In addition, operative and investigative tasks were carried out by the Operative Group for Combating Terrorism.¹³¹ Apart from these state police forces there also exist special anti-terrorism commands (GEK-“Cobra” and the Vienna based WEGA) which play an indispensable part in fighting terrorism. As from 1 December 2002 Departments II/C/6 and II/C/7 and the Operative Group have now been merged into the new Federal Agency for the Protection of the Constitution and the Fight against Terrorism (BVT)¹³², which is conceived as a strong central unit with only 9 subordinate agencies in the provinces, replacing a number of 22 authorities previously

¹²⁷ Proposal for a law referred to above available at www.assemblee-nationale.fr

¹²⁸ This provision was referred to above: see the text corresponding to footnote 42

¹²⁹ Before these recent amendments, the sentence for the offence of participation in an association under Article 270b ranged from a minimum of four years to a maximum of eight years.

¹³⁰ Article 7 (4) (Greek law 30900/2002) limits the right of the accused to refuse a lawyer appointed by the judicial authorities. When the trial is for a crime, which could be long due to the seriousness of the actions or their object, the accused who is not assisted by a lawyer cannot refuse to be defended by the lawyer or lawyers appointed by the judicial authorities but can, by means of a reasoned request, refuse only one of the lawyers; in this case, defence is provided by the remaining lawyers appointed by the judicial authorities. The Spanish report indicates that a lawyer is appointed by the judicial authorities for persons suspected of terrorism to prevent collaboration between those persons and their counsel.

¹³¹ Einsatzgruppe zur Bekämpfung des Terrorismus (EBT).

¹³² Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (BVT).

competent in that field. Clearly, the new organisation's prime goal is to intensify the co-operation between the central head unit and the reporting authorities in the provinces. The new structure of the anti-terrorist police will cover all former tasks including terrorism, extremism, espionage, personal and objects security, but in future put the focus more on early cognition and comprehensive analysis. It should be noted, though, that the ongoing is a mere reorganisation of existing resources. In particular, there will be no additional executive powers vested in the BVT agency, but it is intended to better employ the existing tools offered by the legal framework. One such instrument with clearly preventive character that was already available before the attacks is the 'open' monitoring of groups without the prior need for substantiated suspicion of criminal behaviour, which the law terms extended investigation for threats (*erweiterte Gefahrenforschung*)¹³³. However, for further reaching measures such as concrete observation, bugging operations, or the use of hidden police informers it is required by law that there be at least a material threat of crime. Nevertheless, officials expect the reform of the state police service to produce significant added value in form of an enhanced analysing and prevention capacity at all operative levels. Moreover, the new agency will serve as the prime contact for politics and the recently established National Security Council¹³⁴. This Council is constituted as a political advisory organ with key cabinet members, high-ranking civil servants, and representatives of all parties in Parliament, whose task it is to debate crucial issues of national security and to give recommendations to the government on foreign and defence politics as well as security issues.

Deprivation of liberty

In the **United Kingdom**, under the terms of the *Anti-terrorism, Crime and Security Act 2001*, the Secretary of State for Home Affairs has been awarded extended power for the arrest and detention of foreigners suspected of being international terrorists or whose presence in the territory is considered as a danger for national security. This power¹³⁵ (ss 21-23) encroaches upon the right to liberty and security of the person in a manner that could not be justified without a derogation since it is not linked to the bringing of criminal proceedings, cannot be for the purpose of deportation as the impossibility of this is a prerequisite for the exercise of the power and is not capable of falling under any other ground specified in Article 5(1) of the European Convention of Human Rights¹³⁶.

A challenge to certification, as well as matters relating to the derogation, can only be heard by the Special Immigration Appeals Commission, with provision being made for a person to be appointed to represent a detained person's interests in proceedings before it (ss 25-27). The latter may be sufficient to meet any concerns about restrictions that can be imposed on the evidence to be heard openly and, since other remedies such as habeas corpus and judicial review are now excluded, it also enables the merits of the case for detention to be fully examined. However, there is only provision for appeal on points of law to the Court of Appeal and the House of Lords so there is no scope for challenging any assessment of the evidence made by the Commission.

The continuation of this detention is subject to appeal to a judicial body (the Special Immigration Appeals Commission), as well as review by that body after six months and thereafter on a three-monthly basis (ss 25-27) but the cancellation of a certificate in respect of a particular individual does not preclude a fresh one being made in respect of him or her. Although the detention is not meant to be punitive, there are no special provisions in the Act governing the circumstances in which a detained person may be kept; its potentially long duration might warrant positive efforts to facilitate family links and to secure professional and economic interests.

¹³³ Cf. Section 21 of the Security Police Act (Sicherheitspolizeigesetz), Federal Law Gazette (BGBl.) No. 85/2000.

¹³⁴ Established with effect of 17 November 2001, by Federal Law Gazette (BGBl.) I No. 122/2001.

¹³⁵ This extended power of arrest and detention of suspected international terrorists was not adopted on an indefinite basis, being made operative in the first instance for a fifteen-month period but with provision for its renewal by Parliament for up to a year at a time until 10 November 2006 (s 29). There is also provision for the operation of this power to be reviewed before the end of each period for which it is in force (s 28).

¹³⁶ For an analysis of the derogation by the United Kingdom on compliance with fundamental rights and in particular the European Convention Human Rights, O. De Schutter, « La convention européenne des droits de l'homme à l'épreuve de la lutte contre le terrorisme », in E. Bribosia, A. Weyembergh (dir.), *Lutte contre le terrorisme et droits fondamentaux*, Bruylant, Bruxelles, 2002, pp. 127-140)

This extended power of arrest and detention has been, as from 18 December 2001, the subject of a derogation made under Article 15 of the European Convention on Human Rights, pursuant to the public emergency said to be existing in the United Kingdom. This waiver was made in respect of Article 5 § 1 f) of the Convention. In the terms of the text of the notification addressed to the Secretary General of the Council of Europe: it is possible that notwithstanding the intention to continue to refuse entry or to deport a detainee, there are circumstances in which it cannot be claimed that a deportation procedure is under way within the meaning of the interpretation of Article 5(1) (f) by the European Court of Human Rights in *the Chahal* case. Consequently, since the exercise of the extended power of detention may not inconsistent with the United Kingdom's obligations under Article 5 (1), the Government has decided to make use until further notice of the right of derogation conferred on it by Article 15(1) of the Convention¹³⁷.

No similar derogation has been made in respect of the guarantee of liberty and security under Article 9 of the International Covenant on Civil and Political Rights.¹³⁸ The derogation under the Convention was formally correct but the specific evidence of a threat was not given in it and was considered by many to be lacking at the time of the Act.¹³⁹ The use of a less restrictive measure than detention does not appear to have been contemplated but prosecution for an offence would clearly be more appropriate than detention where this could be instituted. The derogation under Article 15 of the Convention was the subject of an opinion by the Council of Europe's Commissioner for Human Rights (Opinion 1/2001, HR Comm (2002)7). In its view the adoption of the domestic measure for this purpose before the Act inverted the general practice of the measures being sanctioned by the order and also had the potential to limit parliamentary scrutiny. It also thought that inadequate evidence had been provided of a risk to the United Kingdom. On that point, it considered that the general notification against an increase risk of terrorist activity after 11 September 2001 is not in itself sufficient to justify an exemption to the Convention and that several European States confronted with frequent long-term terrorist activity, have not thought it necessary to do so in present circumstances.

The Opinion states that "... Whilst detention under the derogating powers of the Anti-Terrorism, Crime and Security Act requires that the individual be an undeportable foreigner, it is triggered, ultimately, only on the suspicion of involvement with an international terrorist organisation. Though the reasonableness of the Home Secretary's suspicion is justiciable, it remains the case that the detention is effected without any formal accusation and subject only to a review in which important procedural guarantees are absent. The indefinite detention under such circumstances represents a severe limitation to the enjoyment of the right to liberty and security and gravely prejudices both the presumption of innocence and the right to a fair trial in the determination of ones rights and obligations or of any criminal charge brought against one. It should be recalled that an ill-founded deprivation of liberty is difficult, indeed impossible, to repair adequately."

The Opinion of the Commissioner for Human Rights adds that: since these measures are applicable only to foreigners who cannot be deported, they might appear to be ushering in a two-track system of justice, where different human rights standards respectively apply to foreigners and nationals". The English judge nevertheless held that the situation created by the Anti-Terrorism and Security act did not constitute discrimination.¹⁴⁰ A claim that the measure giving the derogation legal force within the United Kingdom and the power of detention under the 2001 Act were vitiated by their discriminatory nature in that only persons without the legal right to remain in the United Kingdom was, after initially being accepted by the Special Immigration Appeals Commission (which has jurisdiction to appear

¹³⁷ Council of Europe, derogation under article 15 ECHR exercised by the United Kingdom/Public Danger after 11 September 2001. For the full text of the derogation, see UKHR, 2002, p. 155.

¹³⁸ The Joint Committee on Human Rights, in its opinion on the Anti terrorism, Crime and Security Act 2001, pointed to a derogation being required in respect of the Covenant and not just the Convention with regard to the proposed detention power (2nd report, Session 2001-2002, 14 November 2001 and 5th report, Session 2001-2002, 5 December 2001).

¹³⁹ The Joint Committee on Human Rights accepted that there might be evidence of a threat to the life of the nation but stated that none had been presented to it and that it was thus not convinced that the requirements for a derogation under Article 15 were met.

¹⁴⁰ Commissioner for Human Rights with the Council of Europe, opinion No. 1/2002 of 26 August 2002, the waiver of Article 5§1 ECHR, adopted by the United Kingdom and 2001, Doc. CommHR(2002)7.

appeals against detention under the Act), rejected by the Court of Appeal. In doing so it found that those affected came into a different class from those who could remain since they could be deported when there was no risk of torture in the receiving country and that the requirement not to discriminate did not oblige more extensive action to be taken than was considered necessary. The fact that no action was taken against those who had the right to remain in the United Kingdom could not, therefore, be used as a basis for challenging the action taken against those who were only able to remain because they could not be deported. It was accepted that there was a state of emergency sufficient to justify a derogation under Article 15 of the European Convention but this was seen as being restricted to the threat posed by Al Qaeda and its associated networks (and no one else) so that this circumscribed the exercise of the power to certify and then detain someone as an international terrorist. It was also found that the manner of detention of the persons concerned did not amount to inhuman or degrading treatment¹⁴¹.

It should be noted that in **Spain**, Article 55 § 2 of the Constitution provides that an exemption can be made by means of an organisational law to the normal limit of 72 hours of police or pre-trial detention without the intervention of the Courts (Article 17-2 of the Constitution) for certain specific people in the context of investigations on terrorist acts. The criminal law (LECr) introduced by the Ley Orgánica 4/1988 of 25 May 1988, provides for this extended period of time to be justified by judge before the expiration of the ordinary 72 hours delay, both in the application for and the grant of, the extension and in this case, it can be increased by from 48 hours to five days (Article 520 bis LECr)¹⁴². Judicial and parliamentary control of the application of this law to fight terrorism is required by the Constitution. Its application is not subject to appeal under Article 15 of the European Court of Human Rights.

Opinion on a government proposal for an Act on the processing of personal data by the police (HE 93/2002vp laiksi henkilötietojen käsittelystä poliisitoimessa ja eräiksi siihen liittyviksi laeiksi)¹⁴³. In this Opinion, the Constitutional Law Committee noted that the general prerequisite of the transfer of personal data to outside the European Union (or the European Economic Area) is that the country in question guarantees an adequate level of data protection. The Committee referred to Article 25 of the Data Protection Directive (95/46/EC) and paragraph 1 of Section 10 of the Constitution of Finland. According to the latter provision, “more detailed provisions on the protection of personal data are laid down by an Act”. In practice, these “more detailed provisions” are laid down by Personal Data Act (Act No 523/1999). The Committee noted that the transfer of personal data is only possible in accordance with the relevant provisions laid down by the Personal Data Act (see especially Chapter 5 of this Act). In particular, the Committee referred to paragraph 4 of Section 9 of the Constitution, providing that “[a] foreigner shall not be deported, extradited or returned to another country, if in consequence he or she is in danger of a death sentence, torture or other treatment violating human dignity.” According to the Committee, the interpretive effect of this provision entailed that personal data shall not be transferred if it is processed for the purpose of sentencing a death sentence or executing it.

A common observation applies to all these developments. International law on Human Rights is not opposed to a State taking measures to protect itself against the threat of terrorism. But as a counterpart to the restrictions that the State adopts to respond to that threat, it must imagine mechanisms by which the consequences that may result for the guarantee of individual freedoms are limited to a strict minimum. In particular, independent control mechanisms must be provided that can counter possible abuse committed by the Executive or the criminal prosecution authorities. In addition, restrictions made to individual freedoms in response to the terrorist threat must be limited to what is absolutely necessary. These restrictions were adopted to cope with an immediate threat, but one that is not necessarily permanent, and as such, they should be temporary character and be assessed regularly

¹⁴¹ *A and others vs. Secretary of State for the Home Department* [2002] EWCA Civ 1502, 13 BHRC 394.

¹⁴² Derogations were also made with regard to the requirement of prior authorisation to search a private domicile or intercept communications in the context of such investigations, without the consent of the person concerned or flagrante delicto (Article 553 a 579 of LECr).

¹⁴³ This bill will repeal the current Act on the Personal Data Files of the Police (Act No 509 of 1995).

under some kind of mechanism. They should be targeted sufficiently precisely and not affect other phenomena or possibly other categories of persons, on the pretext of the terrorist threat. This is also the reason why the offence of terrorism, which can justify the use of search and special measures that constitute restrictions of individual freedoms, must be defined precisely, to avoid a risk of arbitrariness in the use that is made of these measures.

V. Restrictive application of legislation on the residence of foreigners

In the 29th conclusion of its extraordinary session of 20 September 2001, the "Justice and Home Affairs" Council requested the Commission to "to examine urgently the relationship between the safeguarding of internal security and compliance with the obligations and instruments of international protection". In the document, which it issued in response to that request¹⁴⁴, the Commission specified the legal mechanisms available to States for denying international protection to persons suspected of terrorist activities. The Commission document was based on two principles; on the one hand, "bona fide refugees and asylum seekers should not become the victims of recent events" and on the other hand, individuals who support or commit terrorist acts must not gain easy access to the territory of Member States of the European Union. This was, in particular, a matter of stressing the option of using the so-called exclusion clause in Article 1, F, of the Geneva Convention of 28 July 1951 on the status of refugees against persons suspected of terrorist activities or of active membership of terrorist groups. According to this clause, the Convention does not apply "to any person concerning whom there are serious reasons for believing (a) that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to provide for such crimes (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country and (c) he has become guilty of acts contrary to the purposes and principles of the United Nations."¹⁴⁵ In respect of this clause, the United Nations High Commissioner for Refugees noted in his Agenda for protection issued on 26 June 2002¹⁴⁶ that since the fight against terrorism was essentially a question subject to criminal law, and where the abuse of the option of asylum them must be avoided, States should take measures accompanied by appropriate legal guarantees to enforce the exclusion clause of the Convention, including, among others, the incorporation of this clause into national legislation; closer cooperation, more effective sharing of information between the HCR and the authorities responsible for asylum/immigration and the maintenance of public order; priority treatment of applications for asylum by experts when there are reasons to believe that the applicant may fall under Article 1F of the 1951 Convention.¹⁴⁷

The Commission's working document on the "...relationship between the safeguarding of internal security and complying with international protection obligations and instruments"¹⁴⁸ corresponds specifically to this interpretation of Article 1F of the Geneva Convention. The uneasiness created by an approach consisting of reviewing a protective provision on the basis of the need for security appears to provide an explanation for the rejection of the Parliamentary report of 25 September 2002¹⁴⁹ on this communication and the report concerning the open coordination method¹⁵⁰. Among other reasons, the link made between terrorism and immigration in public debate and the attempt to invoke internal security on the subject of asylum is one explanation given for the slight majority against this document.

¹⁴⁴ Commission Working Document, "Relationship between the safeguarding of internal security and compliance with international protection obligations and instruments", COM(2001), 743 final of 5.12.2001.

¹⁴⁵ Under paragraph 5 of the United Nations Resolution 1373, terrorist acts are contrary to these purposes and principles.

¹⁴⁶ Executive Committee of the High Commissioner's Programme, Agenda for protection, United Nations General Assembly, A/AC.96/965/Add I.

¹⁴⁷ It should be noted that Article 7 of the proposal for a comprehensive convention on international terrorism provides that "...subscribing States shall take appropriate measures before granting the right of asylum, to ensure that asylum is not granted to any person about whom there are reasonable grounds for believing that he has committed any offence referred to in Article 2."

¹⁴⁸ COM(2001) 743 final of 5.12.2001

¹⁴⁹ Evans Report of 9 July 2002, A5-0257/2002

¹⁵⁰ Communication on common asylum policy, introducing the open coordination method – First report of the Commission on the implementation of communication COM (2000) 755 final of 22 November 2000, COM (2001) 0710 of 28.11.2001.

At all events, whatever the reception of the working document, a review of the developments in several Member States shows an intensification of exchanges between the authorities responsible for considering applications for asylum and intelligence services, making it possible for an application for asylum to be declared inadmissible on the basis of the exclusion clause of Article 1F of the Geneva Convention, if there are reasons to believe that the applicant for asylum is guilty of terrorist activities. In certain States, there is also a tendency to expel or deport “suspicious foreigners” to States where they may be subjected to cruel, inhuman or degrading sentences or treatment, in disregard of Article 3 of the European Convention of Human Rights.

The case of Sweden gives particular cause for concern. Since 11 September 2001, Sweden seems to have changed its practice when it comes to deporting or expelling individuals to states where they risk being tortured or sentenced to death.¹⁵¹ During the spring of 2002 Sweden received, for example, harsh criticism from both the HRC and the CAT for, among other things, the way the Government disregarded individual human rights in the campaign against terrorism. The CAT recorded its concern with regard to the implementation of and the content of the Special Control of Aliens Act from 1991 (Lag om särskild utlänningskontroll (SFS 1991:572)), known as the anti-terrorist law. It allows foreigners suspected of “terrorism” to be expelled under a procedure, which, might not be in keeping with the UN Convention against Torture, because the Government is the first and only decision-making instance¹⁵²: the Government’s decision on deportation or expulsion of asylum-seekers suspected of “terrorism” cannot be appealed or reviewed in any other way, *i.e.* the applicant is precluded from obtaining knowledge about what evidence is being relied upon to reach a decision.¹⁵³ On the other hand, the Act in question proscribes that in matters which are not particularly urgent, legal proceedings should be held by the district court in Stockholm, where the National Security Police Board is the opposite party (§ 6 of the Special Control of Aliens Act). The court’s investigation results in an opinion, which is submitted to the Government. The opinion may be based on material, which contains important and vital information but which is withheld from the suspected asylum-seeker. The CAT recommended Sweden, therefore, to bring the Special Control of Aliens Act into line with the Convention against Torture.¹⁵⁴ The practice of removal of people based on criteria, which could lead to a breach of the non-refoulement principle, is in the CAT’s view a matter of concern. It could also contradict Sweden’s international commitment for the abolition of the death penalty and come into conflict with other international legal norms.

In addition, the HRC expressed its concern in March 2002 during the consideration of Sweden’s fifth periodic report under the ICCPR for cases of expelling asylum-seekers suspected of terrorism to their countries of origin. The Committee underlined the fact that despite some guarantees that the expelled persons’ human rights would be respected, those countries could pose serious risks to the personal safety and lives of the persons expelled, especially in the absence of sufficiently serious efforts to monitor the implementation of the promised guarantees.¹⁵⁵ The Committee seems to have had in mind the two Egyptian citizens (Muhammad Muhammad Suleiman Ibrahim El-Zari and Ahmed Hussein Mustafa Kamil Agiza) who had been forcibly returned to Egypt in December 2001.¹⁵⁶ The

¹⁵¹ Alternative Report to the Human Rights Committee, From The Swedish NGO Foundation for Human Rights and The Swedish Helsinki Committee for Human Rights, Stockholm 2002-03-07, p. 7.

¹⁵² CAT/C/CR/28/6, § 6(b). An asylum-seeker who is not rejected or expelled in accordance with the Aliens Act can be expelled on the basis of § 1 of the Special Control of Aliens Act if it “1. Is necessary to the safety of the realm or, 2. Due to what is known about the alien’s earlier activities or other circumstances, it can be feared that he will commit or contribute to a criminal act, which includes violence, threat of violence or compulsion for political purposes”. A case of expulsion under the above legislation is normally referred to the Government by the National Security Police Board (SÄPO) but can also be raised by the Government itself. (The Special Control of Aliens Act, § 2).

¹⁵³ This procedure, whereby the Government is the deciding authority, has been subjected to heavy criticism by the Swedish Bar Association, among others. See the Opinion submitted on 20 June 2002 by Amnesty International-the Swedish Section, The Swedish Foundation for Human Rights, the Swedish Refugee Advice Centre, The Helsinki Committee for Human Rights and the Swedish Bar Association.

¹⁵⁴ UN Doc. Concluding Observations of the Committee against Torture, Sweden 07/05/2002, CAT/C/XXVII:CONCL.1, § 6 (b) and § 7(c)).

¹⁵⁵ UN Doc. CCPR/CO/74/SWE, § 12.

¹⁵⁶ AI has sent a letter to the Minister of Migration in February 2002 asking him to reiterate concern about the above-mentioned case and to render information regarding the treatment of the involved persons in Egypt, including their possibility

unconditional ban on torture/risk for torture was substituted by guarantees on the part of Egypt's Government.¹⁵⁷ To this can be added that the criticism from the HRC was of such gravity that the Swedish Government was requested to provide the Committee within one year with relevant information, including the monitoring of the cases of those expelled. It is noteworthy that this is a measure that has never been taken before as far as Sweden is concerned.¹⁵⁸ It should be remembered that the UNHCR has emphasised that expulsion decisions must be reached in accordance with due process of law, which substantiates the security threat and allows the individual to provide any evidence, which might counter the allegations.¹⁵⁹

In the **United Kingdom**, the *Anti-terrorism, Crime and Security Act 2001* stipulates that a dispute over a ministerial certificate regarding the application of the clause of exclusion must be determined first in any asylum claim. This power of a minister to certify that Articles 1F and 33 of the Geneva Convention of 28 July 1951 prevent someone from being entitled to be treated as a refugee (s 33) is designed to speed up the asylum process, so that this issue has to be determined first is not objectionable as the matter will be determined by the Commission. However, the stipulation that consideration would not be required in this process of any events, threats or fear which might otherwise be applicable, could result in consideration not being given to the inadmissibility of removal on the basis of the risk of ill-treatment in any receiving country, notwithstanding that a claim for asylum is not justified (s 34), and thus could lead to a violation of Article 3 of the Convention unless the person is then detained on the extended powers of arrest and detention previously discussed (based on s 25-28 of the Act). The potential scope for use being made of the exclusion clause in Article 1F (as well as that in Article 33) of the Geneva Convention of 28 July 1951 has certainly been increased by the stipulation in the *Anti-terrorism, Crime and Security Act 2001* that a dispute over a ministerial certificate regarding the application of these clauses must be determined first in any asylum claim. However, there does not appear so far to be any evidence of the clauses actually being invoked more extensively than before. And there does not appear to be any pre-selection of asylum applications on grounds of country of origin, although the *Nationality, Immigration and Asylum Act 2002* has reintroduced the designation of certain countries as essentially safe so that an appeal against the refusal of asylum lodged by a person from such a country has no suspensive effect on his or her removal.

Whilst it declared that the exclusion clause had not been used in **Belgium** in 2002 more extensively than in the past, the General Commissioner for refugees and stateless persons, declared that "...being aware of the terrorist threat which States are facing, he would be particularly vigilant when dealing with cases of asylum seekers coming from certain States or regions (Iraq, Algeria, Chechnya, Sudan, ...),¹⁶⁰

In Greece, according to statistics established by the HCR Bureau in Athens, there was a spectacular drop in granting refugee status, although the responsible authorities did not explicitly refer to Article 1F of the Geneva Convention. Following the events of 11 September, the review of applications for asylum - and particularly by applicants from Iraq, was "frozen" until the end of December 2001. In addition, from 1997 to 31 December 2002, the percentages of applications accepted for the grant of refugee status are 5.5 % in 1997, 3.9 % in 1998, 8.5 % in 1999, 11.2 % in 2000, 11.2 % in 2001 and

of having access to legal counsel of choice. By the end of the year 2002, AI had not received a response from the Swedish public authorities to its letter.

¹⁵⁷ Several NGOs have objected that the implementation of the guarantees given by the Egyptian government in the above referred case has not effectively been monitored. The Swedish Embassy personnel visited the expellees while in prison only twice in three months, the first time some five weeks after the return/expulsion and under the supervision of the detaining authorities (C.Söderbergh, Secretary-General of AI, the Swedish Section, made a reference to this case in a speech delivered during the Human Rights days in Stockholm on 18 November 2002. He expressed his deep concern about the way in which the public authorities have acted.). Furthermore, some Swedish NGOs were troubled by the way in which a reference to the UN Resolution 1373 has been made in the written motivation in the decision to expel both Egyptian men, i.e., it is claimed that the decision was based on the Sweden's relation to other countries rather than the potential threat to the national security.

¹⁵⁸ CCPR, Concluding observations: Sweden. 24/04/2002. CCPR/CO/74/SWE, § 17.

¹⁵⁹ UNCHR, *Addressing Security Concerns without Undermining Refugee Protection*, UNCHR's Perspective, Geneva, November 2001, § 21.

¹⁶⁰ Letter of 3 March 2003 from the General Commissioner for Refugees and Stateless Persons to the expert of the network responsible for collecting information on Belgium.

0.4 % in 2002. After adding persons authorized to reside in Greece "for humanitarian reasons", the percentages of acceptances are 9.5 % in 1997 11.3 % in 1998, 32.2 % in 1999, 20.1 % in 2000, 22.5 % in 2001 and 1% in 2002. Although the HCR avoids making an official link with the events of 11 September, it appears reasonable to think that there is causal relationship.

In **Denmark**, most of the amendments brought by the above-mentioned legislative package¹⁶¹ introduce new measures in the legislative instruments coping with foreigners, whether they are asylum seekers, refugees, immigrants or persons under other forms of international or national protection (subsidiary protection, humanitarian clause). The *Danish Extradition Act* has been amended introducing the possibility of extradition based on political offences and the extension of the scope of extradition to any type of criminal activity. It establishes a difference of treatment between Danish citizens of other origin than Danish and there is lack of safeguard in case of possible inhuman or degrading treatment after extradition and/or in case of unfair trial in the country of origin. The *Danish Aliens Act* has been amended to enforce cooperation between the immigration and intelligence services on data access without consent of the person affected. Furthermore, there is now a possibility of being expelled even in presence of a real risk in the country of origin ; the possibility of expulsion of foreigners – even those who have been granted refugee status –in case of unconditional imprisonment and disregarding the factual situation confirms it.

In **Germany**, modifications of the Foreigners Law¹⁶² by the *Act for the Fight Against Terrorism* can be noted, some of these measures being intended to facilitate control of the identity of foreigners. Also, the number of special reasons for denying an otherwise claimable residence permit was considerably extended (among others: threat of the free democratic basic order; participation in politically motivated acts of violence; member of an association that supports the international terror). The regulation about the admission of a foreigner's removal or the removal of a person seeking asylum reproduces Art. 1st F , of the Geneva Convention word for word.¹⁶³ Individuals giving wrong details in relevance of security despite instruction during the visa procedure and face to face at the Foreigners Office, usually will be expelled. In the central index for foreigners, data about foreigners will be saved in considerably extended size; the index will be expanded to be a central visa file. The police offices and the secret services now have easier access to this data bank.

Lastly, in **Italy**, the new legislation on terrorism has not altered the standards concerning the right to asylum and immigration. No hostile behaviour by the government with regard to nationals of certain States has been reported.

VI. Elimination of the finance of terrorism

VI.1. Freezing of assets upstream of notification of offences

Article 8, par. 1 and 2 of the United Nations Convention on the suppression of the financing of terrorism requests contracting States to criminalize acts of financing terrorism and to adopt measures needed to identify, detect, freeze or seize any funds used or intended to be used to commit terrorist offences, and the proceeds of such offences, for possible confiscation. The process of ratification of

¹⁶¹ Lov (2002:378) on the ending af straffeloven, retsplejeloven, lov om konkurrence- og forbrugerforhold på telemarkedet, våbenloven, udleveringsloven samt lov om udlevering af lovovertrædere til Finland, Island, Norge og Sverige [Law (2002:378) changing Act regarding the Penal Code, Act on Administration of Justice, the Telecommunication Competition and Consumer Act, Order on the weapons and explosives Act, Extradition Act and The Extradition Act regarding Finland, Island, Norway and Sweden].

¹⁶² Art. 11-16 Act for the Fight against Terrorism: Modifications of the Ausländergesetz [Foreigner Act], the Asylverfahrensgesetz [Asylum Procedure Act], the Act about the Ausländerzentralregister [Central Register Act regarding Foreigners] as well as modifications of three foreign-law decrees.

¹⁶³ Section 51 (3) Foreigners' Act in the wording of Art. 11 Act for the Fight against Terrorism. With this, the legislator wanted to ensure that the need for protection of the person concerned and the offence fact excluded (no protection as refugee) would be weighted; see Bericht des Innenausschusses [Report of the Committee on Home Affairs], Bundestagsdrucksache 14/7864, p. 8, in addition of Art. 11 No. 9. – The UNHCR criticizes section 51 (3) as a mixing of art. 33 (2) and 1st F of the Geneva Convention.

this important instrument accelerated sharply after the attacks on 11 September 2001. In addition, United Nations Security Council Resolution 1373 on the freezing of terrorist assets and the finance of terrorism recommends making a crime "criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts" (Article 1a). This resolution also specifies that the funds, financial assets or economic resources of persons who "commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts" shall be frozen along with those of persons or bodies associated with them (Article 1b).

Following the adoption of United Nations Security Council Resolution 1373, the European Union assumed two common positions on 27 December 2001¹⁶⁴. Member States also decided to criminalize the finance of terrorism, freezing assets of certain persons or bodies identified in an appendix to the Common Position 2001/931/EPSC as assisting terrorism (a). At the same time, police and judicial cooperation have been strengthened in respect of groups, organizations and individuals listed in the Appendix (b). The list which contains names which are updated twice a year, has been drawn up on the "the basis of precise information or material in the relevant file which indicates that a decision as been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds." (Article 1 § 4 of Common Position 2001/931/CFSP). The compilation and modification of the list are carried out by the Council on the basis of confidential criteria which have not been defined in advance.

(a) On 27 December 2001, the Council also adopted Regulation 2580/2001¹⁶⁵ since Community intervention was needed to implement the asset-freezing provisions of the Common Position 2001/631/CFSP and a ruling was necessary to draw up the list stipulated by Article 2 § 3 of the Regulation.¹⁶⁶ The concepts of "...funds and other financial assets or economic resources" are defined in a wide sense, and including "...including funds of any kind, tangible or intangible, movable or immovable, how ever acquired, legal documents or instruments of any kind, including electronic or digital, evidencing title to or interest in, such assets, including but not limited to bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit".¹⁶⁷

The Common Position 2001/931/CFS was later updated several times¹⁶⁸ and also guided the actions of the Union against the Al Qaida movement¹⁶⁹. This body of standards gave rise to a series of annulment actions, some of which in particular question the grounds of the measure, namely, the right of the

¹⁶⁴ Council Common Position 2001/930/CFSP on fighting terrorism, OJ L344 of 28.12.2001, p. 98 and Council Common Position 2001/931/CFSP on the application of specific measures to the fight against terrorism. OJ L344 of 28.12.2001, p. 93.

¹⁶⁵ Council Regulation 2580/2001 of 20 December 2001, OJ L344 of 28.12.2001, p. 70.

¹⁶⁶ Council Decision 2001/297 of 2077 2001, OJ L344 of 28.12.2001, p. 83

¹⁶⁷ Regulation 2580/2001, Article 1 § 1.

¹⁶⁸ For example, Common Position 2002/976 of the Council of 12 December 2002 updating Common Position 2001/931/CFSP, OJ L 337 of 13.12.2002, p. 93; Decision 2002/974 of the Council of 12 December 2002 implementing Article 2§3 of Regulation 2580/2001, OJ L337 of 13.12.2002, p. 85.

¹⁶⁹ Common Position of the Council of 27 May 2002 adopting restrictive measures against Usama bin Laden, Al-Qaida, the Taliban and associated individuals, groups, undertakings and entities, repealing common positions 96/746/CFSP, 119/77/CFSP, 2001/154/CFSP and 2001/771/CFSP and Council Regulation 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repeating Council Regulation (EC) n° 467/2001 on prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L 139 of 29.2002, p. 9. Article 6 of the Regulation provides that no one who freezes funds in an effort to apply the Regulation in good faith can be held liable. These lists are integrated in the national law of the Member States for their application. Thus in Belgium, see the Ministerial Decree of the Minister Finance of 14 February 2003 amending Ministerial Decree of 15 to 2000 and execution of the Royal Decree of 17 February 2000 on restrictive measures applied to the Talibans in Afghanistan. B.M. 21 February 2003.

persons in question to engage in an armed struggle¹⁷⁰, whilst others prefer to adopt the formal framework of the adoption of these texts or the breaching of their political activities¹⁷¹. The provisions in question here are particularly Article 1 of the Additional Protocol to the European Convention Human Rights on property rights and Article 6 of the European Convention of Human Rights laying down the right to a fair trial. These measures affect the presumption of innocence¹⁷² because the freezing of assets prejudices the guilt of persons who have not been convicted of a crime.

(b) The persons, groups or entities concerned exclusively by Article 4 of the Common Position 2001/631/CFSP on specific measures for police and judicial cooperation to prevent and fight terrorist acts¹⁷³. At this time, in fact, there is no judicial control of the measures adopted in the context of Title V of the Treaty on European Union in the legal order of the European Union.¹⁷⁴ This situation cannot be reconciled with Articles 6 and 13 of the European Convention of Human Rights nor, a fortiori, with Article 47 of the Charter of Fundamental Rights. No doubt in the decision of inadmissibility given on 23 May 2002 on the joint applications *SEGI and others* and *Gestoras Pro-Amnistia and others vs. the European Union*, the European Court of Human Rights ruled that the plaintiffs cannot be considered "victims" of an infringement of their rights, in the meaning of Article 34 of the European Convention of Human Rights, as a result of the adoption of the two common positions in question on 27 December 2001 in the framework of CFSP (common position 2001/930/CFSP on combating terrorism and common position 2001/931/CFSP on the implementation of specific measures for police and judicial cooperation to combat terrorism)¹⁷⁵. The Court considered in fact that recognising the plaintiffs as "victims" in this situation would be equivalent to accepting that the individual's right to lodge complaints under the European Convention of Human Rights could be used to prevent an infringement of the Convention, and would thus extend the concept of "a potential victim" to a violation beyond which this concept had been used in the past. It based its opinion on the observation that the "common positions" adopted in the context of CFSP are not, as such, directly applicable in the Member States and the implementation requires the adoption of concrete provisions in national law in the appropriate legal form in each Member State.

However, it would be a mistake to conclude from the *Segi and others* judgment that the absence of any judicial control in the context of Title V of the Treaty of European Union is an acceptable principle. The fundamental rights of the persons include the right to be protected against damage to his/her honour and reputation and the right to be presumed innocent until guilt is established. But these two rights may be threatened, or violated, by the positions of the Council adopted in the context of the CFSP that identifies certain individuals or organizations in order to attribute certain responsibilities to them, and asks the Member States to adopt measures against them, or that simply designates these

¹⁷⁰ The organization of Mujahadeen of the people of Iran entered an appeal, using as a secondary argument that this decision caused it "considerable" prejudice and infringed the higher legal rule of "revolt against tyranny and oppression". Appeal filed on 26 July 2002 by the organization of Mujahadeen of the people of Iran against the Council of the European Union (Case T-28/02), OJEC, n° C247, 12 October 2002, p. 20. Also see the appeal introduced on 31 July 2002 by Osman Ocalan in the name, the Independent Workers Party of Kurdistan (PKK) and Serif Vaniy in the name of the National Congress of Kurdistan (KNK) against the Council of the European Union (case 5-222/02) OJEC, n° C 233, 28 September 2002, p. 32

¹⁷¹ See, in particular, the action lodged by 3 Swedes of Somali origin above (*Initiatives nationales*).

¹⁷² See ECHR judgment of *Alenet de Ribemont vs. France* of 10 February 1995 (breach of the presumption of innocence can be made not only by a judge or a court but also by public authorities: § 36).

¹⁷³ See Decision 2003/48/JHA of 19 December 2002 Implementation of Specific Measures for Police and Judicial Cooperation to Fight Terrorism in Accordance with Article 4 of the Position 2001/931/CFSP. This decision provides, in particular, for the appointment of specialized services or magistrates (articles 2 and 3) within the police services and judicial authorities (Eurojust or other), an optimal exchange of information with Europol, an urgent priority treatment to be given to requests for mutual assistance concerning persons and groups included in the list (Article 6) and maximum access by the authorities of other Member States to information on the target persons and groups (Article 7). European Parliament's and the Council's explicit reference to fundamental rights, to limit the Member States' use of Eurojust and Europol in their fight against terrorism under Article 4 of the Common Position 2001/931/CFSP, must be approved. (Conclusions of the JHA Council, doc. 15691/02 (press 404), Annex II).

¹⁷⁴ See Article 46 TEU.

¹⁷⁵ ECHR., ruling of 23 May 2002, joined pl. n° 6422/02 and n° 9916/02, *Segi and others vs. Germany autres and others (15 Member States of the European Union)* and *Gestoras Pro-Amnistia and others vs. Germany and others*., ruling of 23 May 2002, joined pl. n° 6422/02 and n° 9916/02, *Segi and others vs. Germany autres and others (15 Member States of the European Union)*.

individuals or organisations by certain terms that could jeopardise their reputation. This is the reason, moreover, that the European Court of Human Rights considered that the circumstance that two of the plaintiffs were listed in the annex to the Common position 2001/91/CFSP was troublesome, but it refused to draw the consequent conclusions from this observation. If the Court of First Instance of the European Communities, before which a complaint has been lodged by the organisations in question!, should consider that it is not competent to investigate these complaints, it will be difficult not to conclude that the legal protection of the individual is insufficient with regard to the potential consequences of common positions or actions adopted under Title V of the Treaty of European Union.

do not however have the right of equal recourse to the Courts, since their inclusion on this list does not at first sight, jeopardize personally and individually their rights and freedoms, but tends to affirm that priority should be given to inquiries concerning them¹⁷⁶. It does however appear that the disreputable stigmatisation incurred by a body or individual in the list must not be neglected, and that the absence of any satisfactory remedy for the protection of their fundamental rights must be seen as regrettable¹⁷⁷.

Aside from questions of the confidentiality of the collection of information, which must not result in a complete absence of control, an important question remains, that of the veracity and reliability of information which results in inclusion in the list, the danger of abuse of asset freezing increasing with a lack of a definition of a terrorist offence. Undeniably, the means of drawing up this list do not appear to be satisfactory in their present form, since the choice of an administrative procedure (inclusion in a list by a governmental body) concerns a field which should fall strictly within the authority of the judiciary. In addition, inclusion in the list, which can result simply from an investigation launched in a Member State, will require the other Member States to freeze the assets of the persons listed, although no control by the judicial authorities of those States is envisaged¹⁷⁸.

The initiatives taken by the Member States are strongly convergent, since they were taken under the United Nations Convention on the suppression of the financing of terrorism, United Nations Security Council Resolution 1373, and Regulation 2580/2001 on the implementation of the freezing of assets. The last of these instruments is directly applicable in the Member States, only sanctions for breaches of the Regulation having to be adopted by the States.¹⁷⁹

¹⁷⁶ On 31 October 2002, the two Basque organisations lodged a complaint with the Court of First Instance of the European Communities against the Decision of the Council of Ministers to include them on the common list of terrorist organisations (case T333/02, OJ C 19 of 25.1.2003, p. 36 and case T-338/02, OJ C 7 of 1.1.2003, p. 24). The plaintiffs notably claim infringement of the presumption of innocence, the right to effective remedy since the common position cannot be the object of annulment proceedings, freedom of expression, and the right to respect of private life. They also argue the absence of prior consultation of the European Parliament, violation of their right to defence since they were not informed of their inclusion on the list.

¹⁷⁷ See ECHR, Dec. *Segi and others* (pl. 6422/02) and *Gestoras Pro Amnistia and others* (pl. 9916/02) of 23 May 2002 (inadmissibility for absence of the capacity of victim in the meaning of Article 34 of the Convention) on the appeal of two Basque organizations SEGI and Gestoras Pro Amnistia close to ETA, after they were included in the list to be the subject of strengthened police and judicial cooperation, against the 15 Member States of the European Union before the European Court of Human Rights. Referring to the Common Positions 2001/930/CFSP and 2001/931/CFSP adopted on 27 December 2001 by the Council of the European Union, the petitioners complained that they did not have the option as individual plaintiffs, of challenging the decisions and measures taken jointly by the 15 Member States in the context of the Common Position before a Community judge. The organisation *Segi* considered that these Common Positions directly and personally breached the rights granted to it by the Convention (breach of the right of presumption of innocence, of the right to a fair trial, of the right to freedom of expression and association, of the right to an effective recourse and of the right to property, these being Articles 6, 6§2, 10, 11 and 13 of the Convention and 1 of the Protocol n° 1).

On 31 October 2002, the two Basque organizations also introduced an action before the Court of First Instance of the European Communities against the Decision of the Council of Ministers including them on the list of terrorist organizations. The plaintiffs argue the absence of prior consultation of the European Parliament, breach of their right of defence for not having been informed of their inclusion on the list and not benefiting from a means of remedy against the Council Decision, and infringement of their freedom of opinion. They also argued that their inclusion on the list of terrorist activities potentially makes their economic resources unavailable. The petitioners claim compensation (Europe Agency 8 January 2003).

¹⁷⁸ A proposal for a framework decision on the implementation in the European Union of decisions to freeze assets or elements of evidence would to apply principle of mutual recognition to decisions to freeze assets, from a judicial cooperation perspective.

¹⁷⁹ In application of Article 9 of Regulation 2580/2001.

Thus, **Belgium** has enacted Royal Decree of 2 May 2002 on restrictive measures against certain persons and bodies in the context of the fight against terrorism¹⁸⁰. Under Article 2, persons convicted of a breach of Regulation 2580/2001 are liable to a prison sentence of from eight days to five years and a fine from € 25 to 25,000¹⁸¹. This Decree is retroactive in respect of situations prior to the date of its publication, since it comes into force from 28 December 2001. It appeared necessary, however, for the legislative chambers to deal with this problem by means of a proposal for a law "...on the implementation of restrictive measures adopted by the Council of the European Union against States, certain persons and bodies" voted by the House of Representatives on 27 February 2003¹⁸². This proposal nevertheless contains other questionable aspects in that it allows the implementation of Common Positions (which are not binding, however) by Royal Decree, *ipso facto* circumventing Parliament.

On 9 April 2002, **Spain** ratified the international convention on the suppression of the financing of terrorism¹⁸³. In addition, in 2002 it submitted a draft law on the prevention and seizure of financing of terrorism, which is yet to be approved by the Senate. The purpose of this legislation is to block transactions and movements of capital belonging to terrorist entities and to prevent opening of financial accounts where one of the parties to the transaction is associated with terrorist groups or organizations. A Monitoring Committee will direct and control these activities.

In **Ireland**, Sections 12-44 of the Criminal Justice (Terrorist Offences) Bill, 2002¹⁸⁴ deal with the suppression of financing of terrorism by making provision for the measures necessary to enable ratification by Ireland of the UN Convention for the Suppression of the Financing of Terrorism, 1999. The definition of financing terrorism in Section 13 is quite broad and provides that a person is guilty of the offence if s/he, inside or outside the State, directly or indirectly, unlawfully and wilfully, provides, collects or receives funds intending that they be used or knowing that they will be used to carry out an act that is an offence under Irish law and within the scope of a treaty annexed to the abovementioned 1999 Convention¹⁸⁵. Attempts to commit such an offence are also covered. A scheme for freezing and confiscating funds used or allocated for use in connection with the offence of financing terrorism is inserted into the Criminal Justice Act, 1994 by Sections 21-43.¹⁸⁶ A procedure (based on the Proceeds of Crime Act, 1996) for the freezing, restraint or confiscation of funds, by means of a court order, in the possession or control of a person that are being used or may be intended for use in committing, or facilitating the commission of, a terrorist offence or an offence of financing

¹⁸⁰ Published in the *Moniteur Belger* of 28 May 2002. This decree was adopted specifically on the basis of Article 1 of the law of 11 May 1995 on the implementation of decisions of the United Nations Security Council (Published in the *Belgian Monitor* on 29 July 1995); this article provides that the King can take the necessary measures, by a reasoned decree of the Council of Ministers, for the implementation of mandatory decisions taken by the Security Council under the United Nations Charter. Article 4 of the law also imposes a general sanction on the breach of measures contained in the implementation decrees of this law, of eight days' to five years' imprisonment and a fine of € 25 to 25,000.

¹⁸¹ In view of the contrast between the strict sentences inflicted on those who on the one hand refrain from freezing the funds of persons and organizations in this list and on the other hand, the immunity provided by Articles 6 of Regulation 881/2002 of the Council of 27 May 2002, imposing restrictive measures in respect of Usama bin Laden, Al-Qaida, the Taliban and associated individuals, groups, undertakings and entities (see a)) on those who in all good faith but erroneously freeze funds, it is to be apprehended that a tendency to freeze assets will occur even in the case of doubts on the identity of these persons with those listed on the European instruments.

¹⁸² Doc 50/2210 submitted to the Chamber on 6 January 2003. The penalties stipulated were taken from those found in Royal Decree of 2 May 2002.

¹⁸³ Publication of 23 May 2002.

¹⁸⁴ For the full text of the Bill and Explanatory Memorandum see: www.irlgov.ie. Parliamentary debates on this legislation can also be accessed at this address.

¹⁸⁵ The Conventions appended to the 1999 Convention are the Convention on the Elimination of Illegal Seizure of Aircraft; Convention on the Elimination of Illegal Acts against the Safety of Civil Aviation; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents; International Convention on the Taking of Hostages; Convention on the Physical Protection of Nuclear Material; Protocol on the Elimination of Illegal Acts of Violence at Airports Serving International Civil Aviation supplementary to the Convention on the Elimination of Illegal Acts against the Safety of Civil Aviation; Convention on the Elimination of Illegal Acts against the Safety of Maritime Navigation; Protocol on the Elimination of Illegal Acts against the Safety of Fixed Platforms located on the Continental Shelf; and the International Convention on the Elimination of Terrorist Bombing.

¹⁸⁶ Sections 14, 15 and 16 provide for interim, interlocutory and disposal orders, which have the effect of freezing certain funds. These provisions mirror Sections 2-4 of the Proceeds of Crime Act, 1996.

terrorism is provided for by Sections 14-20. Une répartition de la charge de la preuve est prévue : Section 18 (based on Section 8 of the 1996 Act) makes provision for the use of opinion evidence by a member of An Garda Síochána (Irish Police) not below the rank of Chief Superintendent with the proviso that the High Court must be satisfied that there are reasonable grounds for that opinion. The section also stipulates that the standard of proof to be applied is that applicable to civil proceedings, i.e. the balance of probabilities.

In the **United Kingdom**, the UN Convention for the Suppression of the Financing of Terrorism has been ratified, entering into force on 10 April 2002. The offences created by this will be added to the list of extraditable offences. Par ailleurs, on constate que unlike the power of forfeiture (ss 1-3 of the Anti-terrorism, Crime and Security Act 2001), that relating to the freezing of assets is not restricted to use in connection with terrorism (ss 4-14). In particular it covers their use in respect of action detrimental to the United Kingdom economy. Not only could this apply to economic activity that is entirely legitimate where it takes place but also fails to give any criteria by which detriment to the economy is to be assessed so that the potential exercise of the power might not be anticipated. The lack of criteria will also handicap judicial scrutiny of any exercise of this power. These provisions are thus not entirely consistent with the controls permitted over the peaceful enjoyment of possessions.

Italy has ratified the Convention of New York of 9 December 1999 on the suppression of the financing of terrorism¹⁸⁷. In view of the contents of Resolution 1373 of United Nations Security Council, the Government has also formed a financial security Committee responsible to the Minister of Economy and Finance¹⁸⁸. The prevention of Mafia type activities (law of 19 March 1990 n° 55) is thus strengthened for the offences listed in Article 270b which includes the finance of terrorism (decree 374/2001, *supra*, concerning the definition of terrorism), by stipulating disciplinary sanctions, the suspension or revocation of the authorisation to exercise banking activities, already provided in respect of the harbouring of stolen goods, money laundering, use of money, goods or other assets of illicit origin¹⁸⁹. The main problem raised by the new standards concerns the punishment of conduct which contributed only occasionally to the achievement of the association's aims, the option of criminalising support given to an association which has not involved the effective membership of a person in that association, entails the risk of breaching the principle of lawfulness by the creation of new repressive schemes not sanctioned by law.

For its part, Sweden has engaged in discussions on decision (SC/7206) concerning three Swedish citizens (originally from Somalia) who were accused of being associated with a terrorist organisation and whose assets were frozen on this basis within just a few days despite their strong denial of any connections with Al-Qaida. Several Swedish NGOs have expressed criticism with regard to withholding information within the UN Security Council about the case in question and thereby not giving any opportunity to the accused to dispute the decision.¹⁹⁰ It is of utmost importance that those under suspicion of having committed a crime are not penalised until their guilt has been proven in a

¹⁸⁷ Text approved by the House of Representatives on 19 December 2002, not yet published in the Official Journal. Parliament did not limit itself to including the Convention in the national legislation but introduced standards which modify and coordinate the content of the Convention with the legislation in force. The most important standard which was modified is Article 25d of Legislative Decree No. 231 (Discipline of administrative responsibility of individuals, companies and associations even those not having a legal existence). The new version provides for financial sanctions or prohibitions for perpetrators of offences whose objective is terrorism or the subversion of the democratic order or offences " which breach Article 2 of the International Convention on the elimination of the finance of terrorism including New York and 9 December 1999".

¹⁸⁸ Decree Law of 12 October 2001 No. 369 (incorporation into national legislation of 14 December 2001 No. 431); urgent measures for the elimination of and fight against finance of international terrorism. The committee, which has an annually renewable assignment, provides coordination of data on breaches of the embargo on and the freezing of assets, nationally and internationally. It also coordinates all initiatives adopted against financing of terrorism, acting as a data and information collection centre and having the power to request the CONSOB (national exchange bureau) and the special fiscal police corps to carry out inspections.

¹⁸⁹ Following a recent judgment by the Supreme Court (Cassazione penale, sez. II, sentenza del 22 novembre 2000), financing by means of transfers to bank accounts abroad must be treated as though it had taken place in Italy resulting in the application of Article 270b of the Criminal Code.

¹⁹⁰ Alternative Report to the Human Rights Committee, p. 45.

fair trial by an independent court. According to the Swedish Red Cross this fundamental legal principle has obviously not been taken into consideration in the case of the three Swedes.¹⁹¹ They were sentenced without a hearing and without a chance to defend themselves. Initially, they were denied legal aid despite the fact that they had no resources whatsoever at their disposal. In other words, the Swedish Government has been criticised for the way in which it has enforced the UN resolutions and EU regulations.¹⁹² The issue is currently subject of proceedings in Luxemburg (at the ECJ), focusing primarily on the actions by EU and Sweden in the matter. The three Swedes as well as the organisation Al Barakaat initiated an action for annulment before the Court of first instance of the EC on 10 December 2001 challenging, *inter alia*, the EU decision to freeze their assets (Annex I to Regulation No (EEC) 881/2002).¹⁹³ The Court of first instance pronounced on 7 May 2002 its decision on the part of the application dealing with a claim for provisional measures in the case T-306/01R, *Abdirisak Aden, Abdulaziz Ali, Ahmed Yusuf, Al Barakaat International Foundation v. EU and the European Commission*. The claim was rejected.¹⁹⁴ Meanwhile the names of the three Swedish citizens have been struck from the sanctions list as the result of an agreement between them and the US.¹⁹⁵

In preparation for the ratification of the UN Convention for the Suppression of the Financing of Terrorism from 1999¹⁹⁶ a new act (Lag om straff för finansiering av särskilt allvarlig brottslighet i vissa fall, m.m.; (SFS 2002:444)) (Act on Punishment for the Financing of Especially Serious Crimes in Certain Circumstances (2002:444) and a new regulation (Förordning om åtgärder mot penningtvätt och finansiering av särskilt allvarlig brottslighet i vissa fall, (SFS 2002:552)) were approved and entered into force on 1 July 2002. The new act criminalises the financing of terrorist crimes in accordance with Article 2 of the UN Convention. It also comprises explicit rules concerning jurisdiction, forfeiture of funds, used or allocated for the purpose of committing the offences set forth in Article 2. In addition, the Act requires companies covered by the Act on Measures against Money Laundering (SFS 1993:768) to examine any transaction, which can be assumed on reasonable grounds to be intended for the financing of the crimes covered by the law (i.e., the terrorist crimes enumerated in the Convention and its annex). The companies shall report any circumstances that may be indicative of such transactions to the Swedish FIU.

Lastly, it should be remembered that **Austria, Finland, Greece and France** have ratified the International Convention on the suppression of the financing of terrorism¹⁹⁷. In Luxembourg, a proposal for a law No. 4954, submitted on 16 May 2002, on the suppression of terrorism and its finance and approving the International Convention on the suppression of the financing of terrorism of 10 January 2000, has not yet been adopted¹⁹⁸.

VI.2 Confiscation of crime-related property

The Danish Presidency of the European Union took an initiative on 13 June 2002 for a framework decision of the Council on the confiscation of crime-related proceeds, instrumentalities and property¹⁹⁹, in order to harmonize the legislative provisions and regulations of Member States. In

¹⁹¹ Svenska Röda Korset, Flyktning & Folk rätt, 19 October 2002, p. 2. See also A.Wigenmark, *Bekämpning av terrorism efter 9/11, Rättigheter i farozonen*, MR-INFO, Frivilligorganisationernas fond för mänskliga rättigheter Nr 04-2002, pp. 1-2.

¹⁹² Alternative Report to the Human Rights Committee, p. 47.

¹⁹³ Regeringens förhållande till riksdagen, 2001/02:KU20, 2.11. FN-sanktioner, pp. 115-127, <http://www.riksdagen.se/SrvFunc/dokarkiv/0102/bet/KU20.doc>.

¹⁹⁴ Their petition for temporary measures was rejected on the grounds that since they were entitled to social assistance by the Swedish authorities, the petition this did not prove that the freezing of their assets constituted serious damage, only able to be repaired with difficulty (Order of 7 May 2002 in the case T-306/01 R).

¹⁹⁵ See www.ud.se and SC/7490, 27 August 2002.

¹⁹⁶ Prop. 2001/02:149 Sveriges tillträde till Förenta nationernas internationella konvention om bekämpande av finansiering av terrorism. The Convention entered into force for Sweden on 6 July 2002.

¹⁹⁷ See above, note 7.

¹⁹⁸ A draft law No. 4937 was submitted on 10 April 2002 for the approval of the International Convention for the Elimination of Terrorist Bombing, enacted by the United Nations General Assembly on 15 December 1999.

¹⁹⁹ Initiative of the Kingdom of Denmark on the adoption of the Council Framework Decision on Confiscation of Crime-Related Proceeds, Instruments and Property. O.J. C 18 up to August 2002, p. 3. The first framework decision 2001/500/JHA of the Council on 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of

keeping with Article 2 of this initial proposal, each Member State is requested to adopt the measures required to enable it to confiscate all or a part of the instrumentalities and proceeds resulting from offences punishable by a sentence of imprisonment exceeding one year, or property whose value corresponds to those proceeds. The power of confiscation also extends to property belonging to a person convicted of a criminal act, even if it has no bearing on the criminal offence, where the offence generates large profits and is punishable by a maximum of six years' detention (Article 3 (1)). Under these conditions, confiscation can also be extended to property in the possession of the spouse or the partner of the person concerned; States can make an exception for property held for more than three years prior to the commission of the criminal offence. Lastly, under the provisions of Article 3 (4), it devolves on the person concerned by the measure of confiscation to establish the probability that the property was acquired legally; it appears that there is a reversal of the burden of proof rather than the sharing of that burden.²⁰⁰

This last provision has been criticized both by the Council of Justice and Home Affairs of 14-15 October 2002²⁰¹ and by Parliament in its resolution published on 7 November 2002. The European Parliament suggested the following main amendments²⁰²:

- each sentence of confiscation should be proportional to the offence committed²⁰³;
- the extended powers of confiscation stipulated in Article 3 § 1 of the Danish initiative should only come into force, if the offence is likely to have generated large profits and the origin of the goods cannot be determined²⁰⁴;
- the extension of the powers of confiscation to the spouse or partner is admissible only if the prosecution proves that the goods acquired illegally by the person found guilty belong only fictively to the spouse or partner²⁰⁵;
- the burden of proof of the illicit origin of the property devolves on the prosecution and not on the defence.

While restricting the scope of the application of confiscation, the draft text amended by Parliament retains the option of confiscating goods or proceeds resulting from the commission of offences other than the offence of which the person in question is being accused. This can constitute the source of some legal uncertainty. In the last version dated 19 December 2002 of the Council framework decision on confiscation of crime-related proceeds, instrumentalities and property²⁰⁶, this extended power of

instruments and the proceeds of crime. It provides for the harmonisation of national provisions on the confiscation of assets procured by organized crime and more specifically attempts to ensure that Member States did not formulate or entertain any reservations regarding the provisions for confiscation in the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed in Strasbourg on 8 November 1990 (which all Member States have ratified) in particular where an offence was punished by a prison sentence or detention of a maximum duration of over one year. This framework decision proved insufficient, however.

²⁰⁰ Under the provisions of Article 12 on confiscation and seizure of the United Nations Convention of 12 December 2000 against trans-national organized crime, the contracting States can require that the perpetrator of an offence shall show the legal origin of alleged crime-related proceeds or other assets, which may be the object of confiscation, if this requirement complies with the principles of their national law and the nature of the judicial procedure and other procedures.

²⁰¹ See the Conclusions of the JHA Council of the EU of 14-15 October 2002, partially published on 28 October 2002: "the provision should only apply to those cases where the prosecution has shown that the property concerned had not been acquired in a legal way".

²⁰² Legislative Resolution of the European Parliament on the proposal for council decision concerning the initiative of the Kingdom of Denmark for the adoption of a framework decision of the Council on confiscation of crime-related proceeds, instrumentalities and property: 10697/2002-C5-0375/2002-2002/0818 CNS, rapporteur Di Lello Finuofi GUE presented on 7 November 2002.

²⁰³ *Ibidem*, amendment 2 of Article 2.

²⁰⁴ *Ibidem*, amendment 3 of Article 3 § 1 a) and c). The view of the LIBE Committee to specify the meaning of "indeterminate origin" of goods was not adopted. The expression referred to property which a person convicted of a criminal offence has available or which he owns, even through an individual, the value of which is disproportionate in comparison to his declared income for tax purposes, or his activities and of which he cannot justify the legal origin.

²⁰⁵ *Ibidem*, amendment 43 Article 3 § 2: (...) if it is not shown that these goods belong to the person convicted of a criminal offence and that, fictionally the spouse or partner has or owns the same.

²⁰⁶ Draft framework decision of the Council on the confiscation of crime-related proceeds, instruments and property, version published on 23 January 2003, 5299/03 DROIPEN 3.

confiscation is only authorized when the person in question is convicted of one of the exhaustively listed offences²⁰⁷, and under conditions pertaining to the maximum sentence of detention provided for these offences and the type of offence²⁰⁸.

Without incorporating the amendments proposed by Parliament word by word into national legislation, the proposal for a framework decision stipulates, among other things, that it cannot result in a change in the obligation to respect fundamental rights (...) including the presumption of innocence (Article 3c). It is specified that the national Courts can only proceed to the confiscation of goods, if they are fully convinced of their criminal origin, either on the basis of concrete elements or of the disproportion between the value of goods held by the convicted person and his/her legal income (Article 3.2).

The version of the proposal for a framework decision dated 19 December 2002 appears to be in compliance with case-law on the subject of the European Court of Human Rights. In its judgment in the case of *Philipps v. the United Kingdom* of 5 July 2001²⁰⁹, the Court held that the principles set out in Article 6 § 1 of the European Convention of Human Rights, such as the rights of a person being prosecuted to be presumed innocent and the obligation of the prosecution to shoulder the burden of proof of the accusations against the person in question, apply to the procedure for the carrying out the sentence of confiscation. It held that, although this right was not absolute since all legal systems practice presumptions both in fact and in law, to which the Convention is not an obstacle provided that the contracting States do not go beyond certain limits in taking account of the seriousness of the issue and safeguarding the rights of the defence (judgment in the case of *Salabiaku v. France* of 7 October 1988, Series A n° 141-A, § 28)²¹⁰. Although a reversal of the burden of proof is inconsistent with Article 6 of the Convention, the sharing of the burden of proof on the basis of legal or de facto presumptions is accordingly admissible provided, in particular, that the presumption or the share of the burden of proof is regulated by law and the accused is able to present his/her arguments in a public judicial procedure and that the real power of assessment in respect of both the factual and the legal elements, is left to the judge.²¹¹

Alongside the proposal for a framework decision on confiscation, another Danish initiative was intended to widen the scope of mutual recognition and to strengthen the framework of cooperation²¹² by authorizing the direct execution by Member States of decisions to confiscate illegal gains handed down by the judicial authorities of another Member State without control of double criminality, when the property is the result of an identified offence such as participation in organized crime or acts of terrorism under conditions defined in article 5 § 1 of the framework decision.

Several initiatives by Member States must be reviewed since they concern the introduction of the sentence of confiscation of crime-related income and can be associated with the trends that have just been mentioned. **Belgium** recently adopted a law on the extension of the option of seizure and confiscation in criminal matters²¹³. Article 4 of the law introduces the sharing of the burden of proof between prosecution and the accused on the subject of the origin of suspect assets. It devolves on the prosecution to show that the person convicted gained certain material advantages, that there are

²⁰⁷ The offences under the framework decision concerning the fight against terrorism are set down in a list (see Article 3, 1.b).

²⁰⁸ It is stipulated that the offence must be of a profit-generating nature, although the Commission has expressed reservations on this provision, in view of the framework decision on the fight against terrorism

²⁰⁹ ECHR, judgment *Philipps vs. United Kingdom* (pl. n° 41087/98) of 5 July 2001.

²¹⁰ See § 40 of judgment *Philipps vs. United Kingdom*.

²¹¹ See ECHR judgment *Pham Hoang vs. France* of 25 September 1992, Series A n° 243. In the judgment *Philipps vs. United Kingdom*, the court held that an English court could decide not to make presumptions if, in its opinion, there was a major risk that the application of presumption could be unfair to the accused.

²¹² Initiative of the Kingdom of Denmark in adoption of a framework decision on the execution of confiscation decisions of the European Union, OJ C 184 off 2.8.2002, p. 5. This initiative was also subject to amendments by the European Parliament: see Legislative Resolution for the adoption of a framework decision of on the execution of confiscation decisions of the European Union, 10701/2002-C5-0375/2002-2002/0816 CNS, rapporteur Di Lello Finuofi GUE presented 7 November 2002.

²¹³ Law of 19 December 2002 on extended possibilities of seizure and confiscation and criminal matters, B. M., 14 December 2003 (entered into force on 24 February 2002).

serious and concrete indications that these assets are the result of the commission of an offence and that the person convicted has not given a plausible explanation to the contrary. The "serious and concrete indications" can be deduced from any reliable element submitted to the Court in a regular manner that shows a disproportion between the temporary or ongoing increase in assets and expenditures by the convicted person during the relevant period (the period elapsing between five years preceding the indictment and the date of judgment) both of which must be stated by the prosecution and, on the other hand, the temporary or ongoing increase in the assets and expenditure of the convicted person during that period for which the person in question has no plausible explanation showing that it does not result from the acts for which he has been convicted, or similar acts.²¹⁴ The sharing of the burden of proof as defined in respect of the illicit origin of the goods appears to comply with the case-law of the European Court of Human Rights.

Other characteristics of the Belgian law should also be mentioned. The new law allows for distraint on any equivalent assets. It gives the prosecution the option of instituting,, with the consent of the Court, a special inquiry on material advantages and gives the Court the option to impose separate confiscation. Like the European proposal, Belgian legislation also provides for an extension of the option of confiscation, not only to confiscation of assets resulting from the offence for which the person is convicted, but also for those which result from similar acts.

In **Italy**, the new article 270b of the Criminal Code also provides for the mandatory confiscation of objects which were used to commit an offence and all objects which constitute the price, profit, the income or the employment of the income generated by the offence.²¹⁵

In Ireland, Section 22 of the Criminal Justice (Terrorist Offences) Bill, 2002, Section 22 of the Criminal Justice (Terrorist Offences) Bill, 2002²¹⁶ enacts confiscation orders, with a detailed provision for the value assessment of funds subject to confiscation by amending Part II of the Criminal Justice Act, 1994. All of the powers contained in the 1994 Act in respect of drugs trafficking offences are now extended to terrorist offences. These include, *inter al*, provisions relating to bankruptcy, money laundering, search warrants, disclosure of information by designated bodies etc.

When the Member States adopt measures to transpose the framework decision on confiscation of crime-related proceeds, instrumentalities and property, it is essential for them to take account of the limits set by the European Court of Human Rights in its judgment *Phillips vs. Royaume-Uni* of 5 July 2001

In this case where the applicant alleged that the statutory assumption made against him by the court which issued a confiscation order following his conviction for a drugs offence violated his right to a fair trial under Article 6 of the Convention, the Court finds that this provision has not been violated only after having noted the safeguards contained in the Drug Trafficking Act 1994. Thus, "the assessment was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. The court was empowered to make a confiscation order of a smaller amount if satisfied, on the balance of probabilities, that only a lesser sum could be realised. The principal safeguard, however, was that the assumption made by the 1994 Act could have been rebutted if the applicant had shown, again on the balance of probabilities, that he had acquired the property other than through drug trafficking. Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice". This latter condition appears to be particularly important in the view of the Court, the judgment of which insists that "in respect of every item taken into account the judge was satisfied, on the basis either of the applicant's admissions or

²¹⁴ See new article 43d § 3 of the Criminal Code, introduced by Article 4 into the Law of 19 December 2002 on extended options of seizure and confiscation and criminal matters, B. M., 14 December 2003 (entered into force on 24 February 2002).

²¹⁵ Decree Law of 18 October 2001 (incorporated after amendment, into the Law of 15 December 2001 No. 438 *Disposizioni urgenti per contrastare il terrorismo internazionale*).

²¹⁶ For the full text of the Bill and Explanatory Memorandum see: www.irlgov.ie. Parliamentary debates on this legislation can also be accessed at this address.

evidence adduced by the prosecution, that the applicant owned the property or had spent the money, and that the obvious inference was that it had come from an illegitimate source²¹⁷.

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²¹⁷ Eur. Ct. H.R. (2nd section), *Phillips v. the United Kingdom*, judgment of 15 July 2001, §§ 43-44.

VII. General conclusions

Main conclusions that can be drawn from this Thematic Comment

1. A review of the measures adopted by the Member States for the transposition of the Council framework decision of 13 June 2002 on combating terrorism shows that the States' transposition measures have not solved the problem of the imprecise definition in this instrument – for the most part, the definition of terrorism given in the framework decision is simply reproduced in national criminal law. In addition, since qualifying an offence as "terrorist" justifies the use of special methods of inquiry (point IV of the Comment below) that entail major interference in private life, the distinction between "terrorist" offences and other offences must be sufficiently precise to meet the condition of lawfulness to which the legitimacy of this interference is subject. This is not the case when the distinction between two offences is described exclusively by the gravity of their consequences and the objective of the perpetrator.

In the current state of the law of the European Union, the refusal by a Member State to abide by its obligation to cooperate under the framework decision on the European arrest warrant of 13 June 2002 can be justified by its concern for complying with its obligation to respect fundamental rights. But in uncertain situations, when the risk of an infringement is not clearly established, the State will hesitate to refuse to surrender a person to the Member State issuing the warrant. Because of the organisation of the procedure for referral for a preliminary ruling under Title VI of the Treaty on European Union, the European Court of Justice is not really in a position to impose a uniform interpretation of the framework decision on the European arrest warrant, which accentuates the risk of applying political considerations and the negotiation within the Council to the requirements for fundamental rights.

3. The Member States are parties to the European Convention of Human Rights. Consequently, in the context of the judicial cooperation that they have chosen to enact with non-member States, they must refrain from assisting those third States when it appears that this means an individual risks violation of his/her fundamental rights, including the case of a flagrant denial of justice. This prohibition defines the limits to judicial cooperation that can be envisaged with the United States. It also plays a role as concerns the exchange of personal data. Under Article 25 of Directive 95/46/EC, the transfer of personal data to a third country for processing can only take place if the third country in question provides an adequate level of protection. There are doubts at this time about whether the protection offered by the United States is adequate. In any case, the decision of the European Commission, adopted under Article 25 § 6 of Directive 95/46/EC stating that processing of personal data in the United States offers sufficient guarantees, can only be accepted within the limits imposed by Article 8 of the Charter of Fundamental Rights of the European Union and by Article 8 of the European Convention of Human Rights and the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. In the absence of full compliance with the principles of pertinence and proportionality, and a right to the individual of modification to the benefit of whose personal data is transferred, there is a real risk of infringement of these various guarantees. Similarly, Article 18 of the Europol Convention adopted by Act of Council on 26 July 1995 defines the conditions under which Europol can transmit personal data recorded by its services to third party States or bodies. But the conditions set by Article 18, including the conditions by which an adequate level of data protection is guaranteed by the non-member State or body, must be interpreted taking into account the general requirements of Article 8 of the Charter of Fundamental Rights of the European Union, as well as Article 8 of the European Convention of human rights and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. From the standpoint of these provisions, and particularly Article of 8 § 3 of the Charter of Fundamental Rights, the absence of an independent control authority competent for supervising the transmission of data by Europol and the uses made of this data by the United States authorities is grounds for particular concern.

4. In November 2002, the Council adopted a recommendation on the development of "terrorist profiles". The development of terrorist profiles on basis the characteristics such as nationality, age education, birthplace, "psycho-sociological characteristics", or family situation – all these elements appear in the recommendation on developing terrorist profiles – in order to identify terrorists before the execution of terrorist acts and cooperation with the immigration services and the police to prevent or reveal the presence of terrorists on the territory of Member States, presents a major risk of discrimination. The development of these profiles for operational purposes can only be accepted in the presence of a fair, statistically significant demonstration of the correlation between these characteristics and the risk of terrorism, a demonstration that has not been made at this time.

5. In the Member States, special measures have been adopted since the attacks of 11 September 2001 to cope with the terrorist threat. They result in interference with private life or with the secrecy of communications, due to increased possibilities of using undercover agents, with the risk of provocation that this entails, in restrictions of the right of the defense (particularly by maintaining anonymity of witnesses), and in exceptional forms of detention. In the United Kingdom, the adoption of the Anti-terrorism, Crime and Security Act 2001 gave rise to a notification of a derogation addressed to the Secretary General of the Council of Europe on the basis of Article 15 of the European Convention of Human Rights, although it is doubtful that the conditions required for the use of this provision are met, or that the detention that the derogation intends to cover is admissible under the derogation that has been notified. All of these developments call for a common observation. International law on human rights is not opposed to States taking measures to protect against the terrorist threat. But as a counterpart to the restrictions that the State adopts to respond to that threat, it must imagine mechanisms by which the consequences for the guarantee of individual freedoms are limited to a strict minimum. In particular, independent control mechanisms must be provided, against possible abuse committed by the Executive or the criminal prosecution authorities. In particular, independent control mechanisms must be provided that can counter possible abuse by the Executive or the criminal prosecution authorities. In addition, restrictions imposed on individual freedoms in response to the terrorist threat must be limited to what is absolutely necessary. These restrictions were adopted to cope with an immediate threat, but one that is not necessarily permanent, and as such, they should be of a temporary character and be assessed regularly under some kind of mechanism. They should be targeted sufficiently precisely and not affect other phenomena or possibly other categories of persons, on the pretext of the terrorist threat. This is also the reason why the offence of terrorism, which can justify the use of search and special measures that constitute restrictions of individual freedoms, must be defined precisely, to avoid a risk of arbitrariness in the use that is made of these measures.

6. The lot of persons, groups or bodies targeted by Article 4 of the Council common position 2001/91/CFSP of 27 December 2001 on the implementation of special measures in the fight against terrorism – subsequently confirmed by common position 2002/340/CFSP of 2 May 2002 and 2002/940/CFSP of 17 June 2002 – clearly illustrate the risk for the guarantee of the right to effective remedy before a judge, of the absence of any judicial control in the context of Title V of the Treaty of European Union. Independently of the quality of the information on basis of which these persons were identified, it must be observed that these persons, groups or bodies undergo a serious violation of their right to presumption of innocence, and their right to preservation of their reputation. Even if it should appear possible for them to obtain compensation of the damage incurred as a result of these violations, the situation remains unsatisfactory: infringement of fundamental rights must be avoided, insofar as possible, and not simply compensated once having been committed.

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