



**OFFICE OF THE COMMISSIONER  
FOR HUMAN RIGHTS**

**BUREAU DU COMMISSAIRE  
AUX DROITS DE L'HOMME**



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**OPINION**

**OF THE COMMISSIONER FOR HUMAN RIGHTS,  
ALVARO GIL-ROBLES,**

**on the draft Convention  
on the Prevention of Terrorism**



## INTRODUCTION

1. At their 908th meeting (7 December 2004, item 2.5d), the Ministers' Deputies invited the Commissioner for Human Rights (hereafter "the Commissioner") to give an opinion before the end of January 2005 on the draft instrument to emerge from the 6th meeting of the Committee of Experts on Terrorism ("CODEXTER", Strasbourg, 13-15 December 2004). In a letter of 11 January 2005, the Chair of the Deputies formally transmitted the text of the draft Convention on the Prevention of Terrorism, as approved on first reading by the CODEXTER at the close of the aforementioned meeting (CODEXTER (2004) 27 rev 4). At the extraordinary meeting of the Bureau of the CODEXTER, 18-19 January 2005, the Commissioner was informed of the revised version of the draft Convention, which appears as CODEXTER (2004) 27 rev 5. The Commissioner has based this opinion on the revised version.
2. This opinion is submitted by the Commissioner to the Committee of Ministers in response to its invitation and pursuant to Articles 5, para. 1 and 8, para. 1 of the appendix to Resolution (99) 50 of the Committee of Ministers on the Commissioner for Human Rights, which sets out his terms of reference.
3. In preparing his opinion, the Commissioner has taken account of the wish expressed by the National Human Rights Institutions (hereafter "NHRIs") in the final declaration of their 3rd Round table (Berlin, 25-26 November 2004) to coordinate, with the Commissioner's support, *"their positions with respect to intended national, regional or international instruments which, if adopted, could endanger the exercise of human rights and fundamental freedoms"* and *"scrutinise measures taken or proposed by States to combat terrorism, in particular those ... prepared within the Council of Europe .... , with a view to ensuring that there are corresponding safeguards adequately protecting human rights and the rule of law"* (COMMDH/NHRI (2004) 2). The Commissioner has therefore undertaken consultations on the draft Convention with the European group of NHRIs and with non-governmental organisations (NGOs) active in the field to gather their points of view. These consultations were conducted first in writing and then orally at a hearing of NHRI and NGO representatives and members of the Commissioner's office, in Paris on 14 January 2005.

4. The Commissioner wishes to thank the NHRIs and NGOs that took part in these consultations for their numerous and valuable contributions. He shares many of the concerns and views expressed orally and in writing. These have frequently been taken into account in this opinion. Nevertheless, the opinion is solely the responsibility of the Commissioner and does not commit the organisations and institutions consulted. Many of them have also expressed their wish, in both written contributions and at the hearing on 14 January, to be consulted directly by the CODEXTER and be allowed to participate directly in its work. While supporting the broadest possible participation of institutions and organisations specialising in the human rights field in intergovernmental activities, the Commissioner does not consider it appropriate to comment on whether such direct consultations are possible, given the time constraints on the CODEXTER and the Committee of Ministers.
5. Finally, the Commissioner notes that the text of the Convention submitted for his examination is an early draft to which significant changes could still be made in the light of subsequent negotiations, before it is adopted. The Commissioner is aware of the need for effective and rapid European responses to the threat posed by terrorism to our democratic societies. He therefore fully understands the urgency and the pressure on the CODEXTER and the Committee of Ministers to complete the work as rapidly as possible. He hopes that the comments and proposals in the opinion will be seen in a constructive fashion, as an additional contribution to the current intergovernmental debate.

## **II. GENERAL CONSIDERATIONS**

6. In his report on his visit to Spain and the Basque Country (COMMDH (2001) 12), the Commissioner acknowledged that the threat of terrorism affected not only individual fundamental rights but also the free exercise of certain civil and political rights that underpinned and supported any democracy, the only political model compatible with the European Convention on Human Rights (ECHR, see European Court of Human Rights, judgment of 30 January 1998, *Unified Communist Party of Turkey et al.*, RJD 1998-I, § 45). In his opinion on certain aspects of the United Kingdom's derogation from Article 5.1 ECHR in 2001 (CommDH (2002)7), the Commissioner also emphasised that governments had an obligation to protect citizens and their institutions from terrorist acts.
7. Terrorism is also a problem shared by all democratic states and one with an international dimension. There can therefore be no effective response to terrorism if this international dimension is not properly taken into account. States must act in concert, share information and experience, harmonise their legislation and co-operate in preventing terrorist acts and prosecuting their perpetrators. This is why in his address to the 110th session of the Committee of Ministers (Vilnius, May 2002), the Commissioner supported the idea of a general convention on terrorism, which would offer a firm legal base for pan-European co-operation against this problem.

8. National and international responses to terrorism must be compatible with the rule of law and must not threaten the human rights *acquis* that constitutes the cornerstone of our democratic societies. Anti-terrorist measures often involve invasions of privacy, challenges to procedural safeguards and interference in the exercise of freedom of expression and association. They therefore call for strict legal safeguards. The Commissioner does not support the approach that advocates a "balance" between human rights and security issues. Protecting human rights is a precondition for any anti-terrorist measure. Such protection is therefore an integral part of such measures and is never incompatible with states' obligations to protect their citizens.
9. Against this background, the Commissioner welcomes the preparation of the draft Convention. Although the role of the current convention submitted for our consideration is undoubtedly more modest than that of a general convention, it has a real value in that it will supplement the existing body of conventions, particularly in the Council of Europe. Once it is adopted and ratified by states, the future Convention should provide a clear legal basis for co-operation in combating terrorism consistent with European human rights standards and safeguards, thereby avoiding arbitrary and unilateral measures. Moreover, the idea of a convention that considers the reaction to terrorism from a human rights standpoint is an international first that should help to show that anti-terrorist action is not synonymous of disregard for human rights, as recognised in European and international law.
10. It has to be asked whether the title "Convention for the Prevention of Terrorism" corresponds to its content. Many NHRIs and NGOs have drawn attention to a certain mismatch between the two. The Commissioner agrees with the view expressed by the CODEXTER (CODEXTER (2004) 34, para. 12), that there is no contradiction between the objective of prevention referred to in the title and the criminalisation provisions in Articles 4-7, in the sense that the offences concerned refer to actions in a preliminary phase or prior to the commissioning of terrorist acts in the strict sense. Moreover, the general preventive function of criminal legislation should not be forgotten. Nevertheless, it has to be stated that the draft Convention contains provisions, such as Articles 12 and 16, that are not preventive in nature. This is not, however, to question the inclusion of these provisions, whose value is undeniable. The CODEXTER is invited to consider changing the title to something that reflects more closely the varied nature of the instrument's provisions.

### III. COMMENTS ON THE TEXT OF THE DRAFT CONVENTION

#### PREAMBLE

11. The drafting of the Preamble is still at a very preliminary stage. With a view to assisting the CODEXTER to complete this part of the draft, the Commissioner makes the following suggestions:

- Avoid the reference to "victimisation" in paragraph 5, since this is a rather unclear expression and is presented as the cause of the growing concern. In fact it is the growing number of terrorist acts that causes growing concern and numerous victims. It would therefore be preferable to divide this paragraph into two. The first could be worded: "*Aware of the growing concern caused by the increase in acts of terrorism and the growing terrorist threat*", and the second: "*Aware of the precarious situation suddenly faced by those who suffer from acts of terrorism and in this connection reaffirming their profound solidarity with the victims of terrorism and their families*";
- The reference to international humanitarian law in the 6<sup>th</sup> indent should be preceded by a reference to international and European human rights law, since the majority of terrorist acts in Europe take place in time of peace;
- Add an explicit reference to the most important international and European human rights instruments, particularly the ECHR;
- Add an explicit reference to the rule of law and democratic values, without which there can be no guarantee of human rights;
- Delete the last paragraph of the Preamble, which seems to give a very broad definition to terrorism, since this leads to confusion and appears to contradict the approach adopted by the Convention, particularly evident in Article 1, which is precisely to avoid definitions of this type;
- Add a paragraph on the absence of any possible justification for terrorist acts, in accordance with the proposal made by the Chair of the CODEXTER (footnote 36 of CODEXTER (2004) 27 rev 5) and the Parliamentary Assembly (Opinion No. 255 (2005) 1, sub para. iii).

## ARTICLE 1

12. The Commissioner has already expressed his support, at the 110th session of the Committee of Ministers (Vilnius, May 2002), for a general convention with a definition of the notion of "terrorism" or "terrorist act". Such an approach would be better suited to fulfil the need for precision, which is inherent to the legality principle of criminal law, as embodied in Article 7 ECHR. A definition of terrorism or terrorist act in Article 1 would also make it possible to clarify the various elements of the associated offences in Articles 4-7 of the draft. This is also the approach adopted by the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, which includes a definition of the principal offence of terrorism to which the offence of financing is attached. More recently, Article 2.1 of the draft Comprehensive Convention on International Terrorism, currently under consideration by the United Nations, has proposed a precise definition of a terrorist act. The EU Council Framework Decision of 13 June 2002 (2202/475/JAI, OJ L164 of 22/06/2002, p. 3) is largely based on this definition and clarifies still further its various elements, for the purposes of EU action against terrorism.
13. Despite the undeniable advantages of a definition of terrorism in Article 1 – which could be based on or even reproduce one of the definitions mentioned above – the CODEXTER has preferred to follow the Council of Europe's traditional approach on terrorism (cf the European Convention on the Suppression of Terrorism of 1977, ETS No. 90, and its amending protocol of 2003, ETS No. 190), which is to refer to offences defined in United Nations sectoral conventions listed in the annex and stipulating, in Article 25, a method for updating them rapidly should the need arise. This option has the undoubted benefit of allowing work to proceed more rapidly, which is consistent with the urgent nature of the CODEXTER's activities.
14. However, the Commissioner reiterates his support for a general Council of Europe convention providing for the criminalisation of terrorism as a principal offence, which would also have beneficial consequences for the implementation of the Convention on the Prevention of Terrorism at national level and, more generally, for European co-operation in this area.

## ARTICLE 2

15. The word "main" should be added to "the purpose" since some of the draft Convention's provisions are not preventive in nature, as noted earlier in paragraph 10. Reference could also be made to other purposes of the Convention, such as protecting victims of acts of terrorism and facilitating international co-operation against the perpetrators of the offences referred to in the treaty.

16. The reference in this Article to "multilateral or bilateral treaties or arrangements" is too vague. Since the Convention's general approach is to prevent terrorism by adopting measures that are compatible with international human rights standards and humanitarian law, the remainder of the sentence after the words "international co-operation" could be deleted, and replaced by a separate paragraph with a general clause stipulating that measures taken in application of the Convention must be compatible with obligations arising from international treaties on human rights and the rule of law.

### ARTICLE 3

17. The reference to human rights and liberties in this Article relates to the preventive measures and therefore usefully complements the one in Article 9, which only refers to the application of the criminal provisions in Articles 4-7. However, there are considerable differences between the two forms of wording, even though they cover the same issue, namely how to safeguard human rights when adopting measures under the provisions of the Convention. There is no clear justification for this difference. The CODEXTER is therefore invited to align the wording of these two provisions to avoid any confusion or ambiguity on the subject.
18. Despite the Convention's essentially preventive purpose, as stated in its title and confirmed in Article 2, paragraph 2 does not raise the question of administrative measures to hinder the freedom of action of terrorist groups, whose preventive value has been cogently argued by Professor Tomuschat in his report to the Secretary General (CODEXTER (2004) 05, paras. 92-96).
19. Professor Tomuschat's report also states (paras. 97-99) that "*one of the essential points under the heading of administrative measures is the exchange of information on terrorists, terrorist activities and possible threats*", and that "*within the [Council of Europe] the available set of mechanisms to prevent terrorist activities has a glaring gap which it would be useful to fill in*". Moreover, Security Council Resolution 1373 now makes information exchanges obligatory. Article 3 paragraph 2 of the draft Convention confines itself to references to information exchanges at national level while Article 3*bis* makes a general reference to international exchanges of information and best practices. The question arises as to whether the absence of a clear legal framework in this area may not impede the preventive function of information exchanges, and thus encourage abuses.
20. Consideration could be given to including in the draft one or more administrative measures aimed at reducing the freedom of movement and action of terrorist groups. Similarly, consideration might also be given to a provision on the conditions, arrangements and channels for information exchanges between states.



21. The beginning of paragraph 3 might be improved if it read as follows: "*Each State Party undertakes to adopt the necessary measures to promote a culture of tolerance and to encourage inter-religious and cross-cultural dialogue, closely associating with NGOs and other bodies ...*"

#### ARTICLE 4

22. It should first be asked whether the format of this Article – and that of Articles 5, 6 and 6 *bis* of this draft – is the most appropriate from a technical standpoint. The Article starts with a paragraph defining the notion of "public provocation" – or in the other cases of "recruitment for terrorism", "training for terrorism" and "non-reporting" – while the second paragraph requires states to make the action defined in the first paragraph a criminal offence. Paragraph 1 is in fact terminological in nature and as such would be more appropriately located in Article 1, which is concerned with terminology. Moreover the latter is drafted in traditional terminological fashion ("For the purposes of this Convention ... means").
23. Having said that, the Commissioner appreciates the fact that the CODEXTER is keen to include in a single Article both the obligation to establish a criminal offence and the definition of the conduct to be criminalised. This could also be achieved by following the example of the Council of Europe treaties on specific offences which provide, within the same clause, for both the obligation to establish a criminal offence and the elements of the conduct to be criminalised (see, for instance, the Convention on the Protection of the Environment through Criminal Law, ETS No. 172, the Criminal Law Convention on Corruption, ETS No. 173 and the Convention on Cybercrime, ETS No. 185). This solution would have the advantage of being clearer and simpler and would therefore make it easier to implement Articles 4-7 of the draft Convention in the countries concerned.
24. As regards content, Article 4 covers both direct and indirect provocation to commit an act of terrorism. Direct provocation does not raise any particular problems insofar as it is already a criminal offence, in one form or another, in most if not all Europe's legal systems. On the other hand, the purpose of making indirect provocation a criminal offence is to remedy the loopholes in international legal rules by adding provisions in this area. The current wording poses problems, however, as it might prove to be too vague and might allow restrictions on freedom to express political criticism and freedom of expression in general.

25. It should be remembered that the principle requiring strict compliance with criminal law – *nullum crimen sine lege* – enshrined in Article 7 ECHR requires that criminal offences be defined in a manner which is sufficiently precise and predictable for members of the public to be able to foresee the consequences of their actions and avoid breaking the law. Moreover, freedom of expression is one of the essential foundations of a democratic society and applies, according to the Court’s case-law (see, for example, the *Lingens v. Austria* judgment of 8 July 1986, HUDOC REF 000000108), not only to ideas and information that are favourably received or regarded as inoffensive but also to those that “offend, shock or disturb”.
26. In contrast to certain fundamental rights which are absolute rights – such as the prohibition of torture (Article 3 ECHR) – and admit no restrictions, interference with, or restrictions on, freedom of expression may be allowed in highly specific circumstances. Article 10.2 ECHR lays down the conditions under which restrictions on, or interference with, the exercise of freedom of expression are admissible under the ECHR. The Commissioner notes, for instance, that incitement to racial hatred cannot be considered admissible on the grounds of the right to freedom of expression (see Article 9.2 of the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965). The same goes for incitement to terrorist violence, and the Court has already held that certain restrictions on messages that might constitute an indirect incitement to terrorist violence are in keeping with the ECHR (see *Hogefeld v. Germany*, 20 January 2000, HUDOC REF 00005340). The question is where the boundary lies between indirect incitement to commit terrorist acts and the legitimate voicing of criticism.
27. It has to be said that Article 4.1 provides little information on the basis of which to establish in what circumstances the view will be taken that there was indirect incitement to commit violent terrorist acts. The provision makes it clear that presenting an act of terrorism as necessary and justified would constitute the offence of indirect incitement, but otherwise leaves it to parliaments to define what constitutes an offence. This means that, as it stands, Article 4 allows each State Party to take different measures. This is liable to undermine the draft Convention's objective of harmonising rules and therefore make it difficult to achieve the key aim of improving international co-operation against the perpetrators of terrorist offences.

28. Furthermore, if the Article were incorporated as it stands in the States Parties' domestic law, it would be particularly difficult to predict the circumstances in which a message would be considered as public provocation to commit an act of terrorism and those in which it would represent the legitimate exercise of the right to express an idea or voice criticism freely. It would be up to the domestic court to decide, in each case, in the light of the particular circumstances, whether or not there was incitement to commit acts of terrorism, on the understanding that the judgment of the domestic court could be reviewed in due course by the European Court of Human Rights. Giving the domestic court such wide discretion could hinder compliance with the principle of legality in criminal law. Moreover, it is a moot point whether the use of the term "unlawfully" in paragraph 2 does anything to clarify the scope of the offence (this comment applies, *mutatis mutandis*, to the second paragraphs of Articles 5, 6 and 6bis).
29. The Commissioner is aware that any definition of a crime is inherently somewhat abstract and general and that it is impossible to attain absolute precision. It is the job of the judiciary to apply the provisions of the Criminal Code to the facts of the case. That said, Article 4 provides very little information about the conduct to be considered a criminal offence and gives the courts too much leeway when it comes to interpreting the Article. The requirements stemming from Articles 7 and 10 ECHR therefore necessitate an additional effort to redraft the Article to ensure greater legal precision and make sure that the expression of controversial or shocking ideas, criticisms, policies or points of view, which should continue to be legitimate in a democratic society, does not become unlawful.
30. The CODEXTER may, when it gives the draft Convention its second reading, wish to consider spelling out, as far as possible, what constitutes the offence of indirect provocation. It might wish to specify that only deliberate perpetration is covered by the provision. It would also be helpful to establish a causal link between provocation and the triggering of acts of terrorism. Lastly, the CODEXTER could specify other forms of conduct, such as the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour, that could constitute indirect provocation to terrorist violence.

## ARTICLE 5

31. Under this Article, the recruitment of another person to commit an act of terrorism or join an association or group responsible for committing acts of terrorism is a criminal offence. It follows that it is only the person recruiting who is covered by this provision and not the person recruited to the terrorist group in question. Yet in its Recommendation (2001)11 to member states concerning guiding principles on the fight against organised crime (adopted on 19 September 2001 at the 765<sup>th</sup> meeting of the Ministers' Deputies), the Committee of Ministers states that “[m]ember states should strive to criminalise the participation of any person in an organised crime group [...] irrespective of the place in the Council of Europe member states in which the group is concentrated or carries out its criminal activities” (paragraph 8 of the appendix to the recommendation). For the purposes of the recommendation, “‘organised crime group’ [means] a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes, in order to obtain, directly or indirectly, a financial or material benefit” (section I of the appendix to the recommendation). Article 5 of the United Nations Convention against Transnational Organized Crime, adopted on 15 November 2000, likewise makes it a criminal offence for someone to participate in an organised criminal group in the knowledge that his or her participation will contribute to the achievement of the criminal aim of the group in question.
32. Admittedly, Article 7.1.c. of the draft Convention provides for the ancillary offence of contributing to the commission of one or more offences referred to in Articles 4-6 of the draft Convention. As it stands, this provision would (provided the criminal acts committed or to be committed were those covered by Articles 4-6) partially cover the conduct referred to in the above-mentioned offence of membership of a criminal group. That said, the offence of membership of a terrorist group is not an ancillary offence but a self-standing offence similar to those referred to in Articles 4-6. Indeed, the criminalised behaviour – membership of a terrorist group – takes place at the preliminary stage of, or prior to, the commission of terrorist acts in the strict sense.
33. The CODEXTER could therefore, when it gives the draft Convention its second reading, consider making membership of a group acting in concert to commit acts of terrorism a principal criminal offence in the same way as recruitment for terrorist purposes. This could give weight to the preventive effect of the offences provided for in Articles 4-6 of the draft Convention and extend, in Europe, the scope of Article 2.3 of the 1997 International Convention for the Suppression of Terrorist Bombings and Article 2.5.c. of the International Convention for the Suppression of the Financing of Terrorism.

## ARTICLE 6BIS

34. Although public co-operation with the police, prosecutors and the courts is very useful, if not essential, in preventing and countering acts of terrorism and enabling the perpetrators of such crimes to be prosecuted and sentenced, it would be going too far to make it compulsory for all citizens to report any facts concerning acts of terrorism and offences set forth in the Convention. Governments must promote, facilitate or encourage civic co-operation with the police and the judiciary, but it is too much to impose a general obligation to report such acts and offences, matched by criminal sanctions, as this provision does. Moreover, this would be difficult to put into practice and could give rise to abuse. If the CODEXTER wants to keep Article 6bis, it should at least restrict its scope to targeted categories of people and to important information or evidence related to the commission of terrorist offences.

## ARTICLE 7

35. The phrase “when committed deliberately” should be inserted in paragraph 1 after the words “under its domestic law” so as to extend the application of *mens rea* to the various forms of participation in crime referred to in this Article and explicitly rule out any form of participation through negligence. The CODEXTER is therefore invited to amend this provision accordingly.

## ARTICLE 8

36. A sentence should be inserted in paragraph 1 of this Article, specifying that domestic law should on no account provide for the death penalty as a punishment for the offences covered by the Convention.
37. Paragraph 2 of this Article would make it possible to avoid inflicting non-concurrent criminal sanctions in two countries for the same offence. The Commissioner is in favour of such a rule. It is arguable, however, that the provision does not go far enough, for if the facts have been judged by the courts in one country, the perpetrator should not be tried and sentenced again in another country for the same offence. Admittedly, under Article 4 of Protocol 7 to the ECHR, the principle of *ne bis in idem* applies only to the courts of one and the same state. The Commissioner is of the opinion that, as a matter of legislative policy, this principle should apply across borders so that someone who has been convicted in one democratic country cannot be sentenced again in another country for the same offences, at least when both countries are bound by the ECHR and other relevant international instruments and share legal values and principles.

38. Accordingly, the Commissioner suggests that the CODEXTER consider providing for the principle whereby no one may be prosecuted or sentenced by a court in one country for an offence covered by the Convention in respect of which he or she has already been acquitted or sentenced by a final judgment in accordance with the law and criminal procedure of another Council of Europe member state.

#### **ARTICLE 8BIS**

39. Matters connected with finance and the confiscation of the assets of terrorist groups are dealt with in detail in the draft Convention on Laundering, the Financing of Terrorism, Search, Seizure and Confiscation of the Proceeds from Crime (cf doc. PC-RM (2004) 2 rev11), which will probably be adopted and opened for signature in the near future. Therefore, it is not necessary, or indeed desirable, to include this provision in the draft Convention on the Prevention of Terrorism.

#### **ARTICLE 9**

40. The Commissioner would reiterate the need to bring the wording of this Article into line with that of Article 3 and would refer back to the points he made in this connection. It is also debatable whether it is worth quoting some of the rights safeguarded by the ECHR, given that there is a reference to the Convention as a whole in the same Article. The reference to “practice” in paragraph 1 could be supplemented or replaced by an explicit reference to “the case-law of the European Court of Human Rights”.

#### **ARTICLE 10**

41. The point should be made that legal entities may be liable not only when the persons supervising or running the legal entity in question have participated in the criminal offence but also when a lack of supervision or control within the legal entity has made the offence possible (cf Criminal Law Convention on Corruption, ETS No. 173, Article 18). It would also be useful to include an explicit mention, as in the case of the EU Framework Decision of 13 June 2002, of the possibility of issuing a judicial winding-up order to the legal entity (cf Article 8 of the Framework Decision).

#### **ARTICLE 11**

42. It is suggested not to include a provision of this type in the draft Convention because its purpose and usefulness are far from clear, particularly if, as suggested above, the CODEXTER decides to insert a paragraph in the Preamble stating that there is no justification for acts of terrorism.

## ARTICLE 11BIS

43. The Commissioner considers that there is no need to include a provision of this kind in the draft Convention, given the existence of Article 1F(c) of the 1951 Convention relating to the Status of Refugees.

## ARTICLE 12

44. The Commissioner welcomes the inclusion of a provision on the victims of terrorism in the draft Convention. This clearly reflects the growing importance afforded to the protection of victims in the context of international human rights law, borne out, for example, by the draft European Convention on Action against Trafficking in Human Beings, which will probably be adopted and opened for signature in the near future. The Commissioner firmly believes that the victims suffer the individual physical and psychological consequences of an attack that is actually aimed at the community as a whole, as represented by its democratic institutions. It is for that reason that the community, as represented by the state, has a duty of great solidarity towards the victims of terrorism that goes further than mere financial compensation for the damage suffered, even assuming that such compensation is possible.
45. The Commissioner therefore considers that this provision should be strengthened. Firstly, a definition of the concept of ‘victim of terrorism’ should be included, either in Article 1 or as the first paragraph of Article 12, depending on the option chosen by the CODEXTER for Articles 4-7 (cf comments above in connection with Article 4). The definition could be based on that set out in Principle 1 of the draft Guidelines on the Protection of Victims of Terrorist Acts adopted by the CDDH at its 59<sup>th</sup> meeting (23-28 November 2004; cf doc.CM(2004)217). The CODEXTER could also consider, *mutatis mutandis*, the definition in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly on 29 November 1985 (see A/RES/40/34).
46. Secondly, it would be appropriate to go beyond mere assistance measures and recognise that victims have a genuine right to protection. As regards the substance of this provision, the Commissioner considers that it is not enough simply to provide for financial assistance and compensation. The protection afforded to victims should – as indeed is the case in the above-mentioned guidelines – include many other aspects, such as emergency and long-term assistance, psychological support, effective access to the law and the courts (in particular access to criminal procedures), access to information and the protection of victims' private and family lives, dignity and security, particularly when they co-operate with the courts.

47. The Commissioner therefore suggests that the CODEXTER consider expanding Article 12 and including a separate section in the draft Convention entitled “Protection of victims of acts of terrorism”, which would recognise victims’ right to protection and lay down basic standards assuring them of the protective measures mentioned above.

### **ARTICLE 13**

48. An explicit reference should be included, either in the text of the draft Convention or in the explanatory report to it, to the applicability to persons detained under Article 13, par.2 of the detention safeguards provided for in Article 5 ECHR and the right to have access to and communicate with a lawyer.

### **ARTICLE 18**

49. The inclusion of this provision would be in keeping with Article 1 of the European Convention on the Suppression of Terrorism (ETS No. 90) and with the insertion in the Preamble, as requested above (cf comments on the Preamble), of a paragraph stating that there is no justification for acts of terrorism.

### **ARTICLE 18BIS**

50. International co-operation is no doubt essential if terrorism is to be effectively countered and populations protected against the serious dangers that this crime entails for all members of the public. Co-operation should therefore be the rule and a refusal to co-operate the exception. That said, it must be remembered that when countries co-operate they are subject to obligations deriving from international human rights standards. For instance, a country cannot, on the pretext of international co-operation, hand over a suspect to another country when the latter does not intend to respect the absolute ban on the death penalty (Protocols 6 and 13 to the ECHR) or when there is reason to believe that the person in question is liable to be tortured or subjected to inhuman or degrading treatment or punishment. Nor should a country co-operate in criminal proceedings that lack some or all of the most elementary safeguards.
51. The Commissioner is therefore satisfied to note that this provision allows countries to make an exception to the general obligation to co-operate, on a number of grounds connected with respect for human rights. In the same spirit, he suggests inserting in paragraph 1 a sentence allowing a country to refuse to co-operate when the request is the result of, or would contribute to, a flagrant miscarriage of justice. Furthermore, the words “or inhuman or degrading treatment or punishment” should be inserted after the word “torture”.



52. The CODEXTER may, when it gives the draft Convention its second reading, wish to consider incorporating the suggestions in the preceding paragraph. Its attention is also drawn to the fact that the title of this Article, “Discrimination clause”, does not properly reflect its content. It is therefore desirable that it be amended.

## **ARTICLE 19**

53. The inclusion of spontaneous information as an additional form of international co-operation is another positive feature of the draft Convention. Indeed, this form of co-operation is provided for in most of the recent criminal law treaties (see, for example, the Convention on Cybercrime, ETS No. 185) and it seems desirable that it should also be possible to use it in the framework of the fight against terrorism.
54. Human rights considerations should, however, also prevail here. The use by one country, in the context of criminal or administrative proceedings against a person or legal entity for terrorist offences, of information obtained in another country by means of torture or other practices that cause serious physical or psychological duress would undermine the absolute nature of the prohibition in Article 3 ECHR and be prejudicial to efforts to combat torture, wherever it takes place. The Commissioner therefore suggests inserting a paragraph in this Article reading as follows: *“The Parties undertake not to use information communicated under this article as evidence in any criminal or administrative proceedings when there is reason to believe that it was obtained through torture or inhuman or degrading treatment.”*

## **ARTICLE 23**

55. The Commissioner considers that a reference to the European Convention on the Suppression of Terrorism (ETS No. 90) and the Protocol amending it (ETS No. 190) should be inserted in paragraph 1 of this Article.