

WAR ON TERRORISM AND RESPECT FOR HUMAN RIGHTS

Review of anti-terrorist measures taken by international, regional and national authorities and their effects on the enjoyment of human rights

Part of a series of the Human Rights Programme of the Europe - Third World Centre (CETIM)



CETIM

Acknowledgement

This brochure received support from the state (canton) of Geneva, the city of Lausanne, from the municipality of Collex-Bossy and from the Fondation K. Popper. It is part of the CETIM's Human Rights Program, itself supported by (November 2007) the Swiss Agency for Development and Cooperation (DDC), the city of Geneva and the city of Lancy, the Municipality of Plan-les-Ouates and Thônex, Caritas/Switzerland.

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War on Terrorism and Respect for Human Rights

© Europe-Third World Centre (CETIM)

ISBN: 2-88053-65-2

Geneva, November 2007

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Printing: Imprimerie du Lion, Genève

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**Part of a series of the Human Rights Programme
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INTRODUCTION

Since the beginning of this new millennium, terms such as terrorist, terrorism, fight against terrorism, etc. are part of everyone's daily life even if nobody knows exactly what is hidden behind such terms, or whether they are used adequately or not.

Moreover, in the name of the sacrosanct "fight against terrorism", anti-democratic and clearly attempting to freedoms measures (video surveillance, telephone hearings, monitoring of private electronic mails...) are imposed, even in so-called democratic countries, in an atmosphere of fear often artificially created or quickly exploited. Even worse, the resort to practices of torture, killings and/or forced disappearances are admitted by "big democracies" to save "innocent lives" while this antique practices are officially banned after decades in these countries and prohibited by international conventions.

In such a climate and with this kind of expeditious methods, human rights are violated, the State of law often mocked and the presumption of innocence forgotten. It is a situation "dreamt of" by certain governments, that hide themselves behind the "terrorist", threat to get huge military and security budgets approved to the detriment of social budgets, to repress social and political struggles - often qualifying them of "terrorist" -, etc.

This brochure does not intend to deal with all aspects of an extremely complex and highly controverted subject. It has four chapters: the first one tackles definition of terrorism and the need to make a distinction between the latter and national and social liberation struggles.

The second chapter give some examples of State terrorism in the recent past, since this aspect is in general the big absent in the debates when it is not manipulated by the powers uniquely to blackmail and mobilize the public opinion.

Chapters third and fourth are dedicated to the present situation as regards the treatment of this matter in international and regional instances. In Chapter III, we have deliberately chosen Western Europe and the United States to examine the impact of the so-called anti-terrorist measures at a national level. There are three reasons for this. Firstly, these countries, "home of human rights and democracy", slip dangerously towards regimes disrespectful of such values though they pretend the contrary. Secondly, although if refugees and migrants are particularly targeted in these countries, such measures affect also their own residents. Thirdly, given these countries' domination position in the world, the measures taken have a pernicious impact not only on human rights in general and the right to self-determination of peoples in particular, but also on the humanitarian international law and the criminal justice systems.

The phenomenon of terrorism, with social, political, ideological and economic implications, must be studied in all its forms and only then we will be able to face it efficiently, fully aware of it.

I. WHAT IS TERRORISM?

A. Definitions of terrorism

Terrorism could be provisionally defined as an action or series of violent actions directed to provoke, with a determined aim, a generalized feeling of fear, panic or terror, its targets being, most of the times, indiscriminately or arbitrarily chosen people and places.

Such feelings of fear, panic or terror can rouse the victim(s) instinctive reactions of self-defence, neutralize their will and even deprive them totally of and/or critical sense.¹

Until now, all attempts to establish a precise legal definition of terrorism have been unsuccessful. It seems even more difficult to establish the penal figure of terrorism as an offence in itself.

In December 1987, the United Nations General Assembly passed Resolution 42/159:

“Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes...”

This Resolution tries in its first part to describe the consequences of terrorism, its second part refers to psychological aspects.

Such text is far from being a definition and the paragraph that reads “...misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes...” refers blatantly to individual or group terrorism but not to State terrorism.

In the absence of a definition of terrorism as an offence in itself, there is, in a series of international conventions, a sectorial focus which defines particular acts, considering them as terrorist, as we will see below.

The absence of a penal qualification of terrorism has allowed many States, concretely after the 11th September 2001 in the United States, to establish norms and act in practice incriminating and prosecuting activities linked to social and political struggles and liberation movements, as if they were terrorist activities.

¹ See “El miedo”, in *Cuatro gigantes del alma*, by Emilio Mira y López, Editorial El Ateneo, Buenos Aires, 1950. Translated by CETIM.

B. Omission of state terrorism in national and international norms and political practices

As stated in the previous paragraph, the attempt to define or to describe terrorism in General Assembly Resolution 42/159 omits state terrorism. Neither international conventions previous to the 11th September nor international, regional and national norms previous and following the 11th September refer to it. It is not taken into account neither in policies of national states nor in those of regional and international intergovernmental organizations, although the United Nations General Assembly has condemned State terrorism more than once. For instance, on the 18th December 1972, the United Nations General Assembly passed Resolution 3034 (XXVII) that recognizes in paragraphs 3 and 4 the right of peoples to fight for their liberation and condemns colonial, racist and alien regimes.²

On the 17th December 1984, the General Assembly in Resolution 39/159 on “Inadmissibility of the policy of State terrorism and any actions by States aimed at undermining the socio-political system in other sovereign States”, urged:

“all States not to take any action aimed at any military intervention and occupation, to force changes in the socio-political system of other States or to undermine it, or to destabilize and overthrow their governments...” (art.2)

At the beginning of the 90s, the United Nations International Law Commission, tried to include State terrorism in its Draft Code of crimes against humanity and it even approved in first reading an article with the incrimination of State international terrorism. But in the end, there was no agreement in the core of the Commission and the article disappeared from the Draft.³

Legal norms should also deal with State terrorism, since, all things considered, such norms establish rules not only for persons but also for the states, as for instance the respect of human rights. And state terrorism is, doubtlessly, a grave violation of human rights.

This important absence in national and international counter terrorist norms and policies could be defined as follows:

“State terrorism is a state policy planned and implemented with the aim to combat with illegal means social struggles, to paralyse or destroy the political or ideological opposition and/or annihilate armed opposition and/or with the aim to justify the suspension of constitutional guaranties, the establishment of

² Resolution 3034 (XXVII), para. 3 and 4: “Reaffirms the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations. 4. Condemns the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms”.

³ Report of the International Law Commission (1995). General Assembly, Supplement N° 10 (A/50/10) par. 105 and foll, http://untreaty.un.org/ilc/documentation/french/A_50_10.pdf

*states of emergency and violation of human rights. The internationalization of terrorism consist, inter alia, of sending agents to other countries in order to commit crimes, giving logistical support to terrorist acts in other countries, giving support to the assassination of foreign dignitaries and terrorize the civil population with air indiscriminate attacks”.*⁴

C. The indispensable distinction between terrorism and national and social liberation struggles

It is indispensable not to mix up terrorism and “the recourse to rebellion against tyranny and oppression”, as stated in paragraph third of the Preamble of the Universal Declaration of Human Rights.

In this sense, paragraph 14 of the above mentioned 1987 General Assembly Resolution 42/159 is very important. This paragraph makes a clear distinction between terrorism and the struggle for national liberation, freedom and independence of peoples subjugated to racist regimes, to alien occupation or to other forms of colonial domination and the right of such peoples to seek and receive support.

Other General Assembly resolutions, among which the already mentioned 3034 (XXVII) of 1972 , recognize the right of peoples to fight for their liberation.⁵

⁴ See American Congress, Church Commission, “Alleged Assassination Plots Involving Foreign Leaders, An Interim Report”, U.S. Government Printing Office, November 18 1975. See also *The CIA's Nicaragua Manual, Psychological Operations in Guerrilla Warfare*, Vintage Books, Random House, New York, 1985. The Church Report refers to attempts to assassinate Fidel Castro and the assassinations, among others, of Chilean General René Schneider in 1970 and of the Congolese leader Patrice Lumumba., on the 17th January 1961, less than six months after being elected as prime minister. In a documentary broadcasted by French-German TV channel ARTE on the 3rd October 2007 (Cuba, una odisea africana), Lawrence (Larry) Devlin, CIA's head mission in Congo can be seen and heard at the time where the facts took place, saying that the order to kill Lumumba would have been given personally by President Eisenhower. Moreover, inter alia, killings of Juan José Torres, former president of Bolivia, in Buenos Aires in 1976, and Orlando Letelier, former Minister of Salvador Allende, in Washington in 1976. At the end of June 2007, some CIA's documents were disqualified, though they had many crossing-outs. They reveal, inter alia, that in September 1960 the CIA was in negotiations with some Miami Mafia men to kill Fidel Castro. Terrorist attacks committed since long ago in Cuba with the logistical support of the United States and Nicaragua in the 80s are renown. These facts were the object of a sentence by the International Court of Justice in The Hague on the 27th June 1986: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*: “The United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State”.

<http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>

⁵ See footnote 2.

Wars of national liberation are also included in article 1, subsection 4 of 1977 Additional Protocol I to the Geneva Conventions,⁶ as they are considered as international conflicts and parties to them must respect Humanitarian International Law. Similarly, dissident armed groups inside a State are recognized in article 1, paragraph 1 of Protocol II, as far as they have a command in charge, and they control part of the territory, what allows them to carry out continue and arrange military operations and apply the Protocol.

⁶ “The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”

II. SOME BACKGROUND

Latin American peoples have the experience of decades of State terrorism, with the consequence of hundreds of thousands of assassinated, disappeared and tortured people, performed in good part by the 60,000 military men formed to this task in the School of the Americas⁷ and with the proved complicity of the Security National Council, the Committee 40 (charged of secret operations) and the Central Intelligence Agency (CIA) of the United States.

State international terrorism has been tentatively described above. In war situations, a way of State international terrorism are terrorist air bombings aimed at undermining the enemy's morale, especially civilians. Such a way of international terrorism is not recent: terrorist bombings against civilian population were already used in the XIX century as naval bombings.⁸ In the XX century with the aviation, terrorist bombings reached a magnitude and cruelty without precedent. Italy performed them in Ethiopia in 1935-36, Japan in China in 1937-39, Germany and Italy during the Spanish civil war (Madrid 1936, Guernica 1937), The Nazi Germany and allies during the Second World War (Warsaw, Rotterdam London, Dresden, Hiroshima, Nagasaki, etc.).⁹ This form of international terrorism is part of the United States military doctrine, broadly used in Vietnam, Panama, Iraq, Yugoslavia, Afghanistan and again Iraq, using forbidden weapons such as the napalm, the orange substance, cluster bombs, daisy cutter bombs and termobaric bombs. Atomic bombs dropped on Hiroshima and Nagasaki were the most hideous terrorist actions in history because they were not military disproportioned actions but militarily unnecessary, as general Eisenhower stated afterwards.

As it does not have the material means or timing that the has, individual or group terrorism is handicraft and search immediate results, and do not observe

⁷ The School of the Americas was opened in 1946 in the area of the Panama Channel. It allowed the United States to train also ideologically more than 60 000 military men. In 1984 it was moved to Fort Benning (Georgia). As it faced a strong opposition even in the United States, it was closed in 2000 to be re-opened immediately with a different name: Western Hemisphere Institute for Security Cooperation. Disqualification of confidential documents has made it possible to know the School "handbooks" to learn methods such as assassination, forced disappearance of persons, torture and prosecution of persons close to the main "target". Among its students, some sadly famous names stand out, Argentinian coup Generals Viola, Videla and Galtieri, dictators Pinochet (Chile), Somoza (Nicaragua), Manuel Noriega (Panamá), Stroessner (Paraguay), Hugo Banzer (Bolivia), Juan Melgar Castro and Policarpio Paz García (Honduras), Carlos Humberto Romero (El Salvador).

⁸ English naval bombing of Canton in 1841 during the first opium war. At the dawn of the XXth century, with the aim of demanding the immediate payment of 161 million bolivars - for a debt that the Venezuelan government estimated in 19 million - twelve warships in Germany, Italy and Great Britain blocked the coasts of Venezuela in 1902 and bombed its ports.

⁹ See Michel Veuthey, *Guérilla et droit humanitaire*, Collection scientifique de l'Institut Henry-Dunant, Genève, 1976, p. 97 and foll. (Bombardements).

the consequences or sacrifices. The messianism and irrationality of their instigators and executors' behaviour often makes them become means, intentional or unintentional, of terrorism. This has happened and continues to happen in very diverse cases, regarding both the "red" terrorism and the "black" terrorism. In not few cases, the intervention in such terrorist activities of secret services, particularly of the United States Central Agency of Intelligence (CIA) has been proved (see below).

Illustration n° 1

The "tension strategy" in Italy

In the 70s and 80s there was a series of terrorist acts with an apparent aim to destabilize democratic institutions (what was called in Italy "the tenseness strategy"), among which the one in Piazza Fontana in Milan in December 1969 (17 killed and 90 injured), in Brescia, the 25th May 1974 (8 killed and 102 injured), the one of the Italicus train, the 4th August 1974 (12 killed and 45 injured), in the Bologna station, the 2nd August 1980 (85 killed and 200 injured).

Justice inquiries proved the participation of CIA agents in the terrorist act of Piazza Fontana, committed by an extreme right-wing group, Judge Salvini, first instance judge in the Piazza Fontana case, explained in an interview on the 11th December 1999 how the Central Agency of Intelligence (CIA) was involved in such attack. It was, more specifically the CIC, a CIA's component linked to the military sphere. In a little farm in On, a village of the Venetian countryside, worked the so-called "santabarbara" where "an infiltrator of the American services, expert on explosives, taught how to make bombs. One went in with nothing and went out with a bomb. The traffic was controlled by an agent of the American services."ⁱ

The first instance court that heard the proceedings of the Bologna station attack issued a judgement in July 1988 condemning, among others, Licio Gelli, chief of the *Logia Propagando Dos*, and two members of the SISMI (the service of military security in Italy). In July 1990 the Bologna Chamber of Appeals, astonishingly, revoked the first instance judgement.

Italian intelligence services (with well-known links with the CIA) made everything possible for Aldo Moro not to be found alive after his kidnapping. He was finally assassinated by the Red Brigades. Aldo Moro, supporter of the "historical commitment" with the Italian Communist Party, was a nuisance to the Italian political class (which left him to his fate) and he disturbed the United States.ⁱⁱ

Sources:

ⁱ www.clarence.com/contents/societa/speciali/010702piazzafontana

ⁱⁱ See: Commission of parliamentary inquiry on terrorism in Italy. 58th session, 24/11/99, statement by Senator Ferdinando Imposimato, former first instance judge in the Moro case. Minutes of this session in Italian in: <http://www.parlamento.it/bicam/terror/stenografici/steno58.htm#imp>. See also: Arthur E. Rowse, "Gladio: The Secret U.S. War to Subvert Italian Democracy," *Cover Action Quarterly*, Washington, D.C., n°49, Summer 1994 and, Anti-Fascist Action (AFA), "Staying Behind: NATO's Terror Network" *Fighting Talk*, London, Issue 11, May 1995.

Links with terrorist and Mafia people are constant features of the American administration. In 1943, during the Second World War, allies disembarked in Sicily and the Ally Military Administration (AMGOT) led by American colonel Charles Poletti, worked closely with the Sicilian Mafia and landowners to control the new civil administration, impede access of communists to civil service and combat by any means the increasing movement of landless peasants. An example of this is the massacre of peasants in Portella della Ginestra on the 1st May 1947. Sicily was about to become a United States “Free Associated State” at the end of the war.¹⁰ More than seventy years later, such policy still prevails: links between Bin Laden and the United States secret services existed and were public, and nobody knows when these links ceased, if ever (see Illustration n° 2).

¹⁰ See the book *Lucky Luciano* by Lino Jannuzzi and Francesco Rossi, ed. Bompiani, Italia, 1973, in Spanish: ed. Schapire, Buenos Aires, 1974. It has a very complete information, including documents of *Narcotics Bureau* and of the United Nations Congress, on the close collaboration between the *Allied Military Government of Occupied Territory* (AMGOT) and the mafia. This book was the base of the film “Salvatore Giuliano” by Rossi. Another book is *Giulio Andreotti tra stato e mafia* by the Italian senator Emanuele Macaluso, edic. Rubbettino, Messina, Italy, 1995.

III. POLITICAL AND LEGAL ASPECTS OF THE FIGHT AGAINST TERRORISM

A) Means and norms to counter terrorism at the national level

After the 11th September there was an avalanche of national means and norms against terrorism that did not appear “ex nihilo”: they consisted, essentially, of the development of existing repressive policies and draft bills of a repressive legislation clearly against freedoms and democracy, waiting to be passed, and governments took advantage of the favourable moment to make them pass almost without opposition.

All national norms are vague when defining terrorism, and this makes it possible to qualify as terrorist some activities that have nothing in common with terrorism. These norms curtail more or less importantly fundamental rights and guarantees of citizens and foreigners, especially as regards the right to immediate intervention of justice, the rights to respect private life, etc. They increase police powers, security and spying of citizens services with no judicial control. Intelligence services can also play an important role in decisions on the admission or expulsion of a foreigner.

All national norms against terrorism have not taken into account terrorism.

On the other hand, some countries have taken advantage of the situation to accentuate, with an absolute impunity, the settling of scores with national movements, as in the case of Russia with Chechnya or Israel with the Palestinians.

Many governments in Europe, Latin America and Asia have handed over relevant areas of national sovereignty in their s and there has been a sort of globalization of the School of the Americas.

Illustration n°2

Inhibited and revealing statements of an American high-level officer

In November 2001, Ambassador Francis X. Taylor, Anti-terrorism Co-ordinator of the United States State Department wrote the following:

“NATO allies agreed to supply the United States the vast range of aid that we asked for, including an unlimited use of their air space, bases facilities, marine ports, logistics, extraordinary safety measures for the American forces in Europe, exchange of intelligence data and anticipated alert air planes. (...) In order to combat terrorism abroad, we use programs related to training, and thus

we help in the protection of Americans that live and travel abroad. The Anti-Terrorism Assistance Program (ATA) of the State Department, by which we train foreign agents in security and law implementation, is one of the milestones of this effort. The program not only offers training but it also helps to promote our policies and to improve our contacts with foreign officers as well, in order to reach our anti-terrorist goals. To date, we have trained more than 20.000 officers in more than 100 countries. We hope that additional funding for the ATA program, after the 11th September attacks, will let us speed up this training (...) We have developed also a Terrorist Interception Program (TIP), that uses modern database systems in order to identify potential terrorists that try to cross international borders. This program will have the most effectiveness in countries that are important transportation centres.”ⁱ

The first paragraph of the preceding text anticipated what now is public: European governments' consent for the so-called “CIA secret flights”, which included secret prisons in some European countries, such as Poland and Romania.”ⁱⁱ

Sources:

ⁱ Ambassador Francis X. Taylor, “Terrorismo: políticas y medidas antiterroristas estadounidenses”, Office of the Anti-terrorism Co-ordinator, State Department of the United States in Agenda de la Política Exterior de los Estados Unidos de América. Electronic publication of the State Department of the United States. Volume 6, number 3, November 2001. <http://usinfo.state.gov/journals/itps/1101/jips/pj63tayl.htm>

ⁱⁱ Dick Marty, Special Rapporteur of the Parliamentary Assembly of the Council of Europe on the question of CIA secret flights revealed at the beginning of June 2007 that between 2002 and 2005, the CIA held people in secret prisons in Poland and Romania. He also stated that a secret agreement between the United States and the NATO in October 2001 allowed the CIA to proceed to these arrests and to carry out other illegal activities in Europe. The agreement between the United States and the NATO was not so secret as Francis X. Taylor, Anti-terrorism Co-ordinator of the State Department of the United States made it public in November 2001 (see preceding paragraph).

Such measures and legislations, extremely dangerous to human rights and public freedoms, were passed in different countries in all regions of the world, but we are only going to analyze, as an example, those of the so-called “western big democracies” that, in the name and representation of the “international community”, give good and bad marks at a planetary scale (or keep silent if they are “friend” dictatorships) and decide upon peace and war.

In these countries, where electronic networks are mass media means, governments have been very careful to establish a closed surveillance – that violates fundamental freedoms – over this communication means, as a way of social control. It is the consecration of 1984's George Orwell's “Big Brother”.

1. United States

The extreme situation of denying international law and humanitarian law in force is the situation of Guantánamo's prisoners (see Illustration n° 6), alleged

Taliban. Those prisoners are in a legal “no man’s land”, deprived of all their rights.¹¹

The Military Order of 13th November 2001 created secret military courts in charge of judging non-citizens accused of terrorism, in and out of the territory of the United States. The Order violates guarantees of article 14 of the International Covenant on Civil and Political Rights and Amendments 5th and 6th of the United States Constitution.¹²

On the 26th June 2006, the United States Supreme Court decided against the military courts in the Hamdan v. Rumsfeld case. But in October 2006, a new legislation was passed to authorize and regulate military courts in Guantánamo (Military Commissions Act of 17th October 2006).

In October 2001, President Bush enacted the “Uniting and Strengthening America by Providing Appropriate Tools Require to Intercept and Obstruct Terrorism Act of 2001” (USA Patriotic Act). This law contains various provisions enlarging powers of surveillance of telecommunications and eases the access to citizens’ personal data. Moreover, timing clauses (sunset clause) by virtue of which certain measures should be re-examined in two or three years do not touch but a tiny part of the new law.

According to this law, at the request of a public prosecutor or of a state, federal police will have the authority to develop the surveillance system DCS-1000 called “Carnivore” and control the suspects’ electronic mail and Web enquiries. Each Internet access supplier or any phone company will provide the FBI, without the need of a judicial order, all data about a customer. These companies cannot provide the customer all the information about the inquiry.

The law gives the FBI a broad power to access personal files (educational, medical, etc.) without judicial control and outside crime investigation. Such new surveillance powers have put under control the overall population of the United States. Provisions related to arrest of suspects and confidentiality of the arrest’s reasons, deprivation of the right to legal assistance and lengthy detention of suspects. More than a thousand people have been victims of violations of their rights, after this law was passed.

¹¹ V. Sarah Pellet, “De la raison du plus fort ou comment les Etats-Unis ont (ré)inventé le droit international et leur droit constitutionnel”, *Sur le vif, Actualité et droit international*, Revue d’analyse juridique de l’actualité internationale, <http://www.ridi.org/adi/articles/2002/200206pel.htm>; and Philippe Weckel, “Le statut incertain des détenus sur la base américaine de Guantanamo”, *Revue Generale de Droit International Public*, 2002, p. 357. <http://www.rgdip.com/>

¹² The Presidential Order on Military Tribunals is the legal tool adopted by the government of the United States that has raised more criticisms. It has been considered as discriminatory and not in accordance with international law and the American Constitution by renown intellectuals and human rights defenders. See particularly criticisms made by Robert Kodok Goldman, former president of the Inter-American Court of Human Rights, under the title: “Why President Bush’s Military Order Runs Afoul of the Law”; the article published in *Le Monde* of 29th November 2001, entitled “Après la victoire, le justice”, by Robert Badinter, former Minister of Justice and French Senator. See also the report by Dato Param Kumaraswamy, Special Rapporteur of the Commission on Human Rights on independence of judges and lawyers (E/CN.4/2002/72 par. 208); and publications by Amnesty International, Human Rights Watch and the FIDH.

The mere suspicion starts the repressive machinery and the right to be presumed innocent just disappears.

In February-March 2006, the American Congress approved and President Bush enacted the extension of the validity of the “Patriotic Act”, with some modifications demanded by congressmen.

This series of norms was completed at the end of 2002 with the INS program (Service of Immigration and Naturalization) that forces foreigners to register under penalty of arrest and expulsion in case of infringement.

Foreigners with no visa, stateless, or the ones whose countries of origin refuse to receive them, can remain in prison indefinitely.

In August 2007 the United States made a step forward in the system of surveillance and total control of population, invoking, as usual, imminent threats against security of the United States. Indeed, on the 4th August 2007, the Chamber of Representatives sanctioned with a large majority the American Protect Act 2007, a bill passed the day before by the Senate, that gives temporary power to the government to hear, without judicial permit, phone calls and to check electronic mails from foreigners that are in touch with people within the American boundaries. It is the “modernization” of a 1978 law: the Foreign Intelligence Surveillance Act (FISA) according to which the government should get permit from a court to accede to communications of suspects of terrorism in North American territory.

In July 2007 President Bush issued a decree that prohibited the CIA to use torture, assassination, rape, denigration of prisoners and mockery of their religious beliefs in their questioning to suspects of terrorism, according to provisions of the common article 3 of the 1949 Geneva Conventions. But it is the Justice Department of the United States the one that settles which questioning techniques breach or not article 3. Pleading security reasons, the American administration never revealed which questioning systems have been dismissed and which approved under the new order, but it is well known that some of the systems this order authorizes are prohibited in the military sphere.

Therefore, the decree of July 2007 is in fact legalizing practices that are contrary to international law used by the CIA (torture) in their questionings, both in the known detention places as well as in the secret ones (see Illustration n° 6).

This is, inter alia, an example of how fight against terrorism is manipulated and public opinion is misled, almost always in complicity with the mass media, invoking the law, in order to better breach it.

Professor Douglas Cassel, summarized this situation in the following terms:

“To combat the real and horrendous threat of terrorism, the United States government, sometimes with the aid of most of the population, has infringed violations of almost the whole catalogue of civil and political rights enshrined internationally in Covenants to which the United States is a State Party: - lengthy and arbitrary detentions of hundreds of prisoners in the United States

*naval base of Guantánamo, Cuba, - secret prisons, unknown even by the Red Cross, and located possibly in Europe, Asia, Africa or on the high seas, - forced disappearances, by means of detention of prisoners not registered in secret prisons, - torture and cruel, inhuman and degrading treatment of prisoners in Guantánamo, Iraq and Afghanistan, - sending of prisoners – the so-called “extraordinary surrenders” – to countries known to have torture as an usual practice, - in at least a known case in Yemen, a possible extra-judicial execution, - arbitrary and discriminatory detention of immigrants in the United States, - phone and electronic mails tapping with no judicial control, and - military trials without the minimal international rules of due procedure”.*¹³

2. France

On the 16th November 2001, two months after the 11th September attacks in the United States, a law on daily security (LSQ) was passed in France. This law included, among the acts liable to be considered as terrorist enumerated in articles 421-1 and 421-2 of the Penal Code, money-laundering and financing a terrorist organization.

Chapter IV of the law tackles the control of vehicles and persons on public highway and chapter V tackles computing security. On the pretext that “recent events prove that internet is at the core of information exchange, in particular codified and used by terrorists”, as stated by the Minister of Justice of the Jospin government, the main articles of a bill on the “Information Society” (PLSI), that was difficult to pass due to its contents attempting to rights and freedoms were re-activated, and surveillance of private electronic communications was established. This law authorizes judges to resort “to state's means submitted to the secret of national defence”. It was passed under the “plural left (wing)” government and just a member voted against Chapter V. A non-governmental organization (IRIS, *Imaginons un Réseau Internet Solidaire*) issued on the 21st December 2001 a claim against this law before the European Commission, particularly against article 29 related to the conservation, for a period up to one year, of technical data referred to a communication. In January 2002, the Commission dismissed the claim. The Commission alleged that it could not be considered because the French government had not passed the decree to implement the law in question.

On the 29th August 2002 a law on guidance and programming on internal security (LOPSI) was passed, in order to reinforce provisions that allowed judicial police to proceed “from the distance, on line” to search computer servers of access suppliers, where all information related to the citizens' connexions to

¹³ “Juicios de Supuestos Terroristas por 'Comisión Militar' en Guantánamo”, intervention by professor Cassel in the International Congress on Human Rights, Instituto de Investigaciones Jurídicas. Universidad Nacional Autónoma de México. México, D.F. 25th May 2006. <http://www.nd.edu/~cchr/publications/UNAM.com.mil.texto.5.25.06.pdf>. Professor Cassel is the Director of the Centre of Civil and Human Rights of Notre Dame Law School University of Notre Dame (Indiana) and Director of the International Centre of Human Rights of the Law School in the University Northwestern, Chicago. Translated by CETIM.

the network as well and the sending and reception of electronic mails both professional and private is stored.

On the 18th March 2003 the French Parliament passed a law on internal security (LSI) as a part of a project designed in the LOPSI the preceding year. The LSI created several new crimes and penalties and gave new powers to forces of public law and order.

In November 2005, favoured by the climate caused by the terrorist attacks committed in London in July that year, the French National Assembly voted and, in December, the Senate passed definitely a new anti-terrorist law. This law increased control over phone communications and Internet, compelling telephone system operators and Internet suppliers to keep all connexion data (dialled numbers, addressees, length, date of the call, sender) during one year; the power of police to act without a judicial permit was increased, and officers were given direct access to personal data of air, marine and train companies' passengers as well as users of phone operators; to administrative files, etc.

The National Commission on Computing and Freedoms (CNIL) considered the text to imply "grave risks". The League for Human Rights, the Judges Union and the Lawyers Union of France qualified the law as "attempting to freedoms".

Instead, the State Council considered that the law offered enough safeguards for civil freedoms and the Constitutional Council, in a decision of 19th January 2006, validated the law's article 6 provision that imposes telephone operators, Internet access "servers" and all public establishments that offer access to internet, such as "cyber-coffees", the obligation to keep all connection data during one year.

With the framework of this law, on the 2nd May 2007, the Minister of Internal Affairs of France started a technical platform of communication system data interception, for instance calls from mobile phones or electronic mails. With this system, security services are able to know who was communicating with whom, when, where and how many times. At this level, security services are not interested in the communication contents. To intervene in that aspect, they need to ask for a permit from the National Commission for Security Interceptions Control (CNCIS). This control centre is administered by the UCLAT (Coordination Unit for Anti-terrorist Struggle).¹⁴

That is to say, under the pretext of preventing terrorist attacks, there is a global control of the population and, well understood, the government can use it also to control and spy its political opponents.

3. United Kingdom

The Anti-Terrorism, Crime and Security Act (ATCSA), adopted on the 14th December 2001, allowed lengthy arrest without opening legal proceedings of

¹⁴ Jean-Marie Darmian, major of Créon, France, "Dormez tranquilles, on veille sur vous", <http://www.darmian.net/>

persons that were suspect of being terrorists. This provision is contrary to article 5 of the European Convention on Human Rights, ratified by the United Kingdom, which sets out that any detention for a long period that falls out of the strict framework of legal proceedings is contrary to law.

The ATCSA allowed the Minister of Internal Affairs to qualify persons as alleged international terrorists and hold or deport foreign citizens that were considered to be suspects.

The law settled that providers of Internet access had to keep during at least one year, all internet users' connection data. Seemingly, the Minister of Internal Affairs stated that he assumed to “have a right to control financial transactions on line, or private electronic mails”. By virtue of this law, police did not need, in many cases, a previous judicial permit to act. It was enough to get such permit from the Ministry of Internal Affairs or from one of its high-level officers to do it. This legislation has a precedent: the Regulation of Investigatory Powers Act (RIPA), adopted in 2000.

The ATCSA, was declared illegal by the Lords Court because it was incompatible with the European Convention on Human Rights as it allowed detention of suspects of terrorism in a discriminatory manner as regards nationality or immigration statute, as nine foreign citizens had been imprisoned in British jails, as suspects of terrorism for three years without a legal trial. Afterwards, on the 11th March 2005, the Terrorism Prevention Act was passed, and it was applicable both to nationals and foreigners. As suspects of crimes of terrorism could not be detained legally without a judicial decision, this law introduced a new figure, that of the so-called “control orders”, that allow surveillance of foreigners, of their movements, and even to arrest them in their domicile. Although such “control orders” are issued by the Minister of Internal Affairs, they must be ratified by a judge within a period of seven days. This is a step forward taking into account that the government's bill allowed house arrest without a judicial order.

After the London attacks in July 2005, new anti-terrorist measures were set out in the United Kingdom.

In March 2006 a new Anti-terrorist Act was passed. Some of its provisions infringe fundamental human rights. The law classifies some new crimes, such as that of “incitement to terrorism”, with a scope that exceeds international law provisions that the government had agreed to respect when classifying it. It also extends the maximum period for judicial custody without charges from 14 to 28 days for persons detained by virtue of anti-terrorist legislation.

Authorities continued to try to expel persons that, according to them, were a threat to “national security” and to impose “control orders” without judicial intervention by virtue of the Terrorism Prevention Act of 2005, to persons allegedly involved in “activities related to terrorism”, instead of taking them to justice.

While this publication is being written, a judgement on a case related to an agreement memorandum signed in 2005 with Jordan is pending. The

government asserts that “diplomatic guarantees” included in this and other agreement memoranda signed with other countries are quite reliable as to exonerate the United Kingdom of its obligation not to send anybody to a country where he/she could be at the risk of suffering torture or other ill-treatment, assumed by virtue of international human rights instruments (see footnote 39).

4. Italy

In 1979 article 270 bis, section 1 was incorporated to the Italian Penal Code, with a definition of terrorism that is circular or tautological: “he/she who promotes, constitutes, organizes, directs or finances associations to commit acts of violence with the aim of terrorism or subversion of the democratic order”.¹⁵

Law 431 of 14th December 2001, on “Urgent measures to repress and counteract financing of international terrorism” created the Financial Security Committee. Law 438 of 15th December 2001 broadened the notion of terrorism with article 270 bis reform (associations with international terrorism aims) and 270 ter (assistance to associated) of the Penal Code. Such law gave new powers to civil (SISDE) and military (SISMI) secret services’ officers and gave them some impunity by authorizing them, with the aim to obtain evidences, to take part in drug and arms traffic, to use false documents, etc.

Article 226 of the Penal Procedural Code (preventive interceptions and controls on communications) was modified. It is necessary a previous judicial authorization to pick up conversations, telephone calls and Internet messages with the aim to prevent some crimes from being committed. Thus, same rules are previewed for both Mafia and terrorism crimes, admitting “preventive interceptions” even in the absence of a penal procedure. Maximum duration of such interception can be up to forty days, however, it can be extended for successive periods of twenty days.

In July 2005, immediately after the London attacks of 7th July, in order to broaden the scope of the definition of terrorism including also its international dimension, art. 270 *six* of the Penal Code was added, under the title of “Conducts with the aim of terrorism”: “Conducts that, by its nature or context, can cause grave damage to a country or to an international organization and that are carried out with the aim to intimidate the population or to oblige public powers or an international organization to do or refrain from doing any thing, or to destabilize or destroy fundamental, constitutional, economic and social political structures in a country or international organization, are to be considered as aiming to terrorism”.¹⁶

Remarkably, this definition does not include the element “violence”, so its contents can be applied to a purely intellectual or ideological conduct.

¹⁵ Translated by CETIM.

¹⁶ Idem.

5. Spain

Title XXII, Chapter 5, Section 2 (articles 571 to 580) of the Spanish Penal Code tackles the crime of terrorism. Article 571 defines as terrorist “those who belong, act at the service of, or collaborate with armed gangs, organizations or groups whose aim is to subvert the constitutional order or to alter gravely public peace, and commit crimes of ravage or fires as qualified in articles 346 and 351 respectively”. Article 572 establishes penalties for those who kidnap, assault or kill people acting in the framework of the activities described in the preceding article. The following articles sanction different ways of participation in activities described in article 571, commission of similar acts when the perpetrator does not belong to a terrorist group (article 577) and article 578, provocation, conspiracy and proposal to commit crimes set out in the previous articles.

Article 55, section 2 of the Spanish Constitution reads:

“An organic act may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the courts and proper parliamentary control, the rights recognized in article 17, section 2 (on the duration of preventive arrest, limited to a maximum of 72 hours) and 18, section 2 (on inviolability of the home) and 3 (on secrecy of communications), may be suspended for specific persons in connection with investigations of the activities of armed or terrorist groups. Unwarranted or abusive use of the powers recognized in the foregoing organic act shall give rise to criminal liability as a violation of the rights and freedoms recognized by the laws”.

Based on repeals made by article 55, section 2 of the Spanish Constitution, the Ley de Enjuiciamiento Criminal (LEC, Criminal Procedural Law) leaves aside some warranties of detainees suspect of terrorism. For example, as a result of articles 520 bis and 503 of the LEC, a detainee suspect of terrorism can be arrested without being handed over to the judicial authorities up to 5 days instead of 72 hours and stay incommunicado up to thirteen days.

These extended terms of arrests without intervention of a Judge and isolation can lead, and in practice so they do, to infringe to the detainee illegal pressures.

But the legal technique of the Spanish Penal Code when qualifying the crime of terrorism is quite precise, as article 71 describes the terrorist organization and its motivations, but in order for the crime to be shaped as such, its members must commit determined crimes as described in other parts of the PC (fires or ravage that put in danger people) as well as in article 572 (wounds, kidnapping or death of persons).

Hence, it has not the ambiguity of other national or international anti-terrorist norms, that allow to impute as terrorist some activities that are not really such.

On the 27th June 2002, the Spanish Congress passed the LSSICE or “Internet Act”. This law obliges providers of Internet access to keep connection and traffic data of their customers during at least one year. Thanks to an amendment inserted by the opposition, these are not going to be used by police or intelligence services without a Magistrate guarantee.

B. Counter-terrorist measures and conventions at the regional level

There are several conventions and other regional measures destined to combat terrorism. Among them: the Arab Convention on Suppression of Terrorism, Cairo, 22nd April 1998; the Islamic Conference Organization Convention to Combat International Terrorism, Ouagadougou, 1st July 1999; the African Unity Organization Convention to Prevent and Sanction Terrorism, Algiers, 14th July 1999; the South Asian Association for Regional Cooperation (SAARC) Convention on Suppression of Terrorism, Kathmandu, 4th November 1987; the Treaty on Cooperation between States Parties of the Community of Independent States to Combat Terrorism, Minsk, 4th June 1999; the European Convention on Suppression of Terrorism, Strasbourg, 27th January 1977 and in the same region, several measures and decisions adopted after the 11th September 2001.

Finally in the American continent, the Organization of American States Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance was passed in Washington in February 1971 and the Inter American Convention Against Terrorism was passed in Barbados in June 2002.

We will analyse particularly norms and other measures adopted in Europe after the 11th September at the two institutional levels: the Council of Europe and the European Union as well as the Inter-American Convention against Terrorism. This can give an idea of the orientation of regional anti-terrorist norms in general.

1. On the European continent

The Council of Europe¹⁷

The first specifically anti-terrorist European treaty, the European Convention on Repression of Terrorism, was passed by the Council of Europe, in January 1977, entered into force in August 1978 and in June 2007 47 European States were parties to it.

After the attacks of the 11th September 2001 in the United States, the Council of Europe decided to update the Convention with an amendment Covenant that was passed by the Committee of Ministers of the Council of Europe on the 13th February 2003. In June 2007, the Covenant had been ratified by 20 States and therefore was not in force because to that end has to be ratified by all parties to the Convention, that is, 47 States.

¹⁷ The Council of Europe was founded in 1949 by six States of Western Europe and nowadays 47 European states are part of it, among which 21 from Central and Eastern Europe. The Council of Europe passed the European Convention on Human Rights in 1950 and successive additional covenants to the Convention. This institution is different from the European Union, formed by 27 European states.

Remarkably, in the Covenant there is a substantial increase of crimes that in no case might be considered as political crimes as a reason not to grant extradition.

The Parliamentary Assembly of the Council of Europe¹⁸ in Recommendation 1664 of 2004 proposed celebrating a new Convention, that was approved in 2005 and entered into force, with seven ratifications,¹⁹ on the 1st June 2007. This Convention does not define terrorism either, and article 1 states that it is a terrorist offence any offence that is applicable as defined in the international treaties of the Annex where ten international treaties on certain terrorist activities or related to those activities are enumerated (see, below, International Conventions on terrorism).

Article 5 of such Convention is to be outlined as an anti-pattern of what is understood as penal breach in a state of law that requests an objective, precise and explicit delimitation of such breach. Article 5 (Public provocation to commit a terrorist offence) states that:

“it is terrorist offence the “distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed”.

Article 20 of the Convention (Exclusion of the political exception clause) states that none of the offences mentioned in articles 5 to 7 and 9 will be considered for the purpose of extradition or judicial cooperation as a political offence or as an offence related to a political offence or as an offence inspired by political motives.²⁰

The Council adopted on the 15th July 2002 the “Guidelines on human rights and the fight against terrorism”. Article IX of such guidelines admits “certain restrictions to the right of defence” and article XII, although it specifies that all requests for asylum may be the object of an effective remedy, also states that “when the State has serious grounds to believe that the person who seeks to be granted asylum has participated in terrorist activities, refugee status must be denied to that person”. Because of this provision, those who finally decide are intelligence services and the right to an effective remedy has fallen on deaf ears.

The same article XII contains the prohibition of collective expulsion of aliens, prohibition already set out in article 4 of the 1963 Covenant 4 to the European Convention on Human Rights and Fundamental Freedoms. In spite of this, at the end of June 2002, leaders of the European Union met in Seville and agreed to start a “community policy of returning of illegal residents” that comprises, with the aim to reduce expenses, joint repatriation of “illegals”

¹⁸ The Parliamentary Assembly of the Council of Europe (not to be confused with the European Parliament of the European Union) is made up of representatives of the 47 national Parliaments of Member States. It has 636 members (318 assigned and 318 substitutes).

¹⁹ Until June 2007 it had been ratified by Albania, Bulgaria, Denmark, Romania, Russia, Slovakia and Ukraine.

²⁰ The text of the 1977 and 2005 European Council Conventions and the 2003 Covenants of amendments to the 1977 Convention can be found at: <http://www.conventions.coe.int/>

from different European countries in the same plane, when they have a common destination,²¹ that is to say collective expulsions, to accelerate the “final solution” to the problem of clandestine immigration in Europe.

The European Union

On the 27th December 2001, the Council of Ministers of the European Union, based upon Security Council Resolution 1373, adopted four measures on terrorism, two common Positions on the fight against terrorism, a Regulation and a Decision. On the 13th June 2002, the Council of Ministers of the European Union adopted a framework decision.

All this heap of measures comprises a very broad definition of terrorism and, above all, of “persons, groups and entities involved in terrorist acts” (article 1, paragraph 2 of Common Position 931 of December 2001) that allows to qualify as terrorists a broad range of persons and organizations. In Common Positions 931 of 2001 and 976 of December 2002 Member States are invited to write lists of persons, groups and entities involved in terrorist acts.

Based on them, the Council of Ministers issued lists of persons and organizations qualified as terrorist. Such lists are submitted to periodical revisions, but can be established without judicial control (paragraph 4 in fine of article 1 in Common Position 931 of 27/12/01).

All these measures are binding to all States Members of the European Union with no previous consideration by national Parliaments. Exclusion in such measures of any reference to state terrorism appears explicitly in point 11 of the framework decision of 13th June 2002 that excludes “activities carried out by armed forces of a State on the exercise of their official duties ...”.

The first part of such point reads: “Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, are not governed by other rules of international law ...”.

According to this interpretation, armed forces of rebel groups and national liberation movements should also be excluded as they are armed forces within the framework of humanitarian international law (article 3 common to the four 1949 Geneva Conventions, article 4 of the 3rd Convention and article 1 paragraph 4 of Covenant I and paragraph 1 of article 1 of the 1977 Covenant II). In spite of this, Common Position 462 of the Council of 17th June 2002 and Council Decision 460 of the same date, include in the list of terrorist organizations, armed groups that should not be there, as for example, the Fuerzas Armadas Revolucionarias de Colombia (FARC). If these organizations breach humanitarian law, they must be sanctioned in the frame of humanitarian international law, and not as terrorist organizations. In the case of the FARC, the Council is taking a political position with no legal base. Moreover, it makes the European Union abandon its role as mediator in the conflict. In June 2003,

²¹ *El País*, 24th June 2002, p. 1-2.

the Spanish Basque political party Herri Batasuna, already declared illegal in Spain in doubtful circumstances as regards constitutional guarantees, was declared to be a terrorist organization by the European Union. Such a qualification of a parliamentary political party by the European Union without guarantees of due process, although it was justified for its alleged links with a terrorist organization and, that follows, as an echo of the qualifying of that same party as terrorist by the government of the United States, is an extremely dangerous precedent for the future of democracy in Europe.

However, there are differences between the contents of measures adopted on the 27th December 2001 and the framework decision of 13th June 2002. The latter refers to respect of fundamental rights (Point 10) totally forgotten in the 27th December 2001 measures, and legal and legislative autonomy of national States is better respected.

In 2001, the European Commission passed two draft framework decisions of the Council of Ministers of the European Union, one related to harmonization of Member States' legal legislations with the view to settle a common definition of terrorist act and to provide common penal sanctions; the other on the creation of a mandate of European arrest. On the 6th February 2002, the European Parliament voted by a big majority in favour of both draft framework decisions.

Illustration n°3

The European arrest warrant sets the end of the asylum right in Europe

“An end to the complex extradition procedures

No more harbouring of criminals in the EU.

According to the new European arrest warrant, sentenced criminals or suspects accused of grave offences in a Member State of the European Union may not seek for refuge in another country while courts begin long and sometimes useless proceedings of extradition.

In the future, a suspect detained anywhere in the EU may be easily and rapidly extradited to be judged in the state where the alleged crime was committed...

...How does the European arrest warrant work?

Judicial authorities of a EU Member State may issue a European arrest warrant related to a person accused of any offence punishable by imprisonment for a minimum period of one year or to a person already sentenced to imprisonment for a minimum period of four months. This includes, for instance, persons that escaped police, that breached liberty on bail in his/her country of origin or escaped detention.

The European arrest warrant is quicker and easier than extradition. Governments cannot refuse to send its own citizens to be judged in another EU member State any more, and must surrender suspects in the term of three months, or 90 days, since the arrest.”

Source:

Directorate General of Freedom, Security and Justice of the European Commission, “Information and Communication” Unit, October 2004, http://ec.europa.eu/justice_home/key_issues/european_arrest_warrant/eaw_1204_en.pdf

Illustration n°4

Some concrete cases of anti-terrorist norms and practices that violate human rights

“To shoot to kill”

On the 22nd July 2005 at 10:05 am in Stockwell station of the London underground, officers of the anti-terrorist brigade killed Jean-Charles de Menezes by shooting him seven times in the head. The drama took place after the 7th July attacks against transport in the British capital and the frustrated attacks of 21st July. After the killing, London Police tried to justify their action on the “suspicious” clothing and behaviour of the victim. But in the proceedings, it was proved that there had not been any suspect attitudes by de Menezes and that his clothing had nothing strange. The prevailing speech leaded by authorities, politicians and media, qualified the act as “tragic”.

After the de Menezes' death, Chief Police Ian Blair justified the “shoot-to-kill” policy to face alleged kamikazes: “It is useless to shoot at the chest of someone that probably has the bomb just there. It is also useless to shoot at other parts of the body because if the kamikaze falls down, he/she will make the bomb explode. The only way to react is to shoot at the head”.ⁱ To Lord Stevens, Ian Blair's predecessor, such principle is “...fair, despite the risk of a tragic error”.

Jean-Charles de Menezes' death is the consequence of one of the multiple responses of the British government to terrorist threats: “shoot-to-kill”. British police sent its experts to Israel, Russia and Sri Lanka to get informed on techniques used to face suicide attacks and on the 22nd January 2003 adopted officially in a meeting held at the MI5 headquarters the “shoot-to-kill” policy, that consists of neutralizing imminent suicide attacks by killing the suspect kamikazes. Such a decision has never been debated in the British Parliament.ⁱⁱ

This “modus operandi”, though theoretically limited to very particular situations of imminent danger of a suicide attack, is in itself a high risk to the population as a whole, risk that increases exponentially when applied unjustifiably and irresponsibly based on mere conjectures or wrong appreciations, as in the case of de Menezes. Such “shoot-to-kill” or “easy trigger” policy is put into practice on a large scale (victims number hundreds) in many countries against common delinquents, real or supposed, and against participants in social protests.

The UN Special Rapporteur on extra-judicial, summary or arbitrary executions has shown his concern on these policies in the following terms “The rhetoric of shoot-to-kill serves only to displace clear legal standards with a vaguely defined licence to kill risking confusion among law enforcement officers, endangering innocent persons, and rationalizing mistakes, while avoiding the genuinely difficult challenges that are posed by the relevant threat.”ⁱⁱⁱ

The cases of Andrej Holm and Heiligendamm: examples of abusive qualification of terrorist acting

In 2006 the Germany Federal Attorney started an inquiry on seven members of the Militante Gruppe (MG), under the accusation of belonging to a terrorist organization, based upon article 129a of the German Penal Code, entitled “constitution of a terrorist organization”. According to the German Federal Office of Criminal Investigation (Bundeskriminalamt, BKA) this group is responsible of about twenty attacks against goods and the burning of private and police vehicles. The BKA considers that this group's aim is to “destroy the society structure and to establish a world communist order”.

With regard to such investigation, on the 1st August 2006, sociologist Andrej Holm was arrested and after being released, on the 22nd August, he was object of espionage techniques provided by German anti-terrorist laws: placing of an electronic device in his car to be able to locate him any time, pursuits, reading of his electronic mails, hearing of telephone conversations, tracing of his mobile phone, etc.

The police accused Holm of “intellectual complicity with a terrorist organization”, based essentially upon a comparative study on the language used in his scientific publications and that of the Militante Gruppe's manifestos. The sociologist is reproached for having provided the MG with a theoretical arsenal.^{iv} After three weeks of arrest, Holm was released on the 22nd August, maybe as the result of protests of renown sociologists, with the support of the American Association of Sociology.^v But the arrest warrant against Holm has not been lifted.^{vi} Such arguments make any scientific activity potentially criminal.

Heiligendamm 2007

Accusations against Holm and the alleged members of the MG are closely linked to actions undertaken by the German police against militants that demonstrated during the G8 summit in Heiligendamm. These operations were based on article 129a of the Penal Code referred to the “constitution of a terrorist organization”.

Before the summit, a metal fence of 12 kilometres, with a cost of 20,5 million dollars was built, and the 9th May some forty breakings and enterings in extreme left institutions in northern Germany took place. During demonstrations, in which 15,000 persons participated, and 1,200 arrests were performed, according to defence lawyers most of them had no legal justification. Lawyers that follow the case deem that 90% of such arrests had no legal grounds.

European arrest warrant

On the 7th December 2004 Jean-François Lefort was arrested in his domicile in Bayonne. He was spokesman in France of Askatasuna, an organization for the defence of Basque political prisoners. Some hours later the then minister of Internal Affairs, Dominique de Villepin, reiterated the total determination of the French government to cooperate with the Spanish government in the fight against ETA.^{vii} Lefort was imprisoned under the accusation of “association with criminals with relation to a terrorist project” and submitted to procedural. In January 2005, at the request of Spanish Judge Baltasar Garzón, a European arrest warrant was issued against Lefort, with the aim to be surrendered to Spain.

The organization Askatasuna is legal in France but in Spain it is considered to be linked to ETA which is illegal in that country, and was declared as terrorist organization in European Common Position of 27th December 2001.^{viii} In a communiqué of 21st January 2005, the French League for Human Rights, with connection to the arrest warrant against Lefort issued at the request of judge Garzón, denounced “inconsistencies of the European arrest warrant established too suddenly and contrary to the right of defence and individual freedoms.”^{ix} The Tribunal Union of France also stated its disapproval in similar terms. The General Attorney was favourable to implement the warrant but finally the Court overruled it.

Sources:

ⁱ Statements published in *Le Monde* of 26th July 2005, p. 2

ⁱⁱⁱ For more details on the de Menezes case, see Nick Vaughan-Williams, “The shooting of Jean Charles Menezes: New Border Politics?” in *Alternatives*, 32, 2007, p. 177- 195. See also Peter Taylor, in *The Guardian*, 8th March 2006.

ⁱⁱⁱ Report E/CN4/2006/53.

^{iv} Among the arguments upon which Holm’s charge was based: his intellectual capacity to write MG’s complex texts, the use, at the service of MG, of its privileged access to libraries and to investigation centres, his “conspiratorial” behaviour and his active role in Heiligendamm’s the protests during the world economic summit.

^v Richard Sennett, Saskia Sassen, Mike Davis, Craig Calhoun, Peter Marcuse and the president of ASA, Frances Fox Piven, among others.

^{vi} For further information see: Martin Kreickenbaum “Un sociologue de Berlin incarcéré durant trois semaines: La science suspectée de terrorisme”, 24th August 2007; Richard Sennett and Saskia Sassen “Guantánamo in Germany”, *The Guardian*, 21th August 2007.

^{vii} *Libération*, 8/12/04, p. 18)

^{viii} Common Position of the Council of 27th December 2001 related to implementation of specific measures with a view to fight against terrorism 2001/931/PESC.

^{ix} Communiqué of LDH: “Terrorismo – Orden de arresto europea. Lefort no debe ser entregado a las autoridades españolas”, 21st January 2005

2. *On the American continent*

Inter-American Convention against Terrorism

It was adopted by the OAS General Assembly in Barbados on the 3rd June 2002. (AG/RES. 1840 (XXXII-O/02)).²² It was agreed upon in a record time, under the pressure of the United States, without discussion and, without listening to objections and proposals made by some NGOs, as the one to postpone the discussion of the draft to have the chance to hold an open debate. At the beginning of the meeting 17 of the 34 governmental delegations made different observations to the project. But when Colin Powell, the then USA Secretary of State, joined the meeting in order to “put the house in order”, and made the 17 delegations displace such observations.

a. Lack of agreement in the definition of terrorism

In the Organization of American States Assembly, that approved the Convention, there was no agreement on the definition of terrorism, and this was indicated by the delegation of Ecuador: “The government of Ecuador deplors that Member States did not reach an agreement on the qualification of terrorism and as an international crime against humanity”.

b. Omission of State terrorism

This observation can seem obvious, but it is noticeable that the Convention only deals with terrorism carried out by individuals or groups, that is to say against established order, and it does not deal with State terrorism at all. As already stated in I-2, an international Convention should tackle also State terrorism, because conventions do not establish rules for persons but, above all and especially for States, as for example respect for human rights. And State terrorism is, doubtless, a grave violation of human rights.

So, as the Convention does not deal with State terrorism, it incurs in a grave omission that ignores one of the basic international law principles: that of State liability.

c. Introduction in the Convention of analogy in penal matter

In penal matters, the general principle is that there is no crime nor sanction applicable without a previous law defining precisely the act wanted to be qualified as a crime. It is the principle *nullum crimen, nulla poena sine lege*. As regards implementation of international treaties in domestic law, there are - as an outline-two legal systems: the dualist, that requests a law or national rules in order for the treaty to be applicable; and the monist, according to which any treaty ratified by the respective State is self executing and, thus considered as domestic law.

²² States Parties to it are: Antigua and Barbuda, Argentina, Brazil, Canada, Chile, Costa Rica, Dominican Ecuador, El Salvador, Grenada, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, United States, Uruguay and Venezuela.

Obviously, if the international treaty is not sufficiently precise or if it contains an invitation to States Parties to “take measures”, even if the legal system is monist, some domestic law or regulations are necessary.

In the particular case of an international treaty that qualifies or describes criminal behaviours, some experts in international penal law adopt an approach clearly dualist and say that international norms establish “norms of behaviour” that describe the prohibited act but do not fix the sanction, as the repressive norm that incriminates the criminal behaviour and establishes the sanction, is a matter of national law.²³

This approach needs qualifying, as not always the description of the act prohibited by the international law and the definition of crime that can be formulated by domestic legislation is so different. For example, crimes against humanity as enumerated in the Statute of the International Penal Court and the Convention on Prevention and Sanction of the Crime of Genocide could be directly applied in domestic law.

Another approach, the monist one, admits direct application as internal penal law of an international treaty that describes a crime, if this has been ratified by the State where it has to be applied.²⁴

But whatever legal system or approach of a State (monist or dualist) as regards implementation in internal law of an international treaty referred to crimes, if in the latter the act intended to be qualified as crime is not clearly defined, ratification of the treaty will not be enough to consider it as a penal figure in domestic law.

As already said there is not, at national or international level, a legal definition of terrorism as a crime. And “without a precise definition of terrorism it is impossible to establish a terrorist offence”.²⁵

The Inter-American Convention does not define terrorism as an offence in itself either and, at a first glance, it seems to have adopted, as thus should be, the sectorial approach, mentioning, in article 2, international instruments that refer to certain actions described as terrorist crimes.²⁶ But the whole of the text presents in this regard a vagueness that can be intentional. Indeed, first

²³ André Huet and Renée Koering-Joulin, *Droit pénal international*, Presses Universitaires de France, 1993, paragraph 58 and foll. According to this criterion, Costa Rica's Legislative Assembly, when adopting the Inter-American Convention against terrorism made, among others, the following interpretative statement: article 2 of the Approval Act of such Convention settles that “The Republic of Costa Rica interpretes that mechanisms and procedures established in this Convention for the cases of section 1 of article 2, will be applicable as each of the acts described in such conventions is qualified as a crime in Costa Rican penal legislation”.

²⁴ When applying such approach, the governments of Ecuador, Guatemala and Venezuela made, each, statements in the sense that they will not apply international Conventions enumerated in article 2 of the Inter-American Convention against terrorism to which they are not parties.

²⁵ Catherine Bourgues Habif, “Le terrorisme international” in *Droit International Pénal*, under the direction of H. Ascensio, E. Decaux and A. Pellet, Center of International Law of the University of Paris X, Nanterre, Editions Pedone, Paris, 2000, p. 459.

²⁶ V. paragraph: “International norms in force”.

paragraph of article 2 states. “For the purposes of this Convention, “offences” means the offences established in the international instruments listed below”...

In other words, the Convention begins by limiting terrorist offences to those acts described in several international conventions. For this reason, articles 4, paragraph 1 section c); 5, paragraph 1; 6, paragraph 1; 8; 9; 10, paragraph 1; 11, contain this “the offences established in the international instruments listed in Article 2 of this Convention”.

But in other parts of the Convention, as its title, article 1 (...eliminate terrorism); 4, paragraph 1 and paragraph 1, sections a) and c) in fine; 7 (...“to detect and prevent the international movement of terrorists”). These articles refer to terrorism and terrorists, as if terrorism was qualified as an autonomous crime, yet it is not.

So, the Inter-American Convention leaves the door opened to the violation of principle *nullum crimen, nulla poena sine lege*. Through this opened breach to extend by analogy of the penal law,²⁷ arbitrary interpretations made by each of the States will pass, where probably diverse ways of social fights and opposition policy as terrorist crimes will enter, according to circumstances and the interest of governments. This will lead to grave violations of human rights related to opinion and expression and the right to a due process.

This extension by analogy of certain crimes to other acts not considered in the penal figure will also mean to include automatically in the category of terrorist, opposition armed groups, although this should not be like that, since their legal framing is common article 3 of the four 1949 Geneva Conventions, whenever they are under a responsible command, exercise control over a part of the territory and can carry out sustained and concerted military operations (article 1, par. 1 of Protocol II additional to the Geneva Conventions).

d. Abandonment in the Convention of fundamental principles as regards extradition, the exception of political crime, refuge and right of asylum

Article 10 of the Convention (Transfer of persons in custody) with the pretext of momentary transfer of a person who is being detained, allows extradition de facto in paragraph 3, with the agreement of the holder State and the requesting State. In Latin America there is a long tradition in the issue of diplomatic and territorial political asylum, reflected in the Inter-American Conferences of 1928 (La Habana), 1933 and 1939 (Montevideo) and 1954 (Caracas).

Article 11 establishes the inapplicability of the political offence exception.

Political offence is difficult to define, though it is generally accepted that the element that qualifies the act is the motive. Thus, Professor Jiménez de Asúa says that the political offender seeks to improve political forms and life

²⁷ Article 22, paragraph 2 of the Statute of the International Criminal Court reads: “The definition of a crime shall be strictly construed and shall not be extended by analogy”.

conditions of majorities. Its motivation is altruistic. If he/she achieves the goal, he/she will be a hero, if not, he/she will be an offender.

Acts particularly detestable such as indiscriminate killing of civilians or grave violations of humanitarian international law should not be covered by political motivation.

This difficulty to qualify the indiscriminate act as political or common crime (qualification is eminently subjective) has been clarified in the 1933, 1939 and 1954 Conventions with the approach that offers major guarantees of objectivity: leaving qualification of the indiscriminate act to the State that grants asylum (article 2 of the 1933 Convention, article 3 of the 1939 Convention and article 4 of the 1954 Convention). Obviously, the State object of the indiscriminate activity will always qualify it as a common offence.

Article 11 of the Convention abandoned such approach, establishing as an obligatory general rule for States parties to exclude activities qualified as political offence, related to or based on political reasons offence.

Thus, the margin of appreciation given to the State that grants asylum has disappeared and, in all cases, whatever the circumstances and the nature of the act, its author will be treated as a terrorist, with the imprecision that such description has in the Convention, that leaves the door opened to extension by analogy, as said in the preceding paragraph c).

Article 12 establishes that the quality of refugee will not be recognized “to persons with respect to which there are founded reasons to consider that they have committed an offence established in international instruments listed in article 2 of this Convention” and article 13 has the same provision as regards asylum.

With these three articles, signatory governments have renounced to a long Latin-American tradition as regards extradition, political offence, refuge and asylum and have renounced also to the sovereign power of States to appreciate and decide on this matters.

Solely Chile, Costa Rica and Mexico made some statements each, to claim the right of asylum and their sovereign power of decision as regards asylum and extradition.

C. International Conventions in force

At the international level the lack of agreement on a definition of terrorism in general has led to the signing of conventions referred to certain terrorist actions.

Thus, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents on the 14th December 1979, the International Convention for the Suppression of Terrorist Attempts Perpetrated with Bombs on the 15th December 1997, the International Convention for the Suppression of

Terrorism Financing on the 9th December 1999 and the International Convention for Repression of Nuclear Terrorism Acts, on the 13th April 2005.

Outside the scope of the General Assembly there are also several International Conventions destined to combat concrete forms of terrorism: the Convention for the Repression of the Illicit Taking Possession of Aircrafts, the Hague on the 16th December 1970; the Convention for the Repression of Illicit Acts against Civil Aviation Security, Montreal , 23rd September 1971; the Convention on the Physical Protection of Nuclear Materials, Vienna, 3rd March 1980; the Protocol for the Repression of Illicit Violent Acts in the Airports that Provide Services to the International Civil Aviation, complementing the Convention for the Repression of Illicit Acts against Civil Aviation Security, Montreal, 24th February 1988; the Convention for the Repression of Illicit Acts against Maritime Navigation Security, Rome, 10th March 1988 and the Protocol for the Suppression of Illicit Acts against the Security of Fixed Platforms Summoned in the Continental Platform, Rome, 10th March 1988.

D. Connected vessels between terrorism financing and transnational financial capital

Money laundering, which keeps the coffers of terrorism well supplied, seems to be hardly affected by anti-terrorist measures, despite the existence of the International Convention for the Suppression of Terrorism Financing, adopted by the UN General Assembly on the 9th December 1999, and of several Security Council Resolutions and the Financial Action Task Force (FATF).²⁸

The French economy newspaper *La Tribune* on the 11th September 2002 had this headline: “Tax havens are untouched, terrorists' money too” and subtitled: “Despite declaration of intents the day after the attacks nothing – or almost nothing – has been done on surveillance of tax havens”. The article states, in this respect, the negative attitude of big powers and the poor result: 10 million frozen dollars of an overall available to terrorist groups estimated in 1,000 million over the 5,000 million under shelter in “offshore” centres. The article concludes: “Tax fraudsters, corrupted persons and, above all, transnational corporations that constituted huge black boxes share the 4,000 million left...”.²⁹

²⁸ The Financial Action Task Force (FATF) is a formally independent organism established by the G-7 Summit celebrated in Paris in July 1989, with the purpose of examining measures led to combat money laundry. In 1990 the GAFI issued 40 recommendations to face this problem. In November 2001, it approved eight recommendations destined to be applied by its members to combat terrorism financing, among others, the enforcement of bank controls. Its mandate ended in 2004 but it was extended until 2012. Its Secretary works in the OECD headquarters. It imposes its decisions and recommendations to states with the threat, in case of infringement, to isolate them from the international financing system. <http://www.fatf-gafi.org/>

²⁹ *La Tribune*, Paris, 11th September 2002, p. 6.

The real reason is that international financing capital is so intertwined with interests (licit and illicit) that it is impossible to distinguish that destined to terrorist activities, be it promoted by some western democracies or by the Al Qaeda constellation.³⁰

Illustration n°5

Dangerous relations between western elites

In the morning of the 11th September 2001, while the aircrafts crashed into the Twin Towers, the Board of Carlyle had a meeting in Washington with the presence of Yeslam Bin Laden, half brother of Osama Bin Laden.

The Carlyle Group is an important transnational investing fund based in Washington. It is composed by Mr. Bush father, the former United States Secretary of State, James Baker, the former Great Britain Prime Minister, John Major and members of Bin Laden's family. Although it is said that the latter left the Group after the 11th September. The Carlyle Board meeting of 11th September 2001 in Washington was presided by its then Director, Frank Carlucci, former United States Defence Secretary and former CIA Assistant Director.

The following day, 12th September all Bin Laden's family left the United States to Saudi Arabia in the only civil flight that was authorized that day.

Jean Ziegler, in his book *Les nouveaux maîtres du monde*^{*} tells that in April 2002 the Carlyle Group met at a dinner in Geneva with the most relevant bankers in the city and some of their customers. Mr. Bush father was also there. What nobody expected was the presence at the door of Yeslam Bin Laden, Osama Bin Laden's half brother, showing his invitation to the dinner as shareholder of the Group. The encounter Bush-Bin Laden at the dinner never took place finally because security guards did not let the Saudi multimillionaire in.

Source:

* Jean Ziegler, *Les nouveaux maîtres du monde et ceux qui leur résistent*, Fayard, Paris, October 2002, p. 55 and 56.

³⁰ V. John Cooley, "L'insaisissable argent d'Al-Qaida" in *Le Monde Diplomatique*, November 2002.

IV. TREATMENT OF THE TERRORISM MATTER AT THE UNITED NATIONS

A. General Assembly

Until now all attempts to reach an international definition of terrorism have failed due, among other things, to the different existing approaches, political especially, on the matter. The Working Group of the Sixth Commission of the General Assembly and the Special Committee of the U.N. General Assembly charged with the task to elaborate a general convention on terrorism³¹ have not been able to establish a legal definition of terrorism.

Earlier in this publication, in the paragraph “Definitions of terrorism” we have already mentioned Resolution 42/159 of the General Assembly of December 1987. Its paragraph 14 makes a clear distinction between terrorism and the fight for national liberation, for freedom and independence of peoples submitted to racist regimes, to alien occupation or to other forms of colonial domination and to the right of such peoples to seek and receive aid.

The same paragraph also mentions Resolution 39/159 of 1984 of the General Assembly on “Inadmissibility of the policy of State terrorism and any actions aimed at military intervention and occupation, forcible change in or undermining of the socio-political system of States, destabilization and overthrow of their Governments... and that of 18th December 1972 – 3034 (XXVII) – that recognizes in paragraphs 3 and 4 the right of peoples to fight for their liberation and condemns terrorist actions by colonial, racist and alien regimes.

General Assembly Resolution 60/158 of 2005, reaffirms that States must make sure that measures adopted to combat terrorism are in harmony with their obligations according to international law and, particularly to international norms on human rights, refugees and humanitarian law. It reaffirms the obligation by States, according to article 4 of the International Covenant on Civil and Political Rights, to respect irrevocability of certain rights under any circumstance.

The General Assembly reiterated such concepts in Resolution 61/171 of March 2007.

Moreover, in the report submitted at the 61st period of sessions of the General Assembly in September 2006 (A/61/353) the United Nations Secretary-General expressed his own concerns and reflected those of several bodies and experts of the U.N. system, on consequences contrary to human rights of counter-terrorism at the international and national levels.

³¹ In 1996 General Assembly Resolution 51/210, decided to establish a Special Committee with the mandate to elaborate an international convention on the repression of terrorism, the mandate has been renewed and extended annually by the General Assembly in resolutions on measures to eliminate international terrorism.

B. Security Council

The day after the attacks of 11th September 2001, the Security Council adopted Resolution 1368 and on the 28th September Resolution 1373, both within the framework of Chapter VII of the U.N. Charter, that is binding to all States. With those Resolutions, the Security Council gave beforehand an appearance of legitimacy to the planetary strategy that then was implemented by the United States under the pretext of fight against terrorism. Security Council Resolutions 1368 and 1373 mention terrorism without defining it, and this leaves a door open to any sort of arbitrariness.

Both Resolutions refer also to legitimate defence (“inherent right to legitimate individual defence according to the Charter” [of the United Nations]) to try to give also beforehand an international legal legitimacy to the aggression against Afghanistan started few days later, on the 7th October. The Council construed abusively the notion of legitimate defence, as this is an immediate response to an aggressor, to put an end to the aggression there where it is taking place.³² Attacking later and outside the territory where the aggressors' operation base is allegedly placed is, in the best of cases, a reprisal armed attack, if not a pure and simple aggression, prohibited by international law.

In Resolution 1373, States were told to qualify criminally, prevent and repress financing of terrorism acts and it decided to establish a Committee against Terrorism composed of all members of the Security Council, charged to monitor implementation by States of the adopted decisions.

Security Council Resolution 1373 *ordered*³³ States, among other things, to make sure that those who seek asylum have not committed terrorist acts and that *they do not oppose extradition for reasons of political demands*. Knowing that international protection of refugees is often not respected and that countries have more and more the tendency to reject the right to asylum, this resolution makes refugees to be potential victims of abuses.

It is noticeable one of the “whereas clauses” in that Resolution: “*Reaffirming* the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely, that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its

³² Olivier Corten and François Debusson, Teacher of International Law and Assistant Teacher of the Université Libre de Brussels, Center for International Law and Sociology applied to International Law, “Opération ‘liberté immuable’: une extension abusive du concept de légitime défense, in *Revue Générale de Droit International Publique*, T. 106, N° 1, April 2002.

³³ Security Council Resolutions adopted within the framework of Chapter VII of the United Nations Charter are compulsory to all States. It has been even said (paragraph 56 of the 2003 Report by the Commission on Human Rights Working Group on arbitrary detention (2003/8)), that such have priority over international treaties. It is not strange, then, that the Security Council be considered as authorized to order States to leave aside their legal obligations contained in their internal legislation and international treaties, for example as regards asylum and extradition.

territory directed towards the commission of such acts”. This paragraph, that recognizes State international terrorism, as the General Assembly³⁴ has several times, was written thinking in the so-called “rogue states” but it was not applicable to the United States and its allies, despite their international practice is perfectly framed within the above mentioned paragraph.

On the contrary, on 12th July 2002, the Security Council gave another proof of its unconditional submission to the United States policy trying to legitimate impunity of the State international terrorism that such country puts into practice. Indeed, that day, under the pressure of the United States, that threatened with no participating nor finance again the so-called “peace maintenance operations” of the United Nations, the Security Council approved unanimously Resolution 1422 by which it ordered the then future International Criminal Court, that had not yet taken up duties, to refrain during one year from investigating on accusations against nationals in a mission, authorized by the U.N., of states that, like the United States, are not party to the Statute of Rome. Thus, it gave an anticipated immunity to undetermined persons. The Security Council and particularly States Parties to the Treaty of Rome, violated the ICC Statute, construing arbitrarily article 16 (that already limited very much the independence of the Court before the Security Council) and violated also article 18 of the Vienna Convention on the Law of Treaties, that prohibits states signatories to Treaties to take steps towards frustrating the aims of the Treaty.³⁵ In June 2003 the Security Council reiterated this violation, by Resolution 1487, this time with the abstention of Germany, France and Syria. In 2004 the United States, despite the adverse generalized climate to that blatant violation of the ICC Statute, tried to renew that Resolution once again, but they did not got the necessary support.

On the 11th March 2004, with Resolution 1530, the Security Council gave another irrefutable proof of lack of objectivity and impartiality that the issue of terrorism is dealt with. That day, between 7:40 and 8:00 am, ten bombs exploded in different trains in Madrid, causing 191 killed and some 2,000 injured.

Officers of the Aznar Government accused immediately ETA, though with no evidence, with the purpose to use politically the attack to influence the result of the general election that had to take place three days after, on the 14th March.

Ten hours after the attack, at 18:00 of the same 11th March, the Security Council, by an initiative of the Spanish representative, passed by consensus,

³⁴ V. the preceding paragraph referred to the U.N. General Assembly.

³⁵ Amnesty International, on the 16th June 2002 declared “...concerned by the resolution contrary to international law adopted by all members of the Security Council (...). By adopting such a resolution, the Security Council tried to modify an international treaty (...) Moreover, the Security Council surpasses its powers trying to modify provisions of a treaty that is totally compatible with the United Nations Charter. On the other hand, by invoking Chapter VII of the United Nations Charter, the Security Council assimilated abusively the threat by the United States to oppose its veto to peace maintenance operations to a threat against peace, a breach of peace or an act of aggression ...”.

resolution 1530 where it attributed ETA the attack's authorship, a non proved hypothesis that fell down in pieces the following 48 hours.

In September 2005, the Security Council, at a Head of States or Government level meeting, for the third time in history, passed resolution 1624 (2005) regarding incitement of the commission of terrorism acts:

“Deeply concerned that incitement of terrorist acts motivated by extremism and intolerance (...) 1. Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to: a) Prohibit by law incitement to commit a terrorist act or acts; b) Prevent such conduct; c) Deny safe haven to any persons with respect to whom there is a credible and relevant information giving serious reasons for considering that they have been guilty of such conduct; (...) 3. Calls upon all States (...) to counter incitement of terrorist acts motivated by extremism and intolerance and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters.”

Although this Resolution invokes human rights and freedom of expression this cannot hide the fact that it encourages to limit arbitrarily the exercise of freedom of expression, by inviting someone to sanction incitement to commit acts of terrorism when a definition and criminal qualification has not yet been reached.

The 22nd December 2006 the Security Council adopted Resolution 1735 (2006) that begins by recalling its resolutions on the same issue adopted in 1999.³⁶ This resolution invokes Chapter VII of the United Nations Charter, in order to make its decisions compulsory to all States (see footnote 33).

This Resolution maintains interference of the Council in policies of the States that are elements of their national sovereign. Thus, article 1 reads “all States shall take the measures as previously imposed by paragraph 4 (b) of resolution 1267 (1999), paragraph 8 (c) of resolution 1333 (2000), paragraph 1 and 2 of resolution 1390 (2002), with respect to Al-Qaeda, Osama Bin Laden and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) (the “Consolidated List”)...”. That is to say, the list of persons and organizations “declared” as terrorist with no judicial process and judgement.³⁷

³⁶ 1267 (1999), of 15th October 1999, 1333 (2000), of 19th December 2000, 1363 (2001) of 30th July 2001, 1373 (2001), of 28th September 2001, 1390 (2002), OF 16th January 2002, 1452 (2002), of 20th December 2002, 1455 (2003), of 17th January 2003, 1526 (2004), of 30th January 2004, 1566 (2004), of 8th October 2004, 1617 (2005), of 29th July 2005, 1624 (2005), of 14th September 2005, and 1699 (2006), of 8th August 2006.

³⁷ In March 2007 Dick Marty, pursuant the mandate received from the Parliamentary Assembly of the Council of Europe, presented to its Committee on Legal Affairs and Human Rights, an Introductory Memorandum on the Security Council “black lists” [(AS/Jur (2007) 14-19 March 2007 ajdoc14 2007 Committee on Legal Affairs and Human Rights - UN Security Council black lists - Introductory memorandum- Rapporteur: Mr Dick Marty, Switzerland, Alliance of Liberals and Democrats for Europe]. The Rapporteur states that some situations are worth of a Kafka's book are produced, under the auspices of the United Nations, in member States of the

Such legal aberration cannot be disguised by the sentence in the “whereas clauses”:

“Reiterating that the measures referred to in paragraph 1 below, are preventive in nature and are not reliant upon criminal standards set out under national law”.

Paragraph b) of article 1 states that States must:

“Prevent the entry into or the transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee established pursuant to resolution 1267 (1999) (“the Committee”) determines on a case-by-case basis only that entry or transit is justified”.

So, this paragraph delegates to the Committee³⁸ the power of final decision on an attribute that is inherent to States sovereign such as to decide who enters and who leaves its own territory.

C. High Commissioner for Human Rights

In her statement to commemorate the Human Rights Day, in December 2005, the High Commissioner for Human Rights showed her concern with relation to two connected phenomena with an acute and corrosive effect on the global prohibition of torture and cruel, inhuman or degrading treatment. The first one is the practice to appeal to “diplomatic guarantees”³⁹ to justify

Council of Europe. It is really odd, he continues, to see how an international organization with the purpose to reaffirm principles of peace, tolerance and justice and the right to be heard by an independent and impartial court, commits abuses such as secret arrests, illegal transfers of detainees and the creation of “black lists” of persons and organizations. These persons and organizations suffer sanctions such as seizure of goods and prohibition to move around as refers persons. All this without being heard and with no possible appeal before the Court. The Rapporteur concludes that “black lists” not only violate fundamental rights but also discredit the international fight against terrorism. The report has as an annex a study on the matter made by Symeon Karagiannis, professor of public law of the University Robert Schuman of Strasbourg. In June 2007, the parliamentary Assembly approved the Marty Report on secret prisons and in November 2007, the Commission on Legal Questions and Human Rights of the same assembly approved its report on the “black lists”.

A communiqué by Interpress Service dated in Brussels the 27/9/07 states that “European Union governments declare themselves not capable to impede, in the future, passage for the air space of aircrafts with alleged terrorists kidnapped by the United States, towards countries that practice torture”. And cites Natacha Kazatchkine, of Amnesty International, who hold that the EU governments “did nothing” collectively to continue the European Parliament and the Council of Europe investigations. “The policy is to deny what happened keeping silent and undermining evidence, despite Bush himself informed the world about what happened”, said Kazatchkine to IPS.

³⁸ Committee against Terrorism, whose creation was decided by the Security Council in Resolution 1267 of 1999, with the mandate to monitor application by States of measures decided in that Resolution. Resolution 1373 of 28th September 2001 also decided the creation of a Committee against terrorism destined to monitor application by States of measures decided in such Resolution.

³⁹ The State that receives the prisoner gives “diplomatic guarantees” to the State that surrenders him/her that he/she will not be tortured and the receiver State is satisfied with such “guarantees”. Although the first State be reputed for practising torture on a large scale.

repatriation and “surrender” of suspects to countries in which they are at risk to be tortured, the second one is to hold prisoners in secret arrest. The High Commissioner urged all governments to reaffirm their adhesion to the absolute prohibition of torture, reflecting such prohibition in their domestic law; obeying the principle of non devolution and refraining to repatriate persons to countries in which they may be exposed to torture; granting access to prisoners and abolishing secret arrest; bringing to justice those liable of tortures and ill-treatment; prohibiting the use of statements obtained under torture, whereas the questioning has taken place in the same place or application by States of measures decided in that Resolution abroad

She also outlined questions related to the work of national courts in the monitoring of measures against terrorism, including the right to a fair trial and the question of using special and military courts; the definition of terrorism and connected offences in the national legislation; the qualification as a crime of activities that are part of the legitimate exercise of rights and freedoms; the principle of non-discrimination; the protection of vulnerable groups, including human rights defenders, non-citizens and journalists, states of emergency or the existence of an armed conflict; judicial and administrative arrest; incommunicado arrest; the right to a private life and questions related to investigation methods and gathering and exchange of information including making and compilation of lists of persons and organizations allegedly terrorist and the blocking of assets of persons suspect of terrorist acts and its implications on the right of property.

The High Commissioner reiterated her concern for the use of secret detention facilities and irregular transfers of persons suspect of participating in terrorist activities that, at her discretion, allow governments to arrest those persons without judicial trial and to get from them information by questioning techniques that can be non-admissible in national and international law.

The High Commissioner examined such matters more thoroughly in her report to the Commission on Human Rights (E/CN.4/2006/94), submitted to consideration of the Human Rights Council.

D. Special procedures and subsidiary bodies of the Human Rights Council

Different Rapporteurs of the extinct Commission on Human Rights (now Human Rights Council⁴⁰), and its ad hoc working groups as well as its subsidiary body, the Sub-Commission for the promotion and protection of human rights have, for several years, tackled counter terrorism and its influence on the respect of human rights in their reports.⁴¹

⁴⁰ For further information about the creation and work of the new Human Rights Council, please see numbers 26, 28 and 29 of the CETIM Bulletin.

⁴¹ Among them reports by Mrs. Hina Jilani, Special Representative of the Secretary-General on the question of human rights defenders (E/CN.4/2002/106, par. 95 to 107); Mr. Param Cu-

1. Special Rapporteurs

The Special Rapporteur on the promotion and protection of human rights while countering terrorism

The Human Rights Council Special Rapporteur on the promotion and protection of human rights while countering terrorism, Mr. M. Scheinin, has produced several reports.

In the one presented to the Commission on Human Rights in 2006 (E/CN.4/2006/98) he reflects on the matter of the definition of terrorism and says, *inter alia*, that:

“Of a particular concern... is that repeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights”.

In his report to the General Assembly of August 2006 (A/61/267) the Rapporteur dealt mainly with the freedom of assembly and association and the fight against terrorism and stated that:

“...in principle, States should not need to resort to derogating measures with respect to the right to freedom of assembly and association and that the measures limiting these rights provided for in the ICCPR are sufficient to fight terrorism effectively.”

He continues by saying:

“In some cases, peaceful actions to protect, inter alia, labour rights, minority rights or human rights may seemingly be covered by the national definition of terrorism. Therefore, groups whose aims are the protection of these or other rights could be designated as terrorist groups... stresses that this is not satisfactory from the point of view of the rule of law.”

The issue of “terrorist profiles” is tackled by the Rapporteur in his 2007 report to the Human Rights Council (A/HRC/4/26), where he writes:

“The Special Rapporteur notes that, in recent years, so-called terrorist profiling has become an increasingly significant component of States' counter-terrorism efforts. The European Union has explicitly asked its member States to cooperate with one another and with Europol (the European police office) to develop “terrorist profiles”, defined as “a set of physical, psychological or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect”. A group of experts from Europol and several EU member States has been established for this purpose. Terrorist profiling also occurs in less explicit forms. For example, law-enforcement agents often rely on sets of physical or behavioural characteristics when deciding whom to stop and search for counter-terrorism purposes.”

maraswamy, Special Rapporteur on the independence of judges and lawyers (E/CN.4/2002/72, par. 28 and 38) and, regarding counter terrorism recently passed in the United States, par. 208; Mrs. Leila Zerrougui on the discrimination in the criminal justice system, par. 15 to 24 (E/CN.4/Sub.2/2002/5 of 23rd May 2002) and, particularly, that by Mrs. Kalliopi Koufa on terrorism and human rights (E/CN.4/Sub.2/2002/35 of 17th July 2002).

The Special Rapporteur notes that “terrorist profiles” can build a sort of racial discrimination. In the same report, the Special Rapporteur:

“is concerned about legal strategies employed by many States, such as Nigeria, Myanmar, Turkey, the United Kingdom and the United States of America to extend the powers of policemen to take action against potential suicide bombers. Several innocent persons have in fact been killed”.

He reiterates that:

“the use of lethal force by law-enforcement officers must be regulated within the framework of human rights law and its strict standard of necessity”.

He recalls that:

“The Special Rapporteur on extra judicial, summary or arbitrary executions has, in several of his communications with governments, drawn attention to the increasing reluctance to respect right to life as a non-derogable human right. Several governments have made their own interpretation of what the use of utmost force means. Invocations such as “targeted killing” or “shoot-to-kill” [see Illustration n° 4] are used to demarcate a new -officially sanctioned- approach to countering terrorism”.

In his recent report to the General Assembly (A/62/263 of 15th August 2007) the Rapporteur refers to as how counter terrorism measures affect rights of refugees and the right to asylum. He examines matters such as pre-entry interception and screening measures related to border control; detention of asylum-seekers and shortcomings in securing court review of such detention, exclusion from refugee or other protection status; the application and non-derogability of the principle of non-refoulement; the return, repatriation or resettlement of rejected asylum-seekers, including persons detained for terrorism-related reasons; the use of so-called diplomatic assurances; and strengthening global responsibility for international protection as an inherent part of a comprehensive counter-terrorism strategy.

In his oral presentation on the 25th September 2006 to the Human Rights Council (A/HRC/2/SR.13 of 5th July 2007), Mr. Scheinin said that tendencies of counter-terrorism involve the risk to violate human rights. Firstly, there is the tendency of States to stigmatize, under the pretext of counter-terrorism, some political, ethnic or regional movements that simply are not of their liking, or the risk for the international community to become indifferent to the worn concept of terrorism and suggest counter terrorist measures without having defined the term.

He referred also to the questioning of prohibiting torture and all forms of cruel, inhuman or degrading treatment, as well as the tendency to consider acts of terrorism not only incitement to terrorism but also everything that according to States is an act of extolling of apology of terrorism. He said that he feared that the threat of terrorism serve to justify the hardening of immigration controls. This is possible by establishing, particularly, profiles based upon racial, ethnic or religious criteria, as well as the extension of police powers as regards criminal investigations or in the prevention of crime.

He warned the international community of the fact that counter terrorism without a definition of the term leaves opened the chance that every State formulates its own definition, with all dangers of involuntary violation of human rights or deliberate misuse of the term.

The Special Representative of the Secretary-General on the situation of Human Rights Defenders

In her report to the Commission on Human Rights (E/CN.4/2006/95), the Special Representative of the Secretary General on human rights defenders stressed that the general tendency of States has been to pass new laws that restrict activities related to human rights, in particular in the context of counter terrorist measures. The grave attacks against human rights defenders have persisted because no global strategies for their protection that take into account not only their physical security but also the matter of impunity that enjoy such attacks' authors have not been adopted. In her report to the General Assembly, the Special Representative express her concern that restrictions imposed to freedom of assembly have been excessively applied to prohibit or disturb peaceful meetings on human rights matters, often under the pretext of public order maintenance and invoking more and more legislation, arguments and mechanism linked to counter terrorism. Moreover, the Special Representative considered that the governments' practice to invoke national security laws when they react to criticisms for their practices as regards human rights, is one of the main factors that threaten those rights' defenders' security. She exhorted States to keep in mind the importance of securing and maintaining the contextual space for human rights defenders' activities, including the right to peaceful assembly, in combination with rights included in freedoms of expression and association.

The Special Rapporteur on Torture

In his report (E/CN.4/2006/6), the Special Rapporteur on torture insisted on the importance to follow attentively some practices such as the use of “diplomatic safeguards” to avoid the prohibition of the use of torture in the context of counter terrorism. In his report to the General Assembly (A/61/267), the Special Rapporteur outlined the need for an absolute prohibition of torture in the context of counter terrorism measures, of the inadmissibility of evidence got through torture as states article 15 of the Convention against Torture, and included an exam of recent judicial decisions that show an increasing tendency towards the use of “secret evidence” proposed by the Attorney and other officers in the proceedings. She recalled that when there are sufficiently founded demands of torture, pursuant article 15 of the Convention, the burden of the proof is born by the state, that will have to prove that evidences invoked against an individual have not been obtained with torture.

The Special Rapporteur on Extra judicial, Summary or Arbitrary Executions

In his report (E/CN.4/2006/53), the Special Rapporteur on extra judicial, summary or arbitrary executions, tackled the question of “shoot-to-kill” policies applied – inter alia – in response to terrorist threats. “Some events that took place in 2005 show that “shoot-to-kill” policies are a real risk to the right to life. This report tries to analyse such policies taking into account not only difficulties to be faced but also respect for human rights established long ago. Different threats, particularly, generalized looting, armed robbery, drug traffic and, even more important, suicide attacks, cast doubt on the adequacy of traditional measures to implement the law. Nevertheless, it is important to affirm that resort to lethal means by security forces must be regulated within the framework of the human rights norms and its prerequisite of strict necessity. The shoot-to-kill rhetoric should never be used. Such rhetoric can transmit the message that clear legal norms have been substituted by an authorization to kill vaguely defined.”

The Special Rapporteur on Contemporary Forms of Racism

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and other related forms of intolerance deals with matters related to terrorism and counter terrorism in his updated study “Political platforms which promote or incite racial discrimination” (E/CN.4/2006/54), in which he deplores “the normalization of racism, racial discrimination and xenophobia for political ends, the penetration of the racist political platforms of extreme right-wing parties and movements in the political programmes of democratic parties and the growing intellectual legitimization of these platforms”; as well as in his annual report (E/CN.4/2006/16) and in his report on the situation of Muslims and Arabs in some parts of the world since the 11th September 2001 events took place (E/CN.4/2006/17), where it refers to “the politicization of Islam is amalgamated with the open validation of Islamophobia in intellectual discourse; the identification of Islam with terrorism and excessive emphasis is placed on containment, mainly from the security angle, through control of its education and monitoring of places of worship and congregations.”

The Independent Expert on Minority Issues

The independent expert on minorities, in her report (E/CN.4/2006/74) expressed her deep concern for the proliferation of counter terrorist measures that violate community rights. Counter terrorist measures must be applied considering minorities rights in a proper manner and, in situations of public emergency, measures that restrict other rights must not be discriminatory on grounds of race, colour, sex, language, religion or social origin.

The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples presented his report (E/CN.4/2006/78) on the situation in some countries in which the State has faced social struggles, claims and protests of indigenous organizations by applying counter terrorist laws. He recalled States that in general, when common order offences are committed within the framework of such movements, ordinary laws are enough to maintain public order.

Illustration n°6

Joint report of independent experts on Guantánamo

Five mandate holdersⁱ in the framework of special procedures presented a joint report in February 2006 (E/CN.4/2006/120) on their investigations about the situation of detainees in the United States naval base in the Guantánamo Bay. The report was elaborated and made public after two years waiting for the authorization of the government of the United States to visit the concentration camp, that finally was not agreed upon.

Indeed, the condition put by the United States government to authorize the visit (prohibition to private interviews with detainees, par. 3 of the above mentioned document) was considered as unacceptable by the group of experts. In his oral statement of 21st September 2006, the United States Ambassador said to this regard that his government put similar conditions to members of the American Congress and to foreign delegations that wanted to go to Guantánamo.

Based on witnesses of former detainees, informations of the detainees' lawyers, the United States government,ⁱⁱ NGOs, media, etc., the independent experts expressed their concern for arbitrary detentions, violations of judicial guarantees, the lack of access to detainees to competent and independent courts, inhuman and degrading arrest conditions, sometimes equivalent to torture, the harmful effects of such conditions for the detainees health and attacks against religious beliefs and dignity of inmates.

The experts also expressed their concern for the attempts of the government of the United States to "redefine torture" in the framework of the fight against terrorism, with the aim to allow certain questioning techniques that would not be according to the prohibition of torture as defined internationally. In this regard, they said that "the confusion with regard to authorized and unauthorized interrogation techniques over the last years is particularly alarming." They affirmed that the United States must respect the International Covenant on Civil and Political Rights and other international convention they are party to.

The experts recommended, inter alia, that terrorism suspects should be detained in accordance with criminal procedure that respects the safeguards enshrined in international law; that all allegations of torture or cruel, inhuman or degrading treatment or punishment are thoroughly investigated by an independent authority, that no detainee should be expelled, returned, extradited or rendered to States where there are substantial grounds for believing they would

be in danger of being tortured, and that the Guantánamo Bay detention facilities should be closed without further delay.

Sources:

ⁱ Leila Zerrougui, President-rapporteur of the working group on arbitrary detention; Leandro Despouy, Special Rapporteur on independence of judges and lawyers; Manfred Nowak, Special Rapporteur on torture; Asma Jahangir, Special Rapporteur on freedom of religion and belief; and Paul Hunt, Special Rapporteur on the right to health.

ⁱⁱ In the experts' report there is an annex with the answer of the government of the United States. Furthermore, the representative of such government circulated a 59 pages document in the Human Rights Council when it examined the report by the group of experts.

2. Working groups

Working Group on Arbitrary Detention

In the report of the Working Group on arbitrary detention (E/CN.4/2006/7) issues such as excessive application of imprisonment and the use of secret prisons in the framework of the fight against terrorism are dealt with.

The Working Group urged States to stop running secret prisons and detention facilities, and indicated that in the context of international cooperation in the fight against terrorism, transfers of suspected individuals between States should always rest on a sound legal basis as arrangements on extradition, deportation, expulsion, transfer of proceedings or transfer of sentenced persons. Judicial control of the admission into or holding in all detention facilities shall be secured.

Working Group on Forced or Involuntary Disappearances

The Working Group on forced or involuntary disappearances expressed in its report (E/CN.4/2006/56) a grave concern for the increasing number of states that use fight against terrorism as a pretext to infringe their duties pursuant to the Declaration and observed a clear tendency since 2001, in many states, to explain disappearances by referring to counter terrorism. In some countries, authorities use the need to fight against terrorism to justify repression to opposition groups, what has sometimes lead to the disappearance of persons. The use of “extraordinary deliveries” and the existence of secret detention centres in several countries that create favourable circumstances to more abuses such as the disappearance of persons, were also mentioned with a deep concern.

Working Group on the Use of Mercenaries

The Working Group on the use of mercenaries as a means to violate human rights and hinder the right of peoples to self-determination presented a report to the General Assembly (A/61/341) on activities of mercenaries and private security companies involved in acts of terrorism and examined the legal definition of “mercenaries” as regards acts of terrorism.

3. Sub-Commission on the Promotion and Protection of Human Rights⁴²

The Special Rapporteur on Terrorism and Human Rights

Appointed in 1998 by the Commission on Human Rights by recommendation of the Sub-Commission, Mrs. Kallipoli K. Koufa carried out a study on different aspects of terrorism from the human rights perspective, essentially on the nature and contents of the relationship between terrorism and human rights, nature of contemporary terrorism, the effect of counter terrorism and “war to terrorism” measures on human rights and humanitarian law and particularly on the criminal justice systems.

Among her observations, the following are remarkable:⁴³

“fear of terrorism [is] out of proportion to its actual risk and generated either by States themselves or by other actors can have undesirable consequences such as being exploited to make people willing to accept counter-terrorism measures that unduly curtail human rights and humanitarian law. Undue fear can foster religious or ethnic intolerance. Exploitation of fear of terrorism can also damage international solidarity, even to the degree of impairing cooperation regarding, reducing or preventing terrorism.”

Mrs. Koufa notes that:

“acts, sometimes merely symbolic ones or vandalism at the most, targeting economic entities, are being considered as terrorist acts.”

According to her:

“The issue of impunity for State actors involves issues such as: (i) sovereign immunity and act of State doctrines which, when abused, result in impunity, and (ii) international tribunals that do not explicitly include State terrorism outside the context of war crimes, crimes against humanity or genocide.”

Although the Special Rapporteur has studied in her successive reports⁴⁴ certain aspects of the definition of terrorist and terrorism, she did not give a definition of terrorism, not considering it necessary in the framework of her study.⁴⁵ Instead, the Rapporteur made an effort to precise what corresponds or not in the field of terrorism.⁴⁶

Regrettably, though the Rapporteur analysed responsibility of state and non-state actors,⁴⁷ she omitted to include among the latter private armed groups used by transnational corporations and some governments.

Finally, the Special Rapporteur recommended to examine the root causes of terrorism and strategies to reduce or prevent terrorism in all its

⁴² Body formed by independent experts, subsidiary to the extinct Commission on Human Rights and now to the Human Rights Council. It will be replaced by a Consultative Committee.

⁴³ Final Report of the Special Rapporteur: E/CN.4/Sub.2/2004/40.

⁴⁴ E/CN.4/Sub.2/1999/27, E/CN.4/Sub.2/2001/31, E/CN.4/Sub.2/2002/35, E/CN.4/Sub.2/2003/WP.1 and Add.1 and 2 and her Final Report E/CN.4/Sub.2/2004/40.

⁴⁵ Par. 12 of her Final Report, E/CN.4/Sub.2/2004/40.

⁴⁶ E/CN.4/Sub.2/2004/40.

⁴⁷ In her reports, when referring to non state terrorist actors, Ms. Koufa only includes in that category opposition armed groups.

manifestations as well as the examination and reinforcement of mechanisms and techniques that will allow to examine the question of state terrorism in all its manifestations.

It is remarkable the fact that, based on her recommendation, the Sub-Commission set up a working group in 2005 in order to elaborate guidelines on the respect of human rights while countering terrorism (see below).

Working group on the respect of human rights while countering terrorism

In its 55th period of sessions (2003), the Sub-Commission on the Promotion and Protection of Human Rights adopted resolution 2003/15 (E/CN.4/Sub.2/2003/43), in which it decided to carry out an study of compatibility of counter terrorism measures, adopted at the national, regional and international levels, particularly after 11th September 2001, with international human rights standards, giving particular attention to their impact on the most vulnerable groups, “with a view to elaborating detailed guidelines”, and appointed Ms. Kalliopi K. Koufa⁴⁸ as the coordinator of such efforts. In 2004, the Sub-Commission decided to establish an in-sessional working group with the mandate to:

“elaborate detailed principles and guidelines, duly commented, on the promotion and protection of human rights while countering terrorism, based, inter alia, on the draft framework of principles and guidelines included in the document elaborated by Ms. Koufa (E/CN.4/Sub.2/2004/47)”.

The Working Group examined the issue in sessions 57th and 58th of the Sub-Commission (2005-2006). The working document noted the need of clear and detailed guidelines on the observance and protection of human rights while countering terrorism, with the aim to give directions to states and contribute in the efforts to balance security interests and the full respect for human rights.

In Resolution 2006/20, the Sub-Commission assumed the Working Group's recommendations and decided to transmit the updated preliminary plan with detailed commentaries (A/HRC/Sub.1/58/30) to the Human Rights Council for its consideration, knowing that such project needed a supplementary reflection and works.

Finally, the Sub-Commission recommended the Human Rights Council, to consider, when revising mandates, to redirect the working group in order to assure to continue the work towards the elaboration of detailed principles and guidelines, with the respective commentaries, regarding the promotion and protection of human rights when countering terrorism.

E. Treaty Bodies

After examining the second report by the United States of America (CAT/C/USA/CO/2), the Committee Against Torture that monitors the implementation of

⁴⁸ In this sense, Ms. Koufa made a study entitledo “Terrorism and human rights” (E/CN.4/Sub.2/2004/40).

the International Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment expressed its concern on the fact that the State Party uses secret detention centres in which prisoners are denied fundamental legal guarantees, as a mechanism to monitor the treatment received and procedures to re-examine their detention. It also took note of the fact that torture is not qualified as a federal crime consistent with article 1 of the Convention and that, despite extra-territorial cases of torture of detainees occurred, there is a lack of prosecution by virtue of the extra-territorial penal condition of the torture.

In its final conclusions, the Committee urged the State party to recognize and ensure the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction. It recommended the State to apply the non-refoulement guarantee to all detainees under its custody, cease the rendition of suspects when they face a real risk of torture and ensure that suspects have the possibility to challenge decisions of refoulement. The State party should register all persons it detains in any territory under its jurisdiction, as a measure to prevent acts of torture and ensure that no one is detained in any secret detention facility under its effective control.

The Committee on Human Rights, that monitors implementation by states of the International Covenant on Civil and Political Rights, when examining joint periodic reports second and third by the United States of America (CCPR/C/USA/CO/3), expressed some concerns, inter alia, the potentially overbroad reach of the definitions of terrorism under domestic law, the State party's practice of detaining people secretly and holding them in secret places for months and years as well as to keep persons, beyond the stated need to remove them from the battlefield, in places their protection of domestic or international law is curtailed or suspended; provisions of the Patriotic Act could be incompatible with article 17 of the Covenant; the use of interrogation techniques that, separately or jointly, and/or applied during a prolonged period, violated the prohibition contained in article 7; allegations of cases of suspicious death and tortures or cruel, inhuman or degrading treatment or punishment by United States military and non-military personnel or contract employees in detention facilities in Guantánamo Bay, Afghanistan, Iraq, and other overseas locations; provisions of the Detainee Treatment Act that bars detainees in Guantánamo Bay from seeking review in case of allegations of ill-treatment or poor conditions of detention. Among other serious motives of concerns, it is remarkable the State party's practice to send or to assist in the sending of suspected terrorists to third countries, either from the United States of America or other States' territory, for purposes of detention and interrogation, without the appropriate safeguards to prevent treatment prohibited by the Covenant.

In its recommendations, the Committee urged the State party to close immediately all secret detention facilities, to grant the International Committee of the Red Cross prompt access to any person detained in connection with an armed conflict, and to ensure that detainees always benefit from the full protection of

the law. It recommended the State party to take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of transfer, rendition, extradition, expulsion or refoulement, if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. The State party should conduct thorough and independent investigations of complaints on the sending of persons to third countries, where they would have suffered torture or cruel treatment or punishment, modify its legislation and policies to ensure that no such situation will recur, and provide appropriate remedy to the victims. Furthermore, it should ensure that any infringement on individual's rights to privacy is strictly necessary and duly authorized by law, and that the rights of individuals to follow suit in this regard are respected.

CONCLUSION

Terrorism is a huge problem with political, social, ideological and even economical dimensions. Its humanitarian consequences are disastrous due to the nature of terrorist acts itself, with the aim to spread terror and, for this reason, in general, it does not select its “targets”: anyone can be a victim of a terrorist act.

The consequence in the real or potential victims, as stated at the beginning, is that “feelings of fear, panic or terror can carry instinctive reactions of self-defence, neutralize their will and even deprive them of discernment and/or critical sense”.

Such irrational feelings imposed to the population involved allow the authors and instigators of terrorist actions (be them state or not) to achieve some policies and conducts, that under other conditions would be rejected, to be accepted: “counter-terrorism” that violates fundamental human rights and the “all-out war against the enemy” dispossessed of humanitarian referents.

Though this brochure has made the usual distinction between state and group terrorism, there are signs that there is only a vague frontier between them: methods are similar and it is even proved that in many cases there are organic links between both of them.

Therefore, we can try to classify or at least enumerate different kinds of terrorism:

1) State terrorism, that can be directed against the population itself (national) or against foreign population or State public personalities (international). The latter is through organized groups or “special officers” or through armed aggressions in which civilians are attacked massively (terrorist bombings).

2) Terrorism by more than one state directed against a country's population. It is the case of state national terrorism carried out by the government of a country against its own population with the aid and collaboration, even instigation of one or more foreign states.

3) Group terrorism, carried out at the national level and/or internationally projected.

4) Finally, collusion or co-ordination between national or international terrorist groups with states that give them funds, logistics, instructors and “experts”.

In this brochure there are concrete examples of these different kinds of terrorism.

The Government of the United States and other big powers confer to some states, the so-called “rogue states” such as Iran, Libya and others, the instigation and promotion of terrorist attacks in several countries.

An objective approach of this aspect of state international terrorism should refer to proved facts, and include the United States under the category of “rogue states”.⁴⁹

After the 11th September 2001 attacks, under the pretext of fighting more efficiently against terrorism, regression in safeguards on the exercise of rights enshrined in many national legislations, in the Charter of the United Nations, in the Universal Declaration on Human Rights and in other international and regional instruments has speeded up.

Under the pretext to “combat terrorism” mechanisms to repress social struggles are reinforced all over the world against the “silent genocide” provoked by the neo-liberal capitalist globalization, that has millions of victims.

Institutional regression and practices that violate human rights in the name of counter-terrorism comprise basically:

1. Abandonment of criminal law basic principles in a State of law, such as:

a) Clear and well delimited shape of penal figures and rejection of extension by analogy of penal norms, in order to avoid to sanction them arbitrarily as offences, activities and conducts of persons because they are contrary to the Power policies.

b) Principles of due process, of equality of everyone before the law, of the right to a fair defence in a trial before an independent and impartial court;

2. Abandonment of universally admitted principles as regards extradition and right of asylum.

3. Curtailment of fundamental rights as freedom of expression and communication, or assembly and organization and of struggle with a view to get essential attainments in political, economic, social, cultural and environmental matters.

4. Abandonment of one of the national sovereignty fundamental features, such as control of national territory, of its air and maritime space.

5. Pressure and/or blackmail on several States to force them to adopt legislative measures against terrorism, attempting liberties, etc.

At the international level, particularly at the United Nations, the problem of terrorism is tackled by several bodies: the General Assembly, the Security Council, the Secretary General, the High Commissioner for Human Rights, the extinct Commission and now Human Rights Council and the Sub-Commission for Protection and Promotion of Human Rights through different Special Rapporteurs and Working Groups and some Committees of the Human Rights Covenants and Conventions.

Many of these bodies deal with the problem quite objectively and impartially and have expressed their concern by the consequences gravely harmful

⁴⁹ That also holds the quasi monopoly of international terrorism that consists of armed aggression to other States with terrorist methods that violate humanitarian law: massive attacks to civilians, destruction of civil facilities, etc.

for human rights and fundamental freedoms of many counter-terrorist national and international norms and the practice of the fight against terrorism.⁵⁰

On the contrary, the Security Council acts as regards terrorism with an absolute lack of objectivity and impartiality.⁵¹

Using its disproportioned powers within the U.N. system, the Security Council, which acts in fact as a world government invoking repeatedly – and often arbitrarily – Chapter VII of the U.N. Charter, directs, under the patronage of the government of the United States, decisions regarding counter-terrorism at a planetary scale, decisions that work as an arm of massive destruction of human rights and fundamental freedoms.

Therefore, an efficient and responsible treatment at an international level of the problem of terrorism inclusive of the seeking and achievement of lasting solutions, is narrowly linked, *inter alia*, to a matter that is pending after decades in the United Nations: its democratization; in particular that of the Security Council and a redistribution of its powers with the General Assembly, increasing the latter's powers.

This process depends on a real political will to carry it out by the majority of the United Nations Member States.

To that end, each of those States must begin by respecting and promoting in their own territories civil, political, economic, cultural and environmental rights of their inhabitants and citizens and to recover the full exercise of their sovereignty and self-determination. Such conditions are indispensable, on the other hand, to combat effectively terrorism in all its manifestations (state and non-state) within the framework of legality.

⁵⁰ Even the Committee against Terrorism, created by the Security Council, in its report of 16th December 2005 (S/2005/800), reiterated that States must ensure that measures adopted to fight against terrorism are according to all obligations due by virtue of international law, that must adopt them in conformity with international law, particularly in human rights international norms, right of refugees and humanitarian law.

⁵¹ The Security Council lack of objectivity and impartiality is blatant not only in its decisions and actions referred to terrorism, but also in its missions. The Security Council boasted of its activism in the case of the Lockerbie terrorist attack (explosion of an aircraft when flying). Instead, its silence is strident in a similar case: the explosion of a Cuban civil aircraft while flying over Barbados on the 6th October 1976 (83 killed), where Posada Carriles, a Cuban CIA agent (as he has recognized in an autobiographic book) who continues to enjoy impunity under the protection of the government of the United States, was involved.

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