IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE

Terrorism and the Foreigner

A Decade of Tension around the Rule of Law in Europe

Edited by Anneliese Baldaccini and Elspeth Guild

Martinus Nijhoff Publishers

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Volume 11

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Foreword

Elspeth Guild

This book results from a research project funded by the European Commission, ELISE, which began in October 2002 and finished at the end of September 2005. Together with researchers at Sciences-Po, Paris, the Universities of Athens, Genoa, Keele and Kings College London, Nijmegen (whence this book comes) and the Centre for European Policy Studies in Brussels we studied the changing relationship between freedom and security in Europe.

> The starting point of the project was that the contention that the liberal and democratic traditions of modern European politics hinge on aspirations for both liberty and security. We sought to understand recent concerns about security among European citizens in light of the imperative not to undermine civil liberties, human rights and social cohesion. To do so we sought to place contemporary dilemmas in a broader context, which enables a broad range of scholarly traditions to engage in productive research over areas of common concern.[1]

The project had three main objectives:

1. To develop a better and more comprehensive understanding of contemporary security challenges;
2. To develop a detailed account of the development of security policies at both national and European levels, especially in the aftermath of events like those of 11 September 2001, and of their impact on the cohesion of European societies, and European society;
3. To identify the primary institutional challenges now confronting both Member States and the European Union as a consequence of the many forces that are reshaping the relation between liberty and security in many different contexts.

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1 ELISE Final Synthesis Report 2005.

These objectives were pursued by researchers in a wide range of different disciplines including political science, sociology, international relations as well as law. At the Radboud University of Nijmegen, we undertook to examine the changing relationship between freedom and security by taking one of the most vulnerable groups in Europe, immigrants and asylum seekers, and to compare the changes to their security which result from the reconfiguration of freedom and security in Europe. In order to understand the changes after 11 September 2001 we chose to make a historical comparison with the changes to the legal position of these groups which occurred at the time of the Gulf War in 1991 with that which is occurring at the moment. When we began the research, we did not anticipate the direction which the United States war on terrorism would take, in particular the war and occupation of Iraq. These events, however, have had an important impact in our field. By examining the security of residence and protection of a particularly weak group over the time period we have revealed important aspects of the nature of the transformations. Anneliese Baldaccini has admirably drawn together the conclusions in her introduction which follows.

As regards the whole project, our final results differ substantially from many of the narratives which are presented by politicians, academics and others regarding the nature of the relationship of freedom and security at the present time. In all of the fields which the project covered it is interesting to note that two characteristics of the relationship between freedom and security are constant: first, the events of 11 September 2001, notwithstanding discourses to the contrary, cannot be considered 'an unprecedented event' which radically changed the nature of the modern world. In this book what is most striking about the changes in law to the position of foreigners in the countries we examine is the lack of direct relationship between measures adopted and the event. Secondly, neither the forms of terrorism nor the responses constitute something fundamentally new and different. Continuity is also the overarching characteristic in respect of the treatment of foreigners, though this has tended to be a continuity towards the precarious.

Many people deserve thanks for their support for our work which has resulted in this book. First, of course, are our authors who have examined carefully and in great detail the subject and provided us with a marvellous perspective. Anneliese Baldaccini, my co-editor of this volume, has done a magnificent job analysing and drawing together all the complex threads of the project. My colleagues at the Radboud University have provided unstinting support, Professor Kees Groenendijk and Dr Paul Minderhoud deserve particular thanks. Among our colleagues from the other institutions which participated in the project, special thanks must be extended to the following (in alphabetical order): Dr Joanna Apap formerly of CEPS and now at the European Parliament, Dr Thierry Balzacq of CEPS, Professor Didier Bigo of Sciences-Po, Sergio Carrera of CEPS, Professors Alessandro Dal Lago and Palidda of the University of Genoa, Dr Vivienne Jabri of Kings College London, Professor Rob Walker of

Keele University and Eleni Tirkou and Professor Scandamis of the University of Athens.

Angela Liberatore and Alessia Bursi, our officials at the European Commission, provided invaluable intellectual input and practical support throughout the project. Last but not least, I would like to acknowledge the tremendous support given to us by our editor, Lindy Melman at Brill Publishing.

The contributions in this Volume state the law as at the end of July 2005

Professor Elspeth Guild

Introduction

*Anneliese Baldaccini**

This Volume traces the developments in the laws and practices of the European Union and five of its Member States (the United Kingdom, Germany, France, the Netherlands, and Italy) at two points in time: first at the time of the Gulf War following Iraq's invasion of Kuwait in August 2000; secondly, following the terrorist attacks in the United States on 11 September 2001. The focus is on the legal status of immigrants and asylum seekers and how that legal status is being modified on grounds of security-related measures adopted over a period of about ten years. Particularly, the question is whether and how far situations have come into existence, which could be considered to be in conflict with fundamental principles of human rights.

This introductory chapter will firstly describe the events which form the backdrop to the analysis offered in the contributions to this Volume. It then considers the vulnerability of asylum and immigration law to the use of exceptional measures adopted in the wake of specific or potential security threats and the extent to which States' action is constrained by principles of human rights and refugee law. The final part will highlight how various responses to security threats were articulated at the European and national levels.

1. The 1990-1991 Gulf crisis

In 1990, the President of Iraq, Saddam Hussein, had a number of economic and political grievances against Kuwait. He complained that Kuwait was failing to respect the oil quotas set by OPEC, thus causing the price of oil to drop, and that the Rumalia oil field, which spans the two countries, was being exploited by Kuwait in a manner which infringed Iraq's rights in the field. Furthermore, President Hussein demanded a payment from Kuwait as a contribution towards Iraq's war with Iran, which he claimed had been carried out on behalf of all the

* The views expressed herein are personal and bind solely the author. Sections 1 and 2 are edited extracts from a draft paper by Hinde Chergui, initially written for the ELISE project.

Arab States. The two countries were also in a dispute about access to the Gulf waterways on which no progress had been made. On 2 August 1990, after various unsuccessful negotiations, Iraq invaded Kuwait. There are wider geopolitical reasons for this invasion which have been analysed elsewhere and according to one study can be described thus:

> The world in January 1990 was not particularly orderly, as its most pronounced feature was the liberation of the hitherto suppressed political forces. However, following two months of revolution in Eastern Europe it was certainly 'new'. The Middle East, settling after a tumultuous decade of war and tension, was unsettled again by the winds of change generated by the collapse of European communism. There were very particular reasons why Saddam Hussein seized Kuwait, not least a chronic indebtedness, but his calculations were shaped by his understanding of the meaning of these larger changes for the stability of his regime.[1]

On 17 January 1991, an international coalition led by the United States, with qualified UN support, started to attack strategic Iraqi targets in Iraq and in Kuwait, with the aim to restore Kuwaiti sovereignty. The war, labelled 'Operation Desert Storm', ended some 40 days later. On the allied side more than 190 people were killed and about 500 injured; most of the losses were American. On the Iraqi side the number of human losses, whether civilian or military, due to bombing and combat is not known. The estimations vary between 100,000 and 200,000 persons killed. The Gulf also suffered substantial ecological damage due to oil leaking from Kuwaiti terminals hit during the war.[2] In March and April 1991, the Kurdish population in the North of Iraq revolted unsuccessfully against the Iraqi regime and unsupported by allied forces (which considered this to be an internal conflict) a great number of persons were forced to flee into the mountains of Turkey and Iran.[3]

2. 'War on Terror' in the Aftermath of 11 September 2001

On 11 September 2001, four American airline flights were hijacked and flown into targets that were the symbol of the United States economic and political power. Two crashed into the twin towers of the World Trade Centre in New York City. The towers caught fire and collapsed. One airplane crashed into the Pentagon on the outskirts of Washington DC shortly after the other two attacks. The fourth plane, bound for San Francisco in California, as a result of a struggle

1 L. Freedman and E. Karsh, *The Gulf Conflict 1990-1991: Diplomacy and War in the New World Order* (London: Faber and Faber, 1993), p. xlv.

2 É. Masurel, "L'année 1991 dans Le Monde- Les principaux événements en France et a l'étranger", Le Monde 1992, pp. 15-19, 33-40.

3 *Ibid*., pp.57, 72-73.

on board, crashed in a field in Pennsylvania. About 3,000 people of different nationalities died as a consequence of these attacks.

On 20 September 2001, President Bush announced that the US was declaring a 'war on terrorism'. The US government reports following the investigation into the events of 11 September have emphasised that the hijackers were members of Al Qa'eda, an international Islamic fundamentalist organisation led by Osama Bin Laden, and that the attack was part of a *jihad* or holy war against the United States. In the light of evidence put forward by the US of a link between the Taliban regime in Afghanistan and Al Qa'eda, an international coalition was formed to oust the Taliban from that country. The military operation commenced on 7 October 2001. The coalition forces rapidly took control of Kabul, the capital, and nominally of the rest of the country. Over 500 persons, alleged Al Qa'eda supporters and Taliban soldiers, were moved to a US army base in Guantanamo, Cuba, where most of them have been held ever since. While there was some international concern about the legitimacy of the Afghanistan campaign, it did not spill over into a full international diplomatic conflict. This occurred, however, in respect of the next development, the action against Iraq.

In 2002, the position of President Hussein of Iraq became part of the US response in the 'war against terrorism'. Action against Iraq was based on allegations that Saddam Hussein was maintaining and building up weapons of mass destruction. Links between Saddam Hussein and Al Qa'eda were also alleged. The UN Security Council supported renewed efforts to check the offensive capacities of President Hussein in November 2002 through a new resolution requiring him to permit inspections and threatening further action if he failed to comply.[4] The UN weapons inspectors returned to Iraq after an absence of some years and re-commenced their inspections.[5] On 23 January 2003, the chief weapons inspector, Hans Blix, reported to the Security Council. The report of the inspection did not provide a clear basis for military intervention. A fierce diplomatic battle ensued in the Security Council with France, as a permanent member of the Council and strongly supported by Germany within the EU and eventually Russia, heading opposition to military intervention in Iraq and the US and UK supporting rapid military action. In the event, notwithstanding the fact that the US and UK were unable to obtain a second resolution from the Security Council expressly authorising military intervention in Iraq, they commenced military action on 20 March 2003 relying on the wording of the previous Resolution 1441. The action was undertaken primarily by US forces but was supported by the UK. The war officially ended on 13 April 2003, when Baghdad

4 UN SCR 1441. The much disputed wording on the basis of which the US and UK claimed legality for the offensive is found in para. 13: "the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations".

5 United Nations Monitoring, Verification and Inspection Commission.

was taken. The ousted President Saddam Hussein went into hiding but was then found and arrested and is currently on trial.

3. Terrorism and the Foreigner

This Volume looks at the fields of immigration and asylum as these areas are engaged through the perception, in the case of both events described above, that the enemy or perpetrators were foreign nationals. The most striking difference between these two events is that, in the first case, war occurred over a limited period and was waged against a State identified as an aggressor. In the second case, we have what is perceived as a permanent threat from a terrorist network of 'Muslim fundamentalists' under circumstances of globalised insecurity. The implications for asylum and immigration law appear significant in the context of the ongoing 'war on terror', as they become part of a transformation of law which makes every foreigner a suspect.

Asylum and immigration law is more vulnerable to exceptional measures than other areas of law. The legal measures which are adopted in respect of immigrants and asylum seekers to protect the rest of the population against terrorism can go farther than constitutional settlements in other fields might permit. The guarantees of due process under the European Convention on Human Rights (ECHR) have been found by the Strasbourg Court not to apply to immigration or asylum proceedings in the same way as they apply to the determination of civil rights and obligations and criminal charges.[6] Foreigners may be detained or removed without charges or evidence to the standard of criminal procedures being brought, or independent reviews of administrative decisions being subject to a high burden of proof or without there being any supervision at all. However, some protections do apply internationally to non-citizens. These stem from obligations States have under international refugee and human rights law and place substantial limitations on State sovereignty as regards exclusion, expulsion and treatment of foreigners. A degree of protection to foreigners is also afforded by EC law if they legally reside in a Member State. Constraints against exclusion or expulsion are at the highest in respect of legally residing nationals of Member States and their family members of any nationality, who have the right to move, reside and work within the European Union.

3.1 Protection Afforded to Foreigners by International Human Rights and Refugee Law

The Geneva Convention Relating to the Status of Refugees (Refugee Convention) places substantial limitations on State sovereignty as regards the expulsion of refugees. Article 33 prohibits to return a refugee to a country where he or she alleges a fear of persecution on the basis of race, religion, membership of a social group or political opinion. This is known as the principle of non-*refoule-*

6 *Maaouia* v *France* (Application No. 39652/98).

ment. The Refugee Convention provides the power to deny protection under the so-called exclusion clauses, but the consequences of such a draconian measure can be extremely serious and require that such clauses be restrictively interpreted and carefully applied.[7] Article 1(F) of the Refugee Convention ensures that perpetrators of gross human rights violations (e.g. war crimes and crimes against humanity), serious non-political crimes outside the country of refuge, and acts contrary to the principles of the United Nations are excluded from refugee status. Article 33(2) allows for the return of a refugee who is considered a danger to the national security of a country and is the only exception in the Refugee Convention to the fundamental principle of non-*refoulement* that protects refugees from return to a country where their life or freedom would be threatened. The two provisions have a different character and scope of application. Article 1(F) is a mandatory provision and is concerned with the severity of crimes committed by refugees in the past, i.e. prior to seeking asylum; Article 33(2) is concerned with the appreciation of a present or future threat posed by a refugee in the host country and requires that this threat be balanced against the consequences of the refugee's return. As shown in the contributions to this Volume, the principles underlying their application have profoundly changed in the time frame considered.

According to UNHCR, the threshold for returning refugees to their country of origin – as an exception to the non-*refoulement* principle – has to be particularly stringent.[8] It must be established in the individual case that the person constitutes a danger to the security or the community of the country of refuge and this danger should outweigh the danger of return to persecution.[9] This applies also to convicted refugees for whom it is held that the commission of a particular serious crime cannot in itself ground expulsion. Refugee protection principles require that the expelling State must establish on a case-by-case basis whether the refugee represents a danger either to the security or to the community of the country, and weigh this danger against the refugee's fear of persecution if returned. The contributions in this Volume highlight that, following the first Gulf War, there was in general no heightened use of exclusion clauses under the Refugee Convention against Iraqis or others considered to represent a security risk, despite a significant increase in asylum applicants from Iraqi nationals in Europe. On the other hand, the most direct impact of 11 September on obligations under the Refugee Convention has been that procedures for asylum claims have been affected by the invocation of the 'national security' exceptions

7 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979, para. 149.

8 UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection*, Geneva, November 2001, para. 22.

9 *Ibid.,* para. 21.

in Articles 1F and 33(2) and created a ground for exclusion from protection before any consideration of the merits of a claim.[10]

The European Convention on Human Rights (ECHR) also creates significant obstacles to the exclusion and expulsion of foreigners from the territory of contracting States. Strasbourg jurisprudence on Article 3 ECHR (prohibition of torture) clearly establishes that issues of proportionality – i.e. the threat posed by the refugee balanced against the risk to him or her if expelled – must be relevant to the legality of expulsion of a refugee from the country of refuge. Whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another country, a contracting State must protect him or her against such treatment in the event of expulsion.[11] According to the European Court of Human Rights, "[i]n these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration".[12] As shown by Sitaropoulos in this Volume, between the two major international events which form the backdrop to this study, the interplay between Article 3 ECHR and immigration and asylum law had more clearly been articulated and developed by the European Court of Human Rights, setting substantive and procedural limits on the contracting States' power to deport.

The ECHR has also come under sustained attack by Member States engaged in the so-called 'war on terror'. Open attempts at undermining the strong Strasbourg jurisprudence on Article 3 first surfaced at European level, in a post-11 September European Commission Working Paper on the relationship between safeguarding internal security and complying with international protection obligations and instruments, where the suggestion was advanced that there might be future case law of the European Court of Human Rights which 'balances' State security against the absolute protection provided by Article 3.[13] At the time of writing, the European Court of Human Rights is due to hear a case brought by Mohammad Ramzy, who was acquitted of involvement in a terrorist cell that was suspected of

10 For an analysis of the erosion of refugee protection principles in the context of the UK emergency legislation and related provisions in asylum law, see also A. Baldaccini, "Public Emergency in the UK after September 11: A New Challenge to Asylum and to the Treatment of Aliens", in A. de Guttry (ed), *Beyond Reaction: Complexities and Limitations of the War on International Terrorism after 11 September* (Pisa: ETS, 2003).

11 The European Court of Human Rights jurisprudence on Article 3 ECHR is well-established. See *Soering* v *UK* (1989) 11 EHRR 439; *Cruz Varas and Others* v *Sweden* ECHR (1991) Series A, No.201; *Vilvarajah and Others* v *UK* ECHR (1991) Series A, No.215; *Chahal* v *UK* (1996) EHRR 413.

12 *Chahal* v *UK* (1996) EHRR 413, para. 80.

13 Commission Working Document, *The relationship between internal security and international protection* (COM(2001) 743 final, 5 December 2001), para. 2.3.1.

recruiting suicide bombers. Ramzy is seeking asylum in the Netherlands, claiming he would face political persecution if he were sent back to Algeria. He says this would be a breach by the Netherlands of Article 3 ECHR. The UK Government is intervening in the case to argue that the rule against deporting people to face torture established in 1996 in the case of *Chahal* ought to be revisited. The UK, as well as other Member States, is currently pursuing policies of seeking to deport people, in spite of a risk of torture, in the face of diplomatic assurances from the receiving country that the person in question will not be tortured or ill-treated. The contention that such assurances with receiving countries constitute a sufficient guarantee to avoid violation of the ECHR is disputed, not least by the UN Special Rapporteur Against Torture.[14]

3.2 The Potections Afforded by EC Law to Certain Categories of Persons

Certain categories of persons who are lawfully present in the EU are beneficiaries of EC free movement rights which entail the right to move, reside, work and be protected from exclusion or expulsion. These are nationals of the Member States and their family members of any nationality. Protection against exclusion, restriction or expulsion for these people may only be derogated from on grounds of public policy, public security, or public health.[15] Only where the individual's behaviour can be shown to be a threat to the ongoing public security of the host State and in circumstances where in respect of the same activities by a national of the State coercive measures are taken, can exclusion, restriction or expulsion be justified.[16] This interpretation of the meaning of public policy and security as regards the entry and residence of individuals in Community law also extends to long-term resident third-country nationals (i.e. those with five years lawful residence) under the Directive concerning the status of third-country nationals who are long-term residents, as they are also protected against expulsion.[17] The power over exclusion or expulsion of all these people no longer rests with the Member States (except, in respect of the long-term residence Directive, those Member States that have opted out). In practice, however, Member States too often misinterpret (or interpret too liberally) the Community concepts of public policy and public security, hence undermining the fundamental guarantees

14 "'Diplomatic Assurances' not an adequate safeguard for deportees, UN Special Rapporteur Against Torture warns", UN Press Release, 23 August 2005.

15 Council Directive 64/221/EC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ 056, 4 April 1964, p. 850).

16 C-348/96 *Calfa* 19 January 1999.

17 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2003 L 016/44).

enshrined in the case law of the European Court of Justice, the EC treaties and relevant secondary legislation.[18]

4. The European Dimension

At **European Union** level, questions about the issue of invocation of emergency rules were hardly considered before the 11 September attacks. When such questions did become prominent in the aftermath of these attacks, the EU institutions took different positions, with the European Parliament, at one end of the spectrum, voicing misgivings about the need for emergency-rule derogations and strongly defending principles of human rights, and the Council, at the other end, supporting the thesis that a 'balance' had to be struck between security and human rights. Since the relationship between security and international obligations first arose in the context of a Commission Working Paper of December 2001,[19] resort to the metaphor of a 'balance' has been an important characteristic of the debate about the relationship between seemingly competing claims about security and liberty.

An important difference in evaluating the EU response in the two periods under review is that, at the time of the first Gulf War, the EU had not yet started to assume competence over asylum and immigration matters (a development of the Third Pillar of the Union from the 1993 Maastricht Treaty), and had no institutional framework for a co-ordinated response to terrorism. However, already during the pre-Maastricht era, the perspective of free movement of persons across borders within the internal market raised the fear of the presence of undesirable elements within people movements. The 'war on terror' springing from the 11 September attacks led to a resurgence of the forms of insecurity generated in the mid-1980s in the name of the struggle against the free movement of people and fear of migrants 'invading' the West. Hence, even when the leading motto of EU governance continues to invoke the need to keep markets open and facilitate freedom of movement, the connection between terrorism and migration is made to push the agenda for more controls on migrants and asylum seekers. Such policies, pursued particularly within the domain of justice and home affairs, have criminalised migrants and securitised asylum seekers.

5. Responses at the National Level

The analysis of responses at the national level gives an indication of the plethora of legislative and administrative measures that were enacted by the five Member States dealt with in this Volume. The order in which these Member States are examined in the following chapters reflects the speed of their legislative reaction

18 See, S. Carrera, "What Does Free Movement Mean in Theory and Practice in an Enlarged EU?" (2005) 11 *European Law Journal* 6, 699.

19 See n. 13 above.

to the attacks of 11 September and the profile of security issues in the domestic debate.

From the Anti-terrorism, Crime and Security Act 2001 to the Prevention of Terrorism Bill 2005, to take the case of the **United Kingdom**, changes in legislation and administrative practices across Europe provide all too many illustrations of a politics of exception and the inherent dangers for the curtailment of the rule of law.

The indefinite detention of persons suspected of terrorist activity has been at the heart of the UK response. In the first Gulf War, powers of indefinite detention were found in temporary emergency legislation, largely shaped by the conflict in Northern Ireland. But restrictions on Iraqi nationals came principally through the extensive powers of detention, deportation, refusal of entry and police registration available under immigration laws. By 2000, temporary emergency legislation had been turned into a permanent terrorism Act more obviously geared towards international terrorism. The events of 11 September led, in the matter of a few months, to the adoption of another Act, which provided for indefinite detention of aliens without trial under immigration powers and required derogation from Article 5 ECHR.

The central element in the UK's response in immigration terms to 11 September – detention without trial of foreign suspects – has been found by the highest court in Britain to be a disproportionate and discriminatory response. Other measures have been enacted since (such as control orders) which are also unlikely to be sustainable under the ECHR, raising the same issues of proportionality, too limited scope of judicial supervision and possible discriminatory application. The attacks in London on 7 July 2005, which were perpetrated by British nationals, have resulted in the proposals of yet another raft of measures which, amongst others, intend to increase the terms of preventive detention. They also seek to extend the public order grounds for exclusion and deportation of foreigners to deal more fully and systematically in particular with those who express views which the Government considers to foment terrorism or who otherwise advocate violence in furtherance of particular beliefs or express what the Government considers to be extreme views that are in conflict with the UK's culture of tolerance.

The long history of tension between the rule of law and the state of exception is also a characteristic of other States which were engaged in counteracting internal forms of terrorism in the 1970s and 1980s, such as Germany and Italy. **Germany** best illustrates the case of a country with an immigration policy difficult to reconcile with an anti-terrorism agenda. The fact that the aftermath of both the first Gulf War and the 'war on terror' coincided with significant changes to immigration and asylum law seems an entirely random occurrence. In the early 1990s, a period of sharp influx of asylum seekers from the Balkans, aliens were not perceived as a source of threat, but were rather the target of violence perpetrated by extreme right-wing groups. However, they bore the brunt of

the single most far-reaching measure adopted in the period of time considered: a change to the German Constitution which made seeking asylum in Germany for people arriving from neighbouring countries all but impossible.

The attacks in the United States in September 2001, and the shock of a German Al Qa'eda cell being directly linked to the events, led to wide-ranging measures against terrorism and a crackdown on Muslim organisations deemed to nurture extremism. However, measures in the immigration field were also put in place, which were not at all correlated to the security agenda but more directly related to a long stifled debate on recruitment of foreign workers, integration of immigrants and Germany's wider views on immigration. Opposition in parliament to a string of controversial measures, curtailing rights and liberties of aliens especially in the context of entry, deportation and removal, was only broken when security issues entered the immigration debate following the terrorist attacks in Madrid in March 2004.

Legislative developments in **France,** particularly in the use of the public order concept, confirm an emerging trend whereby the adoption of criminal offences and of special rules of procedure linked to terrorism intersects with the criminalisation of immigration. This happens, for instance, when, without any clear connection being made, offences which are linked to illegal entry or residence are referred to as offences concerned with the fight against terrorism.

This trend is more marked after 11 September. Although the legislative response to 11 September in France was muted, it resulted in shifting the posts in the immigration debate. A new immigration law, which initially was meant to deal with integration policy, voting rights of foreigners, and regularisation of immigrants, turned into a tough piece of legislation, wholly marked by precariousness of residence and obsession with fraud. The reform of asylum legislation also resulted in a significant departure from previous policy, with the abolition of the concept of territorial asylum and the introduction of exceptional procedures which have been held to undermine refugee protection standards. These reforms were helped by the political exploitation of a growing sense of emergency and fear of insecurity.

In the **Netherlands** the sense of emergency and insecurity following the events of 11 September tapped into a long-standing climate of unease towards foreigners and fears over the possible fundamentalisation of Dutch society caused by migration. The political debate has fostered the belief that there is a connection between practices of Islam and doubtful allegiance to the State. Even where the individuals have become citizens, their religious affiliation makes them suspect as a possible 'fifth column' representing 'the enemy within'. The insistence on stepping up expulsions and enhancing border controls grows considerably in the second period under review, with anti-immigrants sentiments, especially anti-Muslim sentiments, now openly aired as part of the political campaign. Asylum and immigration law is once again amended, extending the grounds on which residence could be terminated (such as for instance for minor

crimes such as shoplifting), criminalising illegal stay, and making it easier to detain people. Although implicitly justified on the ground of heightened security threats, the content of these measures, which dismantle legal protections for aliens, are wholly unrelated to the threat of terrorism.

At the other end of the spectrum is **Italy**. Here the absence of any significant debate on the implications of contemporary security policies is partly explained by the fact that the legal provisions that were extended to terrorists were already in force in relation to organised crime. The Italian case involves two local factors: the traditional criminalisation of migrants as dangerous aliens; and the alleged weakness of Italian borders to terrorist infiltration. Although there is no evidence of connections between terrorism and irregular migration, it has now become normal to search for terrorists among migrants, especially those coming from Muslim countries. This tendency has led to several trials in which individuals have been charged but eventually acquitted. Nevertheless, the social construction of migrants as potential terrorists has been effective. It has enabled a strategy of internment and mass expulsions, such as those from the island of Lampedusa that eventually provoked the intervention of the European Court in Strasbourg.[20]

A new anti-terrorist law came into force in August 2005 in response to the London attacks of July and the threat issued by Al Qa'eda against Italy in relation to its presence in Iraq. The new law includes amongst others measures which make data retention compulsory, and limit judicial oversight in expulsions and in investigative activities.[21] The law also sanctions a departure from ordinary procedure for practices such as detention, searches, surveillance or the adoption of restrictive measures for cases involving terrorist offences, and increases the punishment for individuals contravening restrictive measures imposed upon them.[22] This hastily adopted legislation offers yet another example of responses to terrorism being increasingly built outside the framework of the ordinary criminal process and made to operate under a growing body of unchecked executive powers.

The contributions to this Volume show that one of the most powerful and consequential responses to recent acts of terror has been to try to seal the borders by reinforcing the filters for people willing to enter, to detain potential suspects, and to use the military and intelligence services for internal policing purposes. However, none of these measures is especially novel, although a long history of

20 See, "Italy: The ECHR asks for information on Lampedusa deportations", *Statewatch News*, April 2005.

21 See Statewatch analysis: Italy – Though new anti-terrorist laws adopted, 16 August 2005. Available at www.statewatch.org.

22 Law 155/2005, "Misure urgenti per il contrasto del terrorismo internazionale" (Gazzetta Ufficiale n. 177, 1 August 2005).

strong procedural and substantive protections developed by the European Court of Human Rights has contributed to restrain excesses of unchecked executive powers. It is in the field of the collection, retention and use of massive amount of data on the individuals, particularly biometric data, that public administrations are claiming a wide scope of manoeuvre, against which there is as yet insufficient protection. Recent policy developments seem to be pointing towards new sources of discretionary power through the emergence of EU-wide networks of control which reinforce national policies of exclusions and expulsion.

The structural coherence and potential effectiveness of all these security-related policies, and their compatibility with EU and international human rights standards, data protection legislation and the rule of law for EU and non-EU citizens is very much open to question, as is the real scope and limits of the security measures adopted. The synthesis report of the ELISE project summarizes the challenge we are faced with as follows:

> [It] does not lie in the mysterious task of identifying some acceptable balance between claims about security and claims about liberty. It lies in the need for much more rigorous scrutiny of the conditions under which claims about security warrant the suspension of liberties and freedoms. It requires much more sustained attention to the ways in which the restructuring of political life in response to many different forces is being especially shaped, and distorted, by agencies capable of converting serious threats requiring democratically considered responses into extreme states of emergency requiring military responses, new modalities of social control, intensified forms of surveillance and exclusion as well as unwarranted assaults on the most basic values of liberalism, democracy and the rule of law.[23]

23 ELISE Final Synthesis Report 2005.

Part I The European Dimension

Chapter 1 From Gulf War to Gulf War – Years of Security Concern in Immigration and Asylum Policies at European Level

Nils Coleman

1 Introduction

This chapter will place changes in EU policy and legislation related to the immigration and asylum fields post-11 September 2001 within a wider time-frame of development by starting with a comparative description of the reaction to the first Gulf War of 1991.[1] The title of this chapter loosely delineates the relevant time-frame, the second Gulf War of 2003 being the latest major offensive in the ongoing US-led 'war on terror' that was proclaimed shortly after 9/11.

A tangible parallel between the two periods under comparison is that the 1991 Gulf War was accompanied by a significant terrorist scare. During the run-up to the war, Iraq voiced threats of unleashing a wave of terrorist attacks on coalition countries if military action would be undertaken against it, and several attacks occurred on the territory of EC Member States which were ascribed to the Iraqi State. This chapter will illustrate that these events in relation to the 1991 Gulf War provoked a reflex reaction towards migration control comparable to that after 9/11, although far more limited in scale and visibility especially where concerning the response at the European level. This will be followed by a more in-depth analysis of the profound policy and legislative changes within or

1 The preparation of this chapter has included a number of interviews, largely with Commission officials active in the fields of free movement of persons, immigration, or asylum at the time of the Gulf War, and at present. Other main sources are secondary Community and Union legislation, Commission policy papers, and academic literature. News reports, European Parliament resolutions, questions and debates, and documentation originating from intergovernmental co-operation by the Member States provided important sources of information for section 2 pertaining to the 1991 Gulf War.

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with a bearing on EU immigration and asylum law, tracing back to the events of 9/11.

2 Trailing Gulf War I in the Fields of Immigration and Asylum Policy at European Level: Obscure and Restricted Response

This part of the chapter will present an outline of the response to the Gulf War in 1991 at international and Community level. Trailing the response at the international level has involved, in particular, an extensive review of UN Security Council resolutions adopted in connection with the 1991 Gulf War, considering that the UN Security Council specifically called for measures in the migration and asylum fields following 9/11. Before detailing the response in the fields of immigration and asylum policy, this part will describe the state of European integration, as well as the pre-Maastricht division of competence in terrorism, immigration and asylum matters between Member States and the Community. It will also briefly comment on the role the fight against terrorism played in external relations with the Middle East and the US, and the presence of xenophobic sentiments in the EC, these being particular and influential characteristics of the period following 11 September.

2.1 The International Response to Gulf War I in United Nations Security Council Resolutions

After a period of increasing tension, the Gulf crisis climaxed on 2 August 1990 with the Iraqi invasion of Kuwait. The UN Security Council immediately adopted a resolution condemning the attack as a breach of international peace and security and demanded the immediate withdrawal of Iraqi forces from the territory of Kuwait.[2] In response to Iraq declaring a 'comprehensive and eternal merger' with Kuwait, the Security Council confirmed the annexation as null and void.[3]

Security Council Resolution (SCR) 661 of 6 August 1990 imposed economic sanctions on Iraq under chapter VII of the UN Charter. The resolution prohibited the import and export of commodities to or from Iraq and Kuwait. It also ordered the freezing of Iraqi assets and financial transfers. To implement this resolution, the Community adopted Council Regulation (EEC) No. 2340/90 preventing trade by the Community Member States as regards Iraq and Kuwait[4] and Decision 90/414/ECSC of the representatives of the Governments of the Member States of the European Coal and Steel Community preventing trade as regards Iraq and Kuwait.[5] The economic embargo was continuously amended,

2 UN Security Council Resolution (hereinafter SCR) 660, 2 August 1990.

3 SCR 662 of 9 August 1990.

4 OJ 1990 L 213/1.

5 OJ 1990 L 213/3.

further closing off all transport channels by land, air and sea. However, these restrictions never specifically referred to the movement or transport of persons; the same being true for the EEC regulation and ECSC decision, as well as their parallel amendments.[6]

SCR 661 was followed by a series of resolutions which noted the closure or limitation of Iraqi diplomatic representations in several States, demanded the safe departure of foreign nationals present in Kuwait and Iraq, and condemned actions of Iraqi forces which included the violation of diplomatic premises, the abduction of diplomatic staff and foreign nationals, the taking of hostages, and the destruction of civil records in Kuwait.[7] SCR 678 of 29 November 1990 contained a final warning to Iraq to withdraw its troops from the territory of Kuwait before 15 January 1991, authorising Member States to use all necessary means to restore international peace and security in the area if the deadline were not met. 'Gulf crisis' became 'Gulf War' with the commencement of operation Desert Storm on 17 January 1991 – a US-led coalition, including several EC Member States, to liberate Kuwait.

The quick success of this military operation[8] saw the Security Council formulate an elaborate list of cease-fire conditions for Iraq in SCR 687 of 3 April 1991, which also labelled Iraq as a 'rogue state' – a characterisation that would gain increasing significance in the following years. Most notable for the purpose of this chapter is that the Security Council, after "deploring threats made by Iraq during the recent conflict to make use of terrorism against targets outside Iraq and the taking of hostages by Iraq",[9] required:

> Iraq to inform the Council that it will not commit or support any act of international terrorism or allow any organisation directed towards commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism.[10]

Abstention from committing or supporting terrorist acts as a condition of the cease-fire was not referred to again in subsequent resolutions.[11]

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6 *Bulletin of the EC*, 7/8-1990 through to 12-1990, and 1991.

7 SCR 664, 18 August 1990; SCR 665, 25 August 1990; SCR 666, 13 September 1990; SCR 667, 16 September 1990; SCR 669, 24 September 1990; SCR 670, 25 September 1990; SCR 674, 29 October 1990; and SCR 677, 28 November 1990.

8 SCR 686, 2 March 1991, notes Iraq's pledge to comply with all demands of the Security Council, and the suspension of military operations by the international coalition.

9 SCR 687 (1991), preamble.

10 SCR 687 (1991), para. 32.

11 This includes SCR 778, 2 October 1992, which takes note of a report by the UN Secretary General of Iraq's compliance with the conditions of the cease-fire con-

The Gulf War is of course linked to a migratory event with significant security implications – the mass exodus of Kurds towards Turkey – which featured in UN Security Council resolutions during the period under review and met with an innovative response of migration control. Following a letter from Turkey to the Security Council, SCR 688 of 5 April 1991 expressed concern regarding the repression of the Iraqi civilian population in particular in areas inhabited by Kurds, leading to a massive flow of refugees towards and across Iraq's frontiers. As the situation was considered to have a bearing on international peace and security in the region, the Security Council condemned and called upon Iraq to immediately end these actions taking place within its borders.[12] The reaction of the international community to the Kurdish refugees arriving at the Turkish border was to create and maintain a so-called 'safe-haven' in the North of Iraq through military protection and humanitarian assistance,[13] an initiative supported by the European Community.

In summary of the above, at no point did the UN Security Council mandate or call for measures within the immigration or asylum field, as it would in response to the attacks on US territory on 11 September 2001.

2.2 The Community's Political Response to Gulf War I

2.2.1 European Political Co-operation and European Council Meetings

In the framework of European Political Co-operation (EPC),[14] the Community and its (then twelve) Member States issued a number of joint statements

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tained in SCR 687 (1991), as mandated by SCR 715, 11 October 1991. The following resolutions all refer to, and elaborate upon (other) conditions of the cease-fire: SCR 689, 9 April 1991; SCR 692, 20 May 1991; SCR 699, 17 June 1991; SCR 700, 17 June 1991; SCR 705 and 706 (which set up the oil-for-food programme) and 707 of 15 August 1991; SCR 712, 19 September 1991; and SCR 715, 11 October 1991.

12 In the same period, the European Commission referred to it as "internal unrest" (*Bulletin of the EC*, 4-1991, 1.3.14), whereas the European Parliament considered it "tantamount to the crime of genocide" (*Bulletin of the EC*, 4-1991, 1.3.17).

13 G. S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1996), pp. 130, 141.

14 European Political Co-operation was intergovernmental co-operation between the Member States in the field of foreign policy, which dates back to 1969. The Single European Act of 1987 provided a Treaty basis for such co-operation, which from then on involved the Commission in proceedings, and informed the European Parliament on a regular basis. See J. Niessen, "The European Union's migration and asylum policies", in E. Guild, *The Developing Immigration and Asylum Policies of the European Union: adopted conventions, resolutions, recommendations, decisions and conclusions* (The Hague: Kluwer Law International, 1996). It would later develop into the second pillar of the Treaty on European Union: Common Foreign and Security Policy (CFSP). Combating terrorism was subject to co-operation within EPC, insofar as it pertained to EC external threats.

during the Gulf crisis, often in response to, and thus addressing, the same issues as resolutions of the UN Security Council. Special emphasis was on the need for a peaceful resolution of the crisis, the economic embargo, the fate of Community and other foreign nationals in Iraq and Kuwait, and relations with the Middle East. Pledges of humanitarian assistance to cope with refugee flows in the region, and financial assistance to countries in the region most affected by the embargo were also made.[15] The European Council meetings in Rome in October and December 1990 adopted declarations on the Gulf crisis of the same nature.[16] A statement issued jointly with the Soviet Union pointed to the necessary resolution of the Gulf crisis as well as other conflicts in the region at the time, as they posed threats to international peace and security and risked inciting further conflicts, strengthening the arms race and the spread of weapons of mass destruction (WMD), and could lead to "an escalation of violence and extremism".[17]

With the outbreak of the Gulf War the EC Presidency decided Iraq had "neither the shrewdness nor the courage to go back on a policy which had been unanimously condemned by the international community and repeatedly sanctioned by the UN Security Council".[18] Further declarations under the wing of EPC expressed solidarity with States that were involved militarily and expressed commitment to the restoration and promotion of security and stability in the region after the war, to which end relations with Middle Eastern countries would be developed or strengthened.[19] A joint statement on 28 February 1991 marked the suspension of military operations, and reiterated that the Community and its Member States would "make a major effort to develop an overall approach with regard to the region, bearing at one and the same time on security questions, political problems, and economic co-operation".[20]

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15 Statements of 2, 14, 19 August 1990, *Bulletin of the EC*, 7/8-1990; statements of 7, 14, 17 September 1990, *Bulletin of the EC*, 9-1990; statement of 12 November 1990, *Bulletin of the EC*, 11-1990. The Council undertook several unsuccessful efforts to meet with the Iraqi MFA in January 1991. See statements of 4, 6, 10, 14 (extraordinary ministerial meeting) January 1991, *Bulletin of the EC*, 1/2-1990.

16 Declaration on the Gulf crisis, Presidency of the European Council in Rome, 27-28 October 1990, Council Doc. SN 340/90, Annex II. Declaration on the Gulf crisis, Presidency Conclusions of the European Council in Rome, 14-15 December 1990, Council Doc. SN 424/1/90, Annex I. European Council Conclusions from this period are available at: www.europarl.eu.int.

17 *Bulletin of the EC*, 9-1990, 1.4.11.

18 *Ibid*., 1/2-1991, 1.4.16.

19 Statements of 17, 18, 22 January 1991; 19, 24 February 1991, *Bulletin of the EC*, 1/2-1990.

20 *Bulletin of the EC*, 1/2-1990, 1.4.29.

An informal meeting of the European Council was convened in Luxembourg on 8 April 1991 to discuss the problems caused in the Middle East by the Gulf War. In addition to repeating intentions of increased co-operation with countries in the region, the Council "expressed its support for the move to establish in Iraq a United Nations protected zone for minorities", and committed financial aid to refugees.[21] The following European Council in Luxembourg on 28 and 29 June 1991 included a Declaration on the situation in Iraq along the same lines.[22]

A terrorist threat emanating from the Iraqi State was not addressed in the above EPC declarations, or at European Councils. Also, no reference was made to action or measures with regard to (free) movement of persons, or in the immigration and asylum fields as a result of the Gulf crisis or war, although the absence of Community competence in the latter fields at the time must be borne in mind.

2.2.2 The European Parliament

Special reference should be made to the European Parliament's response to the Gulf War. The EP adopted a number of resolutions, pertaining *inter alia* to the condemnation of the annexation of Kuwait and Iraqi behaviour during the occupation, the reconstruction of the region after the war, Iraq's non-compliance with UN Security Council Resolutions, and the plight of refugees and of Kurds inside Iraq.[23]

More relevant for this research is that the European Parliament held a debate in February 1991 concerning Iraq as a terrorist threat, discussing details of terrorist acts within Member States ascribed to Iraqi nationals and the Iraqi State.[24] Parliament was informed of the measures taken by Member States in response, a number of which fell within the field of immigration. This debate will be outlined further below.

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21 *Bulletin of the EC*, 4-1991, 1.3.13. A statement on 3 April had "firmly condemned" the brutal repression of the Kurds in Iraq, *Bulletin of the EC*, 4-1991, 1.4.2. Protest continued after that date; see below n. 22, and a statement of 15 November 1991, *Bulletin of the EC*, 11-1991, 1.4.11.

22 Presidency Conclusions of the European Council in Luxembourg, 28-29 June 1991, Annex III.

23 OJ 1990 C 260/80; OJ 1990 C 324/200; OJ 1991 C 19/76, 78; OJ 1991 C 48/115; OJ 1991 C 72/129; OJ 1991 C 72/141; OJ 1991 C 106/122; OJ 1991 C 240/173; OJ 1991 C 267/137.

24 *Debates of the European Parliament*, No. 3-401, 20 February 1991, p. 190.

2.3 EC Relations with the Middle East

Concrete measures followed the continuous references to the need for increased co-operation and dialogue with Middle Eastern countries in the political declarations detailed above.[25] Not only was emergency aid for refugees in the countries in the region and financial assistance to the countries most affected by the economic embargo (Egypt, Jordan, Turkey, Israel and the Occupied Territories) made available, but special care was taken to continue the negotiation of a Free Trade Agreement with the Gulf Co-operation Council during the crisis, and to initiate political and cultural dialogue with this body "to improve mutual understanding".[26] Also, the so-called Euro-Arab dialogue was strengthened and expanded, and first discussions were held to set up co-operation and economic and political dialogue with the Arab Maghreb Union. The Council also mandated the speeding up of work on a renewed Mediterranean policy, encompassing Mediterranean and Middle Eastern countries. This policy intended to provide a framework for regional co-operation in the fields of industry, trade, and environment, thereby contributing also "to the solution of economic and social problems".[27] In this context, the Commission and its Member States also saw merit in drawing up "a set of rules and principles in the field of security, economic co-operation, human rights and cultural exchanges".[28] These initiatives would later develop into the Barcelona process, the Euro-Med partnership established in 1995.

Security concerns in the form of terrorism, or migration flows from Iraq or the Middle East to the European Community, were not explicitly mentioned as issues for co-operation or dialogue within the above forums.[29]

2.4 EC Relations with the US

As we shall see below, the US external security agenda and the resulting pressure emanating from that side of the Atlantic was an important determinant of changes in EU policy after 11 September 2001. This chapter does not examine in detail the US domestic reaction to the Gulf War in 1991. European news reports however indicate that the Gulf War in 1991 was accompanied by a fear of terrorist attacks within the US and on US targets abroad, the latter especially being subject to increased security measures.[30] It would seem, however, that this

25 For extensive references, see *Bulletin of the EC*, 7/8-1990 through to 12-1990, and 1/2-1990 through to 10-1990.

26 *Bulletin of the EC*, 9-1990, 1.4.12.

27 *Ibid.*, 1.3.23.

28 *Bulletin of the EC*, 1/2-1991, 1.4.24.

29 See, however, below n. 47.

30 "The Gulf Crisis: Anti-Saddam coalition steeled for international retaliation", *The Guardian*, 11 January 1991; "The Gulf Crisis: US prepares for terrorist attacks", *The Guardian*, 15 January 1991; "Fear of terrorism deters travellers", *The Guard-*

fear was not grave enough to lead to the promotion of structural security policy changes through US external relations. Commission officials had no recollection of any relevant pressure from the US during this time.

The period between the Gulf crisis and the actual conflict saw the start of an institutionalised six-monthly dialogue between the US and the Community on the basis of the Transatlantic Declaration of 22 November 1990.[31] At its basis were common goals of promoting democracy, respect for human rights, development and the economy, and safeguarding peace through combating aggression and repression. The declaration mentions a range of issues for dialogue and information exchange under the headings of economic co-operation, co-operation in the fields of education, science and culture, and joint efforts concerning 'cross-border challenges'. Issues relating to movement of persons, immigration, or asylum are not mentioned. Combating and preventing terrorism is part of the listing of cross-border challenges (alongside drugs, international crime, the environment, and weapons of mass destruction) without receiving any particular attention. The declaration does not refer to the situation in the Gulf.[32]

2.5 Islamophobia

The profile of the 9/11 hijackers and the organisation to which they belonged provoked across Western societies common reactions of distrust and fear of Islam as a religious orientation, and of persons of Arab origin. The ensuing 'war on terror', directed at an enemy which is not a State, but is in principle embodied by individuals who are depicted according to a particular religious orientation and ethnicity, further strengthened such sentiments.[33]

An assessment of similar public reactions in Member States as a result of the 1991 Gulf war[34] is beyond the scope of this chapter, which pertains strictly to

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ian, 29 January 1991; "The Gulf War: Million US tourists expected to cancel", *The Guardian*, 1 February 1991.

31 *Bulletin of the EC*, 11-1990, 1.5.3.

32 Short reports in the *Bulletin of the EC* record that the Gulf War and the resulting situation in the Middle East were discussed at the first and second meeting in the context of the Transatlantic Declaration, respectively, *Bulletin of the EC*, 1/2-1991, 1.3.30; 4-1991, 1.3.29.

33 E. Brouwer, P. Catz and E. Guild, *Immigration, Asylum and Terrorism: A changing dynamic in European law* (Nijmegen: Recht and Samlenleving 19, 2003), preface and p. 2.

34 M. Kettle, "The home front's holy war – The Gulf conflict has brought personal danger to Europe's 30 million Muslims […] Tears, fears and divided loyalties in a community which is reproached for just being here", *The Guardian*, 1 February 1991. See also "War in the Gulf: Baker curbs immigration", *The Guardian*, 19 January 1991; and "French Muslims sing Saddam's song", *The Guardian*, 17 January 1991.

the Community (or 'European') level. However, an anecdotal piece of evidence suggests the presence of 'Islamophobic' sentiments at precisely that level. On 7 March 1991, a parliamentary question was addressed to the Commission bearing the title "dismissal of cleaning staff by the Commission because of the Gulf War". The question ran:

> According to press reports, the Commission has dismissed three quarters of its cleaning staff. In view of the Gulf War, it was apparently considered that cleaning ladies of Arab or Turkish origin constituted a security risk […].
>
> 1. Is it true that the Commission has dismissed cleaning staff?
> 2. Were there specific reasons for these dismissals or were those concerned considered suspect on grounds of their ethnic origin alone?
> 3. What social security provisions were made in respect of those dismissed?
> 4. If those concerned were employed by subcontractors engaged by the Commission, did the Commission bring pressure to bear on the undertakings in question to dismiss those concerned? What attempts has the Commission made to prevent discrimination against employees of Arab or Turkish origin? What social security benefits will be received by the women dismissed?[35]

The Commission denied the reported dismissals. It replied only that "against the background of the events associated with the Gulf crisis, the Commission adopted a stricter system of checks on established and contract staff. This did not give rise to dismissals or special measures".[36] Inquiry with several officials active within the Commission at the time did not confirm the press reports.

2.6 The State of European Integration

The Gulf crisis and war took place at a critical time in the development of the European Union. Political, economic and monetary union were in the process of being forged, leading to the adoption of the Treaty on European Union (TEU). Efforts at completing an internal market where goods, capital, services and persons would move freely were in full swing, with the deadline of 1 January 1993 looming.

Two intergovernmental conferences – one on Political Union, and one on Economic and Monetary Union – were to prepare the TEU,[37] introduce the

35 Written Question No. 369/91, OJ 1991 C 161/29.

36 *Ibid.*

37 European Council in Rome, 14/15 December 1990.

pillar structure,[38] and take regular stock of progress towards abolishing obstacles to free movement of persons in order to complete the internal market. The European Council meeting in Maastricht on 9 and 10 December 1991 subsequently adopted the TEU.[39] Part of the instructions in preparing the TEU were to consider the question of "whether and how activities currently conducted in an intergovernmental framework could be brought into the ambit of the Union, such as certain key areas of home affairs and justice, namely immigration, visas, asylum and the fight against drugs and organised crime".[40]

At the European Council in Luxembourg on 28 and 29 June 1991, Germany presented proposals for home affairs and judicial co-operation.[41] These included a common immigration and asylum policy within the ambit of the Community. The pillar structure eventually decided upon, however, would consign immigration and asylum to intergovernmental co-operation for several more years, although with a higher degree of involvement for the Council and the supranational institutions.[42] Article K.1 of Title VI of the TEU on Justice and Home Affairs (JHA) co-operation identified asylum policy, policy on the crossing of external borders by persons, immigration policy, and policy regarding nationals of third countries, as 'matters of common interest' on which Member States would inform one another within the Council with a view to co-ordinating their action, and adopting joint positions or joint actions.[43] Police co-operation for the purposes of preventing and combating terrorism was also part of this listing.[44]

Combating terrorism, the Gulf crisis or the Gulf War (aside from the declarations referred to earlier), did not feature in the conclusions of the European Councils between October 1990 and December 1991. However, although the Gulf War was not explicitly mentioned as a factor of relevance in the decision-making process towards political, economic and monetary union, documents of the European Parliament suggest that the event of the Gulf War in 1991 shaped to an extent the development of the second pillar of the TEU, the Union's Common Foreign and Security Policy (CFSP). The Gulf War exposed the Com-

38 European Council in Luxembourg , 28/29 June 1991.

39 For description of the development of the TEU through preparatory European Councils, see Guild and Niessen 1996, above n. 14, pp. 43-45, and S. Lavenex, *The Europeanisation of refugee policies* (Hampshire: Ashgate Publishing Limited, 2001), p. 107.

40 European Council in Rome, 14/15 December 1990, SN 424/1/90, p. 8.

41 Annex I, Presidency Conclusions of European Council in Luxembourg, 28-29 June 1991.

42 Articles K.3, K.4(2), and K.6 TEU.

43 *Ibid*., Articles K.1 and K.

44 *Ibid*., Article K.1(9).

munity's inability to react to international events with 'a single voice'.[45] Consequently, the European Parliament considered that the Community should learn from the event and strengthen its political structures by being fully involved in foreign and security policies.[46] In answering a parliamentary question, the Council, acting under EPC, stated that "the Community and its Member States took careful note of the lessons to be learnt from their involvement in the Gulf Crisis when elaborating proposals for a common foreign and security policy".[47]

2.7 The Allocation of Anti-Terrorism Policy at European Level

A Commission official interviewed for the present research remembered anti-terrorism policy as being one of the least politically relevant issues at the Community level throughout the 1990s up until 9/11. The 1991 Gulf War did not see terrorism moved from its inferior position on the political agenda; rather, the focus at the time was on organised crime, and how to combat it in an area without internal border control.[48]

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45 European Parliament Resolution on the outlook for a European security policy, OJ 1991 C 183/18.

46 Resolution on the annexation of Kuwait by Iraq of 12 September 1990, OJ 1990 C 260/80.

47 Question and answer in OJ 1992 C 183/7. The Lisbon European Council of 26 and 27 June 1992 approved a report on the development of the CFSP with a view to identifying areas open to joint action vis-à-vis particular countries or groups of countries, which had been mandated by the Maastricht European Council. The report did not mention the Gulf War. It refers to prevention and settlement of conflicts, and contribution to a more effective international co-ordination in dealing with emergency situations as possible objectives of CFSP, but this may also have been informed by the Balkan crisis, the mass exodus of refugees from Bosnia-Herzegovina having started around April 1992. As another objective of CFSP, the report mentions terrorism as an issue of international interest where existing co-operation may be strengthened, next to arms proliferation and drugs trafficking. It also provisionally identified regions of common interest – Central and Eastern Europe, the CIS, Balkans, Maghreb, and Middle East – on the basis of geographical proximity, interest in political and economic stability of the region, or the existence of threats to the security of the Union. With regard to the Maghreb, the report notes "the growth of religious fundamentalism and integralism" as a threat to the Union's stability (para. 30). Co-operation in the fight against terrorism and drugs trafficking is part of a listing of areas to which to give priority attention in approaching this region. The Middle East was stated to be one of the constant preoccupations of the Community and its Member States, but focused entirely on the Israel-Palestine question. A general reference was made to the fight against terrorism and drug trafficking as potentially open to joint action by Member States. See Annex I, Presidency Conclusions of the European Council in Lisbon, 26-27 June 1992.

48 The conclusions of European Councils between October 1990 and December 1991 make continuous reference to the importance of, and development of, measures in

The Community did not have competence in the fight against terrorism at the time of the Gulf crisis. Exchange of information, co-ordination, and co-operation aimed at combating terrorism took place within the context of the informal and purely intergovernmental TREVI group.[49] Outside the Community framework, Member States' Justice and Interior Ministers had been meeting as the TREVI group once under each rotating Presidency since 1976 to discuss threats which terrorism posed to internal security, pertaining mostly to domestic terrorism in the respective Member States. Meetings of experts and high-level officials complemented the TREVI ministerial group.[50] The field of activity of the group was expanded during the mid-1980s with the inclusion of drugs, organised crime, and (illegal) immigration.[51] The TREVI framework included working groups on terrorism, scientific and technical co-operation, international crime, and abolition of internal border controls.[52] With the entry into force of the TEU, the different policy fields addressed by the TREVI group were absorbed within third pillar justice and home affairs co-operation.

The TREVI group is reported to have formally associated neither the General Secretariat of the Council, nor the Commission with its activities and proceedings, until the semester preceding the entry into force of the TEU.[53] The Commission had been admitted from January 1991 as an observer to TREVI meetings insofar as they dealt with the security aspects of the creation of an area of free movement of persons.[54] It was first allowed to attend a meeting of the TREVI Ministers in June 1991.[55] The European Parliament also received infor-

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the fight against drug trafficking and organised crime, but never mention terrorism. See also M. Den Boer, *9/11 and the Europeanisation of Anti-terrorism Policy: A critical assessment*, Policy Papers No 6, Notre Europe, Groupement d'Études et de Recherches, September 2003, p. 1.

49 The group's name is subject to different explanations. It has been claimed to refer to the Trevi fountain in Rome, where the group held its first meeting, but also to be an acronym of 'Terrorisme, Radicalisme, Extrémisme et Violence Internationale'. See Lavenex, above n. 39. A Commission official has refuted the acronym, and states Trevi to be an indirect reference to the first president of the group, one Mr Fonteijn. See W. de Lobkowicz, *L'Europe et la sécurité intérieure: Une élaboration par étapes* (Paris: Collection Les études de La documentation Française, 2002).

50 Lavenex, above n. 39, p. 86; De Lobkowicz, above n.49, p. 19.

51 Lavenex, above n. 39, p. 87. See also Guild and Niessen, above n. 14, p. 33; and several parliamentary questions concerning the TREVI group in OJ 1992 C 289/33.

52 De Lobkowicz, above n. 49, pp. 20, 34-35.

53 De Lobkowicz, above n. 49, p. 19.

54 Answer given by Mr Delors on behalf of the Commission to parliamentary questions, OJ 1992 C 289/37.

55 *Bulletin of the EC*, 6-1991, 1.4.10.

mal briefings on the activity of the group through the President of the Council by 1991,[56] although these were limited in nature.[57]

2.8 The Allocation of Immigration and Asylum Policy at European Level

The Community did not have competence in the fields of immigration and asylum policy at the time of the Gulf War and not until the entry into force of the TEU. At European level, they were matters exclusively of intergovernmental co-operation, conducted outside the Community framework. Relevant Community competence existed with regard to the free movement of persons within the EC, but efforts at achieving this goal, too, found their emphasis in the intergovernmental sphere. Only policy and legislation concerning the free movement of workers was firmly within the Community's grasp.

The Single European Act of 1986 (SEA) decreed that the Community was to have free movement of persons within its borders by 1 January 1993 as a necessary element of the internal market.[58] This spurred a variety of activities. Member States were left wondering how to safeguard their security in an area without internal border controls. They concluded that this would require an increase in alternative internal control capability through co-operative measures between police authorities, and an enhanced control of the area's external borders. The lifting of internal border controls furthermore required the harmonisation of immigration and asylum policies in order to regulate the entry, internal movement and residence of third country nationals in a more uniform manner. A declaration was annexed to the SEA stating that in order to promote the free movement of persons, Member States would co-operate on policy regarding the entry, movement and residence of third country nationals, without prejudice to the powers of the Community.[59]

The creation of an area of free movement of persons, and all that accompanied it in terms of security measures, harmonisation of immigration and asylum policies, and external border control, was primarily pursued as an intergovernmental matter between Member States.[60] Several different but partially overlapping[61] intergovernmental groups were charged with the task.

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56 Debates of the European Parliament, No. 3-406, 12 June 1991, p. 181.

57 As illustrated by a large number of detailed parliamentary questions concerning TREVI in OJ 1992 C 235/51-58, and OJ 1992 C 289/33-37.

58 Article 8a SEA.

59 G. Callovi, "Regulation of immigration in 1993: Pieces of the European Community jig-saw puzzle" (1992) 26 (2) *International Migration Review* 358.

60 For the Commission's position regarding this development, see Callovi, above n. 59, p. 360.

61 See Lavenex, above n. 39, chapter 2, "'First Generation' co-operation among EU Member States".

In response to the SEA, 1986 saw the creation of the *Ad Hoc* Group on Immigration, tasked with the examination and introduction of measures to ease the lifting of internal frontier controls on persons in the Community.[62] It was similar in structure to the TREVI group. Experts within subgroups and meetings of high level officials drew up proposals and prepared six-monthly meetings of ministers responsible for immigration in the respective Member States. The six-monthly ministerial meetings of the *Ad Hoc* Group on Immigration and the TREVI group were held back-to-back on the same day. Both groups showed a large degree of overlapping membership, depending on the domestic allocation of immigration and security matters to interior, justice, or foreign affairs ministries. The *Ad Hoc* Group on Immigration comprised subgroups on asylum, admission, expulsion, visas, external frontiers, exchange of information, and personal documents.[63] The Commission was associated with proceedings from the start, although it enjoyed observer status only. The meetings of the group were held at Council premises and with the assistance of officials of the Council Secretariat.

The main product of co-operation within the *Ad Hoc* Group on Immigration is the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the Community, signed in Dublin on 15 June 1990.[64] The so-called 1992 London resolutions were also prepared within this group.[65]

Despite the creation of the *Ad Hoc* Group on Immigration, the TREVI group continued to fulfil a task in working towards an area of free movement of persons. An additional working group was created in 1988 under the name of 'TREVI 1992', which was to focus on the maintenance of internal security in an area without internal border controls on persons.[66] This working group

62 Callovi, above n. 59, p. 359. Guild and Niessen, above n. 14, p. 31; Lavenex, above n. 39, p. 86; De Lobkowicz, above n. 49, p. 29.

63 Parliamentary questions also mention a working group on 'information technology', occupied with the development of a database on 'undesirable asylum seekers', OJ 1992 C 235/56.

64 The adoption of a Convention on the crossing of the external frontiers of the European Community stranded on disagreement between the UK and Spain over applicability of the Convention to Gibraltar. See Guild and Niessen 1996, above n. 14, p. 34.

65 The London meeting of the Ministers responsible for immigration, 30 November-1 December, adopted *inter alia* a Resolution on manifestly unfounded applications for asylum, a Resolution on a harmonised approach to questions concerning host third countries, and Conclusions on countries in which there is generally no serious risk of persecution. For description and analysis of these early attempts at harmonisation of asylum policy, see Guild and Niessen 1996, above n. 14.

66 De Lobkowicz, above n. 49, p. 34.

produced a roadmap for working towards the free movement of persons, focusing on security. The '1992 Action Programme',[67] adopted by the TREVI Ministers on 15 June 1990 in Dublin, outlined measures to be implemented before 1 January 1993 as necessary for safeguarding internal security in the absence of internal border controls on persons. Furthermore, the European Political Co-operation (EPC) group was also concerned with the implications of the creation of an area of free internal movement of persons.[68]

This multitude of intergovernmental forums working towards the same goal called for the creation of yet another group to co-ordinate respective efforts and lead the exercise. The Rhodes European Council in December 1988 installed an additional political level between the intergovernmental groups and the ministerial and Community level, with the creation of the Co-ordinators' Group on the Free Movement of Persons, consisting of high-level Member State officials.[69] The European Council considered that the achievement of the Community objective of an area without internal frontiers "is linked to progress in intergovernmental co-operation to combat terrorism, international crime, drug trafficking and trafficking of all kinds"[70] and hence the need to co-ordinate such co-operation, and create a link with the Community level. The Co-ordinators' Group received reports from the various working groups, and reported regularly on progress to the Ministers responsible for immigration meetings, such as the *Ad Hoc* group, and European Councils.[71]

A parallel, overlapping and also intergovernmental track of development was that of co-operation within the smaller circle of Schengen states. In 1985,

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67 *Action programme regarding the reinforcement of co-operation in matters of police and the fight against terrorism or other forms of crime*, Declaration of commitment, Dublin, 15 June 1990.

68 Callovi, above n. 59, p. 360.

69 *Ibid.*, p. 361; Guild and Niessen, above n. 14, p. 32; Lavenex, above n. 39, p. 161. Successors of this group are the 'K.4 Committee' under the TEU, and the current 'Article 36 Committee' as installed by the Treaty of Amsterdam. See De Lobkowicz, above n. 49, p. 33.

70 Quoted in OJ 235/57, 14 September 1992.

71 The Co-ordinators' Group promptly produced the so-called Palma document – adopted by the European Council in Madrid, 26/27 June 1989 – which listed necessary action for free movement of persons to be realised. This included action at external and internal borders, and within Community territory, with respect to drug trafficking, terrorism, organised crime, the granting of refugee status, admission, visas, and judicial co-operation; outlined in Callovi, above n. 59; Guild and Niessen 1996, above n. 14; De Lobkowicz, above n. 49. Guild and Niessen 1996 includes a copy of the Palma document in the annex. This document served as yet another roadmap towards creating free movement of persons. The European Council in Lisbon on 26 and 27 June 2002 called for the implementation of 'essential measures' contained in the Palma document. See Presidency Conclusions, p. 12.

the countries of the Benelux, France and Germany signed the Schengen Accord concerning the gradual abolition of checks at the common borders. In June 1990, the same states adopted the Convention Applying the Schengen Accord, known as the Schengen Convention. It outlined the measures required to achieve the abolition of border checks, as well as 'compensatory measures' necessary to safeguard security. At the time of the Gulf War, membership of the 1990 Schengen Convention had grown to six States with the addition of Italy. Spain and Portugal joined in June 1991.[72] Co-operation between Schengen States has generally been described as a test-bed or experimental laboratory for the abolition of controls at internal frontiers of the wider, and thus slower, group of the Twelve.[73] The emphasis of Schengen co-operation was equally on how to implement free movement of persons without being to the detriment of internal security. The Schengen structure also consisted of control at ministerial level, a gathering of high-level officials in the Schengen Central Group, and a collection of working groups.[74] The working groups pertained to a wider range of issues: police and security, movement of people (subdivided into asylum, visas, migration (admission and expulsion), and external borders), transport, and customs and movement of goods.[75] The European Commission was allowed to join proceedings within the Schengen group as an observer after the signing of the Schengen Convention.[76]

Activity within the above intergovernmental forums is characterised by an absence or lack of democratic control, and remains to this day relatively non-transparent.[77] Requesting the Council archives for access to documents originat-

72 *Bulletin of the EC*, 6-1991, 1.4.11.

73 Lavenex, above n. 39, p. 91; De Lobkowicz, above n. 49, p. 23. Callovi, above n. 59, pp. 359, 363, writes that the Commission shared this view, considering Schengen to lead the way to technical solutions which could speed up the removal of border checks throughout the Community. The overlap between Schengen and Communtiy activity was not considered problematic: in cases of discrepancies Community instruments were thought to prevail.

74 Lavenex has pointed to the high degree of convergence with the *Ad Hoc* Group on Immigration. Besides overlapping State membership, ministerial control of both forums fell largely to the same ministers, and the majority of Member State officials in the Schengen working groups also represented their countries at working level in the *Ad Hoc* Group. Above n. 39, p. 89.

75 *Ibid.*, p. 90.

76 *Ibid.*

77 *Ibid.*, p. 92; De Lobkowicz, above n. 49, p. 35. The Ministers responsible for immigration at the time sought on occasion to contradict criticism of insufficient transparency by pointing out that the results of secret intergovernmental negotiations were submitted to national parliaments, where they were subject to public parliamentary discussion, SN 4038/91, 3 December 1991. There is indication, however, that such national parliamentary scrutiny was no more than token, see T. Bunyan,

ing from these intergovernmental groups in the early 1990s is an arduous and lengthy process. Exact references to TREVI, *Ad Hoc* Group on Immigration, or Schengen documents within the relevant period are scarce, which implies document requests on the basis of keywords within a specified time frame. The particular segments of the Council archives holding this documentation are not catalogued or systematically organised, presenting staff with a considerable challenge in locating relevant documents.[78] In the event that such obstacles are overcome and a relevant document identified, public access is uncertain. Intergovernmental co-operation at European level at the time was subject to a different appreciation of public scrutiny than the principle of transparency which binds the Community. Nevertheless, after consultation by the Council archives with the relevant Member States,[79] a number of documents were obtained for the benefit of the present research, which will be reviewed below.

2.9 A Degree of Disclosure Courtesy of the European Parliament

A debate in the European Parliament in February 1991 reveals intergovernmental discussion and co-ordination at the European level of measures in response to a terrorist threat resulting from the Gulf War, which bear a striking resemblance to action taken within the immigration and asylum fields after 11 September 2001. Considering the relevance of the debate, this section will quote in detail from its transcript.[80]

The cause of the debate was a parliamentary question[81] to the Foreign Ministers acting under EPC, relating to the possibility of terrorist attacks by Iraq in light of the Gulf War. The MEP in question elaborated on terrorist attacks in EC Member States apparently attributed to Iraqi nationals:

> There have been a number of attacks throughout Member States since the Gulf war started. In Germany there have been at least two: on 17 January there were explosions in shops in Bonn and Berlin, and on 13 February an explosion at the American ambassador's residence. In France there was an attack on *Libération* newspaper offices in Paris on 26 January, and on 27 January an attack on the Centre for Immigrants in Marseilles. In Italy there was an explosion at the English school, in an international library in Milan on 17 January,

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"A Europe steeped in racism: the establishment of Euro-racism", *The Guardian*, 28 January 1991.

78 In fact, TREVI documents, as well as EPC documents could initially not be located at all, presumed misplaced during a migration of these archives to the Council.

79 When concerning documentation from a purely intergovernmental context, the Council archives are not competent to decide on granting access to a document, and are required to consult and seek the approval of the Member States concerned.

80 *Debates of the European Parliament*, No. 3-401, 20 February 1991, p. 190.

81 Original question by MEP Banotti, taken over by MEP Cushnahan.

> and on 29 January an attack on the facilities of Coca Cola Milan. In Greece there were a number of attacks: a bus explosion near Acropolis and, of course, the explosion at the Franco-Hellenic school. It is very fortunate that there has not been wholesale slaughter arising out of those attacks.[82]
>
> […] Could I ask the President […] to give an absolute assurance that every possible measure will be taken, be it security or legal […] to ensure that democratic institutions throughout the Community are not under terrorist threat from anywhere, whether the source is the Middle East or [elsewhere]?

In response, the President of the Council outlined an informal ministerial meeting of the TREVI group, which had been convened in Luxembourg on 22 January 1991, "to exchange information on the measures taken by each Member State at the national level and at the same time to discuss the possibilities of joint action and co-operation at the Community level". The TREVI ministers undertook an assessment of the terrorist threat resulting from the Gulf War, and discussed security measures:

> As regards the assessment of the threat, there is a threat of attack and there will continue to be one after the conflict is over […]. There is a risk in certain Community countries where there is a very large population of Muslim origin. There is also a threat of state terrorism, terrorism by organised groups and spontaneous terrorism. Terrorism linked to the crisis in the Gulf may bring in its wake a renewal of international terrorist activity but while our analysis may conclude that an aggravated risk of terrorism does exist, we do not for the moment have any information about the intended acts.
>
> As for the security measures that have been taken, we know of the following initiatives: checks on all Iraqi nationals; in some cases removal and expulsion; tighter security control on nationals of certain risk countries; restrictions or bans on the issue of transit visas to Iraqi nationals; intensification of preventive measures; setting up of security committees; expulsion of certain diplomats; contacts with threatened communities in Europe to reassure them and

82 Press reports confirm a number of these attacks, although not all involved Iraqi culprits. Greece suffered a number of (non-lethal) attacks, directed at US, UK and French business, military and diplomatic representations, throughout January 1991. The attacks were claimed by the Greek organisation 'November 17', acting in opposition to the Gulf War and in solidarity with Saddam Hussain (*The Guardian*, 28, 30, and 31 January 1991). The attack on the immigrant centre in Marseilles does not appear to be linked to the Gulf War. It was claimed by "un mouvement sioniste israélien" (*Le Monde*, 29 January 1991). Whether an explosion at the entrance of the building of the *Libération* newspaper was related to the Gulf War was unclear (*Le Monde*, 28 January 1991).

> maintain a climate of confidence; reinforcement of frontier controls; tighter control at airports – to mention just one example; all electrical equipment is now prohibited on flights; controls on certain threatened targets, notably embassies, public buildings, sensitive areas, American interests and those of other countries directly implicated in the operations in the Gulf.[83]
>
> As to improved co-operation […]: better and faster exchange of information between the Twelve; reciprocal information on all persons declared *persona non grata* and all persons expelled; assessment exchanges on risk communities; rapid exchange of information on persons regarded as suspects; intensification of contacts between information services […].

It would thus appear that the TREVI ministerial meeting in January 1991 undertook an inventory of security measures implemented by certain Member States, and that measures decided upon at 'Community' level were limited to information exchange. The implication of measures within the immigration and asylum fields in the above outline of action taken in response to a perceived Iraqi terrorist threat is apparent, at least at the Member State level.

2.10 A Lack of Response within Policy on Free Movement of Persons, Immigration and Asylum at European Level

The findings of the previous section beg the question whether security concerns in relation to the Gulf War found their way into the limited amount of policy drafted at the time by the supranational institutions in the fields of free movement of persons, immigration, and asylum. Additionally, this section will comment further on the response within TREVI, and consider whether it extended to the *Ad Hoc* Group on Immigration, or the Schengen group.

2.10.1 Absence of Response in European Parliament Resolutions

The European Parliament (EP) made reference only once to the alleged Iraqi terrorism in a resolution on the economic and social consequences of the Gulf crisis, calling for harmonisation of measures undertaken by airlines and Euro-

83 Besides *ad hoc* security measures at airports and diplomatic representations, a limited search in press reports also confirmed a number of measures in the immigration field in several Member States. Most notable were expulsions of Iraqi, Palestinian, and Pakistani nationals, and nationals of North African countries, from the UK, France and Italy. The UK also placed a number of Iraqi nationals in administrative detention pending expulsion on the basis of suspicion of terrorist involvement, and introduced admission restrictions. Reported was also intensive surveillance of Arab and Muslim communities in the UK and France (*The Guardian*, 4, 17, 18, 19, 25, and 30 January 1991; *Le Monde*, 16 and 25 January 1991; *Il Sole 24 Ore*, 19 January 1991).

pean airports to combat 'the terrorist threat'.[84] It did not feature in the numerous other resolutions addressing the Gulf War and its implications.[85]

Resolutions relating to the forging of a European security policy,[86] and Political Union[87] adopted in the period after the terrorist acts connected to the Gulf War took place do not mention these events. The influence of the Gulf War on the development of CFSP, as far as the EP is concerned, appears to have been limited to exposing the Community as an insignificant actor on the international stage, excluding any associated internal security concerns.

Moreover, security concerns relating to the Gulf War do not seem to have affected parliamentary thinking about people flows within or from outside the Community, despite awareness of relevant measures considered necessary at the Member State and intergovernmental level.

For example, a parliamentary debate on the free movement of persons[88] on the same day as the above debate concerning action taken within TREVI did not carry a particular security focus, nor did a resolution on the entry of third country nationals with a view to the free movement of persons, adopted two days later.[89] The same is true for resolutions on completing the internal market by opening internal borders,[90] and free movement and security in the

84 OJ 1990 C 260/80. There is further indication of a heightened focus on terrorism in the field of air travel at the time of the Gulf War. In the context of fulfilling the mandate of Article 8a SEA, the Commission submitted a proposal for a Regulation on the elimination of baggage checks for intra-Community flight and sea crossings one day after the invasion of Kuwait by Iraq, on 3 August 1990 (OJ 1990 C 212/8). The preamble and Article 1 stated the regulation to be without prejudice to the possibility of maintaining safety checks. The Council adopted Regulation (EEC) No. 3925/91 concerning the elimination of controls and formalities applicable to the cabin and hold baggage of persons taking an intra-Community flight and the baggage of persons making an intra-Community sea crossing on 19 December 1991 (OJ 1991 L 374/4). In addition to stating the Regulation to be without prejudice to safety checks, the preamble pointed to the need for Member States to be free to "take specific measures […] for the purpose of carrying out special controls, *inter alia*, in order to prevent criminal activities linked in particular to terrorism, drugs and the traffic in works of art".

85 Above n. 23.

86 Resolution of 10 June 1991 on the outlook for a European security policy: the significance of a European security policy and its institutional implications for European Political Union, OJ 1991 C 183/18.

87 Resolutions of July, October and November 1991, respectively, OJ 1991 C 183/362; OJ 1991 C 240/132; OJ 1991 C 362/211.

88 *Debates of the European Parliament*, No. 3-403, 20 February 1991, p. 141.

89 Resolution of 22 February 1991, OJ 1991 C 72/213.

90 Resolution of 16 May 1991, OJ 1991 C 158/255.

EC,[91] which were prepared and adopted in the following period. They do not betray a security orientation within the fields of free movement, immigration or asylum, other than the pre-existing attention for maintaining security in the absence of internal border controls through increased police co-operation and external border control. There is no mention, either, of a need to ensure where necessary the exclusion or expulsion of immigrants on the basis of public order or national security clauses. That the Gulf War and associated events did not have an effect of this kind on the EP is also illustrated by later resolutions on the European labour market addressing internal movement and immigration,[92] European immigration policy,[93] and harmonisation within the EC of asylum law and policies.[94]

In concluding that security concerns resulting from the Gulf War did not influence the EP's relevant work, it is important to bear in mind that the EP was, to its frustration, not involved in the development of policy and legislation in the fields of free movement, immigration and asylum, and moreover not fully informed. Attempts at penetrating the bastion of intergovernmental dealings within TREVI, the *Ad Hoc* group, and Schengen were a main preoccupation of the EP at the time. Parliamentary questions relating to the composition and activity of these groups would, however, bounce back from the Commission with the message that they should be addressed to the Presidency.[95] The Council would respond that the particular groups were not covered by the Treaties and that it was thus not at liberty to answer.[96] The parliament complained at length

91 Resolution of 13 September 1991, OJ 1991 C 267/197. See also the parliamentary report on which it was based: Rapporteur M. Kurt Malangré, *Rapport de la commission juridique et des droits des citoyens sur la liberté de circulation des personnes et la sécurité dans la Communauteé européenne*, 91/00199 PE 143.354, 3 July 1991. The particular committee from which the report emanated received briefings from the TREVI group on its activities at the time. See *Debates of the European Parliament*, No. 3-406, 12 June 1991, p. 181.

92 Resolution of 8 July 1992, which focused rather on social and free movement rights of legally established third country nationals as EC citizens, OJ 1992 C 241.

93 Resolution of 18 November 1992, OJ 1992 C 337/94.

94 Resolution of 18 November 1992, OJ 1992 C 337/97. This resolution makes only one reference to national security and public order as grounds for exception to the rule of suspensive effect of appeal on expulsion of an asylum applicant. *Ibid.*, para. 7(f).

95 OJ 1992 C 289/37.

96 OJ 1992 C 235/57. During a debate in parliament on free movement of persons, the President of the Council once said: "Successive Presidents […] of the Council have repeatedly tried to explain here over the years that the Council had no competence to answer questions on intergovernmental co-operation between the Twelve, for which, as its name implies, only member states are competent under present Community law. We may regret it, but those are after all the rules of the game, which

about being shut out, stating on one occasion that it received "only inadequate and spasmodic information on [free movement of persons and security] and has no chance of making a serious evaluation".[97] The same was arguably true for the possible relevance of security concerns resulting from the Gulf War to the parliament's work on people flows within or from outside the Community.

2.10.2 Absence of Response in Commission Policy

In the early 1990s, the Secretariat General of the Commission contained a small Justice and Home Affairs (JHA) 'task force' in which a handful of officials were occupied with migration matters. Free movement of persons was dealt with by the Directorate General for internal market, and the narrower domain of free movement of workers by the Directorate General for employment. Several persons who fulfilled relevant posts in the JHA task force or these DGs at the time of the Gulf War were interviewed during the preparation of this chapter. None recalled the Gulf War as an item of relevant discussion that impacted upon the content or course of their work pertaining to free movement of persons, immigration, or asylum. This is confirmed by policy papers, published by the Commission during the last quarter of 1991. The Commission adopted a Communication on immigration,[98] a Communication on the right of asylum,[99] and a Communication on the abolition of frontier controls.[100]

The European Council in Luxembourg in June 1991 instructed the Ministers responsible for immigration to draw up a report defining and planning the preparatory work needed for the harmonisation of Member States' policies on asylum, immigration and aliens, to be submitted to the European Council in Maastricht in December.[101] The two Communications on immigration and asylum were adopted as contributions to this process, and to stimulate discussion on tackling the 'common problems'[102] of immigration and asylum in the run-up to the intergovernmental conference on Political Union. The policy papers analyse the current state of migration of persons and asylum seekers into the Community, argue the necessity of a joint approach and harmonisation of policies, and formulate necessary elements of the common policy response. Neither refers to the Gulf War or associated security concerns. Moreover, they

must be respected until and unless they are changed". *Debates of the European Parliament*, No. 3-403, 13 March 1991, p. 126.

97 Resolution on the free movement of persons and security in the European Community of 13 September 1991, recital K of the preamble, OJ 1991 C 267/197.

98 SEC(91) 1855 final, 23 October 1991.

99 SEC(91) 1857 final, 11 October 1991.

100 COM(91) 549 final, 18 December 1991.

101 Annex I, Presidency Conclusions of European Council in Luxembourg, 28-29 June 1991. The report will be reviewed in the following section.

102 SEC(91) 1855 final, above n. 98, p. 2.

do not mention in any way policy aimed at identifying and removing or excluding persons posing a danger to security within immigration flows.

The Communication on abolition of frontier controls was one of the Commission's regular publications on progress towards the creation of an area of free movement of goods, capital, services and persons. It remained silent on particular security-relevant events, or security measures in light of the forthcoming free movement of persons. It did note with some concern the considerable delay in abolishing border checks on persons as pursued through the intergovernmental track. A later Communication in the same series elaborates on the causes of this delay in more detail.[103]

Firstly, it mentions a lack of concrete follow-up to the 1989 Palma document[104] and similar roadmaps towards achieving free movement of persons.[105] In other words, alternative control measures were not being implemented to a sufficient degree such that Member States' reliance on internal border controls for their security was not alleviated. Secondly, certain Member States held a different view than the Commission on the degree of free movement of persons required by Article 8a SEA. The Commission indicates the views that circulated amongst some of the Member States by forwarding an interpretation of the Article. It argued that Article 8a applied to all persons irrespective of nationality, was not restricted to the movement of workers, service providers and self-employed persons as covered by the Treaty, and did not allow for border checks to establish whether a person is an EU citizen or not, or poses a danger to public policy, public security, or public health.[106] The paper does not give reason to assume, however, that the lack of enthusiasm on the part of Member States to give up control of borders was caused by any particular concern, besides their well-known reluctance to relinquish this sovereign right.

2.10.3 Restricted European Intergovernmental Response

The abovementioned limits of public access to documents originating from relevant intergovernmental forums make it difficult to accurately assess the extent and nature of the reaction to security concerns related to the first Gulf War within developing free movement, immigration and asylum policies at European level. What follows is an assessment on the basis of interviews and of documents, which the Council archives were able to locate and release for public access.

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103 Communication on the abolition of border controls, SEC(92) 877 final, 8 May 1992.

104 Above n. 71.

105 SEC(92) 877 final, p. 5.

106 *Ibid.*, pp. 10-12. For an account of the debate surrounding the interpretation of Article 8a SEA, see the contributions of J.W. de Zwaan and C.W.A. Timmermans in H.G. Schermers et al. (eds.) *Free movement of persons in Europe* (The Hague: Martinus Nijhoff Publishers, 1993).

Regarding TREVI co-operation, a report to the European Council in June 1991 from the Co-ordinators' Group on the free movement of persons mentions that, in addition to the implementation of the 1992 Action Programme, "the question of combating terrorism in the context of the Gulf crisis" dominated the activities of the TREVI group during the first six months of 1991.[107] The question is whether security concerns in relation to the Gulf crisis also influenced the work taking place within the *Ad Hoc* Group on Immigration, or the Schengen Group, bearing in mind their specific tasks as outlined above. One would expect a degree of spillover of the activity within TREVI, especially when considering the overlapping membership between the TREVI group and the *Ad Hoc* Group on Immigration.

Commission officials of the JHA task force who were observers in the Co-ordinators' Group, and relevant working groups of the *Ad Hoc*, or the Schengen group did not recall discussion of the kind of measures featuring within TREVI.[108] This is confirmed by a review of relevant documentation, which has not identified the Gulf War as a significant issue of security concern requiring responsive measures in the immigration and asylum fields. Further reports by the Co-ordinators' Group,[109] conclusions of a series of meetings of the *Ad Hoc* Group on Immigration,[110] and meeting reports of its various subgroups on

107 Co-ordinators Group', *Report to the European Council from the chairman of the Co-ordinators' Group on free movement of persons – work done during the first half of 1991*, CIRC 3640/91 ADD 1 REV 1, CONFIDENTIAL, 26 June 1991, p. 7.

108 The Gulf crisis and war were discussed in the *Ad Hoc* group in a different sense. The arrival of large numbers of Iraqi asylum seekers in Italy during the Gulf crisis created awareness of the value of co-operation with countries of origin and transit in attempts at managing migration flows. The mass exodus of Kurds after the war had further effects. Contacts and co-operation with Turkey were increased in order to deal with the refugees, and discussion commenced on increasing Turkish border control capacity, as well as the possible conclusion of a readmission agreement with Turkey. The Kurdish exodus furthermore led to Member States' support for the installing of a new post at UN level – the still existing post of Under-Secretary General for Humanitarian Affairs – for dealing with situations requiring large-scale emergency humanitarian aid (see Annex VI of the Presidency Conclusion of the Luxembourg European Council of June 1991). It is also in this period that mention is made of setting up a "quick reaction consultation centre" at European level to deal with large and sudden migratory flows. See *Bulletin of the EC*, 6-1991, 1.4.9.

109 Co-ordinators' Group, *Report to the Luxemburg European Council from the Chairman of the Co-ordinators' Group on free movement of persons*, CIRC 3640/91, CONFIDENTIAL, 24 June 1991; *Report to the European Council in Maastricht from the Co-ordinators' Group on free movement of persons*, CIRC 3677/91, CONFIDENTIAL, 5 December 1991.

110 *Ad Hoc* Group on Immigration, SN 1140/91 (WGI 744), CONFIDENTIAL, 19 February 1991; SN 1617/91 (WGI 763), CONFIDENTIAL, 9 April 1991; SN 1895/91 (WGI 770), CONFIDENTIAL, 11 April 1991; SN 1907/91 (WGI 782),

visa,[111] expulsion,[112] documents,[113] and external frontiers were reviewed.[114] None of these documents indicate discussion of events relating to the Gulf War or measures regarding Iraqi nationals or other specific groups of immigrants, or any elevated attention for security matters. An extensive search in documents of the Schengen groups starting from August 1990 undertaken by the Council archives, and an interview with an ex-official of the Schengen Central Group confirmed that the Gulf War was not of influence on activity within that forum, either.

One final document requires mentioning, as a main reference point in the early development of immigration and asylum policies during the period following the Gulf War. The Ministers responsible for Immigration presented a report on the harmonisation of immigration and asylum policies to the European Council in Maastricht, which was prepared within the *Ad Hoc* Group on Immigration.[115] In this document, intended as a definitive roadmap for the development of policy at European level, the Ministers argued for the necessity of harmonisation in light of the lifting of internal border controls, the dramatic increase in asylum applications and persons entering illegally, and the Dublin Convention. The report also established work programmes within priority areas. Unsurprisingly, considering the above review of the activities of the *Ad Hoc*

CONFIDENTIAL, 18 April 1991; SN 2228/91 (WGI 790), CONFIDENTIAL, 3 May 1991; SN 2518/91 (WGI 812), CONFIDENTIAL, 3 June 1991; SN 2534/91 (WGI 828), CONFIDENTIAL, 5 July 1991; SN 3244/91 (WGI 854), CONFIDENTIAL, 26 September 1991.

111 *Ad Hoc* Group on Immigration, meeting of the subgroup on visa, SN 3250/91 (WGI 860), CONFIDENTIAL, 24 September 1991.

112 *Ad Hoc* Group on Immigration, meeting of the subgroup on expulsion, SN 4377/91 (WGI 942), CONFIDENTIAL, 18 December 1991.

113 *Ad Hoc* Group on Immigration, meeting of the subgroup on travel document abuse, SN 1145/91 (WGI 749) (FD 91), CONFIDENTIAL, 25 February 1991; SN 3430/91 (WGI 879) (FD 101), CONFIDENTIAL, 7 October 1991; SN 1280/92 (WGI 970) (FD 105), CONFIDENTIAL, 10 February 1992.

114 *Ad Hoc* Group on Immigration, draft agenda for the subgroup on borders, SN 1130/91 (WGI 734), CONFIDENTIAL, 23 January 1991; meeting of the subgroup on borders, SN 3424/91 (WGI 873), CONFIDENTIAL, 30 September 1991. The following references pertain to a series of meetings of the subgroup on borders which elaborated the draft Convention of the Member States of the European Communities on the crossing of their external borders (above n. 64): SN 1146/91 (WGI 750), CONFIDENTIAL, 4 March 1991; SN 1616/91 (WGI 762), CONFIDENTIAL, 19 March 1991; SN 1621/91 (WGI 767), CONFIDENTIAL, 10 April 1991; SN 1623/91 (WGI 768), CONFIDENTIAL, 28 March 1991; SN 1905/91 (WGI 780), CONFIDENTIAL, 18 April 1991; SN 2237/91 (WGI 789), CONFIDENTIAL, 6 May 1991; SN 2251/91 (WGI 804), CONFIDENTIAL, 22 May 1991.

115 SN 4038/91 (WGI 930), 3 December 1991.

group during the preceding period, the report does not mention the Gulf War, nor does it bear the mark of particularly security-oriented immigration and asylum policies.

In sum, contrary to our earlier expectation, there is strong indication that discussion and co-ordination of security measures within the immigration and asylum fields related to the Gulf War were restricted to the TREVI context.

2.11 Interim Conclusion

As seen above, security concerns related to the first Gulf War exercised little distinguishable influence on the early development of free movement, immigration and asylum policies at the European level. However, a number of factors need to be taken into account. The relevant response in terms of migration control was predominantly located at the Member State level, considering the lack of relevant competence at the European level. In this context we should also point out that, contrary to the security emphasis within free movement policy, security-related measures generally were at the time not considered a suitable element of European immigration and asylum policies. The report of the Ministers responsible for immigration to the European Council in Maastricht in December 1991 was accompanied by an 'explanatory note', in which the Ministers identified policies suitable for harmonisation. Rules governing the legal status of admitted foreigners, and the renewal and loss of that status, were expressly excluded from the possibility of full harmonisation. These were considered matters "related to issues of public order and national security", and thus within the ambit of exclusive competence of the Member States.[116] Clearly, the Gulf War and related events did not change this point of view.

Regarding the supranational institutions, a partial explanation for the lack of reaction by the European Parliament and the Commission is their physical exclusion from the relevant decision-making processes and limited access to critical information. Although the Commission was allowed selected attendance at TREVI meetings at the time, it is unlikely to have been included in meetings that discussed the Iraqi terrorist threat. This in turn indicates a possible explanation for the lack of influence on the work within the *Ad Hoc* Group on Immigration, where the Commission was consistently represented. It would be a plausible speculation that discussion regarding the threat of Iraqi terrorism was screened from the supranational institutions while impacting directly on national security. The prevention of Community involvement in national security matters fits with the interplay at the time between the Member States and the Community in

116 *Ibid.*, p. 27.

the fields of security, free movement of persons, and immigration,[117] as further expressed by the above report.[118]

However, Commission officials, Member State officials and MEPs could not have claimed ignorance of relevant events at the time, even if not included in the powerhouse of decision-making, which can therefore not fully explain their lack of response. The Iraqi terrorist scare and its response featured regularly in news reports throughout January 1991. Actual terrorist acts ascribed to the Gulf War were not severe in the sense of lethal consequences, but the perception of threat during that period appears to have been real and substantial. One could thus suggest that the limited influence of Gulf War-related security concerns on Community and intergovernmental policy-making in the fields under examination was due to the fact that they lacked political efficacy. Arguably, the time was not yet ripe for the introduction of structural and apparent security-oriented measures of migration control.

3 Trailing 11 September 2001 in the Fields of EC Immigration and Asylum Policy: Unequivocal and Sweeping Response

The 1997 Treaty of Amsterdam marked the end of intergovernmental control of European immigration and asylum policy. The response to the events of 11 September 2001 at the European level was more transparent and pertained to the whole range of immigration and asylum policies at the Community's disposal. The remaining sections of the chapter will first consider changes in policy and legislation outside, but with relevance to or affecting, the immigration and asylum fields, i.e. the framework of EU anti-terrorism policy, external relations in general, relations with the US and transfer of passenger data to the US, and developments in the wider JHA field. The last section pertains to immigration and asylum policy and legislation proper.

3.1 The Framework of Anti-Terrorism Policy and the Roadmap of the EU Plan of Action to Combat Terrorism

EU competence with regard to the issue of terrorism resides within the third pillar of Justice and Home Affairs (JHA). Article 29 of the TEU formulates the Union's objective of providing citizens with a high level of safety within an area of freedom, security and justice. This objective is to be achieved *inter alia* through common action among the Member States in preventing and combating different forms of crime, one of which is terrorism.

117 Brouwer, Catz and Guild, above n. 33, p. 7. See also E. Guild, S. Peers, "Deference or Defiance? The Court of Justice's jurisdiction over immigration and asylum", in E. Guild, C. Harlow, *Implementing Amsterdam, Immigration and asylum rights in EC law* (Oxford: Hart Publishing, 2001).

118 Above n. 115.

Terrorism is a horizontal issue which affects different policy fields spread over the three pillars, and is thus met by a variety of policy responses which together constitute the EU fight against terrorism. This is reflected in the so-called EU roadmap of the fight against terrorism.

The extraordinary European Council meeting on 21 September 2001 adopted a Plan of Action to combat terrorism.[119] The implementation of this Plan of Action is outlined by a 'roadmap'. This is an elaborate and regularly updated list of action taken or intended, subdivided into policy areas and standard issues. The great majority of action is undertaken under the headings of General Affairs, and Justice and Home Affairs. The first deals mainly with aspects of external relations. Action within JHA is divided into legislative measures, operational measures, and co-operation in the JHA field with the United States. The heading Economic and Financial Affairs includes most notably measures against money laundering and measures improving the transparency of legal entities. Transport and Telecommunications is one of the policy areas dealing with the high-profile issues of aviation, maritime and (air) port security, and the transfer of passenger data by carrier companies.[120]

Whereas the roadmap is a useful tool for providing a degree of overview, it is not a precise or comprehensive list of EU action relevant to the fight against terrorism. Contrary to the impression it may give, and despite its intentions,[121] the document is not a tool for the overall co-ordination or steering of EU policy. It loosely collates initiatives undertaken in the areas listed, and is given little heed in the development of policy and legislation by Community officials. When regarding the roadmap one should also bear in mind that to speak of an overall co-ordinated EU policy in the fight against terrorism would be inaccurate. As is often the fate of horizontal issues in EU policy-making, terrorism has to a large degree been addressed separately within each policy area, without inter-service consultation or co-ordination at working level of a central or systematic nature.[122]

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119 Council Doc. No. SN 140/01.

120 The first roadmap appeared in October 2001, Council Doc. No. 12800/1/01 REV 1. The last update of the roadmap to appear on the Council website is of 14 November 2002, 13909/1/02. The forthcoming version will cover the period December 2002 until December 2003. DG Justice and Home Affairs of the Commission is responsible for the maintenance of the document.

121 The Declaration on the fight against terrorism attached to the Seville European Council Conclusions, 21-22 June 2002, refers to the JHA Council Plan of Action of 21 September 2001 as a "coordinated and inter-disciplinary approach embracing all Union policies".

122 We can note scattered efforts at improvement in this regard. Within the context of the Council, the roadmap mentions a document titled "Guidelines for a common approach to the fight against terrorism". See roadmap December 2003, point 1 (not

Relevant institutional and organisational changes that were set in motion picked up speed following the attacks by an Al Qa'eda-affiliated organisation in Madrid in March 2004. Plans had been circulating in the Commission to set up an inter-service group for pulling together initiatives from different Directorates General, which are now likely to be realised. The Commission announced improved inter-service co-ordination in its *Action Paper in response to the terrorist attacks in Madrid*.[123] Moreover, the task of the 'EU counter-terrorism co-ordinator', appointed within the context of the Council in March 2004, is to enable a centrally co-ordinated, and thus more consistent and coherent EU approach.[124] The proposal for creating this new office, too, had already been in the pipeline before the events in Madrid.

3.2 External Relations and the Fight against Terror

The Seville European Council took stock of, and provided impetus to the incorporation of the fight against terrorism in the EU's external relations.[125] Following up, the Thessaloniki European Council announced that "the multi-faceted approach towards fighting terrorism has been developed in all aspects of the EU external policy".[126] At this meeting, the CFSP Secretary General/High Representative – Javier Solana – presented recommendations for an overall strategy in the field of foreign and security policy.[127] The European Council instructed the High Representative to continue these efforts and to prepare an 'EU Security Strategy' before the next meeting.[128] The European Council in December 2003

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yet available on the Council website); see also Annex I, Thessaloniki Presidency Conclusions, para. A6. Despite its promising title, however, the intention of the document is limited to co-ordinating relevant dialogue with third countries in the area of external relations. The Thessaloniki European Council also assured that "the EU is developing a more co-ordinated and cross-pillar approach", and referred to CFSP/JHA co-ordination in this regard. Annex I, Thessaloniki Presidency Conclusions, para. E.

123 MEMO/04/66, 18 March 2004.

124 European Council, *Declaration on combating terrorism*, 25 March 2004.

125 *Declaration by the European Council on the contribution of the CFSP, including the ESDP, to the fight agains terrorism*, Presidency Conclusions of the Seville European Council, 21-22 June 2002, Annex V.

126 *Presidency report to the European Council on EU external action in the fight against terrorism (including CFSP/ESDP)*, Presidency Conclusions of the Thessaloniki European Council, 19-20 June 2003, Annex I.

127 *A secure Europe in a better world*, Javier Solana, EU High Representative for the Common Foreign and Security Policy, European Council, Thessaloniki, 20 June 2003.

128 Thessaloniki Presidency Conclusions, para. 54.

adopted *A secure Europe in a better world – European Security Strategy*, also referred to as the 'Solana paper', or 'Solana strategy'.[129]

3.2.1 The Solana Strategy

The new European Security Strategy outlines the direction the Union's Common Foreign and Security Policy (CESP) should take within the current global security environment. As yet only a political declaration, the Solana paper should be read with its possible implications outside CFSP in mind. A follow-up to the Solana paper, for example, was discussed by the JHA Council of 19 February 2004. The Council stated its commitment to the systematic implementation of the new strategy within the field of Justice and Home Affairs. The heavy emphasis of the paper on the threat of contemporary international terrorism is likely to provide confirmation of the existing security orientation within border and migration control, in addition to being an impetus for further initiatives in this area.

The Solana paper serves to illustrate the prime position which international terrorism has commanded since 11 September within the global security order. Typically contemporary 'key threats' which Europe faces are terrorism, proliferation of WMD (especially when linked with terrorism), regional conflicts (which can lead to "extremism, terrorism, State failure, and organised crime, and fuel demand for WMD"), State failure (which "can be associated with obvious threats, such as organised crime and terrorism"), and organised crime.[130] Under the heading of organised crime is a passage which was not present in the earlier draft of June 2003 presented to the Thessaloniki European Council, which associates terrorism *inter alia* with migratory flows:

> Europe is a prime target for organised crime. This internal threat to our society has an important external dimension: cross-border trafficking in drugs, women, illegal migrants and weapons accounts for a large part of the activities of criminal gangs. It can have links with terrorism.[131]

In response, besides specifically addressing threats through targeted measures, the Solana strategy places emphasis on international co-operation and alliances, and on ensuring security and stability in the Union's new neighbouring States

129 Secretary General/High Representative CFSP, Council Doc. 15895/03 PESC 787, 8 December 2003.

130 *Ibid.*, p. 5.

131 *Ibid.*, p. 6.

after enlargement.[132] With regard to terrorism in particular, "the first line of defence will be abroad".[133]

3.2.2 Dialogue and Co-operation with Third Countries

The EU has sought to promote the fight against terrorism within its external relations policy since 11 September 2001. While not as widely as the US, the EU has initiated extensive dialogue and entered into co-operative measures with third countries.[134] Terrorism 'threat assessments' – analysing for example the presence of terrorist organisations and their activity, and sources of financing – determine to a degree the general EU strategy towards countries and regions.[135] These assessments are part of the evaluation of relations with third countries in light of their possible support of terrorism, which was initiated by the General Affairs Council in October 2001.[136] According to the roadmap of the EU Plan of Action to combat terrorism, evaluation takes place on a continuing and systematic basis.[137] There is indication that third countries are also graded according to their efforts in combating terrorism and its financing. Where third countries are found wanting in their actions or attitude, it may have consequences for contractual relations with the EU.[138] Third countries which live up to international obligations in the fight against terrorism – especially referring to the implementation of UN SCR 1373 of 28 September 2001[139] – may be supported in their efforts by technical and financial assistance under the EC's external assistance programmes.[140]

An important vehicle for attaining the co-operation of third countries (and thus the furtherance of the international 'anti-terrorism coalition'[141]) has been the inclusion of so-called anti-terrorism clauses in EC and EU agreements with

132 *Ibid.*, chapter II.

133 *Ibid.*, p. 9.

134 European Commission, MEMO/02/187, 9 September 2002, p.1. Available on: www.europa.eu.int/comm/external_relations.

135 Annex I, Thessaloniki Presidency Conclusions, para. A1.

136 Brouwer, Catz and Guild, above n. 33, p. 147.

137 Roadmap, point 11.

138 Annex V, Seville Presidency Conclusions, para. 4; Annex I, Thessaloniki Presidency Conclusions, para. A4.

139 UN SCR 1373 includes several provisions impacting on migration control.

140 Annex I, Thessaloniki Presidency Conclusions, para. B1. MEMO/02/187, pp. 2-3. See also the roadmap, point 11. According to its latest version of December 2003, the Philippines, Indonesia, and Pakistan have been provided with such assistance.

141 Roadmap, point 1.

third countries.[142] These clauses, which are inserted in a variety of agreements, establish a commitment to undertake co-operative measures in combating and preventing terrorism, and set the parameters for such co-operation. Since 11 September 2001, anti-terrorism clauses have been included in agreements with Algeria,[143] Lebanon,[144] Chile,[145] Syria,[146] Central America,[147] and the Andean Community.[148] Agreements still under negotiation which include such a clause are with Iran,[149] and the Gulf Co-operation Council (GCC).[150] The Council has formulated a standard text for the anti-terrorism clause.[151] Subject to changes resulting from respective negotiations, the clause determines that co-operation shall take place in the framework of implementation of relevant international obligations. Co-operation may consist of the exchange of information, and the exchange of views on counter-terrorism measures and training. This does not mean that the Union has entered, or will enter into co-operation with all the

142 Following a decision by the General Affairs Council of 18-19 February 2002. See Brouwer, Catz and Guild, above n. 33, p. 100.

143 Euro-Med Association Agreement between the European Communities and their Member States and Algeria, signed on 22 April 2002.

144 Annexed to the Euro-Med Association Agreement between the European Communities and their Member States and Algeria (initialled on 10 January 2002) is an agreement in the form of an exchange of letters between the EU and Lebanon on the fight against terrorism, which was adopted by the Council on 22 April 2004. Council Doc. 7642/02.

145 Association Agreement between the European Community and its Member States and Chile, signed on 18 November 2002.

146 Negotiations of a Euro-Med Association Agreement between the EU and Syria were finalised on 9 December 2003. Its initialling is expected before the end of 2004 (www.europa.eu.int/comm/external_relations).

147 Political Dialogue and Co-operation Agreement between the European Community and its Member States and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, signed on 15 December 2003.

148 Political Dialogue and Co-operation Agreement between the European Community and its Member States and Bolivia, Colombia, Ecuador, Peru and Venezuela, initialled on 15 December 2003.

149 Negotiation of a Trade and Co-operation Agreement between the EC and Iran started in December 2002 (www.europa.eu.int/comm/external_relations).

150 Negotiation of a new Free Trade Agreement between the European Community and its Member States and Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates started in March 2002 (www.europa.eu.int/comm/trade).

151 See roadmap, point 11. COREPER reached agreement on the text of the clause on 17 April 2002. Council Doc. 7750/02. This document is not open to public access on the Council website. The text, however, can be deduced from the respective clauses in the above listed agreements.

above countries or regions, but it creates a tangible scope and perspective for doing so if considered necessary or useful in the future.

Here, too, the Union may provide technical assistance to stimulate the conclusion and implementation of anti-terrorism clauses.[152] However, following the attacks in Madrid in March 2004 the Union's approach took on a more punitive note. The Commission has made clear that if clauses are not implemented or if their inclusion in agreements is refused, "this should have direct consequences in terms of the EU's willingness to continue to provide assistance more generally".[153]

In line with the Solana strategy, political commitment to co-operating in combating and preventing terrorism is part of the 'Action Plans' which are elaborated for countries included in the so-called European Neighbourhood/Wider Europe Policy.[154] Provisions to this effect are of similar scope and content to the anti-terrorism clause. The Commission has drafted such action plans for Israel, Jordan, Moldova, Morocco, the Palestinian Authority, Tunisia and Ukraine. They are political documents that establish general policy guidelines and objectives to be agreed upon between the Commission and the country in question.

The European Union furthermore pursues international co-operation against terrorism by way of political dialogue with third countries on a bilateral, regional, and multilateral basis.[155] It does so both with partner countries in the proclaimed coalition against terrorism, and third countries which are held to be 'source' countries of terrorist organisations and associated sentiments. In addition to seeking co-operation in combating terrorism, the Union states to undertake "efforts to tackle root causes of terrorism".[156] What the Union perceives as the root of terrorism is explained in the Solana paper:

> The most recent wave of terrorism is global in its scope and is linked to violent religious extremism. It arises out of complex issues. These include the pressures of modernisation, cultural, social and political crises, and the alienation

152 European Commission action paper in response to the terrorist attacks on Madrid, MEMO/04/66, 18 March 2004.

153 *Ibid.*

154 Commission Communication on *Wider Europe – Neighbourhood: A new framework for relations with our Eastern and Southern Neighbours*, COM(2003) 104 final, 11 March 2003. GAER Council Conclusions of 16 June 2003 on Wider Europe – New Neighbourhood. The aim of the New Neighbourhood policy is to foster closer relations and to stimulate the stability of countries which will border the Union after enlargement.

155 Roadmap, point 1.

156 MEMO/02/187, 9 September 2002, p. 1.

> of young people living in foreign societies. This phenomenon is also part of our own society.[157]

These, then, are issues the Union has tasked itself to address in its relations with relevant third countries, whilst stressing that it "rejects any equation of terrorism with the Arab and Muslim world".[158] Solana, moreover, is careful to add that the listed problems are also domestic, thereby implying that the European societies of EU Member States may likewise breed terrorism of this variety. It is therefore arguable that an implementation in good faith of the Solana strategy would require extensive action in the internal field, combating racism and xenophobia, and promoting the integration of immigrants.

3.3 EU Relations and Co-operation with the US

Whereas the US-led campaign in Afghanistan, which started in October 2001, to oust the Taliban still carried the EU's "staunchest support"[159] the mood had changed by the time the 'war on terror' reached Iraq in March 2003. Undertaken without UN permission, the military operation 'Iraqi Freedom' was firmly opposed by a number of EU Member States, causing a rift in EU-US relations and drawing dividing lines within the EU internally. As a result, the political reaction of the European Union to the military campaign in Iraq was limited in content and duration.

3.3.1 The Union's Political Response to Gulf War II

The Greek Presidency convened an extraordinary European Council meeting in Brussels on 17 February 2003 to discuss the new Iraq crisis and threatening war. It predicted that "the way the unfolding of the situation in Iraq will be handled will have an important impact on the world in the next decades".[160] The Council focused on the disarmament of Iraq, expressed the hope of avoiding armed conflict, and confirmed the importance of the United Nations and its Security Council in remaining at the centre of the international order. The European Parliament was more outspoken in the run-up to the war, stating its position that military action could not be based on UN SCR 1441 (2002), and would be con-

157 Council Doc. 15895/03 PESC 787, p. 5.

158 EU Plan of Action to combat terrorism, Council Doc. No. SN 140/01, p. 4. European Commission, MEMO/02/122, 3 June 2002, p. 2. See also the Commission action paper of 18 March 2004, MEMO/04/66, p. 7.

159 European Commission, MEMO/02/122, 3 June 2002.

160 Presidency Conclusions, Extraordinary Brussels European Council, 17 February, Council Doc. 6466/03. This meeting was preceded by a number of declarations, similar in content, by the Presidency and the Council. See *Bulletin of the EU*, 1/2 2003, pp. 116, 139.

trary to international law and the UN Charter. It also urged the EU to "speak with a single voice" on the matter, yet again.[161]

The European Council meeting in Brussels on 20 and 21 March 2003 coincided with the start of the war in Iraq. In response, the European Council listed a number of "common challenges".[162] These again reiterated the importance of involvement of the UN in the conflict, the need to address the humanitarian situation in Iraq, and a pledge to assist countries in the region if needed, for example in the case of refugee flows, and to contribute to the stability of a post-war Iraq. The Union's Common Foreign and Security Policy (CFSP) and European Security and Defence Policy (ESDP) were to be strengthened, as was the international coalition against terrorism. The Council furthermore stated that "the countries in the region have a particular responsibility to prevent acts of terrorism".[163] With regard to the US, the European Council stated that it remained convinced of the need to strengthen the transatlantic relationship, as it continued to be a fundamental strategic priority for the EU. To achieve the above necessary goals, "the restoration of the unity of the international community is an absolute priority".[164]

No further high-profile statements were made during the course of the war or the months following its supposed conclusion. The next political declaration – also the last of that year – in which the war in Iraq featured explicitly was inserted in the conclusions of the Thessaloniki European Council of 19 and 20 June 2003. It was short and addressed the efforts needed to rebuild and stabilise Iraq and the region.[165] For a situation which was expected to prove of significant impact for decades to come, it received little attention in public political discourse. It seems that in the face of disagreement with the US as well as internally, and the subsequent continuing absence of proof of the presence of WMD casting further doubt on the legitimacy of the war, the Union considered relative silence on the matter of Iraq to be the most appropriate political course. This response, in any case, stands in sharp contrast to the involved and elaborate reaction to the first Gulf War.

In addition to firm disagreement on the Iraq War, especially between the US and France and Germany, the period of political 'goodwill' towards the US which followed 11 September 2001 had started to wane. Grievances concerning the foreign policy of the Bush administration that had abated as a result of

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161 European Parliament, Resolution on the situation in Iraq, 30 January 2003, *Bulletin of the European Union*, 1/2 2003, p. 139.

162 Presidency Conclusions, Brussels European Council, 20-21 March 2003, paras. 66-70.

163 *Ibid.*, para. 68.

164 *Ibid.*, para. 70.

165 Presidency Conclusions, Thessaloniki European Council, 19-20 June 2003, paras. 91-98.

the attacks were already resurfacing before the 2003 Iraq crisis unfolded. The aftermath of the military campaign in Afghanistan had also brought further clashes, most notably over the controversial detention of Al Qa'eda suspects in Guantanamo Bay, some of whom were EU citizens.[166]

This friction within EU-US relations influenced to a certain degree the specific (judicial) co-operation which had started after 11 September 2001 aimed at fighting terrorism.

3.3.2 The Transatlantic Fight against Terror Affecting EC Migration Policy and Control

EC policy, also within the immigration policy field, since 11 September has partially been driven by US demands and pressure.[167] On 16 October 2001, President Bush transmitted a letter to Commission President Prodi, listing a number of proposals for co-operation with the EU. Entitled, "US proposals for co-operation on border control and migration management under the umbrella of US-EU counter-terrorism co-operation", the aim of the proposed measures was not solely to combat international terrorism, but also to target international criminal organisations, including smugglers and traffickers of persons.

The US proposals may be outlined as follows: (i) increased gate and transit passenger checks at airports; (ii) exchange of data between migration authorities on persons who are a threat to public safety; (iii) broader European carrier participation in the Advance Passenger Information System; (iv) the use of European transit facilities for the return of persons from the US; (v) co-ordination of border security training and technical assistance provided in third countries; (vi) document security; (vii) exchange of information on stolen and forged documents; (viii) co-ordination of false document training; (ix) and the use of immigration law and procedures, instead of the process of extradition for the removal of terrorists and other fugitives.

These nine items set the agenda for successive meetings between US delegations and the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), which discussed possibilities and terms of co-operation. The results of the US/SCIFA meetings of 26 October 2001 and 12 April 2002 have been outlined elsewhere.[168] According to a Commission official, activity within this forum came to a relative dead end by the end of 2002. The meeting of 12 April reached agreement on a number of points which were laid down in a co-operation plan but subsequent implementation of the plan – the responsibility of the EU Presidency and the Member States – was limited. In this phase it is suggested

166 Brouwer, Catz and Guild, above n. 33, p. 171.

167 *Ibid.*, pp. 100, 170.

168 *Ibid.*

that the effect of friction in relations between the US and certain EU Member States was being felt.

In an attempt by the US to reinvigorate the SCIFA process, a new US/SCIFA meeting was requested and convened on 23 February 2004 in Dublin. The agenda for this meeting still reflected the original proposals made by the US in October 2001, although several items had become redundant in the meantime. The nine listed items, however, did not feature prominently during the meeting, which discussed only the improvement of information exchange, and initiatives for joint training. More central issues were document security (biometrics), and the US-imposed deadline of 26 October 2004 for machine-readable passports with biometric features as a condition of remaining within the US Visa Waiver Programme. If, as a result, nationals of EU Member States would be removed from the visa waiver regime, the principle of visa reciprocity would imply the imposition of visa requirements on US citizens for admission to the EU.

It is important to note that the emphasis within the US external security agenda has shifted since its initial focus on judicial co-operation, and with that, relevant EU-US co-operation. In the immediate aftermath of 9/11 the US sought co-operation especially on the extradition of suspected terrorists, the exchange of information on suspected terrorists, the removal of persons from the US who are considered a threat to public security, and the return of those who are inadmissible. After a period, presumably having achieved its aim to the degree possible, the focus shifted to border security measures. Developments in this area as relevant to the EU will be highlighted in the next section on transfer of passenger data to the US.

The initial spur in judicial co-operation between the EU (and/or its Member States) and the US has left several tangible results in its wake. Airport checks and transit arrangements have been agreed on a bilateral basis between the US and most Member States. Two agreements were signed between the US and Europol on the transfer of strategic data and personal data in 6 December 2001, and 20 December 2002, respectively.[169] An EU-US agreement on mutual legal assistance was signed on 25 June 2003.[170]

Certain aspects of relevant information 'exchange' between the EU and US are still unresolved. The US has expressed an interest in the data which will be contained in the second generation Schengen Information System (SIS II), and the Visa Information System (VIS), which are being developed by the EU. The EU has consistently pointed to the implication of data protection rules, which would prevent access by the US to these databases, or the sharing of information contained therein.[171] This position remained unchanged at the last

169 See www.usinfo.state.gov, and the roadmap of December 2003, point 50.

170 Agreement on mutual legal assistance between the European Union and the United States of America, OJ 2003 L 181/34.

171 Brouwer, Catz and Guild, above n. 33, p. 102.

EU-SCIFA meeting, which did not reach agreement on the suggestion of information requests by the US on an individual and ad hoc basis.

Another non-starter among the US proposals has been the use of expulsion procedures, instead of extradition procedures for alleged terrorists. Despite its inclusion on the agenda of the US/SCIFA meeting of 23 February, this issue is no longer part of discussions in this forum. Extradition between the EU and US did see a significant development, however, with the EU-US extradition agreement of 25 June 2003.[172]

The current state of play shows that EU-US co-operation within the SCIFA context now pertains to a smaller range of issues. This means that progress has been made on the agenda since October 2001, but it also exposes the limits of EU flexibility on the initial US proposals. SCIFA, however, shows only part of the co-operation which takes place between the EU and US, namely that on first pillar Justice and Home Affairs issues. EU-US meetings to discuss third pillar JHA issues are held every six months, which may also have a bearing on the immigration and asylum fields. There are regular contacts, and visits of officials back and forth, between DG JHA of the Commission and the US Department of Homeland Security (DHS). Furthermore, there are regular meetings of an EU-US Senior Level Group, which discuss issues relevant to mutual relations across the board, including border security. Discussion of this latter issue has recently been taken over by yet another institutional structure under the heading 'EU-US policy dialogue on border and transport security', which includes representatives from several of the Commission DGs, the EU Presidency, the DHS, and the US State Department and Department of Justice.

It is important to bear in mind that the US also influences EU policy indirectly through other multinational forums. A Commission official remarked that the US priority after 9/11 was to achieve fast and effective co-operation on an operational basis. From the start, however, the US was confronted with a certain resistance regarding some of the issues on the nine-point list,[173] and the slow procedural reality of policy-making and action within the EU. A reduced readiness to comply with demands as a result of differences over the war in Iraq further slowed progress. The US thus widened its attempts to achieve co-operation by focusing on bilateral contacts with Member States, and approaching the EU through other channels. Commission officials have pointed out that the

172 Agreement on extradition between the European Union and the United States of America, signed on 25 June 2003, OJ 2004 L 181/27. Notable is the fact that this agreement, and the above agreement on mutual legal assistance, are the first to have the EU as a contracting party, instead of the EC. This is controversial as the legal personality of the EU is still to be determined, awaiting the ratification of the Treaty establishing a Constitution for Europe, which would accord legal personality to the EU.

173 See Brouwer, Catz and Guild, above n. 33, p. 102.

US employs any available platform to push its external security agenda. Examples are the G8, the Organisation for Economic Co-operation and Development (OECD), the Organisation for Security and Co-operation in Europe (OSCE), and the International Civil Aviation Organisation (ICAO). The informal intergovernmental setting of the G8 – with its subgroups on migration, and crime and terrorism – is especially suitable for introducing and promoting the same security measures the US pursues at EC and EU level in the fields of border control, immigration and asylum.

3.4 Transfer of Air Passenger Data to the US

As mentioned above, the current emphasis within US security policy in its relations with other countries is on securing its borders and on enhancing the capability to determine who enters US territory and who does not. To this end, the screening of data of passengers, who board US-bound civil airplanes, at the earliest possible stage before arrival is considered an important tool.

Rules and requirements pertaining to the transfer and screening of passenger data to the US apply to all travellers and migrants from the EU to the US. They are dealt with primarily outside the JHA area, namely within the fields of transport, and the internal market where data protection is regulated.[174] The relevance of these rules and requirements to the present chapter is with regard to the particular group of third country nationals present in EU Member States who wish to travel or migrate to the US. This relevance is thus arguably limited as it concerns a relatively small group, and moreover voluntary movement. Nevertheless, there are two reasons for including a short review. Firstly, EU-US negotiations on the transfer of passenger data have triggered the development of an EU policy in this area, pertaining to incoming as well as internal flights.[175]

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174 There is, however, some involvement of the Commission Directorate Generals JHA and RELEX in relevant negotiations which Commissioner Bolkestein undertakes with the Department of Homeland Security, and in general on this issue.

175 Commission Communication on the transfer of air passenger name record (PNR) data: a global EU approach, COM(2003) 826 final, 16 December 2003, p. 8. The Commission intends to present a proposal for a Framework Decision on data protection in law enforcement co-operation in June 2004. *Ibid.*, pp. 9, 11. In the Communication the Commission also launched a bid for an international approach to the transfer of PNR with a view to border control and national security within the ICAO. At the time of writing, the Council is finalising a working paper for submission to the ICAO, titled "An international framework for the transfer of airline passenger data (PNR) to public authorities", Council Doc. 6949/04, 2 March 2004. Related legislation is also in the pipeline aimed at improving border control and combating illegal immigration: draft Council Directive on the obligation of carriers to communicate passenger data, Council Doc. 7226/04, 10 March 2004. It regulates the transfer of passenger data by carriers which are EU-bound, and carrier sanctions in case of non-compliance. Safeguarding national security or the fight against

The development and outcome of negotiations with the US are instructive for this EU policy, which will thus affect a wider group of persons in the near future. Secondly, the profiling which is used to screen passenger data for the presence of persons who may pose a risk to US national security affects some persons more than others. The 'terrorist profile'[176] of Muslim and male[177] implies that certain third country nationals present in the EU (and EU citizens within certain minority groups) are primarily affected.

Demands on the part of the US concerning the transfer of passenger data continue to drive developments in EU policy and legislation. Economic interests lead the EU to comply with requirements which are imposed by the US unilaterally, and to conclude agreements on the transfer of data by EU carriers to US authorities. Non-compliance by EU carriers would have far-reaching economic consequences through heavy fines, or the denial of landing rights on US territory.[178] This has created a willingness to allow a degree of flexibility concerning data protection rules on the EU side, as will be outlined in the following two sections.

3.4.1 Air Passenger Screening – PNR, APIS and CAPPS

The instruments of this type of US border control are the transfer of Passenger Name Record data (PNR) using the Advanced Passenger Information System (APIS), and the screening of such data by the Computer Assisted Passenger Pre-Screening System (CAPPS). They require the transfer of passenger data to relevant US authorities – the Bureau of Customs and Border Protection (CBP) of the DHS[179] – by air carrier companies at different stages during a trip by plane to the US.

terrorism are not stated as being the purpose of this legislation. The types of data which are the subject of the draft directive indeed do not point to 'terrorist profiling'.

176 For a discussion of attempts to agree on a terrorist profile at EU level, see EU Network of Independent Experts in Fundamental Rights, *The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threat*, (Thematic Comment, 31 March 2003), p. 21.

177 Brouwer, Catz and Guild, above n. 33, p. 189.

178 EU Network of Independent Experts, above n. 176, p. 22. Article 29 Data Protection Working Party, Opinion 2/2004 *on the adequate protection of personal data contained in the PNR of air passengers to be transferred to the United States' Bureau of Customs and Border Protection (US CBP)*, 29 January 2004, Council Doc. 10019/04 WP 87, p. 1.

179 COM(2003) 826 final, p. 5. Commission staff working paper, COM(2004) 81, 21 January 2004, p. 2 (available on: www.statewatch.org).

Passenger Name Records are kept within the automated reservation and departure control systems of air carrier companies.[180] A PNR is a personal folder of a passenger, holding his or her identity, nationality, date of birth, resident address, and booking information. This includes information relevant to the journey, such as date of departure and return, required special onboard services (food), and medical information if relevant.[181] In addition, there may be data of a particular personal nature, such as financial data, information on previous flights of the passenger, his or her place of work, ethnic group, and 'philosophical convictions'.[182] The US Aviation Transportation Security Act of 19 November 2001 and the US Enhanced Border Security Act require the transfer of "PNR with personal details and accommodation addresses in the USA and any other information categories which the US Attorney General may decide to add later" to the US authorities using APIS.[183] Transfers via this system are generally made shortly before take-off, enabling the DHS to screen the data *en route* using CAPPS, and if necessary deny persons admission to the territory upon arrival. The second generation Computer Assisted Passenger Pre-Screening System (CAPPS II) is under development.[184] It is designed to prevent persons from boarding a flight, and thus undertaking the relevant screening before take-off.[185]

The EU and US concluded an agreement on the transfer and use of PNR data on 18 February 2003.[186] This agreement arranged for transfer of PNR to continue, whilst forming the basis for further talks between the Commission and DHS necessary to secure a higher level of data protection from the US side, and

180 COM(2003) 826 final, p. 3.

181 EU Network of Independent Experts, above n. 176, n. 76.

182 *Ibid.*, p. 22. For a list of the 34 PNR data which the DHS currently requires from carriers, see *Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection*, 12 January 2004, Attachment A (available on: www.statewatch.org). Some of the more sensitive data referred to above such as 'ethnicity' and 'philosophical conviction' are not part of this list.

183 Quoted in EU Network of Independent Experts, above n. 176, n. 76. A Commission official commented that APIS was an existing system in September 2001, used for the transmission of certain types of passenger data. Its use was adapted by subsequent legislation to meet the needs of the fight against terrorism.

184 DG TREN, *Study on civil aviation financing security*, Study No. TREN/F3/51-2002, September 2004, p. 222.

185 One of the problems raised by this system is that a denial of boarding implies a (unilateral) annulment of an agreement between passenger and air carrier by the latter. Perhaps recent EC legislation may provide a solution here: Regulation 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights, OJ 2004 L 46/1.

186 EU Network of Independent Experts, above n. 176, p. 22.

to agree on the use of CAPPS II.[187] Subsequent changes in US policy would however require negotiation of a new agreement altogether. DHS requirements for carrier companies changed beyond the *transfer* of data by a carrier to communicating data to the DHS by allowing it electronic *access* to its PNR databank.[188] DG Internal Market of the Commission and the DHS reached agreement on this issue in May 2004.[189]

3.4.2 EU Data Protection

The transfer of passenger data to the US has led to a number of problems with EU data protection rules, which underpin the right to respect of private life. The transfer to and use of data by the US is not considered to be in conformity with data protection legislation, namely Directive 95/46/EC of 24 October 1995.[190] *Inter alia* it raises issues regarding the purpose of the transfer, the principle of proportionality, the processing of sensitive data, and the guarantees for and rights of data subjects.[191] Infringement of the directive may be justified on certain grounds – one of which is national security – when anchored within Member State legislation.[192] The third country, however, to which the data is transferred must have certain safeguards in place; it must provide "an adequate level of protection".[193] When US legislation introduced the obligation for carriers to transfer passenger data in November 2001, the US did not meet this standard. The EU sought assurances from the US on improvement of its level of

187 COM(2003) 826 final, pp. 6-7; Letter of Commissioner Bolkestein to US Secretary Tom Ridge of the DHS, 18 December 2003 (available on: www.europa.eu.int/comm/internal_market).

188 COM(2004) 81, 21 January 2004; *Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection*, 12 January 2004, p. 1 (both available on: www.statewatch.org). Even though, as mentioned above, data such as 'ethnicity' and 'philosophical conviction' are not part of the DHS list of required data, difficulties arise of monitoring, controlling and limiting the data which the CBP takes from carriers' PNR databases when given electronic access.

189 Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, OJ 2004 L 183/83. Full text of the agreement available on : www.europa.eu.int/comm/internal_market).

190 OJ 1995 L 281/31.

191 These are some of the concerns addressed by the Article 29 Data Protection Working Party in opinions which it submitted in October 2002 and June 2003. See Article 29 Data Protection Working Party, Opinion 2/2004, p. 2.

192 Article 13 of Directive 95/46/EC.

193 Article 25 of Directive 95/46/EC.

data protection through negotiations.[194] In the meantime, transfers of passenger data by air carriers was contrary to Directive 95/46, but the Commission did not impose penalties in order to avoid a situation where carriers would be subject to sanctions on both sides of the Atlantic, faced as they were with conflicting obligations.

PNR transfers to the US officially ceased to be illegal with the December 2003 decision by the Commission under Article 25 of Directive 95/46 – a so-called 'adequacy finding' – declaring the US level of data protection sufficient for receiving and screening EU PNR. There were serious doubts, however, whether the Commission's 'adequacy finding' was justified. In its latest Opinion 2/2004, the Article 29 Data Protection Working Party contradicted the Commission's optimistic stance. The Working Party retained much of its former criticism, and explicitly states that the current level of data protection in the US, and the assurances as to its improvement, do not allow for a favourable 'adequacy finding'.[195] It did not, however, call upon the Commission to impose penalties on EU carriers for violation of Directive 95/46.

In May 2004, the Commission again took a decision finding the level of data protection offered by the DHS adequate, subject to a set of commitments on the part of the latter as resulting from negotiations between the Commission and DHS over the previous year.[196]

3.5 Developments in JHA Non-Migration Issues

A variety of instruments aimed at combating or preventing the activities of terrorist organisations were adopted in the wake of September 2001. The Council adopted four instruments on 27 December 2001 for the purpose of implementing UN SCR 1373 of 28 September 2001: the Common Position on combating terrorism,[197] the Common Position on the application of specific measures to combat terrorism,[198] Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism,[199] and Decision 2001/927/EC regulating the list provided for in Article 2(3)

194 COM(2003) 826 final, p. 6.

195 Article 29 Data Protection Working Party, Opinion 2/2004, p. 12. For more information and criticism of the EU policy and approach with regard to this issue, see www.statewatch.org.

196 OJ 2004 L 235/11. See also the Commission's press release of 17 May 2004, *Commission secures guarantees for protecting personal data of transatlantic air passenger*, IP/04/650.

197 2001/930/CFSP, OJ 2001 L 344/90.

198 2001/931/CFSP, OJ 2001 L 344/93.

199 OJ 2001 L 344/70.

of Regulation 2580/2001.[200] These instruments (excepting Regulation 2580/2001) have all been updated several times since.[201] *The EU Network of Independent Experts in Fundamental Rights* has noted that most were adopted under the second pillar, thus escaping parliamentary and European Court of Justice (ECJ) scrutiny.[202]

Subsequent developments in the JHA field include the adoption of Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial co-operation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP; Council Decision 2002/996/JHA of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism; Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime; Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism; Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, and Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence.

The following sections will consider two of these instruments more closely: the Framework Decision on combating terrorism, and the Framework Decision on the European arrest warrant and the surrender procedures between Member States.

3.5.1 Defining Terrorism

If international co-operation is key to fighting international terrorism, then agreement on a common definition of terrorism is essential. The EU's consoli-

200 A similar instrument is Regulation 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama Bin Laden, the Al Qa'eda network and the Taliban, and repealing Regulation 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan. Inclusion in the listing of natural persons, legal persons, groups and entities annexed to this regulation has been the subject of legal challenge before the Court of First Instance, *Aden and others*, 7 May 2002, T-306/01. See also Brouwer, Catz and Guild, above n. 33, pp. 112, 186; Jimeno-Bulnes, M., "After September 11th: the fight against terrorism in national and European law. Substantive and procedural rules: some examples" (2003) 10 (2) *European Law Journal* 246.

201 Brouwer, Catz and Guild, above n. 33, pp. 104, 107 and 187. EU Network of Independent Experts, above n. 176, pp. 9-10, 40-42.

202 EU Network of Independent Experts, above n. 176, p. 9. See also Brouwer, Catz and Guild, above n. 33, p. 132.

dated attempt at providing a legal definition of terrorism in the wake of the attacks of 11 September is contained in the Council Framework Decision of 13 June 2002 on combating terrorism.[203] The definition consists of a collection of provisions determining, respectively, 'terrorist offences", "offences relating to a terrorist group", "offences linked to terrorist activities", and "inciting, aiding or abetting, and attempting" any of these acts.[204] The framework decision has been criticised for being imprecise in its distinction between terrorism and non-terrorist organised crime.[205] Indeed, to capture the commonly used concept of 'terrorism' in adequate legal terms has proven a difficult task.[206]

The UNHCR has pointed to the risk which a wide and imprecise definition of terrorism poses to the protection of asylum seekers and refugees. Persons who stand accused of having committed 'terrorist acts' are commonly excluded from refugee status through Article 1(F) of the 1951 Refugee Convention relating to the status of refugees (Refugee Convention). A person's past actions must be of a certain level of gravity in order to fall within the scope of Article 1(F). Agreement between EU Member States on a 'vague and broad-brush' definition could unjustifiably widen the category of persons eligible for exclusion from refugee status.[207]

3.5.2 European Arrest Warrant

Within the field of judicial co-operation in criminal matters, the Framework Decision of 13 June 2002 on the European Arrest Warrant (EAW) and the surrender procedures between Member States is generally considered a significant

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203 2002/475/JHA, OJ 2002 L 164/3. The Commission presented the proposal for this framework decision on 19 September 2001. See Brouwer, Catz and Guild, above n. 33, p. 104. The deadline for its implementation in national law of the Member States was 31 December 2002 (Article 11 of the Framework Decision). The definition of terrorism – "terrorist act" – was previously located in the Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP, OJ 2001 L 344/93), which still contains the regularly updated list of persons, groups and entities involved in terrorist acts.

204 Articles 1-4 of the Framework Decision.

205 EU Network of Independent Experts, above n. 176, pp. 7-8, 11.

206 Equally, if not more so, at UN level. One of the main outstanding issues in ongoing negotiations of the UN Comprehensive Convention on International Terrorism is still the core problem of defining terrorism. The original proposal for this convention was submitted by India on 28 August 2000. Negotiations started in December 2002. See Center for Nonproliferation Studies, *Draft Comprehensive Convention on international terrorism*, 9 October 2003, p. 1 (available on: www.cns.miis.edu); Roadmap December 2003, point 8. The text of the draft convention is available on: www.sisde.it.

207 Related in Brouwer, Catz and Guild, above n. 33, p. 134.

development which may be directly attributed to 9/11.[208] The framework decision greatly facilitates extradition between Member States. A EAW requests the arrest and surrender of a person by another Member State for the purpose of criminal prosecution or to serve a sentence on the basis of the principle of mutual recognition.[209] It applies *inter alia* to offences punishable by law with a prison sentence of at least three years, such as for participation in a criminal organisation, terrorism, smuggling of persons, trafficking in human beings, drugs, or weapons, and crimes within the jurisdiction of the International Criminal Court.[210]

The framework decision does not excel from the viewpoint of fundamental rights safeguards for extraditees. Recital 12 of the preamble of the framework decision refers to Article 6 TEU, the EU Charter of Fundamental Rights, and grounds of persecution drawn from the Refugee Convention. Recital 13 of the preamble reiterates that the prohibition of torture or inhuman or degrading treatment or punishment may stand in the way of removal, expulsion, or extradition. Article 1(3) partially elaborates on the preamble, by stating the framework decision to be without prejudice to the obligation to respect fundamental rights and fundamental legal principles as formulated in Article 6 TEU, thus indirectly including a reference to the European Convention on Human Rights (hereinafter ECHR) in the main body of the text.

The legal status of preamble recitals is unclear. Moreover, recital 13 only reflects the primary standard of Article 3 ECHR. This leaves secondary standards in the extradition of persons and expulsion of foreigners contained in the ECHR unmentioned, such as Articles 6 (right to fair trial) and 13 (right to effective remedy). A possible flagrant denial of a fair trial, or the denial of an effective judicial remedy may also stand in the way of extradition or expulsion. At present, such standards have been included in an indirect fashion, through reference to Article 6 TEU in Article 1(3) of the framework decision, and arguably the EU Charter of fundamental rights in the preamble.[211]

The understatement of fundamental rights protection in the framework decision must be seen in a certain context. The EU is not a party to international

208 OJ 2002 L 190/1. The Commission proposal for this framework decision was presented together with the Framework Decision on combating terrorism of 19 September 2001. See Brouwer, Catz and Guild, above n. 33, p. 104. For background on subsequent development in the adoption of these instruments, see *ibid.*, pp. 104-107. The implementation deadline for this framework decision was 1 January 2004. At the time of writing, Austria, Germany, Italy, Greece and the Netherlands have yet to transpose the framework decision into national law.

209 Article 1(1) and (2) of the Framework Decision.

210 *Ibid.*, Article 2(2).

211 Article 47 of the Charter concerns the right to an effective remedy. The Charter has been incorporated as Part II of the Treaty establishing a Constitution for Europe. Ratification of the Treaty by Member States will make the Charter legally binding.

fundamental rights treaties involved in the extradition of persons, such as for example the ECHR. It is committed to respect the fundamental rights listed in the ECHR pursuant to Article 6(2) TEU, but that would not necessarily require including reference to the ECHR in EU secondary legislation. Furthermore, the possibility of violation is mitigated by unanimous Member State party-membership to the ECHR. Obligations contained therein are thus guarded at Member State level when implementing the framework decision in national law. Also, Article 1(3) of the framework decision arguably indirectly recognises the prevalence of the ECHR should a conflict arise. However, considering that the framework decision will to a large degree command European extradition practice, an explicit reference to prevailing protection under relevant treaties in the main body of text would have been pertinent. Such a provision would moreover be advisable, as it would expressly confirm that a Member State would not be liable under EU law for non-compliance with the framework decision (as implemented into national law) in case of conflict with other international obligations.[212]

Concern with regard to the understatement of fundamental rights and refugee protection in the framework decision is amplified when taking into account that the framework decision will also govern the extradition of persons who are asylum seekers, or who have received refugee status in EU Member States.[213]

4 The EU Fight against Terror after 11 September 2001 in Immigration and Asylum Policy

The need for a general policy response to 9/11 at national level and through international co-operation was immediately apparent to European politicians and policy-makers. The organisation of an EU response did not wait long to start. A string of extraordinary Council meetings in different policy areas quickly set out the political guidelines for the necessary changes in internal EU policy and the Union's external relations.[214] Immigrants and asylum seekers were implicated in these changes from the beginning. The identification of the culprits of the attacks as *foreign* placed immigration policy in the limelight. Logical in its simplicity, the common conviction was that controlling migration would thus prevent terrorism. Illustrative is a study undertaken by a US-based think-tank:

> The nation's response to the horrific attacks of September 11, 2001 has taken many forms, from military action to expanded security measures at airports. As important as these measures are, there is probably no more important tool for preventing future attacks on US soil than the nation's immigration system

212 See in this regard EU Network of Independent Experts, above n. 176, p. 18.

213 For UNHCR comments, see Brouwer, Catz and Guild, above n. 33, p. 134.

214 Initial meetings were that of the General Affairs Council on 12 September 2001, Justice and Home Affairs Council on 20 September 2001, and European Council on 21 September 2001.

> because the current terrorist threat comes almost exclusively from individuals who arrive from abroad.[215]

This part of the chapter will review policy and legislative developments in response to the events of 11 September 2001 in the EC policy areas of external border control, asylum, other immigration and residence, document security and databases, and return of migrants without a claim to residence or presence. The first section, however, makes a few preliminary observations regarding the link between terrorism and migration. This chapter forms a contribution to the already sizeable documentation of the changes the attacks of 11 September 2001 have brought to migration policy and control, and confirms these as significant and of lasting effect. One would expect such a response to have been provoked by a firmly established link between contemporary international terrorism and certain types of migration – one that would go beyond the mere fact that terrorists at times cross borders, too. But there exists little conclusive information and little analysis has been undertaken of the methods used by alleged terrorists to gain entry to territory.

4.1 The Terrorist's Entry Pattern

In December 2001, the Commission wrote:

> It is […] legitimate and fully understandable that Member States are now looking at reinforced security safeguards to prevent terrorists from gaining admission to their territory through different channels. These could include asylum channels, though in practice terrorists are not likely to use the asylum channel much, as other, illegal, channels are more discreet and more suitable for their criminal practices.[216]

Discussions with different Commission officials have presented different positions on terrorists' methods of entry. Paraphrasing these discussions, the main line which has informed Commission policy during the last years is not the (already wavering) above quote, but the assumption that persons who attempt entry with the intent to commit terrorist acts are more likely to do so through so-called legal, rather than illegal channels, as avoiding contact with law enforcement authorities is an absolute priority. Following this logic, however, legal entry is not void of unwanted scrutiny and registration, and the increase in control of

215 S.A. Camarota, *The Open Door: How militant Islamic terrorists entered and remained in the United States, 1993-2001*, Center for Immigration Studies, May 2002 (available on: www.cis.org).

216 Commission working document on the relationship between safeguarding internal security and complying with international protection obligations and instruments, COM(2001) 743 final, 5 December 2001.

legal entry channels might be directing alleged terrorists (back) to illegal entry channels.

The Solana strategy posits that cross-border networks which traffic women and illegal migrants "can have links with terrorism".[217] A study is currently being undertaken within the context of the G8 on the link between illegal immigration and terrorism, the interim results of which are equally inconclusive.[218] In summary, it is difficult to distinguish an agreed Commission position underpinning relevant policy and the drafting of legislation by this institution in the immigration and asylum field, while there exists as yet no conclusive information on the entry pattern of alleged terrorists.[219]

A lack of knowledge, however, can present political opportunity. Rather than hindering, this lack of information has promoted the development of EC policy in arguably two ways. Firstly, it has enabled a comprehensive preventative approach. In the absence of concrete knowledge of where and how alleged terrorists enter, it is thus advisable to scrutinise and control all entry channels, thereby preventing a shift in method of entry towards less guarded channels. Secondly, it presented policy-makers with political opportunity to push through previously unpopular proposals. Regardless of the particular area of EC immigration and asylum policy, the terrorism argument was put to use in realising

217 Above n. 129.

218 Paraphrasing an interview with a Commission official, if anything, the results of this study, which consisted of a questionnaire drafted by the US and filled in by the G8 countries, show that alleged terrorists probably use all channels without a distinguishable pattern.

219 The study of the Center for Immigration Studies, above n. 215, forwards an entry pattern, but one which is based on limited data. It reports that 48 Islamic terrorists have been convicted in the US since 1993, which includes the 19 hijackers of 11 September 2001. Almost all are now believed to be linked to the Al Qa'eda organisation. Of these, 16 held temporary visas, 17 were lawful permanent residents or naturalised US citizens (two of whom entered by way of marriage of convenience), 12 were illegally present of whom three had entered illegally, and three were asylum seekers. It thus concludes that the pattern of entry and presence of foreign terrorists is as follows: 36 per cent are naturalised citizens or permanent legal residents; 33 per cent temporary visa holders; 25 per cent illegal aliens, and three per cent asylum seekers. The study argues for comprehensive revision of the immigration system. Some of its conclusions and recommendations are staggering in their simplicity. Amnesties of illegally present migrants facilitate terrorism, as one of the 48 had been legalised in the past. Some had been working illegally, so employers should be sanctioned more and illegal workers expelled. All young and unattached Middle Eastern men should not be issued visas. The overall level of immigration should be reduced to increase the control capacity of authorities and have fewer foreign-born individuals' in the US, etc. Interestingly, 42 of the 48 terrorists had entered the US legally on visas at some point, *Ibid.*, p. 7. A preference for legal entry thus seems the best educated guess.

initiatives that had been pending but bogged down by disagreement or opposition. This opportunistic use of momentum for the introduction of security measures during the aftermath of 9/11 has been documented in *Brouwer*, *Catz* and *Guild*, which describes how the impact of the attacks was absorbed within the ongoing creation of a common immigration and asylum policy.[220] This part of the chapter will chart the continuation of these two tendencies, although the link between policy and legislation and the events of 11 September or 'terrorism' has grown weaker in terms of explicit reference and presentation.

The expansion of migration control at all levels after 9/11 was arguably more a reaction based on an assumption inspired by perceived common sense or emotion, than a well-informed policy. Whether more persons with terrorist intent are actually apprehended and terrorist acts thwarted as a result is uncertain, and in any case unknown to the general public. The value of the contribution of contemporary immigration and asylum policies to the fight against terror is information within the domain of national security interests. What is certain is that the face of EC migration policy and control has changed since 11 September 2001.

4.2 External Borders: Shutting out Dangers and Strangers

As the point of departure for the policy and legislative response to the attacks of 11 September 2001 within the fields of immigration and asylum, border control is a logical first item of review. The conclusions of the extraordinary JHA Council of 20 September 2001 that pertained to migration policy were grouped together under the heading 'measures at borders'.[221] The reaffirmation and strengthening of borders was a reflex reaction. Similarly, UN SCR 1373 of 28 September 2001 determined that States "shall prevent the movement of terrorists or terrorist groups by effective border controls".[222] This wording was copied literally into Article 10 of the Council Common Position of 27 December 2001 on combating terrorism, which made SCR 1373 part of the EU's Common Foreign and Security Policy (CESP).[223]

This section addresses border control in a narrow sense. It is limited to controls of persons, and does not include consideration of, for example, the issuing of visas, the activities of immigration liaison officers, the use of electronic databases such as the Schengen Information System or EURODAC, document security, or the exchange or sharing of travellers' data. Most of these issues are addressed in other sections of this chapter. Moreover, the main focus of this section is on the presentation of the role of borders and border control in the

220 Brouwer, Catz and Guild, above n. 33, chapter 7.

221 Council Doc. 3926/6/01.

222 SCR 1373, 28 September 2001, para. 2(g).

223 2001/930/CFSP, OJ 2001 L 344/90; Brouwer, Catz and Guild, above n. 33.

context of the fight against terrorism, more than on the substance of policy and legislative developments.

4.2.1 From Brussels 2001 to Thessaloniki 2003

The extraordinary JHA Council in Brussels of 20 September 2001 called on Member States to strengthen control of external borders and surveillance of internal borders.[224] It furthermore stated it would "study arrangements for co-ordinated recourse" by the Member States to the possibility of re-imposition of border controls on persons under Article 2(2) of the Schengen Convention.[225] The European Council of 14 and 15 December 2001 in Laeken stressed the importance of external border control as a flanking measure in the fight against terrorism. Paragraph 42 of its Presidency Conclusions called for the Commission to work out "arrangements for co-operation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created".[226]

Internal security, security at the border, and terrorism are dominant themes throughout the Commission Communication of 7 May 2002 towards integrated management of the external borders of the Member States of the European Union,[227] which was adopted in answer to the Laeken European Council.[228] The tone of the document is set by its first paragraph:

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224 Conclusions of the extraordinary Justice and Home Affairs Council of 20 September 2001, para. 24.

225 *Ibid.*, para. 28. Follow-up was provided within the Council. On 23 November 2001, the Article 36 Committee (CATS) drew up a common definition of a 'terrorist threat of exceptional gravity' that could justify coordinated recourse by Member States to the possibilities afforded by Article 2(2) of the Schengen Convention. Council Doc. 14181/1/01, 30 November 2001. The roadmap announces that the Commission is preparing a relevant proposal. Roadmap December 2003, point 39. Guild has pointed out that terrorism-related concerns have not led to actual application of Article 2(2). Brouwer, Catz and Guild, above n. 33, p. 178.

226 Council Doc. SN 300/1/01 REV 1.

227 COM(2002) 233.

228 The preparation of this document was announced in the Commission Communication of 11 November 2001 *on a common policy on illegal immigration* (COM(2001) 672 final). This policy paper had been in the final stages of adoption in September 2001, and was adapted accordingly. The section on document security and the development of a visa database, for example, was placed in the context of 9/11. Also, a likely change to its concluding remarks is where the Commission writes, at p. 25: "Border controls must in particular respond to the challenges of an efficient fight against criminal networks, of trustworthy action against terrorist risks and of creating mutual confidence between those Member States which have abandoned border controls at their internal frontiers".

> [Paragraph 42 of the Laeken Presidency Conclusions] reminds us that coherent, effective common management of the external borders of the Member States of the Union will boost security and the citizen's sense of belonging to a shared area and destiny. It also serves to secure continuity in the action undertaken to combat terrorism, illegal immigration and trafficking in human beings.[229]

Mindful of the old struggle between the Community and its Member States in completing the internal market, the Commission initially adopted a neutral stance on the relation between external border control and internal security. "Rightly or wrongly, the external borders of the European Union are still sometimes seen as a weak link that can affect the internal security of the Member States, in particular in an area without internal borders".[230] The Commission however continued by stating that the new challenges to internal security force an expanding EU to regard external border control as a priority. Enhancing border control, moreover, was a major need in order to effectively combat "all forms of internal and external threats that terrorism poses to the Member States and to the security of persons".[231] By the time the issue of control of the Union's external borders reached the Thessaloniki European Council of 19 and 20 June 2003, however, the presentation of the issue had changed, preceded by a period of decreasing emphasis on internal security since the Seville European Council of June 2002.

4.2.2 A European Border Agency

The Thessaloniki Presidency Conclusions focus on operational co-operation undertaken by Member States since the Seville European Council.[232] Terrorism or internal security are no longer mentioned.[233] The next relevant Commission Communication on the development of a common policy on illegal immigra-

229 COM(2002) 233, p. 2. The subsequent *Plan for the management of the external borders of the Member States of the European Union* of 14 June 2002 (Council Doc. 10019/02) contains the same passage, minus the reference to the effect on citizens' senses.

230 COM(2002) 233, p. 4.

231 *Ibid.*

232 This included joint training of border guards, pilot projects and joint operations in border control and surveillance, and risk analysis of source countries of illegal immigrants. Seville also called for the creation of an External Borders Practitioners' Common Unit within the Council Strategic Committee on Immigration, Frontiers and Asylum (SCIFA).

233 Presidency Conclusions of the Thessaloniki European Council, 19-20 June 2003, paras. 12-16. The Presidency Conclusions of the Seville European Council, 21-22 June 2002, do not contain direct reference to terrorism or security in the area of

tion, smuggling and trafficking of human beings, external borders and the return of illegal residents, is drafted along the same lines.[234] This Communication laid the basis for a subsequent legislative proposal, which can be considered the culmination of Community-co-ordinated activity in this area since Laeken. Neither the Proposal of 11 November 2003 for a Council Regulation establishing a European agency for the management of operational co-operation at the external borders,[235] nor its Explanatory Memorandum, contain any reference to terrorism or internal security.[236]

The establishment of the European Border Agency is a measure building on the existing Schengen *acquis*, which is the locus of the regulation of common external border control of the EU zone.[237] The Commission explains that the new agency will increase the effectiveness of external border management by co-ordinating operational co-operation between the Member States.[238] It will have assisting, facilitating or co-ordinating tasks in training border guards, undertaking risk analyses, providing follow-up to research concerning control and surveillance of external borders, and dealing with border emergencies. Its field of activity also includes supporting the removal of third country nationals without a right of residence or presence.[239] The word 'security' in the Commission's proposal is exclusively used in quoting the Tampere credo, defining a high and uniform level of control of persons and surveillance at the external borders as a prerequisite for 'an area of freedom, security and justice'.[240]

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border control, but explicitly endorse the Communication and Plan on external border management of May and June 2002, respectively. See paras. 31 and 32.

234 COM(2003) 323 final, 3 June 2003. The only direct reference to internal security and terrorism in this document is with regard to the objectives of the Visa Information System (VIS).

235 COM(2003) 687.

236 Its presentation to the public, however, upholds the connection with terrorism and internal security. In a press release of 5 November 2003, Commissioner Vitorino is quoted explaining the aim of the European Border Agency: "First of all, external border control is to prevent the illegal entry in the territory of the European Union. But secondly, we are extremely concerned of guaranteeing the conditions of security within the free border area that the Union is today and therefore we need to guarantee the controls over criminals or terrorists that might try to enter into the European Union." (available on: www.europa.eu.int).

237 Council Conclusions on the main elements of the Commission proposal for a European Border Agency, Council Doc. 15446/03, 28 November 2003, para. 6.

238 COM(2003) 687, Explanatory Memorandum, p. 5.

239 Council Conclusions on the main elements of the Commission proposal for a European Border Agency, Council Doc. 15446/03, 28 November 2003, para. 2. COM(2003) 687, Explanatory Memorandum, p. 5.

240 COM(2003) 687, preamble, and Explanatory Memorandum.

The current state of play in the field of external EU border control leads back to developments that were set in motion after the attacks of 11 September 2001.[241] The November 2003 proposal for a European Border Agency, however, contains no trace of the prose of the May 2002 Communication, invoking the "citizen's sense of belonging to a shared area and destiny". What caused the severance of the link between external border control and combating terrorism in EC policy?

4.2.3 From Dual Purpose Back to Single Purpose

During the period under review, policy language with regard to border control arguably changed according to political need and evolving assumptions of terrorists' methods of entry. The initial reaction to 9/11 of affirmation of the impenetrability of borders, which served to reclaim at least the suggestion of State control after the occurrence of calamities that shook the impression of national security in the public mind, is understandable. In this light, the brief resonating of popular sentiments in especially Commission policy-writing can be seen as a legitimate response to the basic need of the public for reassurance. As such sentiments abated, so did their political response.[242]

However, border controls also present a real incursion point and, therefore, control opportunity. The crossing of a border is an instance where a State may exercise its sovereign authority in the identification and screening of objects – goods, capital, persons – which can either be tagged or intervened against. Border control thus arguably represents a dual- purpose measure, combating terrorism whilst curbing illegal migration flows. As terrorists at times cross borders, too, there is always a chance that border control may lead to their interception. Increased border control may likewise have a deterrent effect on those contemplating entry to a particular territory, in this case the EU. The response

241 The Commission Communication of 11 November 2001 on a common policy on illegal immigration (COM(2001) 672 final) already contained suggestions for the development of a European Border Guard. It also announced the presentation of a Communication on European border management in the near future, which resulted in the Commission Communication of 7 May 2002 towards integrated management of the external borders of the Member States of the European Union (cited n. 227, above).

242 That political affirmation of the soundness of borders is a common reaction to events which affect national security has again been confirmed by the attacks in Madrid on 11 March 2003. External border control reappeared as an explicit component of the Union's stated response to terrorism immediately after the attacks. From 12 March onwards the EU website (www.europa.eu.int) featured an outline of the EU fight against terrorism, which prominently included EU external border control, listing developments in the field since the European Council in Laeken in December 2001.

thus went beyond the popular need for reassurance and new policy and legislative measures were introduced at EC level.

The presentation of the subject not only changed according to political need; the explicit link in policy language between borders, terrorism and internal security was dropped as assumptions concerning the entry pattern of terrorists changed. Under the assumption that persons who attempt entry with the intent to commit terrorist acts are more likely to do so through regular channels, an explicit linkage between border control and combating terrorism cannot be justified while the effect of measures directed at countering and preventing illegal migration flows on the cross-border movement of alleged terrorists is, arguably, limited. By then, however, the direction of policy had already been determined. When the smoke cleared, the content and appearance of common external EU border control measures had significantly changed, and with it, the capacity to prevent the entry or arrival by land, sea and air of migrants without a claim to residence or presence in the EU had been increased.[243]

4.3 Asylum – The Terrorist's Cloak

As important as the attention given to borders after 9/11 was the perception of the asylum channel as a liability in the fight against international terrorism. A major concern was that persons with the intent to commit terrorist acts might use asylum procedures to gain entry to the EU. A general feeling was also that more safeguards were needed to prevent the use of international refugee protection as a safe haven by those who had committed terrorist acts elsewhere. The common instruments which address both these concerns are Articles 1(F)[244] and

243 Within the framework of the SCIFA External Borders Practitioners' Common Unit, several '*ad hoc* centres' have been set up for the co-ordination and joint operations in controlling borders. A Land Borders Centre and Border Guard Training Centre have been set up in Germany and Austria, respectively; a Risk Analysis Centre in Finland; and an Air Borders Centre in Italy. See COM(2003) 687, Explanatory Memorandum. Greece and Spain are each in the process of creating a Sea Borders Centre. See Council Doc. 6049/04, 9 February 2004. The intention is to transform these centres into specialised branches of the forthcoming European Border Agency.

244 Article 1(F) states: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for believing that
(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

33(2)[245] of the Refugee Convention. A person involved in a past terrorist act outside or on the territory of the host state may be excluded from the application of the convention if the requirements for grounds under Article 1(F) are fulfilled. The protection against *refoulement* in particular may also be withdrawn in these cases on the basis of Article 33(2). The latter Article may moreover apply to persons whom there is reason to believe are intent on committing a terrorist act in the host state.

SCR 1373 of 28 September 2001 determined that states shall, in conformity with international law:

> Take appropriate measures […], before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts;[246]
>
> Ensure that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts, and that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists.[247]

At the EU level, the Plan of Action to combat terrorism of 21 September 2001 was limited to stating that the Union will award special attention to the problem of refugee flows and in particular to Afghan refugees.[248] The extraordinary JHA Council of 20 September had been more specific, instructing the Commission to examine urgently how to safeguard internal security whilst adhering to obligations of international refugee protection.[249] The EU Common Position on combating terrorism included the above paragraphs of SCR 1373 (2001) as Articles 16 and 17, respectively.[250]

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245 Article 33(2) contains an exception to the prohibition of expulsion or return ('*refoulement*'):
> "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

246 A similar provision is contained in Article 7 of the draft UN Comprehensive Convention on international terrorism.

247 SCR 1373 (2001), paras. 3(f) and 3(g).

248 Council Doc. No. SN 140/01, p. 4.

249 Conclusions of the extraordinary JHA Council of 20 September 2001, para. 29 under the heading 'measures at borders'.

250 Above n. 223.

Pursuant to paragraph 29 of the JHA Council Conclusions, the Commission produced a Working Document on 5 December 2001 on the relationship between safeguarding internal security and complying with international protection obligations and instruments.[251] The working document offers several suggestions with regard to the exclusion from refugee status of alleged terrorists in EC legislation in substance and procedure. Moreover, the Commission announced measures beyond the asylum field: a thorough examination of all legislative proposals under Title IV of the Treaty establishing the European Community (TEC) to prevent possible liability in light of the fight against terrorism if adopted in their current form. The Commission committed itself to checking whether pending and future proposals for immigration and asylum legislation were 'terrorist proof'. This implied a review of the presence and quality of the tools for exclusion and expulsion, i.e. national security and public order clauses.

At this point, it would be a useful to determine the degree to which relevant suggestions by the Commission in response to the attacks of 11 September 2001 have been incorporated into EC legislation in the asylum field. A Commission official summarised Commission policy after 9/11 as approaching the field of asylum in the assumption that asylum seekers and refugees are potential terrorists, though not at the cost of fundamental rights. The ultimate purpose of this section is thus to trace a policy which attempts to address the entry and presence of terrorists disguised as asylum seekers and refugees within EC legislation.

Brouwer, *Catz* and *Guild* have established that the directive on temporary protection,[252] the directive on reception conditions,[253] and the Dublin Regulation[254] have not been changed to accommodate the fight against terror.[255] Thus what remains for consideration are the two remaining instruments intended to shape the asylum systems of EU Member States in the coming years. First we will discuss Council Directive 2004/83/EC on minimum standards for the quali-

251 COM(2001) 742 final. See Brouwer, Catz and Guild, above n. 33, for a commentary.

252 Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 62/12.

253 Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ 2003 L 31/18.

254 The book by Brouwer, Catz and Guild, above n 33, reviews the proposal for the Dublin Regulation, which became Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50/1).

255 Brouwer, Catz and Guild, above n. 33, pp. 184-185.

fication and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, as adopted on 29 April 2004 (hereinafter qualification directive),[256] followed by the amended proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter draft procedures directive).[257]

4.3.1 The Qualification Directive

The proposal for the qualification directive was adopted, as scheduled, by the Commission on 12 September 2001, despite the events of the previous day.[258] The Commission introduced changes to the draft text at a later date. Member States have also introduced additional relevant amendments during the negotiation process within the Council. It is instructive to compare the text of the qualification directive with the original Commission proposal.

It appears that the preamble of the qualification directive was redrafted to ensure that 'terrorists' are indeed excludable from refugee protection under international and national law. Recital 22 reminds that terrorist acts, methods and practices, as well as the financing, planning and inciting thereof, are contrary to the purposes and principles of the United Nations, as referred to in Article 1(F)(c) Refugee Convention. Recital 28 adds that "the notion of national security and public order also covers cases in which a third country national belongs to an association which supports international terrorism or supports such an association". The latter recital is related to several newly added clauses, which allow the Member States increased leeway in the treatment of asylum seekers, refugees and their rights through use of the concepts of national security and public order.

Exceptions were introduced to the principle of non-*refoulement* as contained in Article 21 of the qualification directive, which are a near literal copy of Article 33(2) Refugee Convention.[259] Another newly added paragraph now

256 OJ 2004 L 304/12. Our review is limited to beneficiaries of protection under the directive who qualify as a refugee. Regarding beneficiaries of subsidiary protection, see G. Noll, *International protection obligations and the definition of subsidiary protection in the qualification directive* (EAP: 2003), p. 183.

257 Council Doc. 14203/04, 9 November 2004.

258 COM(2001) 510 final, 12 September 2001.

259 The original provision in the Commission proposal (then Article 19) was limited to a simple reiteration of the principle of non-*refoulement* in accordance with international obligations. In addition to paraphrasing Article 33(2) Refugee Convention, the newly introduced exceptions are stated to only apply where not prohibited by 'international obligations'. The wording of the provision is unfortunate and ill-chosen – "Member States may refoule a refugee" – but does not contravene the Refugee Convention.

determines that the State will no longer be obliged to meet any claim to a residence permit which may have arisen, should there be reason to revoke protection on the basis of the exceptions in Article 21(2).[260] A Member State may revoke, end, or refuse to renew refugee status if the beneficiary is considered a danger to its security or community.[261] Likewise, benefits for family members of a recognised refugee may be refused, reduced or withdrawn for reasons of national security or public order.[262] Family unity and benefits for family members, moreover, may be refused if the family member in question is excluded, or would be eligible for exclusion, from refugee status.[263]

Furthermore, the mandatory issuing of a residence permit to a person who has been recognised as a refugee is now conditional upon his or her not posing a threat to national security and public order.[264] This may give rise to a seemingly peculiar situation: a person is recognised as a refugee and has already been screened *inter alia* in light of possible exclusion from refugee status and the danger he or she may pose to national security and public order. Yet this refugee may subsequently be denied a residence permit on those same or similar grounds. The qualification directive thus explicitly creates an additional control-point in the decision-making process of the Member States.

Formal recognition as a refugee does not automatically lead to admission as a refugee, i.e. a right of residence. The Refugee Convention is not considered to guarantee residence to refugees, or to contain an obligation to undertake an assessment of entitlement to residence, which is thus a question of national law. This often translates into a procedural distinction between recognition and admission, the latter requiring an additional decision by the State.[265] To the extent that Member States have not already provided for it, the requirements upon which the latter decision depends now explicitly include an absence of threat to national security or public order by virtue of the qualification directive. Admission decisions being a matter purely of national law, Member States would be able to deny the admission of a refugee for reasons of national security or public order based on criteria, or a burden of proof, different to the criteria and burden of proof pertaining to the recognition question as derived from international law.

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260 Article 21(3) of the qualification directive.

261 *Ibid.*, Article 14(4).

262 *Ibid.*, Article 23(4).

263 *Ibid.*, Article 23(3).

264 *Ibid.*, Article 24(1). The same condition is included in the original proposal for the issuance of a travel document, COM(2001) 510 final, Article 23(1).

265 T.P. Spijkerboer and B.P. Vermeulen, *Vluchtelingenrecht*, serie migratierecht III (Utrecht: NCB, 1999), pp. 212-214. As the same authors point out, the first decision is declaratory, the second constitutive in nature. *Ibid.*, p. 214.

Another striking amendment in comparison with the original proposal is the qualification directive's provision on exclusion from refugee status, i.e. Article 12. The Commission perhaps drew inspiration from SCR 1373 (2001)[266] when it redrafted this provision.[267] Article 1(F)(b) Refugee Convention determines that a "serious non-political crime" committed prior to a person's admission as a refugee and outside the territory of the country where he or she is admitted shall lead to exclusion from the provisions of the Refugee Convention. EC legislation now holds that a political crime is sometimes a non-political crime, and may thus also be cause for exclusion. Article 12(2) of the qualification directive reads: "particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes".[268] It moreover stipulates admission of a refugee as the point in time where the beneficiary is issued a residence permit. This ensures the maximum period of time for "serious non-political crimes outside the country of refuge" to come to light to prevent inclusion of a refugee.[269] Noteworthy is that the wording of Article 12(2) (like Article 1(F) Refugee Convention) is mandatory. This is unlike the other changes to the qualification directive which we have addressed. These are either formulated in a discretionary way,[270] or provide a discretionary escape clause to the mandatory granting of certain rights to refugees or their family members.[271]

Finally with regard to Article 12 on exclusion, several of its original paragraphs have disappeared. One of these was an affirmation of "personal and knowing conduct" as the only possible basis for exclusion.[272] A new paragraph

266 Above n. 246, 247.

267 The provision in the original proposal – then Article 14 – was a near literal copy of Article 1(F) Refugee Convention.

268 It should be emphasised that this redefinition of Article 1(F)(b) reflects current legislation of many of the Member States, and also seems in line with the interpretation of UNHCR. See UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Doc. HCR/IP/4/Eng/REV.1 (re-edited) (Geneva: UNHCR, January 1992) [hereafter *UNHCR Handbook*], para. 152.

269 Up until the point of issuance of a residence permit, refugees thus risk exclusion from refugee status for alleged past crimes under Article 12, as well as refusal of admission for reasons of national security or public order under Article 24(1) of the qualification directive.

270 Articles 14(4), 21(2) and (3), and 23(4) of the qualification directive.

271 *Ibid*., Articles 23(3), 24(1) and 25(1).

272 COM(2001) 510 final, Article 14(2). This paragraph was deleted despite explicit confirmation of 'personal and knowing conduct' as a precondition for exclusion by the Commission in its working document of December 2001 (COM(2001) 742 final). The other deleted paragraphs 3 and 4 of the original article ensured a judicial remedy against an exclusion decision, and contained a general reference to Member States' obligations under international law, respectively. Paragraph 3 was arguably

has appeared instead which determines that persons, who instigate or otherwise participate in the crimes or acts mentioned in the article, are equally eligible for exclusion from refugee status.[273]

The qualification directive clearly bears the mark of a thorough 'terrorist proofing' by Commission and Council in a legislative attempt at closing off the asylum channel to alleged terrorists and other threats to the internal security of the EU.

4.3.2 The Draft Procedures Directive

Since its presentation by the Commission on 20 September 2000, the proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status has shed its skin several times. It is important to bear in mind when considering this directive that it remains a work in progress. Its negotiation has proven arduous, illustrated by the inability of the Member States to reach agreement on a final text before 1 May 2004, implying the continued negotiation of the procedures directive within the enlarged Council. The substantial changes to the draft text moreover required a re-consultation of the European Parliament, further dragging out the process.[274] A result of its repeated redrafting, in addition, is that there is serious doubt as to the value which the procedures directive will have as a harmonising instrument. The desire of the Member States to retain respective domestic policies has moulded the directive into an *à la carte* instrument, listing discretionary options instead of prescribing a uniform procedure.[275]

Some of the draft directive's current provisions may be traced back to the events of 11 September 2001. Relevant work by the Commission has focused on attempts to implement some of the more technical elements of the December 2001 Commission working document.

The procedural treatment of Article 1(F) cases in EC law changed as a result of 9/11. In the original proposal of September 2000, asylum applications of persons eligible for exclusion could explicitly *not* be dismissed as manifestly unfounded.[276] The Commission considered exclusion cases too complex to qual-

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superfluous. Legal remedies are subject to regulation in the procedures directive. Paragraph 4, however, would have provided a comprehensive scope of safeguarded international obligations in exclusion cases, where Article 63(1) TEC only determines that the qualification directive must be in accordance with the Refugee Convention.

273 Article 12(3) of the qualification directive.

274 European Parliament, draft report on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing of refugee status, 11 May 2005, PE 357.562v02-00.

275 See in this regard in particular the EP's draft report, above, at p. 53.

276 COM(2000) 578 final, Article 28(2)(b).

ify as such, its understanding being that only cases which clearly and evidently did not require more thorough investigation could be manifestly unfounded.[277] The relevant provisions in the proposal determined that if initial indication of the application of Article 1(F) was 'manifestly serious', the case would be decided by so-called accelerated appeal or be subject to automatic review.[278] Also relevant was that cases involving grounds of national security or public order were subject to exception to the rule of suspensive effect of appeal on expulsion.[279]

The amended proposal of 3 July 2002[280] clearly documents attempts at follow-up to the December 2001 Commission working document. Contrary to the original proposal, the amended Article 29(c) determined that Member States may reject an application as manifestly unfounded, provided "the applicant is *prima facie* excluded from refugee status by virtue of [the qualification directive]".[281] Manifestly unfounded cases were subject to processing within an accelerated procedure if a Member State so desired,[282] as were applications of persons considered a danger to the security of the State or its community.[283] Grounds of national security or public policy could allow the removal of an applicant pending appeal or review of his or her case.[284] Furthermore, two paragraphs were added to Article 25, allowing the rejection of an application as *inadmissible* in

277 *Ibid.*, Explanatory Memorandum, Articles 28 and 37.

278 *Ibid.*, Article 37. Also included under this procedural regime were applicants who had committed a serious offence on the territory of a Member State, or who fell within the criteria of Article 33(2) Refugee Convention.

279 *Ibid.*, Article 33(2)(c).

280 COM(2002) 326 final.

281 The Commission working paper (COM(2001) 742 final, at p. 10) saw potential for exception to the rule that exclusion should be dealt with *after* the question of inclusion has been answered, laid down in *UNHCR Handbook*, paras. 176 and 177. The Commission suggested making an exception where it is '*prima facie* established' that a person is eligible for exclusion, a category which would be included in the qualification directive. In terms of procedure, the application for asylum could then be dealt with in an accelerated procedure which would address exclusion first, foregoing the need for further consideration if found applicable, and lead to the request being declared 'manifestly unfounded' It is possible that the qualification directive made provision for such a category of cases at a certain point, but none made it into the final text reviewed in the previous section.

282 COM(2002) 326 final, Article 23.

283 *Ibid.*, Article 32(h).

284 *Ibid.*, Article 39(4).

the case of an extradition request by a country other than the country of origin, and an indictment by the International Criminal Court.[285]

The draft procedures directive as of 9 November 2004[286] shows that neither the explicit reference to *prima facie* exclusion, nor the elaborated Article 25 survived subsequent negotiations. With regard to the latter, a Commission official explained that negotiations failed on a technical level, rather than for lack of political will. Agreement could not be reached on the practical and legal terms regulating the relation between asylum applications and parallel indictments by international criminal tribunals or requests for extradition. Moreover, the matter was not considered a priority as it pertained to a very limited number of cases.

The procedural treatment of persons who are excluded from refugee status has remained largely the same since the amended proposal of July 2002, although exclusion is no longer mentioned explicitly, and Article 39 on suspensive effect has been deleted.[287] Article 29(1) determines that Member States may consider an application for asylum as *unfounded* if a determining authority establishes that the applicant does not qualify for refugee status pursuant to the qualification directive. Article 29(2) continues by determining that the cases referred to in Article 23(4)(b) as well as 23(4)(m) may be considered as *manifestly* unfounded. Article 23(4)(b) pertains to cases where the applicant 'clearly' does not qualify for refugee status under the qualification directive. Article 23(4)(m) pertains to applicants who are considered a danger to the national security or the public order of a Member State, or who have been expelled for serious reasons of public security and public order under national law. Both paragraphs of Article 29 may

285 Article 25, paras. (d) and (e). The Commission in its working document of December 2001 (COM(2001) 742 final, at p. 10) had offered two options for dealing with asylum applications and parallel extradition requests by countries other than the country of origin, or indictments by international criminal tribunals (the latter was especially topical at the time, as the ICC in the Hague was about to be installed): 'freezing' or rejecting. The first pertained to suspension of the asylum procedure. Following the handing over or extradition of the individual to the tribunal or third country, prosecution, and execution of a possible sentence, the person would subsequently return to the Member State where the original asylum claim was made to further pursue the original asylum procedure. The latter option was to declare the asylum application inadmissible, as reflected in Article 25 of this version of the draft procedures directive. The working document stated that the procedures directive should in this case also make provision for the possible application for asylum after extradition, prosecution and the execution of any sentence, in the country to which extradition takes place should that be a Member State. This suggestion was however not taken on board.

286 Draft procedures directive, Council Doc. 14203/04, 9 November 2004.

287 This proved one of the most difficult subjects of negotiation in the Council, and has now been expressly left to the jurisdiction of the Member States by Article 38(3)(a) of the November 2004 draft text.

thus apply to exclusion cases, Article 29(2) in conjunction with Article 23(4)(b), in particular, being a reflection of the Commission's original *prima facie* category.[288] Likewise, it remains possible to process applicants, who are considered a danger to the national security or the public order of a Member State, or who have been expelled for serious reasons of public security and public order under national law, within a 'prioritised or accelerated' procedure.[289]

The current draft procedures directive holds several more relevant features, following amendments introduced in December 2003.[290] Article 6 determines that applicants have the right to remain on the territory of the Member State pending the examination of their claim. This right may now be withdrawn if the Member State is obliged to surrender a person to another Member State pursuant to a European Arrest Warrant or otherwise, or to international criminal courts or tribunals.[291] Secondly, Article 3A stipulates that Member States must designate a determining authority for the examination of asylum claims. Paragraph 2(b) of this article allows Member States to appoint a different authority to take decisions on applications in light of national security provisions, provided a determining authority is first consulted on whether the applicant qualifies as a refugee.[292] Finally, restrictions have been placed on the disclosure of relevant information regarding the asylum application of a person to his or her

288 The draft procedures directive, however, does not determine that exclusion may be dealt with as a preliminary matter, or that the application of an exclusion clause would forego the need for consideration of the remaining merits of the case, as originally suggested by the Commission (above n. 281). The order in which to deal with the matters of inclusion and exclusion has been left to the Member States to decide on.

289 *Ibid*., Article 23(4)(m). The draft European Parliament legislative resolution concerning the minimum procedures directive amends this provision, linking it to exclusion from refugee status according to the Refugee Convention instead of the concepts of national security and public order (above n. 274, p. 30). Article 29, as discussed here, is also subject to substantial amendment by the EP (above n. 274, p. 37).

290 Amended proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing of refugee status, Council Doc. 15198/03, 4 December 2003.

291 *Ibid*., Article 6(2).

292 The December 2001 Commission working document argued in favour of having exclusion cases examined by a separate and specialised 'Exclusion Unit'. See COM(2001) 742 final, p. 11. The draft European Parliament legislative resolution concerning the minimum procedures directive deletes this provision. Above n. 274, p. 15.

legal counsel, as well as to the authority responsible for appeal, in cases that involve security aspects.[293]

One can conclude that, notwithstanding the fact that not all efforts at implementing the Commission's view post-9/11 on the interface between security and asylum procedures have been successful, the draft minimum procedures directive, as it stands, provides greater procedural facilitation in warding off asylum seekers and refugees who elicit security concerns.

4.4 Immigration and Residence of Third Country Nationals: The Enemy Within

The initial international response to the events of 11 September in the migration field focused on borders, asylum, and documents.[294] Scrutiny of what is known commonly and in policy as 'legal' immigration did not feature in the immediate reaction by either the UN or EU, and was thus apparently considered a matter of less urgency. This is contrary to what one would expect given the fact that the 9/11 hijackers were not asylum seekers, nor recognised refugees, nor had entered illegally, but had all been in possession of valid or expired student or visitor visas.[295]

The Commission expanded the mandate it received from the JHA Council of 20 September 2001 to study the relationship between combating terrorism and adhering to international protection standards to announcing review not just of asylum but of all its proposals under Title IV TEC. Several of the legislative proposals relating to migration and residence have been elaborately examined and reviewed in other publications.[296] These discuss EC legislation or proposals for legislation on family reunification,[297] the status of third country

293 Eligible cases are defined as follows: "when disclosure would jeopardise national security, the security of the organisations or persons providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised. In these cases, access to the information or sources in question must be available to the authorities referred to in Chapter V [responsible for appeal], except where such access is precluded in national security cases" (draft procedures directive, Council Doc. 14203/04, 9 November 2004, Article 14(1)).

294 See below, section 4.5.

295 Brouwer Catz and Guild, above n. 33, p. 4.

296 Brouwer, Catz and Guild, above n. 33. E. Guild, *Exceptionalism and the Rule of Law in the EU; the case of long term resident migrants*, September 2003 (available on: www.eliseconsortium.org). J. Apap, S. Carrera, *Towards a proactive immigration policy for the EU?*, Centre for European Policy Studies Working Document, 2003 (available on: www.eliseconsortium.org).

297 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251/12.

nationals who are long-term residents,[298] the entry of and residence of third country nationals for paid employment and self-employed activities,[299] and the entry and residence of third country nationals for studies, vocational training and voluntary service.[300] They record an overall sharpening of criteria for the granting of entry and residence and associated rights to immigrants, together with a widening of criteria for their expulsion through the intensification in content and number of public order or national security clauses. A recurring point is that the gulf in rights, benefits and obligations between immigrants who are long-term residents and EU citizens has expanded. Changes to EC legislation after 11 September have had the overall effect of rendering the status and position of long-term resident immigrants harder to attain, weaker in content, and more difficult to retain.

As the last of the Commission's proposals to be tabled in order to complete the Tampere mandate to harmonise Member States' legislation on the entry and residence of third-country nationals,[301] and not fully covered by the above literature, this section will provide comments on the proposal for a Council Directive on the conditions of admission of third country nationals for the purposes of study, pupil exchange, unremunerated training or voluntary service (hereinafter the draft students directive).[302] This proposal also stands out because it pertains to short-term entry and residence, suspected to be the preferred method of crossing borders of persons intent on committing terrorist acts.[303]

The preamble of the original proposal of 7 October 2002 states that the promotion of mobility of students, pupils, trainees and volunteers from third countries to Europe is key to creating a European centre of excellence for studies and vocational training, which is one of the Community's objectives. The directive is also expected to bring mutual enrichment to immigrants and EU citizens, country of origin and host country, and help to promote familiarity between cultures.[304] To this end, it provides for the issuing of short-term residence permits of a maximum of one year, which may be renewed, depending on

298 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44.

299 COM(2001) 386 final.

300 COM(2002) 548 final.

301 *Ibid.*, Explanatory Memorandum, section 1.1.

302 This is the current title of the above original proposal of 7 October 2002 (COM(2002) 548 final). The latest available draft text is Council Doc. 6681/04 of 25 February 2004.

303 Above n. 215.

304 COM(2002) 548 final, preamble recitals 4 and 5.

the purpose of admission.[305] It also regulates aspects of stay in a Member State, such as limited access to the labour market.[306]

Paraphrasing a Commission official charged with the drafting of this directive, consideration of terrorism has had relatively little influence on its content. Remarkably so, considering that short-term visas enabled the entry of the 9/11 culprits. A possible explanation lies in the fact that control on the entry and movement of students, for example, has traditionally been greater in the EU than in the US. Left unchecked in terms of presence and mobility in the US, students from third countries in the EU were already under an obligation to register with local authorities, and subject to limitations in movement between Member States. However, note was taken during the drafting process of the December 2001 Commission working document of the need to allow Member States sufficient opportunity to exclude potential terrorists and other threats to national security.

The Explanatory Memorandum of the draft directive indeed states:

> The wish to promote the admission of third country nationals for the purpose of studies or vocational training must be accompanied by a constant concern to safeguard public policy and public security. On this point the proposal contains provisions that are broad enough to leave the Member States with the room for manoeuvre they need to refuse admission or terminate the stay of a third-country national who constitutes a threat to public policy and public security. The fact that the various types of residence permit covered by the proposal have a general maximum period of validity of one year, except in special cases, or must be renewed every year will make it easier for Member States to exercise strict control.[307]

The draft students directive contains exclusionary clauses, but not beyond what may be expected. Among the general conditions for admission is that the student, pupil, trainee or volunteer must not be regarded as a threat to public policy, public security or public health.[308] An issued residence permit may likewise be withdrawn on the same grounds.[309] There are differences, however, between the original proposal and latest draft which indicate that Member States desired a higher level of restriction or 'room for manoeuvre' in the application of the directive. Both provisions originally held an explicit affirmation that "public policy or

305 Council Doc. 6681/04, Articles 11-14.

306 *Ibid.*, Article 18. This provision falls within chapter IV ("Rights of third-country nationals") of the draft directive, which was renamed "Treatment of the third-country nationals concerned".

307 COM(2002) 548 final, Explanatory Memorandum, section 1.5.

308 *Ibid.,* Article 5.

309 *Ibid.*, Article 15(2).

public security grounds shall be based exclusively on the personal conduct of the third-country national concerned".[310] That was deleted. Also, a non-discrimination clause[311] was moved from the main body of text to the preamble.[312]

4.5 Biometrics, Documents and Databases: Who Does What When and Where

The events of 11 September 2001 created an opportunity for the improvement of document security. The third and last explicit component of the initial international response directly relevant to immigration policy was for States to "prevent the movement of terrorist groups by […] controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents".[313] This coincided with the national agenda of certain Member States. A proposal for the enhancing of document security by way of insertion of certain biometric data was introduced at EU level by Germany on 27 September 2001.[314] Biometrics was taken on board as a means of improving the establishment of persons' identity in general and thereby internal EU security, but would soon find their way to the context of immigration,[315] and are now to be inserted in visas and residence permits.

A parallel and partially linked development is the expansion or creation of databases which assist in controlling migration flows – the Schengen Informa-

310 *Ibid.,* Articles 5 and 15(2).

311 *Ibid*., Article 24: "The Member States shall give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation."

312 Council Doc. 6681/04, Article 24.

313 UN SCR 1373 of 28 September 2001. Measures for the improvement of document security were not part of the conclusions of the extraordinary JHA Council of 20 September 2001, which were limited to calling for the stepping up of systematic checks of identity papers to detect falsification. See para. 25.

314 Brouwer, Catz and Guild, above n. 33, p. 122.

315 The November 2001 Communication on a common policy on illegal immigration announced a legislative proposal on the integration of a photograph into the uniform visa format, as "only a first concrete step towards the integration of further high security measures, which should be developed using new technologies" (COM(2001) 672 final, p. 12). The possibility of inserting biometric data in visas was also mentioned in the Comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, adopted by the Justice and Home Affairs Council of 27-28 February 2002, Brouwer, Catz and Guild, above n. 33, p. 114.

tion System II (SIS II) and Visa Information System (VIS).[316] Plans to expand the SIS existed prior to 9/11, brought on by the need to accommodate a larger number of users after enlargement of the European Union. Current proposals for SIS II vary from their pre-9/11 form, however, as its functions have been extended to provide for the fight against terrorism, and adapted, for example, to enable the storage of biometric data.[317]

The JHA Council Conclusions of 20 September 2001 invited the Commission to develop a network for information exchange concerning visa issuance.[318] A Commission official recalled that the idea of a system for the exchange of information between Member States on visa issuance gathered little support until 9/11. Concerns related to infringing upon the private life of individuals, and fears that such a system would enable the mapping and monitoring of Member States' respective visa issuing practices, revealing embarrassing facts. Mutual confidence in the control of the Union's external borders in an area without internal frontiers can be severely affected if, for example, third country nationals of a certain nationality who are issued a visa by one Member State are consistently found overstaying that visa elsewhere. But in the face of greater national security interests, reluctance quickly made way for enthusiasm. The creation of the VIS is currently well underway.[319]

It has been suggested that the combined purpose of these measures is to identify, register, screen, and track the movement of third country nationals

316 A third electronic database which is operated at EU level is EURODAC (Regulation 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention). A Commission official confirmed that the data in EURODAC is not screened for the possible presence of alleged terrorists among the EU's asylum seeking third country nationals, as such would not be in conformity with data-protection rules. The EURODAC database is therefore not included in this chapter.

317 Brouwer, Catz and Guild, above n. 33, p. 119.

318 Conclusions of the extraordinary Justice and Home Affairs Council of 20 September 2001, para. 26.

319 In its Communication of November 2001, the Commission announced a feasibility study of a European Visa Identification System, a common electronic online system which would provide an instrument to ensure proper admission for short-term stays and return after the expiration of a visa. This would enable a "dual identification process based on secure documents and a corresponding database". The system would furthermore facilitate the identification of illegal residents for return purposes. (COM(2001) 672 final, p. 13. The results of the study were presented to SCIFA on 22 May 2003. See roadmap December 2003, point 40). By the June 2002 Justice and Home Affairs Council, the system had been renamed Visa Information System. Brouwer, Catz and Guild, above n. 33, p. 122.

who enter EU territory, and to exercise control over their actions.[320] It seems unlikely that the current furtherance at European level of biometric technology in combination with compatible databases either aims to, or will enable a full determination of which third country national does what when and where. What is certain, however, is that third country nationals will be tagged using biometric data which will also be stored in databases. Here, the data may be screened for certain purposes, or used for an accurate and swift verification of identity or other information.

Policy and legislation regarding the improvement of the security of documents of third country nationals and the parallel development of databases for the storing and screening of corresponding data, which assist in controlling immigration, maintain a link with the fight against terrorism. They are explicit dual-purpose measures.

4.5.1 Tagging Third Country Nationals

Perhaps one of the most lasting effects of 11 September is that confidence in documents as a means to establish the identity of persons and control migration flows was severely affected, which enabled the implementation of measures necessary for the restoration of that confidence. The introduction of biometric data in visas, residence permits and passports arguably reflects the culmination of a history of evolving document security along the interaction between State, forger and *fraudeur*. The Community is spearheading the ultimate effort to secure the link between document and holder this side of the Atlantic by introducing the required legislation. On 24 September 2003, the Commission presented (joint) proposals for a Council Regulation amending Regulation (EC) 1683/95 laying down a uniform format for visas,[321] and a Council Regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals.[322]

320 Brouwer, Catz and Guild, above n. 33, p. 170, 189-190. Recommendations to the same effect are made in the study by the Center for Immigration Studies, above n. 215, at pp. 7-8: "The first step to enforcing [visa] time limits is the establishment of an entry-exit system that would automatically record the entry and exit of all persons to and from the United States. Those who overstay should be barred from ever entering the country again. The system would also allow the INS to identify overstayers who are still in the country. […] In addition […], there needs to be a system to track temporary visa holders once they enter the country. Currently, a system that requires colleges and universities to inform the INS if a foreign student stops attending class or otherwise violates his visa is being implemented. This system should be expanded to include other temporary visa holders […] such as guestworkers, intracompany transferees, and cultural exchange visitors".

321 COM(2003) 558, 2003/217 (CNS).

322 COM(2003) 558, 2003/218 (CNS). Similar developments are underway for EU citizens. On 18 February 2004, the Commission presented a proposal for a Council

The Explanatory Memorandum of the proposals starts by explaining that the events of 11 September 2001 made clear that detecting persons who attempt to enter the EU on forged documents is essential, as is prevention of the use of 'bogus or false identities'. The latter requires a more reliable check as to whether the holder of a document and the person to whom the document has been issued are one and the same.[323] To fulfil these demands, the intention of the Commission proposals is to move the deadline for integrating a digital photograph in the uniform format for visas and residence permits in sticker form from 2007 to 2005,[324] and harmonise Member States' efforts to integrate biometric identifiers into visas and residence permits.[325]

A digital photograph is to provide the so-called primary interoperable biometric identifier; interoperability in this case meaning that different systems operated by Member States will be able to use the same digital image.[326] The secondary biometric identifier to be added is a set of two fingerprints, which is held to provide the best solution for "background checks".[327] By background check, the Commission means a one-to-many search, which is defined as "the process of determining a person's identity through a database against multiple templates or images",[328] i.e. the screening of a database on the basis of a certain profile.[329] In addition to the integration of the image of the photograph and fingerprints, both biometric data are also to be stored on a storage medium – a chip[330] – in

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Regulation on standards for security features and biometrics in EU citizen's passports (COM(2004) 116 final). Besides thereby completing the introduction of biometric identifiers in all travel documents – passports and visas – this legislation is also necessary to meet US requirements concerning passport holders from visa waiver countries. COM(2003) 558, Explanatory Memorandum, p. 2. For doubts concerning the legal basis of this regulation, see B. Waterfield, "Watching EU: Imminent proposals for a biometric European Union passport are both politically sensitive and legally questionable", *The Parliament Magazine*, 26 January 2004.

323 COM(2003) 558, Explanatory Memorandum, p. 2.

324 Two unpublished Commission decisions had set deadlines at 3 June 2007 and 14 August 2007, respectively. *Ibid*, p. 3.

325 *Ibid.*

326 *Ibid.*, pp. 4, 13.

327 *Ibid.*, p. 4. The Community did not opt for an iris image as a second identifier, which the ICAO has determined may also be used. Fingerprinting is an older and more established technique. The patent for iris recognition, moreover, is held by a US company. *Ibid.*, pp. 4, 5.

328 *Ibid.*, p. 13.

329 A 'one-to-one' check, by contrast, is "a comparison of two templates or images to establish the validity of a claimed identity. The process of claiming an identity and subsequently verifying the claimed identity". *Ibid.*

330 *Ibid.*, pp. 4, 11.

the documents.[331] Such storage enables searches in databases on the basis of the document.[332] The Commission stresses that the two regulations only provide the *legal basis* for the integration and storage of biometric data on visas and residence permits for third country nationals. The manner in which this action is implemented is left to the Member States.

The Commission recalls that the processing of all personal data, including that of biometric data by Member States within the scope of Community law, is governed by Directive 95/46 of 24 October 1995.[333] The Article 29 Data Protection Working Party adopted a working document on biometrics on 1 August 2003,[334] prompted by the rapid progress in biometric technology in light of public security since 11 September 2001, and its forthcoming application in ID cards, passports and visas. The Working Party points out that the use of such data has until now mostly been confined to certain law enforcement activities. The current extension to other applications, such as authentication, verification and identification in order to control entry to territory or access to certain services, increases the risk of use of such data by third parties for a purpose other than that intended, for example, within the law enforcement field.[335]

For these and other reasons, the Working Party sees a need to lay down specific data protection safeguards in the collection and use of biometric data along the requirements of Directive 95/46. These include respect for the principle of purpose and proportionality, criteria for the collection and processing of data, and security measures to prevent unauthorised access or the occurrence of errors leading to mistaken identifications.[336] The Working Party stresses that biometric data revealing racial or ethnic origin constitute sensitive data within the meaning of Article 8 of Directive 95/46,[337] which determines that the processing of such data is prohibited unless subject to one of the exemptions contained in that Article. This implies that, unless a third country national consents to the processing of such data (Article 8(2)(a)), an exemption would have to be

331 COM(2003) 558 final, Article 4a of both proposals. With regard to visas, the JHA Council of 27-28 November 2003 decided that an additional legislative measure would be required to allow for such storage of fingerprints. This Council meeting also instructed the Commission to prepare a proposal for amendment of the Schengen Common Consular Instruction in order to create an obligation for consulates to register the fingerprints of visa applicants (Presidency Conclusions, Council Doc. 14995/03, and background document, available on: www.ueitalia2003.it).

332 COM(2003) 558 final, Explanatory Memorandum, p. 5.

333 *Ibid.* For the reference to the directive, see above n. 190.

334 12168/02, WP 80.

335 *Ibid.*, p. 2.

336 *Ibid.*, pp. 6-9.

337 *Ibid.*, p. 10.

based on paragraph 4.[338] Furthermore, paragraph 5 of the Article holds further requirements for the processing of data relating to offences, criminal convictions or security measures, which are sensitive regardless of whether they reveal racial or ethnic origin.

The Explanatory Memorandum of the above proposals is limited to taking note of the Working Party's report, and reminding Member States to take its findings into account when implementing the regulations as amended by the proposals.[339]

Increasing the quality of security items in documents by adding biometric identifiers strengthens the link between document and holder, as the document becomes more difficult to forge or use fraudulently. Another novelty is the storage of the same biometric data in databanks which allow checks on whether the holder of a document and the person to whom the document has been issued are the same (which further counters fraudulent use), and enable 'background checks'. The fact that the data are biometric makes these checks more reliable and increases the chance of a 'hit' in database searches.[340]

4.5.2 Registering and Screening Third Country Nationals

The Schengen Information System (SIS) allows competent authorities in Member States to consult a set of alerts relating to persons and property for the purposes of border checks and controls, other police and customs checks carried out in-country, the issuing of visas and residence permits, and the administration of aliens.[341] Information contained in the system is mostly personal data derived from Member States' police forces and other authorities allowed to handle sensitive data.[342] The SIS is considered a vital instrument for managing the fields of security, freedom and justice for the Schengen area,[343] policing the free movement of persons and assisting in the fight against transnational crime,[344] and maintaining public order in an area without internal frontiers.[345] It

338 Article 8(4): "subject to suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions either by national law or by decision of the supervisory authority".

339 COM(2003) 558 final, Explanatory Memorandum, p. 7.

340 COM(2003) 771 final, p. 31.

341 Article 92 of the Schengen Convention.

342 Communication on development of the Schengen Information System II and possible synergies with a future Visa Information System, COM(2003) 771 final, 11 December 2003, p. 7.

343 *Ibid.*, p. 4.

344 Council Conclusions on SIS II, Council Doc. 9808/03, 26 May 2003.

345 COM(2003) 771 final, p. 5.

is thus a helpful tool in combating terrorism. The renewed SIS II is scheduled to become fully operational in early 2007.[346]

In addition to accommodating the enlargement of the EU, the system was also in need of modernisation. A Commission official explained that the current SIS is of limited use for linking information to persons. Based on alphanumeric data, searches can come up empty due to simple errors in spelling or transcription of a name, or persons using an alias.[347] Post-9/11, the addition of biometric data to the SIS II presents a solution to the system's technical weaknesses in identifying persons.[348]

The Council has discussed new 'functionalities' for the SIS.[349] SIS II will likely feature additional categories of alerts on persons, documents and property, linkage between alerts, prolonged duration of alerts, and allow more elaborate access of Member State authorities to the database.[350] Changes have already been made to the original provisions of the 1990 Schengen Convention governing the SIS.[351] These pertain *inter alia* to the exchange of information between Member States and expansion of the list of competent authorities that have a right of access to the SIS to authorities responsible for the issuing of visas and residence permits, the examination of applications thereof, and the administration of legislation relating to aliens.[352] The Commission is also examining possible 'synergies' of SIS II and the forthcoming VIS.[353]

The VIS is a system for data exchange between Member States. Its objectives are manifold. The VIS is to improve consular co-operation and the exchange

346 *Ibid.*, Annex 2.

347 See also *ibid.*, pp. 5, 16.

348 *Ibid.*, section 4.3 on biometrics.

349 SIS/SIRENE Working Group, Future functionalities of the Schengen Information System II, Council Doc. 6637/04, 23 February 2004 (n/a).

350 Council Doc. 9808/03. COM(2003) 771 final, pp. 15, 31.

351 Initiative of the Kingdom of Spain with a view to adopting the Council Regulation (EC) No …/2002 concerning the introduction of some new functions for the Schengen information system, in particular in the fight against terrorism, OJ 2002 C 160/5. The Council finalised the text of this regulation on 31 March 2004, with a slight change in title: Council Regulation (EC) No /2004 concerning the introduction of some new functions for the Schengen Information System, *including* in the fight against terrorism. Council Doc. 7575/04, 31 March 2004.

352 For an updated list of competent authorities, see Council Doc. 6265/03, 9 October 2003. It includes police services, the judiciary, security services, border control authorities, and indeed offices and immigration services for aliens, as well as ministries responsible for legislation relating to aliens. The granting of access to security services is also the result of post-9/11 initiatives. See Brouwer, Catz and Guild, above n. 33, p. 120.

353 Above n. 342.

of information between consular authorities, combat fraud, facilitate checks at border checkpoints or at immigration or police checkpoints, prevent 'visa shopping', facilitate application of the Dublin Regulation and the expulsion of third country nationals, improve the functioning of the common visa policy, and improve internal security and the fight against terrorism.[354]

The VIS provides for the storage of relevant data when a visa is issued, annulled, revoked, or extended, and subsequent consultation of this data for the purposes given above. In addition to personnel of consular posts, immigration and border authorities, the data in the VIS may be consulted by personnel of police services, security services, and by border guards. Its capacity will provide for the connection of at least 12,000 users in 27 Member States and at 3,500 consular posts, and is based on an estimated processing of 20 million visa applications a year. It will cover Schengen and national visas of the Member States which have abolished checks at their EU internal borders. The VIS will be implemented before the end of 2006 using certain alphanumeric data and digital photographs.[355] In a second step, by the end of 2007 biometric data of visa applicants will be added in line with developing legislation on the uniform visa format. It will then be possible to link biometric data with the alphanumeric information for verification purposes and greater reliability in identifying persons and on 'background checks'. Supporting documents for visa applications will also be added to the system at a later stage. Data will be retained for at least five years from its entry into the system following a decision on the visa application.[356]

The intended synergy of SIS II and VIS is twofold. Firstly, it constitutes a cost-effective merger of hardware. The SIS II and VIS will operate as different systems with separated data and access, but the sharing of facility, equipment and staff at central level will mean a significant cost reduction in the development of the latter database. Secondly, it implies a software interface between the

354 COM(2003) 771 final, 11 December 2003, p. 25. Council Conclusions on the development of the Visa Information System, 20 February, Council Doc. 6535/04, 20 February 2004, para. 1.

355 To be registered are: the type of visa; the status of the visa; all the relevant data required to identify the applicant, to be taken from the application form; all the relevant data to identify the visa, to be derived from the visa sticker; the authority which issued, refused, annulled, revoked or extended the visa; information required for consultation of the central VIS (VISION network); and records of persons issuing invitations (those liable to pay board and lodging costs). Council Conclusions on the development of the VIS of 20 February 2004, para. 3.

356 COM(2003) 771 final, pp. 25-26. Council Conclusions on establishing the VIS of 19 February 2004, para. 2. See also the Commission proposal of 12 February 2004 for a Council Decision establishing the Visa Information System (COM(2004) 99 final), the aim of which is to initiate the development of the VIS through Community financing.

two systems. This will combine the information in both systems. SIS users will be able to check the authenticity of a visa and identity of a third country national, documented or undocumented, the latter no longer an obstacle by virtue of biometric identifiers. VIS users can cross-reference the SIS to determine if an alert has been issued for a particular visa applicant, although for the limited purpose of refusing entry only.[357] The prospect of interlinkage and combination of searches in the SIS II and VIS implies the development of compatible technology for the storage and use of biometric identifiers in the two databases.[358]

According to the Article 29 Working Party, the risk of use of biometric data for incompatible purposes, and thus violation of persons' fundamental rights and freedoms, is relatively low if the data are not stored in centralised databases, but remain with the person and are inaccessible to a third party. This risk increases substantially when biometric data are stored in a centralised database, and more so if such data form the key to an interconnection between databases that would enable detailed profiling of an individual.[359] Integration of a photograph and an image of fingerprints in a document, and the storage of the biometric data on a chip in the document, thus seem to be within accepted limits, bearing in mind the requirements of Directive 95/46. The additional storage of corresponding biometric data in the SIS II and VIS, and a synergy of these databases, is more questionable. The Commission has stated that the data protection authorities will be regularly consulted during the course of these developments.[360]

4.6 Return – Fruit of the 'War on Terror'

It is a matter of general agreement that the fight against terrorism is best countered by international co-operation, and best served by the prosecution and incarceration of terrorists. The response to 9/11 within immigration and asylum policy, however, bears witness to the continued prevalence of national security interests over those of international security. Denying entry to, or expelling terrorist suspects may arguably fulfil a purpose in preventing and combating typically domestic terrorism. It does not, however, assist the fight against contemporary international terrorism, the threat of which is not necessarily limited to any one particular State.[361] It is contradictory to emphasise the importance of international co-operation in facing what is a common problem, yet fail to remove alleged terrorists from circulation and fail to prevent terrorist acts, feared by one State, occurring in another.

357 COM(2003) 771 final, p. 27.

358 *Ibid.*, pp. 16, 26-27. Council Conclusions on establishing the VIS of 19 February 2004, paras. 6-7.

359 12168/02, WP 80, pp. 6-7.

360 COM(2003) 771 final, p. 31.

361 Brouwer, Catz and Guild, above n. 33, pp. 9, 186.

Besides the short-sightedness[362] inherent in a policy which continues to focus on the preservation of national security, there is also a procedural temptation which leads States to take recourse to expulsion or to denial of admission as a means to combat terrorism. In its working document of December 2001, the Commission remarked that States which have successfully excluded alleged terrorists from refugee status should in principle provide follow-up by prosecution of such persons. It recognised, however, problems of jurisdiction and availability of proof, which frequently prevent such action. Proof, that is to say, of the standard required for a charge of terrorism in criminal law and procedure, which is superior to that required for the exclusion of a person from refugee status,[363] the expulsion of a non-national, or the refusal of admission of a migrant. The concept of national security finds a more comfortable home in administrative procedures, which govern the lot of migrants, and cater to vague suspicions and charges of terrorism.[364]

Recognising such State policy, ensuring that EC Member States have the desired 'room for manoeuvre' in excluding and expelling suspected terrorists, runs like a red thread through Community immigration and asylum legislation. However, the specific aim of expulsion of persons who are perceived as a threat to national security does not appear to have taken hold in the Community's return policy.

4.6.1 Community Return Policy

It has been observed that the attacks of 11 September 2001 facilitated the adoption by the EC of certain measures in the immigration field that were already being considered.[365] This is especially true for measures aimed at curbing illegal immigration. The attacks fed into a process of intensifying Community action against illegal residence that arguably began when a group of Chinese migrants was found suffocated in a lorry in Dover in July 2000.[366] The period after 9/11 has seen a further hardening of EC policy in 'the fight against illegal immigration', which can only partially be explained by a need to fight terrorism, but nevertheless has 'piggy-backed' on the ensuing more restrictive political climate *vis-à-vis* immigration. Examples of policy and legislative changes have been discussed in the sections on border control, which has fought terrorism to a fluctuating degree, and document security and databases, which have retained an outspoken function in fighting terrorism. Return policy has equally undergone changes, yet

362 *Ibid.*, p. 172.

363 COM(2001) 742 final, p. 13.

364 Guild 2003, above n. 296, pp. 140-146.

365 Above n. 220.

366 Communication on a Community immigration policy, COM(2000) 757, 22 November 2000, p. 6.

has at no point explicitly formed part of the EU's fight against terrorism. Most notably, a change in policy language occurred. The Commission unreservedly adopted the position that enforcing the removal and return of illegal residents is an integral and crucial part of the fight against illegal immigration, necessary for maintaining the credibility of, and thus public support for, immigration and asylum policy as a whole.[367] It parted from its characteristic 'freedoms' orientation and the promotion of migration flows, and moved towards a greater emphasis on enforcement and restriction.

Although the Commission's various policy papers on return policy include sections on the expulsion of persons who are considered a threat to national security or public order,[368] such policy does not hold a prominent position and no mention is made of the expulsion of alleged terrorists. Also, despite strong policy language on enforcement and repeated affirmation of Member States' prerogative of carrying out enforced returns, the development of Community return policy thus far remains focused on voluntary return. This is reflected in the first concrete offspring of the common return policy, which will be discussed in the following section: the EU Return Action Programme,[369] and the EU Plan for return to Afghanistan.[370]

4.6.2 EU-Assisted Return to Afghanistan – Prospects for Iraq

The military campaigns in Afghanistan in October 2001 and in Iraq in May 2003 did not trigger specific security-oriented measures in the EC immigration and asylum policy fields. A Commission official commented that whereas both campaigns heightened security concerns in general,[371] these did not impact on immigration or asylum policy, as initial concern in these fields was mitigated

367 Communication on a common policy on illegal immigration, COM(2001) 672 final, 15 November 2001, pp. 8, 25. Green Paper on a Community return policy on illegal residents, COM(2002) 175 final, 10 April 2002, p. 8. Communication on a Community return policy on illegal residents, COM(2002) 564, 14 October 2002, pp. 4, 8. Return as a condition for credibility of the asylum system was already mentioned in the Communication towards a common asylum procedure and a uniform status (COM(2000) 755 final, 22 November 2000).

368 COM(2002) 175 final, section 3.1.2; COM(2002) 564, sections 2.3.3. and 2.3.4.

369 Council Doc. 14673/02, 25 November 2002. A single reference is made to expulsion on the grounds of a serious threat to national security in the context of mutual recognition of expulsion orders (para. 50).

370 Council Doc. 15215/02, 4 December 2002. The plan contains no reference to expulsion or removal of persons who pose a threat to national security or public order.

371 With regard to the war in Iraq, the roadmap mentions terrorist threat assessments by Member States and the implementation of safety measures, with Europol in an assisting role. See roadmap December 2003, point 35. Another example is the adoption of a Commission Communication on the consequences of the war in Iraq for energy and transport, *Bulletin of the EU*, 3-2003, p. 69.

by two facts. A feared mass exodus of persons fleeing armed conflict did not present itself at the borders of Afghanistan or Iraq, and both wars resulted in a drop in asylum levels. Also, the military campaigns did not occur in a security vacuum. One could argue that policy developments set in motion after 11 September 2001 had already amply addressed the security liability which admission and residence of third country nationals were perceived to pose.

Afghanistan and Iraq ceased to find a place among the list of top source countries of asylum applicants in the EU following the removal from power of the Taliban and, later, Saddam Hussain and the Ba'ath party.[372] In the case of Afghanistan, massive returns of Afghan refugees from neighbouring Iran and Pakistan soon followed. The establishment of what were perceived as sufficiently safe conditions in Afghanistan led to a response within an EU framework and with Community financial backing, namely that of organising the return of the sizeable Afghan population which had accumulated in Member States.

The Seville European Council of 21 and 22 June called for the "adoption by the end of the year of the components of a repatriation programme […]; these components must include the best possible facilities for early return to Afghanistan".[373] The EU Return Action Programme and the EU Plan for return to Afghanistan were consequently adopted at the JHA Council meeting of 28 November 2002.

Rather than securing returns to Afghanistan through the potentially lengthy process of negotiating a Community readmission agreement, a faster solution was sought. The EU Plan for return to Afghanistan is a loose framework providing a division of tasks between participating Member States and the Commission. Member States carry responsibility for the actual implementation of returns under the plan, measures before departure, and travel arrangements to Afghanistan. The Commission's role is to co-ordinate Member States' respective efforts in returning Afghans and to arrange their reception in Afghanistan.[374] The

372 Absolute numbers of asylum applications by Afghan nationals in the EU show a sudden drop from 2,196 in October 2001 to 992 in November 2001 (Asylum applications lodged in Europe, North America, Australia and New Zealand, January-November 2001, available on: www.unhcr.ch). In January 2002, the number of applications was up again at 2,615, to subsequently show a steady decline throughout 2002, falling below 1,000 in 2003, with September 2003 showing 737 applications (Eurostat). Absolute numbers of asylum applications by Iraqi nationals in European countries show a decline from March 2003 (2,763) onwards, with November 2003 registering 761 applications (Asylum levels and trends in industrialised countries, January-November 2003, available on: www.unhcr.ch).

373 Presidency Conclusions of the Seville European Council, para. 30.

374 Council Doc. 15215/02.

Commission reserved part of its budget under budget line B7-667[375] to procure international organisations to fulfil the latter part of its appointed tasks.[376] The emphasis of the plan is on voluntary return, but Member States may forcefully return those persons who "do not have protection needs justifying their stay but who nevertheless after the passage of reasonable time continue to refuse to avail themselves of a voluntary return programme".[377] The target group of the plan is comprised of legally residing Afghans who wish to return, and Afghans who are illegally present, which in the EC definition includes rejected asylum seekers.[378] Beyond the securing of a degree of co-operation from the Afghan authorities by providing financial support "to smooth the return of all refugees",[379] reaching specific agreement on the return of migrants with the then Afghanistan Transitional Administration[380] was left to Member States to organise bilaterally.

Member States began returning Afghans under the banner of the EU plan in June 2003. Their numbers, however, remained far below the mark. 5000 returns were anticipated for a 15-month period,[381] but by November 2003 only some 450 returns had taken place. Afghans have been unwilling to return voluntarily; this is due in part to a degree of settlement following their long residence in an EC Member State, but is largely a result of continuing fear for their safety upon return. A lack of political will, but also lack of legal opportunity, has prevented Member States from enforcing returns on a large scale, as safety conditions in Afghanistan indeed increasingly deteriorated in the months after the EU Plan for return to Afghanistan became operational.

An opening for similar action was created by the fall of Saddam's regime in Iraq but none has thus far been forthcoming. A Commission official confirmed that Iraq has been mentioned as a possible next country to which to organise EU-

375 "Co-operation with third countries in the field of migration". For its purpose and an outline of action under this budget line, see the Commission Communication integrating migration issues in the European Union's relations with third countries, COM (2002) 703 final, 3 December 2002.

376 Selected were an IOM and a UNHCR project. The IOM RANA project (Return, Reception and Reintegration of Afghan Nationals to Afghanistan, see: www.belgium.iom.int) arranges reception, information dissemination, training courses and onward travel. The Commission funded the continuation of an ongoing UNHCR project aimed at capacity building of the Afghan government, *inter alia,* in receiving back its nationals.

377 Council Doc. 15215/02, para. 11.

378 *Ibid.*, para. 13.

379 The EU's relations with Afghanistan, available on: www.europa.eu.int/comm/externa_relations.

380 Council Doc. 15215/02, para. 4.

381 The IOM RANA project was procured on the basis of this estimate, see: www.belgium.iom.int.

assisted returns. Returns to Iraq certainly represent a Community-wide interest. Like Afghanistan, Iraq was one of the top five refugee-producing countries over a protracted period resulting in a substantial Iraqi presence in all EC Member States. It is unlikely, however, that Iraq will be subject to an EU return measure in the near future. Iraq may have stopped producing refugees, but conditions in the country have thus far prevented the development of EU measures for returning Iraqi nationals. Moreover, lessons have been learned from the implementation of the EU Plan for return to Afghanistan. Firstly, there is no reason to assume that EU involvement could alleviate regular problems of return practice in Member States. Unwillingness to return voluntarily, or persons absconding from enforced removal if not detained, has likewise affected 'EU' returns to Afghanistan. Secondly, the success of the plan in realising returns has been highly limited, as Afghanistan has proven a particularly difficult case. It is likely that the EU will look for an 'easier' subject in its next endeavour at organising and assisting the return of illegal residents, which makes Iraq an unlikely candidate.

5. Conclusions

Security measures were not alien to European immigration and asylum policy and legislation prior to the Al Qa'eda attacks in the US on 11 September 2001. Migration had been a matter of security concern at European level arguably since the 1985 Schengen Accord, amplified soon after by the Single European Act of 1986. Fear of the presence of undesirable or criminal elements amongst those people moving freely within the EU single internal market had influenced policy-makers already during the pre-Maastricht era. Additionally, as a result of the Gulf War in 1991, Member States had previous experience of security-type measures which influenced decision-making in the Council after 11 September 2001.

Certain of the EC Member States introduced measures within the immigration and asylum policy fields in response to an Iraqi terrorist scare directly resulting from the Gulf War in 1991. These measures were discussed and, to a degree, co-ordinated within the select intergovernmental forum of TREVI. This determined a reflex reaction towards migration control measures directed exclusively at foreigners, comparable to that which followed 9/11. The relevant response, however, remained isolated within elusive TREVI co-operation. Security concerns resulting from the Gulf War in 1991 did not, therefore, exercise a structural influence on the development of an area of free movement of persons, or on early immigration and asylum policies as elaborated at Community and intergovernmental level.

On the other hand, 9/11 gave certain EC policies in the immigration and asylum fields significant stimulus. The events of 11 September 2001 acted as a catalyst for desired policies. The legitimate objective of preventing the entry of terrorists and the immediate call to formulate policy to this effect led the

Community policy-makers charged with this task to take a certain connection between contemporary international terrorism and immigrants and asylum seekers at face value. Had this not also suited the political agenda and intended policy and legislation, it is likely that a deeper analysis of the methods of entry of terrorists would have been undertaken first.

Explicit linkage of EC policy and legislation in the fields of immigration and asylum to the events of 11 September 2001 or 'terrorism' has become less frequent, but its influence is still felt. Current policy and legislation are rooted in dynamics that were set in motion in the immediate aftermath of September 2001, which may be evidenced through a direct policy trail. A further, more indirect, influence is the seemingly irrevocable change in attitude towards people flows which the European Commission – the primary drafter of the common immigration and asylum policy – has undergone.

Regarding the effectiveness and legitimacy of the current security-oriented approach to EC policy-making in the immigration and asylum fields, it is instructive to recall the attempt by the Solana strategy paper to define the root of contemporary international terrorism. It posits that terrorism springs from a set of complex issues such as pressures of modernisation, cultural, social and political crises, and the alienation of young people living in foreign societies. Such a general definition is difficult to fault. The Solana paper is quick to acknowledge that the same phenomena exist within the societies of EU Member States. Indeed, this definition of the root cause of terrorism may well have been a summary of issues surrounding the current political debate on integration of immigrants in many of the Member States.

The Solana definition of the root causes of terrorism suggests that policies that stigmatise and exclude immigrants are likely to breed extremist sentiments and lead persons into the hands of terrorist organisations. Reviewing the current state of EC policy and legislation has revealed a structural and deliberate weakening of the position of immigrants, asylum seekers and refugees by increasing their dependence on Member State discretion for receiving and maintaining rights to residence and benefits. The current policy choices which aim to improve security by preventing or deterring the entry and presence of suspected terrorists may, by the Union's own reckoning, thus also be creating risks. If one accepts that such a policy is necessary, its effectiveness, and thus its legitimacy, depends upon an equal level of commitment to combating racism and xenophobia and to promoting the integration of immigrants. In other words, a comparative study of parallel EU activity in the latter areas may provide a better indicator of the true state of EU internal security.

Chapter 2 The Role and Limits of the European Court of Human Rights in Supervising State Security and Anti-terrorism Measures Affecting Aliens' Rights

*Nicholas Sitaropoulos**

1 Introduction

The European Court of Human Rights (ECtHR) has been faced, for more than 40 years, with the onerous task and challenge of striking a fine balance between European State security interests and individual rights, in political conflict situations involving acts or threats of terrorism,[1] ensuring, at the same time, that the European Convention on Human Rights (ECHR) continues to play its central role as "a constitutional instrument of European public order".[2] However, current forms of internationalised terrorism are of an entirely different character and dimension from terrorism that European and other States had to cope with in the 1960s or 1970s.

The terrorist attacks in the US in September 2001, as well as the subsequent acts of terrorism especially in Western Europe, showed the extremely violent, irrational form and the devastating effects of terrorist acts upon human lives and societies based on the principles of democracy, human rights and the rule

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1 See, e.g., *Lawless* v *United Kingdom (No.3),* judgment of 1 July 1961, Series A 3; *Ireland* v *United Kingdom*, judgment of 18 January 1978, Series A 25. See also I. Cameron, *National Security and the European Convention on Human Rights,* (Uppsala: Iustus Förlag, 2000) passim, esp. 435-453; C. Warbrick, "The ECHR and the prevention of terrorism" (1983) 32 *International and Comparative Law Quarterly*, 82-119; C. Warbrick, "The principles of the ECHR and the response of states to terrorism" (2002) *European Human Rights Law Review*, 287-314.

2 Council of Europe Committee of Ministers, Declaration on *ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels,* 12 May 2004, para. 2, www.coe.int/cm.

Elspeth Guild and Anneliese Baldaccini (eds.), Terrorism and the Foreigner ... *85-120.*
 ISBN 90 04 15187 7.

of law. These attacks have given an unprecedented high profile to the issue of terrorism and put it on top of international and national political agendas for two main reasons. Firstly, they have rocked the bases of established perceptions of high-level security in many States, especially in the Western world, thus seriously damaging their self-confidence. It is these States which, in turn, adopted instinctively reactive, legislative and other, measures hardly compatible with fundamental human rights principles of modern liberal democracies. Secondly, a major side effect of the post-2001 rise of the terrorism phantom has been the victimisation of aliens, that is, of third-country immigrants, asylum seekers or even refugees. The unfortunate, *de facto*, connection of international terrorism with 'other' social, religious or ethnic groups that constitute also minority parts of the polities of Western liberal democratic States, has put aliens – members of the above groups in these States – at the centre of a phobic cyclone that has eventually prevailed worldwide. The Parliamentary Assembly of the Council of Europe, a few days after the September 2001 attacks, adopted a Resolution that reflected these concerns and expressed its conviction that:

> introducing additional restrictions on freedom of movement, including more hurdles for migration and for access to asylum, would be an absolutely inappropriate response to the rise of terrorism.[3]

Regrettably, the 2001 and subsequent terrorist attacks have not only provided an excuse for Western States' further restrictive immigration and asylum policies but also led to the introduction of discriminatory legislative and administrative practice against aliens in States considered, so far, as prototypes for the protection of human rights and the rule of law.[4]

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3 Para. 13 of Parliamentary Assembly Resolution 1258 (2001) *Democracies facing Terrorism*, 26 September 2001, in Council of Europe (ed.), *The Fight Against Terrorism – Council of Europe Standards,* (Strasbourg: Council of Europe, 2003), 361 and at http://assembly.coe.int/. See also ECRI, *General Policy Recommendation No. 8 on Combating Racism While Fighting Terrorism*, 17 March 2004, Doc. CRI(2004)26, www.coe.int/T/E/human_rights/Ecri/1-ECRI.

4 See, e.g., *A (FC) and others (FC)* v *Secretary of State for the Home Department*, House of Lords judgment of 16 December 2004, [2004] UKHL 56, www.publications.parliament.uk. See also summary of and notes on this case in O. Sands, "British Prevention of Terrorism Act 2005", *Asil insight*, April 27, 2005, www.asil.org/insights.htm. In this case, the House of Lords found that the application of UK anti-terrorism legislation providing for indefinite detention of aliens suspected of terrorism was disproportionate and discriminatory. The judgment of the House of Lords has drawn heavily on and reaffirmed the direct effect in the UK of the ECtHR's case law. After this judgment, the UK withdrew her derogation from Article 5(1) ECHR. See chapter by Bonner and Cholewinski in the volume for an

The ECtHR, rightly interpreting the ECHR, in principle, in a dynamic, teleological manner, has proved so far to be an efficient 'pan-European constitutional court' and a guardian of human rights and freedoms in a series of cases relating to anti-terrorism policies and measures of European States affecting mainly their own nationals.[5] It is the author's belief that the same is true, despite certain occasional misgivings,[6] with regard to the vast majority of cases involving aliens as victims of anti-terrorism or national security measures. The major body of the relevant case law started, in fact, to develop in 1996 when the Grand Chamber of the ECtHR delivered its judgment in the case of *Chahal* v *United Kingdom* (see below). By this, and a number of subsequent judgments, the Court proved undeniably that it has the capacity to act as a strong and resistant bulwark against European States unwilling or incapable of providing effective protection to aliens charged with or suspected of terrorism-related offences, especially when the latter are in the most vulnerable state of being subject to deportation or extradition.

The present chapter aims to provide an overview of the relevant major case law developed so far (by 8 November 2005) by the ECtHR, pointing to its main strengths and weaknesses. The paper is divided into five sections covering five major subjects related to aliens suspected of or prosecuted for acts of terrorism or of organised crime. Firstly, the right to freedom from torture and inhuman or degrading treatment or punishment, a crucial issue that has very often arisen in forced removal (deportation or extradition) proceedings; secondly, the decisive right to liberty and security of terrorism-suspect aliens, especially in States initiating forced removal proceedings; thirdly, the particularly thorny question concerning the right to a 'fair trial' of these aliens both in the removing and in the receiving States; fourthly, the issue of protecting these persons' family life in the context of the ECHR; last, but not at all least, the provision of effective remedies to this special category of aliens on the domestic level, as well as on the international plane through the ECHR that frequently constitutes an *ultimum remedium* for the effective protection of aliens' rights in Europe.

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in-depth examination of this judgment and A. Tomkins, "Readings of *A v Secretary of State for the Home Department*", (2005) *Public Law* 259-266.

5 See, e.g., C. Warbrick, "The European response to terrorism in an age of human rights" (2004) 15 *European Journal of International Law*, 989-1018, esp. 993-995, 1003-1006.

6 See, in particular, below at 4.1.

2 The High Standard of Protection Against Torture or Ill-treatment Provided by Article 3 ECHR[7]

2.1 Risk and Protection From Torture or Ill-treatment of Aliens Allegedly Threatening 'State Security'

The risk of torture or ill-treatment (the latter term used herein generically to denote 'inhuman or degrading treatment or punishment') in the destination country (country to which an alien is deported or extradited) has been established in international law as an absolutely sound ground for excluding an alien's forced removal. Article 21(2) of the 2005 Council of Europe Convention on the Prevention of Terrorism has clearly provided for the exclusion from extradition of persons who risk being exposed to torture or ill-treatment in the requesting State.[8] The Council of Europe Member States have further enhanced the protection of individuals subject to extradition, by Article 21(3) of the same Convention, which provides for the prevention of extradition of persons also in cases where they risk being exposed to the death penalty or, occasionally, to life imprisonment without the possibility of parole. Exceptions to this rule may be made on condition that the requesting State provides 'sufficient assurance' to the requested State that the death penalty will not be imposed or carried out, or that the person concerned will not be subject to life imprisonment without the possibility of parole.[9] Noteworthy is the rightly unqualified nature and wording

7 Article 3 – Prohibition of torture: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

8 Article 21(2): "Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to torture or to inhuman or degrading treatment or punishment." Council of Europe Treaty Series No. 196. This Convention was signed on 16 May 2005, http://conventions.coe.int/. See also relevant section XIII of the Committee of Ministers, *Guidelines on Human Rights and the Fight against Terrorism*, 11 July 2002, in Council of Europe (ed.), *The Fight Against Terrorism – Council of Europe Standards,* above n. 3, at 275.

9 Article 21(3): "Nothing in this Convention shall be interpreted either as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to the death penalty or, where the law of the requested Party does not allow for life imprisonment, to life imprisonment without the possibility of parole, unless under applicable extradition treaties the requested Party is under the obligation to extradite if the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be imposed or, where imposed, will not be carried out, or that the person concerned will not be subject to life imprisonment without the possibility of parole." See also similar provision, regarding only capital punishment, in Article 13 of the Agreement on extradition between the European Union and the United States of America, OJ 2003 L 181/27, and similar provision in Article 5(2), concerning custodial life sentences or life-detention orders, of the European arrest warrant Council Framework Decision of 13 June 2002, OJ 2002 L 190/1. Article 21(3) actually reflects ECtHR case law. See,

of the above provision regarding a risk of violation of the non-derogable right to freedom from torture or ill-treatment (Article 21(2)). In these cases, unlike those involving a risk of the death penalty or life imprisonment without parole (Article 21(3)), 'sufficient assurance' given by a requesting State is not provided for and, thus, may not have any legal value or effect whatsoever on extradition procedures.

The case of *Chahal* v *United Kingdom*[10] was the first major case concerning measures aimed at the deportation of an alien – an Indian Sikh militant – characterised as a terrorist by the respondent State, allegedly posing a danger to the State's national security. The facts of the case related to the early 1990s. This *cause celèbre* was, in fact, the first major 'battle' before the ECtHR raising the delicate issue of balancing a State's legitimate interest to be protected from a potential terrorist activity of an alien, on the one hand, and considerations of effective human rights protection, on the other. At the same time, it gave the ECtHR the opportunity to affirm and maintain some of its fundamental case law principles applicable to the present subject matter.

The Grand Chamber of the ECtHR in *Chahal* stressed and affirmed, probably in the strongest possible manner, the paramount importance of Article 3 to the European system of human rights protection, noting that it "enshrines one of the most fundamental values of democratic society".[11] In addition, the ECtHR underlined that it "is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence".[12] Even in these circumstances, however, the protection afforded by the above provision of the ECHR is absolute, subject to no exception whatsoever. In the words of the Court, "the Convention prohibits in absolute terms torture or inhuman or

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e.g., *Einhorn* v *France*, decision as to the admissibility, 16 October 2001, www.echr.coe.int, para. 27: "it is…not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention". See also the new case law of the ECtHR regarding the entry into play of Article 3 ('inhuman treatment') and of Article 2 (right to life) in cases involving imposition of the death penalty following unfair proceedings in *Öcalan* v *Turkey*, Grand Chamber judgment of 12 May 2005, paras. 169-175, *Bader and others* v *Sweden*, judgment of 8 November 2005, paras. 41-49, www.echr.coe.int, and below at 4.2.

10 Grand Chamber, judgment of 15 November 1996, Reports 1996 – V.

11 Para. 79 of the judgment. In *Soering* v *United Kingdom*, judgment of 7 July 1989, Series A 161, the Plenary of the ECtHR had restricted this 'value' to the Member States of the Council of Europe, noting that "Article 3 enshrines one of the fundamental values of democratic societies making up the Council of Europe", judgment para. 88. See also *Mamatkulov and Askarov* v *Turkey,* Grand Chamber judgment of 4 February 2005 para. 68; *Öcalan* v *Turkey*, above n. 9, para. 179.

12 Para. 79 of the judgment. This is actually a standard phrase used by the ECtHR in a number of similar judgments delivered after 1996.

degrading treatment or punishment, irrespective of the victim's conduct".[13] The influence of this case law is particularly clear in subsequent Council of Europe treaty-making, as evidenced by the aforementioned Article 21(2) of the 2005 Council of Europe Convention on the Prevention of Terrorism.

2.2 Assessing 'Substantial Grounds' and 'Real Risk' in the Context of Article 3 ECHR

According to the established case law of the Court, Article 3 comes into play in forced removal cases when "**substantial grounds** have been shown for believing that an individual would face **a real risk** of being subjected to treatment contrary to Article 3 … if removed to another State".[14] The general evidentiary rule established by the Court in this kind of cases is the 'proof beyond any reasonable doubt' based on the facts presented to it.[15]

The two vital procedural questions arising from the application of Article 3 in all cases of aliens' forced removal are the following: firstly, which point in time should be taken into account for the assessment of a 'real risk' existence; secondly, which grounds should be considered 'substantial' and thus form the basis on which the real risk assessment should take place.

The ECtHR has made a clear-cut differentiation between cases in which the deportation or extradition has already taken place and cases, as, for example, in *Chahal,* where the deportation or extradition order has not been executed at the time of examination of the case by the Court. In the former cases, the material time is that of removal. In the latter, it is always the time of the case's consideration by the Court ('the present conditions') that should be material.[16] In these cases, the Court evaluates the situation on the basis of evidence available before and after the State decision of an alien's forced removal.[17]

It is noted that the ECtHR seems to have adopted a rather pragmatic stance, and consequently a less rigorous examination method, in a case where alien applicants had already been removed. This was the case of *Mamatkulov and Askarov* v *Turkey*, regarding the extradition from Turkey to Uzbekistan of

13 *Chahal*, paras. 79-80. Affirmed in *Chamaïev et 12 autres c. Géorgie et Russie,* arrêt du 12 avril 2005, www.echr.coe.int, para. 335. See also *Ramirez Sanchez c. France*, arrêt du 27 janvier 2005, www.echr.coe.int, paras. 95-96.

14 *Chahal*, para. 80, emphasis added. The Court characteristically added that "[i]n these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 … is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees …"

15 *Chamaïev*, above n. 13, para. 338.

16 *Chahal*, paras. 83-86. Affirmed in *Mamatkulov and Askarov* v *Turkey*, para. 11, para. 69.

17 See *Chamaïev*, above n. 13, paras. 358-368.

two Uzbeks charged with terrorism-related offences and already extradited at the time of the examination of the case by the ECtHR. The Court did not enter into an in-depth examination of the evidence regarding the risk of ill-treatment incurred by the applicants. Instead, it dismissed the relevant claim attaching substantial weight to the diplomatic assurances provided by Uzbekistan to Turkey.[18] The Court, however, accepted later that the extradited applicants in this case were hindered by the respondent State to substantiate their claims related to Article 3. A violation of Article 34 ECHR was thus found by the Court.[19]

As for the crucial question of the actual criteria ('substantial grounds') used for assessing the existence of a real risk, the ECtHR has reiterated in *Chahal* that the relevant examination by itself should be 'a rigorous one' taking into account the fundamental character of Article 3.[20] The Court did not give a clear-cut answer to the question of the substance of the assessment criteria ('substantial grounds'). However, the first kind of 'substantial grounds' used by the Court in the above major case was a series of reports by Amnesty International, the Indian National Human Rights Commission and the UN Special Rapporteur on torture. Documentary evidence from these sources convinced the ECtHR about the existence of a very anomalous human rights situation in India at that time that put suspected Sikh militants, such as the applicant, in a very precarious, 'real risk' situation.

A second real risk assessment ground that was raised in *Chahal* and put on balance by the ECtHR was the provision of diplomatic assurances by the receiving country. In the above case, India had assured the UK authorities that the applicant "would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities".[21] The Court, however, applied effectively its rigorous examination rule. Having been convinced by the aforementioned evidence that, despite the Indian government's efforts, "the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem", it concluded that the above diplomatic assurances could not provide the applicant "with an adequate guarantee of safety".[22]

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18 Judgment paras. 71-77. A more rigorous approach was followed apparently in *Chamaïev*, above n. 13, paras. 332-386.

19 See below section 6 and para. 108, *in fine*, of the judgment.

20 *Ibid*., para. 96. See also *Chamaïev,* above n. 13, para. 336. On the similar problématique in asylum cases and persecution prognosis by domestic courts, see N. Sitaropoulos, *Judicial Interpretation of Refugee Status* (Athens- Baden-Baden: Ant. N. Sakkoulas – Nomos, 1999), 321-348.

21 *Ibid*., para. 37 and para. 92.

22 *Ibid*., para. 105. See also Human Rights Watch, *Still at Risk: Diplomatic Assurances no Safeguard Against Torture,* April 2005, http://hrw.org/reports/2005/eca0405/. HRW expressed through this report its grave concerns at the growing practice

In this context, it is noteworthy that, following the above case law, the 2005 Council of Europe Convention on the Prevention of Terrorism (Article 21(2)), clearly provides for an unqualified exemption from extradition of persons who risk being subjected to torture or inhuman/degrading treatment or punishment in the requesting State. By contrast, in cases involving risks of imposing the death penalty or life imprisonment without parole, 'sufficient assurance' to the opposite effect may be taken into consideration by the requested State (Article 21(3)).[23]

A third 'substantial ground' used in the real risk evaluation by the ECtHR in *Chahal,* and in other subsequent, similar cases, was the political profile of the person under deportation: the more one is exposed to publicity related to activities considered to be against the State interests of a destination country characterised by persistent problems of human rights violations, the higher is the risk of treatment contrary to Article 3. Thus, in the case of *Chahal*, the Court rightly took into particular consideration the applicant's 'high profile' as a Sikh militant supporting Sikh separatism that "would be likely to make him a target of interest for hard-line elements in the security forces who have relentlessly suspected Sikh militants in the past".[24]

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among Western governments of seeking assurances of humane treatment in order to transfer terrorism suspects to States with well-established records of torture. See also Amnesty International EU Office, *Human Rights Dissolving at the Borders? Counter-terrorism and EU Criminal Law,* 31 May 2005, www.amnesty-eu.be, 36-39. The serious human rights protection problems raised by the practice of diplomatic assurances/guarantees were particularly evident in the case of *Agiza* v *Sweden*, UN CtAT decision of 24 May 2005, www.unhchr.ch/tbs/doc.nsf. This case regards the violation by Sweden of, *inter alia*, Article 3 UNCAT, following the expulsion from Sweden to Egypt of an Egyptian national, and rejected asylum seeker, who had been convicted in Egypt on terrorism-related grounds, was subjected to 'mistreatment' by 'foreign intelligence agents' while still in detention in Sweden and was subsequently subjected to ill-treatment in Egypt, despite the existence of 'guarantees' to the opposite effect. See also Council of Europe Commissioner for Human Rights, *Report on his Visit to Sweden (21-23 April 2003)*, Strasbourg, 8 July 2004, para.19: "The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains".

23 See texts above n. 8 and 9. See also ECtHR judgment in the case of *Bader and others* v *Sweden*, above n. 9, esp. para. 45; Council of Europe Committee of Ministers, *Twenty Guidelines on Forced Return,* (Strasbourg: Council of Europe, September 2005), available at www.coe.int/legal, esp. para. 1 of Guideline 2 "Adoption of the removal order".

24 *Ibid*., para. 106. Accordingly, the Court found the order for the applicant's deportation to India would, if executed, give rise to a violation of Article 3 ECHR. See also

Finally, a fourth ground related to an alien's removal risk evaluation may be, in certain cases, the potential of imposing the death penalty by the State of destination on the person subject to removal. Even though the ECtHR has accepted that Article 3 ECHR does not, in and of itself, prohibit the death penalty, this provision may come into play by the particular circumstances surrounding a death sentence and/or the person concerned. Thus, the European Court in the case of *Chamaïev,*[25] concerning, *inter alia*, the extradition of Russian Chechens from Georgia to Russia, has helpfully enlisted the following criteria for assessing a possible violation of Article 3 ECHR in these circumstances:

(a) the manner in which the death penalty is pronounced or applied;
(b) the personality of the convicted person and the existence of proportionality towards the gravity of the offence;
(c) the detention conditions awaiting execution;
(d) the attitude of the European contracting States towards the death penalty are also relevant for the assessment of whether the acceptable threshold of suffering or degradation has been exceeded;[26]
(e) the young age of the person in question.

Chamaïev, above n. 13, para. 351, where the five extradited Chechen applicants' lack of a high political or war profile, *inter alia*, seriously weakened their claim of an Article 3 violation. The Court, however, found a violation of Article 3 with regard to eleven of the applicants subject to extradition on the grounds of their physical and moral suffering caused mainly by the violence used by the Georgian authorities in order to carry out the extraditions. *Ibid*., paras. 373-386. See also *Venkadajalasarma* v *The Netherlands*, judgment of 17 February 2004, www.echr.coe.int, where the Court found that the applicant's expulsion to Sri Lanka would not be in violation of Article 3, para. 68: "the Court notes that the activities which the applicant was made to carry out for the LTTE consisted of the transportation of foodstuffs, kitchen-work and the digging of trenches … It considers that this kind of relatively low-level support, provided under duress, is unlikely to lead the Sri Lankan authorities to believe that the applicant could be a high-profile member of the LTTE in whom they might still be interested".

25 Above n. 13, para. 333.

26 The first four criteria had been expressly cited by the Court in *Soering*, above n. 11, para. 104. See also Committee of Ministers Resolution DH(90)8, 12 March 1990, (www.coe.int/T/E/Human_Rights/execution) by which the Committee concluded the supervision of execution of the *Soering* judgment by the UK, taking into account, *inter alia*, the US assurance provided to the UK, according to which the applicant would not be prosecuted for the offence of capital murder. On the first criterion, see also texts on the *Öcalan* judgment of 12 May 2005 and *Bader and others* judgment of 8 November 2005 regarding the application of Articles 3 and 2 in cases involving imposition and execution of death penalty following unfair proceedings, below at 4.2 *in fine*.

2.3 Ill-Treatment in the Course of Aliens' Detention in the Removing State

Article 3 ECHR may well come into play also in relation to the conditions of detention of an alien in the removing State. As stressed once again by the ECtHR in the *Ramirez Sanchez* case,[27] detention conditions in a European contracting State should be up to the standards prescribed by the above provision, no matter whether the person concerned is related to terrorism or organised crime.

In this context, the European Court has also reiterated that in order for a treatment to qualify as 'inhuman' it must be premeditated, last for hours and cause, at least, real physical and moral suffering. On the other hand, a treatment may be 'degrading' when it generates fear, anxiety or inferiority, or feelings that humiliate or degrade the victim of such a treatment. In the latter case, premeditation is not necessary for the entry into play of Article 3 ECHR. However, the existence of an intention to humiliate or degrade the victim is a factor that may be taken into consideration.[28]

The ECtHR has set out three detention-related fundamental principles, emanating from Article 3: firstly, the detention conditions of every detainee should always be compatible with the respect for human dignity; secondly, the method of detention should not put the detainee to distress or a test of an intensity that exceeds the level of inevitable suffering inherent in detention; finally, the detainee's health and well-being should always be adequately ensured by the administration.[29]

Of course, there are a number of factors that are always taken into account when the ECtHR evaluates detention conditions. Thus, the duration of detention, its actual physical and mental effects on the detainee and sometimes the latter's sex, age or state of health, may all be taken into account for the relevant appraisal.[30] The issue of conditions of detention of aliens subject to forced removal was raised before the ECtHR in the case of *Dougoz* v *Greece.*[31] This case concerned a Syrian national – a rejected asylum seeker –subject to deportation and detained in the meantime in two police stations in Athens and Piraeus. The Court found a violation of Article 3 ECHR due to the serious overcrowding and

27 Above n. 13, para. 95 : "La Cour rappelle que l'article 3 de la Convention consacre l'une des valeurs fondamentales des sociétés démocratiques. Même dans les circonstances les plus difficiles, telle la lutte contre le terrorisme et le crime organisé, la Convention prohibe en termes absolus la torture et les peines ou traitements inhumains ou dégradants."

28 *Ibid.,* para. 97.

29 *Ibid*., para. 99.

30 *Ibid*., para. 98.

31 Judgment of 6 March 2001, www.echr.coe.int.

absence of sleeping facilities in the detention centres concerned, combined with the inordinate length of this kind of detention.[32]

3 The Extent of Protection Offered by ECHR to 'Terrorist Aliens'' Right to Liberty and Security

3.1 Article 5(1)(f) ECHR – Detained Aliens Subject to Forced Removal[33]

The first major issue that arises in the cases under consideration is that of the lawfulness of the arrest or detention of an alien against whom action has been taken with a view to his or her deportation or extradition (Article 5(1)(f) ECHR). There are two main principles that, according to the established case law of the ECtHR, should govern the relevant detention process.

First, deprivation of liberty under the above provision is justified only for as long as deportation proceedings are in progress *and* are prosecuted with 'due diligence'.[34] In the case of *Chahal,* for example, the applicant's detention with a view to deportation lasted for almost four years during which a series of administrative and judicial review proceedings were carried out. The Grand Chamber of the ECtHR, contrary to the former Commission's position, found that there was no issue of lack of diligence, pointing out that this case "involve[d] considerations of an extremely serious and weighty nature".[35] What the Court obviously meant by this were the considerations relating both to the alleged risk incurred by the applicant and the national security concerns advanced by the deporting State.

The second fundamental principle that should govern these cases is that of procedural lawfulness. By this, the ECtHR has made clear that it meant not only that the detention procedure of the alien in question should be in accordance with the substantive and procedural rules of national law. Moreover, the Convention requires that the detention be in conformity with the "purpose of Article 5", that is, the *individual's* protection from State arbitrariness.[36] In the

32 *Ibid*., para. 48. The adoption of general measures by Greece for the execution of this judgment and the prevention of similar violations is still examined by the Council of Europe Committee of Ministers under Article 46(2) ECHR. See Committee of Ministers Interim Resolution ResDH(2005)21, 7 April 2005, www.coe.int/T/E/Human_Rights/execution/.

33 Article 5 – Right to liberty and security: "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: … (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

34 *Chahal*, above n. 10, para. 113.

35 *Ibid*., para. 117.

36 *Ibid*., para. 118. Affirmed in *Chamaïev,* above n. 13, para. 397.

case of *Chahal*, the Court found that this prerequisite was also fulfilled given that the Secretary of State's decision to detain the applicant with a view to his deportation on national security grounds was subject to review by an 'advisory panel', including 'experienced judicial figures', whose report, however, as it was noted by the Court itself, was never disclosed.[37] Even though the ECtHR in this terrorism-related case granted, reasonably, the expelling State a rather wide margin of appreciation and action that is not provided in normal cases of an alien's arrest or detention, it noted the serious deficiencies of the control system regarding other major elements of the lawfulness of detention, thus, finding later on violations of Articles 5(4) and 13 ECHR.[38] Thus, the Court managed to accommodate the serious security concerns of the expelling State and the principle of lawfulness of detention that may not be distanced from the existence of an effective domestic remedy prescribed by Articles 5(4) and 13 ECHR.

3.2 Article 5(2) and (4) ECHR[39] – Aliens' Right to be Informed Promptly and to Challenge Lawfulness of Detention

These two provisions of the Convention provide some of the most fundamental procedural rights for persons subject to limitations of their liberty and especially for detained aliens subject to forced removal. Article 5(2), in particular, enshrines a 'fundamental guarantee':[40] every (alien) person under arrest should know the reason for his or her arrest. As the Court specified in the case of *Chamaïev*, the above provision, in fact, obliges States to:

> signaler à une telle personne, dans un langage simple, accessible pour elle, les raisons juridiques et factuelles de sa privation de liberté, afin qu'elle puisse en discuter la légalité devant un tribunal en vertu du paragraphe 4.[41]

The Court has affirmed in *Chamaïev* that this provision does not require the transmission of the whole file to the individual aliens (or their lawyers) concerned. However, the latter should, at least, be provided with sufficient informa-

37 *Ibid*., para. 122.

38 See below at 3.2 and 6.

39 Article 5(2): "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."
Article 5(4): "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

40 *Chamaïev*, above n. 13, para. 413.

41 *Ibid.*

tion that would allow them to initiate the judicial review proceedings provided for by Article 5(4) ECHR.[42]

The first fundamental prerequisite for the effective implementation of Article 5(2) by a State is to provide the aforementioned information 'promptly'. The Court has indicated that the promptness in this context would be examined on a case by case basis.[43] For example, in *Chamaïev*, the Court noted that the passing of four days between some of the applicants' detention with a view to their extradition and their being informed about the reason of their detention would not be considered compatible with the time constraints prescribed by the promptness rule of Article 5(2) ECHR.[44]

The second fundamental rule enshrined in Article 5(2) ECHR, and crucial for aliens subject to forced removal for whatever reason, is that the information should be provided by the competent State authorities in a language understood by the arrested persons. The ECtHR in *Chamaïev* has clarified, in an indirect but clear enough manner, that the State authorities, in cases of forced removal of aliens who do not understand the language of the removing State, should show particular meticulousness and precision in the translation of the extradition-related documents that need to be provided to the aliens. Thus, in the above case – concerning mainly the arrest of Russian Chechens with a view to their extradition from Georgia to Russia – the European Court found a violation of Article 5(2) not only on the ground of the lack of promptness in information provision, but also because the Georgian judicial authorities, competent for the extradition procedure in question, had not handled the issue of translation of the extradition-related documents into Chechen (the applicants' language) with the meticulousness and precision required by Article 5(2) ECHR, especially in extraditions where a very large number of aliens' rights are usually at stake.[45]

So far as there is no derogation from the Convention,[46] Article 5(4) (right to challenge before a court the lawfulness of detention) has been effectively applied by the ECtHR stressing the need for ensuring judicial control of the lawfulness of an alien's arrest or detention, even on national security or anti-terrorism

42 *Ibid.*, paras. 427-434.

43 *Ibid.*

44 *Ibid.*, para. 416.

45 *Ibid.*, para. 425.

46 Article 15 ECHR provides for the possibility of derogation of the contracting States from their ECHR obligations "in time of war or other public emergency threatening the life of the nation". Two basic requirements should be fulfilled, according to para.1 of this provision: first, the extent of the derogation should be that "strictly required by the exigencies of the situation"; second, these measures should not be "inconsistent with [the derogating State's] other obligations under international law". See, *inter alia*, *Aksoy* v *Turkey*, judgment of 18 December 1996, Reports 1996-VI, esp. paras. 68-84.

grounds. The European Court in *Chahal* has affirmed two basic rules that should be followed in these cases: firstly, as noted also in the same case in the context of Article 5(1)(f) ECHR,[47] lawfulness here does not denote solely abidance by national law but also by the ECHR requirements and general principles, as well as the aim of restrictions permitted by Article 5(1) ECHR; secondly, the 'court' that should be able to decide speedily and order release need not "substitute its own discretion for that of the decision making authority". However, its review should be "wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to Article 5 para. 1".[48] In the case of *Al-Nashif* v *Bulgaria,*[49] the ECtHR clearly affirmed one more important relevant procedural rule, based on its earlier case law: the person deprived of his or her liberty should always have the opportunity to be heard before a 'court' either in person or through some form of representation.[50]

In this context, the ECtHR has been crystal clear in asserting that a European State may never consider itself free from effective judicial control when it believes that national security and terrorism are involved.[51] A violation of Article 5(4) was found in the case of *Chahal* on three major grounds: first, national courts could not review the national security grounds for detention advanced by the administration; secondly, the main applicant himself was not provided with legal representation and was only given an outline of the grounds for the deportation notice; finally, the aforementioned 'advisory panel' to which the applicant could have recourse was not a 'court' since its advice was not binding and was never disclosed.[52] Similar was the factual basis of the Article 5(4) violation in the aforementioned case of *Al-Nashif*: firstly, the administrative decision of detention with a view to deportation was subject to no judicial review; secondly, the detention order was not reasoned; thirdly, the main applicant, similarly to *Chahal*, did not have access to a lawyer, that would have allowed him to proceed to a legal challenge against the impugned measures.[53]

47 See above at 3.1.

48 *Chahal*, para. 127.

49 Judgment of 20 June 2002, www.echr.coe.int.

50 *Ibid*., para. 92.

51 *Chahal*, para. 131: "The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved …", affirmed in *Al-Nashif*, above n. 49. para. 94.

52 *Ibid*., para. 130. The UK legislation was amended accordingly after the *Chahal* judgment. See Committee of Ministers Resolution ResDH(2001)119, 15 October 2001 and Appendix thereto, www.coe.int/T/E/Human_Rights/execution/.

53 *Al-Nashif*, above n. 49, para. 94.

It is interesting to note the pedagogical role that the ECtHR has seemed to be willing to undertake, and rightly so, in both the aforementioned cases by indicating to both respondent States examples of other States which had developed effective forms of judicial control in these kinds of cases. Thus, in 1996, in the case of *Chahal*, the Court, using documentation submitted by four intervening NGOs, provided as an example Canadian legislation that had managed to accommodate the need for 'procedural justice' with the legitimate need of keeping confidential the relevant administrative information related to national security.[54] In 2000, in the case of *Al-Nashif*, the European Court interestingly indicated the legislative measures taken by the UK after the *Chahal* judgment, that provided, *inter alia*, for the appointment of a 'special counsel' in some cases involving national security.[55] By providing such best practice guidance in its judgments, the ECtHR not only aids the respondent European States in adopting general measures for the prevention of similar violations but it, moreover, enhances its image and role as an efficient guardian of the Convention which should continue to constitute "a constitutional instrument of European public order, on which the democratic stability of the Continent depends".[56]

3.3 Article 5(3) ECHR[57]: the Right of Detainees to be Promptly Tried

Aliens subject to extradition may, at the same time, be subject to prosecution proceedings in the requested State and, thus, be detained with a view to their possible trial or serving of sentence. The issue of procedural promptness in this context, affecting the pre-trial detention of an alien under extradition, arose and was examined by the ECtHR in 2005 in the case of *Sardinas Albo* v *Italy,*[58] a case concerning a Cuban national accused of international drug-trafficking and prosecuted in Italy while concurrently being subject to extradition to the United States.

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54 *Chahal,* paras. 131, 144.

55 See *Al-Nashif*, para. 96 and Committee of Ministers Resolution ResDH(2001)119 on the execution by the UK of the *Chahal* judgment, above n. 52.

56 See Committee of Ministers 2004 Declaration on *ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels,* above n. 2. On the ECtHR's cautious but important move away from mere declaratory to prescriptive judgments, see P. Leach, "Beyond the Bug river – a new dawn for redress before the European Court of Human Rights?" (2005) *European Human Rights Law Review*, 148-164.

57 Article 5(3): "Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

58 Judgment of 17 February 2005, www.echr.coe.int.

The ECtHR affirmed its thesis that reasonableness of detention may be evaluated only *in casu* and that continued detention may be justified "only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty".[59] Thus, after a "certain lapse of time", the Court has stressed that the State detaining an individual should provide supplementary grounds for the continuation of detention. Even then, though, the Court has rightly added one more crucial condition for the effective application of Article 5(3) ECHR: the competent judicial authorities should always display 'special diligence' in the relevant prosecution/trial committal proceedings.[60]

Thus, in the *Sardinas Albo* case, the Court found that the first aforementioned basic requirement that a continued detention should meet was fulfilled. What was missing, though, was the 'special diligence' in the conduct of the criminal proceedings in Italy, after the preliminary hearing. The European Court found excessive the more than seven months required by the national authorities in this case in order to solve a question of competence *ratione loci*. In addition, during a period of approximately one year and four months there was either a total stay of the proceedings or a suspension of case examination on merits, while awaiting the outcome of a proceeding concerning a preliminary issue.[61] As a consequence, the duty of 'special diligence' enshrined in Article 5(3) ECHR had not been respected by the respondent State.

The effective application of the above provision, as interpreted by the Court, provides substantial protection to aliens subject to extradition after initiation of criminal proceedings in the requested State. The high standards of personal liberty and security protection set out by the ECtHR, in this respect, may rightly be considered to be of fundamental importance to aliens subject to extradition, taking particularly into account the fact that extradited aliens are faced with a new, usually long, series of criminal proceedings in the requesting State.

4 The Limits of the 'Right to a Fair Trial' for Aliens Under Deportation or Extradition in the Removing and Receiving States

4.1 Is There Not a 'Right to a Fair Trial' in the Removing State?

The ECtHR has refused, so far, to make the step towards recognising the 'right to a fair trial', under Article 6(1) ECHR,[62] for aliens involved in proceedings of deportation or extradition. According to the Court:

59 *Ibid*., para. 84.

60 *Ibid*., para. 86.

61 *Ibid*., paras. 95-97.

62 Article 6 – Right to a fair trial: "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public

> decisions regarding entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6§1 of the Convention.[63]

The major judgment that still supports this thesis is that of the Grand Chamber of the ECtHR in the case of *Maaouia* v *France.*[64] There, the applicant, a Tunisian married to a French national, had claimed a violation of Article 6(1) ECHR on the ground of excessive length of proceedings brought by him and aimed at rescission of the judicial order of exclusion from French territory for ten years that accompanied his conviction of one year's imprisonment.

The Grand Chamber of the European Court dismissed the applicant's claim, basing its argumentation on a reasoning that is striking for its restrictive character and, especially, for its clear antithesis to the Court's own established teleological method of interpreting the ECHR as a living instrument rendering its human rights safeguards "practical and effective".[65] Instead, the Court preferred to ground its reasoning in the – entirely out of the context of a human rights law instrument (a 'legislative treaty') – method of 'subjective interpretation'[66] which attaches particular, or exclusive, weight to the intention of the States parties to a treaty, and regards these intentions as the compass for any intended interpretation.

Thus, the main thrust of the Court majority's argument in *Maaouia* was that judicial proceedings relating to aliens' removal could not be covered by

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may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

63 See *Maaouia* judgment below, para. 35. See particularly swift affirmation of this constant case law, and consequent exclusion of applicability of Article 6(1) even in the context of extradition-related judicial proceedings, in *Mamatkulov*, above n. 11, para. 82; see also B. Poynor, "*Mamatkulov and Askarov v Turkey*: The relevance of Article 6 to extradition proceedings", (2005) *European Human Rights Law Review* 409-418, esp. 416-417. The Court in effect follows, to date, the relevant case law of the former Commission of Human Rights dating back to the late 1970s.

64 Judgment of 5 October 2000, Reports 2000-X.

65 See judgment in *Mamatkulov*, above n. 11, para. 101. On the question of occasional serious divergences in the ECtHR's interpretational methodology see, e.g., A. Orakhelashvili, "Restrictive interpretation of human rights treaties in the recent jurisprudence of the European Court of Human Rights" (2003) 14 *European Journal of International Law,* 529-568.

66 See D. Nicol, "Original intent and the European Convention on Human Rights", (2005) *Public Law* ,152-172. See also N. Sitaropoulos, *Judicial Interpretation of Refugee Status*, above n. 20, 100-110, esp. 105.

the procedural fairness requirements of Article 6(1) ECHR, given that this was allegedly not the intention of the contracting States or later States parties to the ECHR. The ECtHR based this position notably on Article 1 of Protocol No. 7 to ECHR,[67] by which the Member States of the Council of Europe laid down minimum procedural safeguards relating to the expulsion of aliens lawfully residing in a Member State. The Court considered that, by adopting the above provision, the Council of Europe Member States "clearly intimated their intention not to include proceedings [concerning aliens' expulsion] within the scope of Article 6§1 of the Convention".[68]

The above argument advanced by the Grand Chamber strikes one by its excessively static mentality and its sharp contrast to the teleological method of interpreting the ECHR established by the same Court. It shows, in effect, an unjustifiable cautiousness, or even fear, on the part of the Court to touch upon a State's, in principle, sovereign right to control aliens' entry, residence in and expulsion from its territory. The advancing and use by the ECtHR of divergent methods of interpretation of a 'legislative treaty', such as the ECHR, regrettably promotes legal insecurity and impairs the quality of the case law of the Court relating to aliens' rights, a part of which, especially that related to Article 8 ECHR, has been particularly characterised by lack of clarity and coherence.[69]

Moreover, Article 1 of Protocol No. 7, used by the Court in its argumentation, concerns *administrative* proceedings aimed at a lawfully resident alien's expulsion. It does not deal with *judicial* proceedings which are the main subject matter of Article 6 ECHR. Thus, the use by the ECtHR of Article 1 of Protocol No. 7 as a basis for aliens' exclusion from the protective ambit of Article 6(1) ECHR flies in the face of reason, even in cases where it is a State's own legislation that has provided for a judicial review of the relevant (judicial) deci-

67 Protocol No. 7 Article 1 – Procedural safeguards relating to expulsion of aliens:
"(1) An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
(a) to submit reasons against his expulsion,
(b) to have his case reviewed, and
(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
(2) An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

68 *Maaouia*, above n. 64, para. 37.

69 See, e.g., C. Harvey, "Promoting insecurity: Public order, expulsion and the ECHR" in E. Guild, P. Minderhoud (eds), *Security of Residence and Expulsion – Protecting Aliens in Europe,* (The Hague: Kluwer Law International, 2001), 41-57.

sion, as was the case in *Maaouia.*[70] There is nothing in Article 1 of Protocol No. 7 to ECHR, or in its explanatory report, that could logically lead one to the conclusion that, since lawfully resident aliens are offered minimum procedural safeguards in administrative removal proceedings by Protocol No. 7, *all aliens in general* should, as a consequence, not be able to benefit from the right to a 'fair trial', in the context of judicial proceedings evaluating the lawfulness of removal/exclusion proceedings in the expelling State.[71] It is a stream of thought based on a wrong premise, thus, leading to a conclusion *ad absurdum*. Additionally, it is rather odd to accept the possibility of a (limited) responsibility of an expelling State, with reference to Article 6 ECHR, if an alien is removed to a State risking a 'flagrant denial of justice' in the country of destination (see below section 4.2), while no such responsibility may be recognised in principle, under the same provision, for unfair removal-related judicial proceedings in the expelling State, that may well lead to a seriously defective judicial proceeding against the alien concerned in the destination State.

Also, the reasoning in the *Maaouia* judgment contrasts with the judgment delivered in the later case of *Al-Nashif*[72] where the ECtHR clearly conceded that deportation orders, even if based on national security grounds, may "affect fundamental human rights", such as the right to respect for family life, thus having a direct bearing upon an individual's 'civil' rights.[73] According to the Court, these orders should be subject to "some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence". This independent body, according to the Court, should,

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70 See J.E.S. Fawcett, *The Application of the European Convention on Human Rights,* (Oxford: Clarendon Press, 1987), 143: "It is tempting to argue [following the ECtHR's judgment in *Sporrong and Lönnroth*] that, where the domestic law of a Convention country prescribes a judicial or quasi-judicial process for determining certain rights and obligations, even when these are not civil rights or obligations in the narrower sense so far described, the provisions of Article 6 (1) should nevertheless be applicable to the process".

71 In this vein, see the well-argued dissenting opinion of Judge Loucaides, joined by Judge Traja, in the *Maaouia* judgment, above n. 64, *in fine*. Accord, N. Blake, R. Husain, *Immigration, Asylum & Human Rights,* (Oxford: Oxford University Press, 2003), 245-250.

72 Above n. 49.

73 See P. van Dijk, "Access to court", in R. St. J. MacDonald et al. (eds), *The European System for the Protection of Human Rights,* (Dordrecht: Martinus Nijhoff Publishers, 1993), 345-379 at 359-360: "As far as the protection of human rights vis-à-vis public authorities is concerned, it is clear from the survey of the case-law that the applicability of Article 6 depends on whether the right at issue implies 'civil rights or obligations' or has a direct bearing on such rights or obligations; the right to respect for family life and the right to the peaceful enjoyment of possessions are clear examples".

additionally, "be able to react in cases where invoking [by the executive of an alien's threat to national security] has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary".[74] Such a body, in order to live up to the above standards, should arguably be of a judicial nature and, consequently, could not but abide by the procedural requirements laid down by Article 6(1).[75]

In other words, the judgment in *Al-Nashif* indirectly but clearly recognised the right of access to a court, in the sense of Article 6, for aliens subject to deportation or exclusion, at least on State-security grounds, and created another serious rift in the *Maaouia* judgment that makes even more untenable the ECtHR majority position advanced in the latter case in 2000 and invariably followed thereafter. Moreover, the established case law now conflicts sharply with recently enacted EU legislation concerning the status of third-country nationals, which has established the latter's right to "mount a legal challenge" or to "have access to judicial redress" against administrative decisions interfering with their residence rights.[76] The establishment of a right of access to a court in these cases necessarily entails the application of the fair trial principles of Article 6.[77]

The autonomous concepts of 'civil rights and obligations' contained in Article 6(1) have been rightly interpreted by the European Court in a liberal

74 Above n. 49, paras. 123-124. See also below section 5.

75 Following the similar judgment in *Chahal*, the UK introduced the Special Immigration Appeals Commission. This Commission was granted a judicial nature, a full merits review jurisdiction and the capacity to entertain appeals against deportation order decisions, *inter alia*, on national security grounds. See Committee of Ministers Resolution ResDH(2001)119, 15 October 2001 and Appendix thereto, www.coe.int/T/E/Human_Rights/execution/.

76 See, e.g., Article 20(2) of Directive 2003/109/EC *concerning the status of third-country nationals who are long-term residents*, OJ L 16/44; Articles 15 and 31 of Directive 2004/38/EC *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,* OJ L 158/77. EU law developments have occasionally influenced and advanced the case law of the ECtHR. See, e.g., *Christine Goodwin* v *the UK*, Grand Chamber judgment of 11 July 2002, Reports 2002-VI, para. 100, where the ECtHR noted that "Article 9 [on the right to marry and found a family] of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women". See also, *ibid.*, paras. 92-93 where the ECtHR's reasoning on the right to private life of a gender reassigned person, in the context of Article 8 of the Convention, has been obviously influenced by developments in the ECJ case law.

77 On the application of Article 6 ECHR by the ECJ, see S. Peers, "The European Court of Justice and the European Court of Human Rights: Comparative approaches", in E. Örücü (ed.), *Judicial Comparativism in Human Rights Cases,* (Guildford: UK National Committee of Comparative Law, 2003), 107-129, esp. 124-127.

and effective manner, encompassing questions relating to a very wide spectrum of administrative action affecting the legal position of individuals.[78] Thus, some judges to the ECtHR have already expressed minority opinions stressing their concern and showing the serious flaws inherent in the aforementioned majority arguments and case law.[79] As already mentioned in these judicial opinions, reasons related, at least, to case law consistency and coherence mandate the recognition by the ECtHR that administrative or judicial exclusion orders involve and affect aliens' 'civil rights and obligations', necessitating, thus, the right of access to court in the sense of Article 6(1). These minority judicial opinions allow for some degree of optimism and hope for a more coherent and principled interpretation of the Convention in the immediate future that would allow 'aliens' exclusion' proceedings to be considered as involving the determination of 'civil rights and obligations' and the concomitant right of access to court, in conformity with the teleological interpretation already adopted by the European Court in the major part of its case law corpus.[80]

4.2 The Limits of the Right of an Alien Subject to Extradition or Deportation to a 'Fair Trial' in the Receiving State

The ECtHR has accepted that aliens subject to extradition, even on grounds relating to terrorism, should be protected, by virtue of Article 6, from travesties of justice in the requesting State. This principle was first laid down by the Court, and later further promoted by the Council of Europe Committee of Ministers,[81] in the case of *Soering v United Kingdom,*[82] where it stated that:

78 See C. Ovey, R.C.A. White, *European Convention on Human Rights,* (Oxford: Oxford University Press, 3rd edition, 2002), 147; P. van Dijk, above n. 73, at 356-357.

79 See above, N. 71. See also concurring opinion of Judge Costa, joined by Judges Hedigan and Panţîru. They argued that, "[aliens'] exclusion orders should, in principle, be classified as part of the criminal law and thus come within the scope of Article 6§1", *ibid*. para. 4. See also C. Ovey, R.C.A. White, above n. 78, 148-149; P. van Dijk, above n. 73.

80 See dissenting opinion of Judges Loucaides and Traja in *Maaouia*, above n. 71. See also Council of Europe Committee of Ministers Recommendation Rec(2004)20 *on judicial review of administrative acts*, 15 December 2004, www.coe.int/cm. According to this Recommendation, all administrative acts should, in principle, be subject to an effective judicial review by "an independent and impartial tribunal".

81 Committee of Ministers, *Guidelines on Human Rights and the Fight against Terrorism* (2002), above n. 8, section XIII, para. 4: "When a person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition".

82 Above n. 11, para. 113.

> The right to a fair trial in criminal proceedings, as embodied in Article 6 holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial ...

This case law was affirmed by the Grand Chamber in 2005 in the *Mamatkulov* case.[83] In this case, the Court rightly went on to specify that, similarly to cases involving Articles 2 or 3 ECHR, the risk of a 'flagrant denial of justice' in the requesting State "must primarily be assessed by reference to the facts which the [requested State] knew or should have known when it extradited the persons concerned".[84] However, if removal has been deferred, then evidence subsequent to the removal order may also be taken into account by the ECtHR.

Despite its undeniably great significance for aliens' effective human rights protection, the above case law of the ECtHR raises two main concerns. The first one relates to the substance and level of protection that Article 6 ECHR should provide to aliens in these cases. There is no doubt that the Court has adopted the lowest possible standard of protection affordable. The reason for this restrictive stance arguably relates to the rather exceptional extraterritorial applicability of the ECHR (that may be triggered by acts of a European contracting State, performed or producing effects out of its territory) that has been recognised so far by the European Court.[85]

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83 Above n. 11, paras. 84-91.

84 *Ibid*., para. 90.

85 See *Soering,* above n. 11, para. 86: "Article 1 … of the Convention, which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I', sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('reconnaître' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 … cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention …". On the questions that arise from the case law of the ECtHR on the extraterritorial effect of the ECHR see, e.g., R. Wilde, "The 'legal space' or 'espace juridique' of the ECHR: Is it relevant to extraterritorial action?" (2005) *European Human Rights Law Review,* 115-124 ; F. Benoît-Rohmer,

The second main concern arising from the Court's case law, directly linked to and compounding the first one, is the lack of elaboration upon the question what is a 'flagrant denial of justice or of fair trial' that, if risked by the alien subject to removal, would incur the expelling or extraditing State's responsibility under Article 6 ECHR. It is hoped that future case law will provide some clear guidance in this respect. To date, the Court has applied a casuistic approach of interpretation, examining each particular case on the basis of its own individual merits and evidence. It is worth noting, though, three particularly illuminating rules of thumb put forward by the ECtHR in this respect. First, the impossibility for a person subject to extradition and convicted *in absentia* to have his or her case reopened and reheard on both points of law and of fact in the requesting State should always be considered, unless there is an express waiver of this right by the person concerned.[86] Secondly, the Court has attached particular weight to the fact that the requesting State is an ECHR contracting State which has, consequently, "accepted obligations to provide procedural guarantees and effective remedies in respect of breaches of the [ECHR]". At the same time, it may examine general measures taken and applied by the requesting State with a view to providing an effective system of human rights protection, including protection of the right to a fair trial.[87] Thirdly, the Court may duly examine whether

"Pour la construction d'un espace juridique européen de protection des Droits de l'Homme", *L'Europe des Libertés,* No. 15, mars 2005, 5-11.

86 See *Einhorn* v *France*, above n. 9, para. 33: "a denial of justice undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been unequivocally established that he has waived his right to appear and to defend himself. The extradition of the applicant to the United States would therefore be likely to raise an issue under Article 6 of the Convention if there were substantial grounds for believing that he would be unable to obtain a retrial in that country and would be imprisoned there in order to serve the sentence passed on him in absentia". Affirmed in the case of *Stoichkov* v *Bulgaria*, judgment of 24 March 2005, www.echr.coe.int, paras. 54-56, where the Court indicated that 'flagrant denial of justice' means "manifestly contrary to the provisions of Article 6 or the principles embodied therein". In this respect, Article 5(1) of the European arrest warrant Council Framework Decision of 13 June 2002 (OJ 2002 L 190/1) raises an issue of incompatibility with the ECHR since it does not make mandatory the retrial of the requested person convicted *in absentia* in the 'issuing Member State'. See also *Bader and others* v *Sweden*, judgment of 8 November 2005, *ibid*., esp. para. 47 where the Court found that "because of their summary nature and the total disregard of the rights of the defense, the proceedings [in Syria that had led to an *in absentia* conviction and sentence to death of the first applicant] must be regarded as a flagrant denial of a fair trial".

87 See *Milovan Tomic* v *United Kingdom*, decision as to the admissibility, 14 October 2003, *in fine*, www.echr.coe.int. The case concerned the expulsion to Croatia from the UK of an ethnic Serb from Croatia. See also *Ali Reza Razaghi* v *Sweden*, deci-

a requested State's assurance that it would never extradite an alien to a country where he would risk, for example, serving a sentence that has been delivered and is manifestly contrary to the rules of Article 6 ECHR, is in fact corroborated by case law of the above State.[88]

It is noteworthy that the Grand Chamber of the ECtHR, by its 2005 judgment in the *Öcalan* case, has provided a new dimension to the fairness of a proceeding that may lead to the imposition and/or execution of the death penalty. Drawing upon its interpretation of Article 2, the Court stressed that capital cases have to conform to the strict standards of fairness and noted that the anguish and fear of execution suffered by a person sentenced to death following an unfair proceeding may well amount to inhuman treatment contrary to Article 3 ECHR. Accordingly, in the above case, a violation of Article 3 was found, given that the death penalty had been imposed on the applicant following an unfair procedure and that he had to suffer the consequences of the imposition of that sentence for nearly three years. The Court, in order to reach this conclusion, took into particular consideration the applicant's extremely high political profile in Turkey and the fact that he had been convicted for some of the most serious crimes carrying with them the capital penalty, factors that made real the risk of implementing the death penalty.[89]

By its judgment in the case of *Bader and others* v *Sweden,*[90] the Second Section of the ECtHR has further advanced the Court's jurisprudence in this field, rightly bringing into play not only Article 3 but also Article 2 of the Convention. This case concerned the threatened deportation to Syria of a Syrian national, who had been convicted and sentenced to death *in absentia* following a summary trial. The Court, notably in view of these circumstances and the fact that executions in Syria are carried out without public scrutiny or accountability, found

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sion as to admissibility, 11 March 2003 and relevant judgment (striking out) of 25 January 2005, www.echr.coe.int.

88 See *Drozd and Janousek* v *France and Spain*, ECtHR, plenary session, judgment of 26 June 1992, Series A 240, para. 110: "The Court takes note of the declaration made by the French Government to the effect that they could and in fact would refuse their customary co-operation if it was a question of enforcing an Andorran judgment which was manifestly contrary to the provisions of Article 6 or the principles embodied therein. It finds confirmation of this assurance in the decisions of some French courts: certain indictments divisions refuse to allow extradition of a person who has been convicted in his absence in a country where it is not possible for him to be retried on surrendering to justice … and the Conseil d'Etat has declared the extradition of persons liable to the death penalty on the territory of the requesting State to be incompatible with French public policy …" This case concerned a Spanish and a Czechoslovak nationals serving in France sentences of imprisonment imposed by an Andorran court.

89 *Öcalan* v *Turkey,* above n. 9, paras. 167-175. See also above section 2.2.

90 See above n. 86.

that a deportation would expose the main applicant "to a real risk of being executed and subjected to treatment contrary to Articles 2 and 3".[91]

Even though it did not concern an extraterritorial application of Article 6, this new case law may well have serious repercussions on cases concerning aliens' forced removal to States where the imposition or execution of a death sentence are very likely to take place following a proceeding carried out in the context of a legal system providing no or few guarantees for procedural fairness prescribed by Article 6, even if the State in question is a contracting party to the Convention. Following the new case law developments outlined above, the international responsibility of European States that forcibly remove an alien is particularly stressed and increased, at least under Article 6 ECHR, requiring, consequently, these States' special attention and rigorous scrutiny before the execution of a forced removal order.

5 Protection of Family Life of 'State Security Risk' Aliens in the Context of Deportation or Extradition Proceedings

The issue of protection of family life of an alien subject to deportation on State security grounds was raised, successfully for the applicants, and analysed to a significant extent by the ECtHR, in the case of *Al-Nashif* v *Bulgaria.*[92] In this case, the first applicant was a stateless person living in the expelling State, from 1992 until 1999, with the other two applicants, his two minor children born in Bulgaria and having Bulgarian nationality, as well as his wife, apparently also a stateless person. The Court found a violation of the three applicants' right to respect of their family life, as prescribed by Article 8 ECHR.[93] The basic ground of this violation was the quality of the national legislation that had enabled the

91 *Ibid*. para. 48. The Court drew upon the Grand Chamber's *obiter dicta* in the *Öcalan* judgment (above n. 9), according to which: "capital punishment in peacetime … had come to be regarded [by Council of Europe Member States] as an unacceptable form of punishment which was no longer permissible under Article 2 of the Convention", while "it would be contrary to the Convention … to implement a death sentence following an unfair trial as an arbitrary deprivation of life was prohibited", *ibid*., para. 42.

92 Above n. 49.

93 Article 8 – Right to respect for private and family life:
"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

expelling State's authorities to interfere with the applicants' family life and proceed to the applicant father's deportation order.

The significance of this judgment lies in the fact that the ECtHR took a very clear position by accepting that an alien's right to respect of his or her family life may not be left outside of the rule of law, even if national security grounds are advanced by the expelling State. As a consequence, the Court applied its established jurisprudence, stressing that the domestic law that may allow an exception according to Article 8(2) ECHR should bear three fundamental characteristics, applicable to all exclusion clauses of the Convention. Firstly, it should be accessible. Secondly, it should be 'foreseeable', that is, formulated with sufficient precision to allow individuals to regulate their conduct, "if need be with appropriate advice". The Court specified that the foreseeability requirement did not oblige States to enact legislation "listing in detail all conduct that may prompt a decision to deport an individual on national security grounds" since security threats may not be always anticipated and may be difficult to define in actual practice.[94] However, the domestic law should always set out the scope of administrative discretion and the manner of its application "with sufficient clarity".[95]

The third criterion of law quality affirmed by the ECtHR is a direct outcome of the above considerations and relates to the availability in the national legal system of a review by an 'independent authority' of executive orders interfering with the rights safeguarded by the Convention, such as the right to respect for family life.[96] This should, moreover, involve an adversarial proceeding in which the alien subject to removal should be entitled to be engaged. In this respect, the Court has been particularly vocal and clear stating the following:

> 123. Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information …
>
> 124. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary.

94 *Al-Nashif*, above n. 49, para. 121.

95 *Ibid.*, para. 119.

96 See also Article 1 of Protocol No. 7 to ECHR regarding procedural safeguards relating to administrative expulsion of aliens and above section 4.1.

> Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.

In the case of *Al-Nashif,* none of the above 'law quality requirements' had been met by the respondent State's legislation: the prosecutor who was involved in the initiation of the deportation procedure had acted without any established procedure; the administrative deportation decision had been made without making known any reasons whatsoever to the applicants or their lawyers; no 'independent body' was in place that could review the deportation order in accordance with the aforementioned criteria set out by the Court, aimed at eliminating administrative arbitrariness.[97]

6 The Right of 'Terrorist Aliens' to An Effective Domestic and International Remedy for Violations of Their Rights

6.1 The Aliens' Right to an Effective Domestic Remedy

Article 13 ECHR[98] provides one of the most fundamental guarantees for the effective protection of Convention rights on the domestic plane.[99] Even though it allows the European States certain discretion in this area, it prescribes the existence of a remedy in all cases of 'arguable complaints' involving Convention rights. The ECtHR in *Chahal* has established this rule in cases involving also aliens subject to removal on security or anti-terrorism grounds. There are two basic relevant conditions that should always be fulfilled: firstly, the competent 'national authority' should be able to deal with the substance of the above complaints; secondly, it should be able to grant appropriate relief.[100]

Thus, the ECtHR has rightly stressed and set out a high standard of effective domestic remedies, under Article 13 ECHR, in cases involving deportation

97 *Al-Nashif,* above n. 49, paras. 125-128. The execution of this judgment by Bulgaria has been under supervision by the Committee of Ministers, according to Article 46(2) ECHR. See relevant notes in Committee of Ministers' Deputies, *Annotated Agenda* Vol. I, 922nd DH meeting, 5&7 April 2005, Doc. CM/Del/OJ/DH(2005) 922 Volume I 28 April 2005, www.coe.int/cm.

98 Article 13 – Right to an effective remedy. "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

99 See Committee of Ministers Recommendation Rec(2004)6 *on the improvement of domestic remedies*, 12 May 2004, www.coe.int/cm and in Directorate General of Human Rights (ed.), *Guaranteeing the Effectiveness of the ECHR,* (Strasbourg: Council of Europe, 2004), 69.

100 *Chahal*, above n. 10, para. 145. The Court affirmed that "in certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13". See also *Al-Nashif*, above n. 49, para. 132, and in *Chamaïev*, above n. 13, para. 446.

or extradition of aliens who risk treatment in violation of Articles 2 or 3 ECHR, as in the aforementioned cases of *Chahal* and *Chamaïev*. In these cases, the Court has pointed out that Article 13 "requires independent scrutiny … [which] must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling state".[101]

This scrutiny is not necessary to be provided by a judicial authority. In any case, however, that 'national authority' should have enough power to deal with the substance and provide relief, as well as be able to provide guarantees of independence and impartiality in order to qualify for an effective domestic remedy mechanism.[102] Thus, national mechanisms may not be considered as effective, in the sense of Article 13 ECHR, if they may examine the question of risk incurred by the alien under deportation but are not in a position to review 'national security considerations' in which the deportation order is grounded.[103]

In the case of *Al-Nashif*, the ECtHR has further advanced the relevant case law by underlining that a high standard of effective remedy should also be available even if the alien's removal does not pose a risk of torture or ill-treatment contrary to the core Article 3, but of violating a derogable right such as the right to respect for family life under Article 8 ECHR. The Court conceded that in cases where security considerations are involved, in the context of the exclusion

101 *Chahal*, above n. 10, para. 151; *Chamaïev*, above n. 13, para. 448.

102 *Chahal*, above n. 10, para. 152; *Al-Nashif*, above n. 49, paras. 132-133. The case law source originates in *Leander* v *Sweden*, judgment of 26 March 1987, Series A 116: "77. For the interpretation of Article 13 … the following general principles are of relevance: (a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see, inter alia, *Silver and Others*, Series A no. 61, p. 42, para. 113); (b) the authority referred to in Article 13 … need not be a judicial authority but, if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective (*ibid.*); (c) although no single remedy may itself entirely satisfy the requirements of Article 13 … the aggregate of remedies provided for under domestic law may do so (*ibid.*); (d) Article 13 … does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms …"

103 *Chahal,* above n. 10, para. 153. In cases where derogable rights, such as those of Articles 8 and 10 ECHR, are involved, the ECtHR in 1996 seemed to be ready to accept a lower standard of effective domestic remedy. See, *ibid.*, para. 150. This stance, however, was not affirmed later in *Al-Nashif* where the effective remedy standard was also, rightly, set on a high level by the ECtHR.

clause of Article 8(2), the available remedies may be justifiably limited, in so far as these remedies are effective in practice and in law.[104]

The ECtHR actually proceeded to differentiate cases of aliens' expulsion on national security grounds from earlier cases brought before it involving claims of Article 8 violations, in the context of secret surveillance and the use of secret information for screening job candidates who would have access to sensitive information. The Court rightly pointed out that in the former cases it would be easier for the States to provide for an effective domestic remedy reconciling the interest of preserving sensitive information with the right to an effective remedy. By contrast, in the latter cases secret surveillance or checks could only function, in practice, if the individual affected by the relevant measures stayed uninformed about them.[105]

The Court in *Al-Nashif* went on to provide some clearer guidelines, than those in *Chahal*, also setting higher the threshold of the domestic effective remedy mechanism that should be in place in cases of aliens' removal on security grounds, even though it conceded that national security reasons may justify some procedural restrictions as a consequence of a "wide margin of appreciation [granted] to the executive in matters of national security". In any case, the 'national authority' before which the domestic remedy is brought should meet the following four minimum requirements:

(a) the competent independent authority must be informed of the reasons for the deportation decisions, even if these are not publicly available;
(b) the above authority must have the power to reject the executive's claim of existence of a national security threat as arbitrary or unreasonable;
(c) the relevant proceedings should be adversarial;
(d) finally, the domestic appeal authority should have the competence of evaluating and pronouncing upon the existence of proportionality ('fair balance') between alleged public (State security) interests and individual rights.[106]

In the case of *Al-Nashif,* the issue of the need for domestic remedies to have a suspensive effect was not raised. However, this condition is implicit in the third requirement, relating to the necessarily adversarial nature of the relevant proceedings. The ECtHR has established in its case law that in adversarial proceedings it is necessary that the applicant be present therein, along with their counsel, if these proceedings involve evaluations of the applicant's "character and state of mind" that play a significant role and "their outcome could be of major detriment to him".[107] There may be no doubt that in proceedings where

104 See above section 5.

105 *Al-Nashif*, above n. 49, paras. 136-137.

106 *Ibid.,* para. 137.

107 *Kremzow* v *Austria*, judgment of 21 September 1993, Series A 268-B, para. 67: "The Court observes that the Supreme Court was called upon in the appeal proceedings

the main question raised is that of an alien person's threat to national, or even international, security this person's presence therein is a *conditio sine qua non* because, firstly, a personality evaluation by the relevant 'independent authority' in this context is *de facto* called for; secondly, the outcome of this assessment may undoubtedly have detrimental effects on the applicant's rights and freedoms.[108]

As noted in section 4.1, these high standards laid down by the Court may, in fact, be met only by a judicial body that enjoys the qualities of independence and impartiality required by Article 6(1). The European Court has, in effect, recognised in these cases the need for the protection of aliens' rights by a tribunal through fair proceedings that should meet the requirements of the above provision which, thus, may take over the function of Article 13. In this context, it is worth noting that following the *Chahal* judgment, the Special Immigration Appeals Commission was established in the UK. This Commission was granted a judicial nature, a full merits review jurisdiction and the capacity to entertain

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to examine whether the applicant's sentence should be increased from twenty years to life imprisonment and whether the sentence should be served in a normal prison instead of a special institution for mentally deranged offenders. In the event, the Supreme Court answered both questions in the affirmative. Unlike the jury which had been unable to establish a motive for the offence, it also found that the applicant had carried out the murder to cover up his own 'financial misdeeds' … These proceedings were thus of crucial importance for the applicant and involved not only an assessment of his character and state of mind at the time of the offence but also his motive. In circumstances such as those of the present case, where evaluations of this kind were to play such a significant role and where their outcome could be of major detriment to him, it was essential to the fairness of the proceedings that he be present during the hearing of the appeals and afforded the opportunity to participate in it together with his counsel." See also *Stanford* v *United Kingdom*, judgment of 23 February 1994, Series A 282-A, para. 26, where the Court clearly stated that the 'accused' person's presence in the proceedings involves their right to hear and follow the latter and that "[s]uch rights are implicit in the very notion of an adversarial procedure".

108 See also *Čonka v Belgium*, judgment of 5 February 2002, www.echr.coe.int, para. 79: "The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (see, *mutatis mutandis, Jabari*, para. 50). Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision ..." Affirmed by the Grand Chamber in the *Mamatkulov* judgment, above n. 11, para. 124. See also R. Byrne, "Remedies of limited effect: Appeals under the forthcoming Directive on EU minimum standards on procedures" (2005) 7 *European Journal of Migration and Law*, 71-86 at 78-80.

appeals against deportation order decisions on, *inter alia*, national security grounds.[109]

6.2 *The Aliens' Right to an Effective Supranational Remedy – The Provision of an* Ultimum Remedium *by the ECHR*

The case of *Mamatkulov and Askarov* v *Turkey*[110] brought to the surface once again, and seems to have given the final answer to, the question of effectiveness of remedies to human rights violations before international judicial fora. The two Uzbek applicants in this case, charged, *inter alia,* with terrorism-related offences, had been extradited by Turkey to Uzbekistan despite the opposite indication given by the ECtHR to Turkey, on the basis of Rule 39 of the Rules of Court.[111] The applicants claimed that their extradition in these circumstances constituted a violation of their right to an individual application to the ECtHR, enshrined in Article 34 ECHR.[112]

The Grand Chamber of the ECtHR found in favour of the applicants, reversing, at the same time, the relevant previous case law of the same Court. Using the teleological approach of interpretation and recent case law of international courts and UN treaty bodies, the ECtHR concluded that the applicants had been hindered in the "effective exercise of their right to individual applica-

109 See Committee of Ministers Resolution ResDH(2001)119, 15 October 2001 and Appendix thereto, www.coe.int/T/E/Human_Rights/execution/. The adoption of similar general measures are under consideration by Bulgaria in the context of execution of the *Al-Nashif* judgment. See Committee of Ministers, Annotated Agenda for the 928th CM DH meeting (6-7 June 2005), doc. CM/Del/OJ/DH(2005)928 Volume I Public, 34, www.coe.int/cm.

110 Above n. 11. On this judgment and the arising relevant issues see, G. Cohen-Jonathan, "Sur la force obligatoire des mesures provisoires" (2005) *Revue Générale de Droit International Public*, 421-432, and B. Poynor, above n. 63.

111 Rule 39 (Interim measures): "1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. 2. Notice of these measures shall be given to the Committee of Ministers. 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measures it has indicated", www.echr.coe.int. The vast majority of cases where interim measures are indicated concern deportation and extradition proceedings. According to the ECtHR, cases of States ignoring interim measures indications are very rare. See *Mamatkulov*, above n. 11, paras. 104-105.

112 Article 34 – Individual applications: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

tion guaranteed by Article 34 of the Convention, which the applicants' extradition rendered nugatory".[113] By linking Rule 39 with Article 34 ECHR the Court, in effect, gave the former a legally binding nature, a fact that will undoubtedly enhance the effectiveness of the European human rights system in the years to come.

The Court indicated that the right to an individual application – "a key component of the machinery for protecting the rights and freedoms set forth in the Convention"[114] – is not solely a positive but also a negative right *vis-à-vis* States. Article 34 ECHR grants individuals two fundamental negative rights. Firstly, the right not to be subjected to any kind of pressure to withdraw or modify their complaints. By 'pressure' the Court actually means:

> not only direct coercion and flagrant acts of intimidation against actual or potential applicants, members of their family or their legal representatives, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy.

Secondly, in cases of aliens' removal, as in *Mamatkulov*, the authorities of the respondent States are also required not to proceed to:

> any act or mission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure.[115]

Additionally, the Court underlined the auxiliary, but of utmost significance, character of Court Rule 39, whose object is to maintain the *status quo* pending the determination by the Court of the case. An indication by the Court of interim measures ordering e.g. stay of extradition, thus, "goes to the substance of the Convention complaint" making it possible for individuals to enjoy on the European plane their right to assert their Convention rights and freedoms.[116]

It is noteworthy that the Grand Chamber in *Mamatkulov* made a fine comparison of the international remedy offered by Article 34 ECHR with the

113 *Mamatkulov,* above n, 11, para. 127.

114 *Ibid.,* para. 122.

115 *Ibid.,* para. 102. See also *Chamaïev*, above n. 13, paras. 471-473. See also the UN CAT case of *Agiza* v *Sweden*, above n. 22, para. 13.9 where the UN Committee Against Torture found a "frustration of right under article 22 [UN CAT] to exercise complaint to the Committee", given that the complainant had been arrested and removed by Sweden to Egypt immediately upon the government's decision of expulsion being taken and that the formal decision had been served on the complainant's counsel the following day.

116 *Mamatkulov,* above n. 11, paras. 108 and 122.

domestic remedies prescribed by Article 13 ECHR.[117] It rightly stressed that the principle of effectiveness should be applied evenhandedly in both cases when deportation or extradition is in issue. Domestic remedies against an alien's removal with no suspensive effect may not be regarded as effective, since they may not prevent the execution of measures that would have irreversible effects upon the alien subject to removal. The same principle should be applied with regard to an international remedy, such as that provided for by Article 34 ECHR and whose effectiveness is intertwined, in practice, with Court Rule 39.[118] The net effect of this new significant case law is that a State's failure to comply with interim measures indicated under Court Rule 39 entails, in effect, a violation of Article 34 ECHR.[119]

The obligation and need for the States parties to co-operate with the ECtHR for the effective application of the Convention following the lodging of an individual application are also directly linked to Article 38(1) ECHR. This provision prescribes, *inter alia*, the respondent States' effective co-operation with the Court by furnishing all necessary facilities in case of an investigation by the Court in the State concerned. The Court's access and *in situ* investigation are of paramount importance especially in cases where there exist claims of ill-treatment following aliens' forced removal. Thus, in the case of *Chamaïev,* where a violation by Russia of the above provision was found, the Court stressed that, in the context of Article 38(1) ECHR, respondent States should provide to it access to their territory, to the applicants in question, as well as to the places it considers necessary to visit, "in search of the truth".[120]

7 Conclusions

The need by the ECtHR to elaborate and establish clear, coherent and binding principles for the protection of the rights of aliens subject to prosecution and/or forced removal by European States on terrorism or security related grounds may not be overstated at this particular period in time. EU Member States, especially following the terrorist attacks in London on 7 July 2005, are in fact determined to prioritise the building "on the existing strong EU framework for pursuing and investigating terrorists across borders".[121]

117 See above section 6.1.

118 *Mamatkulov,* above n. 11, para. 124. Accord, Council of Europe Commissioner for Human Rights, *Recommendation concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders,* Doc. CommDH/Rec(2001)1, Strasbourg, 19 September 2001, para. 11.

119 *Mamatkulov,* above n. 11, para. 129. See also *Chamaïev*, above n. 13, paras. 505-518.

120 *Chamaïev*, above n. 13, paras. 496 and 502.

121 See para. 4 of EU Council *Declaration on the EU Response to the London Bombings*, Press release of the JHA Extraordinary Council, 13 July 2005, 11116/05 (Presse

What is particularly striking in the relevant post-7 July Declaration of the EU Justice and Home Affairs Ministers is that there is hardly a single reference to the need for the EU Member States to abide, at the same time, by human rights and fundamental freedoms. The inadequate reference to these principles, which are now enshrined in the Charter of Fundamental Rights of the Union (2000),[122] had also been worryingly clear in the earlier EU Hague Programme on Freedom Security and Justice. There, "the security of the EU and its Member States" and a "pragmatic approach"[123] have obviously taken precedence over guaranteeing individual rights and freedoms. In other words, there has been an evident trend of maximizing State 'security' that leads, at the same time, to a minimisation of 'freedom and justice'.

The preceding analysis of ECtHR case law shows that the European system of human rights protection, as developed so far in the context of the interpretation and application of the ECHR, to which all EU Member States are parties, has the real potential of acting as a strong counter-balance to the elaboration and, in particular, application of over-reactive legislative and administrative anti-terrorism measures that contravene the fundamentals of European human rights protection related to aliens. The direct effect provided today to the ECHR and the judgments of the ECtHR by the overwhelming majority of European

187), http://ue.eu.int/Newsroom. See also, T. Balzacq, S. Carrera, *The EU's Fight against International Terrorism – Security Problems, Insecure Solutions,* Brussels, CEPS Policy Brief, July 2005, www.ceps.be; Réseau U.E. d'Experts Indépendants en Matière de Droits Fondamentaux, *Les exigences des droits fondamentaux dans le cadre des mesures de prévention de la radicalisation de la violence et du recrutement de terroristes potentiels – Avis no 3-2005,* 23 août 2005, http://europa.eu.int/comm/justice_home/cfr_cdf/doc/avis/2005_3_fr.pdf.

122 The Charter now constitutes Part II of the *Treaty establishing a Constitution for Europe*, OJ 2004 C 310/41. Its preamble (recital 2) characteristically states that the "Union" "places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice". At the same time, the preamble of the Charter (recital 5), now forming Part II of the Treaty establishing a Constitution for Europe, has reaffirmed "the rights as they result [*inter alia*] from international obligations common to the Member States, the European Convention on Human Rights … the Social Charters adopted by the Union and by the Council of Europe and the case law of the [Luxembourg and Strasbourg Courts]". Also, current Article III-267(1) of the European Constitution has prescribed the Union's obligation to develop "a common immigration policy aimed at ensuring, at all stages, [*inter alia*] fair treatment of third-country nationals residing legally in Member States".

123 See para. 4 of the introduction to the Hague Programme and para. 1 of its section II.1 respectively, OJ 2005 C 53/1.

states' domestic legal orders[124] has provided additional safeguards and further promoted the effective application of European human rights standards to alien victims of these kinds of measures, as evidenced, in particular, by the House of Lords judgment of 16 December 2004.[125]

As shown in earlier sections, the ECHR individual rights protection mechanism is flexible enough to accommodate legitimate State-interest concerns with the need for effective respect *and* protection of aliens' human rights and fundamental freedoms. The ECtHR has time and again made it clear in its aliens' rights-related case law that, while interpreting dynamically and teleologically the Convention, it has never lost sight of the "immense difficulties faced by States in modern times in protecting their communities from terrorist violence".[126] It has thus granted the executive a wide margin of appreciation, in this context, which may never, nonetheless, amount to an annihilation of the core of the rights enshrined in the Convention.

The major significance and real strength of the ECtHR case law related to aliens' rights is that the Court has hardly ever failed to see to the human rights of aliens, even if the latter are linked to terrorism or organised crime. Indeed, the major part of the relevant jurisprudence attests to the fact that aliens in Europe, at least, are entitled to the same rights and freedoms enshrined in the ECHR, as every other human being within the jurisdiction of the European States parties. As shown in this paper, the clearest evidence of this has been provided by the European Court's major case law relating to Articles 3, 5(1)(f), 5(2)-(4), 8(2) and 13. The rigorous scrutiny and the liberal, teleological interpretation rightly employed by the ECtHR, while determining aliens' rights under the above provisions, make one still consider the ECHR as the most advanced regional human rights protection system.

Where the ECtHR has not, as yet, managed to effectively evolve is in its restrictive interpretation and non-application of Article 6(1) to procedures related to decisions regarding entry, stay and deportation or extradition of aliens. As noted in section 4.1, the European Court has, to date, refused to recognise that such procedures may well relate to the determination of 'civil rights and obligations' and, consequently, come within the purview of the above provision. The Court has, to date, adhered to an out of context, historical interpretation of the Convention, grounded in States parties' intentions. However, this

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124 See, *inter alia*, J. Polakiewicz, "The status of the Convention in national law", in R. Blackburn, J. Polakiewicz (eds), *Fundamental Rights in Europe – The ECHR and its Member States, 1950-2000,* (Oxford: Oxford University Press, 2001), 31-53.

125 See above n. 4. See also C.J.M. Safferling, "Terror and the law – Is the German legal system able to deal with terrorism? – The Federal Court of Justice decision in the case against El Mottassadeq" (2004) 5 *German Law Journal*, 515-524 (www.germanlawjournal.com).

126 *Chahal*, above n. 10, para. 79. See also above section 2.1.

not only contravenes its own established teleological method of interpreting the Convention as a living legislative treaty, but also contrasts sharply with its own post-*Maaouia* case law created in another major case, that of *Al-Nashif*, as well as with emerging EU legislation concerning the status of third-country nationals.[127]

The need for homogenising the relevant aliens' rights-related case law, in line with the prevailing interpretational method favouring the *'effet utile'* of the Convention,[128] is urgently needed, firstly, for reasons related to the quality and international prestige that the ECtHR has meritoriously gained to date. However, a principled, coherent jurisprudential evolution of the Court is all the more greatly needed today, in view of the internationally prevailing phobic anti-terrorism climate and State policy aimed at enhancing State security, while losing sight of the importance of securing individual, and particularly aliens', rights and freedoms. Evidence of this are, *inter alia*, the recent EU Member States' programmes and decisions concerning 'freedom, security and justice'. These instruments confirm that the highly influential EU Member States' legal ideology is still based mainly on *raison d'état* considerations that regrettably overshadow the real *raison d'être* of a European political union which is nothing more or less than freedom and justice, in line with the principles of democracy, the rule of law and human rights.

In this exceptionally challenging, contemporary political context, the role and limits of the ECtHR, as a pan-European quasi-constitutional court, are of paramount importance, especially in the context of its case law related to the rights of aliens subject to prosecution or extradition on security or terrorism-related grounds. A pan-European Court that will not be able to live up to the exigencies of the current situation and provide principled, clear and coherent supervision and guidance to the European States, through its construction of the ECHR, is dangerously doomed to become superfluous. The answers which are being and will be given by the ECtHR to the questions related to the conditions under which an alien – this "frightening symbol of the fact of difference"[129] – may enter or remain outside modern European societies will greatly influence and define the fundamental principles on which these societies will be shaped. These are answers that will determine, in the final analysis, the future of democratic values and sensitivity that should characterise the inherently pluralistic societies and States in Europe.

127 See above section 4.1.

128 See, e.g., J.G. Merrills, *The Development of International Law by the European Court of Human Rights,* Manchester (Manchester University Press, 1993), 98-124; I. Cameron, above n. 1, at 448-451.

129 H. Arendt, *The Origins of Totalitarianism (*New York: Harcourt, Brace & World, Inc., 1966) at 301.

Part II Responses at the National Level

Chapter 3 The Response of the United Kingdom's Legal and Constitutional Orders to the 1991 Gulf War and the Post-9/11 'War' on Terrorism

David Bonner and Ryszard Cholewinski

1 Introduction and Overview

This chapter examines the impact of terrorism on immigration law and asylum law in the United Kingdom – particularly those parts concerned with national security – in respect of two rather different 'wars'. Section 2 considers the response of the United Kingdom's legal and constitutional orders during the First Gulf War (1990-91). Section 3 does the same with respect to the post-9/11 'war' on terrorism. This section briefly places the responses in context and highlights points of contrast between them, and the key factors shaping them, the better to enable appreciation of the more detailed analysis in the rest of the chapter.

At first sight the central elements of the response in each 'war' appear the same. As regards immigration law, the focus is firmly on the exclusion, curtailment of residence or deportation of foreign nationals thought to threaten national security, or their detention without charge or trial, ostensibly under the ancillary powers of detention in immigration legislation, where deportation was precluded. As regards asylum law, the most direct impact on obligations under the Refugee Convention is the invocation of the 'national security' exceptions in Articles 1F and 33(2). But the impact goes wider than that. The link between some asylum seekers and a perceived security threat has rendered colder the climate for all asylum seekers and further contributed to the reduction in substantive and procedural rights of asylum seekers in United Kingdom law and policy since 1990. However, it is also important to view this development against the background of strenuous efforts on behalf of the government to reduce the flow of asylum seekers by a variety of tools, such as accelerated determination procedures for manifestly unfounded claims, safe countries of origin and safe third country concepts, the removal of the suspensive effect of appeals, and the reduction of welfare benefits, especially for those asylum seekers who fail

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to lodge a claim for refugee status under the Geneva Convention relating to the Status of Refugees [hereafter Refugee Convention] as soon as it is reasonably practicable after their arrival in the UK. The UK Government has also opted in to all of the asylum measures adopted at the EU level[1] with the result that the interpretation of Articles 1F and 33(2) and the procedures for asylum claims affected by 'national security' considerations will be informed by EU law once the relevant Directives are transposed into national laws. In the meantime, however, there have also been some specific changes and additions to national legislation addressing asylum claims in the post-9/11 climate that have made it much more difficult for asylum seekers who have been involved in violent acts abroad to obtain Refugee Convention status. Furthermore, the protection of refugees from *refoulement* is arguably less secure than previously, particularly if the European Convention on Human Rights (ECHR) is deemed not to apply to their situation.

In each 'war', the response operated in a context of broader anti-terrorist laws and the general criminal law, exercisable in respect of citizen and non-national alike. The interaction of those laws and the criminal process forms a 'modified criminal prosecution' approach to terrorism, furnishing the authorities with more extensive powers than are available to deal with other serious crimes, without altering the criminal trial process itself. Those anti-terrorist laws confer powers to proscribe organisations (declare them illegal); to stop and search persons and vehicles; to enter and search premises and seize material found there. They create a variety of widely drawn specific offences relating to terrorism (e.g. membership of a proscribed organisation, directing a terrorist organisation). They establish a regime facilitating arrest and extended detention without charge in respect of persons reasonably suspected to be involved in the commission, preparation or instigation of acts of terrorism, in no way tied to notions of a specific criminal offence. In the First Gulf War, those powers were found in emergency legislation: the Prevention of Terrorism (Temporary Provisions) Act 1989, largely shaped by Northern Ireland terrorism. Those available at the time of 9/11 are in a permanent Terrorism Act 2000, more obviously geared towards international terrorism.

Closer examination reveals significant differences between the responses, stemming from alterations in the legal and constitutional orders of the United Kingdom in the two periods under study. The post-9/11 response sees greater prominence of human rights norms through incorporation of the ECHR in the Human Rights Act 1998 (HRA). Moreover, between the two periods, ECHR standards in immigration and asylum law had more clearly been articulated and developed by the European Court of Human Rights, particularly in *Chahal*,[2] which set substantive and procedural/institutional limits on the power to deport.

1 See chapter 1.

2 *Chahal* v *United Kingdom* (1997) 23 EHRR 413. See Chapter 2.

In addition, to a lesser degree, the response to 9/11 has taken place within parameters set by the EU response to terrorism, something not extant in the First Gulf War.[3] To detain after 9/11 those foreign nationals who could not be deported, the United Kingdom had to derogate from the ECHR because of a 'public emergency'. The scale of detentions has been much smaller, and there is a more sophisticated review process. But the powers remain controversial and subject to trenchant criticism from official review bodies and NGOs. On 16 December 2004, the House of Lords declared them incompatible with Convention rights, but this did not under the United Kingdom's constitutional arrangements render the powers unlawful or inoperative. Their incompatibility was accepted by the Government and new legislation enacted in March 2005 repealing the detention without trial powers. The detainees were released from detention, but instead subject to varying degrees of restriction on free movement, assembly, expression and association, under the 'non-derogating' control order regime instituted by the new legislation: the Prevention of Terrorism Act 2005.

2 The Response to the First Gulf War (1990-1991)

2.1 Immigration Law and National Security: Deportation and Detention

Here there were clearly defined enemies (Iraq, Iraqis in the UK, persons linked with the PLO which was supporting Saddam Hussain). The conflict and crisis was also short.

Iraqis were subject to a variety of restrictions. United Kingdom bank accounts of non-resident Iraqis were frozen by the Bank of England in August 1990. But restrictions came principally through immigration law:

> Instead of assuming emergency powers, the Home Secretary relied on the Immigration Act 1971 to equip himself with extensive powers of detention, restriction, deportation, refusal of entry and police registration. Prerogative powers were needed only for the establishment of a prisoner of war camp at Rollestone near Stonehenge where internment was under the Third Geneva Convention. In no other western Coalition state, including America, which faced the same threat of reprisals, has internment or deportation been used.[4]

Immigration law requires some foreign nationals to register with the police. Failure to register is a criminal offence. The Immigration (Variation of Leave) Order 1991[5] extended that requirement to all Iraqi nationals, not holding British citizenship or exercising free movement rights under EC law, with limited leave to

3 The EU response to terrorism is examined in Chapter 1.

4 S. Grant, "A just treatment for enemy aliens" (1991) 141 *New LJ* 305.

5 S.I. 1991/77. The rules on registration with the police were then contained in the Immigration (Registration with the Police) Regulations 1972 (S.I. 1972/1758), as amended.

enter or remain in the UK. The Immigration Rules were amended from 22 September 1990, to prevent the admission of new Iraqi students to the United Kingdom.[6] In August, the Home Secretary withdrew from Iraqi nationals the ability to benefit from a transit visa concession, and informed air carriers (as *de facto* immigration control) of that.[7] In January 1991, after the outbreak of hostilities in the Gulf, he effectively suspended immigration facilities for Iraqi nationals who wanted to come to the UK or extend their stay there.[8] The requirement to register was extended to all non-resident Iraqis.[9] The duty to register generated:

> a certain amount of confusion. The police registration rule affected Iraqis of all ages (16 is the normal registration age for aliens). What did this mean in the very cold weather for mothers of small babies? The police said even babies must be brought in person for registration, while the Home Office told callers that a photograph and birth certificate would be enough. One inevitable effect of these different – and widely publicised – measures was to encourage public hostility to Iraqis, regardless of their political opinions. Unlike many European states, this country does not issue any identity card to asylum-seekers while their applications are considered, and employers in particular have had no easy way of distinguishing between Iraqis who had arrived as refugees from fervent supporters of Saddam Hussein. Certainly jobs were lost as a result of indiscriminate suspicion.[10]

The suspension of hostilities and the UN Security Council Resolutions[11] on ceasefire arrangements in the Gulf enabled the Home Secretary to lift all these extra restrictions on Iraqi nationals from 12 April 1991, so that from then on applications would be subject to the normal Immigration Rules and requirements.[12]

The most controversial power, contributing to a negative public perception of all Iraqis, was deportation of those thought to be a national security risk. Someone who is not a British citizen is liable to deportation if the Secretary of State (Home Secretary) deems his deportation to be conducive to the public

6 Home Office News Release, 21 September 1990.

7 *Ibid.*

8 Home Office News Release, 12 April 1991.

9 Grant, above n. 4.

10 *Ibid.*

11 UNSC Res. 687, 688, 689 found at http://www.un.org/Docs/scres/1991/scres91.htm.

12 Home Office News Release, 12 April 1991.

good.[13] So are non-British citizen members of the principal deportee's family.[14] A deportation order requires its subject to leave, and prohibits her/him from entering, the country. It invalidates any leave to enter or remain.[15] The process resulted in the effective detention without trial of those unable to be deported because of lack of flights or lack of travel capability to landlocked Iraq.

The Iraqi community in the United Kingdom was variously described as between 5000[16] and 10,000 strong.[17] From September 1990 to January 1991, deportation decisions were taken, on security grounds connected with the Gulf conflict, against 176 individuals, 164 of whom were Iraqis, the others connected with the PLO. Many were students, some businessmen,[18] two employees of a software company,[19] and one (Cheblak) a writer, journalist and officer of the Arab League, previously a lecturer in public law.[20]

It was reported that 80 individuals left the country 'voluntarily'. Who they were is less clear because they made no challenge to the decision to deport. The Home Office described them as 'Baathist thugs',[21] an appellation that cannot necessarily be taken as wholly accurate in the light of criticisms of intelligence material in respect of those detained or interned.[22] Thirty-five individuals – said to be students and academics sponsored by the Iraqi Army – were transferred from Home Office jurisdiction to that of the Ministry of Defence, and interned without trial, presumably under prerogative powers,[23] as prisoners of war. The remainder (most of whom were postgraduate students on Iraqi Government scholarships and said by the Home Office to be subject to Iraqi Embassy discipline) were detained in prison under detention powers ancillary to deportation

13 Immigration Act 1971, s. 3(5)(b).

14 Immigration Act 1971, s. 3(5)(c).

15 *Ibid.*

16 J. Carvel, "War in the Gulf: Baker curbs immigration", *The Guardian*, 19 January 1991; "War in the Gulf: Jail prepared for terror suspects", *The Guardian*, 18 January 1991; "War in the Gulf: Suspect Iraqis taken to prison", *The Guardian*, 17 January 1991.

17 Grant, above n. 4.

18 J. Carvel, "War in the Gulf: Suspect Iraqis taken to prison", *The Guardian*, 17 January 1991.

19 *R* v *Home Secretary, ex parte B*, Law Report, *The Guardian*, 30 January 1991, Law Report, *The Independent*, 29 January 1991.

20 *R* v *Secretary of State for the Home Department, ex parte Cheblak*, [1991] 2 All ER 319; I. Leigh, "Gulf War Deportations" (1991) *Public Law* 331.

21 Grant, above n. 4.

22 See below.

23 Inherent common law powers of the Crown (Executive).

powers in immigration law. In all, some 200 of the estimated 1000 Iraqi students in the UK were affected by detention and internment.[24]

2.1.1 Challenging Detention Pending Deportation[25]

Where someone's deportation was considered conducive to the public good on grounds of national security, that person had no right of appeal within the statutory immigration appeals system.[26] They could seek redress in the High Court by way of a *habeas corpus* application (an ancient means of testing the legality of detention) or an application for judicial review. In addition, they could resort to a non-statutory advisory panel of three Advisers, appointed by the Home Secretary to review deportation (and thus detention) and advise him accordingly. Indeed, the net result of applications to the courts effectively produced the answer that the detainee's first and appropriate port of call should be that non-statutory mechanism,[27] with the courts willing to review the decisions of the advisory panel where, for example, "it could be shown to have acted unfairly within its terms of reference",[28] "taking account of the fact that its procedures must necessarily be tailored to the unique nature of the subject matter within its remit."[29] Otherwise, the court could only invalidate the Home Secretary's decision on narrow grounds of irrationality (abuse of discretion),[30] something impossible to prove when the courts would not compel the Secretary of State to disclose more of the case against the individual than he (the Home Secretary) was prepared, on grounds of security, to disclose. The common law rules of procedural fairness or natural justice were trumped by the demands of national

24 Grant, above n. 4. On individual cases, covering Iraqis, Jordanians and Lebanese of Palestinian origin or connection, and Palestinians, see: J. Cumberbatch, "Women: Prisoner of war – Can a suburban computer salesman be seen as a threat to national security? He can if he's Palestinian", *The Guardian*, 30 January 1991; *R* v *Home Secretary, ex parte B*, Law Report, *The Guardian*, 30 January 1991, Law Report, *The Independent*, 29 January 1991; *R* v *Secretary of State for the Home Department, ex parte Cheblak*, [1991] 2 All ER 319.

25 There would appear to have been no legal challenges by those detained by the Ministry of Defence as prisoners of war under prerogative powers and the Third Geneva Convention.

26 Immigration Act 1971, s. 15(3).

27 *R* v *Secretary of State for the Home Department, ex parte Cheblak*, [1991] 2 All ER 319, per Lord Donaldson MR, at p. 335.

28 *Ibid.*

29 *Ibid.*, at p. 330.

30 *Ibid.*, at p. 335. This involves the impossible task of establishing that the Home Secretary acted in bad faith (i.e. not believing what he claimed) or in a way so arbitrary, absurd or unjust that no reasonable Secretary of State could ever act.

security.[31] The deportee/detainee was not entitled to the reasons grounding those given in the standard notice served on deportees/detainees.[32] A notice of intention to deport was little more than a recitation of the statutory criteria and some rights of challenge.[33] The ground for deportation was thus 'conducive to the public good' and the reason for it 'national security'. In addition, those who indicated a wish to make representations to the panel received a further letter amplifying this reason. For Palestinians like Mr and Mrs B[34] or those with a Palestinian connection like Mr Cheblak,[35] the amplification read:

> The Iraqi Government has openly threatened to take terrorist action against unspecified western targets if hostilities break out in the Gulf. In the light of this your known links with an organisation which we believe could take such action in support of the Iraqi regime make your presence in the United Kingdom an unacceptable security risk.[36]

Iraqis received a similar amplificatory letter referring to the individual's "links and activities in connection with the Iraqi regime."[37] As regards detainees under immigration legislation, the warrant for detention was little more than a recitation of the statutory basis.[38]

Correspondence with lawyers and legal proceedings sometimes elicited a little more. Thus Mr B was said to be the nephew of Mr T, a notorious terror-

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31 *Ibid.*, per Lord Donaldson MR, at pp. 331-332, 335, per Beldam LJ, at p. 339, per Nolan LJ at pp. 342-343. See also *R* v *Secretary of State for the Home Department, ex parte Hosenball* [1977] 3 All ER 452 (national security interests trump procedural fairness as regards the issue of full disclosure) and *Council of Civil Service Unions* v *Minister for the Civil Service* [1984] 3 All ER 935 (the essential non-justiciability of national security once the court is satisfied by 'evidence' – usually the affidavit from the Secretary of State or the Permanent Secretary to the Home Office – that national security is properly an issue).

32 *Cheblak* [1991] 2 All ER 319, above n. 27; *R* v *Home Secretary, ex parte B*, Law Report, *The Guardian*, 30 January 1991, Law Report, *The Independent*, 29 January 1991. In both cases, the courts followed the reasoning of the Court of Appeal in another immigration context (one where someone was seeking leave to enter the UK for one week): *R* v. *Home Secretary, ex parte Swati* [1986] 1 WLR 477, at p. 490, per Parker LJ.

33 Cited in *Cheblak* [1991] 2 All ER 319, at p. 324.

34 *R* v *Home Secretary, ex parte B*, Law Report, *The Guardian*, 30 January 1991, Law Report, *The Independent*, 29 January 1991.

35 *Cheblak* [1991] 2 All ER 319, above n. 27.

36 *Ibid.*, at p. 325.

37 Grant, above n. 4.

38 *Cheblak* [1991] 2 All ER 319, at p. 325.

ist. Mr B claimed to have had no contact with his uncle since boyhood and to deplore his activities. When his solicitors asked the Home Office whether Mr B's links were based on more than the relationship with Mr T, they were merely told "yes".[39] The letter to Mr Cheblak, set out above, as to others, did not specify the name of the organisation in question and, according to Grant, "no information was given to enable the individual to know what 'links', 'activities' or organisation' the Home Office had in mind."[40]

Recourse to the advisory panel procured release for some, though this has been seen as a criticism of the weakness of the intelligence against the individuals rather than a vindication of a much criticised review scheme. Grant records that:

> By March 1, 33 detainees had appeared before the panel challenging their deportation decisions and 19 had been released. Far from vindicating the review procedure, these figures show that in a high proportion of cases the unreliability of the security information on file was evident to the panel even without any challenge from the person concerned. Foreign Office leaks aside,[41] we know there were mistakes of identity – Muslim naming systems and Arabic transliteration can be no easy matter for MI5 – and that some files contained information on personal and political matters which was many years out of date. Prisoners of war were identified and interned on the basis of an old list of student grants sent to the Bank of England by the Iraqi Military Attache; it turned out that some students on the list were not in the army.[42]

The advisory panel process was condemned as a charade by *The Times* newspaper[43] and as "quite unsatisfactory" by the leading immigration law text.[44] It was based on a procedure for rooting out communists, spies and security threats from the civil service.[45] The Home Secretary outlined the procedures to the House of Commons in 1971:

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39 *R* v *Home Secretary, ex parte B*, above n. 34.

40 Grant, above n. 4.

41 *Ibid.* She asserts that leaks from "Senior Whitehall sources" (she assumes the Foreign Office) "lost no time in leaking their view that Home Office detention decisions rested on 'sloppy' out-dated intelligence files, and that MI5's charges of terrorist links were 'speculative'."

42 *Ibid.*

43 *Ibid*.

44 I. Macdonald and N. Blake, *Macdonald's Immigration Law and Practice*, (Butterworths, 3rd ed, 1991), at p. 382.

45 *Ibid*, at p. 383.

> All these proceedings start with a personal decision by the Home Secretary on national security grounds. The person concerned is notified of the decision and he will be given by the Home Office only such particulars of allegations as will not entail disclosure of sources of evidence. At the same time the person will be notified that he can make representations to the three advisors and will be given time to decide whether or not to do so. The advisors will then take account of any representations made by the person concerned. They will allow him to appear before them, if he wishes. He will not be entitled to legal representation, but he may be assisted by a friend to such extent as the advisors sanction. As well as speaking for himself, he may arrange for a third party to speak on his behalf. Neither the sources of evidence nor evidence that might lead to the disclosure of sources can be revealed to the person concerned, but the advisors will ensure that the person is able to make his point effectively and the procedure will give him the best possible opportunity to make the points he wishes to bring to their notice. ... Since the evidence against a person necessarily has to be received in his absence, the advisors in assessing the case will bear in mind that it has not been tested by cross-examination and that the person has not had the opportunity to rebut it. ... On receiving the advice of the advisers the Secretary of State will reconsider his original decision, but the advice given to him will not be revealed.[46]

In *Cheblak*, Lord Donaldson took a sanguine view of procedures alien to an adversarial tradition, seeing in its "independent quasi-judicial scrutiny" elements of the inquisitorial approach adopted by courts elsewhere in Europe.[47] The Court of Appeal also made much of the Home Secretary's constitutional responsibility to Parliament for his decisions and any failure to heed the advice of the panel.[48] In contrast, Grant considered that while the advisory panel might be a suitable way of looking for a 'mole' in a spy thriller world, it was not a good one "for assessing evidence of planned acts of terrorism where nothing is known of the individual and his circumstances except what appears in a security file."[49] She suggested as preferable approaching matters according to the terms of the Fourth Geneva Convention, which regulates the treatment of civilians in wartime and requires a legal review procedure in national security cases.[50] Leigh, who had discussed with the then chairman of the advisory panel the approach the panel had taken in these First Gulf War cases, was similarly much more criti-

46 HC Debs (5th series), Vol. 819, Col. 376 (15 June 1971).

47 *Cheblak* [1991] 2 All ER 319, above n. 27, at p. 332.

48 *Ibid.*, at p. 330.

49 Grant, above n. 4.

50 *Ibid.*

cal than the judiciary of a process involving oral hearings with the detainee of 45 minutes on average:

> To claim that they are the best that can be devised consistent with the requirements of national security demonstrates both over-subservience to that concept and a lack of imagination. [W]hile security *policy* is, quite properly, an issue reserved for the executive, arguably this does not justify the refusal to allow intelligence information in individual cases to be tested by cross-examination. Issues of accuracy, potential bias or self-interest of informers and alternative interpretations of the facts could all be dealt with without calling into question the policy underlying the decision contested. The real issue here ... is confidentiality. The challenge is to devise legal procedures which preserve executive responsibility and protect confidentiality, but also allow rigorous testing of the case on the appellant's behalf.[51]

He drew attention to a better approach in Canada, where security evidence heard in the absence of the individual was scrutinised with the help of a security-cleared advocate.[52]

The United Kingdom's dualist legal order limited the role of the ECHR. Not incorporated but only an international legal obligation, national courts could not use its provisions to require the Home Secretary to exercise an unambiguous statutory discretion, apparently conferring unlimited power, in a manner consonant with ECHR obligations. The *Soering* principle, later applied in *Chahal* with crucial shaping effect for the United Kingdom response post-9/11, relevant to the matter of a deportee's destination, was not considered in the High Court challenge by B because no decision on destination had at that stage been taken. It was not then established that detention for deportation could only be valid so long as deportation, diligently pursued, was a feasible prospect. This came only after Mr Chahal's human rights' challenge at Strasbourg, which coupled with the ECHR's incorporation into United Kingdom law through the HRA, dramatically changed the legal and constitutional landscape in which the United Kingdom Government had to operate in deciding how to respond to 9/11 as part of the 'war' on terrorism.

2.2 Asylum and Refugee Law

The institution of asylum and the acceptance by the international community that persons who have crossed international borders fearing persecution or threats to their life or freedoms in their countries should not be returned to those countries give rise to particular challenges for States concerned with safeguarding security within their borders. Given the existence of well-estab-

51 I. Leigh, above n. 20, at p. 337.

52 *Ibid.*, at pp. 337-340.

lished international obligations addressing the situation of refugees and asylum seekers, the discretion States possess in the treatment of non-nationals is clearly limited. However, the perceived connection between the institution of asylum and national security questions is often overplayed. Professor Colin Harvey discusses the relationship between asylum and national security succinctly:

> National security *may* become relevant to the asylum process at different stages. I stress *may* to emphasise that there is no necessary connection between the asylum system and national security. A link may emerge if asylum seekers, like other individuals, engage in specified actions in the asylum state or before entry. Some asylum seekers and refugees will have been politically active in their state of origin. This activism may have taken a number of forms. The issue of security may arise when the exclusion clauses are being considered during the status determination process. National security is not intended to be the primary concern at this stage, but there is evidence that it does enter into the process. If a person is still awaiting determination of her claim, or is recognised as a refugee, her actions in the asylum state may trigger concern about a possible security risk. At this point her removal may be sought with reference to national security considerations. Removal in this context presents particular challenges where the individual faces a real risk of serious ill-treatment upon return. While removal is an option, there is no necessary impediment to prosecution under existing anti-terrorism and/or criminal law. The legal framework currently in existence thus includes provision for dealing with asylum seekers and refugees who are suspected of being involved in terrorism.[53]

Before assessing the impact of the First Gulf War on the treatment of asylum claimants and recognised refugees in the UK, it is necessary to describe the international legal framework as developed to date with a view to gauging to what extent security considerations should affect the determination of refugee status or the position of recognised refugees in countries of asylum. This framework has undergone considerable elaboration since 1990-91 because of the introduction of additional UNHCR guidelines and the developing ECHR jurisprudence has impacted considerably on the post-9/11 laws relating to asylum at both the EU and UK levels.

53 C. Harvey, "The Rule of Law in Times of Trouble: Asylum, National Security and Human Rights", paper presented to the W G Hart Workshop 2004 on "The Challenge of Migration to Legal Systems", Institute of Advanced Legal Studies, London, 29 June-1 July 2004, at p. 8.

2.2.1 Position under the Refugee Convention and International Human Rights Law

The 1951 Refugee Convention, as supplemented by its 1967 Protocol, recognises that national security matters as well as criminal acts connected with terrorism, whether perpetrated before entry or while in the country of asylum, may well affect the acceptance of persons as refugees or their continued stay in host States. The principal provisions dealing with these questions are Articles 1F, 32 and 33(2). Article 1F lists the categories of persons who are excluded from international protection:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.[54]

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, which is to be treated as authoritative guidance for States parties to the Convention, notes that the facts justifying exclusion will normally occur during the determination process, but that cancellation of refugee status would also be justified if these facts were to emerge after a person has been recognised as a refugee.[55] The Handbook underlines that exclusion under Article 1F applies if "there are serious reasons for considering" that one of the acts listed has been committed, although formal proof of a previous criminal prosecution is unnecessary. However, given the very serious consequences of exclusion for the person

54 This provision draws its inspiration from Article 14(2) of the Universal Declaration of Human Rights. Article 14(1) provides for the right to seek asylum while Article 14(2) stipulates that "[t]his right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations". See N. Blake, "Exclusion from Refugee Protection: Serious Non Political Crimes after 9/11" (2002) 4 *European Journal of Migration and Law* 425, at p. 429, citing J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), at p. 214.

55 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Doc. HCR/IP/4/Eng/REV.1 (reedited) (Geneva: UNHCR, January 1992) [hereafter *UNHCR Handbook*], at para. 141.

concerned, the Handbook urges a restrictive interpretation of the provision.[56] UNHCR Guidelines, issued in September 2003, complement the Handbook's assessment of Article 1F.[57] The most vexing issue that arises is whether a person, who is considered a security threat or who has been involved in violent activity linked to terrorism, has committed "a serious non-political crime" under Article 1F(b), which can only apply if the crime is committed outside the country of refuge. The Handbook advises that acts disproportionate to their political objectives (which are often associated with terrorist activity) cannot be classed as 'political crimes' and would thus be covered by Article 1F.[58] The recent UNHCR Guidelines are more explicit on this point by referring expressly to terrorism: "Egregious acts of violence, such as those acts commonly considered to be of a 'terrorist' nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective".[59] The Guidelines contain the following paragraphs on terrorism, which appear to be clearly influenced by the heightened sensitivity to terrorist activity since the events of 9/11:

> Despite the lack of an internationally agreed definition of ***terrorism***, acts commonly considered to be terrorist in nature are likely to fall within the exclusion clauses even though Article 1F is not to be equated with a simple anti-terrorism provision. Consideration of the exclusion clauses is, however, often unnecessary as terrorists may not be eligible for refugee status in the first place, their fear being of legitimate prosecution as opposed to persecution for Convention reasons.

56 *Ibid*., at para. 149.

57 UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses – Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, Doc. HCR/GIP/03/05 (hereafter *UNHCR Guidelines on Application of the Exclusion Clauses*). These guidelines summarise the lengthier UNHCR Background Note on the same topic (4 September 2003). Both of these documents are available from the UNHCR web site at http://www.unhcr.ch/cgi-bin/texis/vtx/publ.

58 *UNHCR Handbook*, above n. 55, at para. 152: "In determining whether an offence is 'non-political' or is, on the contrary, a 'political' crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature".

59 *UNHCR Guidelines on Application of the Exclusion Clauses*, above n. 57, at para. 15.

> Of all the exclusion clauses, Article 1F(b) may be particularly relevant as acts of terrorist violence are likely to be disproportionate to any avowed political objective. Each case will require individual consideration. The fact that an individual is designated on a national or international list of terrorist suspects (or associated with a designated terrorist organisation) should trigger consideration of the exclusion clauses but will not in itself generally constitute sufficient evidence to justify exclusion. Exclusion should not be based on membership of a particular organisation alone, although a presumption of individual responsibility may arise where the organisation is commonly known as notoriously violent and membership is voluntary. In such cases, it is necessary to examine the individual's role and position in the organisation, his or her own activities, as well as related issues...[60]

The Handbook underlines further that a balance should be struck "between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared".[61]

The September 2003 UNHCR Guidelines also describe the procedures that should be in place when exclusion is considered. They emphasise that rigorous procedural safeguards are necessary in the determination process given the serious consequences of exclusion and recommend that decisions relating to exclusion should in principle be addressed within the regular refugee determination procedure and not in admissibility or accelerated procedures. Moreover, inclusion should normally be considered before exclusion.[62] The Guidelines also underscore that the burden of proof for exclusion rests with the State.[63]

Articles 32 and 33(2) are respectively concerned with the expulsion of recognised refugees and the withdrawal of the protection of non-*refoulement*. Arti-

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60 *Ibid*., at paras. 25-26 (footnote omitted). Original emphasis.

61 *UNHCR Handbook*, above n. 55, at para. 156. See also *UNHCR Guidelines on Application of the Exclusion Clauses*, above n. 57, at para. 24: "As with any exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion", which is particularly relevant to Article 1F(b) crimes.

62 *Ibid*., at para. 31. However, the Guidelines foresee some possible exceptions to this approach: "The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion, but there is no rigid formula. Exclusion may exceptionally be considered without particular reference to inclusion issues (i) where there is an indictment by an international criminal tribunal; (ii) in cases where there is apparent and readily available evidence pointing strongly towards the applicant's involvement in particularly serious crimes, notably in prominent Article 1F(c) cases, and (iii) at the appeal stage in cases where exclusion is the question at issue."

63 *Ibid*., at para. 34. Or with the UNHCR where it is given the responsibility to determine the asylum claim.

cle 32(1) prohibits the expulsion of refugees lawfully in the territory of States parties save on national security or public order grounds. However, Article 32(2) stipulates that expulsion in these circumstances may only occur if a decision has been reached "in accordance with due process of law," although the withdrawal of safeguards concerning the possibility of refugees to submit evidence and to appeal might be required by "compelling reasons of national security".[64] Article 33(1) contains the cardinal principle of international refugee law, namely non-*refoulement*. However, this principle is qualified in the second paragraph, which enables States of asylum to return refugees who are considered to be a threat to their national security or convicted criminals who are a danger to the national community:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

The international legal framework for addressing the relationship between asylum and national security, as laid down in the Refugee Convention and the subsequent explanatory texts issued by the UNHCR, no longer stands alone and has been supplemented by human rights developments. Thus, international human rights law has curtailed the operation of Article 33(2) considerably, as enshrined in the prohibitions on torture and inhuman and degrading treatment and punishment in the UN Convention against Torture and the International Covenant on Civil and Political Rights (ICCPR). At the regional level, the European Court of Human Rights in such cases as *Chahal* v *United Kingdom*[65] (discussed below) and *HLR* v *France*,[66] has established an absolute prohibition on the *refoulement* or return of persons to countries where they face a real risk of torture or degrading treatment at the hands of governmental authorities or non-State actors in contravention of Article 3 ECHR. This prohibition also extends to those persons who are perceived to constitute a risk to the national security of the State of asylum.

64 Article 32(3) obliges contracting States to allow refugees a reasonable period of time within which to seek admission to a third country, although States can apply such "internal measures" as they may deem necessary during this period, which presumably would include restrictions on their movement within the country.

65 *Chahal* v *United Kingdom* (1997) 23 EHRR 413.

66 *HLR* v *France* (1997) 26 EHRR 29.

2.2.2 The Position in the UK at the Time of the First Gulf War

There is little evidence to suggest that there was a heightened use of exclusion clauses at the turn of the 1990s even though asylum applications in the UK almost doubled in 1991 as compared with the previous year. In 1991, there were approximately 44,800 applications as opposed to 25,300 in 1990.[67] Between 1988 and 1992, 8,000 Iraqis claimed asylum in the UK, which constituted seven percent of all asylum applications,[68] while, as discussed above, Palestinians, who were also considered a national security threat because of the PLO's support for the actions of Saddam Hussain, are not covered by the Refugee Convention.[69] As noted above, many of those detained and deported were students and business people, including some persons who had been lawfully resident in the UK for a considerable period of time.[70]

The period subsequent to the First Gulf War also saw two important judicial decisions concerning Articles 1F, 32 and 33(2) of the Refugee Convention, the first of which remains good authority while the second is of importance to understanding the UK's legal response to the impact of the post-9/11 events in the asylum field discussed below. The leading case on the interpretation of Article 1F comes from 1996. In *T* v *Home Secretary*,[71] the House of Lords considered the meaning of 'non-political crime' for the purpose of Article 1F(b) in the case of an Algerian national who had been excluded from refugee status because of violent acts on behalf of the Islamic Salvation Front (FIS), a political organisation which had been prevented from becoming the government of Algeria by democratic means. T had admitted involvement in a bomb attack on the airport in Algiers, which had killed ten people, and in planning other raids to seize arms resulting in one further death. The House of Lords judgment was essentially in line with the guidance in the UNHCR Handbook. After an extensive consideration of foreign common law jurisprudence, Lord Lloyd, in the leading judgment, which was followed by two other judges, arrived at the following definition of a political crime:

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67 UNHCR, *The State of the World's Refugees: The Challenge of Protection 1993* (London: Penguin, 1993), at p. 157 (Annex I.5).

68 *Ibid*., at p.159 (Annex I.7).

69 Article 1D, by virtue of which the Convention does not apply to those persons who are receiving protection and assistance from other UN agencies or organs other than the UNHCR. Palestinian refugees are the responsibility of the UN Relief and Works Agency (UNRWA).

70 A.J. Carroll, "The Gulf Crisis and the Ghost of Liversidge v Anderson" (1991) 5 *Immigration and Nationality Law & Practice* 72, at p. 74.

71 *T* v *Secretary of State for the Home Department* [1996] AC 742; [1996] 2 WLR 766 (HL).

> A crime is a political crime for the purposes of article 1F(b) of the Geneva Convention if, and only if (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or government target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.[72]

Lord Lloyd found that T's criminal activities were committed for a political purpose and thus met the first subjective part of the definition. However, T did not satisfy the second objective part of this definition:

> Mr T was an active member of a terrorist organisation which was prepared to advance its aims by random killing. He was closely associated with the attack on the airport. Although the airport itself could be regarded as a governmental target, the crime as carried out was almost bound to involve the killing of members of the public. The means used were indiscriminate, and therefore the link between the crime and the political object which Mr T was seeking to achieve was too remote.[73]

The two remaining judges adopted a more radical view finding that the acts concerned were properly characterised as terrorism and consequently outside the scope of a political crime within the meaning of Article 1F(b).[74] Despite these differences of opinion, the House of Lords arrived at the same conclusion, namely that there were serious reasons for considering that T had committed a 'serious non-political crime' outside of the UK within the meaning of Article

72 *Ibid.*, at p. 800d-f.

73 *Ibid.*, at p. 801c.

74 *Ibid.*, at pp. 786-787 (Lord Mustill). See also Blake, above n. 54, at pp. 436-437, who comments: "If a sufficiently coherent definition of what terrorism actually consists of could be found, there may be advantages in this approach, and treating such crimes as acts contrary to the objects and purposes of the United Nations [Article 1F(c)] rather than distort the natural and necessary breadth of the term serious non-political offence". Indeed, such an approach appears to be taking shape in Canada. Blake, *ibid.*, citing the Canadian Supreme Court decision in *Pushapanathan* v *MIEA* [1998] 1 SCR 748.

1F(b) and therefore dismissed his appeal against the Home Secretary's decision to exclude him from refugee status.[75]

In *Chahal*,[76] the Home Secretary issued a notice to deport Mr Chahal on the grounds that his presence in the UK was not conducive to the public good for reasons of national security. The Home Secretary contended that once he had arrived at this decision it was not necessary to consider whether Mr Chahal qualified for asylum under the Refugee Convention. According to Staughton LJ's judgment, which the other two judges essentially followed, the major issue in the case was "whether the threat to life or freedom in art. 33(1) [of the Convention] has to be balanced against the danger to the security of the country in art. 33(2)".[77] In his view, "despite the literal meaning of art. 33, it would seem to me quite wrong that some trivial danger to national security should allow expulsion or return in a case where there was a present threat to the life of the refugee if that took place".[78] Furthermore, the Immigration Rules also required the Home Secretary to balance the public interest against any compassionate circumstances when considering whether deportation was the correct course of action. According to the combined effect of the Convention and the Rules, therefore, Staughton LJ concluded that such a balancing exercise was necessary.[79] However, he also found on the facts that the Home Secretary had in fact carried out this balancing exercise.[80] Although this approach has been limited significantly by the subsequent finding of the European Court of Human Rights that balancing national security interests against a threat to life or freedom is inappropriate if the applicant faces a real risk of torture, inhuman or degrading treatment in contravention of Article 3 ECHR, the decision remains relevant because it establishes the important principle that national security should not override the determination of the asylum claim, which also conforms to the widely understood interpretation of the Refugee Convention. Unfortunately, as discussed in the section below on the impact of 9/11 on asylum developments in the UK, this principle has now been undermined considerably by recent legislation.

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75 For a more in-depth discussion of this decision, see Blake, above n. 54, at pp. 434-437 and C. Harvey, *Seeking Asylum in the UK: Problems and Prospects* (London: Butterworths, 2000), at pp. 273-274.

76 *R* v *Secretary of State for the Home Department, ex parte Chahal* [1995] 1 All ER 658.

77 *Ibid.*, at p. 665c.

78 *Ibid.*, at p. 665f.

79 *Ibid.*, at p. 666e. However, Nolan LJ supported greater deference to the executive by suggesting that the scales might properly be weighted in favour of the national security interests. *Ibid.*, at p. 671ab.

80 *Ibid.*, at p. 667ef.

3. The Response to the Post-9/11 'War' on Terrorism

3.1 Immigration Law and National Security: Deportation and Detention

The response to the threat from the frightening form of international terrorism exemplified by 9/11 is misleadingly referred to as a 'war' since there is a much less well-defined enemy than a State or 'insurgent' or 'rebel' army. There is no timescale for victory. Government and a variety of review bodies accept that the threat and response is very much a long-term one:

> The growth in the use of non-negotiable means of conflict and the use of terror methods has transformed the way in which we need to respond. Those for whom prosecution and punishment hold no fear, and who are prepared to take their own lives in destroying others, do not recognise normal processes of law or fear the consequences of detection.
>
> In the more complex world of global migration and open borders, we must also face the challenges posed by international terrorists who do not hold British nationality but nonetheless have rights here under our international obligations. We must also look at how to protect ourselves from British citizens who may aid, abet or carry out acts of terrorism. In relation to the first of these, we have the opportunity of removal, drawing on the Immigration Act 1971, and where this is not possible, detention under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (ATCS Act). For both, we have the criminal law and the Terrorism Act 2000 …
>
> Although there remains a threat to the United Kingdom connected with the affairs of Northern Ireland, the main threat to the UK and its interests overseas is international, likely to be of long duration, involving groups of people engaged in long-term planning, using sophisticated new technology, science and communications available to them, skilled in practising deception and evading surveillance, and using multiple stolen or fraudulent identities. Despite successes since 11 September in disrupting Al Qaida's operations, the view of the Director General of the Security Service, as outlined in a recent lecture, is that "Al Qaida remains a sophisticated and particularly resilient terrorist group. The UK and our interests overseas are under a high level of threat from International terrorism. That level of threat has been constant for several years but the scale of the problem has become more apparent as the amount of intelligence collected and shared has increased. The absence of an attack on the UK may lead some to conclude that the threat has reduced or been confined to parts of the world that have little impact on the UK. This is not so. The initiative generally rests with the terrorists. The timing of any attack is of their choosing and for them patience is part of the struggle".

> Today's terrorists present particular challenges. Their activities are developed in loose networks of multiple contacts in many countries, difficult to penetrate, presenting severe challenges to the security authorities who seek to discover and disrupt them at an early stage of their planning. The suicide terrorist is a new problem for the West, forcing us to consider difficult legal and operational issues if we are to anticipate and hence prevent suicide attacks. International terrorists can be foreign nationals or British citizens. The Government's assessment in 2001 was that the threat came predominantly but not exclusively from foreign nationals. That remains the case.[81]

This raises the spectre of a permanent 'emergency'.[82]

The United Kingdom opted out of most of Schengen, so all borders, except with countries within the United Kingdom, count as external, and immigration control applies to all travellers including European (EU and EEA) citizens. The United Kingdom has in addition for almost 30 years operated an anti-terrorist security control on air and sea travel between both parts of Ireland and Great Britain. Since September 11 this has been extended to all internal air and sea journeys.[83] International passengers face both an immigration check and this random security check, generally by officers from the Special Branch of the police force in whose area the port or airport is situated. Since increased vigilance is at the heart of all this, measures on enhanced aviation security, while directed to other more obvious ends, have some relevance in contributing to an overall climate of enhanced security.[84] Regulation of immigration begins abroad, with management of visa control by consular officials, and continues prior to the border with use of carrier personnel as proxy immigration officials, the result of a variety of schemes imposing penalties on carriers who transport passengers with inadequate documentation.[85] Co-operation between them and

81 *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society – A Discussion Paper*, Cm 6147 (February 2004), at paras. 3-7.

82 Joint Select Committee on Human Rights, *Review of Counter-Terrorism Powers*, Eighteenth Report of Session 2003-04, HL 158/HC 173, at paras. 4, 5.

83 Terrorism Act 2000, s, 53 and Sched. 7, as amended by ATCSA 2001.

84 See Regulation (EC) No. 2320/2002 of the European Parliament and Council, 16 December 2002, OJ 2002 L355/1; Commission Regulation (EC) No. 622/2003, 4 April 2003, OJ 2003 L89/9. See also welcoming of the policy by the Parliamentary Assembly of the Council of Europe, Rec.1549 (2002), available at http://assembly.coe.int/.

85 Council Directive 2001/51/EC of June 2001 (OJ 2001 L187/45) supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 sets out three optional systems.

officials is crucial,[86] and co-operation with France and Belgium, to the extent of having United Kingdom immigration officials operating there in conjunction with their French and Belgian counterparts (juxtaposed controls), is hailed by the United Kingdom Government as a major plank in its security response.[87] The problem of 'identity theft' and 'bogus documents' necessitates measures for preventing and detecting forgeries in visa, identity and passport documentation. The United Kingdom, like the EU and a number of other Member States, is actively pursuing an agenda of adding biometric data (e.g. facial recognition, fingerprint or iris scanning) to passports.[88] Coupled with better scanning equipment, this should enable heightened security and the more rapid processing of travellers, thus also aiding convenience of movement but at no little cost to privacy interests. Unlike World Wars I and II where both enemy aliens and sympathisers were interned, the response to British citizen suspected terrorists is the use of the modified criminal prosecution approach (under the general criminal law and the permanent Terrorism Act 2000), while that towards foreign terrorist suspects is at first sight still the same as in the First Gulf War: deportation and detention pending deportation. But there are two important differences from that response described in section 2 of this chapter. The legal and constitutional context has changed substantively and procedurally/institutionally because of the *Chahal* decision, other implied legal limits set on the ancillary detention powers, and the incorporation of Convention rights into national law.

Setting substantive limitations on deportation, *Chahal* established that even a terrorist threatening a country's national security could not be deported from that country to another State if there were substantial grounds for believing

86 SN 3296/6/01 REV 6, para. 26. See also Council Decision 2003/170/JHA of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States, OJ 2003 L67/27 and Council Regulation 377/2004/EC of 19 February 2004 on the creation of an immigration liaison officers network, OJ 2004 L64/1.

87 *Border Control: Strengthened Security*, Home Office Website Information at http://www.homeoffice.gov.uk/terrorism/govprotect/borders/index.html.

88 On the United Kingdom see: Home Office Press Releases 123/2003 "Modernising Border Controls for the 21st Century" and 128/2003 "Common Standards on Biometrics Agreed by the G8"; HC Debs, Vol. 383, Col. 357 (Mr Blunkett, Home Secretary on 'Operation Hornet'). On Germany, see its Report to the UN Security Council Counter-Terrorism Committee, UN S/2002/11, at pp. 11, 13-14, S/2002/1193, at p. 17 and see E. Brouwer, "Germany: Controlling Data" in E. Brouwer, P. Catz and E. Guild, *Immigration, Asylum and Terrorism: A Changing Dynamic in European Law* (Nijmegen: Recht and Samlenleving 19, 2003), at pp.37-38 (inclusion of biometric data). On Ireland, see S/2001/1252, at p. 9, S/2002/675, at pp. 11-12. On Finland, see S/20011/1251, at p. 8. On France, see S/2001/1274 at p. 26. On the Netherlands, see S/2001/1264 at p. 9. These reports can be accessed at http://www.un.org/Docs/sc/committees/1373/.

that, if returned there, he faced a real risk of subjection to torture, inhuman or degrading treatment or punishment whether at the hands of State, or as developed in later jurisprudence,[89] non-State actors. Deportation in such circumstances breached the sending country's obligations under Article 3 ECHR. That Article was absolute, contained no 'national security' exception, and did not permit balancing the degree of risk posed to national security against the degree of risk of harm to the putative deportee. As regards the United Kingdom and the post-9/11 threat, since the only State to which the suspect could be deported would typically be one where there was a real risk of such ill-treatment contrary to Article 3 ECHR, deportation there would breach the Home Secretary's obligation to act in accordance with Convention rights. That precluded deportation, but, of itself, would have required no emergency legislation. This was required because of the second substantive limit set in *Chahal*. The Court said that Article 5(1)(f) could only support detention for purposes of deportation where there was a reasonable prospect of deportation and that was being pursued with due diligence. Accordingly, to hold someone under the ancillary detention powers attaching to deportation found in the Immigration Act 1971 – the response in the First Gulf War – would be unlawful as a breach of Convention rights. In addition, from the perspective of United Kingdom law itself the High Court had earlier held that detention pending the making of a deportation order or removal from the country was subject to limitations:

> First ... it cannot be used for any other purpose. Second, as the power is given in order to enable the machinery of deportation to be carried out, ... the power of detention ... [is] ... impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. ... [W]here it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, ... it would be wrong for the Secretary of State to seek to exercise his power of detention.[90]

Article 3 ECHR is non-derogable: the State cannot deport persons in circumstances breaching its obligations under it and seek to justify exposing people to a risk of torture etc by claiming a public emergency. How then could the Home Secretary protect the public from the terrorist threat seen to be posed by foreign nationals who cannot be deported and who cannot be prosecuted either because of insufficient admissible evidence or to maintain the confidentiality of evidence to protect security sources? To enable indefinite preventive detention, free from

89 *HLR* v *France* (1997) 26 EHRR 29; *TI* v *United Kingdom* [2002] INLR 211.

90 *R* v *Governor of Durham Prison, ex parte Singh* [1984] 1 All ER 983, at p. 985, per Woolf J.

the limitations set by the Convention rights in such circumstances, the United Kingdom derogated from Article 5(1) under the Article 15 ECHR public emergency clause in order to enact Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), the precise terms of which are considered later.

The procedural/institutional limit set by *Chahal* is equally important: the European Court of Human Rights decided that the mechanisms for review of a deportation decision (described in section 2 of this chapter) were insufficient to provide the prompt review of the legality of detention by a *court*, as required by Article 5(4) ECHR,[91] or (alone or in combination) the effective domestic remedy demanded by Article 13 ECHR.[92] As regards Article 5(4), judicial review by the courts was inadequate because the permissible depth and intensity of review was too limited; the deference required to be shown on national security matters was such that the courts were not in a real position to review whether the decisions to detain and deport were justified on national security grounds.[93] Since the advisory panel had no powers of decision, only the rendition of secret advice to the Home Secretary, and since the detainee was deprived of legal representation and given too little information on the case against him, the advisory panel, while providing a degree of control, could not be regarded as the 'court' required by Article 5(4) nor the effective remedy mandated by Article 13.[94] Moreover, as regards the violation of Article 13, neither the courts, nor the advisory panel:

> could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk [of ill-treatment contrary to Art. 3], leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security.[95]

The United Kingdom responded by establishing a new 'court' – the Special Immigration Appeals Commission (SIAC) – to review a range of immigration decisions regarding national security. Its decisions are binding, and it can see all the material on which the Home Secretary's decision was based. It operates in open and closed sessions. The individual can be legally represented and present in open sessions. Closed sessions are ones from which the individual and his

91 "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

92 "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

93 *Chahal* (1997) 23 EHRR 413, at para. 130.

94 *Ibid.*

95 *Ibid.*, at paras 153-154.

lawyer are excluded because SIAC is examining confidential security information. To assist SIAC in that task, a security cleared special advocate (a leading barrister expert in immigration law), appointed by the Attorney General, acts as counsel to the Commission and, in effect, endeavours to afford the individual a degree of protection by playing 'devil's advocate', probing the weaknesses of the security material. He or she is not, however, in any way instructed by the individual and his or her lawyer and is unable to communicate with them without SIAC's approval after seeing the security evidence.

In short, a changed legal and constitutional landscape meant that the government had to proceed, as regards those foreign nationals unable to be deported, by way of emergency legislation (Part 4 of ATCSA), complying with Article 5(4) and 13 ECHR by enabling binding review of detention decisions under that legislation by SIAC, a body very like that called for by Leigh and the intervenors in *Chahal*. In addition, following pressure in Parliament, ATCSA enhanced SIAC's status to one equivalent to the High Court, a 'superior court of record', making it the sole means of appealing against and reviewing detention decisions under ATCSA. From SIAC – as with national security immigration decisions – appeal lies on a point of law only to the Court of Appeal and thence to the House of Lords.

3.1.1 Detention without Trial

Part 4 of ATCSA enables, under a range of immigration provisions the effect of which would otherwise be limited temporally, the indefinite detention without trial of someone, not a British citizen, whom the Home Secretary certifies as a suspected international terrorist threat to national security, and who cannot be deported for a legal (typically Article 3 ECHR or its ICCPR equivalent) or practical reason. The Home Secretary can so certify such a person where he reasonably both believes that the person's presence in the United Kingdom is a risk to national security, and suspects that the person is a terrorist. A 'terrorist' is someone who is or has been concerned in the commission, preparation or instigation of acts of international terrorism, is a member of or belongs to an international terrorist group, or has links with an international terrorist group in the sense that he supports or assists it. An international terrorist group is one subject to the control or influence of persons outside the United Kingdom, where the Home Secretary suspects that the group is concerned in the commission, preparation or instigation of acts of international terrorism. ATCSA deploys the definition of 'terrorism' embodied in the Terrorism Act 2000[96] – the United Kingdom's

96 Section 1 of the Terrorism Act provides:
"(1) "terrorism" means the use or threat of action where-
(a) the action falls within subsection (2),
(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

permanent anti-terrorist legislation – an overbroad definition according with, but not created in response to, that in the EU Council Framework Decision on Combating Terrorism.[97]

As noted above these powers are inapplicable to British citizens. The Home Secretary has, however, used powers to deprive of British citizenship (however acquired), a dual national where he is satisfied that he or she has done anything seriously prejudicial to the vital interests of the United Kingdom or a British overseas territory, a statutory embodiment of the language of Article 7(1)(a) of the European Convention on Nationality.[98] The prime targets will be those

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(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it-
  (a) involves serious violence against a person,
  (b) involves serious damage to property,
  (c) endangers a person's life, other than that of the person committing the action,
  (d) creates a serious risk to the health or safety of the public or a section of the public, or
  (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section-
  (a) "action" includes action outside the United Kingdom,
  (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
  (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
  (d) "the government" means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation."

97 OJ 2002 L164/3. For criticism of the EU definition, see S. Peers, "EU Responses to Terrorism" (2003) 52 *ICLQ* 227; T. Bunyan, "The War on Freedom and Democracy", *Statewatch Analysis* No. 13, at pp. 7-8, available at http://www.statewatch.org/news/2002/sep/04freedom.htm; EU Network of Independent Experts in Human Rights, *The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threat*, (Thematic Comment, 31 March 2003) available at http://www.statewatch.org/news/2003/apr/CFR-CDF.ThemComment1.pdf, at pp. 7-8, 11-16.

98 British Nationality Act 1981, s. 40(2), (4), as substituted from April 1, 2003 by the Nationality Immigration and Asylum Act 2002. For the text of the Convention see

dual nationals who are suspected of terrorism, and removal of their citizenship would render them susceptible to deportation on security grounds or detention under ATCSA. The decision on deprivation is appealable to SIAC and, from there, on a point of law only, to the Court of Appeal.

The detention powers – especially when contrasted with detention in the First Gulf War or that at Guantanamo Bay – have been used sparingly by the Home Secretary. Perhaps this is indicative of at least some lessons learned from the intelligence debacle in that earlier conflict. Sixteen persons were certificated and detained. Two obtained release by agreeing to return to a country that would take them. But they and the others challenged certification and detention before SIAC, with mixed results.

3.1.2 Legal Challenges to Certification and Detention

The time-limited ATCSA detention powers were twice extended by Parliament, notwithstanding the currency of a variety of legal challenges. Essentially, there are three main strands to this litigation, involving different legal strategies. The first raised the compatibility of certification and detention with Convention rights, putting in issue the validity of the United Kingdom derogation under Article 15 ECHR (the 'derogation' litigation). The second (assuming the general scheme compatible with the ECHR) looked to the legal propriety of the certification and detention of each individual (the 'merits' litigation). The third strand involved the scope of SIAC's power to admit to bail a certificated and detained person.[99]

SIAC appears to have ample powers in respect of national security detentions and deportations. The effect on them of the House of Lord's decision in *Rehman*[100] needs to be considered. Rehman, a Pakistani national practising as a minister of religion (Islam) in England, was thought by the Home Secretary to have connections (as a recruiter, fundraiser and sponsor of trainees) with an Islamic terrorist organisation involved in the Kashmir conflict, so he certified that his deportation would be conducive to the public good in the interests of national security.[101] SIAC allowed Rehman's appeal. It was required to do so where it considered that the decision appealed against was not in accordance with the law or any applicable immigration rules or where it considered that the Secretary of State's discretion should have been exercised differently.[102] Here the Secretary of State's decision was held not to accord with the law or Immigra-

ETS No. 166. The Home Secretary has used this power against the radical cleric, Abu Hamza.

99 ATCSA, s. 24.

100 *Secretary of State for the Home Department* v *Rehman* [2002] 1 All ER 122.

101 *Ibid.*, at para. 1 (Lord Slynn).

102 Special Immigration Appeals Commission Act 1997, s. 4.

tion Rule 364.[103] For SIAC, conduct could only threaten the United Kingdom's national security if it were targeted at the United Kingdom, its system of government or its citizens, or, if targeted against another State, if that State would take reprisals affecting the security of the United Kingdom or its citizens. Moreover, the Secretary of State needed to prove to a "high civil balance of probabilities" the particular acts which were said to constitute that threat. This he had failed to do. The Court of Appeal allowed the Secretary of State's appeal from SIAC, and that Court's decision to do so was upheld by the House of Lords when Rehman appealed to them. Both the Court of Appeal and the House of Lords held that SIAC had deployed too narrow a definition of 'national security' and had required too high a standard of proof. The real test was whether, looking at the entirety of the case and taking account of the Home Secretary's policy on the importance to national security of international co-operation in the fight against terrorism, the individual could be said to be a danger to national security. In short it was a matter of impugning the exercise of discretion on a matter of judgment and policy by a senior and responsible member of the executive with "the advantage of a wide range of advice from people with day-to-day involvement in security matters which the commission, despite its specialist membership, cannot match".[104]

The effect of *Rehman*, in requiring so much deference to be shown to the opinion of the Secretary of State (the more so after September 11),[105] is very much to reduce SIAC's ostensibly full powers in the national security deportation field to applying principles of judicial review and compliance with Convention rights.[106] However, under the objectively worded detention powers in ATCSA, as is discussed below, their powers seem more extensive than in the national security deportation context, going far beyond the traditional *Wednesbury* review standards for irrationality, and are thus more extensive than the powers of review to which the courts limited themselves during the First Gulf War, (see section 2, above, and the courts' consideration of SIAC's powers under ATCSA, below).[107] One should here note also their Lordships' wide view of what the risk to national security entails. The risk need not be the result of a direct threat to the United Kingdom. It is not limited to action by an individual targeted at the United Kingdom, its system of government or its people. It embraces activities

103 *Rehman* [2002] 1 All ER 122, at paras. 2-5 (Lord Slynn).

104 *Ibid*., at para. 57 (Lord Hoffman); see also paras. 23-26 (Lord Slynn).

105 *Ibid*., at para. 29 (Lord Steyn) and most graphically at para. 62 (Lord Hoffman).

106 *Ibid*., at paras. 17, 26 (Lord Slynn), 49-54 (Lord Hoffman) (listing no factual basis/no evidence, and irrationality [*Wednesbury* unreasonableness] as grounds).

107 See the decisions of the Court of Appeal in *A and Others: the 'merits' case* [2004] EWCA Civ 1123, at paras. 46-52 (Pill LJ), 233-238 (Laws LJ), 335-341, 360-378 (Neuberger LJ); and in *Secretary of State for the Home Department* v *M* [2004] EWCA Civ 324, at paras. 15-16, 33-34.

directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom that affect the security of the United Kingdom or of its nationals. Given the current state of world affairs, action against a foreign State can indirectly affect the security of the United Kingdom. The means open to terrorists both in attacking another State and attacking international or global activity by the community of nations are capable of reflecting on the safety and well-being of the United Kingdom or its citizens. Factors to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently, whether directly or indirectly, be put at risk by the actions of others include the sophistication of terrorist weaponry, the rapidity of movement of persons and goods, and the speed of modern communications. The interests of the state needing protection include its military defence, its democracy, and its legal and constitutional systems. The reciprocal co-operation between the United Kingdom and other States in combating international terrorism can promote its national security; such co-operation may itself foster such security "by, inter alia, the United Kingdom taking action against supporters within the United Kingdom of terrorism directed against other states".[108]

All courts, including SIAC, must show this necessary degree of deference when approaching the Home Secretary's decision on a security matter. As regards, decisions by the appellate courts, this involves 'double deference' in decision-making; an appeal lies from SIAC on a point of law only, and an appellate court must also accord a degree of respect to the decision of the expert lower 'court' which, in the case of SIAC and its security cleared membership, has seen all the material the Home Secretary saw.

3.1.2.1 The 'derogation' litigation

This strand of litigation has now been through all relevant United Kingdom courts. In SIAC it was successful in part. In the Court of Appeal the challenge was wholly unsuccessful. However, in a decision showing a very welcome departure from a constitutional and legal tradition of undue judicial deference to executive opinion in times of emergency or when the executive then or otherwise intones the mantra of national security, the House of Lords on 16 December 2004, issued a declaration under section 4 of the HRA that the detention without trial scheme (Part 4 of ATCSA) is incompatible with Convention rights.[109] It is, firstly, incompatible with Article 5 read with Article 15 ECHR as going beyond what was necessitated by the exigencies of a public emergency threatening the life of the nation (disproportionate). Secondly, it was incompatible with

108 *Rehman* [2002] 1 All ER 122, at paras. 15-17 (Lord Slynn, with whose views the others concurred).

109 *A (FC) and others (FC)* v *Secretary of State for the Home Department* [2004] UKHL 56.

Article 14 read with Article 5 ECHR as being unjustifiably discriminatory on grounds of nationality/national origin.

This decision, by eight opinions to one, by the highest court in the land, however, did not procure the release of the detainees, nor an immediate change in the law. This reflects the nature of the constitutional settlement from 1688 as 'tweaked' by the relationship between lawmakers and courts embodied in the HRA 1998. In stark contrast to the position in most countries with a higher law constitution, the guardian of which is its Supreme/Constitutional court, the HRA preserves the United Kingdom's key constitutional principle of parliamentary sovereignty (judicial inability to hold invalid an Act of Parliament). Hence a declaration of incompatibility does not invalidate the scheme or deprive it of legal effect. It remains fully in force. Instead, the declaration is directed to the lawmakers (the executive/legislature partnership) thereby putting political pressure on them to respond to it by repealing the detention scheme. The lawmakers are not obliged to do so, and could do nothing, leaving the individuals to pursue their case in Strasbourg. Indeed, the Home Secretary's attitude to adverse decisions on other aspects of the litigation on ATCSA detainees, noted below, suggested that, with a General Election looming, such a 'wait and see' response would have been likely, especially if their Lordships were closely divided on the issue. That has not proved the case. The new Home Secretary, Charles Clarke, on January 16 2005 responded to the declaration of incompatibility by announcing to the House of Commons that he would seek renewal of the detention powers in March only for so long as necessary to procure from parliament legislation replacing the detention scheme with a legislative regime empowering him to impose on any terrorist suspect, whatever his or her nationality and whatever the terrorism involved, a control order, capable of embodying a spectrum of controls ranging from reporting to the police at one end to house arrest at the other.[110] This chapter offers later some thoughts on the incompatibility of that now enacted scheme – the Prevention of Terrorism Act 2005 – with Convention rights. It proceeds first to examine more closely the decisions given in the derogation litigation by SIAC, the Court of Appeal and the House of Lords.

The challenge to the Convention rights aspect was initially upheld by SIAC, which declared the relevant ATCSA provisions incompatible with Article 5 read with Article 14 ECHR as discriminatory on grounds of national origin, since those terrorist suspects threatening security who held British citizenship could not be detained. That decision was overturned by the Court of Appeal[111] since the proper pigeonhole for the legislative scheme was 'immigration' which of necessity distinguishes, as recognised in international law, between citizens and aliens. Moreover the greater threat to security (paying the due deference

110 HC Debs, Vol. 430, Cols. 305-324.

111 *A and Others* v *Secretary of State for the Home Department* [2003] 1 All ER 816.

to the opinion of the Home Secretary required by law)[112] came from foreign nationals, so that the detention only of such nationals was not discrimination contrary to Article 14 ECHR. The two groups were not similarly situated for purposes of comparison. Crucially, both SIAC and the Court of Appeal – the former paying the due deference to executive opinion that the law requires, and the latter deferring to that opinion and to SIAC as the only court which had seen the 'security' evidence' – held that there existed in the United Kingdom an imminent public emergency threatening the life of the nation, because of the devastation possible if a September 11 type attack by Al Qa'eda operatives were not prevented.[113] That conclusion was thought to be reinforced since both courts saw the United Kingdom, standing shoulder to shoulder with the United States in the war on terrorism, as at greater risk than other European States.[114] Again paying the required due deference to executive opinion, both SIAC (on one reading of its judgment) and the Court of Appeal held that the detention measures taken did not go beyond the exigencies of that emergency situation required. They were not disproportionate and, the deprivation of liberty imposed was subject to adequate safeguards, because of the availability of SIAC appeal and review options.[115] The decision on the adequacy of safeguards is supportable, but the former finding on proportionality may be criticised since neither court explored the viability of less restrictive alternatives which might be sustainable under the ECHR without an Article 15 derogation. These perforce would have to fall well short of effective 'house arrest' (e.g. electronic tagging, physical and other electronic surveillance), and would have significant privacy implications and resource costs.[116]

As noted in the section of the chapter on its establishment after *Chahal*, SIAC has to hear the 'security' evidence in closed session – that is in the absence of the detainee and his lawyer and only disclosing to them such of the material as is consonant with security. Consequently, an issue of 'fair hearing', stipulated in Articles 5(4) and 6 ECHR, arose. That issue had to be adjudged in light of the SIAC scheme providing that in closed session security cleared counsel to the Commission, appointed by the Attorney General, plays 'devil's advocate' with the security material, but does not as such take instructions from the detainee or his lawyer and cannot disclose to them matters relating to the security material. The Court of Appeal merely stated gnomically that the right to a fair hear-

112 *Rehman* [2002] 1 All ER 122, cited n. 100, above.

113 *A and Others* [2003] 1 All ER 816, cited n. 111, above, at paras. 33-35, 83-90.

114 *Ibid.*

115 *Ibid.*, at pp. 831-836, 844-846.

116 See D. Bonner, "Managing Terrorism While Respecting Human Rights? European Aspects of the Anti-terrorism Crime and Security Act 2001" (2002) 8 *EPL* 497, at pp. 517-520.

ing contains a national security exception.[117] Since Article 6 ECHR itself only does so as regards the public character of the proceedings (i.e. it permits the exclusion of press and public), it is assumed here that the Court must have had in mind the indications of the European Court of Human Rights in *Chahal* that such a system, modelled on one version of the Canadian security regime, would satisfy ECHR procedural fairness requirements and afford an effective remedy.[118] Doubts very much remain on that point.[119] The Court of Appeal in *M* considered that, while the procedures used in SIAC were not ideal, it was wrong to undervalue the process because it was possible through the special advocate system to ensure that detainees can achieve justice.[120] It was also impressed "by the openness and fairness with which the issues in closed session were dealt with by those who were responsible for the evidence given before SIAC".[121]

And so to the seminal decision of the House of Lords on December 16, 2004, a decision welcome as a marked departure from a traditional judicial attitude of extreme deference to executive opinion when the red flag of national security is waved. Given that established constitutional and legal tradition of deference, and given the weak-willed approach of the European Court of Human Rights to Article 15 ECHR, the Home Secretary may have thought legal challenge an irritant but not a particular problem. Especially so when the House of Lords in a decision (*Rehman*) written before but delivered after 9/11 had castigated SIAC for too narrow an approach to national security and for insufficient deference to the Home Secretary's expertise in security matters. The deferential tradition was very much to the fore in the Court of Appeal decision in *A and Others*.

SIAC found that an imminent emergency existed, not because an attack was imminent, but because of the devastation that could occur if one took place. The House of Lords held by eight opinions to one (Lord Hoffman dissenting on this point and others indicating a degree of scepticism about the claim) that SIAC had not erred in law in that finding, so their Lordships were not empowered to overturn that. Moreover, 'public emergency' is a question *par excellence* primarily if not exclusively a matter for the executive rather than the judiciary. Lord Hoffman's much reported dissent – doubtless reflective of his South African experience – is hard to reconcile with the deferential approach he set out for SIAC in *Rehman* immediately after 9/11.

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117 *A and Others* [2003] 1 All ER 816, above n. 111, at p. 836 (para. 57).

118 *Chahal* (1997) 23 EHRR 413, above n. 76, at para. 131. The Court reiterated this in *Al-Nashif* v *Bulgaria* (2003) 36 EHRR 37, citing SIAC, but declined to give an opinion on whether the SIAC system conformed with the Convention (at para. 97).

119 See Amnesty International Report on the Anti-Terrorism, Crime and Security Bill at http://web.amnesty.org/library/index/ENGEUR450172002.

120 *Secretary of State for the Home Department* v *M* [2004] EWCA Civ 324, at para. 34.

121 *Ibid.*, at para. 34.

On the proportionality question (are the indefinite detention measures strictly required by the exigencies of that emergency situation?), the Lords considered that courts were not required to show so much deference here. Their job, said Lord Bingham, is to protect liberty and thus to subject the Home Secretary's decision to use detention to very close scrutiny.[122] Part 4 of ATCSA was not strictly required – it was unnecessary and disproportionate because if British citizen terrorist threats could be dealt with by measures short of detention, so could foreign nationals in the United Kingdom. Moreover, it was hard to see that the detainees were so very dangerous given that the UK was happy to let them go to any country that would take them.

The Lords further held that the measures were discriminatory on grounds of nationality/national origin (Article 14 [non-discrimination] read with Article 5 ECHR [liberty and security or person]). Non-discrimination demands that 'like cases be treated alike'. The key problem lies in setting the parameters for the appropriate grouping warranting equal treatment. This depends through which 'telescope' one views the subject-matter. If it is marked 'immigration', this produces no problems in terms of discrimination as the Government argued and the Court of Appeal accepted; national and international law on immigration permits differentiation between nationals and non-nationals. But if, as SIAC and the House of Lords correctly thought, the appropriate telescope was marked 'security' the picture seen through it changes. The House held that the group similarly situated was composed of all those terrorist suspects threatening national security who could not be prosecuted and who could not *for one legal reason or another* be removed from the UK. That group comprised both British citizens (national and international law says that one cannot deport one's own citizens) and foreign nationals whose removal is precluded by Article 3 ECHR. Since only the latter could be detained, this was unjustifiable discrimination.[123]

3.1.2.2 The 'merits' litigation

Here results have been mixed. One detainee (M) was released when the Court of Appeal upheld SIAC's decision to allow his appeal against certification and cancel the certificate.[124] Certification and detention are only possible where the suspect is linked to Al Qa'eda.[125] M, a Libyan national, was connected to the Libyan Islamic Fighting Group (LIFG). Exercising its own 'objective' judgment on the matters of reasonable suspicion and belief, SIAC considered him a terrorist but not one connected to Al Qa'eda. The Court of Appeal stated:

122 *A(FC) and others* [2004] UKHL 56, above n. 109, paras. 36-44, esp. 42. See also paras 80-81 (Lord Nicholls), 100-101, 107-108 (Lord Hope), para. 177 (Lord Scott).

123 *Ibid.* The opinion of Baroness Hale at paras. 234-239 examines this very well.

124 *Secretary of State for the Home Department* v *M* [2004] EWCA Civ 324.

125 *Ibid.*, at para. 11.

> What is critical is the value judgment which SIAC had to make as to whether there was reasonable ground for the belief or suspicion required. As to this question SIAC was the body qualified by experience to make a judgment. SIAC came to a judgment adverse to the Secretary of State. It has not been shown that this decision was one to which SIAC was not entitled to come because of the evidence, or that it was perverse, or that there was any failure to take into account any relevant consideration. It was therefore not defective in law. … This is not a case in which SIAC overruled a decision of the Secretary of State. SIAC had to come to its own decision on the material which as we have indicated was tested [by means of the special advocate] in a way in which it could not be tested before the Secretary of State.[126]

The Home Secretary's response to SIAC's decision had been illuminating, procuring an injunction to prevent release pending appeal, with Home Office lawyers seeking to dress up something they did not like as a point of law and making a mockery of justice.[127] Unfortunately, frustration at losing here, as with comments on the bail litigation (seen by Amnesty International as undermining the judiciary) and his other criticisms of the 'civil liberties/human rights lobby', suggests less than wholehearted commitment to the substantive and institutional constraints on executive action of the rule of law and human rights instruments.

The appeals of the other detainees were rejected by SIAC. There were, in its view, reasonable grounds for the suspicion and belief of the link with terrorist groupings linked with Al Qa'eda as regards each of these detainees of North African origin. Given the lack of formal structure of Al Qa'eda, its various associated groups or networks, or the links between them, SIAC thought it:

> unrealistic … to define the [necessary] connection in a way which suggests that no more than one remove or link is permissible in order for the link to the public emergency, derived as it is from the activities of Al Qa'eda and its associates to be made.[128]

SIAC accepted the Home Secretary's assessment:

126 *Ibid*., at paras. 33, 34.

127 A. Gillan, "Judges accuse Blunkett over terror suspect", *The Guardian*, 9 March 2004; A. Travis, "Judge of principle shows he's his father's son", *The Guardian*, 19 March 2004.

128 Para. 112 of the SIAC judgment, cited in *A and Others: the 'merits' case* [2004] EWCA Civ 1123, at para. 62.

> that there is a network, largely of North African extremists, in this country which makes up a number of groups or cells with overlapping members or supporters. They usually have origins in groups which had or may still have a national agenda, but whether that originating group does or does not have a national agenda, whether or not it has direct Al Qa'eda links, whether or not the factions are at war in the country of origin, such as the GIA and GSPC in Algeria, those individuals now work together here. They co-operate in order to pursue at least in part an anti-West terrorist agenda. Those less formal groups are connected back to Al Qa'eda, either through the group from which they came which is part of what can be described as the Al Qa'eda network, or from other extremist individuals connected to Al Qa'eda who can be described as part of Al Qa'eda itself or associated with it. They are at least influenced from outside the United Kingdom. These informal, ad-hoc, overlapping networks, cells or groups constitute 'groups' for the purposes of the 2001 Act.[129]

As regards those detained, SIAC considered that:

> It does not matter whether the individuals support all the means of war or terror urged by Al Qa'eda, including the deliberate mass killing of civilians by suicide actions. They can still support or assist a group connected with Al Qa'eda and in some way increase its capability for launching terrorist operations of whatever sort which threaten the United Kingdom.[130]

An appeal to the Court of Appeal was rejected.[131] That Court considered that SIAC – bearing in mind the limitations set in *Rehman* – had applied to the cases the correct level of scrutiny.[132] More controversially, however, by a majority it held that SIAC, not bound by strict evidentiary rules, could take on board even material obtained by torture of a third party abroad, so long as no United Kingdom personnel administered it or connived at its use.[133] It is submitted that the dissenting judgment is to be preferred. The majority view is at odds with obligations under the Torture Convention and, in the view of the Council of Europe's Human Rights Commissioner, difficult to reconcile with the absolute nature of Article 3 ECHR.[134] It also raises fair trial issues under Article 6 ECHR. Moreover requiring SIAC (and thus in reality also the Secretary of State) to be satis-

129 Para. 302 of the SIAC judgment, cited *ibid.*, at para. 63.

130 Para. 303 of the SIAC judgment, cited *ibid.*, at para. 63.

131 *A and Others: the 'merits' case* [2004] EWCA Civ 1123 (August 11, 2004).

132 *Ibid.*, at paras. 49-51 (Pill LJ), 233-238 (Laws LJ), and 360-378 (Neuberger LJ).

133 *Ibid.*, at paras.124-139 (Pill LJ), 250-255 (Laws LJ).

134 Joint Select Committee on Human Rights, above n. 82, at paras. 26-29; Council of Europe Doc. CommDH (2005) 6, paras. 26, 27.

fied of the propriety or otherwise of the provenance of evidence is an important element in evaluating its reliability.[135] The dissenting judge held that evidence such as confessions or incriminating statements obtained through torture were inadmissible, but that 'physical' or real evidence (e.g. a chemical) obtained as a result, was not.[136] He placed the burden of proving that non-physical material was not obtained by torture firmly on the Secretary of State.[137] By a majority the Court also held that SIAC had jurisdiction to consider appeals by those whose certificates had been revoked by the Home Secretary because they had left the country.[138] The 'torture' issue was raised by the detainees in the derogation issues appeal to the House of Lords, but the decision of 16 December 2004 confines itself to the derogation issues. The appeal from the 'merits' decision of the Court of Appeal will be heard in the Lords in Autumn 2005.

3.1.2.3 The 'bail' litigation

SIAC admitted to bail another detainee (G) whose mental condition was severely adversely affected by detention in prison conditions, but subject to such tight conditions as clearly to amount to a deprivation of liberty – electronic tagging and house arrest without outside communication – contrary to Article 5 were it not for the Article 15 ECHR derogation.[139] The Court of Appeal ruled that there was no right of appeal from that decision (a matter to be rectified by legislation in the next session of Parliament) ,[140] and while a judicial review was left to be determined at a future date, the Home Office seems now to have accepted the SIAC decision. The Home Secretary's initial reaction was, however, troubling, criticising SIAC's decision in terms that should not be used in relation to courts by a principal Secretary of State, and seen by Amnesty International as undermining the judiciary and the rule of law.[141] On 14 October 2004, SIAC ordered the lifting of the blanket ban on visitors and the restriction barring G from

135 *Cf.* B. Barder (former SIAC member), *The Times*, letters page, 16 August 2004; S. Jenkins, "Why isn't your conscience torturing you, Mr Blunkett?" *The Times*, 18 August 2004, p. 16.

136 *A and Others: the 'merits' case* [2004] EWCA Civ 1123, at paras. 492-506 (Neuberger LJ).

137 *Ibid.*, at paras. 507-521 (Neuberger LJ).

138 *Ibid.*, at paras. 140-149 (Pill LJ), 350-359 (Neuberger LJ). Laws LJ disagreed for reasons set out in paras. 275-276.

139 Above n. 82, evidence from JUSTICE, at pp. 76-83; compare *Guzzardi* v *Italy* [1981] 3 EHRR 333.

140 *G* v *Secretary of State for the Home Department* [2004] EWCA Civ 265.

141 A. Gillan, "Release of 'terrorist' shocks Blunkett", *The Guardian*, 24 April 2004. The Home Secretary has promised to change the law.

leaving his flat.[142] It has recently rejected returning him to jail for alleged breach of conditions.[143] Since the Lords' ruling on the derogation issues, several more detainees have been released on similar bail conditions.[144] In addition, Home Secretary Blunkett released one detainee unconditionally in 2004 as did Home Secretary Clarke in January 2005.[145]

3.1.3 Criticism by Parliamentary and Other Review Bodies

Parliamentary scrutiny of the ATCSA proposals resulted in a narrowing of the detention powers (an objectivisation of the terms of the Home Secretary's powers by inserting the requisites of reasonable suspicion and belief)[146] and subjecting those powers to a sunset clause,[147] and to the requirement that, pending sunset, the powers would lapse without periodic renewal by both Houses of Parliament having the benefit of a report on use of the powers by a government appointed reviewer.[148] In addition, it was established that the first renewal after 15 months operation should be preceded by review by a Committee of Privy Counsellors of such ATCSA powers as that Committee chose to consider.[149] The powers were renewed after 15 months,[150] and again in March 2004,[151] but those reviews, and continuing scrutiny by parliamentary select committees, have confirmed the powers as controversial, with two of the bodies – the Newton Committee of Privy Counsellors[152] and the Joint House of Commons/House of Lords Select Committee on Human Rights[153] calling for the withdrawal of the Article 15 ECHR derogation and the repeal of the detention without trial powers, condemned by them – and as we have seen by SIAC and the House of Lords – as discriminatory on grounds of nationality and national origin, and thus contrary to Article 5 ECHR read with Article 14 ECHR. Both committees

142 R. Verkaik, "Judge tells Blunkett to relax restrictions on terror suspect", *The Independent*, 15 October 2004.

143 *The Guardian*, 7 February 2005.

144 *The Guardian*, 31 January and 11 March 2005.

145 *The Guardian*, 1 and 7 February 2005.

146 ATCSA, s. 21.

147 ATCSA, s. 29. The statutory powers are set to expire on November 10, 2006. Their continuance beyond that date or their replacement would require a new Act of Parliament.

148 ATCSA, s. 28.

149 ATCSA, ss. 122-123.

150 SI 2003/1016, art. 2(2).

151 SI 2004/751, art. 2.

152 Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report* HC 100 (2003-2004), D.4, paras. 172-259.

153 Above n. 82.

preferred reliance on increased use of criminal prosecution and the admission at criminal trial of evidence from communications intercepts. The terms of reference for Lord Carlile, the Government appointed reviewer, do not cover the propriety of the derogation and the proportionality of the response, but he has made clear that his continuance as reviewer is predicated on his continued satisfaction on those matters. He has twice concluded that the certification process operated properly and that those detained were appropriately detained.[154] He also noted that, contrary to the belief of some, civil servants were very much concerned to keep down the number of detentions.[155]

3.1.4 Other Critiques

Amnesty International,[156] Human Rights Watch,[157] JUSTICE,[158] Liberty,[159] and the Islamic Human Rights Commission[160] have consistently called for the withdrawal of an unnecessary derogation and the repeal of the ATCSA detention powers. They have also expressed grave concern about their discriminatory use and the damaging focus on the Islamic community as contributing to a climate of Islamophobia. Both the British Psychological Society[161] and the Medical Foundation for the Care of Victims of Torture[162] have expressed grave concern about the impact on mental health of indefinite detention without trial, and the latter organisation its concern over SIAC's willingness to accept evidence that may have been obtained through torture. The Council of Europe's Human Rights Commissioner thought such willingness difficult to reconcile with the

154 Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003 by Lord Carlile of Berriew QC, at para. 36.

155 *Ibid.*, para. 38.

156 See evidence to the Joint Select Committee on Human Rights, above n. 82, at pp. 66-67.

157 "Neither Just nor Effective" (July 2004), found at http://hrw.org/backgrounder/eca/uk/index.htm.

158 See evidence to the Joint Select Committee on Human Rights, above n. 82, at pp. 76-83.

159 See e.g. "The Impact of Anti-terrorism Powers on the British Muslim Population" June 2004, found at http://www.liberty-human-rights.org.uk/resources/policy-papers/2004/anti-terror-impact-brit-muslim.PDF; "Reconciling Security and Liberty in an Open Society" the Liberty Response, August 2002 found at http://www.liberty-human-rights.org.uk/resources/policy-papers/2004/liberty-and-security.pdf.

160 See "The Hidden Victims of September 11: Prisoners of UK Law" September 2002, found at http://www.ihrc.org/.

161 See evidence to the Joint Select Committee on Human Rights, above n. 82, at pp. 72-75.

162 *Ibid.*, at pp. 84-85.

absolute nature of obligations under Article 3 ECHR.[163] The European Committee on the Prevention of Torture, reporting in June 2005 in respect of its 2004 visit, considered the treatment of some ATCSA detainees as inhuman and degrading, a finding hotly disputed by the Government.[164]

3.1.5 The Governmental Response[165]

Home Secretary Blunkett perceived ATCSA detention as essential, but was closely examining what changes can be made to the criminal and deportation processes to reduce reliance on detention. He recognised some threat from British citizens but regarded extending ATCSA detention powers to them as a disproportionate response to the emergency, incompatible with Article 15 ECHR. The Cabinet rightly rejected his more draconian proposals for establishing a SIAC type criminal trial process for terrorist cases and lowering in it the criminal standard of proof to the civil standard of balance of probabilities. Stigmatising convictions achieved through a process devoid of the safeguards necessary to public confidence would be counterproductive and tarnish the criminal process generally. They would also be unlikely to comply with Article 6 ECHR without an Article 15 derogation.

His successor as Home Secretary, Charles Clarke, initially greeted the House of Lords' ruling in a similarly resistant manner to that of his predecessor. Having considered the judgment, however, he announced to the House of Commons on January 26, 2005, that the government accepted the declaration of incompatibility in respect of ATCSA Part 4. It was therefore to be replaced as soon as possible with new legislation: detention in prison would go.

It was sensible to accept the declaration of incompatibility. Ignoring it would devalue the constitutional settlement embodied in the HRA and be a further sign of the weak rooted nature of the United Kingdom's human rights' culture. Not doing so would have meant that it would have been nigh impossible to get the House of Lords as a legislative chamber to renew Part 4 of ATCSA in March 2005. Furthermore, not doing so at all would have enhanced the risk of adverse comment by the European Court of Human Rights, to which the case will be taken in due course, on the efficacy of a declaration of incompatibility as a remedy, thus necessitating another redrawing of the constitutional balance between lawmakers and judiciary over the validity of legislation.

Instead of detention without trial, the Government announced it would deal with terrorist suspects in a number of ways. Prosecution to conviction of a criminal offence – with all its benefits of transparency and safeguards – remains

163 Council of Europe Doc. Comm DH (2005) 6, paras. 26, 27.

164 Council of Europe Doc CPT/Inf (2005) 10 (report), paras. 19, 20; CPT/Inf (2005) 11 (response), 15, 45-54.

165 *Discussion Paper*, above n. 81, at pp. 5-16.

the preferred mode.[166] But Government shocked observers by rejecting the use in court of intercept evidence,[167] a position now said to be under review.[168] This is sensible since enabling its use has won the support of an unlikely set of bedfellows: Liberty; two Metropolitan Police Commissioners and the Leader of HM Opposition, Michael Howard.

The Government is also through diplomatic channels seeking urgently to enable more deportations of foreign national suspects to countries of origin. The aim is to get clear written assurances from proposed destination States in North Africa and the Middle East that the putative deportee will not, if returned, be subjected to ill-treatment contrary to Article 3 or to the death penalty.[169] But this is fraught with difficulty. Many may see such written assurances – with some reason – as worthless pieces of paper. Implementing the policy will inevitably lead to litigation to prevent removal, all the way to the European Court of Human Rights. Courts on the way will impose a 'no deportation' order as an interim measure of protection pending final decision on the matter. As the Council of Europe's Commissioner for Human Rights has commented:

> There is clearly a certain inherent weakness in the practice of requesting diplomatic assurances from countries in which there is a widely acknowledged risk of torture. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot be sufficient to permit expulsions where a risk is nonetheless considered to remain. There are sufficient examples already of breached assurances for the utmost caution to be required.
>
> Such assurances must, certainly, as the UN Special Rapporteur on Torture has noted, be unequivocal and an effective monitoring mechanism be established. It is equally important that the State in question does not condone or practise torture and is able to exercise an effective control over the actions of state and non-state actors. Given the extremely serious consequences at stake it would be vital that the deportation of foreigners on the basis of diplomatic assurances are subject to judicial scrutiny capable of taking all these elements, the content of the assurances, and the likelihood of their being respected into account.[170]

166 HC Debs, Vol. 430, Col. 307.

167 *Ibid.*; HC Debs, Vol. 430, Col. 19 *WS*.

168 HC Debs, Vol.430, Col.1457 (Hazel Blears MP) (8 February 2005).

169 HC Debs, Vol. 430, Col. 307.

170 Council of Europe Doc. Comm DH (2005) 6, paras. 29, 30.

Most controversially, the Government sought and obtained, after an epic parliamentary battle, legislative power to subject to a 'control order' *any* terrorist suspect whatever his or her citizenship and whatever the terrorism involved. During that battle, issues over proper safeguards for extraordinary powers were inappropriately used by the Government to try in an election year to portray the opposition parties as 'soft on terrorism', when the real difference between the parties is really on how terrorism can best be dealt with. Home Secretary Clarke was "well aware that the proposals … represent a very substantial increase in the executive powers of the State in relation to British citizens".[171] Statements that such powers are without equal since World War II ignore the parallel of exclusion orders used against British citizens from Northern Ireland, removing them from or excluding them from mainland Great Britain in the period 1974-1998 under successive Prevention of Terrorism (Temporary Provisions) Acts.

The main provisions of the Prevention of Terrorism Act (PTA) 2005 entered into force on March 11, 2005.[172] ATCSA 2001 sections 21-32 (detention without trial) were repealed with effect from March 14, 2005, without prejudice to ongoing appeals or claims for compensation.[173] Instead there is a new regime of 'non-derogating' and 'derogating' control orders. The distinction between these orders reflects the distinction drawn in ECHR jurisprudence between interferences with freedom of movement (guaranteed by Protocol Four ECHR, to which the United Kingdom is not a party)[174] and situations where the degree of restriction, moving nearer to the 'close confinement' or 'imprisonment' end of the spectrum, constitutes an interference with liberty and security of person guaranteed by Article 5 ECHR which stipulates an exhaustive range of permissible heads of legitimate interference with that crucial freedom.[175]

'Derogating' control orders, which would enable, for example, 'house arrest', have not yet been invoked, and require parliamentary approval of an Article 15 ECHR designated derogation order under the HRA 1998.[176] This is not yet thought necessary: the restrictions applicable by means of 'non-derogating' con-

171 HC Debs, Vol. 430, Col. 309.

172 There is no provision for commencement so under standard common law rules it becomes effective on Royal Assent.

173 PTA 2005, s. 16(2)-(4).

174 Even if it were bound by it, then, subject to 'proportionality' in each case, the range of restrictions available under a 'non-derogating control order' might well comply with the legitimate restrictions on freedom of movement within a State set out in the Protocol. See further the sources cited in the next note.

175 *Guzzardi* v *Italy* (1981) 3 EHRR 333. See further C Ovey and R White, *Jacobs and White: European Convention on Human Rights*, (OUP, 3rd ed., 2002), pp. 103-105 [Art. 5] and chap. 18 [Protocol Four].

176 PTA 2005, ss. 1(10), 4(3)(c), (7)(c), (10)(c); HRA 1998, s. 14(1).

trol orders, issued by the Home Secretary after he has secured the approval of a High Court judge, are deemed sufficient to meet the security threat.[177]

The obligations imposable under either form of control order are those that the Home Secretary or the court (as may be) "considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity".[178] A non-exhaustive list of obligations includes a prohibition or restriction on possession of certain articles; restrictions on association or communication with others; electronic tagging; curfews; restrictions on movement within the UK; and a requirement that the person remain in a particular place.[179] As Home Secretary Clarke informed the Commons:

> At the top end, the obligations that could be imposed could include a requirement for the individual to remain in a particular place at all times, or some similar measure that amounted to a deprivation of liberty. The place in question will vary with the threat posed by the individual. It could be the individual's own home, or his or her parents' home. It could even, in certain circumstances, be in accommodation owned and managed by the Government. However, such severe forms of control order would require a derogation from article 5 of the ECHR before they could be implemented.[180]

The Home Secretary and/or the High Court will have to decide at what point in any case the degree of restriction shades from one on freedom of movement into one amounting to a deprivation of liberty and security protected by Article 5 ECHR, so that a 'non-derogating' order is impermissible and a 'derogating' control order must be sought.[181]

Consistently with the policy of prosecution where possible, if he considers that the involvement in terrorism-related activity of which an individual is suspected may involve an investigable offence, the Home Secretary must consult the appropriate chief officer of police about whether there is evidence available that could realistically be used for the purposes of a prosecution of the individual for

177 HC Debs, Vol. 431, Cols. 151-155 (Home Secretary) (22 February 2004).

178 PTA 2005, s. 1(3).

179 PTA 2005, s. 1(4)-(8). HC Debs, Vol 431, Col. 152 (22 February 2005).

180 HC Debs, Vol 431, Col. 152 (22 February 2005).

181 If the Home Secretary went for a 'non-derogating' control order in circumstances where the degree of restriction was thought by the High Court to raise issues under Article 5 ECHR, that Court could refuse permission, or, if it had been granted, quash the order at full hearing stage (see below) as flawed in the light of the principles of judicial review (illegality). The Home Secretary would have to appeal that decision and/or apply instead for a derogating control order. See also the view of the Human Rights Commissioner in Council of Europe Document Comm DH (2005) 6, para. 17.

an offence relating to terrorism.[182] After an order is made, he must inform the relevant chief officer of that, so that the chief officer, consulting the prosecuting authorities as appropriate, can secure that investigation of the individual's conduct with a view to his prosecution for an offence relating to terrorism is kept under review, consulting throughout the period during which the control order has effect.[183] Breach of a control order is an arrestable and imprisonable offence.[184]

Just as the degree of restrictions that may be imposed varies as between 'non-derogating' and 'derogating' control orders, so does the applicable decision-maker, the process for making them, and the relative degree of judicial control of their imposition. The whole process has become much more *'judicialised'*, with the Home Secretary, who wants a control order against an individual, largely having to seek the issue of one from the High Court rather than making one of his own volition and having to defend it in court later. The needs of 'due process/fair hearing' for transparency, and the principles of 'equality of arms' they embody, remain subordinated to the demands of 'security' for keeping certain intelligence and evidential material 'secret' from the suspect and his or her lawyer, with the application of 'closed session' proceedings in the High Court operating under SIAC-type procedures and involving the participation of the 'special advocate' device to assist the court at the full-hearing stage.

The test for making a '*non-derogating' control order* is whether there are reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity and the decision-maker (the Home Secretary or the court, as the case may be) further considers it necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.[185] A 'non-derogating' control order (one whose restrictions are not of sufficient degree to amount to a deprivation of liberty guaranteed by Article 5 ECHR as opposed to limiting free movement guaranteed by Protocol Four by which the UK is not bound), can be made by the Home Secretary (subject to court challenge after the event) only in two circumstances: where in his opinion the urgency of the situation precludes his seeking court permission to issue the order or the order was made before 14 March 2005, against an individual who, at the time it is made, is an individual in respect of whom a certificate under section 21(1) of ATCSA was

182 PTA 2005, s. 8(1), (2).

183 PTA 2005, s. 8(3)-(7).

184 PTA 2005, s. 9. One alleged condition-breaker has been remanded in custody for trial in the Crown Court: see Liberty, "Anti-terror control orders descend into cruel and futile farce", Press Release, April 28, 2005: found at http://www.liberty-human-rights.org.uk/press/2005/control-orders-cruel-and-futile-farce.shtml.

185 PTA 2005, s.2(1).

in force (i.e. the existing 'Belmarsh' detainees).[186] Otherwise, having decided that there are grounds to make such an order against that individual, he must apply to the High Court for permission to make the order. That hearing will generally be *ex parte* (with no representations from the suspect who will generally not even know of the application). The court may only refuse permission to issue an order where it considers that the Home Secretary's decision to go for one on the basis that the test was met was 'obviously flawed' in terms of the principles applicable on judicial review. If permission is granted, the order is made and executed, and the court must arrange for a full hearing on the order – in which the individual and his lawyer, subject to the security considerations mentioned above, can participate and challenge the order. At that hearing, the court must confirm the order unless satisfied that the decision to make it at all and/or the restrictions to impose is flawed in the light of the principles of judicial review, in which case it can quash it or one or more of the obligations imposed by it, or give directions to the Secretary of State for the revocation of the order or for the modification of the obligations it imposes.[187] The principles of judicial review are illegality, procedural impropriety or irrationality – the 'Diplock' trilogy – plus breach of Convention rights, including 'proportionality'.[188] 'Proportionality' issues could clearly be raised under any of a number of ECHR Articles where protected rights and freedoms are restricted by a 'non-derogating' control order: Articles 8 (privacy/family life and respect for correspondence), 9 (freedom of religion [e.g. prohibiting an individual from preaching, as has been done in one case]), 10 (expression) and 11 (assembly and association). These Articles, of course, permit restrictions necessary in a democratic society to protect legitimate aims such as national security, the rights and freedoms of others or prevention of crime and disorder. The key question is whether they are 'proportionate', bearing in mind the degree to which the right and freedom is restricted and the nature of the legitimate aim. In addition, each of those Articles requires that the restriction in question be "in accordance with the law" or "prescribed by law". That a control order meets that particular 'principle of legality' criterion of Convention compatibility may seem obvious, given the clear and generally readily understandable provisions of the Act. But ECHR jurisprudence also imports into that criterion of lawfulness a requisite that the exercise of the power be subject to adequate judicial control,[189] and the scheme may be vulnerable on that ground given the limited nature of the courts' powers on 'non-derogating'

186 PTA 2005, s. 3(1).

187 PTA 2005, s. 3(10), (11).

188 PTA 2005, s. 3(2).

189 See, for example, *Al-Nashif* v *Bulgaria* (2003) 36 EHRR 37, paras. 121-123, a case on Article 8 ECHR in respect of a clash between family life and expulsion for alleged terrorist activities

control orders, which fall short of a 'merits' review.[190] Article 14 – freedom from discrimination – could also be raised in conjunction with any of these other provisions; even where a restriction on one of these other rights and freedoms is compatible as a proportionate measure, it can nonetheless constitute a violation of that other provision read with Article 14 if operated or imposed in a discriminatory manner.

A *'derogating control' order* (one interfering because of the degree of its restrictions with 'liberty and security of person' protected by Article 5 ECHR, e.g., house arrest) will require an Article 15 designated derogation order approved by both Houses of Parliament.[191] Appropriately, judicial control is tighter here. But it is questionable:

> whether the degree of prior judicial involvement provided for in the Government's amendments in relation to derogating control orders is compatible with the Convention requirement that deprivations of liberty must be lawful ... whether an *ex parte* hearing to determine whether there is a *prima facie* case for making a control order, followed by an *inter partes* hearing which is still not fully adversarial because of the use of special advocates in closed sessions, constitutes a sufficient safeguard against arbitrary detention to satisfy the basic requirement of legality.[192]

The Home Secretary must apply to the High Court for a 'derogating' control order against a person,[193] and the putative subject can be arrested and detained by the police where it is thought necessary to ensure that he is available to be given notice of the order if it is made. The person can be so held for up to 48 hours, and the usual rights granted to those arrested under the Terrorism Act 2000, of access to a lawyer and to have someone informed of the detention, apply here without ability to postpone their exercise.[194] Detention thereafter is a matter for the High Court.[195] The court must hold an immediate preliminary hearing on the application (which may be held without the suspect being notified, present or allowed to make representations) to decide whether to make such an order and, if so, to direct the holding of a full hearing to determine whether to confirm the order (with or without modifications). The test to be applied by the High Court varies according to whether it is considering the matter at the

190 Joint Commons/Lords Select Committee on Human Rights, Tenth Report of Session 2004-2005, *Prevention of Terrorism Bill*, HL 68/HC 334, paras. 11-17.

191 PTA 2005, ss. 4, 6; HRA 1998, s. 14(1).

192 Joint Committee Report, above n. 190, para. 10 (footnote references omitted).

193 PTA 2005, s. 4.

194 *Ibid.*, s. 5(1)-(3).

195 *Ibid.*, s. 5.

preliminary hearing of the Secretary of State's application for such an order, or considering at the later full hearing whether to confirm the order issued at that earlier stage. The standard for confirmation is more stringent than for the initial issuing of the order.

At the *preliminary hearing*, the court in essence:

> considers whether there is a *prima facie* case for the making of an order. It could be said to be equivalent to the decision by a criminal court as to whether there is a case to answer. This is a low threshold for the making of a judicial order which deprives the individual of liberty, particularly when one bears in mind the width of the definition of conduct which is capable of amounting to involvement in terrorism-related activity. It falls far short of a requirement that the court be satisfied itself of the necessity for an individual to be deprived of their liberty.[196]

To delineate more fully the court's powers at this stage, the court may make a 'derogating' control order against the individual in question if it appears to the court (a) that there is material which (if not disproved) is capable of being relied on by the court as establishing that the individual is or has been involved in terrorism-related activity (the *prima facie* case aspect); (b) that there are reasonable grounds for believing that the imposition of obligations on that individual is necessary for purposes connected with protecting members of the public from a risk of terrorism; (c) that the risk arises out of, or is associated with, a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 ECHR; and (d) that the obligations are or include derogating obligations of a description set out for the purposes of the designated derogation in the derogation order. The obligations that may be imposed by a 'derogating' control order at this stage include any which the court has reasonable grounds for considering are necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity.[197]

At the *full hearing*, higher standards are applicable. The court may confirm the control order (with or without modifications) only if (a) *it is satisfied, on the balance of probabilities*, that the controlled person is an individual who is or has been involved in terrorism-related activity; (b) *it considers* that the imposition of obligations on the controlled person is necessary for purposes connected with protecting members of the public from a risk of terrorism; (c) it appears to the court that the risk is one arising out of, or is associated with, a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 ECHR; and (d) the obligations to be imposed by the order or (as the case may be) by the order as modified are or include derogating obligations of a

196 Joint Committee Report, above n. 190, para. 6 (footnote references omitted).

197 PTA 2005, s. 4(3), (4).

description set out in the designation order. Otherwise it must revoke the order made at the preliminary hearing.[198] A 'derogating' control order lasts for up to six months, unless revoked earlier, but can be renewed for further periods of up to six months.[199] If invoked, however, exactly the same 'derogation' questions as arose in *A and Others* would arise for the High Court and, on appeal on a point of law, for the Court of Appeal and the House of Lords: is there a public emergency threatening the life of the nation; are the restrictions strictly required by the exigencies of that emergency (necessity, proportionality and appropriate safeguards issues); and are the measures applied in a non-discriminatory fashion and consistently with the United Kingdom's other obligations under international law?

Overt discrimination between citizens and non-nationals has been removed from the face of the law, and the focus has rightly been shifted from 'immigration' to broader matters of 'security'. Concern remains that communities, popularly but mistakenly, regarded as 'immigrant', and Muslims in particular, will be disproportionately and inappropriately targeted in the deployment of these ostensibly neutral powers.[200]

Relevant to an appraisal of the 'proportionality' of control orders are safeguards: judicial control; and subjecting the Act to annual renewal by Order approved by both Houses of Parliament, preceded by an independent review of the operation of the legislation.[201] Before making such an Order the Home Secretary must consult the independent reviewer, the Intelligence Services Commissioner, and the Director-General of the Security Service (MI5).[202] Moreover, the Home Secretary every three months must lay a report before Parliament about his exercise of the control order powers during that period.[203] But also pertinent is the arguable implication from their Lordships' finding, in *A and Others*, that ATCSA Part 4 was disproportionate, namely, that the degree of restriction then being applied in the case of British citizen terrorist threats (such physical and electronic surveillance as the law then permitted) was a proportionate response to the degree of threat then faced by the nation. In other words, the Government may have to make it clearer why restrictions imposable through control orders, previously thought unnecessary for British citizen terrorist suspects, have now become so.

198 *Ibid.*, s. 4(5).

199 *Ibid.*, s. 4(5)-(9).

200 Compare the use of immigration powers in the 'Roma Rights' case: *Regina* v *Immigration Officer at Prague Airport and another, ex parte European Roma Rights Centre* [2004] UKHL 55.

201 PTA 2005, ss. 13, 14(2)-(7).

202 *Ibid.*, s. 13(3).

203 *Ibid.*, s. 14(1).

There also remain issues about the compatibility of the 'closed session' and 'special advocate' processes, transplanted now from SIAC to the High Court, with ECHR provisions on fair hearing and equality of arms. The Joint Commons/Lords Select Committee on Human Rights suggested that:

> Some obligations imposed by the Home Secretary may also amount to the determination of a civil right within the meaning of Article 6(1) ECHR, for example a restriction in respect of his work or other occupation or in respect of his business, and in such cases the limited degree of judicial control available may not be sufficient to satisfy the Convention requirement that there be a right of access to a court with full jurisdiction.[204]

Interferences with movement, like national security deportation decisions might, however, not be embraced by the term 'civil rights and obligations' in Article 6 ECHR.[205] The Council of Europe's Human Rights Commissioner thought it arguable that 'non-derogating' control orders fell within the autonomous ECHR notion of 'criminal charge', thus attracting Article 6 standards.[206] Deprivation of liberty and security of person by means of a 'derogating' control order, if ever invoked, would attract the full 'due process' elements of Article 5(4), unless that provision was itself a subject of the derogation. The House of Lords in *A and Others*, having allowed the appeal on other grounds examined above, chose not to deal with arguments under Articles 3 and 6.[207] It remains to be seen whether SIAC-type processes in the High Court, with their additional involvement of the special advocate (something not present with the adviser system), the power of binding decision, plus the status of that court and its ability to see and better probe all of the material before the Home Secretary, provide enough procedural safeguards in this 'security' context to satisfy ECHR Articles, 5(4), 6(1) and 13.[208]

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204 Ninth report of 2004-05, *Prevention of Terrorism Bill: Preliminary Report*, HL 61/ HC 389, paras. 16-17.

205 See N. Blake and R. Husain, *Immigration, Asylum and Human Rights*, (Oxford: Oxford University Press, 2003), at p. 211.

206 Council of Europe Doc. Comm DH (2005) 6, paras. 20-22.

207 [2005] UKHL 56, para. 71 (Lord Bingham, giving the 'lead' opinion in which the others in the majority concurred).

208 For critiques of the SIAC processes see House of Commons Constitutional Affairs Committee, Seventh Report of Session 2004-05, *The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates,* HC 323-I, esp. chaps. 3 and 4; Council of Europe Documents Comm DH (2005) 6 (Human Rights Commissioner) and CPT/Inf (2005) 10 (Committee for the Prevention of Torture).

3.2 Asylum and Refugee Law

The post-9/11 climate has clearly had a profound impact on the application of international refugee law, which is best indicated in the response of the UNHCR in issuing guidelines on the interpretation of the exclusion clauses in the Refugee Convention, discussed in section 2 above, and in developments at the EU level where security considerations have played a role in the drafting of the refugee qualification and asylum procedures Directives. The treatment of the Convention's exclusion clauses in the former is a good indication of this and has been discussed in some depth in chapter 1. Given that the UK has opted in to the above EU Directives, its approach to exclusion clauses and the treatment of national security issues in the refugee status determination procedure will have to be informed by the implementation of these measures. To date, however, no parliamentary bills have been introduced to reflect the changes at the EU level. However, provisions have been adopted at the national level in recent anti-terrorism and asylum and immigration legislation, which undermine the protections previously afforded to asylum seekers and recognised refugees.

The risk of the asylum seeker and refugee being labelled 'an international terrorist' is today much greater given the broad definition of terrorism in section 1 of the Terrorism Act 2000. Moreover, the proscription of a large group of organisations (including organisations such as the Liberation Tigers of Tamil Eelam (LTTE) and the Kurdistan Workers' Party (PKK)), and the section 11 offence of membership of a proscribed organisation has blurred the distinction between asylum seeker and terrorist.[209] These enhanced measures also increase the risk of the individual asylum seeker suspected of involvement in terrorist activity, as broadly defined above, from being excluded from protection under Article 1F of the Refugee Convention. The link between anti-terrorism activity and asylum is now explicit in Part 4 of ATCSA, which is labelled 'Immigration and Asylum'. In addition to the Home Secretary's power to certify non-nationals as 'suspected international terrorists', which may result in their indefinite detention, Part 4 also contains provisions, which essentially preclude resort to the proper substantive determination of an asylum claim if it is deemed that the exclusion clauses apply or if the person concerned is considered to be a danger to national security in accordance with Article 33(2) of the Refugee Convention. Under section 33 of ATCSA, the Home Secretary has the power to certify that the asylum claimant is not entitled to protection from *refoulement* under Article 33(1) of the Refugee Convention because of Article 1F and Article 33(2) and that removal from the UK would be conducive to the public good. In such a case, the individual may only appeal to SIAC, which is only empowered to consider the statements made in the Home Secretary's certificate and not the substantive asylum claim, i.e. whether the person has a well-founded fear of persecution.

209 N. Finch, "Refugee or Terrorist" (2002) 16 *Immigration, Asylum and Nationality Law* 146, at p. 146.

If SIAC upholds the certificate, the Home Secretary can proceed to remove the person concerned from the UK, but if SIAC concludes that the certificate is unjustified then the Home Secretary is required to consider the substance of the claim. Information about the kind of reasons used to make section 33 certificates is available from the judgments in *A* v *Secretary of State for the Home Department*,[210] decided by the Court of Appeal in August 2004, which concerns a number of challenges to certifications under ATCSA. For example, in the case of appellant B, the section 33 certificate was issued because he belonged to the Salafist Group for Call and Conduct (GSPC), a proscribed organisation under the Terrorism Act 2000, had contacted leading members of the organisation in the UK and had played an important role in procuring telecommunications equipment and logistical support, which according to the Home Secretary, was for Chechen Mujahaddin extremists and the GSPC in Algeria.[211] In the case of C, the reasons for issuing the section 21 and section 33 certificates were the same:

> You are an active supporter of [Egyptian Islamic Jihad (EIJ)] which is designated a proscribed organisation under Part 2 of the Terrorism Act 2000. Earlier this year, EIJ merged with Al Qa'eda. You were sentenced in absentia … to fifteen years imprisonment by an Egyptian military court for your role in trying to recruit serving Egyptian Army officers for the EIJ and in planning operations on behalf of the EIJ, both in Egypt and abroad.[212]

This deference in section 33 of ATCSA to executive discretion over consideration of the substance of the asylum application is inconsistent with the structure of the Convention, the UNHCR Handbook and the subsequent 2003 Guidelines on Application of the Exclusion Clauses as well as previous authority in the UK, which all point to the need to consider the substantive claim first before a view is taken regarding exclusion.[213] Clearly, section 33 of ATCSA removes the need to strike a balance, as articulated in the UNHCR Handbook, between the

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210 *A, B, C, D, E, F, G, H, Mahmoud Abu Rideh, Jamal Ajouaou* v *Secretary of State for the Home Department* [2004] EWCA Civ 1123 (CA) (hereafter *A* v *Home Secretary*).

211 *Ibid.*, at para. 185 (Laws LJ).

212 *Ibid*, at para. 199. In the third case of D, in respect of whom a s. 33 certificate was also issued, the Home Secretary's case was that "D was an active supporter of the GIA [Armed Islamic Group], used false documents, and was involved with other extremists …". *Ibid*., at para. 204.

213 See respectively Blake, above n. 54, at p. 431, and the Immigration Tribunal authority in *Singh* (10860), cited by Finch n. 209, above, at p. 146. Blake, *ibid*., contends: "In Article 1(F)(b) it is clear that the crime that there are reasonable grounds to suspect that the claimant has committed is a crime committed abroad before the

nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. Blake and Husain note that these provisions reverse the modest restraints available previously and articulated in the Court of Appeal's judgment in *Chahal* where the Home Secretary had to weigh up national security interests with the gravity of the harm faced if the individual had been excluded from protection. Consequently, the only safeguards now available would be a claim under Article 3 ECHR.[214] Moreover, the exceptions listed in the recent UNHCR Guidelines on Exclusion,[215] which might permit consideration of exclusion before the determination of inclusion issues, would arguably not be applicable unless strong evidence can be adduced demonstrating the applicant's involvement in particularly serious crimes such as those in Article 1F(c) cases, i.e. acts contrary to purposes and principles of the UN.

The Immigration and Nationality Directorate's Asylum Policy Instructions (APIs) are still awaiting more detailed amendments in respect of the question of exclusion,[216] presumably to take account of some of the above changes. The current APIs state that "[c]aseworkers should refuse asylum to those who fall under the exclusion clauses. It may nevertheless be appropriate to grant Discretionary Leave in such cases. Any decision to refuse asylum on grounds of the exclusion clauses should be taken by a Senior Caseworker."[217] According to the APIs, discretionary leave is to be granted when the applicant does not qualify for asylum or humanitarian protection,[218] but where removal would be unlawful or inappropriate. Further guidance is issued in accordance with the API on

flight to seek status. Its character will therefore fall to be determined against the background of the state of flight".

214 N. Blake and R. Husain, above n. 205, at pp. 338-339.

215 Above n. 62.

216 The API on 'Assessing the claim' deals with the exclusion clauses at para. 12. It refers, however, to the API on Article 1F for further information but then notes that this instruction has not yet been issued and that any enquiries should be directed to the Asylum Policy Unit. The APIs are available from the web site of the Immigration and Nationality Directorate at http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/policy_instructions/apis.html.

217 *Ibid.*, at para. 12.1.

218 According to the API, above n. 216, at para. 13, "humanitarian protection should be granted where the applicant does not qualify for asylum but where if removed, he would face a serious risk to life or person arising from the death penalty, unlawful killing, torture, inhuman or degrading treatment or punishment". The most recent Government statistics on asylum do not provide a further breakdown of the figures with reasons why discretionary leave or humanitarian protection are granted. In 2003, 3,235 or five per cent of asylum applicants were granted discretionary leave or humanitarian protection. See J. Dudley, *Control of Immigration: Statistics, United Kingdom, 2003*, Home Office Statistical Bulletin 12/04 (24 August 2004), at para. 12 (see http://www.homeoffice.gov.uk/rds/pdfs04/hosb1204.pdf).

discretionary leave. With regard to Article 1F, the APIs underline, in accordance with the UNHCR Handbook and the more recent Guidelines, that it may be invoked after a person has been recognised as a refugee, if it subsequently came to light that they had committed in the past a serious non-political crime in another country, or at the stage of the initial consideration of his or her claim for asylum.[219] The Court of Appeal recently confirmed this position:

> Article 33 applies to putative and recognised refugees alike, and Article 1F disqualifies a person from refugee status whether or not he has earlier been recognised as a refugee. Any other interpretation produces bizarre results which cannot have been intended by the drafters or the States Parties to the Convention.[220]

The APIs also emphasise that any cases where asylum seekers admit to having committed violent acts for political reasons should first be considered under the inclusion clauses and if the person concerned qualifies for asylum only then should caseworkers consider whether invoking the exclusion clause would be justified.[221] On their face, the APIs appear to be in conformity with international refugee law and human rights law in respect of the position of recognised refugees who are convicted of serious crimes while in the UK. In accordance with Article 32 of the Refugee Convention, the APIs stipulate that expulsion of such refugees must meet due process of law requirements and additionally that the UK's other international obligations must be met, including compliance with Article 3 ECHR.[222]

Article 33(2) of the Refugee Convention, which permits States to exclude refugees from the protection of the Convention if they "having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community of that country" has now been applied in section 72 of the Nationality, Immigration and Asylum Act 2002. Section 72(2) reads:

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219 API, above n. 216, at para. 12.4. With regard to exclusion at the initial consideration stage of the asylum application, the API notes that "Article 1F may also be used at the initial consideration stage where asylum is to be refused because the Article 1A criteria have not been met but the applicant's conduct would mean his or her exclusion even if they did meet the Article 1A criteria".

220 *A* v *Home Secretary*, above n. 210, at para. 202 (Laws LJ).

221 API, above n. 216, at para. 12.5.

222 *Ibid*., para. 12.4.

> A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is
> (a) convicted in the United Kingdom of an offence, and
> (b) sentenced to a period of imprisonment of at least two years.

Under section 72(4), a person will also "be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if (a) he is convicted of an offence specified by order of the Secretary of State". The Home Secretary laid an Order before Parliament in July 2004, which came into force on August 12, 2004. The Order lists *inter alia* a whole host of specific offences under the anti-terrorist legislation.[223] Both of these provisions, however, have been criticised by the British Refugee Council because they may result in the refugee being removed to possible persecution for having committed relatively minor offences, such as the destruction of identity documents without reasonable excuse, which is made an offence punishable with a maximum penalty of imprisonment of up to two years under section 2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, and criminal damage and minor theft, which are specified in the aforementioned Order. Moreover, with regard to the application of section 72(4), a sentence of at least two years' imprisonment is not required.[224] It should be underlined here, in line with the earlier discussion, that refugees facing removal under these provisions, would still be able to rely on the protection of Article 3 ECHR.

4. Conclusion

This study has demonstrated the impact of the First Gulf War and the post-9/11 'war' on terrorism on immigration law and asylum law in the United Kingdom. It has shown that both areas were significantly affected, at some significant cost to civil liberties and rights of challenge to adverse decisions. The perceived security threat in each period under study, but particularly that post-9/11, has aided governmental efforts, in the face of criticisms from the Right, to implement a range of laws and policies, which have interpreted the exceptions afforded by the Refugee Convention to the principle of non-*refoulement* very broadly and in a way that is hardly compatible with the more measured views of the UNHCR, thus rendering the climate colder for all asylum seekers. In immigration law, the prime restriction has been detention without trial under immigration powers. In terms of numbers detained, the response post-9/11 has been more muted than in the First Gulf War. However, detention without trial of foreign terrorist sus-

223 SI 2004/1910.

224 Refugee Council, "Asylum and Immigration Act 2004: main changes and issues of concern" (August 2004), at p. 14 (available from http://www.hmso.gov.uk/acts/en2004/2004en19.htm).

pects – the central element in the United Kingdom's response in immigration law terms to 9/11 – is not sustainable under the ECHR having been found by eight of a nine member panel of the House of Lords to be a disproportionate response to a public emergency threatening the life of the nation. The control order aspect of the Government's proposed response to that court's declaration of incompatibility will, in terms of 'non-derogating' control orders, raise ECHR issues in a number of spheres, compatibility turning on 'proportionality' in each case, and possibly, raising issues about a too limited scope of judicial supervision, and possible discriminatory application. If 'derogating' control orders are ever made, the issue of compatibility with Article 5 ECHR will raise the same questions as in *A and Others*: is there a public emergency threatening the life of the nation; are the measures strictly required by the exigencies of that emergency (the necessity, proportionality and appropriate safeguards issues); and are the measures applied in a non-discriminatory fashion? Quite rightly the focus has moved from 'immigration' to 'security', focussing on the degree of the threat regardless of citizenship. But concern will remain that communities, popularly but mistakenly, regarded as 'immigrant' will be disproportionately and inappropriately targeted in the deployment of these powers.

The study reveals, in both immigration and asylum law, the vital importance of international standards and enforcement machinery, given the extent of governmental power in the national security area, and a need to move away from the arguably undue degree of deference United Kingdom judges have traditionally deemed necessary to accord executive opinion on these sensitive matters, and their willingness, to date, to sanction as admissible in ATCSA detention without trial decisions evidence obtained by torture. The welcome decision of the House of Lords in *A and Others (the derogations issues)* is a positive step in the right direction, hopefully reflecting an enhanced judicial willingness in the Human Rights Act era to protect all within their jurisdiction from draconian and arbitrary governmental power.

Chapter 4 Immigration, Asylum, and Terrorism: How Do They Inter-relate in Germany?

Ulrike Davy

1 Introduction

German soldiers were not actively engaged in Gulf War I or the post-11 September war on terrorism. Coincidentally, however, Germany reflected upon fundamental changes in immigration and asylum law in the early 1990s as well as in the early 2000s. Yet, the relationship between immigration, asylum, and terrorism was conceived of very differently. In the early 1990s, measures combating terrorism did not directly relate to immigration and asylum law. Rather, they were primarily connected to criminal law. In the aftermath of the attacks of 11 September 2001, measures against terrorism and changes in immigration law were intrinsically entwined.

2 Immigration, Asylum and Terrorism in the Aftermath of Gulf War I

2.1 Terrorism: The Phenomenon

The word 'terrorism' as a legal term was first introduced in 1975/76. In May 1975, the Conservative Party in Parliament[1] – then in opposition – formally submitted a Bill on combating terrorist criminal groups.[2] The governing coalition of Social Democrats and Liberals followed suit, avoiding, however, any reference to 'terrorism' in the title of their bills. They simply referred to amendments to the Criminal Code (*Strafgesetzbuch*), the Criminal Procedure Act (*Strafprozess-*

1 The term 'Conservative Party' and the term 'Conservatives' refer to a parliamentary coalition between two parties having seats in the *Bundestag* (first chamber of Parliament): the *Christlich-Demokratische Union* and the *Christlich-Soziale Union* (CDU/CSU).

2 Entwurf eines Gesetzes zur Bekämpfung terroristischer krimineller Vereinigungen (Bill on combating terrorist criminal groups), 21 May 1975 (Gesetzentwurf der Fraktion der CDU/CSU), BT-Drs. 7/3661.

Elspeth Guild and Anneliese Baldaccini (eds.), Terrorism and the Foreigner ... *177-232.*
 ISBN 90 04 15187 7.

ordnung), the Act on the Organisation of Courts (*Gerichtsverfassungsgesetz*), and the Federal Act on legal counsels (*Bundesrechtsanwaltsordnung*).[3] The Act on amendments to the Criminal Code, the Criminal Procedure Act, the Act on the Organisation of Courts, and the Federal Act on legal counsels was finally published as law in August 1976.[4] Colloquially, the Act was and is nevertheless called the 'Anti-Terrorism Act',[5] because it was clearly prompted by the terrorist activities Germany was exposed to in the early 1970s.

2.1.1 RAF-Terrorism

Around 1970, a group of persons – Andreas Baader, Gudrun Ensslin, and Ulrike Meinhof being the most well-known – organised themselves as the 'Red Army Faction' (*Rote Armee Fraktion,* short, RAF). The first generation of RAF members had close links with the student movement of the late 1950s and the 1960s. The members of the group were opposed to Adenauer's policy of rearmament based on nuclear weapons, and to US policies and military tactics *vis-à-vis* Vietnam, and took a critical stance towards the Shah's regime in Iran. In the late 1960s, the group's protest took a different form. Members of the group planted incendiary bombs in shopping malls, robbed banks, attacked US military sites in Germany, and threatened the life of high-ranking German officials. In 1972, Andreas Baader, Holger Meins, Gudrun Ensslin, and Ulrike Meinhof were arrested. All were accused of murder and of the formation of a criminal group (*Bildung einer kriminellen Vereinigung*). When the trials finally began in 1975, Germany was hit by another wave of terrorist attacks, this time primarily committed by second generation members of the RAF who demanded the liberation of the accused. In March 1975, Peter Lorenz, the leader of the Conservative Party's section of Berlin was kidnapped; in April 1975, the German embassy in Stockholm was attacked, and two attachés were shot dead.

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3 Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches, der Strafprozeßordnung, des Gerichtsverfassungsgesetzes und der Bundesrechtsanwaltsordnung v. 4. 6. 1975 (Gesetzentwurf der Fraktionen der SPD und der FDP), BT-Drs. 7/3729; Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches, der Strafprozeßordnung, des Gerichtsverfassungsgesetzes und der Bundesrechtsanwaltsordnung v. 1. 9. 1975 (Gesetzentwurf der Bundesregierung), BT-Drs. 7/4005.

4 Gesetz zur Änderung des Strafgesetzbuches, der Strafprozeßordnung, des Gerichtsverfassungsgesetzes, der Bundesrechtsanwaltsordnung und des Strafvollzugsgesetzes (Act on amendments to the Criminal Code, the Act on Criminal Procedure, the Act on the Organisation of the Courts, the Federal Act on Legal Counsels, and the Act on the Execution of Sentences), 18 August 1976, BGBl. I S. 2181. The Act came into force on 20 September 1976.

5 See, e.g., v. Bubnoff, in H.-H. Jescheck, W. Ruß and G. Willms, eds, *Strafgesetzbuch, Leipziger Kommentar. Großkommentar*, (Berlin: de Gruyter, 10th edition, 1988), Sec. 129a.

The German Parliament quickly decided to act and to strengthen sanctions in order to undermine the willingness of young people to join the RAF. The Anti-Terrorism Act 1976 inserted a new criminal offence in the Criminal Code, termed "formation of a terrorist group" (*Bildung terroristischer Vereinigungen*). Under the new Sec. 129a(1) Criminal Code, it was an offence to form or to support a group of persons aiming to commit murder, manslaughter, or genocide, to take hostages or kidnap persons in order to compel others to do something, or to commit offences dangerous to public safety, such as arson. From then on, members or supporters of terrorist groups, who committed such acts, were liable to imprisonment for up to ten years.[6] Secondly, the Anti-Terrorism Act 1976 made it an offence not to immediately report to the police any offences committed under Sec. 129a(1) that came to the individual's knowledge.[7] That provision was targeted at a broader segment of the public. In fact, Parliament assumed that a considerable number of people not directly involved in terrorism nonetheless felt some sympathy for the activities of the RAF. Investigations of the police were deemed to be seriously hampered by a widespread unwillingness to share information.[8] The new sanction under Sec. 138(2) Criminal Code (imprisonment of up to five years or imposition of a fine) was meant to overcome such unwillingness. Thirdly, Parliament assumed that the RAF detainees somehow used the contact with their counsels to conspire with members of the RAF still at large. To undercut those communications, the Anti-Terrorism Act 1976 also widened the rules to allow the exclusion of counsels from the trial.[9]

Whether or not the Anti-Terrorism Act 1976 proved effective is still under dispute.[10] Many of the first generation members of the RAF were – in any case – tried for murder or manslaughter, offences which were punishable with up to lifelong imprisonment.[11] With respect to these members of the RAF, there was actually no need to rely additionally on Sec. 129a(1) Criminal Code (formation of a terrorist group). First generation members were fully liable under existing law which authorised sanctions exceeding by far the sanctions provided for by Sec. 129a Criminal Code. The Anti-Terrorism Act 1976 was indeed more

6 Anyone forming such a group or joining the group as a member faced imprisonment ranging from six months to five years. Ringleaders faced imprisonment ranging from one year to ten years.

7 Sec. 138 para. 2 Criminal Code as amended by the Anti-Terrorism Act 1976.

8 See, e.g., the Bill BT-Drs. 7/3661, above n. 2, at p. 4, and the Bill BT-Drs. 7/4005, above n. 3, at p. 10.

9 See Sec. 138a para. 4 and 5 Act on Criminal Procedure as amended by the Anti-Terrorism Act 1976.

10 See, e.g., R. von Plottnitz, "§ 129a StGB: Ein Symbol als ewiger Hoffnungsträger" (2002) *Zeitschrift für Rechtspolitik* 35/8, pp. 351–354.

11 See Secs. 211 and 212 Criminal Code.

radical. The Act was aimed at people not yet involved in RAF terrorism, but likely to become involved. People sympathising with the RAF were meant to be discouraged by the sanctions. People without a criminal record suddenly faced a severe criminal conviction for supporting the RAF, even if actual attacks of RAF members did not occur. However, the Anti-Terrorism Act 1976 was no immediate deterrence. On the contrary, in April 1977, the Federal Chief Prosecutor (*Generalbundesanwalt*) Siegfried Buback was murdered, and the RAF claimed responsibility. In July 1977, the banker Jürgen Ponto was killed, and the RAF again claimed responsibility. And in September 1977, the president of the top organisation for employers, Hanns Martin Schleyer, was kidnapped, and murdered, when it became clear that the Government was not ready to give in and free Baader, Ensslin, and Jan-Carl Raspe. Baader, Ensslin, and Raspe killed themselves when they learned that the attempt at blackmailing the Government had failed.

The RAF resumed terrorist activities in 1985/86 when members launched attacks on US military bases, murdered Ernst Zimmermann (the President of the BDLI – *Bundesverband der deutschen Luft- und Raumfahrtindustrie, Federal Association of the German aviation and spacecraft industry*), murdered a member of the Siemens board of directors and a high-ranking official of the Foreign Office. The German Parliament acted promptly for a second time. The governing coalition of Conservatives and Liberals felt that existing sanctions for forming or otherwise supporting terrorist groups should be tightened even further in order to send an unambiguous signal that the Government was dedicated to the rule of law and not inclined to accept acts of terrorism.[12] This time, the official title of the act explicitly referred to terrorism. Under the Act on Combating Terrorism 1986,[13] any person forming or participating (as a member) in a group aiming to commit certain offences faced imprisonment ranging from one year to ten years. If the perpetrator acted as a ringleader, he or she faced minimum imprisonment of three years. Other forms of support could lead to a prison term ranging from six months to five years. However, even after the 1986 amendments, the number of convictions under Sec. 129a Criminal Code remained small.[14] In the 1980s and 1990s, opposition parties – Social Democrats, the Green Party,

12 See Entwurf eines Gesetzes zur Bekämpfung des Terrorismus (Bill on combating terrorism), 31 October 1986, BT-Drs. 10/6286 (Gesetzentwurf der Fraktionen der CDU/CSU und FDP). The Social Democrats opposed the Bill. See Motion for a resolution, 3 December 1986, BT-Drs. 10/6654.

13 Gesetz zur Bekämpfung des Terrorismus (Act on combating terrorism), 19 December 1986, BGBl. I S. 2566.

14 R. von Plottwitz, above n. 10, at p. 352.

PDS[15] – asserted time and again that Sec. 129a Criminal Code was outdated and should be abolished accordingly.[16]

It is worthwhile to note that the original concept of terrorism under German criminal law did not require that terrorist acts served a certain purpose, such as the purpose to intimidate a population or to compel a government to do something. To commit a crime under Sec. 129a(1) Criminal Code, it sufficed that the perpetrator was part of a group aiming to commit murder, manslaughter, take hostages, or commit arson. The absence of a defined 'terrorist' purpose was basically in line with the approach of the international conventions on terrorism of that time.[17] Since States had, for decades, been unable to agree on a common definition of 'terrorism', conventions were confined to just circumscribing certain acts declared to be 'offences' under the conventions.[18]

Things changed after the attacks of 11 September 2001. On 20 September 2001, the Council of the EU reached the consensus that a common understanding of terrorism was highly desirable under the circumstances.[19] On 27 December 2001, the Council was in fact able to agree on a definition of terrorism.[20] Under the Common Position 2001/931/CFSP terrorism was mainly defined by three elements: certain acts, the effects of the acts (damage), and the purpose of the acts (intimidation, compelling of a government, destabilisation).[21] The definition was by and large confirmed by the Council Framework Decision of 13 June 2002

15 *Partei des Demokratischen Sozialismus* (Party succeeding the Unity Party of the former German Democratic Republic).

16 Entwurf eines Zweiundzwanzigsten Strafrechtsänderungsgesetzes (22. StrÄndG), 19 November 1984, BT-Drs. 10/2396; Entschließungsantrag der SPD: Zehn Jahre danach – offene Fragen und politische Lehren aus dem 'Deutschen Herbst' (I, II), 15 March 1989, BT-Drs. 11/4219; Kleine Anfrage der PDS zu den 'Terroristengesetzen', 24 January 2000, BT-Drs. 14/2581.

17 See, e.g., the Convention for the Suppression of Unlawful Seizure of Aircraft 1970; the Convention for the Suppression of Unlawful Act Against the Safety of Civil Aviation 1971, UNTS Vol. 974, No. 14118, pp. 178–184; the International Convention Against the Taking of Hostages 1979; the International Convention for the Suppression of Terrorist Bombing 1998.

18 See, e.g., Article 1 of the 1971 Convention (above n. 17): "Any person commits an offence if he unlawfully and intentionally ... performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft ...".

19 Press Release No. 12019/01 (Presse 327). See also Proposal for a Council Framework Decision on combating terrorism, 19 September 2001, COM(2001) 521 final and Coleman in this volume, at section 3.5.

20 Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), OJ 2001 L 344/93.

21 *Ibid.,* Article 1.

on combating terrorism.[22] The impact of EU action on German law was basically twofold. Firstly, any opposition against Sec. 129a Criminal Code was silenced. It became unthinkable that Germany would abandon her Anti-Terrorism law at that particular time. Secondly, Parliament amended the Criminal Code in order to implement the Council Framework Decision of 13 June 2002. Again, it is interesting to note that the approach of Sec. 129a(1) Criminal Code was not completely replaced by the approach of the EU definition. Instead, the EU definition was additionally inserted in Sec. 129a(2) Criminal Code.[23] The exact relationship between the two definitions remains unclear.

By the early 1990s, activities orchestrated by the RAF had vanished. In April 1998, members of the RAF declared that they would cease to fight against the Government.[24] Some RAF members even disassociated themselves from their former cause. RAF terrorism, once a threat to internal security, became part of Germany's recent history: irritating, yet something that eventually belonged to the past. Public discourse changed according to the changes in perception. In the 1990s, public attention focused on questions such as how to deal, after German reunification, with RAF members who had been able to go into hiding in the (former) German Democratic Republic: should they be tried for offences they had committed 15 to 20 years earlier? What should happen to officials of the German Democratic Republic who facilitated their disappearance?[25] And how should RAF members serving their sentences be dealt with? Most RAF members had been sentenced to life imprisonment. Should they be granted a pardon if they renounced their goals? Some RAF members were indeed quietly released.[26]

22 OJ 2002 L 164/3, Article 1.

23 Gesetz zur Umsetzung des Rahmenbeschlusses des Rates vom 13. Juni 2002 zur Terrorismusbekämpfung und zur Änderung anderer Gesetze (Act to implement the Council Framework Decision of 13 June 2002 on combating terrorism and to amend related Acts), 22 December 2003, BGBl. I S. 2836.

24 See "Rote-Armee-Fraktion aufgelöst?", *Frankfurter Allgemeine Zeitung*, 21 April 1998; "Der Rechtsstaat wird vorgeführt", *Frankfurter Allgemeine Zeitung,* 26 April 1998. See also "RAF-Mitglied vermisst Worte des Bedauerns", *Frankfurter Allgemeine Zeitung*, 7 May 1998.

25 See, e.g., "Kein Prozeß gegen Neiber wegen Stasi-RAF-Verbindung", *Frankfurter Allgemeine Zeitung*, 11 August 1998.

26 See, e.g., "Der Bundespräsident begnadigt einen RAF-Terroristen", *Frankfurter Allgemeine Zeitung*, 3 May 1994; "Ex-Terroristin Irmgard Möller; Überlebende der bleiernen Zeit", *Süddeutsche Zeitung*, 18 November 1994; "Früherer RAF-Terrorist Pohl von Herzog begnadigt", *Frankfurter Allgemeine Zeitung*, 20 May 1998.

1.1.2 Neonazi-Terrorism

In the early 1990s, terrorist acts taking place in Germany were firmly linked to right wing groups. This was a form of terrorism post-war Germany was not acquainted with. Very soon after unification, places and cities all over the country saw Neonazi violence, such as arson, incendiary bombings, beatings in broad daylight, verbal insults, and desecration, especially of (Jewish) cemeteries. The most notorious incidents occurred in Rostock, Hoyerswerda, Lichtenhagen, Solingen, and Mölln. The victims were primarily non-nationals (often asylum seekers or immigrant workers and their families), or people perceived as aliens (naturalised immigrants, Jews). In general, the perpetrators were young males, many of whom had not even reached the age of 20.[27] They were loosely organised in small groups, wearing boots, their heads shaved. According to these groups, German politics were misdirected and misguided. The Government should concentrate on German interests and – with regard to migration – not only curb the influx but also seek to remove aliens somewhere else. Officials estimated that the climate of *Angst* was attributable to 5,000 to 6,000 militant skinheads who would not hesitate to use weapons, fists, or other devices to make their point.[28] Neonazi violence reached its peak in 1992, when statistics counted overall 2,285 violent incidents (701 involving bombs), leaving 17 people dead.[29]

It is certainly correct that the fall of the Iron Curtain and the war in the Former Yugoslavia caused an influx of migration to Western Europe, especially to Germany. Between 1989 and 1995, the numbers of non-nationals residing in Germany climbed from 4.85 million to 7.17 million.[30] To a large extent, these newcomers were asylum seekers or *de facto* refugees. In 1989, the number of asylum seekers was 121,318; in 1990, the number climbed to 193,063; in 1991, the number further climbed to 256,112; in 1992, asylum seekers numbered 438,191; and in 1993, the number was 322,599.[31] From 1994 through 1996,

27 Chancellor Helmut Kohl, policy statement of 10 December 1992, BT-PlProt. 12/128, at p. 11040.

28 "Bundestag debattiert über Gewalt gegen Ausländer", *Süddeutsche Zeitung*, 26 November 1992; "Weniger extremistische Straftaten", *Frankfurter Allgemeine Zeitung,* 15 September 1994.

29 "Bericht über den Rechtsextremismus", *Frankfurter Allgemeine Zeitung,* 8 Febuary 1993.

30 *Bericht der Beauftragten der Bundesregierung für Ausländerfragen über die Lage der Ausländer in der Bundesrepublik Deutschland* (Bonn: Bonner Universitäts-Buchdruckerei, 2002), p. 389.

31 Bundesamt für die Anerkennung ausländischer Flüchtlinge, ed., *Asyl im Blick*, (Kronach: Druck und Media GmbH, 4th edition, 2001), at p. 12. Since 1994, the number of asylum seekers has continually fallen. In 2003, asylum seekers numbered 50,563. See H.-I. von Pollern, "Die Entwicklung der Asylbewerberzahlen im Jahre 2003" (2004) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 24/3, p. 107.

Germany additionally admitted 345,000 refugees fleeing the conflict in Bosnia and Herzegovina on an *ad hoc* basis.[32] And, between 1989 and 1995, Germany also admitted more than 1.8 million immigrants from Eastern Europe claiming to be of German descent (*Aussiedler, Spätaussiedler*).[33]

Despite these numbers, German politicians did not jump to the conclusion that Neonazi-terrorism and immigration were directly connected and that, in order to combat terrorism, immigration should be severely cut. Chancellor Kohl conceded that recent migratory movements did not have a parallel in post-war Germany; he also admitted that the political situation in Europe had undergone radical changes and that that was difficult for anybody to understand.[34] However, Chancellor Kohl explicitly declined to conclude that immigrants themselves laid at the heart of the problem:

> Against the background of Nazism, we, the Germans, do have a special responsibility; it is our special duty to stop the violence and to protect human rights as well as human dignity ... anyone remaining idle promotes violence.[35]

Social Democrats backed the position. Yet, Social Democrats framed the relationship between terrorism and immigration slightly differently. Social Democrats stressed that some aspects of current immigration law concurred with right-wing thinking and that these aspects should be eliminated to demonstrate that right-wing thinking could not rely on legislation.[36] Social Democrats specifically referred to the German understanding of 'nation' which heavily drew on (biological) descent. The concept needed to be replaced with a concept allowing for a truly modern nationality law that quickly conferred political rights upon immigrants, primarily through accepting dual citizenship.[37]

2.1.3 PKK-Terrorism

In the early 1990s, there was another group engaged in terrorist activities in Germany: the Workers' Party of Kurdistan (PKK).

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32 Beauftragte der Bundesregierung für Ausländerfragen, ed., *Migrationsbericht der Ausländerbeauftragten* (Bonn: Bonner Universitäts-Buchdruckerei, 2001), p. 49.

33 Beauftragte der Bundesregierung für Ausländerfragen, above n. 32, at p. 30. *Aussiedler* and *Spätaussiedler* immediately receive the status of Germans when they enter Germany. They are, therefore, not included in statistics on non-nationals staying in Germany.

34 Chancellor Helmut Kohl, policy statement, above n. 27, at p. 11041.

35 *Ibid.,* pp. 11041, 11042.

36 Oskar Lafontaine, BT-PlProt. 12/128, 10 December 1992, p. 11043.

37 Oskar Lafontaine and Cornelie Sonntag-Wolgast, BT-PlProt. 12/128, 10 December 1992, pp. 11043,11065.

In August 1990, the Turkish Government officially declared that in certain parts of the country, especially in Southeast Anatolia, the life of the nation was being seriously threatened by ongoing attacks of terrorists who were partly acting out of foreign bases.[38] Aimed at eradicating violence as well as separatism in the Southeast of Turkey, the Turkish Government suspended numerous provisions under the European Convention on Human Rights (ECHR), *inter alia*, right to liberty (Article 5), freedom of expression (Article 10), and freedom of association (Article 11). At the same time, military and security forces intensified their efforts to overcome the militant wing of the PKK, employing force, sometimes even brutal and illegitimate force.[39] The policy of the Turkish Government did, however, not only affect certain provinces in Anatolia and the Kurds. The policy also had consequences for Germans and Germany. Firstly, representatives of the PKK announced that the Summer of 1993 was going to be the bloodiest summer ever.[40] PKK activists did indeed attack several tourist sites in Turkey, causing many casualties, including Germans spending their holidays there. Secondly, PKK activists and sympathisers attacked Turkish sites in Europe, including Germany, such as Turkish banks, travel agencies, shops, premises of consuls or diplomats.[41] Thirdly, PKK activists and sympathisers were suspected of extorting money from Kurdish migrant workers or of killing disloyal supporters, and also doing the same in Germany.[42] The Turkish Government responded swiftly. They

38 See Communication contained in a letter from the Permanent Representation of Turkey, dated 6 August 1990, registered at the Secretariat General on 7 August 1990, http://conventions.coe.int/. The Turkish Government relied on Article 15 ECHR which authorises Member States to derogate from certain of their obligations under the Convention.

39 Meanwhile, the methods of the Turkish Government employed in the early 1990s are widely known from judgments of the European Court of Human Rights holding Turkey responsible for human rights violations. See, e.g., *Aksoy* v *Turkey*, judgment of 18 December 1996, Application No. 21987/93; *Kurt* v *Turkey*, judgment of 25 May 1998, Application No. 24276/94; *Mahmut Kaya* v *Turkey*, judgment of 28 March 2000, Application No. 22535/93; *Ilhan* v *Turkey*, judgment of 9 November 2004, Application No. 22494/93.

40 "Die Bomben gelten einer Lebensgrundlage der Türken", *Frankfurter Allgemeine Zeitung,* 29 June 1993.

41 See, e.g., "Terrorismus-Diskussion im Stadtrat", *Süddeutsche Zeitung,* 1 July 1993; "Vorsitzender des Bundestags-Innenausschusses: Ausländische Gewalttäter abschieben", *Süddeutsche Zeitung*, 22 November 1993.

42 "Urteile im Düsseldorfer Kurden-Prozeß", *Frankfurter Allgemeine Zeitung,* 8 March 1994.

stepped up military activity in the Southeast,[43] and they criticised the German Government for its leniency towards the PKK.[44]

The criticism addressed to Germany was not wholly unfounded. In fact, the PKK had been tolerated as a legal association for many years in Germany.[45] Even after the outbreak of violence against Turkish sites located in Germany in the Summer of 1993, public discourse showed some signs of appreciation of the Kurdish cause. The mayor of Munich, for example, asserted publicly that Kurds were a maltreated group of people worthy of some sympathy.[46] Nevertheless, in November 1993, the German Government eventually moved to formally proscribe the PKK. The proscription immediately prompted further unrest. 20,000 Kurds rallied to protest the Government's move in Bonn,[47] and desperate Kurds set themselves on fire.[48] The Turkish Government welcomed the proscription.[49] Early in 1994, public authorities started to prohibit festivities sponsored by Kurdish groups, such as Newroz, because it was feared that the PKK would use the occasion for its own purposes. Thousands of Kurds protested the action of the police. Riots occurred in major German cities, such as Berlin, Wiesbaden, Augsburg, Mannheim, München, Kassel.[50] Autobahns were blocked. Leading Conservatives angrily contended that immigrant Kurds had misused their 'right of hospitality' (*Gastrecht*).[51] For the first time, politicians considered relying on

43 "Die 'Arbeiterpartei des Volkes' verboten", *Frankfurter Allgemeine Zeitung,* 16 June 1993.

44 "Ankara: Bonn soll die PKK verbieten", *Frankfurter Allgemeine Zeitung,* 22 September 1993. Tansu Çiller, then Prime Minister of Turkey, wanted Germany to expel all PKK activists.

45 Time and again, the Turkish Government called on the German Government to act and to put an end to the PKK's activities in Germany. See, e.g., Der türkische Innenminister fordert: Bonn soll die PKK verbieten", *Süddeutsche Zeitung,* 12 December 1992.

46 Terrorismus-Diskussion, above n. 41.

47 "Vorsitzender des Bundestags-Innenausschusses: Ausländische Gewalttäter abschieben", *Süddeutsche Zeitung*, 22 November 1993.

48 "Kurden in Deutschland: Wir haben doch nichts mehr zu verlieren", *Süddeutsche Zeitung,* 26 March 1994.

49 "Erleichterung in Ankara", *Frankfurter Allgemeine Zeitung,* 27 November 1993.

50 "Gewalttätige kurdische Demonstration", *Frankfurter Allgemeine Zeitung,* 20 December 1993; "Proteste von Kurden im Rhein-Main-Gebiet", *Frankfurter Allgemeine Zeitung,* 21 February 1994; "Ausschreitungen bei Demonstrationen", *Frankfurter Allgemeine Zeitung,* 21 March 1994.

51 "Eine neue Realität", *Frankfurter Allgemeine Zeitung,* 24 March 1994; "Polizei setzt Wasserwerfer gegen Kurden-Demonstration ein", *Frankfurter Allgemeine Zeitung*, 28 March 1994. See also Klaus Klinkel (Secretary of State for Foreign Affairs), BT-PlProt. 12/218, 13 April 1994, at p. 18865: "Any person misusing the right of

immigration law in order to combat terrorism and violence. Immigration law was to be implemented with all severity.[52] However, actual removal of Kurds proved difficult since many Kurds could reasonably claim that they faced persecution upon their return to Turkey. German Courts and politicians were reluctant to give in to Conservative pressure.[53] When violence escalated for a second time in March 1996,[54] the German Government initiated parliamentary procedures aimed at changing immigration law. The initiative was successful. This time, Parliament was ready to change immigration law in response to terrorism.

2.2 Parliamentary Actions

2.2.1 Aliens Act 1990

Until 1990, German immigration policy was governed by the Aliens Act 1965,[55] generally allowing for immigration "if the presence of the alien does not interfere with public interests".[56] Even if that clause seems rather generous, post-war immigration policy was firmly based on the premise that Germany was not a 'country of immigration', and never would be one.[57] Workers migrating to

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hospitality in Germany and committing a crime will certainly be tried, expelled, and removed from the country".

52 "Nach schweren Krawallen vom Wochenende: Kanther fordert schnelle Abschiebung militanter Kurden", *Süddeutsche Zeitung,* 22 March 1994; "Bundesregierung plant Begleitmaßnahmen. Bonn: Abgeschobene Kurden schützen; Kanther strebt völkerrechtliches Abkommen mit der Türkei an", *Süddeutsche Zeitung*, 25 March 1994.

53 "Bundesregierung will über Abschiebeabkommen beraten", *Frankfurter Allgemeine Zeitung*, 26 March 1994; "Folge der Gewalttaten: Bayern will weiteren Kurden abschieben", *Süddeutsche Zeitung*, 5 April 1994; "Nach Kritik an Kurden-Abschiebung: Bayern attackiert Bundesjustizministerin", *Süddeutsche Zeitung*, 6 April 1994; "Bonner Parteien verurteilen türkische Kurdenpolitik", *Süddeutsche Zeitung*, 11 April 1994; "Kinkel warnt die Türkei", *Frankfurter Allgemeine Zeitung*, 18 April 1994; "Abschiebungsversuch in Bayern ist vorerst gescheitert", *Frankfurter Allgemeine Zeitung*, 27 April 1994.

54 See, e.g., "Brutale Gewalt bei Kurden-Krawallen", *Frankfurter Allgemeine Zeitung*, 17 March 1996; "Kinkel: Terror der Kurden Kriegserklärung an den Rechtsstaat", *Frankfurter Allgemeine Zeitung*, 18 March 1996; "Mit Entschlossenheit, bis nichts mehr geht", *Frankfurter Allgemeine Zeitung*, 19 March 1996 (quoting Abdullah Öcalan saying: "The oppression of the Kurds has become unbearable. They are close to exploding. And Germany will be right in the middle of it.").

55 Ausländergesetz (Aliens Act), 28 April 1965, BGBl. I S. 353 (hereafter AuslG 1965).

56 Sec. 2(1) AuslG 1965.

57 See, e.g., M. Kanther, "Deutschland ist kein Einwanderungsland. Eine gesetzliche Regelung ist überflüssig" (1997) *Zeitschrift für Sozialhilfe/Sozialgesetzbuch* 36/2, pp. 67–70.

Germany in the 1960s were called 'guest-workers' since they were expected to leave the country in due course, returning to their countries of origin. When Germany's economy slumped into a recession in the early 1970s in the aftermath of the oil price crisis, the Government introduced a complete halt in the recruitment of workers from non-EU countries, especially from Southeast Europe (*Anwerbestopp*). Technically, the halt in recruitment meant that authorities were no longer allowed to admit third country migrant workers or to issue work permits, save on the basis of governmental regulations specifying areas of employment deemed exempt from the halt. Indeed, from 1973 through 1976, the numbers of employed migrant workers dropped sharply.[58] However, at the same time the overall number of foreign residents kept rising, due to joining family members or asylum seekers.[59] Over the following years, the number continued to climb.[60]

In 1989/90, there was still cross-party consensus that the *Anwerbestopp* (halt in recruitment) was not to be lifted. Yet, there was also consensus that the existing legal framework was no longer appropriate to the needs of migrant workers.[61] After decades of continually admitting aliens, the ruling Conservative-Liberal coalition finally conceded that the majority of non-EU nationals residing in Germany seemed not inclined to return to their native countries. The statutory framework for their presence had, therefore, to be changed in order to accommodate their needs. Reforms were carried out with the aim of curbing the authorities' discretion, granting the right to reside and to family reunification, creating reliable perspectives with regard to status, putting non-nationals slowly on an equal footing with nationals, and – as an overarching concept – promoting the integration of immigrants. Eventually, the Aliens Act 1965 was replaced by the Aliens Act 1990,[62] an act explicitly aimed at introducing legal clarity,

58 According to estimates, 600,000 non-national workers were ousted from their jobs. See K.J. Bade, "Einheimische Ausländer: 'Gastarbeiter' – Dauergäste – Einwanderer", in K.J. Bade, ed., *Deutsche im Ausland – Fremde in Deutschland. Migration in Geschichte und Gegenwart* (München: Verlag C.H. Beck, 1992), at p. 396.

59 Between 1973 and 1989, the number of foreign residents climbed steadily from 4 million to 5 million. See K.J. Bade, above n. 58, at p. 396.

60 Today, foreign residents number 7.3 million, 1.8 million (25 percent) being EU nationals. See Statistisches Bundesamt (Federal Statistical Office), ed., *Statistisches Jahrbuch* (Reutlingen: SFG – Servicecenter Fachverlage GmbH, 2004), at p. 47.

61 See Entwurf eines Bundesausländergesetzes (BAuslG) (Bill on the status of aliens), 10 November 1989 (Gesetzentwurf der SPD), BT-Drs. 11/5637; Entwurf für ein Gesetz zur Neuregelung des Ausländerrechts (Bill on reorganising the law on aliens), 27 January 1990 (Gesetzentwurf der Bundesregierung), BT-Drs. 11/6321.

62 Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Ausländergesetz – AuslG) (Act on the entry and stay of aliens in Germany [Aliens Act]), published in Article 1 Gesetz zur Neuregelung des Ausländerrechts (Act on

predictability, and certainty in migration matters. But the ruling Conservative-Liberal coalition did not want to go any further. The coalition firmly declined to change nationality law and to exclude deportation under certain circumstances. Those changes had been eagerly called for by Social Democrats.[63] Conservatives dismissed the proposals as one-sided, naïve, and unrealistic.[64]

The Aliens Act 1990 made use of two sets of instruments. Firstly, it introduced an individual right to obtain an indefinite permit to stay (*unbefristete Aufenthaltserlaubnis*), a right to obtain an indefinite permit to reside (*Aufenthaltsberechtigung*),[65] and a right to family reunification (*Familiennachzug*).[66] Even if those individual rights were dependent upon certain conditions defined by law,[67] the Act offered definite individual perspectives. Secondly, the Aliens Act 1990 deliberately traced out clear-cut courses or paths that immigrants might take in order to gain a status similar to the status of nationals. If conditions were met, third-country immigrants were able to replace their limited permit to stay by an indefinite permit (*unbefristete Aufenthaltserlaubnis*), thereby ending periodical reviews by the authority dealing with aliens. The status connected with an indefinite permit to reside (*Aufenthaltsberechtigung*) was even better. Holders of an indefinite permit to reside were no longer liable to deportation unless their presence in the country constituted a grave violation of public interests.[68] Similar instruments were introduced with regard to access to the labour market. Under certain conditions, immigrants were able to replace their limited work permit (*Arbeitserlaubnis*) with an unlimited permit allowing employment at will (*Arbeitsberechtigung*).[69] Holders of an indefinite permit to stay or to reside were no longer required to have a work permit.[70]

When legislators deliberated upon the Aliens Bill in the first half of 1990, no one referred to terrorism. Legislators felt that this was a time of great

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the reorganisation of the law on aliens), 9 July 1990, BGBl. I S. 1354 (hereafter AuslG 1990).

63 See Bill on the status of aliens, above n. 61, at Sec. 15(5); BT-PlProt. 11/195, 9 February 1990, at p. 15030 (Schröer).

64 Wolfgang Schäuble (Secretary of State for the Home Department), BT-PlProt. 11/195, 9 February 1990, at p. 15027.

65 Secs. 24, 27 AuslG 1990.

66 *Ibid.,* Secs. 17–22.

67 Such as length of stay, duration of employment based on a work permit, sufficiency of means to maintain oneself, accrual of pension rights, and language skills.

68 Sec. 48(1)(1) AuslG 1990.

69 Secs. 285, 286 Sozialgesetzbuch (SGB) Drittes Buch (III) Arbeitsförderung (Social Security Code Vol. III on unemployment insurance and the promotion of employment), 24 March 1997 (hereafter SGB III).

70 Sec. 284(1)(2) SGB III.

political change (*Zeit des Umbruchs*).[71] The changes, however, were thought to be primarily connected to developments in the Eastern part of Europe, such as the fall of the Berlin Wall and the breaking apart of the Soviet Union. The majority felt that, under those circumstances, stability was an important ingredient of peace and that, to achieve this, it was important that aliens residing in Germany could live here in transparent and predictable circumstances.[72] Thus, terrorism was not in the mind of legislators, and there are no explicit references to the phenomenon in the Act. The phenomenon of terrorism was only dealt with in vague clauses. On the one hand, the Aliens Act 1990 provided that entry or stay was regularly to be denied if the aliens were liable to deportation or if their presence threatened public interests.[73] On the other hand, authorities were given the power to expel aliens if their presence thwarted public security or public order.[74] Under the Aliens Act 1990 that was (regularly) to be assumed, if the aliens threatened the fundamental principles of the constitution, if they took recourse to violence in order to achieve their political goals, or if they were punished with imprisonment.[75] These statutory provisions certainly enabled authorities to issue a deportation order if aliens were found to be involved in terrorist activities as defined by German criminal law.[76] Obviously, legislators thought that no further provision was required.

2.2.2 Compromise on Asylum 1993

When Germany had to deal with Neonazi-Terrorism in the early 1990s, politicians took the resolute stance that right-wing violence and xenophobic sentiments were not to be tolerated. Still, there were also politicians, mostly Conservatives, voicing concern about the rising numbers of asylum seekers. In 1992, their number had after all almost reached 440,000. In his policy statement (*Regierungserklärung*) of 10 December 1992 following several incendiary attacks, Chancellor Helmut Kohl also stated that annoyance caused by the mass influx of asylum seekers was not to be confused with xenophobia. Many Ger-

71 Wolfgang Schäuble (Home Secretary), BT-PlProt. 11/195, 9 February 1990, at p. 15023.

72 *Ibid.*

73 Sec. 7(2) AuslG 1990.

74 *Ibid.,* Sec. 45(1).

75 *Ibid.,* Sec. 46(1), Sec. 47(1)(1) or (2). Under these provisions, an alien was to be deported, if he or she was sentenced to imprisonment of five years or more (*compulsory deportation*). An alien was subject to regular deportation if he or she was sentenced to imprisonment without probation (*regular deportation*). Aliens liable to regular deportation had to be deported unless the authorities were convinced that special circumstances demanded otherwise.

76 For details on the concept of terrorism under German criminal law, see above at 2.1.

mans worried about their future and expected politicians to react quickly and effectively.[77] Wolfgang Schäuble was even more outspoken. According to him, people expected the Government to protect their interests, and such protection included measures curbing the numbers of asylum seekers. Reducing the numbers of asylum seekers was a prerequisite for peaceful relations between natives and immigrants.[78] Conservatives assumed that many asylum seekers did in fact not have a valid claim under the constitutional right of asylum. It was believed that asylum seekers relied on that right for one reason only, namely to circumvent the rigid concept of the halt in recruitment (*Anwerbestopp*). Those people simply wanted to escape misery and the dire conditions prevailing in their countries of origin.[79] Social Democrats – up to then adamant defenders of the constitutional right of asylum – in December 1992 eventually gave in. They agreed to amendments to the constitution considerably curtailing the right of asylum. Obviously, Social Democrats feared that right-wing thinking would spread if they resisted further.[80]

The political compromise on asylum, enacted in 1993,[81] had three objectives. Firstly, members of Parliament wanted to demonstrate that Parliament was determined to solve the 'asylum problem'. Secondly, the (perceived) misuse of the right of asylum was to be effectively undercut. Thirdly, legislators wanted to ensure that Germany would no longer carry most of the burden connected with asylum seekers in Europe.[82] The first objective was easily achieved. It sufficed that Parliament indeed moved to change the German Constitution.[83] The second and third objectives required specific instruments to be employed. In order to thwart the misuse of the right of asylum, Parliament established fast-track procedures for applicants fleeing a country deemed to be safe and for applications deemed

77 BT-PlProt. 12/128, 10 December 1992, at p. 11042.

78 *Ibid.*, at p. 11048.

79 See, e.g., Rudolf Seiters (Secretary of State for the Home Department), BT-PlProt. 12/134, 21 January 1993, at p. 11605: "The right to asylum, meant to protect those who are persecuted in other countries, was turned into an instrument for economic immigration that was no longer under control."

80 Dieter Wiefelspütz, BT-PlProt. 12/160, 26 May 1993, at pp. 13574–13575.

81 See Gesetz zur Änderung des Grundgesetzes (Artikel 16 und 18) (Act on amending the Constitution [Articles 16 and 18], 28 June 1993, BGBl. I S. 1002; Gesetz zur Änderung asylverfahrens, ausländer und staatsangehörigkeitsrechtlicher Vorschriften (Act on amending the Asylum Procedure Act, the Aliens Act, and the Nationality Act), 30 June 1993, BGBl. I S. 1062.

82 At that time, 60 percent of the asylum applications submitted in EU Member States were lodged in Germany.

83 See Article 16a Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany), 23 May 1949, BGBl. I S. 1, as amended by the 1993 Act (hereafter GG).

to be manifestly unfounded.[84] The new rules shifted the burden of proof towards the applicants and restricted the suspensive effects of remedies.[85] In order to change the existing model of burden sharing amongst States, Parliament enacted a very strict version of the 'safe third country' concept. Under Article 16a(2) of the Constitution, asylum seekers no longer had a valid claim to asylum if they entered Germany from a Member State of the EU or another third country respecting the Convention relating to the Status of Refugees (Refugee Convention)[86] or the European Convention on Human Rights (ECHR). Since all neighbouring countries were deemed to be safe countries by statutory law, asylum seekers entering Germany via country roads would regularly see their applications dismissed. That would not necessarily imply that those applicants were not protected against deportation. Under the Aliens Act 1990, authorities were not allowed to remove aliens to a country where their life or their liberty was threatened on account of their race, religion, nationality, membership of particular social group, or political opinion.[87] The same applied if – upon removal – the aliens ran the risk of being tortured,[88] sentenced to death,[89] or subjected to treatment contrary to the ECHR.[90] Under Sec. 51 or Sec. 53 Aliens Act 1990, aliens may have been able to remain in Germany. However, their legal status was precarious: their right to stay ended as soon as there was no longer the risk of being persecuted or otherwise harmed. Moreover, access to the labour market and the right to social assistance were considerably restricted. From 1993, the alternative mechanisms of protection against removal nevertheless became more and more important.[91]

There was, thus, some relation between the compromise on asylum and terrorism. In 1993, no one feared that terrorist groups might use the cover of asylum to further their terrorist ends. Asylum seekers were mainly conceived of as poor and desperate people trying to evade distress. However, even if asylum seekers were not believed to be terrorists but often the victims of terrorists, they

84 See Article 16a(3)–(4) GG.

85 Under the new rules, fear of persecution is to be deemed not well-founded unless the applicant proves that his or her situation is not covered by the presumption. Remedies do not have suspensive effects unless the court has serious doubts with regard to the lawfulness of the administrative decision denying asylum.

86 UNTS. Vol. 189 No. 2545, p. 137.

87 Sec. 51(1) AuslG 1990.

88 *Ibid.,* Sec. 53(1).

89 *Ibid.,* Sec. 53(2).

90 *Ibid.,* Sec. 53(4).

91 In 2003, for example, 1,534 applicants were formally granted asylum (1.63 percent of all applicants). In addition to that, 1,602 applicants were granted protection under Sec. 51 AuslG 1990, and 1,567 applicants were granted protection under Sec. 53 AuslG 1990. See, H.-I. von Pollern, above n. 31, at p. 110.

were targeted by new statutory law. It was thought that restrictions in the field of asylum would calm down Neonazi-Terrorism. Partial abolition of the right of asylum was the price Germany was ready to pay for the absence of violence directed against non-nationals residing in Germany.

2.2.3 Measures against Terrorism

2.2.3.1 Anti-Crime Act 1994

The first Act directly responding to terrorist activities of the early 1990s was the Anti-Crime Act 1994.[92] Again, aliens were not perceived as the main perpetrators or the main source of the threats. In February 1994, when the governing Conservative-Liberal coalition proposed to combat crime more effectively, the fight against right-wing terrorism was at the top of the agenda.[93] The Government wanted to signal it was prepared to stand up firmly against terror and xenophobia orchestrated by the far right as well as against organised crime, another threat specifically related to the early 1990s and the fall of the Iron Curtain.[94] The people's trust in the implementation of what was prescribed by law and the rule of law was to be strengthened in the face of some facts indicating that crime paid off.

Against that political background, the Anti-Crime Act 1994 was chiefly meant to amend the Criminal Code and the Criminal Procedure Act. The Act widened criminal liability for using the insignia, badges, or emblems of associations prohibited by law,[95] for stirring up public disorder (*Volksverhetzung*), for inciting racial hatred (*Aufstachelung zum Rassenhass*),[96] and for bodily injury (*Körperverletzung*).[97] Criminal procedures were streamlined in order to hasten decision-making. Still, the Anti-Crime Act 1994 was not completely confined to changing criminal law. The amendments concerning organised crime changed criminal law, but they also changed immigration law. Rules granting immunity to witnesses willing to testify for the prosecution – until then applicable only in the context of terrorism – were extended to also cover organised crime.[98]

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92 Gesetz zur Änderung des Strafgesetzbuches, der Strafprozeßordnung und anderer Gesetze (Verbrechensbekämpfungsgesetz) (Act to amend the Criminal Code, the Act on Criminal Procedure, and related Acts [Anti-Crime-Act]), 28 October 1994, BGBl. I S. 3186.

93 See, Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches, der Strafprozeßordnung und anderer Gesetze (Verbrechensbekämpfungsgesetz) (Anti-Crime Bill), 18 February 1994, BT-Drs. 12/6853.

94 See, Anti-Crime Bill, above n. 93, at p. 18.

95 Sec. 86a(1) Criminal Code as amended by the Anti-Crime Act 1994.

96 *Ibid.,* Sec. 130.

97 *Ibid.*, Secs. 223–225.

98 Article 5 Anti-Crime Act 1994.

Moreover, organised smuggling of illegal immigrants[99] or organised incitement to misusing the right of asylum[100] were declared to be offences. Finally, the Anti-Crime Act 1994 broadened the scope of compulsory deportation. Under a newly inserted clause in Sec. 47(1) Aliens Act 1990, authorities had to proceed with deportation if an alien was sentenced to imprisonment without probation for crimes connected with drugs.[101] Terrorism attributed to aliens was still not explicitly referred to in the Aliens Act 1990.

2.2.3.2 Aliens Act Amendments 1997

PKK-terrorism changed political opinion and, eventually, immigration law. While the PKK excesses of March and April 1994 did not spread the feeling that legal provisions on entry and deportation of aliens ought to be tightened up, the riots of the Spring of 1996 did.[102]

In June 1996, members of the Conservative-Liberal coalition presented a Bill to amend immigration and asylum law.[103] The authors asserted that two primary goals of the Aliens Act 1990 – setting up a clear legal framework for integration and maintaining the halt of recruitment (*Anwerbestopp*) – had been successfully put into practice.[104] In some respects, though, the instruments created by the Aliens Act 1990 had turned out to be ineffective. That was, so the authors asserted, especially true for provisions on deportation.[105] As had become apparent after the 1996 Spring riots, deportation and actual removal could not be carried out smoothly under the existing provisions. Since nationals and non-nationals alike condemned crimes committed by aliens residing in Germany, and since those crimes exacerbated relations between nationals and non-nationals, Parliament should quickly act and facilitate deportation.[106]

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99 See Secs. 92a, 92b AuslG 1990 as amended by the Anti-Crime Act 1994.

100 § 84 Asylverfahrensgesetz (AsylVfG) (Asylum Procedure Act), published in Article 1 Gesetz zur Neuregelung des Asylverfahrens (Act on the reorganisation of the law on asylum procedure), 26 June 1992, BGBl. I S. 1126, as amended by the Anti-Crime Act 1994.

101 Sec. 47(1)(3) AuslG 1990 as amended by the Anti-Crime Act 1994. If the alien was a juvenile offender, compulsory deportation was not to take place unless the sentence reached the minimum of two years imprisonment.

102 For details, see above at 2.1.3.

103 Entwurf eines Gesetzes zur Änderung straf-, ausländer- und asylverfahrensrechtlicher Vorschriften (Bill to amend the Criminal Code, the Aliens Act, and the Asylum Procedure Act), 18 June 1996, BT-Drs. 13/4948.

104 *Ibid.,* at p. 1.

105 *Ibid.,* at pp. 1 and 7.

106 *Ibid.,* at p. 7.

The 1997 Act to amend immigration and asylum law[107] brought three major changes that are of concern here. Firstly, authorities were required to issue a deportation order if aliens were sentenced to imprisonment for three years or more (prior to the Act compulsory deportation was linked to imprisonment for five years or more).[108] That change aimed at ensuring deportation even if courts were reluctant to sentence aliens to five years' imprisonment. Secondly, authorities were required to proceed with deportation if aliens were sentenced to imprisonment without probation for crimes related to drugs or for having committed a breach of the public peace (*Landfriedensbruch*).[109] That change aimed at ensuring deportation if aliens were convicted for having been involved in riots. Thirdly, the Act reduced protection against actual removal (*Abschiebungsschutz*). Prior to the amendments, protection against removal (Sec. 51[1] Aliens Act 1990) did not apply if there were serious grounds for assuming that the aliens were a danger to the security of the country or, having been convicted of a particular serious crime, a danger to the community of the country.[110] These exemptions from protection against removal almost literally transposed Article 33(2) of the Refugee Convention into national law. Courts had not been prepared to lift protection under that clause easily.[111] The 1997 amendment to the Aliens Act 1990 was clearly intended to make the criteria less strict. Under the amendment, protection against removal under Sec. 51(1) Aliens Act 1990 did not apply if there were serious grounds for assuming that the aliens were a danger to the security of the country or, having been convicted of a crime and sentenced to imprisonment for three years or more, a danger to the community of the country.[112] Legislators hoped that the reference to imprisonment of three years or more would finally pave the way for a less reluctant approach in practice.[113] It has to be borne in mind, though, that aliens unable to claim protection under Sec. 51(1) Aliens Act 1990 could still have a valid claim under Sec. 53 Aliens Act 1990. Pursuant to Sec. 53 Aliens Act 1990, protection against actual removal extended to aliens who, upon removal, were at risk of being sentenced to death or subjected to treatment contrary to Article 3 ECHR. The 1997 amendments to Sec. 51 Aliens Act 1990 nevertheless made sense. The status of aliens protected

107 Gesetz zur Änderung ausländer- und asylverfahrensrechtlicher Vorschriften (Act to amend the Aliens Act and the Asylum Procedure Act), 29 October 1997, BGBl. I S. 2584.

108 Sec. 47(1)(1) AuslG 1990 as amended.

109 *Ibid.,* Sec. 47(1)(2). *Landfriedensbruch* as defined by criminal law includes violence (or the threat of violence) against people or objects, emerging from a crowd of people in such a manner that public security is endangered.

110 See, originally, Sec. 51(4) AuslG 1990.

111 See below at 2.3.

112 Sec. 51(3) AuslG 1990 as amended.

113 See Bill, above n.103, at p. 9.

under Sec. 53 was inferior to the status granted under Sec. 51: aliens protected under Sec. 53 Aliens Act 1990 were simply legally 'tolerated' (the paper issued to them was called *Duldung*).

2.3 Case Law

In the 1990s, courts dealing with asylum or immigration cases came to confront terrorism in two different contexts: in the context of granting asylum on the one hand, and in the context of granting protection against removal (*Abschiebungsschutz*) on the other hand. In each case, courts took a rather cautious stance, every now and then rejecting blunt approaches favoured by administrative authorities or politicians.

When deciding upon whether or not to grant asylum, administrative authorities and lower courts contended that asylum was in any case to be denied if asylum seekers were involved in terrorist activities in their countries of origin.[114] Authorities and courts held that, what asylum seekers feared upon return under those circumstances, was not persecution, but prosecution. In their countries of origin (e.g. Sri Lanka, India, Turkey), governments were struggling for their existence, facing guerrilla warfare staged by groups willing to overthrow the government or to separate from the existing state body. Since any government would fight against those movements and prosecute the perpetrators, measures employed by the governments concerned were deemed legitimate. In a famous decision concerning asylum seekers from Sri Lanka, the Federal Constitutional Court (*Bundesverfassungsgericht*) stepped in.[115] The Constitutional Court ruled that governments struggling to defend themselves against insurgents might, nevertheless, be found to persecute those who opposed their policies.[116] The Court held that, in former times, revolutionary or separatist movements had been the main cause for granting asylum and denying extradition.[117] Against that historical background, so the Constitutional Court ruled, the claim of insurgents under the constitutional right of asylum was *prima facie* valid.[118] Their claim could not be dismissed unless convincing reasons warranted otherwise. For the Constitutional Court, convincing reasons for denying asylum were to be assumed if the measures feared by the applicant (e.g. detention or criminal sanctions) were in fact directed against the criminal component of the applicants' actions and common amongst States, not against their political

114 See, e.g., Oberverwaltungsgericht Rheinland-Pfalz, judgment of 8 June 1988, Az: 11 A 32/86 (Sri Lanka).

115 Bundesverfassungsgericht, decision of 10 July 1989, BVerfGE 80, 315.

116 *Ibid.,* at p. 336.

117 *Ibid.,* at pp. 336–337.

118 *Ibid.,* at p. 337.

component, such as the political opinion of the applicants.[119] Asylum was, therefore, to be denied, when the applicants had been actively engaged in terrorist activities, unless the applicants had good reasons to believe that they would – because of their political convictions – face harsher treatment than other perpetrators.[120] However, in another ruling concerning a Kurdish separatist, the Federal Constitutional Court held that the constitutional right of asylum indeed entailed an absolute limitation.[121] According to that ruling, separatists involved in terrorism in their native country could not validly rely on the right of asylum if they remained engaged in those activities on German territory.[122] Under those circumstances, applicants would in fact not seek protection from persecution but a new environment and new chances for their struggle against a foreign government. The constitutional right of asylum was not meant to support ongoing terrorism.

Whether or not involvement in riots or attacks on travel agencies or consulates also limits protection against removal (*Abschiebungsschutz*) became an issue, when Kurds sympathising with the PKK were convicted for having breached the public peace (*Landfriedensbruch*).[123] Administrative authorities immediately issued deportation orders. The effect of these orders was that the addressees lost their former legal status with regard to stay (residence) and employment when the order became final. The administrative authorities then wanted to execute the deportation orders and actually remove those who had lost their right to stay in Germany. The courts intervened. They admitted that involvement in riots and ensuing criminal convictions might legitimise a deportation order even if the alien had been granted asylum in Germany.[124] Actual removal, however, was a different thing, especially if the persons liable to removal reasonably feared that they faced persecution after they had been removed. The courts held that Sec. 51(3) Aliens Act 1990 (allowing for the removal to a country where aliens were at risk of persecution) was to be interpreted strictly since the consequences of the removal might be dire.[125] The clause lifting the protection under Sec. 51(1) was not to be applied unless the alien's presence in Germany entailed exceptionally serious threats (*außergewöhnlich schwerwiegende Gefahren*).[126] Furthermore,

119 *Ibid.,* at p. 338.

120 *Ibid.,* at p. 338.

121 Bundesverfassungsgericht, decision of 20 December 1989, BVerfGE 81, 142.

122 *Ibid.,* at pp. 153–154.

123 For details, see above at 2.1.3.

124 See, e.g., Bundesverwaltungsgericht (Federal Administrative Court), judgment of 5 May 1998, BVerwGE 106, 351, at p. 358.

125 *Ibid.,* at p. 360. See also W. Kanein and G. Renner, *Ausländerrecht. Kommentar*, (München: C.H. Beck, 6th edition, 1993), at p. 213.

126 *Ibid.*

the clause would not apply unless there was a high probability that the alien was a danger to the security of the country or the community in the future (*Wiederholungsgefahr*).[127] Past conduct alone would never legitimise removal to a country where persecution loomed. In effect, courts often quashed the decision to remove since there were not enough indications that the aliens concerned were an actual and exceptionally serious threat to Germany or the public.[128] After the 1997 amendments,[129] the courts changed their interpretation, but just slightly.[130] They acknowledged that in 1997 Parliament intended to make actual removal under Sec. 51 Aliens Act 1990 easier in practice.[131] The courts nonetheless insisted that sentences of imprisonment of three years or more would not automatically lift protection against removal.[132] Authorities were still requested to show in each and every case that the alien concerned constituted an actual threat to the country or the community (*Wiederholungsgefahr*).[133] Yet, the courts conceded that the amendment had changed the probability test. A high probability that dangerous conduct would re-occur was no longer required by law; it sufficed that re-occurrence of prior conduct was a serious possibility (the new wording reads: *neue, vergleichbare Straftaten des Ausländers müssen ernsthaft drohen*).[134] Thus, courts remained vigilant, though to a lesser extent.

3 Immigration, Asylum and Terrorism in the Aftermath of 11 September 2001

3.1 Mainstream Perceptions: What is the threat?

After the attacks of 11 September 2001, politicians and the media quickly agreed that terrorist threats had changed their inherent features. To make their point, politicians and the media relied on several elements. Some stressed the fact that the attacks of 11 September 2001 were not attributable to a State under the international rules on state responsibility.[135] Perpetrators did not act as state organs; they did not even have close ties to a state. Basically, perpetrators acted on their own devices. They were private actors in a classical sense, and their actions did,

127 *Ibid.,* at p. 361.

128 See, e.g., Bundesverwaltungsgericht, judgment of 5 May 1998, BVerwGE 106, 351; judgment of 30 March 1999, BVerwGE 109, 25.

129 See above at 2.2.3.

130 See Bundesverwaltungsgericht, judgment of 16 November 2000, BVerwGE 112, 185.

131 *Ibid.,* at pp. 189–190.

132 *Ibid.,* at p. 188.

133 *Ibid.*

134 *Ibid.,* at p. 191.

135 Motion for a resolution of the *Bundestag*, submitted by the Conservatives (CDU/CSU), 9 October 2001, BT-Drs. 14/7065(neu), at p. 1.

therefore, not fit squarely into what was traditionally covered by international law. Terrorists seemed out of the reach of the law. Others pointed to the sheer magnitude of losses caused by the attacks and that there was virtually no place on earth where one could feel safe.[136] Even if terrorists had their basis in a remote country, they were obviously able to strike anywhere at any time. Germany was no longer a secure place.[137] Terrorists were referred to as 'nomads of terror'.[138] A third element underscored in the Autumn of 2001 – especially by Conservatives – was the close link between terrorism and religious fanaticism. By and large, the attacks of 11 September 2001 (and some other attacks afterwards) were meant to incarnate 'modern terrorism' nurtured by radical Islamism. Everything had to be done to expose and to eliminate the Islamist potential for violence; all those who were staying under cover in Germany, while planning, conspiring, and preparing for vicious crimes should be removed from the country.[139] Finally, it was felt that international terrorism had come to focus on a new target, namely the open societies of the free, Western-oriented world.[140] The threat of international terrorism seemed not directed against single persons, single governments, or single countries of the world. Terrorism was deemed to threaten civilisation itself, universal values, or the Western style of life.[141] Thus, Western democracies were radically challenged. They were called upon to prove that they were able to defend themselves against global terror, the worst of all enemies.[142]

German politicians were also shocked that some of the US security forces' main leads pointed to Germany. How did it happen that one of the perpetrators of the attacks of 11 September 2001 – Mohammed Atta – could live his life here for quite a while without anyone realising what he was about to do?[143] The feeling that Germany might unknowingly be involved in terrorist actions had some influence on the ongoing debate on the integration of immigrants, again especially on the arguments put forward by Conservatives. It was argued that even if integration entailed the efforts of the whole of society, the individual's will

136 Wolfgang Wieland, BT-PlProt. 14/195, 18 October 2001, at p. 19017.

137 Motion for a resolution of the *Bundestag*, above n. 135, at p. 1; Motion for a resolution of the *Bundesrat*, submitted by Baden-Württemberg, Bayern, Hessen, 12 October 2001, BR-Drs. 807/01, at p. 1.

138 Wolfgang Wieland, above n. 136, at p. 19017.

139 Motion for a resolution of the *Bundesrat*, above n. 137, at p. 1.

140 Motion for a resolution of the *Bundestag*, above n. 135, at p. 2.

141 Norbert Röttgen, BT-PlProt. 15/19, 16 January 2003, at p. 1486; Motion for a resolution of the *Bundestag*, 11 March 2003, BT-Drs. 15/540, at p. 1.

142 See, e.g., Aliens Bill, submitted by Bayern and Niedersachsen to the *Bundesrat*, 18 October 2001, BR-Drs. 841/91.

143 See, e.g., the debate on the Motion for a resolution of the *Bundesrat* (above n. 137), BR PlProt. 768th session, 19 October 2001, at pp. 524–539.

to integrate was not to be neglected.[144] Those unwilling to integrate themselves into German society should not be able to expect that they could remain in Germany forever.[145] Some politicians did not hesitate to make an appeal to the conscience of Muslim immigrants. After all, the Muslim population numbered three million, and politicians worried about how they would react to the terrorist threat and to counter-measures to the threat. The Conservatives had an easy answer. They believed that it was the self-understood duty of immigrants, most above all of immigrants with a Muslim background, to renounce international terrorism rooted in Islamism.[146] Up to the Autumn of 2001, the tune of the governing coalition of Social Democrats and the Green Party had been very different. The Government had been ready to admit that immigration was an important factor for Germany's economy and to abolish the halt of recruitment introduced in November 1973.[147]

3.2 Parliamentary Actions: What Happened in Response?

3.2.1 Security Package I

The German Government and Parliament started to respond to international terrorism in October and November 2001. The Government proposed to crack down on certain religious organisations,[148] to extend criminal sanctions for forming terrorist organisations,[149] and to mobilise resources for financing counter-measures.[150] All these proposals initiated by the Government were referred to as 'Security Package I'.[151]

144 Motion for a resolution of the *Bundesrat,* above n. 137, at p. 7.

145 *Ibid.*

146 *Ibid.* See also Erwin Teufel, BR PlProt. 768th session, above n. 143, at p. 525.

147 For further details, see below at 3.2.3.

148 Entwurf eines Ersten Gesetzes zur Änderung des Vereinsgesetzes (Bill to amend the Act on Associations), 4 October 2001 (Gesetzentwurf der Bundesregierung), BT-Drs. 14/7026.

149 Entwurf zum 34. Strafrechtsänderungsgesetz (Bill on the 34th changes to criminal law), 4 October 2001 (Gesetzentwurf der Bundesregierung), BT-Drs. 14/7025.

150 Entwurf eines Gesetzes zur Finanzierung der Terrorbekämpfung (Bill on Financing Measures against Terrorism), 9 October 2001 (Gesetzentwurf der SPD und Bündnis 90/Die Grünen), BT-Drs. 14/7062.

151 For on overview, see, e.g., St. Detjen, "Nach den Anschlägen in den USA werden in Berlin Sicherheitspakete auf den Weg der Gesetzgebung gebracht" (2001) *Zeitschrift für Rechtspolitik* 34/11, pp. 532–533; St. Schnorr and V. Wissing, "Neuorientierung bei der Inneren Sicherheit" (2001) *Zeitschrift für Rechtspolitik* 34/11, pp. 534–536; E. von Bubnoff, "Terrorismusbekämpfung: Eine weltweite Herausforderung" (2002) Neue Juristische Wochenschrift 55/37, pp. 2672–2676.

3.2.1.1 Prohibition of Religious Organisations

The German Act on Associations, in its version dating back to 1964,[152] did not apply to religious associations.[153] This was a deliberate decision taken by Parliament. The intention was to keep religious associations exempt from administrative interference, since those associations could (and can) rely on Article 4 of the German Constitution guaranteeing freedom of religion.[154] In ordinary language, the exemption was called *Religionsprivileg* (privilege of religious associations) since administrative authorities had no legal power to dissolve or otherwise prohibit religious associations even if they were engaged in extremist or fundamentalist activities. Religious associations were better off than other associations.

The privilege of religious associations was politically disputed even before the attacks of 11 September 2001. Every now and then, the police or secret services thought religious associations to be implicated in dubious activities, yet they were not allowed to respond adequately. The lack of legal powers was obviously difficult to comprehend with regard to Scientology,[155] Milli Görüs (an association of Turks said to have close ties to the Refah Party in Turkey),[156] and the *Kalifatstaat* (an association of Turks promoting an Islamic revolution in Turkey and the introduction of the Sharia in Turkey).[157] Those associations were suspected of breaching the law on German soil. However, the hands of the authorities were tied. Authorities could not impose sanctions. In the late 1990s, there had been several attempts to abolish the privilege of religious associations. The attempts had been cautious though, as the Government feared that the move would be met with resistance based on the argument that the abolition of the privilege was not compatible with Article 4 of the Constitution (freedom

152 Gesetz zur Regelung des öffentlichen Vereinsrechts (Vereinsgesetz) (Act on Associations), 5 August 1964, BGBl. I S. 593, (hereafter VereinsG 1964).

153 See Sec. 2(2)(3) VereinsG 1964.

154 Article 4(1) GG reads in English: "Freedom of faith, freedom of conscience, and freedom of religious or philosophical profession are inviolable." Article 4(2) GG reads: "Undisturbed religious practice is guaranteed." Neither Article 4(1) nor Article 4(2) explicitly authorises Parliament or the Government to allow for administrative restrictions with respect to these rights.

155 See, e.g., "Zahl ausländischer Extremisten wächst", *Frankfurter Allgemeine Zeitung*, 27 April 1999.

156 See, e.g., "Behrens warnt vor islamistischen Gruppen", *Frankfurter Allgemeine Zeitung*, 22 January 1999.

157 See, e.g., "Religion als Tarnung, Umsturz als Ziel", *Frankfurter Allgemeine Zeitung*, 11 September 1997; Gesetzesbruch gehört zum Programm", *Frankfurter Allgemeine Zeitung*, 18 September 2001. The so-called *Kalifatstaat* was registered under the designation "Verband der islamischen Vereine und Gemeinden".

of religion).[158] After the attacks of 11 September 2001, doubts and hesitation disappeared. In November 2001, the *Bundestag* (first chamber of Parliament) enacted an amendment abrogating the exemption.[159] From 8 December 2001, administrative powers to dissolve associations laid down in the Act on Associations applied to religious associations as well.

Although the constitutionality of the amendments was indeed questioned,[160] administrative authorities acted promptly and fiercely under the new powers, though not very often. In December 2001, the Home Secretary (Otto Schily) announced that the *Kalifatstaat* was proscribed under the Act of Association for being opposed to the German Constitution and to peaceful relations amongst peoples (*Völkerverständigung*) and, therefore, for being a threat to internal security and other important interests of Germany.[161] On 12 December 2001, more than 1,200 policemen searched over 200 premises of the *Kalifatstaat*, including flats and offices.[162] In August 2002, a Palestinian charity organisation – the Al Aqsa e.V. – was proscribed. The organisation was suspected of financing terrorist activities in Israel and the Occupied Territories.[163] And in November 2002, police turned on another Muslim organisation – Hizb-ut-Tahir – that was suspected of having ties with Al Qa'eda.[164] Once the decisions on proscribing the organisations became final, they were legally dissolved and their assets liquidated.

158 Leading commentators on Article 4 GG hold that restrictions of the freedom of religion are excluded by Article 4 unless the restrictions are warranted by other provisions of the Constitution. See, e.g., J. Kokott, "Article 4" in M. Sachs, ed., *Grundgesetz. Kommentar*, (München: C.H. Beck, 2nd edition, 1999), at pp. 308–309.

159 BT-PlProt. 14/199, 9 November 2001, at p. 19551 (vote by open ballot).

160 K. Groh, "Das Religionsprivileg des Vereinsgesetzes" (2002) *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 85/1, pp. 39–62.

161 The proscription was declared to be lawful by the Federal Administrative Court as well as by the Federal Constitutional Court. See BVerwG, judgment of 27 November 2002, Az: 6 A 9/02; BVerfG, decision of 2 October 2003, 1 BvR 536/03.

162 See "Schily ist der Böse! Allahu akbar!", *Frankfurter Allgemeine Zeitung*, 13 December 2001; "Der 'Kalifatstaat' verboten. Razzia gegen islamistische Extremisten", *Frankfurter Allgemeine Zeitung*, 13 December 2001.

163 "Gemeinnützige Patenschaften für Gefangene", *Frankfurter Allgemeine Zeitung*, 6 August 2002. The proscription was eventually confirmed by the Federal Administrative Court in December 2004. See "Verbot von al-Aksa ist rechtmäßig", *Süddeutsche Zeitung*, 4 December 2004.

164 "Polizeiaktion gegen mutmaßliche Islamisten", *Frankfurter Allgemeine Zeitung*, 14 November 2002.

3.2.1.2 Extension of Criminal Sanctions

At the time of the attacks of 11 September 2001, it was an offence to form or to participate as a member in a group of persons aimed at committing murder, manslaughter, or genocide, at taking hostages or kidnapping persons in order to compel others to do something, or at committing offences dangerous to public safety, such as arson.[165] It was also an offence to otherwise support such a group.[166] However, and that was seen as a problem, individuals participating in such a group could be convicted only if the group was (at least partly) based in Germany. In April 2002, the *Bundestag* (first chamber) adopted an amendment extending sanctions to individuals participating in terrorist groups not based in Germany.[167] Under the newly inserted Sec. 129b(1) Criminal Code, Sec. 129a equally applies to groups based in other countries (*Vereinigungen im Ausland*). Punishment is not dependent on additional conditions if the terrorist group relates to other EU Member States. Yet, if the group is based in a third country, participation will not be punishable unless some additional conditions are met (activities on German territory; German victims; German perpetrators).

3.2.1.3 Provision of Funds

The Act on Financing Measures Combating Terrorism[168] raised taxes on tobacco products and certain (private) insurance contracts, such as contracts on fire insurance, hail insurance, or certain categories of accident insurance. The Government promised to earmark the additional income for their efforts to enhance protection against terrorism.

3.2.2 Security Package II: Anti-Terrorism Act 2002

Immediately after launching the initiatives comprising the 'Security Package I', the Government started preparations for the 'Security Package II', a Bill proposing to change a wide variety of laws, such as the law on secret services, immigration, passports and identity cards, associations, and civil aviation (Anti-Terrorism Bill).[169] The Conservative opposition in Parliament did not remain

165 Sec. 129a(1) Criminal Code. Sec. 129a was inserted by the Anti-Terrorism Act 1976. Under Sec. 129a(1) the offence was punishable with imprisonment ranging from one year to ten years. For details, see above at 2.1.

166 Sec. 129a(2) Criminal Code (the offence was punishable with imprisonment ranging from six months to five years).

167 BT-PlProt. 14/234, 26 April 2002, at p. 23340. Published as Vierunddreißigstes Strafrechtsänderungsgesetz (Act on the 34th changes on criminal law), 22 August 2002, BGBl. I S. 3390.

168 Gesetz zur Finanzierung der Terrorbekämpfung, 10 December 2001, BGBl. I S. 3436.

169 The Bill was issued early in November 2001. See, Entwurf eines Gesetzes zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz),

idle either. Indeed, the Conservatives managed to surpass the Government's parliamentary activities.

3.2.2.1 Conservative Prelude

On 9 October 2001, the Conservatives formally asked the *Bundestag* (first chamber) to take an explicit view on combating terrorism.[170] The Conservatives wanted Parliament to deliberate and then decide upon guidelines meant to direct the Government's further actions. In greater detail, the Conservatives wanted Parliament to support a long list of proposals, *inter alia*, the proposals to strengthen police forces and secret services, to improve communication between those authorities, to reintroduce immunity for witnesses willing to testify in cases related to terrorism, to make provision for so-called sky-marshals, to prescribe that passports and identity cards include the fingerprints of the holder, and to authorise State agents to persistently monitor persons suspected of supporting terrorist organisations. The Motion also contained proposals with regard to immigration law.[171] The Conservatives wanted to broaden electronic databases on visas (the database should not just include the applications but also the decisions upon the applications), to strictly implement existing provisions on deportation and removal (especially with respect to non-nationals engaged in extremism), to facilitate deportation (and, accordingly, change the law), and to allow for a revocation of German nationality, if German nationality had been acquired by naturalisation and the holder was found to be involved in terrorism.

The Motion of the Conservative Party was backed by a firm resolution of the *Bundesrat* (second chamber) on 9 November 2001.[172] On immigration and asylum issues, the resolution was even more outspoken than the Motion of the Conservatives. For example:

– It requested the Government to stop issuing visas generously; in cases of doubt, visas should be denied, not granted.
– It demanded that special provision be made with respect to nationals of States known or suspected of supporting international terrorism: applicants for visas should be fingerprinted, and their data kept for an indefinite period.
– In order to facilitate integration of immigrants, Parliament was requested to introduce mandatory integration courses. The resolution held that immi-

8 November 2001, BR-Drs. 920/01 and BT-Drs. 14/7386 (neu) (hereafter Anti-Terrorism Bill).

170 Motion for a resolution, above n. 135.

171 *Ibid.,* at pp. 4–5.

172 Motion for a resolution, above n. 137. The motion was sponsored by Conservative-led *Länder*. For details on the voting, see BR PlProt. 769th session, 9 November 2001, at pp. 607–613.

grants should be barred from secure legal status if they failed to participate in the courses.
- It proposed to ensure that non-nationals threatening the security of Germany (e.g. through engaging in terrorist or extremist activities) were deported and removed from the country. Applications for judicial review should not hamper execution.
- It urged that non-nationals publicly approving of terrorist acts be deported without delay.
- It proposed to curtail protection against removal under Sec. 51 Aliens Act 1990. Provision should be made that protection against removal did not apply if the aliens had been sentenced to imprisonment for two years or more.
- Finally, the resolution requested that provision be made to overcome barriers to actual removal. If non-nationals declined to co-operate, authorities should have the power to arrest them in order to make them co-operate. Authorities should also have the power to search aliens unwilling to co-operate.

3.2.2.2 Anti-Terrorism Act 2002

Most of the proposals of the Conservatives were eventually dismissed in December 2001, when the Parliament finally adopted the Anti-Terrorism Act 2002.[173] Some proposals had become obsolete since they simply echoed proposals of the Government elaborated in the Anti-Terrorism Bill.[174] Others were deliberately rejected. In greater detail:
- The Anti-Terrorism Act 2002 extended the functions as well as the powers of secret services (*Verfassungsschutz, Militärischer Abschirmdienst, Bundesnachrichtendienst*). Since 2002, secret services have been authorised to request facts and data from banks and businesses for financial services, from airlines, and from telecommunication services (data with regard to the holder of the bank account and financial transactions, and with regard to the services provided).
- The Act broadened the application of the provision prescribing compulsory security checks for individuals being employed in employment deemed

173 Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz) (Act on combating international terrorism [Anti-Terrorism Act]), 9 January 2002, BGBl. I S. 361. For an overview on the Act, see D. Kugelmann, "Betroffensein der ausländischen Wohnbevölkerung von Maßnahmen der Terrorismusbekämpfung" (2003) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 23/3, at pp. 96–103; B. Huber, "Die Änderungen des Ausländer- und Asylrechts durch das Terrorismusbekämpfungsgesetz" (2002) *Neue Zeitschrift für Verwaltungsrecht* 21/7, at pp. 787–794.

174 Above n. 169.

sensitive (*sicherheitsempfindlich*), such as public transport, power stations, banks, or the like.

– The Act amended the Civil Aviation Act (*Luftverkehrsgesetz*) in order to enhance security in airports and airplanes. The Act, for example, authorised members of a special police force (*Bundesgrenzschutz*) to accompany airplanes in flight and to use force, if that proved necessary, to secure the safety of the plane or order in the cabin.

With regard to immigration and asylum, the governing coalition of Social Democrats and the Green Party did not go as far as proposed by the Conservatives. The reluctance of the Government did not go unchallenged. Conservative members of Parliament persistently asserted that the measures proposed by the Government were not sufficient to effectively encounter terrorist threats.[175]

For instance, under Sec. 8(1)(5) Aliens Act 1990 as amended by the Anti-Terrorism Act 2002, authorities had to deny visas or leave to remain (i) if the alien threatened certain constitutional values or the internal security of Germany, (ii) if the alien had resorted to violence in order to further political goals, or (iii) if facts proved that the alien participated in a group supporting international terrorism. That provision covered only a part of what the Conservatives had been asking for. The Conservatives in Parliament wanted titles to be strictly denied and deportation to be legal if aliens were just under suspicion of participating in or supporting terrorism (*Terrorismusverdacht*).[176] Sec. 8(1)(5) Aliens Act 1990 as amended required authorities to prove that the alien was indeed an impending threat to the security of the State or individuals.[177]

With regard to the Conservatives' proposals that passports, identity cards, and permits issued to non-nationals include fingerprints, the Anti-Terrorism Act 2002 indeed allowed for the inclusion of biometric data in identity cards and permits issued to aliens.[178] However, implementation was subjected to further

175 See Wolfgang Bosbach, BT-PlProt. 14/201, 15 November 2001, at p. 19667 (first reading of the Bill).

176 See Erwin Marschewski, BT-PlProt. 14/201, 15 November 2001, at p. 19678: "The measures proposed by the Government will not prevent terrorists from entering Germany, and the measures will not facilitate deportation and removal. Denial of entry or deportation ought not to be based on proof (*Nachweis*) of involvement in terrorism but simply on suspicion of involvement in terrorism backed by some facts." See also the similar statement of Erwin Teufel in the *Bundesrat*, BR PlProt. 770th session, 30 November 2001, at p. 654 and the Recommendations of the Committees of the *Bundesrat*, 22 November 2001, BR-Drs. 920/1/01, pp. 31–33.

177 See Report of the Committee for Internal Affairs, 13 December 2001, BT-Drs. 14/7864, at p. 6.

178 See Secs. 5(4) and 39(1) AuslG 1990 as amended by the Anti-Terrorism Act 2002.

regulations by the Home Secretary.[179] The relevant provisions of the Act had no immediate effect.

The Conservatives had further wanted aliens to be 'regularly' deported if they were under suspicion of being involved in terrorism (*Terrorismusverdacht*). The Anti-Terrorism Act 2002 amended the list of grounds warranting 'regular' deportation.[180] However, just as in the context of entry or prolongation of status, deportation was not to be ordered unless the aliens were found to be an impending threat to security because of their terrorist involvement.

The Conservatives had also been fighting for amendments lifting protection against removal to a country where the life or freedom of the aliens would be threatened upon their return. The governing coalition agreed to change the provision of the Aliens Act 1990 granting protection. However, under the new provision, protection was lifted only if there were serious reasons to believe that the alien had committed a crime against peace, war crimes, or crimes against humanity, or if there were serious reasons to assume that the alien had committed a serious non-political crime outside Germany or acted contrary to the purposes and the principles of the United Nations.[181] It appeared that the ruling coalition was prepared to implement Article 1(F) Refugee Convention (which had not yet been done). The Government was, however, not prepared to also include in the clause aliens involved in terrorism.

The ruling coalition also rejected the Conservatives' proposal that applicants for visas be fingerprinted on a regular basis, at least if they were nationals of States known or suspected of promoting international terrorism. The Anti-Terrorism Act 2002 simply provided that diplomatic missions might request the secret services to check on applicants (*Regelanfrage*).[182] The Home Secretary was explicitly authorised to specify the countries and their nationals who would then be subjected to the procedure, whereas other aliens would be exempted from it.[183]

Finally, many other proposals launched by the Conservatives were completely ignored. They included the proposal to provide for the detention of aliens protected by law against removal, yet suspected of being engaged in terrorism;[184] the proposal to explicitly provide for the deportation of aliens

179 *Ibid.,* Sec. 5(6).

180 *Ibid.,* Sec. 47(2)(4).

181 *Ibid.,* Sec. 51(3).

182 *Ibid.,* Sec. 64a(1).

183 *Ibid.,* Sec. 64a(4).

184 See Erwin Marschewski, BT-PlProt. 14/201, 15 November 2001, at p. 19678 accusing the Government of ignorance: "Your Bill will not facilitate the removal of terrorists. All terrorists will remain in Germany, just as it was before. And they will be kept under surveillance by policemen at the cost of tax payers. You know what is being discussed in England right now. The British Government – after all, a government

publicly approving of crimes against peace, war crimes, crimes against humanity, or terrorist action of a similar character;[185] the proposal to oblige aliens liable to deportation to stay in designated places in order to promote their willingness to leave;[186] and the proposal to allow the Army to take part in actions aimed at combating terrorism.[187]

When the *Bundestag* (first chamber) voted upon the Anti-Terrorism Bill in December 2001,[188] it became apparent that the Bill was backed by a huge majority. Social Democrats, members of the Green Party, and Conservatives voted in favour, Liberals and the left-wing PDS voted against. Negotiations on the Bill and parliamentary debates had not been easy for the ruling coalition of Social Democrats and the Green Party. The coalition was under constant political pressure, mainly exerted by the Conservatives. At the very beginning, the Home Secretary (Otto Schily) seemed to give way to the pressure or even to agree with the Conservative proposals.[189] Members of the Green Party were strongly opposed.[190] They feared that the Social Democrats would give in to far-reaching restrictions of fundamental rights. Negotiations between the governing Parties started. In October 2001, Social Democrats and members of the Green

led by the Labour Party – provides for the detention of suspected international terrorists. There ought to be no no-go areas here. The United Kingdom has a long-standing tradition of adhering to the rule of law. Like Germany, the United Kingdom has ratified the European Convention on Human Rights. What is deemed legitimate in the United Kingdom should not be discarded in Germany because some have bad feelings regarding Germany's recent history."

185 See Recommendations, above n. 176, at p. 38.

186 *Ibid.,* at p. 44.

187 See Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Artikel 35) (Bill on amendments to the Constitution [Article 35]), 23 November 2001 (Gesetzesantrag der Freistaaten Bayern und Sachsen), BR-Drs. 993/01. Under Article 87a(2) of the German Constitution, the Army must not be put in action unless this is provided for by the Constitution. According to the Constitution, the Army's main task is to defend the country or another NATO Member State in wartime, as the case may be (Article 87a). Under Article 35(2), civil forces of the *Länder* may, however, request the Army to step in and help in the case of a natural disaster or an especially grave accident. Since it is not obvious that Article 35(2) also encompasses terrorist threats, the Conservative Party in Parliament proposed to amend the clause accordingly. The proposal met strong opposition in Parliament.

188 BT-PlProt. 14/209, 14 December 2001, at p. 20763.

189 See, e.g., H. Knaup, W. Krach and H. Stark, "Alle Bürger unter Generalverdacht", *Der Spiegel*, 22 October 2001. See also Volker Beck, BT-PlProt. 14/201, 15 November 2001, at p. 19670.

190 See, e.g., R. Beste, H. Knaup, D. Koch, J. Leinemann and G. Rosenkranz, "Gefährliche Routine", *Der Spiegel*, 22 October 2001; "Juristen kritisieren Schilys Sicherheitspläne", *Süddeutsche Zeitung*, 25 October 2001.

Party found a compromise[191] paving the way for the members of the Green Party to be willing to defend the Bill in Parliament and in public as a sound and well-balanced approach to combating terrorism.[192] During parliamentary debates, the coalition took a vigorous stance, showing no signs of crumbling. Conservatives were not able to break through the compromises forged in October. The Government showed every sign of self-confidence, and there were good reasons to do so: it had just successfully launched the initiatives labelled 'Security Package I'.[193] And it had just shown strength with the proscription and spectacular action taken against the *Kalifatstaat*.[194]

3.2.3 Residence Act 2002

Early in November 2001, the Home Secretary (Otto Schily) did not just publish the Anti-Terrorism Bill, he also published an Immigration Bill advocating radical changes in Germany's immigration policy.[195] The most important changes were to be found in the Residence Bill[196] forming the core of the Immigration

191 See, e.g., "SPD und Grüne ringen um Schilys Anti-Terror-Paket", *Frankfurter Allgemeine Zeitung*, 27 October 2001; "Verständigung über ein zweites Anti-Terror-Paket", *Frankfurter Allgemeine Zeitung*, 29 October 2001.

192 The media reckoned that the Home Secretary had been able to negotiate a package deal linking measures against terrorism on the one hand and immigration on the other (leniency in immigration matters in the context of the Residence Bill against consent for tough measures in the context of the Anti-Terrorism Bill). See, e.g., "Nach dem Kompromiß in der Koalition sucht Schily wieder die Stimmen der Union", *Frankfurter Allgemeine Zeitung*, 6 November 2001. On the need to balance 'freedom' and 'security' when deciding upon measures directed against terrorism, see below at 3.3.1.

193 For details, see above at 3.2.1.

194 For details, see above at 3.2.1.

195 Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz) (Bill on controlling and curbing immigration and on regulating the stay and the integration of EU nationals and aliens [Immigration Bill]), 8 November 2001 (Gesetzentwurf der Bundesregierung), BR-Drs. 921/01; Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz) (Bill on controlling and curbing immigration and on regulating the stay and the integration of EU nationals and aliens [Immigration Bill]), 8 November 2001 (Gesetzentwurf der Fraktionen SPD und Bündnis 90/Die Grünen), BT-Drs. 14/7387 (hereafter ZuwG 2002).

196 Entwurf eines Gesetzes über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz – AufenthG) (Bill on the stay, the employment, and the integration of aliens in Germany [Residence Bill], incorporated in Article 1 ZuwG 2002.

Bill. The Immigration Bill was immediately submitted to the *Bundesrat* (second chamber) and to the *Bundestag* (first chamber). Although the timing indicated otherwise, the Immigration Bill or the Residence Bill were not a direct response to the attacks of 11 September 2001 (as was the Anti-Terrorism Bill). The Residence Bill had its roots in events dating back to the Spring of 2000.

For several decades, Germany's immigration policy had been marked by the *Anwerbesstopp* (halt in recruitment).[197] The halt was introduced in 1973 and maintained by changing Governments ever since. Backed by leading trade associations and major firms, the Chancellor (Helmut Schröder) unexpectedly acknowledged in the Summer of 2000 that the *Anwerbestopp* seriously impaired Germany's ability to compete on a global level. Countries around the world were eager to attract young, highly qualified immigrants in order to boost their economies. Yet, Germany had no role to play in that game because of her outdated immigration law and policy which kept immigrants in an inferior status. Germany – so the Chancellor concluded – was simply not attractive for young, highly qualified people willing to leave their home countries. However, natives as well as immigrants would be better off if Germany were indeed attractive as a country of immigration.

The Chancellor's announcement, hailed by firms, spurred politics into action. In July 2000, the Conservative Party set up a committee dealing with immigration issues.[198] In September 2000, the Home Secretary (Otto Schily) entrusted a group of 21 experts with the preparation of a report on whether and how Germany's immigration policy should be changed to meet global challenges (*Zuwanderungskommission*).[199] The political climate had changed dramatically. The slogan of the Summer 2000 read: "We have to reinvent our immigration policy". The fact that at the same time 3.9 million people were unemployed had no bearing on the debate. When the expert group presented its report in the Summer of 2001,[200] their summary did not really come as a surprise: Germany needs immigrants and Germany must become a place where young, highly qualified people would want to go to.[201] The recommendations of the *Zuwanderungskommission* had been unthinkable a few years earlier. In short, they suggested that Germany should seriously consider joining the ranks of modern immigration countries, such as the United States, Canada, or Australia, and think of immigration not as a burden, but as a valuable asset. The report

197 For details, see above at 2.2.1.

198 See, e.g.," Müller: Zuwanderung ist sinnvoll", *Frankfurter Allgemeine Zeitung*, 12 July 2000.

199 See, e.g., "Wiefelspütz und Özdemir warnen vor Alleingang bei Zuwanderungsgesetz", *Frankfurter Allgemeine Zeitung*, 12 September 2000.

200 Bericht der Unabhängigen Kommission 'Zuwanderung', *Zuwanderung gestalten, Integration fördern* (Berlin: Zeitbild GmbH, 2001).

201 *Ibid.,* at p. 17.

also recommended that the *Anwerbestopp* (halt in recruitment) should be lifted. It did not take long for the Government to prepare parliamentary action. When the Residence Bill was published it became apparent that the Government had indeed opted for radical changes. The Bill proposed admitting migrant workers according to the needs of the labour market in general (no longer pursuant to regulations specifying certain areas of employment). Highly qualified migrant workers were even to be admitted according to certain selection standards, without prior assessment of whether or not a certain post could be filled with workers already staying in Germany (*Auswahlverfahren*). The Bill also proposed explicitly to extend protection against removal to persons fearing persecution by non-State actors or persecution on account of sex.[202] And the Bill proposed to introduce 'integration courses' for newly-admitted immigrants.

The public debate on immigration taking place in the Autumn of 2001 and the Spring of 2002 was completely absorbed by questions such as: can we seriously consider abolishing the *Anwerbestopp* while facing 3.9 million unemployed? Will the instruments proposed by the Government indeed control and curb immigration or, on the contrary, unleash a wave of desperate immigrants knocking on Germany's doors? How should the idea that immigrants are expected to integrate into German society as a whole be implemented? Should they be required by law to participate in language courses and courses on German traditions, history, and constitutional principles? What consequences should be drawn if immigrants failed to do so?

Terrorism and measures against terrorism remained marginal in the debate. The Government proposed to just incorporate the respective provisions of the Anti-Terrorism Act into the new law and saw no need to go any further.

The Conservatives were reluctant to formally lift the halt in recruitment. With regard to terrorist threats, the Conservatives first resumed fighting for the amendments already rejected when Parliament voted on the Anti-Terrorism Bill.[203] To fuel the debate, the *Bundesrat* then adopted a Bill in January 2002 (sponsored by the Conservatives) proposing to change the provisions on deportation and on protection against removal.[204] The *Bundesrat's* Bill proposed

202 The wording of the relevant provision was changed during committee stage. See Recommendations of the committee, 27 February 2002, BT-Drs. 14/8395, at p. 44. The proposal to extend protection against non-State actors and for gender-based persecution was a consequence of negotiations on the EU qualification directive. See chapter by Nils Coleman in this volume for further reference.

203 See above at 3.2.2. For details on the position of the Conservatives, see also BR PlProt. 771th session, 20 December 2001, at pp. 722–744 (debate on the first reading of the Immigration Bill in the *Bundesrat*) and BT-Drs. 14/7987, Annex II (written comments of the *Bundesrat* on the Immigration Bill).

204 See, Entwurf eines Gesetzes zur Änderung des Ausländergesetzes (Bill on amendments to the Aliens Act), 17 January 2002, BT-Drs. 14/8009.

that aliens be 'regularly' deported[205] if they threatened national security, or resorted to violence in order to further their political goals. According to the Bill, aliens were also 'regularly' to be deported if there were facts justifying the assumption that they had participated in or supported terrorist organisations, or had made false representation with regard to their relationship to (suspected) terrorist groups. It also proposed that aliens could not rely on the provision granting protection against removal under Sec. 51(1) Aliens Act 1990 if there were serious reasons to believe that they had committed or planned a crime against peace, war crimes, crimes against humanity, or terrorist crimes of a similar character.

Again, the ruling coalition of Social Democrats and the Green Party stood firm. Proposals to tighten provisions on entry, deportation, and removal in order to meet terrorist threats were once again dismissed. They were not even discussed in Parliament. The ruling coalition successfully kept parliamentary debates focused on 'immigration' proper.[206] Yet, by the Spring of 2002, immigration had become an issue in the ensuing campaign for the 2002 Election due in the Autumn. Conservatives decided to return to their traditional position, i.e. the *Anwerbestopp* was not to be lifted; Germany was not a country of immigration. The vast majority of the members of the Conservative Party in the *Bundestag* (first chamber) voted against the Immigration Bill.[207] The Bill was basically adopted with the votes of Social Democrats and the members of the Green Party. Most of the Liberals abstained.

Under the German Constitution, the enactment of the Immigration Bill required the consent of the *Bundesrat* (second chamber), composed of representatives of the *Länder*.[208] Here, Social Democrats and the Green Party could not rely on a solid majority of the votes. The Committee of the *Bundesrat* recommended that the second chamber of Parliament should not agree to the Bill.[209] When the members of the *Bundesrat* met on 22 March 2002 to vote on the Immigration Bill,[210] the vote of one of the *Länder* (Brandenburg) was dubious: the representatives of Brandenburg had not voted unanimously, and when asked again, the head of the Brandenburg Government explicitly voted in favour of the Bill.[211] The President of the *Bundesrat* held Brandenburg's vote to be valid and, therefore, declared the Bill adopted with a slim majority of the

205 On the meaning of 'regular deportation', see above n. 75.

206 See BT-PlProt. 14/222, 1 March 2002, at pp. 22017–22063 (second and third reading of the Immigration Bill).

207 *Ibid.,* at p. 22061 (vote by roll call).

208 Articles 77(2), 78 GG.

209 See Recommendations of the Committees, 11 March 2002, BR-Drs. 157/1/02.

210 See BR PlProt, 774th session, 22 March 2002, at pp. 131–175.

211 *Ibid.,* at pp. 171–172.

votes.[212] The Conservatives disagreed. The Conservative-led *Länder* appealed to the Federal Constitutional Court contending that Brandenburg's vote was void and, accordingly, the Immigration Act was void (since the *Bundesrat's* consent was lacking). In December 2002, the Federal Constitutional Court concurred and the Immigration Act 2002 was declared null and void.[213] The Immigration Act 2002 and the Residence Act 2002 never came into force.

3.2.4 Residence Act 2004

3.2.4.1 Conservative Prelude

When the Government's impending defeat before the Federal Constitutional Court was leaked to the press, the Conservatives launched two new initiatives relating to immigration: they raised parliamentary questions;[214] and they submitted a Motion for a resolution of the *Bundestag* (first chamber).[215]

At that time, the secret services generally assumed that the threat of terrorist attacks had increased considerably. In November 2002, the head of the secret services (*Bundesnachrichtendienst)* had stated publicly that the risk of Germany being attacked was now no less than the risk of the United States.[216] Moreover, the trial against Mounir al-Motassadeq – who allegedly had close contact with the hijackers of 11 September 2001 – did not run smoothly at the turn of the year. It had become apparent that US security forces were not willing to cooperate with the prosecution and the court; they did not come forward with crucial information.[217] The United States was obviously prepared to take the risk of undermining the position of the prosecution in the Motassadeq case. Commentators on the case feared that the trial might fail.[218] The two initiatives

212 *Ibid.* at p. 172. The text was eventually published as Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz) (Act on controlling and curbing immigration and on regulating the stay and the integration of EU nationals and aliens [Immigration Act]), 20 June 2002, BGBl. I S. 1946. The Act was supposed to enter into force on 1 January 2003.

213 Bundesverfassungsgericht, judgment of 18 December 2002, 2 BvF 1/02.

214 Kleine Anfrage: Keine Einbürgerungen von Extremisten und mutmaßlichen Terroristen, 17 December 2002, BT-Drs. 15/244.

215 Motion for a resolution of the *Bundestag*, submitted by the Conservatives (CDU/CSU): Deutschland wirksam vor Terroristen und Extremisten schützen, 17 December 2002, BT-Drs. 15/218.

216 *Ibid.,* at p. 2.

217 See, e.g., "Einstellung des Verfahrens gefordert", *Frankfurter Allgemeine Zeitung*, 4 December 2002; "Keine Hilfe aus Amerika", *Frankfurter Allgemeine Zeitung*, 8 Januar 2003.

218 See, e.g., "Die Bundesanwaltschaft im Zeugenstand?" *Frankfurter Allgemeine Zeitung*, 14 Januar 2003.

of the Conservative Party in Parliament increased pressure on the Government. Both initiatives asserted that existing immigration and security law would not suffice to prevent terrorist attacks. The parliamentary questions clearly implied that it was quite easy for terrorists to acquire German citizenship and then to proceed with their vicious activities under the cover of German nationality.[219] They demanded that the Government put an end to a thoughtless naturalisation policy, and ensure that applicants were checked by the secret services before naturalisation and that German nationality could be revoked if naturalised individuals were found to engage in terrorist activities. In their Motion for a resolution, Conservatives contended that, at that particular moment, 30 Al Qa'eda members were on their way to Europe, eight of them had already reached German soil, and three had applied for asylum.[220] These facts indicated that existing law left many loopholes to be exploited by terrorists. The authors of the Motion then went on to repeat some of their long-standing demands: suspicion of being involved in terrorism should suffice to deny entry or stay and to order deportation; applicants for indefinite permits to remain ought to be checked first by secret services; protection against removal under Sec. 51(1) Aliens Act 1990 should not apply if the aliens were engaged in terrorism, notwithstanding the obligations deriving from international human rights instruments; showing approval for terrorist attacks should immediately lead to deportation; identity cards should include biometric data, and so forth.[221]

When parliamentary debate on the Motion for a resolution of the *Bundestag*[222] was reopened in May 2003 after the committee stage,[223] the Government was – for the first time – no longer in a position of strength. The debate reopened following a series of violent and cruel terrorist attacks, such as the attacks in Casablanca (16 May 2003), Riad (12 May 2003), and Bali (12 October 2002). All these attacks had been linked in the media to Al Qa'eda. The organisation seemed unharmed, active, and omnipresent. In January 2003, German security forces had been able to arrest two suspected members of the Al Qa'eda network in Frankfurt. Nonetheless, the action had not been based on German intelligence, but on a request by the United States.[224] The media quickly raised harsh questions on the inability of German secret services to gather relevant information and on whether Germans were safer now or, on the

219 See Kleine Anfrage, above n. 214, at p. 2.

220 See Motion for a resolution, above n. 215, at p. 3.

221 *Ibid.,* at pp. 3–13.

222 See above n. 215.

223 BT-PlProt. 15/46, 22 May 2003, at pp. 3857–3875.

224 See, e.g., C. Holm, G. Mascolo and A. Ulrich, "Hilfe für den großen Bruder", *Der Spiegel,* 13 Januar 2003.

contrary, more threatened as a target for retaliation.[225] Finally, Germans had been shocked by an incident that occurred in Frankfurt in January 2003, when a confused and possibly sick young man had been able to capture a motor glider from Frankfurt airport and threatened to crash into one of the tower blocks of the city centre, prompting a take-off by the German Air Force and a complete evacuation of the city centre.[226] In the end, the young man was talked into landing the glider at the airport. No harm was done. Yet, questions remained: What would have happened had the pilot not changed his mind? After all, the German Constitution did not clearly authorise the Army to take over in a case like this and to use force in order to prevent an attack.[227] Under these circumstances, the Government's reaction to the Conservatives' proposals was rather defensive. The Motion was rejected with the votes of the governing coalition and the Liberals.[228] The arguments put forward by Social Democrats and members of the Green Party were nevertheless weak: either they kept referring to measures already implemented by the Anti-Terrorism Act 2002 or they questioned the efficiency of the measures proposed by the Conservatives.

3.2.4.2 Parliamentary Debates

In January 2003 – with the initiatives of the Conservatives still pending before Parliament – the Government launched a new Immigration Bill.[229] The wording of the Bill was basically identical to the wording of the 2001 Bill as adopted by the *Bundestag* (first chamber) on 1 March 2002.[230] The Bill was submitted to the *Bundesrat* (second chamber) for comments on 16 January 2003. The Conservative-led *Länder* of the *Bundesrat* – which held a secure majority of the votes of the *Bundesrat* at that time – immediately signalled that they were not inclined to

225 See, e.g., "Einbahnstraße der Informationen", *Süddeutsche Zeitung,* 13 January 2003.

226 See, e.g., "Irrflug löst Sicherheits-Debatte aus; Struck hält Abschuß entführter Flugzeuge für möglich; Terrorangst im Frankfurter Hochhausviertel", *Süddeutsche Zeitung*, 7 January 2003; "Abfangjäger ohne klaren Auftrag. Die Frage, ob ein entführtes Flugzeug abgeschossen werden darf, ist rechtlich noch nicht beantwortet", *Süddeutsche Zeitung*, 8 January 2003.

227 Above n. 187.

228 BT-PlProt. 15/46, above n. 223, at p. 3875.

229 Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz) (Bill on controlling and curbing immigration and on regulating the stay and the integration of EU nationals and aliens [Immigration Bill]), 16 January 2003 (Gesetzentwurf der Bundesregierung), BR-Drs. 22/03.

230 See above at 3.2.3.

consent to a Bill that had already been rejected by the *Bundesrat*.[231] The fact that the Government had simply relaunched what had been declared null and void by the Federal Constitutional Court was taken as a provocation.[232] Accordingly, the *Bundesrat* decided, by a majority of the votes, to abstain from commenting on the Bill at that stage.[233] In February 2003, the new Immigration Bill was presented to the *Bundestag*.[234] The Bill passed through the *Bundestag* very quickly. On 9 May 2003, the Bill was adopted by the *Bundestag* during its third reading without any changes.[235] On 20 June 2003, the *Bundesrat* decided not to give its consent to the Bill.[236] Again, terrorism was not an issue during parliamentary debates. The debates concentrated wholly on how to model Germany's immigration policy in general: was there really a need to attract immigrants? Was it possible to reconcile measures against unemployment with immigration? How was the integration of immigrants effectively to be achieved?

At the beginning of July 2003, the Government decided to submit the Immigration Bill to the conciliation committee (*Vermittlungsausschuss*), a parliamentary committee designed to search for options reconciling differing positions between *Bundestag* and *Bundesrat*.[237] Negotiations between members of the committee are regularly held in private and may take some time. That was exactly what happened with respect to the Immigration Bill: The negotiations in the conciliation committee lasted for almost one year. At the end of June 2004,

231 The committees of the *Bundesrat* had recommended proposing more than 130 amendments to the Bill (BR-Drs. 22/1/03). This recommendation was rejected by the majority of the *Länder*. For details on the discussion, see BR PlProt. 785th session, 14 February 2003, at pp. 9–18.

232 Peter Müller, BR PlProt. 785th session, above n. 231, at p. 9.

233 BR PlProt. 785th session, above n. 231, at p. 18.

234 Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz) (Bill on controlling and curbing immigration and on regulating the stay and the integration of EU nationals and aliens [Immigration Bill]), 7 February 2003 (Gesetzentwurf der Bundesregierung), BT-Drs. 15/420.

235 BT-PlProt. 15/44, 9 May 2003, at p. 3670. During committee stage, the Conservatives had come forward with a long list of amendments; the amendments had been rejected by the committee. See, Beschlußempfehlung und Bericht des Innenausschusses, 7 May 2003, BT-Drs. 15/955.

236 For details on the discussion, see BR PlProt. 789th session, 20 June 2003, at pp. 182–192.

237 See Article 77(2) GG. The conciliation committee comprises 16 members of the *Bundestag* and 16 members of the *Bundesrat*. The members of the *Bundestag* are appointed (by a vote of the *Bundestag*) according to the distribution of seats held by political parties. The 16 members of the *Bundesrat* are nominated by the 16 German *Länder*.

the conciliation committee presented its recommendations to the *Bundestag*.[238] The committee's proposal comprised more than 100 amendments to the Immigration Bill as adopted by the *Bundestag*, 69 amendments relating solely to the Residence Bill. Little became known about the negotiations and the motives for compromising. Moreover, the committee's recommendations did not include explanatory notes. What became known was that members of the Green Party did not have a decisive saying in the negotiations, at least not during the last months. The same is true for the Liberals. They were even more marginalised. The Social Democrats and Conservatives had taken the lead. What also became known was that, in their final phase, negotiations almost exclusively concentrated on security issues. That negotiations suddenly switched to security issues was clearly linked to the terrorist attack in Madrid on 11 March 2004. Two weeks after the attack, the Chancellor (Helmut Schröder) gave a policy statement (*Regierungserklärung*) in Parliament touching on a number of matters, including terrorism and immigration.[239] The Chancellor conceded for the first time that there might be loopholes in the existing immigration law (*Sicherheitslücken*) and that, if that was the case, those loopholes had to be quickly eliminated.[240] The Chancellor also admitted that aliens protected against actual removal to another country caused problems under the perspective of security; those aliens should be obliged to stay in certain places and to register with the police.[241] Even a member of the Green Party held that:

> We have all seen the effects and the remnants of the Madrid attacks. Many people in Germany are scared. I believe they should be taken seriously ... existing loopholes in law ought to be closed.[242]

The recommendations of the conciliation committee were adopted by the *Bundestag* and the *Bundesrat* without any further controversies.[243] The new law on immigration – the Residence Act 2004[244] – came into force on 1 January 2005,

238 See Beschlußempfehlung des Vermittlungsausschusses, 30 June 2004, BT-Drs. 15/3479

239 For details, see BT-PlProt. 15/100, 25 March 2004, at pp. 8901–8912.

240 *Ibid.,* at p. 8911.

241 *Ibid.*

242 Katrin Göring-Eckardt, above n. 239, at p. 8930.

243 See BT-PlProt. 15/118, 1 July 2004, at p. 10723; BR PlProt. 802th session, 9 July 2004, at pp. 337–346.

244 Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz – AufenthG) (Act on the stay, the employment, and the integration of aliens in Germany [Residence Act], published in Article 1 Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern

and there can be no doubt that a number of important provisions pertain to Conservative thinking: The Residence Act 2004 does in fact not put an end to the *Anwerbestopp* (halt in recruitment). Only highly qualified migrant workers may aspire to be admitted without prior assessment of the situation of the labour market.[245] Others may be admitted only for specified employment and only if the employer is not able to find other employees taking precedence, such as Germans, EU nationals, or long-term residents.[246] The Residence Act 2004 does not provide for admission based on standard selection.[247] And the Act introduces mandatory integration courses.[248] If immigrants obliged to participate fail to do so, the authorities may deny a further leave to remain or even reduce social benefits.[249]

Conservative thinking also determines the relationship between immigration and measures combating terrorism. Firstly, denial of entry, denial of a permit to remain or to reside, or deportation no longer depend on "facts proving that the alien participates in an organisation supporting international terrorism or that the alien supports such an organisation".[250] Instead, denial (of entry or permits) or deportation depend on "facts justifying the conclusion that the alien participates in an organisation supporting international terrorism (or has done so in the past) or that the alien supports such an organisation (or has done so in the past)".[251] The exact wording of these provisions had been in dispute for some years. Conservatives had been urging time and again that denial of entry (and permits) or deportation ought to take place if aliens were simply suspected of being engaged in terrorism (*Terrorismusverdacht*).[252] The governing coalition had always insisted on 'proof', not 'suspicion'. Yet, whether or not the new wording fully implements the wishes of the Conservatives remains to be seen. It is now up to the courts to decide whether and to what extent the phrase "facts justifying the conclusion that" indeed includes mere suspicion.

(Zuwanderungsgesetz) (Act on controlling and curbing immigration and on regulating the stay and the integration of EU nationals and aliens [Immigration Act]), 30 July 2004, BGBl. I S. 1950 (hereafter AufenthG 2004).

245 Sec. 19 AufenthG 2004.

246 *Ibid.,* Sec. 18(3)–(4); Verordnung über die Zulassung von neueinreisenden Ausländern zur Ausübung einer Beschäftigung (Beschäftigungsverordnung – BeschV), 22 November 2004, BGBl. I S. 2937 (regs. 17–31).

247 Sec. 20 AufenthG 2004 reads: "abolished" (*weggefallen*).

248 *Ibid.,* Sec. 44a.

249 *Ibid.,* Sec. 44a(3).

250 Sec. 8(1)(5) and Sec. 47(2)(4) AuslG 1990 as amended by the Anti-Terrorism Act 2002.

251 Sec. 5(4) and Sec. 54(5) AufenthG 2004.

252 See above at 3.2.2.

Secondly, the Conservatives successfully pushed for an extension of the list of grounds explicitly legitimising deportation. Pursuant to the new Sec. 54 Residence Act 2004, an alien is subject to 'regular deportation'[253] if he or she has been the head of an association proscribed by law for violating criminal law or if he or she has turned against the Constitution (*die verfassungsmäßige Ordnung*) or against peaceful relations amongst peoples (*Völkerverständigung*). Apparently, the ground is meant to cover Imams practising what was referred to by Conservatives as hate speech (*Hasspredigten*). The list of grounds leading to 'discretionary deportation' (Sec. 55 Residence Act 2002) now also extends to aliens publicly approving of crimes against peace, war crimes, crimes against humanity, or terrorist activities of comparable character (*terroristische Taten von vergleichbarem Gewicht*) in a manner that disturbs public security and order.[254] 'Discretionary deportation' further encompasses aliens who, in a manner disturbing public security and order, incite hatred against segments of the population, call upon others to act violently or arbitrarily towards segments of the population, or violate the dignity of others through insults, disparagement, or defamation.[255] Again, the new clauses on 'discretionary deportation' are aimed – at least partly – at aliens engaged in hate speeches.

Thirdly, the ruling coalition resisted demands to further restrict protection against removal.[256] Yet, Social Democrats and members of the Green Party agreed to introduce alternative instruments designed either to facilitate removal or to enhance control with regard to aliens involved in terrorism. Under Sec. 58a Residence Act 2004, the highest authority of the *Länder* (e.g. the respective governments) may order the removal of an alien without prior deportation order if – based on an assessment relying on facts (*auf Grund einer auf Tatsachen gestützten Prognose*) – removal seems necessary to counter a special threat to

253 For the meaning of 'regular deportation', see above n. 75.

254 Sec. 55(2)(8a) AufenthG 2004.

255 *Ibid.,* Sec. 55(2)(8b).

256 The wording of Sec. 60(8) AufenthG 2004 is still identical to the wording of Sec. 51(3) AuslG 1990 as amended by the Anti-Terrorism Act 2002. Aliens protected by the Refugee Convention must not be removed to a country where they fear persecution unless there are serious grounds to assume that the aliens are a danger to the security of the country or, having been convicted of a crime and sentenced to imprisonment for three years or more, a danger to the community of the country. Refugees are not protected against removal either, if there are serious reasons to believe that they have committed a crime against peace, war crimes, or crimes against humanity, or if there are serious reasons to assume that they have committed a serious non-political crime outside Germany or acted contrary to the purposes and the principles of the United Nations.

the security of the country or a terrorist threat.[257] The removal order may be immediately executed,[258] unless the alien is protected against removal under Sec. 60 of the Act.[259] Whether or not the alien can rely on such protection is to be assessed by the authority ordering the removal (and not by the asylum authority). The authority ordering removal is not bound by other decisions, e.g. decisions on applications for asylum. The alien concerned may apply for judicial review and a stay of execution.[260] If an alien was ordered to be removed under Sec. 58a or to be deported because of his or her involvement in international terrorism under Sec. 54(5) of the Act, the alien is automatically required to report to the police at least once a week.[261] The alien may not leave the district of the alien's authority.[262] Furthermore, the alien may be required to reside in a certain place outside the district if that proves necessary to prevent ongoing illegal activity[263] or to abstain from using certain telecommunication services.[264]

The fight against modern international terrorism has finally become an integral part of the new law on immigration: denial of entry, denial of permits, deportation and removal have been turned into specific tools, used to mobilise against terrorism.

3.2.5 Aviation Security Act 2005

When the German Parliament moved to decide upon measures against international terrorism in the aftermath of 11 September 2001, Conservatives strongly advocated for an active engagement of the Army. In the Autumn of 2001, Conservatives opted for amendments to the Constitution in order to disperse doubts on the legitimacy of such engagement.[265] They wanted the Constitution to state beyond doubt that, in case of a terrorist threat, the *Länder* could request the Army to protect civil sites if the police forces of the *Länder* were not able to do so.[266] The proposition was met with fierce resistance from the Social Democrats and other Parties in Parliament. Social Democrats were not inclined to 'militarise internal security' at all,[267] and maintained that there would be "no

257 Sec. 58a(1) AufenthG 2004. The Home Secretary may take over the case if he or she thinks fit. *Ibid.,* Sec. 58a(2).

258 *Ibid.*

259 *Ibid.,* Sec. 58a(3).

260 *Ibid.,* Sec. 58a(4).

261 *Ibid.,* Sec. 54a(1).

262 *Ibid.,* Sec. 54a(2).

263 *Ibid.,* Sec. 54a(3).

264 *Ibid.,* Sec. 54a(4).

265 See above at 3.2.2.

266 For details, see BR-Drs. 993/01, above n. 187.

267 Dieter Wiefelspütz, BT-PlProt. 14/201, 15 November 2001, at p. 19665.

counter-terrorism engagement of the Army on German soil on [their] watch".[268] Opposition crumbled, though, when the nation was shocked by the incident of the motor glider threatening to hit tower blocks in Frankfurt city centre in January 2003. It seemed now intolerable that the law could leave open the question of whether or not the Army – the sole institution equipped to bring down a hostile aircraft – was in fact authorised to act and to use force in the face of a terrorist threat.[269] Only the Liberals still insisted that there were "good reasons for prohibiting a German Army to turn again against German citizens. [They would] not give in!"[270]

In November 2003, the governing coalition finally introduced a Bill on aviation security.[271] The Bill served two different purposes. On the one hand, the Bill was meant to implement EC Regulation No. 2320/2002 establishing common rules in the field of civil aviation security.[272] On the other hand, the Bill's intention was to codify national rules on civil aviation security, including rules of engagement of the Army (Air Force) in cases where police forces could not deal with the crisis.[273] The Government, however, did not propose changing the Constitution on the subject.[274] It just proposed making non-constitutional law authorising the Army to bring down a civil aircraft in order to prevent an especially grave accident.[275] According to the Government, the authorisation given to the Army was indeed covered by the Constitution (Article 35(2)). The Conservative Party in Parliament objected.[276] They held that a terrorist threat was not necessarily 'an especially grave accident' in the sense of Article 35(2) of the Constitution. To clarify the point, it was deemed necessary to amend the Constitution. And Conservatives held that the role of the Army should – in any case – not be confined to bringing down hostile aircraft. The Army should also

268 Alfred Hartenbach, above n. 267, at p. 19681.

269 See, e.g., Wolfgang Schäuble, "Menschenmöglicher Schutz", *Frankfurter Allgemeine Zeitung*, 12 Januay 2003; "Schröder: Es bleibt dabei – Nein zu Schulden, Nein zum Irak-Krieg", *Frankfurter Allgemeine Zeitung*, 15 January 2003.

270 Gisela Piltz, BT-PlProt. 15/19, 16 January 2003, at p. 1474.

271 See Entwurf eines Gesetzes zur Neuregelung von Luftsicherheitsaufgaben, 7 November 2003, BR-Drs. 827/03 (Gesetzentwurf der Bundesregierung). The Bill was submitted to the *Bundestag* on 14 January 2004. See BT-Drs. 15/2361.

272 OJ 2002 L 355/1.

273 See BT-Drs. 15/2361, at p. 1.

274 Under Article 35(2) GG, civil forces of the *Länder* may request the Army to step in and help in the case of a natural disaster (*Naturkatastrophe*) or an especially grave accident (*einem besonders schweren Unglücksfall*).

275 Bill, above n. 271, draft-Section 15.

276 See Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Artikel 35 und 87a) (Bill to amend the Constitution), 9 March 2004 (Gesetzentwurf der CDU/CSU), BT-Drs. 15/2649.

participate in the protection of threatened civil sites, such as airports, industrial plants, nuclear power stations, or waterworks. That required amendments to the Constitution.

Eventually, the *Bundestag* adopted the Bill with the votes of the governing coalition, while opposition parties voted against.[277] When the *Bundesrat* objected to the Bill,[278] the *Bundestag* dismissed the objection.[279] The Civil Aviation Security Act was then passed on to the Federal President (*Bundespräsident*) who was reluctant to sign the Act. The President contended publicly that the Act might violate constitutional rights, such as the right to life and bodily integrity (*Recht auf Leben und körperliche Unversehrtheit*) since the Army was given *carte blanche* to kill innocent civilians.[280] Eventually, the Act was signed by the President and enacted.[281] At the time of writing, applications launched by leading Liberals and pilots are pending before the Federal Constitutional Court.

Until further notice by the Federal Constitutional Court, the German Army is now explicitly authorised by law to force down a civil aircraft in order to prevent a grave accident.[282] Pilots of the Army may push civil airplanes off their route; they may force them to land, threaten to use force, and fire warning shots. Use of force is legitimate only if, according to the circumstances, it is to be assumed that the aircraft is used to kill people and only if the use of force is the only means to prevent this from happening.[283]

3.3 Underlying Discourse: Why Did We Respond That Way?

Public discourse on the Security Package I, the Security Package II, the Immigration Bills, and on civil aviation security had a common underlying framework, a certain way of thinking about what had happened on 11 September 2001 and of choosing between possible responses. In the aftermath of 11 September 2001, public discourse was preoccupied with three main questions: what is the relationship between 'security' and 'freedom'? What exactly is the relationship between instruments to counter terrorism and human rights obligations? And what exactly is our (the majority's) relationship to Islam, to the Muslim world, or to the Muslims residing in our country? The answers to these questions were of the utmost importance when Parliament moved to act.

277 BT-PlProt. 15/115, 18 June 2004, at p. 10545.

278 See Recommendations of the committees of the *Bundesrat*, 30 June 2004, BR-Drs. 509/1/04, and BR PlProt. 803th session, 24 September 2004, at p. 414.

279 BT-PlProt. 15/127, 24 September 2004, at p. 11619.

280 "Schily zeigt sich kompromißbereit", *Frankfurter Allgemeine Zeitung*, 29 January 2005.

281 Gesetz zur Neuregelung von Luftsicherheitsaufgaben (Civil Aviation Security Act), 11 January 2005, BGBl. I S. 78.

282 Sec. 14(1) Civil Aviation Security Act 2005.

283 *Ibid.,* Sec. 14(3).

3.3.1 Constitutional Ramifications: How to Balance Freedom and Security

As politicians started to think about introducing new laws to counter terrorism in the Autumn of 2001, public discourse focused on two principles, each backed by the Constitution, namely 'freedom' and 'security'.[284] Participants in the discourse firmly believed that they were facing a dilemma. Simply put, the dilemma was: We [the Western-oriented post-war generation] are used to certain freedoms and liberties that we cherish dearly. In the face of terrorism, however, we are compelled to give up some of our freedoms in order to enhance security. What we have to concentrate on, therefore, is to adequately balance 'freedom' and 'security'. Yet, in detail, many facets of the dilemma were disputed: how to define the adequate balance between 'freedom' and 'security'? How can we possibly measure 'freedom' against 'security'? Is there really a conflict between 'freedom' and 'security'?

The Conservatives moved promptly to one end of the spectrum. In general, the Conservatives were least prepared to accept that 'freedom' and 'security' were opposing principles. They kept asserting that freedoms and liberties were unthinkable unless they were based on 'security', that permanent vigilance was the price to be paid for enjoying freedoms and liberties,[285] that measures guaranteeing 'security' were not in contradiction to 'freedom', since 'security' was definitely a prerequisite for the enjoyment of all sorts of fundamental rights.[286]

The Liberals equally quickly moved to the other end of the spectrum. They consistently maintained that internal security was best served if existing laws were fully and consequently implemented and if law enforcement authorities were sufficiently and properly equipped.[287] Basically, the Liberals saw no need for legislative changes. Problems with respect to 'security' were to be solved through

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284 See, generally, W. Hoffmann-Riem, "Freiheit und Sicherheit im Angesicht terroristischer Anschläge" (2002), *Zeitschrift für Rechtspolitik* 35/12, at pp. 497–510.

285 See Motion for a resolution, above n. 135, at p. 1: "Freiheit ist ohne Sicherheit nicht denkbar. Wachsamkeit ist der Preis der Freiheit."

286 Andreas Birkmann, BR PlProt. 768th session, 19 October 2001, at pp. 531–532: "Nicht 'Sicherheit oder Freiheit', wie einige Kritiker meinen, sondern 'Freiheit in Sicherheit' ist das Motto. Sicherheit für unsere Bürger als unabdingbare Voraussetzung für die Bewahrung der Freiheit – das ist das Gebot der Stunde." See also Wolfgang Bosbach, BT-PlProt. 14/195, 18 October 2001, at p. 19009: "Wir müssen immer die Balance zwischen möglichst viel Freiheit auf der einen und einem hohen Maß an Sicherheit auf der anderen Seite halten; aber Freiheit und Sicherheit sind keine Gegensätze. Wer glaubt, daß weniger Sicherheit mehr Freiheit bedeutet, bringt – ob bewusst oder unbewusst – Frieden und Freiheit in Gefahr."

287 Max Stadler, BT-PlProt. 14/195, 18 October 2001, at p. 19015: "Der inneren Sicherheit ist am besten gedient, wenn die bestehenden Gesetze vollständig und konsequent angewandt werden. ... Wir müssen die Sicherheitsbehörden personell,

law enforcement only. They also believed that 'security' was in sharp conflict with 'freedom', and – when asked to choose – they opted for 'freedom' rather than for 'security': "We have to try hard to keep our freedoms unharmed, even if that makes us vulnerable to terrorist threats".[288] Most of the anti-terrorism laws enacted from 2001 through 2005 were adopted with the Liberals abstaining or voting against them.

Social Democrats and the Green Party took a position somewhere in between those two extremes, and they obviously had difficulties when they had to make choices. Social Democrats and members of the Green Party were reluctant to prefer 'security' over 'freedom' and they were reluctant to prefer 'freedom' over 'security': In principle, the governing coalition accepted as self-understood that it was the State's duty to protect its citizens so that they could live their lives in peace and feel safe.[289] The coalition also accepted that, in the aftermath of 11 September 2001, things had changed. People did not feel as safe as they had before. Yet, these fears were deemed ambiguous. People feared that terrorists might strike in Germany, and that they might lose valuable liberties.[290] Thus, everything was about finding a fair balance. Under these assumptions, mechanisms introduced to minimise terrorist threats necessarily entailed restrictions of liberties and rights. And that was apparently hard to accept: "The best defence for a society adhering to the rule of law is to preserve liberties as far as possible. Liberty dies by inches".[291]

It was of course up to the ruling coalition to primarily set the tone for any changes in law and, thereby, to strike the balance between 'freedom' and 'security'. When they did, they met considerable pressure exerted by the Conservatives who held far more seats in Parliament (*Bundestag*) than the Liberals did. For some

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finanziell und technisch so ausstatten, dass sie ihre Aufgaben wirkungsvoll erfüllen können."

288 Gisela Piltz, BT-PlProt. 15/19, 16 January 2003, at p. 1474: "[Wir] müssen alles daran setzen, um unsere Freiheit zu bewahren, auch wenn das in mancherlei Hinsicht verwundbar macht. Nach unserer Auffassung ist unsere Freiheit das aber wert."

289 Ute Vogt, BT-PlProt. 14/195, 18 October 2001, at p. 19013: "[Wir] sind uns in einem Punkt sicherlich einig: dass es die Aufgabe des Staates sei, die Sicherheit seiner Bürger zu gewährleisten, damit sie in Frieden und Freiheit leben können."

290 *Ibid.*, at p. 19013: "In der Bevölkerung sind Ängste vorhanden. Dies sind zum einen Ängste vor Angriffen und vor Bedrohungen, zum anderen aber auch Ängste vor Einschränkungen von Freiheiten. Ich sehe uns im Parlament in der Verantwortung, diese Ängste ernst zu nehmen, ... aber keinesfalls dazu beizutragen, weitere solcher Ängste zu schüren."

291 Wolfgang Wieland, BT-PlProt. 14/195, 18 October 2001, at p. 19019: "Den Rechtsstaat verteidige ich nur, indem ich ihn bewahre, und nicht dadurch, dass ich ihn abbaue. – Genau dies wollen die Terroristen. Diesen Gefallen dürfen wir ihnen nicht tun. 'Liberty dies by inches' – 'Die Freiheit stirbt zentimeterweise' – so sagt man im Englischen. Ich füge hinzu: Sie stirbt sogar meterweise."

time, the Social Democrats and members of the Green Party would not bend too much to those pressures. The coalition demonstrated that it was ready to react to terrorist threats. Two 'security packages' were successfully launched in the Autumn of 2001. Still, the list of measures implemented by those initiatives was much shorter than the list of measures requested by the Conservatives. For example, immigration and asylum law was indeed amended by the Anti-Terrorism Act 2002 Provisions on entry and deportation were changed. However, the effects of the changes remained quite limited. Existing law was clarified rather than tightened. With respect to terrorists, authorities had the power to deny entry or to make a deportation order even before the Anti-Terrorism Act 2002 came into force; the powers had just been hidden in vague clauses. The Anti-Terrorism Act 2002 made the powers explicit. In the Autumn of 2001, the doves prevailed. The situation changed in the Summer of 2004. In the Summer of 2004, the hawks prevailed. During negotiations in the conciliation committee, the Conservatives managed to get many of their long-standing demands accepted. When those demands were eventually adopted by Parliament, existing immigration law changed, and most of those changes entailed restrictions of fundamental rights (freedom of liberty, freedom of the press, freedom of expression, freedom of movement, freedom of communication, and so forth). Finally, when the *Bundestag* voted on the Civil Aviation Security Bill, the right to life was outweighed by the need to save other lives.

3.3.2 International Ramifications: How to Reconcile Measures against Terrorism with Human Rights

The governing coalition as well as the Conservative Party in Parliament time and again stressed that measures to fight terrorism – even though enacted on a national level – were closely related to international law. Very often, members of Parliament referred to the United Nations Security Council Resolution (SCR) 1373, adopted on 28 September 2001.[292] The Home Secretary (Otto Schily), for example, made reference to the Resolution when he announced to the *Bundestag* in October 2001 that measures countering terrorism were under way, such as an extension of the grounds justifying regular deportation, the inclusion of biometric data in identity cards, or the provision that applicants for naturalisation should be screened by the secret services before being granted German nationality.[293] The Anti-Terrorism Bill, launched by the Government in November 2001, relied on SCR 1373 in order to explain why it was again necessary to cut down protection against removal under Sec. 51 Aliens Act 1990.[294] Still, what exactly was required by SCR 1373, and how Germany should respond to the Resolu-

292 SCR 1373 (2001). See also Coleman in this volume, sections 3.5 and 4.2.

293 Otto Schily, BT-PlProt. 14/195, 18 October 2001, at p. 19027.

294 See Bill BT-Drs. 14/7386 (neu), above n. 169, at p. 57. For details on the 1997 amendments to Sec. 51 Aliens Act 1990, see above 2.2.3.

tion, was heavily disputed. The Conservatives consistently contended that the mechanisms introduced by the ruling coalition were not enough to fulfil Germany's obligation under the Resolution.[295] They were especially worried about protection against removal. No decent citizen was – so they claimed – able to understand why aliens threatening the security of the country were still allowed to stay here; aliens threatening internal security or having committed heinous crimes should not be protected by law.[296] During the first and second readings of the Anti-Terrorism Bill, the Conservatives attacked the concept of protection against removal fiercely. It became apparent for the first time that Conservative criticism was not just aiming at lifting protection against removal under Sec. 51 Aliens Act 1990 (risk of persecution), but also at lifting protection against removal under Sec. 53 Aliens Act 1990 (risk of death penalty, risk of treatment contrary to Article 3 ECHR).[297] Some Conservatives went so far as to assume that SCR 1373 effectively eliminated some of Germany's obligations deriving from Article 3 ECHR, especially the obligation not to remove aliens to a country where they were at risk of being tortured or ill-treated.[298] Thus, German authorities were meant to be free to remove (suspected) terrorists to any place they wanted. And if actual removal proved not to be viable, authorities should have the power to detain (suspected) terrorists indefinitely.

From 2001 through 2003, the governing coalition was not willing to follow suit. Social Democrats and members of the Green Party insisted on the validity of Germany's obligations under Article 3 ECHR and other human rights instruments.[299] In the Spring of 2004, resistance began to melt. After the Madrid attack in March 2004, the Conservatives resumed their fight against the existing provisions on protection against removal (then Secs. 51, 53 Aliens Act 1990).

295 See, e.g., Motion for amendments to the Anti-Terrorism Bill, 13 December 2001 (Änderungsantrag der CDU/CSU), BT-Drs. 14/7861, at p. 26; Erwin Marschewski, BT-PlProt. 14/209, 14 December 2001, at p. 20751; Motion for a resolution of the *Bundestag*, above n.215, at p. 5.

296 See, e.g., Erwin Teufel, BR PlProt. 768th session, 19 October 2001, at p. 525; Erwin Marschewski, above n. 295.

297 See, e.g., Erwin Marschewski, BT-PlProt. 14/201, 15 November 2001, at p. 19678; Erwin Marschewski, BT-PlProt. 14/209, 14 December 2001, at p. 20751. See also Motion for a resolution of the *Bundestag*, above n. 215, at p. 5.

298 See, e.g., Motion for a resolution of the *Bundestag,* above n. 215, at pp. 5 and 7.

299 See, e.g., Volker Beck, BT-PlProt. 14/209, 14 December 2001, at p. 20752 (affirming that he was not willing to abrogate traditional European human rights); Otto Schily, *ibid.,* at p. 20760 (asserting that he would stand by the European Convention on Human Rights); Otto Schily, BT-PlProt. 15/19, 16 January 2003, at p. 1494 (contending that the proposals of the Conservatives were not in line with Germany's obligations under the Refugee Convention and the Convention on Human Rights); Motion for a resolution of the *Bundestag*, 12 March 2003, BT-Drs. 15/549, at p. 1 (measures countering terrorism may never infringe upon human rights).

Suddenly, the Home Secretary seemed willing to introduce indefinite detention.[300] When members of the Green Party protested sharply, negotiations in the conciliation committee almost broke down.[301] In May 2004, the Home Secretary announced that indefinite detention would not be dealt with in the context of the Immigration Bill.[302] The demand would be postponed. In June 2004, members of the conciliation committee reached a cross-party consensus that suspected terrorists who could not be removed under human rights obligations should be subjected to restrictions of movement and police surveillance.[303] Yet, even if the Conservatives did not succeed entirely, the battle fought in the Spring of 2004 was not a battle for human rights. None of the opponents of the Conservatives argued that the demands of SCR 1373 remained utterly vague[304] and that the request that Member States take adequate measures to prevent the abuse of refugee status explicitly conceded priority to "relevant provisions of national and international law, including international standards of human rights".[305] None of the opponents of the Conservatives publicly relied on the fact that the General Assembly of the United Nations as well as the Parliamentary Assembly of the Council of Europe had called upon Member States to strictly abide by their international human rights obligations even when combating terrorism.[306] And none of the opponents of the Conservatives pointed out that the United Kingdom had been ready to formally suspend some of her duties under the ECHR in order to implement domestic provisions allowing for indefinite detention of suspected terrorists who could not be removed from the country.[307]

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300 "Schily erwägt Unterbindungsgewahrsam für mutmaßliche Terroristen: 'Eine Weile in Haft' / Grüne: Das gibt es im Rechtsstaat nicht", *Frankfurter Allgemeine Zeitung*, 26 April 2004.

301 "Einwanderungsgespräche ergebnislos vertagt", *Frankfurter Allgemeine Zeitung,* 3 May 2004.

302 "Für Ausweisung und Regelanfrage", *Frankfurter Allgemeine Zeitung*, 18 May 2004.

303 See above at 3.2.4

304 SCR. 1373, above n. 292, operative part 2 provides, *inter alia*, that States shall (a) refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, (b) take the necessary steps to prevent the commission of terrorist acts, (c) deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens, or (d) prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes.

305 *Ibid.,* operative part 3(f).

306 See UNGA. Res. 57/219, 27 February 2003; UNGA. Res. 59/191, 10 March 2005; Parl. Ass. Res. 1271 (2002), 24 January 2002, and Parl. Ass. Rec. 1550 (2002), 24 January 2002.

307 See Declaration contained in a Note Verbale from the Permanent Representation of the United Kingdom, dated 18 December 2001, registered by the Secretariat General

In the Spring of 2004, human rights arguments were either ignored or deemed too weak to be put forward.

3.3.3 Religious Ramifications: How to Get to Terms with Islam

After the attacks of 11 September 2001, the Conservatives were convinced that there was a direct link between terrorist threats and religious convictions. Religious fanaticism was deemed to be at the root of international terrorism.[308] Some statements sweepingly referred to 'Islamist terrorism' rather than 'international terrorism'.[309] To counter that phenomenon effectively, the whole Islamist potential for violence (*islamistisches Gewaltpotential*) had to be disclosed and wiped out.[310] Arguments like these were often mixed with fears specifically relating to Muslim communities in Germany:

> We have to acknowledge to ourselves that many immigrants tend to live in parallel societies (*Parallelgesellschaften*), in separate worlds with their own rules and cultures, cut off from our world, sometimes even hostile toward our world.[311]

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on 18 December 2001, http://conventions.coe.int/. The declaration immediately raised questions under Article 15 of the Convention on Human Rights. See, e.g., Ch. Grabenwarter, "Right to a Fair Trial and Terrorism", in Societé Française pour le Droit International, ed., Journee Franco-Allemagne: Les nouvelles menaces contre la paix et la sécurité internationales. New threats to international peace and security (Paris: Editions A. Pedone, 2004), at pp. 220–224. In December 2004, the UK House of Lords declared indefinite detention of suspected terrorists to be in violation of human rights. See *A (FC) and others (FC)* v *Secretary of State for the Home Department* [2004] UKHL 56. On 16 March 2005, the Secretariat General of the Council of Europe registered a *Note Verbale* of the British Government containing the withdrawal of the derogation. See also Bonner and Cholewinski in this volume.

308 See Motion for a resolution of the *Bundestag*, above n. 135, at p. 1: "Die Grenzen zwischen totalitären Ideologien, politischem Extremismus, religiösem Fanatismus und sozialer und gesellschaftlicher Entwurzelung als Urheber von Aggressivität und menschenverachtenden Angriffen verwischen zunehmend."

309 See Motion for a resolution of the *Bundesrat*, above n. 137, at p. 1: "weltweite Vernetzung des islamistisch motivierten Terrorismus".

310 *Ibid.*: "Es ist alles daran zu setzen, islamistisches Gewaltpotential, das sich unerkannt hier aufhält und konspirativ Anschläge vorbereitet, aufzuspüren, um schwerste Straftaten, die weltweit verübt werden können, zu verhindern."

311 Hartmut Koschyk, BT-PlProt. 15/19, 16 January 2003, at p. 1478: "Wir wissen bzw. müssen zur Kenntnis nehmen, dass es bei Zuwanderern aus fremden Kulturkreisen eine deutliche Tendenz zu Parallelgesellschaften gibt, in denen sie sich von unserer Werte und Gesellschaftsordnung abschotten, ja, sie sogar massiv bekämpfen."

On the basis of that sombre diagnosis, Conservatives called upon Muslims residing in Germany to demonstrate unmistakably that they were loyal to the Constitution and German society as a whole.[312] The governing coalition of Social Democrats and the Green Party preferred a different framework. They did not deny that there was a connection between religion and terrorism but did not stress that connection. The ruling coalition kept referring to 'international terrorism', 'terrorist threats', or 'extremists'.[313] In the aftermath of 11 September 2001, Social Democrats and the Green Party avoided the term 'Islamism', and they tried to keep the discourse on integration of immigrants separate from the discourse on combating terrorism. The religious angle of modern international terrorism did not seem noteworthy. The ruling coalition was quite successful in keeping religion out of the discourse.

Public debate on Islam reached another peak after the murder of the filmmaker, Theo van Gogh, in Amsterdam on 2 November 2004. It was again up to the Conservative Party to take the initiative in Parliament. In November 2004, the Conservatives submitted a Motion for a resolution of the *Bundestag* (first chamber), entitled "Fight political Islamism, support Muslims loyal to the Constitution".[314] As indicated by the title, authors of the Motion drew a clear line between Muslims adhering to constitutional principles and Muslims taking the side of what was called 'political Islamism'. The authors contended that certain segments of Muslims residing in Germany would keep themselves separate, forming 'parallel societies': "Many Muslims have not yet arrived in the mid of our society".[315] That was – so the Motion continued – partly due to ignorant behaviour on the part of German society, and partly due to the fact that Muslims in Europe had not been able to create a 'European Islam', i.e. an Islam based on European values.[316] That situation was deemed prone to conflicts of all sorts, and some Muslims – authors reckoned them to number around 31,000 – would try to deepen and widen the gap between Muslims and non-Muslims. For these 'Islamist' Muslims, democracy, pluralism, human rights, or secularity had no meaning at all; they would accept only the Sharia and the Sunna as fundamental guiding principles. 'Islamism', so the Motion went on, was to be subdivided into 'terrorist Islamism' and 'political Islamism'.[317] The

312 Erwin Teufel, BR PlProt. 768th session, 19 October 2001, at p. 525: "Alle hier lebenden Menschen müssen es unabhängig von ihrer Staatsangehörigkeit und ihrem religiösen Bekenntnis als eine selbstverständliche Pflicht begreifen, gegenüber unserem Staat und unserer Gesellschaft loyal zu sein."

313 See, e.g., Anti-Terrorism Bill, BT-Drs. 14/7386 (neu), above n. 169, at pp. 1 and 35.

314 Antrag der CDU/CSU: Politischen Islamismus bekämpfen – Verfassungstreue Muslime unterstützen", 22 November 2004, BT-Drs. 15/4260.

315 *Ibid.,* at p. 1.

316 *Ibid.*

317 *Ibid.,* at p. 2.

authors noted that, while terrorist Islamism was now recognised as a threat, the threats emanating from 'political Islamism' were widely underestimated. Even if political Islamists would not promote violence openly, their opposition to Western traditions was truly radical, and their teachings fertile ground for 'terrorist Islamism'.[318]

The responding Motion of the governing coalition emphasised pluralism, not conflict and tensions.[319] The Motion contended that:

> People living in Germany have different backgrounds, different origins, different cultures, different religious beliefs. That there is heterogeneity – with all its chances and risks – rather than homogeneity has to be acknowledged as a fact and has to be dealt with … We stand for a culture of respect for others (*Kultur des Respekts*). We cannot expect immigrants to integrate into our society unless we make them feel accepted.[320]

These Motions started the first parliamentary debate on the values forming the inviolable core of Germany's post-war identity, i.e. values that must – under all circumstances – be cherished.[321] It is interesting to note that, despite the differences in framing the situation, there is indeed room for a cross-party consensus. Firstly, all Parties accepted there should be a distinction between 'Islam' and 'Islamism' or 'extremism'.[322] 'Islam' was what the vast majority of Muslims in Germany adhered to as a religion and what was to be respected. 'Islamism' was irritating and a threat to inviolable constitutional values. Secondly, values deemed inviolable derive from the Constitution. Conservatives specifically referred to democracy, inalienable fundamental rights, the rule of law, pluralism, separation of State and faith (*Säkularität*), and people's sovereignty.[323] Social Democrats and the Green Party relied on the respect for the dignity of all human beings, freedom of liberty, equality before the law, equality between sexes, freedom of religion, and the separation of State and faith.[324] Thirdly, there is consensus that disrespect for those values must result in sanctions:

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318 *Ibid.*

319 Motion for a resolution of the *Bundestag*, 1 December 2004, BT-Drs. 15/4394: "Zusammenleben auf der Basis gemeinsamer Grundwerte". See also Motion for a resolution of the *Bundestag*, submitted by the Liberals, 1 December 2004, BT-Drs. 15/4401.

320 *Ibid.,* at p. 1.

321 For details, see BT-PlProt. 15/145, 2 December 2004, at pp. 13437–13467.

322 See Motion sponsored by the governing coalition, above n. 319, at p. 4: "In der politischen Debatte darf die Trennlinie zwischen muslimischer Religion und Extremismus nicht verwischt werden."

323 Motion for a resolution, above n. 314, at p. 5.

324 Motion for a resolution, above n. 319, at p. 1.

> Tolerance does not mean that anything goes and it does not mean indifference … There must be State sanctions if extremism turns against our society and our core values.[325]

Debates on the Motions also revealed dissent and helplessness. Firstly, the Conservatives departed from cross-party consensus when they argued that minimal integration of immigrants (especially immigrants from Muslim countries) should not just encompass "acceptance of the Constitution", but also "acceptance of a liberal-democratic leading culture" (*freiheitliche demokratische Leitkultur*).[326] Opponents fiercely criticised the idea of a 'leading culture' for its vagueness and for its implication that there was a hierarchy of cultures, and that cultures shaped by Christianity took precedence over cultures shaped by Islam.[327] Secondly, no one seriously considered expelling 31,000 Muslims suspected of being loyal to political Islamism and, therefore, not loyal to the Constitution. Obviously, the instruments employed in order to fight terrorism are different from the instruments employed to fight political Islamism. Fighting political Islamism primarily means struggling for people's hearts and sympathies although they may cling to pre-modern traditions. According to the authors of the Motions such instruments include education, training, employment, promotion of language skills, of equality of sexes, of inclusion on all levels of society, or of religious teachings responding to the needs of Muslims living in a European country. To move forward in that struggle certainly takes patience and time.

4. Conclusions

For a lengthy period of time, terrorism and immigration or asylum law were not related at all in Germany. When 'terrorism' was first acknowledged as a phenomenon requiring attention by Parliament, the phenomenon was considered to be homemade. The terror orchestrated by the Red Army Faction in the 1970s and 1980s had German perpetrators and a German political background: the rebellion of discontent young people against politicians pertaining to the immediate post-war generation. Neonazi-Terrorism was also perceived as an indigenous phenomenon. In the early 1990s, marginalised youth demonstrated that Nazism had still roots in some parts of German society. Neonazis deliberately depicted aliens as their targets to remind the Government that Germans were unjustly neglected by German politics. In each case, Parliament responded and it did so by amending the Criminal Code. The formation of a terrorist group became an offence punishable by imprisonment, a provision which was tightened up

325 *Ibid.,* at pp.1, 2.

326 Motion for a resolution, above n. 314, at p. 6.

327 See, e.g, Franz Müntefering, BT-PlProt. 15/145, 2 December 2004, at pp. 13441–13443; Hans-Michael Goldmann, *ibid*., at p. 13446; Claudia Roth, *ibid.*, at p. 13447; Sebastian Edathy, *ibid*., at p. 13453.

at later stages. When Germany had to deal with riots staged by angry Kurds sympathising with the PKK in 1994 and 1996, counter-terrorism and immigration law became directly linked for the first time. Politicians were stunned and outraged that aliens – in ordinary language still called guest-workers – had dared to invade Autobahns, threaten policemen, and cause damage. That was deemed to be a clear-cut misuse of the right of hospitality. Specific instruments were deployed to meet the threat caused by these aliens. Parliament wanted them not just convicted for having breached the public peace (*Landfriedensbruch*), but also deported.

Measures introduced and enacted in the aftermath of 11 September 2001 were wide-ranging and – right from the start – also aimed at non-nationals residing in Germany or wanting to enter Germany. When Parliament abolished the privilege traditionally accorded to religious associations, law enforcement authorities immediately decided to crack down on Muslim organisations deemed to nurture extremism. And when Parliament moved to specifically counter terrorism, amendments to the Aliens Act were part of the package. Nonetheless, opinions on how to respond to terrorism in the field of immigration differed greatly. Conservatives pressed for tough instruments, basically overriding all rights aliens might have under international law. The ruling coalition of Social Democrats and the Green Party was just willing to amend existing law symbolically. The Terrorism Act 2002 explicitly gave powers that were already provided for, prior to the amendment, by a vague clause of the Aliens Act. In 2002 and 2003, Social Democrats and members of the Green Party still echoed a precarious consensus reached in the Summer of 2001, namely that Germany should re-arrange its position towards immigration and finally lift the halt of recruitment dating back to 1973. Conservatives got their second chance when the (first) Immigration Act 2002 was declared null and void by the Federal Constitutional Court and the Government reintroduced the Immigration Bill: negotiations peaked when Madrid was hit by terrorist attacks. The Residence Act 2004 (the core of the Immigration Act 2004) indeed curtailed rights and liberties of aliens, especially in the context of entry, deportation, and removal. The 'war on terrorism' underlying the Residence Act 2004, however, is not just about stopping ticking bombs. It is also about turning against aliens who fundamentally criticise Western culture and might thereby take sides with positions deemed close to terrorism, or against religious associations and their leaders tagged as 'Islamist'. In 2004, even the concept of integration of immigrants got drawn into the struggle: are immigrants who refrain from learning German not indicating that they want to stay in their separate worlds, and are separate worlds not breeding grounds for terrorism? Politicians still have to realise that 'political Islamism' will not be wiped out under the new rules on deportation and removal. We have to find ways to get along with immigrants preferring, at least in some contexts, to abide by the laws of Allah.

Chapter 5 The Changes in Laws on Immigration and Asylum in France in Response to Terrorist Fears

*Claire Saas**

1 Introduction

In France, changes in laws on immigration and asylum in respect of terrorist fears are focussed around the concept of national security and public order. Thus, if we follow this concept closely we can see what has been happening to the law as a result of concerns about terrorism. In asylum law the matter is somewhat complicated by the fact that international obligations of protection limit the State's power to use national security as a ground to exclude asylum seekers. Principally, the provisions of Articles 1F and 33 of the 1951 Convention relating to the Status of Refugees have to be taken into account in this field.

This chapter will trace the development in French law and jurisprudence of the public order concept in the areas of entry, residence permits, expulsion and asylum in the four years after the 1990 Gulf crisis (on the assumption that it takes about four years for laws to be passed, and for court decisions to become final) and analyse the changes to legislation. The same approach is then applied to the period from 2001 to 2005 in the context of the 'War on Terror'. A comparison can then be drawn between these two periods.

2 The Concept of Public Order in French Law[1]

The question of public order has been raised in France since World War II in relation to the situation of aliens, although it was limited to the context of

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1 Until 28 February 2005, the situation of aliens in France was governed by the Act of 2 November 1945. Over the past 30 years, this Act has been amended by many different laws, referred to with the name of the Minister of Interior. The legislation

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expulsion. Thus, the Minister for the Interior can make an expulsion order,[2] if the presence of the alien on French territory is constitutive of a threat to public order.[3] In the Decree of 29 April 1976 relating to family immigration, which was declared invalid by the *Conseil d'Etat* (the French supreme court for administrative matters), family reunification could be restricted if the presence of the 'entering person(s)' presented a threat to public order. Not until 1980 was the concept of public order used in legislative texts in a field other than expulsion: the Act of 11 January 1980 applied the condition of not being a threat to public order for the first time to entry provisions,[4] and to privileged residents,[5] who could be deprived of that status on the same ground.

With the Act of 29 October 1981, expulsion could be ordered on the grounds of a 'serious threat' to public order. A serious threat to public order could be established where a person had been sentenced following conviction to imprisonment for more than one year. Following the Act of 17 July 1984, by which Parliament unanimously introduced the ten-year residence permit into French legislation, a serious threat to public order could be established where an alien had been sentenced to more than one period of imprisonment and the aggregated sentences exceeded one year. Under the same Act, a residence permit may be renewed on the condition that its holder does not constitute a threat to public order.

Over the years, the concept of public order has been introduced in legislation concerning the entry, residence and expulsion of aliens in France, notwithstanding that it is one of the vaguest concepts in French law: What is public order? What constitutes a threat to public order? What is a 'serious' threat to public order? How is this condition being controlled? Is being a threat to public order subject to a person's criminal conviction? Is the mere accusation of having

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regarding asylum seekers is the Law of 25 July 1952. The Act of 2 November 1945 and the Law of 25 July 1952 have both been codified in the 'Code de l'entrée et du séjour des étrangers et du droit d'asile', referred to as CESEDA, which entered into force on 1 March 2005. It is a constant law codification (*codification à droit constant*). See, the Journal Officiel de la République Française (JORF) of 25 November 2004, p. 19924. All quotes of legal provisions will contain both references: articles of the Code and of the Act of 2 November 1945, or articles of the Code and of the Law of 25 July 1952.

2 Art. 23 Act of the Act of 2 November 1945; Art. L. 521-1 CESEDA.

3 Or a threat to public credit: this reference is due to financial scandals which occurred under the Third Republic and in which aliens were involved. Cf. 'Staviski Affair'.

4 Law No. 80-9 of 10 January 1980 (JORF of 11 January 1980, p. 71). In effect, the law only implemented the practice used by the Police to refuse entry to someone for the same public order reasons applied in expulsion cases.

5 According to Article 16 of the Act of 2 November 1945, in the original version, a 'permit for privileged resident' can be issued to aliens who have been living for three years in France, if they were less than 35 years old when they came to France.

committed an offence sufficient? Could the public order concept be related to the fear of terrorist attacks?

2.1 The Public Order Concept in French Jurisprudence

The case law of the Supreme Court in administrative matters provides some interpretation of the public order concept. Since 1956, the jurisdiction admits that criminal convictions may be taken into account but cannot be the sole ground for expelling an alien. In a decision of 14 November 1956,[6] the Administrative Court asserted that the Minister for the Interior could take into account spent convictions to assess whether the presence of the alien constituted a threat to public order, but could not legally justify the expulsion by reference to those facts alone. In the 1970s, one interpretation of being a threat to public order was 'lack of political neutrality'. However, the *Conseil d'Etat* did not accept this ground, considering that political activity is not as such a threat to public order, and therefore could only justify an expulsion if the person's written or spoken words had caused disorder.[7]

In the late 1970s,[8] in a fundamental decision the Administrative Court set out features of the concept of threat to public order which have been consistently referred to since. It established that:

> Criminal offences committed by an alien could not by themselves provide a legal basis for a measure of expulsion and do not exempt the competent authority from taking all circumstances of the case into consideration in order to decide whether the presence on French territory of the person concerned is liable to constitute a threat to public order.[9]

It was also pointed out that the Minister for the Interior was required to proceed by way of an individual assessment of the alien's case, taking into account the entirety of his or her behaviour in France.[10] In 1988, the *Conseil d'Etat* explained

6 CE, 14 November 1956, Corradini, Rec. Lebon, p. 620.

7 CE, 13 May 1977, Perregaux, Rec. Lebon, p. 216.

8 CE, 21 January 1977, Dridi, Rec. Lebon, p. 38; CE, 11 June 1982, Ministre de l'Intérieur c/ R., No. 32.292.

9 "Les infractions pénales commises par un étranger ne sauraient, à elles seules, justifier légalement une mesure d'expulsion et ne dispensent en aucun cas l'autorité compétente d'examiner, d'après l'ensemble des circonstances de l'affaire, si la présence de l'intéressé sur le territoire français est de nature à constituer une menace à l'ordre public." See also, CE, 26 October 1998, Diallo, No. 173098; CE, 5 mai 1989, Ministre de l'Intérieur c/ El Rhmani, No. 87588.

10 CE, 8 December 1978, Benouaret, No. 11.846.

that "the expulsion of an alien does not have the character of a sanction, but of a police measure, solely aimed at protecting public order and security".[11]

A notable feature of the case law – which has not fundamentally changed – is that the court is satisfied with a minimal degree of scrutiny of administrative decisions in this area: even if the assessment of the alien as being a risk to public order is exaggerated, the judge would not invalidate the administrative decision, as he or she would do if the individuals concerned were citizens of EU Member States.

Undoubtedly there is a connection between criminal convictions and a threat to public order. However, as the case law established, whilst a conviction is necessary, it is not sufficient for establishing a threat to public order. The core reason for being a threat to public order was not at that time related to terrorism, but to the lack of political neutrality or to the commission of ordinary criminal offences. Thus, there was no specific legal provision concerned with terrorism until the beginning of the 1980s.[12] The first legal provisions were created and developed later on, after the first terrorist attacks occurred in France.[13] After each string of terrorist attacks, in 1986 and 1996, the legislature responded by first creating the mechanism of a specific law on terrorism and, then, by widening its field of application.

2.2 Developments in Anti-Terrorism Legislation

In France anti-terrorist legislation is based on the Act of 9 September 1986,[14] which has been complemented by the New Criminal Code, the Act of 22 July 1996,[15] the 2001 Law on Everyday Security (*Loi relative à la Securité Quoti-*

11 CE, 20 January 1988, Ministre de l'intérieur c/ E., No. 87.036.

12 The main concern in the field of terrorism was related to the decolonisation war in Algeria (1954-1962). Legislative provisons preventing crimes against the State security were the only mechanism existing in the criminal code.

13 The main terrorist attacks on the French mainland (and specifically in Paris) occurred on: 3 October 1980 – rue Copernic – Abu Nidal Organisation; 22 April 1982 – rue Marbeuf – attributed to Illitch Ramirez Sanchez; 9 August 1982 – rue des rosiers – Abu Nidal Organisation; 15 July 1983 – aéroport d'Orly – ASALA (Armenian Secret Army for the Liberation of Armenia); 7 December 1985 – Galeries Lafayette et Printemps – CSPPA (Committee of Solidarity with Arab and Middle East prisoners); 20 March 1986 – Galerie Point-Show – CSPPA; 17 September 1986 – rue de Rennes – CSPPA; 25 July 1995 – RER Saint-Michel – GIA (Armed Islamic Group); 7 September 1995 – Villeurbanne – GIA; 6 October 1995 – avenue d'Italie à Paris – GIA; 17 October 1995 – RER musée d'Orsay – GIA; 3 December 1996 – RER Port-Royal – GIA. For an analysis of the terrorist attacks in 1986, see D. Bigo, "Les attentats de 1986 en France", Part I and II, Cultures et conflits, http://www.conflits.org.

14 Law No. 86-1020 of 9 September 1986, JORF of 10 September 1986, p. 10956.

15 Law No. 96-647 of 22 July 1996, JORF of 23 July 1996, p. 11104.

dienne,[16] hereafter referred to as LES), the 2003 Law on the Internal Security (*Loi sur la Sécurité Intérieure,*[17] hereafter referred to as LIS) and the 2004 Law to adapt Justice to the evolutions of Criminality *(Loi portant adaptation de la Justice aux évolutions de la Criminalité,*[18] hereafter referred to as LJC).

In 1986, after several terrorist attacks in France, a specific response to terrorism was adopted by Parliament in the form of the Act of 9 September 1986, which modified the old Penal Code. In that Act a 'terrorist offence' is an offence under ordinary criminal law, the 'aim' of which "is to cause a serious disturbance to public order by means of intimidation or terror".[19] A few autonomous terrorist offences exist and concern environmental terrorism,[20] membership of terrorist groups,[21] and financing of terrorism.[22] It is not only the specific offences related to terrorism that are important, but also the whole derogation from rules of procedure applicable to ordinary criminal law, such as the centralisation of the 'anti-terrorist' judges for all the territory in one section, the 14th section of the prosecution service;[23] police custody extended to 96 hours instead of 48 hours as in any ordinary criminal field; specific rules relating to house search, remands in custody, composition of the court and convictions.

In January 1999, the International Federation for Human Rights (*Fédération Internationale des Ligues des Droits de l'Homme*, hereafter referred to as IFDH) published a report on the legislation on terrorism and its application in France. The legal system had not by then undergone the three reforms of the LES, the LIS and the LJC. The IFDH concluded that violations of the European Convention on Human Rights (ECHR) were a product of "some practices resulting from the application of the anti-terrorist legislation"; they were also the product of "the content of the anti-terrorist legislation itself". It also concluded that nothing could justify "the 'anti-terrorist' practices that prevail in France, which open the way to an arbitrary system of justice". Without doubt,

16 Law No. 2001-1062 of 15 November 2001, JORF of 16 November 2001, p. 1215.

17 Law No. 2003-239 of 18 March 2003, JORF of 19 March 2003, p. 4761.

18 Law No. 2004-204 of 9 March 2004, JORF of 10 March 2004, p. 4567.

19 Article 421-1 Criminal Code.

20 *Ibid.*, Article 421-2.

21 *Ibid.*, Article 421-2-1.

22 This act has been criminalised for the first time in the LES. Before the LES, one could be sued for financing terrorist groups through the incrimination of complicity of terrorism.

23 The report of the IFDH on this section is particularly interesting. See "France: la porte ouverte à l'arbitraire", Mission internationale d'Enquête, Rapport de Michaël Mc Colgan et Alessandro Attanasio, January 1999.

its assessment of anti-terrorism law in 2003 would be no less critical after the adoption of three complementary Acts by Parliament in 2001, 2003 and 2004.

2.3 Public Order Threat and Immigration Law

Action against terrorism, resulting since 1986 in the adoption of autonomous criminal offences and special rules of procedure, sometimes intersects with the idea of a permanent struggle against immigration – notably through its penalisation. Of course, some intersections between the two legal developments can be identified. For instance, the condition of not being a threat to public order is increasingly made a requirement for entry to, or stay on, French territory; some offences which are linked to illegal entry or residence are being referred to as offences concerned with the fight against terrorism in order to criminalise them in the most drastic way; even people protected from expulsion or from a prohibition to enter French territory are no longer protected when there is a conviction for a terrorist offence. Since the terrorist attacks in New York and Washington, these two tendencies appear to proceed more often at the same pace. Evidence of this is provided by the LES, the LIS, the LJC, the modification of the law on Immigration with a permanent reference to criminality, the modification of the law on Asylum with the extension of public order as a ground to refuse asylum.

Whereas the connections between immigration and terrorism were not really identified before 1986, the legislation on immigration has been considerably hardened in 1994 and 2003, a few years after the first and second Gulf crises. Although, no single, direct link between the first Gulf crisis and hardened immigration legislation can be drawn, a constant fear of war, general feelings of 'insecurity' and stigmatisation of aliens supports a global trend to security responses, as can be illustrated by the situation in France around the time of the first Gulf crisis in 1991, and around the time of the war against Iraq in March 2003.

3 Indirect Connection Between War, Terrorism and the Law on Immigration and Asylum in 1990-1994

During the summer of 1990, the invasion of Kuwait by Iraq became a preoccupation of politicians in France. The international community, joined by the French government, asked Saddam Hussein to withdraw from the occupied country as the occupation appeared to be a manifest violation of international law. Following the failure by the Iraqi government to withdraw the decision to intervene in order to re-establish Kuwait's sovereignty over its territory was taken. After much hesitation about military intervention, President François Mitterrand, supported by his government and the opposition parties, decided at the beginning of 1991 to participate in the international coalition waging war against Iraq. In a famous speech, he stated that, if Iraq did not act by itself in relation to the international coalition's ultimatum to leave Kuwait, "the weap-

ons shall speak". At that moment, French public opinion widely supported that proposition. Only the Minister for Defence, Jean-Pierre Chevènement, favouring an alternative solution, made the decision to leave the government. The international coalition and the French government decided, however, not to pursue Saddam Hussein in Baghdad. After the retreat of the Iraqi army, France gave up any idea of fighting against Iraq and did not take part in the permanent aerial bombings.

There is in this period no direct connection between terrorism, or fear of terrorist attacks, and immigration and asylum law in France. However, as will be shown below: (i) the condition of not being a threat to public order already existed in the legislation on immigration and asylum in 1990; (ii) the first Gulf crisis did not bring much change to the situation of aliens in France, apart from the activation of the 'Vigipirate' emergency plan to an intensified level; (iii) the two Laws 'Pasqua' in 1994 initiated the widespread application of the condition of not being a threat to public order; and (iv) criminal offences concerning immigration and aliens were being indirectly justified by the fear of terrorism.

3.1 The Threat to Public Order in Immigration and Asylum in 1990

In 1990, both the laws on immigration and asylum already included the condition of not being a threat to public order to qualify for entry and residence in France.

3.1.1 Immigration Law

Entry onto French territory has been made conditional upon not being a threat to public order since 1980. According to French immigration law, "access to French territory can be refused to any alien whose presence would be constitutive of a threat to public order or who is subject to a prohibition to enter the territory or an expulsion".[24] It is interesting to note the fact that freedom of movement for many African States' citizens was limited in 1986 by the introduction of a visa requirement in order to prevent terrorist attacks in France. At that time, this measure was meant to be a temporary one. It is still in force today.

A limitation to stay in French territory on the ground of being a threat to public order already existed in 1990. But it was limited to the issue of a ten-year residence permit. Such a permit may be issued under immigration legislation[25] on the basis of State discretion.

As regards measures relating to return, the prohibition to enter French territory can be enforced either at an administrative (*arrêté d'expulsion*) or a judicial level (*interdiction du territoire français*). Both administrative and judicial prohibitions to enter French territory are referred to as the 'double penalty' (*double peine*). This means that an alien will have to pay his debt to society twice:

24 Art. 5 al. 3 of the Act of 2 November 1945; Art. L. 213-1 CESEDA.

25 Art. 14 of the Act of 2 November 1945; Art. L. 314-3 CESEDA.

first by a period in custody or the payment of a fine; secondly by departing and staying away from France.

As for the administrative measure relating to return, an expulsion decision can be taken by the Minister for the Interior if the presence of the alien on French territory constitutes a "serious threat to public order".[26] The person must then be heard by the Departmental Commission for Expulsions, which gives advice to the Minister. Only when this advice is unfavourable to the expulsion is the Minister obliged to follow it. A few categories of aliens are protected from expulsion.[27] These are: children under the age of 18; the spouse, for more than six months, of a French citizen; people living habitually in France since reaching the age of ten; people who have lived legally in France for ten years; persons who have lived habitually in France for more than 15 years; people staying legally in France without having been convicted and sentenced to imprisonment for more than one year. In a case of absolute emergency, the protection of the hearing by the Commission for Expulsions does not exist.

In October 1991, the Law 'Questiaux' introduced into French legislation the concept of 'overwhelming necessity for State security' (*une nécessité impérieuse pour la sûreté de l'Etat*).[28] When this condition is fulfilled, the protection for certain categories of persons is removed. Is there only a difference of degree between a 'serious threat to public order' and an 'overwhelming necessity for State security'? Or is it a difference of substance? This concept has been defined no more precisely than the concept of serious threat to public order. During the debates on the Law 'Questiaux' before Parliament, the government stated that expulsion on the grounds of 'overwhelming necessity for State security' should only be put in practice for terrorists, spies and drugs traffickers. However, on the one hand, the application of this legislative provision[29] has been more widespread than envisaged by the legislature and has been used against aliens prosecuted for rape or other sexual offences. On the other hand, conviction for terrorist offences is not regarded as by itself sufficient to give rise to an 'overwhelming necessity for State security'. However, expulsion orders based on the 'overwhelming necessity for State security' have been considered legal when taken against a person affiliated to an organisation which has committed terrorist attacks or is liable to do so on French territory, such as the Armenian Secret Army for the Liberation of Armenia or the Committee of Solidarity with Arab and Middle East Prisoners.[30]

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26 Art. 23 of the Act of 2 November 1945; Art. L. 521-1 CESEDA.

27 Art. 25 of the Act of 2 November 1945; Art. L. 521-2 CESEDA.

28 Law No. 81-973 of 29 October 1981, JORF of 30 October 1981, p. 2970.

29 Art. 26 of the Act of 2 November 1945; Art. L 521-3 CESEDA.

30 CE, 6 May 1988, M. Hadi Ala'a Abdul, No. 79375 81838 : "le ministre de l'intérieur s'est fondé sur les relations suivies entretenues par l'intéressé avec le services de renseignements d'un pays étranger et sur sa fréquentation assidue des milieux étrangers

Another provision allowing for deportation has been reactivated in French legislation with the Act of 31 December 1970, concerning the judicial prohibition to enter French territory for crimes related to drugs.[31] The harshness of this sanction had been justified by the legislature on the basis of the public disorder caused by crimes related to drugs and was therefore restricted to a very specific kind of criminal activity. In the Act of 31 December 1991, aliens with a 'privileged relationship to France' are protected against such a measure, except where they have committed a serious drug-related offence. However, the Act extended the application of the judicial prohibition to enter French territory to offences against the legislation on entry and residence.

As regards security concerns related to the first Gulf War affecting the treatment of aliens in France, an explicit link can be found in a circular of 24 September 1990 addressed by the Ministry of Education to university institutions. The Ministry required the presidents and directors to suspend training of Iraqis, to refuse the enrolment of Iraqi students during the year 1990-1991 and to cancel existing enrolments. However, there was such a general outcry that the Ministry for Education issued a new circular on 18 October 1994 to cancel the September circular. Two NGOs had already appealed to the Supreme Court. Whereas the conclusions of the government commissioner tended to establish the illegality of the circular, the State Council declined jurisdiction to consider the matter because the circular was said to be connected with the diplomatic relations of France and as 'an act of government' escaped any jurisdiction.[32] The noteworthy exception in the circular concerned asylum seekers or refugees to whom these restrictions did not apply.

3.1.2 Asylum Law

Article 1F of the Geneva Convention relating to the Status of Refugees (Refugee Convention) provides that:

> the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

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impliqués dans les attentats terroristes commis dans la région parisienne à la fin de l'année 1985 et au début de l'année 1986"; CE, 2 December 1988, M. Ebrahimian, No. 72686 ; CE, 12 December 1986, M. Bouassi, No. 91688 ; CE, 19 June 1989, M. Kabalan, No. 91821.

31 Law No. 70-1320 of 31 December 1970, JORF of 3 January 1971, p. 74. In fact, the first time that the French Criminal Code made a distinction between alien and French citizens as regards penalties must be seen in the Act of 8 August 1893, relating to the life-long internment of multi-recidivists in the French colony. This act introduced the prohibition to enter the French territory.

32 Ce, 23 September 1992, 1ère et 4ème sous-sections réunies, No. 120437 120737.

> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

The contracting State to the Refugee Convention must however respect the provisions of Article 33 which provides that:

> no Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The prohibition of '*refoulement'* contains a protection of the holder of refugee status from any form of return: expulsion, extradition and deportation.[33] Nevertheless, the grounds for that protection are not to be found in the text of the Refugee Convention, but in the general principles of law, which also apply to asylum seekers in respect to expulsion and deportation.

At the time of the first Gulf crisis, the OFPRA (*Office français de protection des réfugiés et apatrides* – French Office for the Protection of Refugees and Stateless Persons) did not generally rely on the fact that the asylum seeker had committed a serious non-political crime to activate the exclusion clause.[34] The single exception was applied to citizens of Tunisia who had engaged in an armed opposition against their government. Iraqi people who fled from their country did not encounter great difficulties in being recognised as statutory refugees.

3.2 The First Use of 'Vigipirate' at an Intensified Level

The Gulf crisis provided the first occasion for the use of an existing emergency plan, the Plan Vigipirate, at an intensified level. In 1978, Vigipirate, the French Ministry of Defence (*Secrétariat général de la défense nationale*) set out an emergency plan the aim of which was to prevent threats from, or actions of, terrorists. It was aimed at:

33 CE, Ass, 1 April 1988, No. 85234, Bereciartua-Echarri, Rec. Lebon, p. 135.

34 D. Alland, C. Teitgen-Colly, *Traité du droit de l'asile*, Presses Universitaires de France, Collection Droit fondamental, 2002, p. 518. CCR, SR, 20 July 1993, Chahrour, No. 231390: "la participation à la décision, à la préparation ou à l'exécution d'actions pouvant recevoir" la qualification de crime grave de droit commun justifie le jeu de l'article 1F (b).

> promoting enhanced awareness among all public services and private partners, increasing security along highways, train stations, ports and airports as well as securing sensitive points and networks throughout the country.[35]

At that time, the emergency plan consisted of two levels, one permanent, the other one intensified. The latter consists in the intensification of security measures at public establishments, the control of access to sensitive networks (airports, railway stations, museums etc) and control of the efficiency of surveillance measures. At this stage, the French army can be involved, as well as police, customs authorities and civil security. The decision to implement the emergency plan at the intensified level is to be taken by the Prime Minister, on the advice of the Minister for Interior Affairs. The Interior Minister forwards the instructions for the implementation of the plan to the different heads of the French (regional) departments. The heads of departments are further responsible for its implementation.

Whether the intensified level of Vigipirate resulted in an increasing number of detentions cannot be ascertained, as no figures concerning detention rates during that period are available.[36] However, all NGOs working with immigrants confirmed an increasing sense of vulnerability amongst the alien population. A general practitioner working mainly with asylum seekers explained this phenomenon not only in terms of the aliens' fears of being arrested due to the increasing number of identity controls, but also of the fears of living again in war conditions reminiscent of those that made them leave their countries.[37]

Illegal immigrants became a more explicit target of security concerns with the expansion of the threat to public order provisions in the Laws 'Pasqua' of 1994.

3.3 Strengthening the Threat to Public Order Provisions in the Immigration Law in 1994: the Laws 'Pasqua'

Resort to the public order concept has been brought into widespread use by the Laws 'Pasqua' of 24 August and 30 December 1993, which amended the law on immigration. According to the amended provisions, temporary residence permits would only be issued to a young person living in France on grounds of family reunification if the person's presence did not constitute a threat to

35 E. Brouwer, "France: Focussing on internal security", in *Immigration, asylum and terrorism*, E. Brouwer, P. Catz, E. Guild (eds), Recht & Samenleving 19, 2003, pp. 13-25.

36 Unfortunately neither Cimade has kept track of the figures, nor the Minister for Interior Affairs had already adopted a communicative way of tackling the question of immigration by reporting on rates of deportations.

37 A. Veisse, "Politique de l'immigration en France et en Europe", Intervention in Marne-la-Vallée, 24 October 2003, Local Social Forum.

public order.[38] The 'Pasqua' reform also made the issuing of a ten-year residence permit conditional upon the absence of a threat to public order, although it had to be issued automatically.[39] Whereas the condition of not threatening public order was required for the discretionary issuing of residence permits, it has been extended to circumstances where the issuance is by right. That makes rather paradoxical the notion of 'issuance as a granted right'. Furthermore, family reunification can be refused if the presence of the family members on French territory constitutes a threat to public order.[40]

As for deportation (*arrêté de reconduite à la frontière*), since the Laws 'Pasqua', an alien may be deported if he or she "has been subjected to the withdrawal, refusal of issuance, or refusal of renewal, of a residence permit on the grounds of being a threat to public order".[41] However, a decision not to renew a residence permit on grounds relating to public order has no legal basis and is therefore illegal. To make up for this legal loophole, the interpretation by the *Conseil d'Etat* of a circular of 8 February 1994 provides a legal basis where the issuance of the residence permit is due to a mistake, or the alien was subject to an entry in the Schengen Information System.

In 1994, after the entry into force of the New Penal Code, around 200 offences could lead to a decision of prohibition of entry into French territory. Among these offences many are part of the chapter "Offences against Nation, State and Public Peace", such as terrorism, criminal conspiracy, plot, bribery of a public magistrate, escape, spying, counterfeiting, and uprising. Some of them are common or ordinary offences such as murder, manslaughter, rape, crime against humanity, genocide, sexual aggressions, procuring, causing an explosion. It is noteworthy that this gives the judge power to make such a decision against a person as long as the ground specified is the seriousness of the offence, even if a very strong integration into French society can be shown. Of course, a stereotypical motivation of the sentence[42] is considered sufficient by the French Supreme Court for criminal matters (*Chambre criminelle de la Court de cassa-*

38 Art. 12 bis of the Act of 2 November 1945; Art. L. 313-11 CESEDA.

39 Art. 15 of the Act of 2 November 1945; Art. L. 314-11 CESEDA.

40 Art. 29-I-3° of the Act of 2 November 1945; Art. L. 411-6 CESEDA.

41 Art. 22-I-7° of the Act of 2 November 1945; Art. L. 511-1 CESEDA.

42 A stereotypical motivation of a sentence is a motivation that does not include a real reference to the facts of the case, such as: "Considering the seriousness of the offence and the degree of integration, the court considers that a prohibition of entry to French territory is appropriate". In fact, there is a motivation in the decision, but that can be used in any other case concerning an alien. The supreme court for criminal matters is satisfied with that kind of motivation, so that the theoretical protection does not really exist: "les juges ont souverainement apprécié qu'il n'y avait pas disproportion entre le respect de la vie privée et familiale de l'intéressé et le but recherché par la mesure d'éloignement, la cour d'appel a justifié sa décision au

tion). Noteworthy is the fact that the protection of aliens against such decisions by requiring their motivation[43] does only apply for correctional matters, not for criminal ones, as the seriousness of the public disorder caused by criminal activity is always presumed to counterbalance the integration into French society, however strong it might be.[44]

As for the admission of an asylum seeker to France, it can only be refused if his or her presence constitutes a threat to public order.[45] Furthermore, the application of the non-*refoulement* principle means that the asylum seeker is granted the right to stay on French territory for as long as the examination of the claim for asylum continues. However, as soon as the application has been rejected by the OFPRA, he or she may be deported, even if he or she has appealed against the refusal to the CRR (*Commission de Recours des Réfugiés* – Appeal Court for Refugees), if his or her "admission to residence as an asylum seeker constitutes a serious threat to public order".

As seen above, with the Laws 'Pasqua' the grounds of plain or serious threat to public order entered into widespread use. But the concept has not become clearer through its extension to many different fields in immigration and asylum law. A circular of 8 February 1994 – which repeats the terms of a previous circular of 14 March 1986 – proposes no definition of the concept, but specifies that the threat to public order must be assessed by reference to all the factual and legal elements of the individual's conduct. Therefore, it is neither necessary nor sufficient that the alien has been convicted of criminal offences. The existence of such convictions is, however, one of the issues to be considered, along with other matters such as age, the nature or the seriousness of the facts held against the alien and his or her usual behaviour. This position is similar to that of the *Conseil d'Etat*.

Meanwhile, in 1994, after the terrorist attack on the French consular residence in Algeria, 40 Algerians were arrested and placed in detention in Folembray. On 31 August 1994, 20 of the 'Folembray Islamists' suspected of terrorism were deported without trial to Ougadougou, in Burkina-Faso, further to an agreement between the governments of France and Burkina-Faso. Thus, the French government found a way of banishing *non grata* Algerians, without sending them to a country in a state of civil war. Ten years later, six of the deportees

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regard des dispositions de l'article 131-30 du Code pénal". Chambre criminelle, 17 March 2004, No. 03-85892.

43 According to French criminal Law, judges do not have to give the grounds of their sentences. Only a few must be motivated, such as decisions prohibiting entry to French territory.

44 Chambre criminelle, 18 February 2004, Bull. Crim. No. 46.

45 Art. 31 bis 3° of the Act of 2 November 1945, abrogated by the Act of 11 May 1998; the legal provision can now be found in Article 8 of the Law of 25 July 1952, i.e. Article L. 714-4 CESEDA.

are still living there demanding a return to France and a trial. However, their demands are ignored by the authorities of Algeria, France and Burkina-Faso or are met with the response that the person to whom the demand is addressed has no competence in the matter.

At the same time as subjecting immigrants increasingly to the public order requirement, criminal offences concerned with aliens were created, some of which were more directly motivated by security concerns heightened by the threat of terrorism.

3.4 New Offences Concerning Aliens

The question of fear of terrorism certainly played a role before Parliament in relation to the offence of complicity in illegal entry. Article 27 of the Schengen Implementing Agreement 1990 requires the Contracting States to establish penalties against anyone who helps or tries to help, with the aim of making a profit, an alien to enter or to stay on the territory of one of the contracting States. France was to implement this provision in French legislation by bringing the provisions of the Act of 2 November 1945 in line with Article 27 of the Schengen Implementing Agreement. However, the aim of profit-making disappeared from the French version, as enacted in the Law of 27 December 1994.[46] One of the reasons raised during the parliamentary discussions was that "Islamist, terrorist or spy networks should be prosecuted" for this offence by means of immigration law.

This idea of reaching terrorist networks through the creation of crimes relating to aliens continued in French law with the draft Law 'Toubon' of 1996,[47] which was to amend Article 421-1 of the Criminal Code concerning the definition of terrorist offences so as to include direct or indirect help given to an alien to enter, circulate or stay in France. This new criminal offence would have permitted an increase of the maximum sentence from five to seven years' imprisonment. This provision adopted by Parliament has undergone review by the Constitutional Council which stated that:

> such conduct does not stand in immediate relation to the commission of a terrorist act. In any event, when this relation exists, this conduct can be sanctioned by prosecution for complicity in terrorist acts, for harbouring a wrongdoer or participation in criminal conspiracy as provided in other laws. Besides, the qualification of terrorist act has the consequences not only of an increase of the applicable penalties but also the application of procedural rules which derogate from common procedural rules.[48]

46 Law No. 94-1136 of 27 December 1994, JORF of 28 December 1994, p. 18535.

47 Law No. 96-647 of 22 July 1996, JORF of 23 July 1996, p. 11104.

48 Decision No. 96-377 DC of 16 July 1996, http://www.conseil-constitutionnel.fr/decision/1996/96377dc.htm.

In the case law of the Constitutional Court, the connections between terrorism and the laws on asylum or immigration have become more frequent and direct since 2001.

4 A More Direct Connection between War, Terrorism and Law on Immigration and Asylum in 2001-2005

The terrorist attacks in New York and Washington led to two major wars: one in Afghanistan and one in Iraq. Whereas France immediately supported the war against Afghanistan, the country was strongly opposed to a military intervention in Iraq, rather believing in firm measures and further investigative missions. In fact, the attacks had reactivated the question of weapons of mass destruction and the necessity of an investigative mission under the supervision of the UN.[49] Although the first results of the missions of the UN and IAAE (International Agency for Atomic Energy) might have led to confidence in the possibility of peaceful disarmament of Iraq, the United States was in favour of leading a 'preventive war'.

In so far as it was Dominique de Villepin, the French Minister for Foreign Affairs, who expressed the preference of many other countries for the peaceful disarmament of Iraq, it seemed as if France embodied resistance against the American hegemony. Many demonstrations attested to the very strong opposition of French people. Even when the consensus among Member States of the EU began to break, the opponents to the war stood firm in Belgium and Germany. However, the fact of holding out against war in Iraq did not include recognition of a *prima facie* entitlement to refugee status for Iraqi people fleeing from their country. Nor did it imply recognition that harsh and repressive laws were not necessary in order to fight terrorism on French territory.

In this period we witnessed that: (i) the public order concept, which had been widely used in the laws on immigration after 1994, was extended by immigration legislation in 2001 and thereafter; (ii) aliens, however, were not only subject to the public order requirement as regards entry, stay or deportation; they were also subject to a wide range of measures against criminality overtly concerned with aliens; (iii) the penalisation of immigrants was accompanied by the disappearance of the inviolable protection of asylum in French law; and (iv) the harshest modification of the act on immigration, since its adoption in 1945, took place .

4.1 An Extension of the Condition of the Absence of Public Order Threat: Entry, Residence and Return

The condition of not being a threat to public order is now considered at each stage of the 'movement' of an alien, beginning with the issuing of a visa and entry. This condition has been extended to most of the residence permit provi-

49 UN Security Council Resolution No. 1441, 8 November 2002.

sions, since the Law 'Debré' in 1997[50] and the Law 'Chevènement' in 1998.[51]. According to the Act on immigration, a temporary residence permit can always be refused on public order grounds to three categories of people: scientists, salaried persons, artists;[52] family members;[53] asylum seekers.[54]

It can also be considered in respect of the ten-year residence permits.[55] As for measures of deportation, public order is now a ground for every kind of return measure.

4.1.1 Entry

To enter French territory, a visa is usually required and the issue of a visa usually requires production of many documents, among which is a certificate of housing. After 11 September 2001, some mayors refused to sign the certificate of housing on security grounds. However, refusing a certificate of housing on grounds related to terrorism or public order does not have a legal basis.[56] The MRAP (*Mouvement contre le Racisme et pour l'Amitié entre les Peuples* – Movement against racism and for Friendship between Populations) indicated that on 11 September 2001, the mayor of Saint-Prix had announced his decision to refuse to sign attestations of reception to people coming from "countries which are frequently associated with international terrorism or countries where scenes of jubilation accompanied the news of the drama that has just occurred in the West". This position was then adopted by other mayors in France.

A visa can also be refused on public order grounds.[57] Whether somebody constitutes a threat to public order can be assessed by consultation of the Schen-

50 Law No. 97-396 of 24 April 1997, JORF of 25 April 1997, p. 6268.

51 Law No. 98-349 of 11 May 1998, JORF of 12 May 1998, p. 7087.

52 Art. 12 of the Act of 2 November 1945; Art. L. 313-3 CESEDA.

53 Art. 12-*bis* of the Act of 2 November 1945; Art. L. 313-11 CESEDA.

54 Art. 12-*ter* of the Act of 2 November 1945; Art. L. 313-13 CESEDA.

55 Arts. 14 and 15 of the Act of 2 November 1945; Art. L. 314-3 and L. 314-11 CESEDA.

56 According to Article 2-1 of the Decree of 27 May 1982, such a certificate can only be refused for lack of valid documents or because the indications on the certificate of housing and the documents presented do not match.

57 CE, 19 February 2001, Aouichi, No. 210877: "en l'absence de toute disposition législative ou réglementaire déterminant les cas où le visa peut être refusé à un étranger désirant se rendre en France, sous réserve de l'application des stipulations des conventions internationales, et eu égard à la nature d'une telle décision, il appartient aux autorités françaises qui disposent d'un large pouvoir d'appréciation et peuvent fonder leur décision non seulement sur des motifs tenant à l'ordre public mais sur toute considération d'intérêt général, de s'assurer au préalable de la réalité des raisons invoquées au soutien de la demande dont elles sont saisies"; CE, 29 July 1998, Epoux Knoth, No. 189208; CE, 27 April 1998, Massaoudi, No. 183586.

gen Information System (SIS). However, the use of SIS gives rise to serious issues of legality when a visa is denied on the basis of an expulsion decision that has been quashed. In one such case, an expulsion order had been made and executed against a Tunisian. After the invalidation of this expulsion order by an administrative jurisdiction, the Tunisian decided to return to France and applied for a visa. The visa was refused because he was said to constitute a threat to public order, as he had repeatedly committed offences during his last stay on French territory. Although the expulsion order decision had been invalidated, the grounds for taking that decision were still used for the purpose of refusing the visa application. One can assume that the expulsion order had led to the insertion of the alien's data in the SIS, although this is not allowed. The *Conseil d'Etat* confirmed the decision, satisfied with a review restricted to the ground of obvious error of law.[58]

Finally, the condition of not being a threat to public order is applied on entry and can be refused to anybody "whose presence on the territory would be constitutive of a threat to public order, or who is subject either to a prohibition to enter French territory or an expulsion order".[59] It is noteworthy that the motivation of the refusal of entry is mandatory, since the Law 'Chevènement' of 11 May 1998, when it concerns a person appearing in the SIS.

The legislation on the issue of visas and on entry has not been modified since the terrorist attacks of 11 September. But the freedom of movement within the territory has undergone restrictions through the increase of identity controls and administrative detentions.

4.1.2 Restrictions on Freedom of Movement Through Identity Controls and Administrative Detention

After having been set at the intensified level during the first Gulf crisis and the terrorist attacks in Paris in 1995-1996, the emergency plan 'Vigipirate' was again set at an intensified level on 12 September 2001. On 5 June 2002, the French Prime Minister announced the extension of the intensified level of the emergency plan for another three months. At the beginning of February 2003, the government announced its decision to reinforce the intensified level of 'Vigipirate' in case of a war in Iraq. The eventual reinforcement led to the modification of the emergency plan: instead of two levels (the simple and the intensified one), four levels were envisaged, from a yellow level, for an intensified vigilance, to a scarlet level for particularly serious awareness which includes the possibility to interrupt public transport in Paris in case of an attack against the subway, as happened in 1995. This would be the last step just before having recourse to Article 16 of the French Constitution which provides for a state of emergency.

58 CE, 17 February 2003, M. Bechir X, No. 244216.

59 Art. 5 para. 4 of the Act of 2 November 1945; Art. L. 213-1 CESEDA.

The amended 'Vigipirate plan' was to offer more flexibility and enhance the possibility of repression.

The question of who would be responsible for enforcement of the plan had also been raised. The solution was to use the civil reserve of the national police, which had just been created by the Law on Internal Security, as well as military forces. After the terrorist attacks in Madrid in March 2004 and London in July 2005, Vigipirate's red level has been activated. More than a thousand soldiers have been sent on patrol to sensitive locations, such as airports, railway stations, subways, trains. Schools, public establishments and places of worship have also been placed under special surveillance.

Although there are no available official statistics about the nationality of persons who were affected by the measures based on the 'Plan Vigipirate', in September 2001, the CIMADE (the ecumenical organisation for assistance to immigrants) claimed that in the first week after the enforcement of the emergency plan, the number of irregular immigrants placed in administrative detention with the aim of expulsion/return had increased by 30 per cent. In the *Centre de rétention administrative* de Vincennes, there was an increase of 46 per cent with 76 persons detained each day. The CIMADE made clear too that the number of aliens detained in administrative detention dropped to the 'usual level' in October 2001. Even before the reactivation of 'Vigipirate' on 12 September 2001, a circular of the Ministry for the Interior had invited police officers to make identity checks in places where crowds of foreigners gather, and, where appropriate, to arrest and expel them. This has been a matter of grave concern for NGOs which hold 'legal permanencies' to assist the documentation process of foreigners. They have also warned that 'Vigipirate' is likely to discriminate against people who appear to be aliens. Shortly after its reactivation in September 2001, two out of five foreigners would not come to the legal permanencies for fear of being arrested by the police.[60]

4.1.3 Deportation

In the field of deportation, following September 11, the government decided to implement existing measures of expulsion, or prohibition to enter the territory, against several Algerians who had been accused of supporting the Algerian terrorist movement GIA after the much debated 'Chalabi trial' in 1998. Most of the accused were discharged or sentenced to imprisonment for no more than the period of pre-trial detention and lived freely in France, sometimes with legal documents. After the terrorist attacks in New York and Washington, some deportations were carried out by the government amidst great publicity. Each of the deportees is now living freely in Algeria, with the exception of one, who

60 Different NGOs noticed the absence of aliens coming to their legal permanency, such as GISTI, MRAP, CIMADE.

was convicted in Great Britain.[61] The government had previously protected these people from deportation to a country in which there were risks to their life or physical integrity. This policy was reversed to demonstrate to Algeria, the United States and to French public opinion the government's eagerness to fight terrorism.

As regards legislation, the Law 'Chevènement' of 1998 did not bring much change to the prohibition to enter French territory. The special grounds for a prohibition order against a protected person must be connected to both the seriousness of the offence and the individual situation of the alien, bearing in mind the situation justifying his or her being treated as a protected person. In fact, no person, except young people aged under 18, can be really considered as protected from a prohibition to enter French territory. As regards that point, the reform of the Act of 2 November 1945 is very interesting. Publicly designated as a reform abolishing the so-called 'double sanction', it leaves the core of the system unchanged.

On 9 January 2003, the Minister for the Interior, Nicolas Sarkozy, asked the prefectoral authorities to make some efforts at deporting illegal aliens including families. He maintained that "our fellow citizens are not hostile to aliens. What they cannot bear any longer is the inability of the public authorities to control migration flows". He acknowledged that returning illegal immigrants, including families, is not an easy task, but he asked the authorities to remove the 'psychological' obstacles. In fact, the Minister's marathon speech was the occasion for announcing the future reform of the laws on immigration and asylum, whilst a wide range of criminal measures concerning immigrants were being adopted by Parliament.

4.2 A Wide Range of Measures Against Criminality Concerning Immigrants

A wide range of criminal measures have been adopted in France since the terrorist attacks in September 2001.[62] Although some of them are not explicitly concerned more with aliens than with French citizens, their enforcement has greater impact on the former. Others are explicitly concerned only with immigrants. To understand the whole structure, it is necessary to look at the Law on Everyday Security, the Law on Internal Security, and the Law to adapt Justice to the evolutions of criminality.

61 The invididual concerned is Brahim Chalabi. See chapter by Bonner and Cholewinksi in this Volume.

62 For an excellent overview, see J. Danet, "Le droit pénal et la procédure pénale sous le paradigme de l'insécurité", Archives de Politique Criminelle No. 23.

4.2.1 The Law on Everyday Security

The Law on Everyday Security (LES)[63] was adopted in a very significant period both for France and the world. As regards the internal context, politicians had made much of the fight against the growing sense of insecurity,[64] mainly attributed to juvenile delinquency (which is largely a metaphorical designation of young French people of 'foreign origins' living in the suburbs), rave-parties, the fear of sex offenders, offences linked with the use of new media like the internet, and the wide development of the so-called incivilities,[65] both in the cities and the countryside. Since the Congress led by the French Socialist Party in Villepinte at the end of 1995, where security was considered a right to which every citizen was equally entitled,[66] this question has gradually contaminated political discussions. After the adoption in June 2001 by the first chamber of the French Parliament (National Assembly – *Assemblée Nationale*) of the draft of the law, the second chamber (Senate – *Sénat*) had to debate the draft adopted in June but enlarged by a new chapter on the fight against terrorism. The inclusion of amendments of a fundamental character, contrary to normal parliamentary procedures,[67] was justified by the Ministry for the Interior by reference to the attacks of 11 September.

According to the LES, "security is a fundamental right and one of the conditions for the full exercise of individual and collective liberties", thus confirming Article 1 of the law of 21 January 1995.[68] When, in 1981, the 'Security and Liberty' Law was adopted, the school of human rights had strongly pointed out the risk of balancing security and liberty and focused on the necessity never to confuse both questions. In 2001, the adoption of the LES clearly showed that

63 Law No. 2001-1062 of 15 November 2001, JOFR No. 266 of 16 November 2001, p. 18215.

64 L. Cadic, "Etat de non-droit", *L'Humanité*, 1 February 2003, p. 23.

65 This concept of 'incivilities' is a very much debated point. See, L. Wacquant, "Les prisons de la misère", *Raisons d'agir*, 1999; L.Bonelli, "Des populations 'en danger' aux populations 'dangereuses': les logiques de gestion policière et judiciaire des quartiers populaires", in L. Bonelli, G. Sainati (eds), *La machine à punir*, L'esprit frappeur, 2001.

66 Noteworthy is the confusion often made between safety (sûreté) and security (sécurité). The first one refers to the fact of not being deprived of liberty without a legal basis, whereas the second one relates to criminality.

67 Usually such fundamental modifications should be submitted to the control of the *Conseil d'Etat*; furthermore, they were only discussed by the '*Commission mixte paritaire'* (joint commission with equal representation of both sides of parliament), which normally adopts the definitive version of the text, when, after two readings in each chamber, the provisions could not be adopted in the same terms.

68 Law No. 95-73 of 21 January 1995, JORF of 24 January 1995, p. 1249. Moreover, Vigipirate's purpose was "to share and spread a culture of security".

Parliament would resort to any means, including very strong restrictions to liberties, to ensure security.[69]

It is striking that the Law on Everyday Security was adopted by a huge majority and consequently did not undergo scrutiny by the Constitutional Court. Such scrutiny would undoubtedly have led to the quashing of the law both on formal and substantive grounds. However, the Court cannot become seized of a measure by itself but may only scrutinise a measure for consistency with the Constitution upon referral by the President, the Prime Minister or at least 60 Members of Parliament.

The new provisions of the LES concerning terrorism are the following:

– police and gendarmerie are authorised to inspect vehicles with a warrant of the public prosecutor, who has merely to indicate the relation of the inspection to terrorism, trafficking of arms, explosives or drugs,[70] without any geographical or temporal limitation of the authorisation;[71]
– during a preliminary investigation, unoccupied premises may be searched, without the approval of their owner or inhabitants, with a warrant from the magistrate indicating the context of prevention and investigation of terrorist offences;[72]
– police and private security agencies are empowered to ensure the security of airports and sea ports, which includes the search of luggage and body searches. Consent of the individual is only required for body searches done by private security agents. Furthermore, both police and private security agents may conduct luggage and body searches in places other than airports and sea ports "where there are particular circumstances relating to the existence of serious threats to public security", without any judicial control.

The chapter of the LES on terrorism was voted in as a temporary mechanism to be in force only until 31 December 2003. However, as is often the case in the French history of temporary measures, it has been extended until 31 December 2005 by the Law on Internal Security (LIS).

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69 Albert Camus's question "The end justifies the means? It is possible. But what does justify the end?" is relevant in this context. See, J. Lévi-Valensi, A. Garapon, D. Salas, N. Philippe, *Réflexions sur le terrorisme – Albert Camus*, 2002, p. 124.

70 One may wonder why this derogatory rule should apply to drugs trafficking. The links between terrorism and drugs trafficking have very seldom been found. And if there are any, the offence of being an accessory to terrorists should be enough to be prosecuted. The exceptional system is therefore not necessary to fight against terrorism and very dangerous in so far as it introduces a very harsh rule in common criminal law.

71 Art. 78-2-2 of the Criminal Proceedings Code.

72 Art. 76-1 of the Criminal Proceedings Code.

The LES, dangerous though it may seem in relation to civil liberties, does not expressly concern aliens. However, the power to search vehicles may have effects in the field of immigration in that illegal acts, other than the ones covered by the warrant, discovered during a search conducted under its provisions may be prosecuted. The warrant will not be cancelled on the ground that it had not been issued in relation to the suspected offence that was in fact discovered. The French League of Human Rights (*Ligue des droits de l'Homme*) has repeatedly raised concerns about the fact that the new search powers for police, gendarmerie and security agents would have a greater impact on citizens who, by virtue of their appearance, are already repeatedly subject to controls.[73]

Obviously, the LES has been significant in the history of the French criminal system and the supposed balance between public order and respect for civil liberties. It fights 'insecurity' by resorting to all available means.[74] Although the law does not explicitly discriminate between aliens and French citizens, if the terrorist as well as the young delinquent is seen as the 'other', a non-French person, then the designation of the alien as delinquent could very swiftly occur. The Law on Internal Security brought the criminalisation of the alien one step nearer.

4.2.2 The Law on Internal Security

The Law on Internal Security (LIS)[75] of March 2003 is a milestone in the history of both criminal and immigration legislation. Whereas it is supposed to be an ordinary law on substantive and procedural criminal law, aliens are directly targeted by it at different points: in the provisions against passive touting (*racolage passif*), those affecting 'travellers' (*gens du voyage*), and those allowing for wider controls at the frontiers.

Most notable in this law is the power to withdraw a residence permit from an alien who is liable to criminal prosecution. The prefect, an administrative authority, can withdraw a residence permit when the alien is liable to prosecution, even though only a court is competent to determine whether a criminal offence has been committed and to decide whether a person must be convicted for a criminal offence. 'Being liable to criminal prosecution' is a concept which does not exist as such in criminal law. This power of the prefect would not be subject to any control, even by the administrative court, because only the criminal jurisdiction is competent for criminal affairs. How will the administrative court be able to control the legality of withdrawal of a residence permit on

73 See E. Brouwer, above n. 35.

74 Communiqué du Syndicat de la Magistrature, 2 October 2001, http://www.lsijolie.net/; Avis sur les dispositions législatives proposées par le gouvernement en vue de renforcer la lutte contre le terrorisme, adopté le 29 octobre 2001, par la Commission Nationale Consultative des Droits de l'Homme.

75 Law No. 2003-239 of 18 March 2003, JORF of 19 March 2003, p. 4761.

grounds the existence of which depends on the decision of another jurisdiction? Furthermore, the withdrawal of the residence permit would not be at all subject to limitations, whereas some limitations to expulsion or deportation measures are provided either by the Criminal Code or by the law on immigration.[76]

Further, the new law gives the power to the prefect to make a decision to deport (*arrêté de reconduite à la frontière)* against an alien if "during the validity of the visa or during the period of three months (for persons not subject to a visa requirement), his or her behaviour has been constitutive of a threat to public order".[77] The application of this provision concerns foreign prostitutes who stay legally in France (i.e. with a visa or within the period of three months for Romanians or Bulgarians) but whose behaviour is criminalised by the law on Internal Security and by the Criminal Code as passive touting. No prosecution, let alone conviction, is necessary: the mere behaviour of being on a sidewalk might be sufficient.

Another striking feature of the LIS is the creation of criminal offences specifically and directly concerned with aliens. Of course, aliens as such are not named in the Law. But it does apply to 'travellers' with the introduction of Article 322-4-1 in the Criminal Code referring to the "illicit installation of a group of people on land owned by another in order to settle there as a place of residence", and to prostitutes with the creation of the offence of passive touting, which directly concerns citizens of Central and Eastern European countries.

As regards the proper criminal prong, the LSI modifies some provisions on identity controls, vehicles and body searches, and thus brings back in use some provisions enshrined in other laws. For instance, the inspection of vehicles by police forces, allowed in matters of terrorism, arms trafficking or offences connected with explosives and trafficking of drugs, is being extended to thefts and possession of stolen goods, under a warrant of the prosecutor.[78] Contrary to the LES version, the warrant must indicate limitations of time and space. This requirement of a limited warrant must not lead us to forget some new provisions[79] which introduce by the back door a new means to extend the powers of the police. For instance, it is foreseen that the inspection of vehicles can be carried out if there exist "towards the driver, or one passenger, one or many plausible reasons to suspect him of having committed, as author or co-respondent, a crime or a misdemeanour in *flagrante delicto*".[80] Furthermore, the LIS introduces another provision which allows the police to carry out a vehicle search

76 See the following provisions of the Criminal Code: Art. 225-4-1 to 225-4-4, Art. 225-4-7, Art. 225-5 to 225-11 (procuring, touting); Art. 225-12-5 to 225-12-7, Art. 311-4-7° (theft in a public transport); and Art. 312-12-1 (extortion).

77 Art. 22-I-2° of the Act of 2 November 1945; Art. L. 511-1 CESEDA.

78 Art. 78-2-2 of the Criminal Proceedings Code.

79 Art. 78-2-3 and Art. 78-2-4 of the Criminal Proceedings Code.

80 Art. 78-2-3 of the Criminal Proceedings Code.

immediately with the driver's authorisation or within 30 minutes under a warrant delivered by the prosecutor if the aim is "to prevent a serious attack on persons and goods".[81]

According to the French League of Human Rights:

> all these provisions, adding further to those in the LES, lead to police forces having at their disposal an absolute, sovereign and uncontrolled power to inspect vehicles, without any real possibility to challenge abuse.[82]

As a whole, the LIS is a clear instance of the penalisation of poverty, aliens, young people living in the suburbs, and of increasing powers of police and prosecution services. Unlike the LES, the LIS has been submitted to the scrutiny of the Constitutional Court, which gave its decision on 13 March 2003.[83] Not one provision was invalidated. Only reserves of interpretation (i.e. a requirement that certain provisions be interpreted in the manner established by the Court) were given. One may conclude that the current monitoring by the Constitutional Court of the compatibility of legislation with the French Constitution is, at present, chimerical.

4.2.3 The Law to Adapt Justice to the Evolutions of Criminality

To crown the whole edifice of a new system in the field of 'security', Parliament adopted in March 2004 the Law to adapt Justice to the evolutions of Criminality (LJC), which is also called 'Law against organised criminality'. The Lord Chancellor's Office clarified that all of the new and extensive powers of the police were being brought within the framework of the general struggle against organised criminality.[84] However, no specification has been given of what lies within the scope of organised criminality or an organised group.

Of course, the concept of organised crime exists in France, but it is no more detailed and clear than the concept of public order. Article 132-71 of the Criminal Code defines an organised group as "every group formed or every agreement established, characterised by one or many material facts, in order to prepare one or many offences". The circular issued on 14 May 1994 to assist in the implementation of the New Criminal Code is of little help. The list of offences regarded as capable of being committed by an organised group makes interesting reading.[85] Among these one can find what could be called the "offences relating to the

81 Art. 78-2-4 of the Criminal Proceedings Code.

82 Note argumentaire sur le projet de loi Sarkozy; http://www.ldh-France.org/

83 Decision No. 2003-467 DC of 13 March 2003, http://www.conseil-constitutionnel.fr/decision/2003/2003467/2003467dc.htm.

84 According to Articles 706-73 and 706-74 of the Criminal Proceedings Code.

85 Art. 706-73 of the Criminal Proceedings Code.

forms of expression of civic actions". These include, for instance, the voluntary destruction by an organised group of fields or stores of genetically modified crops as part of the fight against genetically modified foods and organisms. Of more direct concern to our topic is that complicity in the illegal stay of immigrants may fall within organised criminality.

When one bears in mind that the sanction for complicity in illegal entry or stay of immigrants in France now includes the possibility of seizure of one's personal estate or that of an association, the consequences of the application of expanded police powers in this field are very worrying. It is all the more worrying as the police will have to identify the offences which they are investigating and therefore effectively decide on their own whether they may or may not use their expanded search powers.

The Law to adapt Justice to the evolutions of Criminality is characterised by the hegemony of the powers of the police, the omnipresence of the prosecution services and the lack of supervision by the courts. The entirety of the criminal process, which is in essence a delicately balanced mechanism, from the first moment of the investigation to the last moment of enforcement of the sanction, has shifted its centre of gravity towards the police and the prosecution sections, the competency of the courts being more and more limited to the role of a chamber of registration.

The LJC must also be seen as another step towards the reform of the rules of criminal procedure which began in France in 1999 with the conferral on the prosecutor of a broad power to negotiate with a criminal offender (plea bargaining). The introduction into French rules of procedure of the guilty plea, under the supervision of the prosecution service, applies the same logic. What should be exceptional rules applicable in respect of terrorism are given a more widespread use in the area, amongst others, of 'criminal migration law'. The role of the judge and the guarantee of a fair trial seem to fade away in favour of a conviction based on a confession or on a police investigation placed under the sole competence of the prosecutor.

These modifications of the procedural and substantive criminal rules in France are undoubtedly being readily accepted, even though they are jeopardising fundamental rights, because of the very specific context of the 'feeling of insecurity', reinforced by the fears of terrorist attacks. One striking feature, though it does not appear to relate directly to our topic, is the fact that the legislature makes the victims a party in the process of penalty enforcement and gives the victims a substantial role in criminal proceedings. Whereas the place of a victim in the framework of a criminal trial should be restricted to that of a witness, or to a claim for damages, it has been extended in an extraordinary way during the last few years, notably to sentencing and to the enforcement of sanctions. Without doubt this trend contributes towards the hardening of criminal law. The notion of 'justice without limits' comes to mind, when the scale of the

sanction against a criminal offender is being related to the pain of the victims rather than to the dangerousness of the offender.

In May 2005,[86] the French government announced the drafting of a white paper dedicated to internal security and terrorism. It is structured around six main areas: the state of the terrorist threat in the world; the different types of terrorist attacks which could occur in France; new technological means; the balance between security and liberty through the legal system; international co-operation in the fight against terrorism; and information of citizens. The white paper, awaited for the beginning of 2006, will undoubtedly give rise to a general frame law on justice (*Loi de programmation sur la justice*).

The different laws on criminality discussed above are linked to extraordinarily harsh measures in the field of asylum and immigration which were discussed by Parliament in October 2003.

4.3 Amendments to Asylum Law[87]

The reform of the law on asylum, which was adopted in December 2003[88] and entered into force on 1 January 2004, signals the disappearance of the inviolable right to asylum in France. Immigration, by contrast, never had this characteristic. Indeed, France, as a sovereign State, has the right to restrain migration but must adhere to international conventions, such as the Geneva Convention on Refugees of 1951. Until the 2003 reform, the protection of the right to asylum in French law, notwithstanding the many criticisms that were levelled at it, was considered to be in accordance with both international and constitutional provisions. Since then, there appears to have been a change in priority from refugee protection to control of migration flows, as evidenced by the growing role of the Ministry for the Interior in the OFPRA. Furthermore, the new asylum provisions incorporate into French asylum law some much debated concepts, such as the 'internal flight alternative' and the 'safe third country' concept (*les pays 'sûrs'*).[89] In addition, it provides for exceptional procedures for examination of the asylum claim which put compliance with the Refugee Convention at stake.

The question of being a threat to public order does not appear as the most substantial issue.[90] However, lawyers practising in asylum law have noticed a more widespread use of the exclusion clause since the terrorist attacks in the

86 See, e.g., *Le Monde*, 5 May 2005.

87 GISTI, Les cahiers juridiques, *Le droit d'asile en France après la loi du 10 décembre 2003*, June 2004.

88 Law No. 2003-1176 of 10 December 2003, amending the Law No. 52-893 of 25 July 1952, JORF of 11 December 2003, p. 21080.

89 See, e.g., the decision of the OFPRA of 30 June 2005, which designates 12 'safe' third States.

90 According to D. Alland and C. Teitgen-Colly, around 0.25 per cent of the decisions of the CRR are based on the exclusion clause. D. Alland, C. Teitgen-Colly, *Traité*

United States, something that was extremely rare during the 1990s. Furthermore, the fact of being a threat to public order is not being used as a ground to exclude a person from the protection of the Refugee Convention after having examined his or her claim and accepted in principle an entitlement to protection, but as a condition of admissibility or inadmissibility to the asylum determination procedure. Resorting to that exclusion clause as a determinant of admission to the asylum procedures is not the result of an explicit, open and transparent political decision. Furthermore, it seems that the threat to public order is not being used as a legal instrument, but as one of the psycho-ideological factors influencing, in an unstated manner, the 'intimate convictions' of the assessors sitting for the CRR (Appeal Court for Refugees).

The public order concept not only plays a very tangible role at a practical level, it also appears in concrete terms in the law, which provides for the abolition of territorial asylum and replaces it with subsidiary protection, which can be granted for one year, renewable thereafter. At any time the OFPRA can proceed to the withdrawal of this kind of protection from "an individual against whom it can be seriously assumed that:

a) he or she has committed a crime against peace, a war crime or a crime against humanity;
b) he or she has committed a serious crime under ordinary criminal law;
c) he or she has made himself guilty of acts contrary to the purposes and principles of the United Nations;
d) his or her presence on the territory is constitutive of a serious threat against public order, public security or State security".[91]

These exclusion clauses are wider than the ones found in the Refugee Convention. Furthermore, the prefect or the Minister for the Interior will have the power to seek from the OFPRA the re-examination of a person's entitlement to subsidiary protection on grounds related to public disorder.[92]

The entirety of the Law has been severely condemned by the French Coordination for Asylum (*Coordination française pour le droit d'asile*). The few advances are heavily outweighed by the decline of the application of the Refugee Convention in France.[93] Along with new provisions in the field of asylum, during the same period the Law 'Sarkozy' on immigration was adopted by Parliament.

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du droit de l'asile, Presses Universitaires de France, Collection Droit fondamental, 2002, p. 520.

91 Art. 2 IV of the Law of 25 July 1952; Art. 712-2 and 712-3 CESEDA.

92 See the decision of CE, 2 February 1998, Ravan, No. 178021: the second paragraph of the Article 33 of the Refugee Convention does not include the possibility to withdraw the refugee status from someone.

93 Coordination française pour le droit d'asile, *Projet de réforme de l'asile: Commentaires et recommandations*, 30 September 2003.

4.4 Amendments to Immigration Law[94]

Since World War II, no other reform of the immigration legislation has been so harsh. The Minister for the Interior had declared the law as being a response to an 'absolute emergency' which led to a shortened discussion in Parliament. The government had announced a piece of legislation dealing with integration, voting rights for third-country nationals, regularisation of illegal migrants, and the abolition of the 'double penalty'. However, the nature of the law was to be quite different. It has tightened the system for visa and entry. The whole law is marked by the precariousness of residence permits and obsession with fraud.

4.4.1 Visa/entry

With regard to the issue of visas and entry clearance, the 'certificate of reception' is being replaced by the system of 'certificate of housing', against which a few tens of thousands of people had fought in 1997, when the draft of the Law 'Debré' was discussed by Parliament. Though the name is still the same (*attestation d'accueil*),[95] the attestation by the mayor is neither free of taxes nor automatically delivered. For instance, the mayor may refuse to issue a certificate, if the prior attestations of reception signed by the same host have shown an abuse of procedure.[96] To proceed to such verification, a system of processing of personal data will be necessary.[97]

A refusal of entry to French territory was not permitted to result in removal from the territory before 24 hours had passed so that the alien could get in touch with his or her family, with an advisor, or with friends.[98] The alien could expressly forgo the benefit of this delay. Now, however, if the alien refuses to sign the decision of refusal to enter the French territory, he or she is to be treated as having implicitly renounced entitlement to the 24-hour delay, and to the possible benefit of legal advice.[99]

The Minister for the Interior has further insisted on the necessity to establish a data processing system on aliens based on biometrical information. Since the Law 'Debré', it is possible to take fingerprints from third-country nationals applying for a residence permit, living illegally in France or subject to a measure of return.[100] This provision has been extended to the collection of fingerprints of

94 Law No. 2003-1119 of 26 November 2003, JORF of 27 November 2003, p. 20136. GISTI, Les cahiers juridiques, *Entrée, séjour et éloignement des étrangers après la loi Sarkozy*, June 2004.

95 Art. 5-3 of the Act of 2 November 1945; Art. L. 211-3 CESEDA.

96 Art. 5-3 of the Act of 2 November 1945; Art. L. 211-5 CESEDA.

97 Art. 5-3 of the Act of 2 November 1945; Art. L. 211-7 CESEDA.

98 According to Article 5 of the Act of 2 November 1945, before the Law 'Sarkozy'.

99 Art. 5 of the Act of 2 November 1945; Art. L. 213-2 CESEDA. Also see the Circular of 20 January 2004.

100 In conformity with Article 8-3 of the Act of 2 November 1945.

aliens who have crossed frontiers irregularly.[101] Of course, this provision must be read in the light of the entry into force, on 15 January 2003, of the EURODAC Regulation, although this is not mentioned in the law's preamble. Fingerprints of aliens applying for a visa are also to be collected.[102]

4.4.2 Precariousness of Residence

In 1984, Parliament unanimously adopted the ten-year residence permit, admitting that a secure stay was the mainspring of integration. In 2003, the legislator made an about face: a ten-year residence permit was only to be issued if integration has occurred, as a reward for the efforts made by the migrant. Thus, previously parents of French children could obtain a ten-year residence permit when they were either exercising their parental rights or providing for their children's needs. With the new law, they now have also to prove their integration into French society.[103] The same applies to spouses of French people, who must have been married for more than two years, instead of one year as previously.[104] People coming to France for family reunification will only be given a one-year residence permit, even if they join an alien holding a ten-year residence permit.[105] Thus, the law extends the number of cases in which a temporary residence permit will be issued, instead of a ten-year permit. The logic is one of jeopardising the residence of third countries' nationals in France. Certainly, no direct relation with terrorism can be drawn, but the context of fear and the amalgam between migrants and criminals has done a great deal to encourage the adoption of such restrictive measures. Obviously, the condition of not being a threat to public order can still be raised to refuse a residence permit.[106]

4.4.3 Obsession with Fraud

The treatment of aliens through the prism of criminality is also appearing very clearly in the obsession with fraud and the willingness to monitor each step of the life of aliens in France. Since 1981, and the recognition of the individual right to petition the European Court for Human Rights, France abolished the requirement for an authorisation to be given by the prefect for aliens to get married as it restricted the constitutional right to get married.[107] With the new law,

101 Art. 8-3 of the Act of 2 November 1945; Art. L. 611-3 CESEDA.

102 Art. 8-3 of the Act of 2 November 1945; Art. L. 611-6 CESEDA.

103 Art. 14 of the Act of 2 November 1945; Art. L. 314-9 and Art. 314-10 CESEDA.

104 Art. 15-1° of the Act of 2 November 1945; Art. L. 314-11 CESEDA.

105 Art. 12-*bis* of the Act of 2 November 1945; Art. L. 313-11 CESEDA.

106 Art. 12-*bis*, 12-*ter*, 14 and 15 of the Act of 2 November 1945; Art. L. 313-11, 313-13, 314-8 and 314-11 CESEDA.

107 The Parliament was conscious that the authorisation of marriage was contrary to the Articles 12 and 14 ECHR. This was made clear during the discussion around the Law 'Questiaux'.

the fact of living illegally in France must be considered by the officer of the registry office as a serious indication of a fraud.[108] Some mayors had already made use of this as a ground to refuse to celebrate a wedding. Although they have been condemned by the courts,[109] Parliament has endorsed this practice and generalised it. In the same vein, marriages of convenience have been criminalized.[110] The act of entering into a marriage to pursue an aim other than the one of matrimonial union and only in order to get a residence permit, or the act of helping someone to get a residence permit, will be punished by imprisonment for up to five years and a fine of 15,000 Euro. This new offence criminalises aliens in a manner which is not only unnecessary but also disproportionate. The mere fact of the presence of an alien may well be considered a threat to public order, when this logic is applied to its extreme consequences.

4.4.4 The False Abolition of the 'Double Sanction'

The false disappearance of the administrative and judicial prohibitions of entry into French territory is one of the most fascinating aspects of the Act. There was general agreement on the fact that the right-wing sections of Parliament dared to do something incredible by proposing the abolition of the 'double sanction'. During a lobbying campaign, a co-ordination of NGOs had therefore suggested setting up a dialogue by focussing on the humanitarian side of the matter: how should it be possible to expel an alien who has spent his or her entire life on French territory and let him or her carry on living there, but without any rights? Both public and political attention on this matter had been heightened. The announcement of the suppression of the 'double sanction' had consequently a very strong impact on public opinion.

As a matter of fact, the prohibition of entry to French territory or expulsion has not been abolished at all by this reform. It has merely been modified and its application has been extended to new offences. The decision to forbid an alien to re-enter France can still be taken against 'protected people' as long as the seriousness of the offence makes it necessary.[111] A new range of people is given a more protected status: an alien living in France since the age of 13; an alien living in France for 20 years; an alien living in France for more than ten years and married to a French citizen for more than three years, if the marriage

108 Other facts that can be considered as a serious indication of a fraud exist, but they are given by a circular, not by a law, whose force is restricting, unlike the one of circulars.

109 On 29 March 2002, the Court of Appeal in Toulouse has very clearly explained that the irregular situation of a future spouse was not a circumstance liable to be constitutive of a serious indication that consent was lacking.

110 Art. 21-*quater* of the Act of 2 November 1945; Art. L. 623-1 CESEDA.

111 Art. 26 of the Act of 2 November 1945 and Art. 131-30-2 of the Criminal Code, as amended by the Law of 26 November 2003.

was celebrated before the commission of the offence; an alien living in France for more than ten years and who is the parent of a French child, if the child was born before the commission of the offence and if the parent does effectively provide for the child's needs. This protection does not exist when the offence is related to the fundamental interests of the nation, to terrorism, counterfeit etc. Even members of Parliament who supported this proposal had always been against any kind of protection for any categories of people in cases of terrorism.

Provisions concerning expulsion were also toughened. Previously, people had to be sentenced to imprisonment for more than one year to be subject to a measure of expulsion (except in a few cases directly related to illegal employment and housing) without any reference to terrorism. That condition, which was justified by the necessity to prove the serious threat to public order, is no longer required. An alien who has been considered for conviction, even without any sentence, can be the object of such a measure.[112]

The entire system of prohibition to enter French territory had been the object of heightened attention after the Law of 26 November 2003. Whereas the 'double sanction' had in practice not been abolished, some members of Parliament held the system to be far too liberal. On 8 June 2004, a first proposal was made to suppress any protection, both on a substantial and procedural level, when the alien has any kind of relationship with a person or a group of persons likely to be prosecuted for terrorism.[113] This proposal was rejected. A second proposal, on 20 June 2004, aimed at restraining the field of the protection against expulsion.[114] This was adopted without any difficulties.[115]

In any event, the rate of enforcement of deportation measures has increased significantly over the past years – something that appears to give the Minister for the Interior reason for satisfaction. According to the government, more than 16,000 aliens were deported in 2004. The initial goal of 20,000 deportations to be reached in 2005, announced by the former Minister for the Interior de Villepin,

112 Art. 25 of the Act of 2 November 1945.

113 The proposal concerned Article 25-*bis* 3° of the Act of 2 November 1945: "3° en cas de proximité avec toute personne ou groupe susceptible de faire l'objet de poursuites pour association de malfaiteurs avec circonstances de terrorisme telle que définie aux articles 450-1, 421 et suivants du code pénal ou de faire l'apologie de ces crimes ou délits."

114 According to Art. 26 of the Act of 2 November 1945, the protection against expulsion could be granted to an Imam, settled in France for more than 20 years, who justifies a man's recourse to violence against his adulteress spouse. The so-called 'Bouziane affair' was seen as an excellent justification for hardening the legal system.

115 Art. 26 of the Act of 2 November 1945; Art. L. 521-3 CESEDA.

was increased to 23 000 by the Minister for the Interior Sarkozy in July 2005.[116] Some deportations are being enforced in such a violent way that other aircraft passengers have complained and prevented the police force from carrying out the measure. This behaviour is considered a criminal offence in France. Several people have been indicted for holding up the departure of an aircraft during the period after the terrorist attacks in 2001. Everybody tried has been convicted and sentenced to a 'token' sanction. However, the mere fact that such actions have led to criminal prosecutions marks an evolution in the politics of criminal justice in France. The fight against (violent) deportation has led to the criminalisation of 'solidarity delinquents' (*Délinquants de la solidarité*). The Minister also expressed concern about the fact that "irregular immigration has reached proportions never equalled before during the last years". A plan to tackle illegal immigration was launched in May 2005, which raised very strong opposition.[117] The goal has been the same over the past 30 years: "to fight in a firm but humane manner against illegal immigration".

5 Conclusion

The concept of being a threat to public order (and public credit) appeared in French immigration legislation at the end of World War II as a reason for expulsion from France.[118] Although it has been widely used, it eludes definition. During the 1970s, this notion was interpreted as including a 'lack of political neutrality' or 'the commission of criminal offences'. The leading case law on the topic was developed during that period and is still relied on now. Until the beginning of the 1980s, being a threat to public order applied only in expulsion cases. After that period, it was extended to every field of immigration control, including entry, privileged residence permits, deportation, temporary residence permits, ten-year residence permits and territorial asylum. There is no explicit connection between fears of terrorism and the introduction of the threat to the public order concept in immigration law. In criminal law, such a connection may be found in the creation of a distinct procedural and substantive law for terrorist offences.

In fact, two parallel tendencies exist in France. On the one hand, there is the fight against terrorism, which has involved the development of an autonomous criminal law; on the other hand, there is the permanent struggle against immigration and the slow criminalisation of immigration since 1980. Undoubtedly, the two tendencies intersect from time to time: the condition of being a threat

116 L. Giovannoni et J. Stewart, "Le scandale des rétentions", *Le Monde*, 12-13 June 2005.

117 C. Rodier, *Libération*, 12 May 2005; Amnesty International, 12 May 2005.

118 In fact, the fact of being a threat to public order has been widely used to justify expulsions since the French Revolution, in different revolutionary acts and in the old Criminal code.

to public order, often linked with the commission of offences, is a condition formulated in immigration law; some immigration offences are being referred to as offences connected with the fight against terrorism in order to criminalise them in the heaviest possible way; the protection from expulsion or prohibition of entry into the French territory is lost on conviction for terrorist offences.

After the 11 September 2001 terrorist attacks, it appears that the two tendencies have intersected more. This can be seen in the Law on Everyday Security (LES), the Law on Internal Security (LIS), and the Law to adapt Justice to the evolutions of Criminality (LJC). It is also apparent in the modification of the law on immigration to incorporate a permanent reference to criminality, and the modification of the law on asylum with the extension of the threat to public order as a ground to refuse territorial asylum. Since September 2001, the intersection of these tendencies can be seen at a number of different levels: in the reactivation of the emergency plan (Plan Vigipirate) and the LES, which in theory are not concerned with aliens any more than with citizens, but in fact, without requiring any legislative change, have a particular impact on aliens (e.g. in the refusal of attestations of reception; execution of old measures of expulsion; increasing numbers of administrative detentions); in the inclusion in the LIS of a wide range of criminal offences concerned only with immigrants without any control worthy of the name by the Constitutional Court; in the permanent attack on asylum over the recent years; and in the harshest reform of immigration law and asylum law ever to have occurred in France.

The sense of emergency and the growing 'feeling of insecurity' due to fears of terrorism certainly provide a ready justification for illegal procedures before Parliament (as seen in the adoption of the LES and LIS) and lack of control by the Constitutional Court. However, most of the references both to criminality and immigration during the debates were not concerned with terrorist acts but with casual offences, such as touting, procuring, and extortion. What is emerging is an autonomous criminal law for aliens under the jurisdiction of the prefect and thus outside the criminal jurisdiction.

Chapter 6 The Impact of Terrorism on Immigration and Asylum Law in the Netherlands

Hinde Chergui and Helen Oosterom-Staples

1 Nationality, Religious and Gender Politics in the Netherlands

Dutch political and social life has been highly stratified throughout the 20th century. In the debate in the Netherlands, both after the First Gulf War and following 11 September, three central themes can be distinguished, namely nationality politics and the question of belonging; religious politics; and gender politics.

The debate on nationality politics reveals a distinction between so-called 'native' Dutch nationals and non-native Dutch nationals. A native Dutch person is somebody who is born of two Dutch parents who are Dutch nationals at birth. This group is referred to as '*autochtonen*'. A non-native Dutch national is a person born from a relationship of which at least one of the parents did not have Dutch nationality at birth and/or a person of colour. These Dutch nationals are called '*allochtonen*'. Thus, for example, a person born in the Netherlands from Dutch parents of Moroccan origin will be classed as an '*allochtoon*' and called 'Moroccan', despite the fact that all three of them have acquired Dutch nationality. Although both groups have exactly the same political rights, as they are all Dutch nationals, this distinction has resulted in a social division of society where *autochtonen* are first-class citizens and *allochtonen* are classed as second class-citizens.

The debate that has dominated the second theme, religious politics, has its origins in the 'politics of pacification'.[1] This terminology was introduced in 1917 when an agreement was reached between the confessional parties, on the one hand, and the liberal and socialist parties on the other hand. This agreement put an end to a number of differences of opinion. The first concerned the financing of education. The participants to this debate were the confessionals,

1 A. Lijphart, V*erzuiling, pacificatie en kentering in de Nederlandse politiek,* 1990, Haarlem, pp. 36, 100-106.

Elspeth Guild and Anneliese Baldaccini (eds.), Terrorism and the Foreigner ... *267-294.*
 ISBN 90 04 15187 7.

who demanded subsidies to found schools where education would be geared to their own religious beliefs, and the liberals who demanded support for public schools, not based on any particular religious denomination. At the same time the battle fought by the socialists for an enlargement of voting rights resulted in a separation of political parties. The third battle focused on the amelioration of the rights of the working class. The agreement reached entailed the granting of subsidies for religious and public education, on the one hand, and, on the other hand, the granting of voting rights to all men (not just the upper class) in 1918 along with proportional representation of political parties in Parliament in accordance with the number of votes acquired by each party.

The Dutch debate on gender politics involves the restructuring of natural constituencies or political fault lines along lines of support for or against same sex relationships and calls for the emancipation of women. This way of dividing society was capitalised upon by politicians who broke with the traditional rules of Dutch consensual politics by demanding specific changes in society unrelated to the party to which they belonged or the kind of group they were thought to represent in Dutch society.

2 Dutch Engagement in the First Gulf War

The Gulf War of 1990-1 marked a change in Dutch defence policy. It was the first time since the Korean War in 1950 that the Netherlands had participated in a war. According to several commentators, the outspoken pro-American point of view that was adopted in the Netherlands was different from the view adopted by the other Western European countries. The war against Iraq met with little resistance from the Dutch peace movements. The Dutch policy in the period preceding the First Gulf War is characterized by ad hoc decisions.[2] However, with the ultimatum to Saddam Hussein to withdraw from Kuwait by 15 January 1991 drawing closer, it became necessary for the Dutch government to take a position on the approaching war. In this period there could be no doubt that the Netherlands embraced the United States policy. On January 8, 1991, the Dutch government announced that the Dutch fleet would be put under American command and defend the American fleet when the war started. A request on behalf of Turkey to send Patriot air defence was met by the Dutch government.[3]

3 Perceived Threats According to Dutch Intelligence Service

Before the beginning of First Gulf War, the Minister of Interior Affairs, Dales, had already stated that the communist threat, which had disappeared after the

2 Jolanda van Eeveren en Duco Hellema, "Het Nederlandse beleid in de Golfcrisis: geen schoonheidsprijs", in Paul Aarts en Bert Bomert (eds.), *Stilte na de storm – De tweede Golfoorlog in perspectief*, Studiecentrum voor Vredesvraagstukken 1993, Cahier 59, p. 90.

3 *Ibid.,* pp. 90-100.

collapse of the Berlin Wall, had been replaced by a terrorist threat that required special attention.[4]

After the Gulf War began, the Minister stated that this new threat was linked with the Gulf War. She did not, however, consider that additional measures would have to be taken in this respect.[5] The Secret Intelligence Service (BVD) expected special threats, such as sabotage and terrorist activities by activists and Muslim communities, who – according to the BVD – had been called by Baghdad and affiliated groups to commit terrorist crimes in the countries of the allied forces. Representatives of the Islamic community in the Netherlands publicly distanced themselves from this call. After the Gulf War most of these attacks appeared to have taken place in the countries near to Iraq.[6]

By the end of 1990 the BVD was under reform. On the one hand, the reform plans were deemed necessary due to competence problems. On the other hand, changes in international relations dictated reform. The Minister of Internal Affairs, Dales, stated:

> Nowadays the threats are less clear and show a pattern which is random and complex. The new BVD must be able to react adequately and according to the requirements of these times on activities which constitute a threat of the interests mentioned in the law.[7]

The Minister also stated that special attention was focused on the democratic legal order and State security and in the social and economic sphere. The Minister mentioned an IRA attack, which had taken place in Roermond. Concerning State security, she stated that the developments in Eastern Europe had led to a decline of spying activities in these countries. She considered that the democratisation process was not evolving as quickly as expected. An example of a risk in the social and economic sphere would be the spread of knowledge, raw materials and spare parts that could be used for the production of nuclear weapons. The activities of Libya and Iraq were particularly alarming and immediate in this respect.

In a review report on the BVD and its functioning, the unpredictability of international terrorist violence and the undemocratic activities against and between minorities in the Netherlands were also mentioned as developments which could constitute a threat to the democratic legal order.[8] The activities of

4 *Tweede Kamer* 1990-1991, 21819, No. 3, 14 November 1990, p. 1.

5 *Tweede Kamer* 1990-1991, 21800 VI, No. 35, 1 March 1991, p. 4.

6 Binnenlandse Veiligheidsdienst, Jaarverslag [Annual Report]1991, October 1992, pp. 13, 20.

7 Unofficial translation.

8 *Tweede Kamer*, 1991-1992, 22463, No. 3, p. 5.

the Workers' Party of Kurdistan (PKK) – a Kurdish separatist movement in Turkey – were mentioned as an example of a threat to the democratic legal order in the Netherlands. This organisation, it was considered, might possibly intimidate persons residing in the Netherlands, or undermine, in one way or another, these persons' constitutional rights. However, it appears from the Annual Report of the Intelligence Service that the PKK remained inactive during the First Gulf War.[9] A further element of threat identified was that of unacceptable ideological speech. This element was linked with activities of right-wing groups, as well as Shi'ite fundamentalist groups. Finally, covert political influence from the Soviet Union was not yet excluded.[10]

The 1991 Annual Report of the Intelligence Service reported that during the First Gulf War the Turkish left-wing revolutionary movement, Devrimci Sol, repeatedly attacked organisations, the government and NATO representatives in Turkey. After the Dutch army had stationed several Dutch air defence units on Turkish soil, the Intelligence Service claimed to be aware of the possible danger of attacks in the Netherlands. However when they did occur it was apparent that they had not been capable of preventing them. In July 1991 the Dutch affiliation of the group ignited several firebombs in various Turkish offices located in Rotterdam and Amsterdam.[11]

Another report of the Dutch Intelligence Service was published at the end of February 1992. In this report the BVD stated that it feared a possible 'fundamentalisation' of Dutch society caused by migration. Migration could, the report mentioned, also have influence on the relations between ethnic groups in the Netherlands. Political, ethnic, or religious conflicts in the countries of origin could spread to the Netherlands, possibly leading to serious rivalry that could ultimately result in bloodshed, restrictions of freedom of speech or other constitutional rights, as well as serious disruptions to public order. Several reactions to the report followed. Spokespersons of several political parties, *Dijkstal* (VVD), *Kraijenbrink* (CDA) and *Scheltema-de Nie* (D66), declared that some parts of the report could excite negative feelings towards the Muslim population in the Netherlands. The Mayor of Amsterdam, Ed van Thijn, spoke of rousing unpopular feelings against migrants.[12]

In the Annual Report of the BVD for the years 1991 and 1992, public disorder as a possible side effect of migration from Southern European and North African countries was mentioned. The BVD pointed out that the ongoing radicalisation or fundamentalisation of Muslim communities in non-Muslim countries could possibly have an impact on the relations between these migrant

9 Binnenlandse Veiligheidsdienst, Jaarverslag 1991, October 1992, p. 25.

10 *Tweede Kamer*, 1990-1991, 21819, No. 3, 14 November 1990, p. 7.

11 Binnenlandse Veiligheidsdienst, Jaarverslag 1991, October 1992, p. 25.

12 "BVD vreest 'fundamentalisering' in Nederland", in *Nieuwsblad migranten*, No. 4, 27 February 1992.

groups in the Netherlands and their attitude towards Dutch society. Political, ethnic or religious conflicts in the countries of origin, it was considered, might spill over to the Netherlands, where they could lead to serious rivalry and possible bloodshed, restrictions of freedom of opinion or other constitutional rights, or serious disruptions to public order.

The BVD argued that, in order to prevent such side effects, it should be clear that it was the task of the government to secure freedom of choice for all citizens. Moreover, all government sectors should make clear what was and what was not allowed according to the Dutch democratic standards. Swift and effective measures were to be taken against those who did not respect the Dutch democratic values. It was considered that the most vulnerable groups in Dutch society should, in particular, not be left in doubt as to the fact that the government also sought to protect them and was truly committed to giving them this protection if and when necessary.[13]

In November 1991 the Dutch extremist left-wing organisation RARA (Revolutionary Anti-Racist Action) bombed a Department of the Ministry of Internal Affairs as well as the house of the Secretary of State, Kosto, responsible for immigration and asylum. Fortunately there were no casualties, as the bombing only caused severe material damage. Although the Dutch intelligence service claimed to have kept a close eye on the organisation, it was completely surprised by the attacks.[14] In the declaration that was written by RARA it claimed to "want to stop the asylum policy which abandons people, excludes them and dehumanises them". The Secretary of State for Justice was considered to be the person responsible for this policy. The incident was not considered as a justifiable reason to change security arrangements aimed at the protection of political figures and buildings. The Secretary of State himself was also not in favour of stepping up security measures. He stated in the Dutch newspaper *De Volkskrant* that he would find it extremely sad if political figures would no longer be able to move in public without protection. Parliament did not request this either, although they were extremely shocked by the bomb attack.[15] Condemnation of the attacks[16] came also from organisations of minorities and groups defending the rights of migrants and asylum seekers, which expressed concern that this attack would have negative repercussions on the groups they represented or advocated for.[17]

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13 *Tweede Kamer,* 1991-1992, 22463, No. 3, p. 19.

14 "Aanslagen in Nederland", *NRC Handelsblad*, 14 November 1991.

15 "Veiligheidsbeleid voorlopig ongewijzigd na bomaanslagen op huis Kosto en Ministerie – Landelijjk politieteam op jacht naar RARA", *Volkskrant*, 14 November 1991.

16 Binnenlandse Veiligheidsdienst, Jaarverslag 1991, October 1991, p. 24.

17 John Wanders, "Kosto's Asielbeleid sober doch humaan", *Volkskrant*, 14 November 1991.

4 Changes to Asylum and Immigration Law and Practice in the Early 1990s

4.1 The Framework

Most of the important changes to asylum and immigration law in the Netherlands were not introduced as a consequence of the Gulf War, but can be attributed to the rapidly increasing numbers of asylum seekers (see below) and the preparations necessary to implement the abolition of the internal borders as required by the Schengen Agreement.[18] The most important component of the immigration flow to the Netherlands was no longer migrant workers, but was the result of family reunification and formation and those fleeing persecution.[19]

At the end of February 1989, a draft for a new Dutch migration law was submitted.[20] The new rules were the result of what Professor Groenendijk has described as "[t]he fragility of the political compromise and the lack of a clear consensus amongst politicians and civilians".[21] It was a voluminous and complex draft that met with a lot of criticism. The changes came into force in 1991 and will be dealt with below.

In 1991, the asylum law was amended. This, again, does not appear to be a consequence of the Gulf War, but rather a response to the prospective opening of internal borders and the ever increasing number of asylum seekers, which was considered to represent a problem.[22] New provisions were introduced concerning external borders and the fight against human trafficking and alterations to the asylum determination procedure were made.[23]

At the end of August 1992 a proposal to change the Aliens Act and the Penal Code[24] was submitted even though, at the same time, the Department of Justice was already working on another change in the law. As a consequence of the Schengen Implementing Agreement, the Aliens Act was changed in 1993.[25] The Aliens Act was amended continuously little by little. According to the Explanatory Memorandum, the proposal of 28 August 1992 was submitted "in view of the growing number of requests for admission to this country" and its purpose was to change some material parts of the Aliens Act "without chang-

18 In June 1990 the Schengen Implementing Agreement was signed between France, Germany and the Benelux.

19 P. Boeles, "Kroniek Vreemdelingenrecht 1989-1990", in *NJB* (1990 - 45/46), p. 1854.

20 *Tweede Kamer* 1988-1989, 21018, Nos. 1-3

21 C.A. Groenendijk, "Waarom het vreemdelingenrecht niet eenvoudiger kan", *Sociaal recht* 1987, p. 3 ff.

22 *Tweede Kamer*, 1990-1991, 22146, No. 1, 3 June 1991, p. 1 and *Tweede Kamer,* 1990-1991, 22142, Nos. 1-2.

23 *Tweede Kamer,* 1990-1991, 22142, Nos. 1-2

24 *Tweede Kamer,* 1992-1993, 22735.

25 For the parliamentary debate: see *Tweede Kamer,* 1990-1991, 22142.

ing the system thoroughly".[26] Despite the expressed intention, the proposal did consist of a fundamental change in the existing law. The proposal was met with serious criticism from several non-governmental organisations active in the field. In Parliament, the majority considered that the level of protection of aliens' rights should not fall below the general level of administrative protection in the Netherlands.[27]

4.1.1 Asylum Applications in the Netherlands

As can be seen in the Table below, the big jump in number of asylum seekers in the Netherlands did not occur until well after 1991. For government officials, the transformation of a system accustomed to numbers of asylum seekers in four digits to one in five digits was a shock. Undoubtedly, the fall of the Berlin Wall and the easing of border restrictions with the former Communist countries were responsible for some of the increase in the number of asylum seekers over this period. The war in Bosnia in 1991-1992 also contributed to the substantial increase. The rapid rise of asylum seekers from Iraq seeking access to the European Union only started in earnest in 1997, rising from approximately 10,000 asylum seekers from Iraq to the European Union as a whole in 1992, to over 35,000 in 1997, followed by a drop in 1999, and a substantial rise again in 2000 (to more than 40,000) and 2001.[28]

Asylum Applications in the Netherlands

Year	New Applications	Recognition as a refugee
1984	2,603	114
1986	5,865	176
1988	7,486	589
1989	13,900	1,032
1990	21,208	694
1991	21,615	775
1992	20,346	4,903
1994	52,573	6,654
1996	22,170	3,133
1998	45,217	1,067
1999	42,733	628
2000	43,895	896
2001	32,579	244

Source: UNHCR Statistical Yearbook 2001

26 Unofficial translation.

27 P. Boeles, "Kroniek van het migratierecht sinds 1990", *NJB* (1993 –19) p. 710- 712.

28 UNHCR Statistical Yearbook 2001.

4.2 The Case Law

Two judgments of the Dutch courts are of importance in the asylum field in this period. They concern the application of Article 1F of the Refugee Convention (the exclusion clauses)[29] and are rather unusual. The relevant court is the *Afdeling Rechtspraak* of *Raad van State* (the Council of State). Very few cases regarding Article 1F have reached the Council of State. The association of asylum seekers with terrorist threats does not appear frequently in the treatment of individuals. The emphasis in the judgments and their analysis at the time focused on the way in which the Council of State approached the interpretation of Article 1F. The Council of State did not, in the opinion of several commentators,[30] follow a logical order in testing the criteria of the Refugee Convention. Instead of dealing with the question of whether the applicant fell within the criteria of Article 1A (refugee definition) first, it started out by checking whether the applicant could be excluded under Article 1F of the Convention. By switching the order of consideration, the Council of State reversed the logical order, the one which the guardian of the Convention, the UNHCR, sets out as the correct method in paragraphs 176 and 177 of the Handbook prepared to assist States in the interpretation of their duties under the Convention.[31] The consequences of this reversion are that, from the beginning of the assessment of the case, the emphasis is on the legitimacy, or otherwise, of the State's claim to exclude the individual on grounds of national security. The asylum seeker's claim to pro-

29 Article 1(F) states: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for believing that
(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

30 René Bruin, "Overzicht rechtspraak in asielzaken 1993 (deel 1)", *Nieuwsbrief asiel- en vluchtelingenrecht*, (1994 – 2).

31 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992 (reedited), para. 176: "An application for refugee status by a person having (or presumed to have) used force, or to have committed acts of violence of whatever nature and within whatever context, must in the first place – like any other application – be examined from the standpoint of the inclusion clauses in the 1951 Convention"; para. 177: "Where it has been determined that an applicant fulfils the inclusion criteria, the question may arise as to whether, in view of the acts involving the use of force or violence committed by him, he may not be covered by the terms of one or more of the exclusion clauses. These exclusion clauses, which figure in Article 1F(a) to (c) of the 1951 Convention have already been examined".

tection and, therefore, the compassionate circumstances of the claim, are not considered until after the decision has been made as to whether the individual constitutes a threat to national security.

A decision of 8 April 1991 is of particular importance.[32] It concerned a Turkish applicant who, together with three others, hijacked an airplane of the Turkish airlines on May 1972, demanding the release from prison of three leaders of Dev Genç,[33] scheduled for execution on 5 May 1972. The airplane was handed over to the Bulgarian authorities and no harm was done to the passengers. The applicant managed to get to the Netherlands and applied for asylum in the late 1980s. On account of his acts (in particular the hijacking) he feared persecution in Turkey. However, the Dutch authorities rejected his claim on the basis of Article 1F. The Council of State decided that in the light of the serious nature of the acts specifically designated in Article 1F, the court should first determine whether this provision must be applied. Further, it stated that the Advisory Commission (which carried out the first review) had not provided sufficient reasons for the decision that the crimes mentioned under Article 1F(a) and (c) could also include the hijacking an airplane. The decision according to the court was unrelated to any Convention or relevant international document and, therefore, was insufficient. The decision was quashed for lack of reasoning. This was considered in line with the restrictive interpretation of the exclusion clause expressed in the note attached to the decision. This decision was criticized by one commentator on the grounds that, as far as 1F(a) was concerned, it was clear that the hijacking constituted a crime under Dutch law (Article 385a *et seq* Criminal Code), but the commentator doubted whether any other conventions or international instruments would describe hijacking as a crime within the meaning of Article 1F(a).[34]

Also important is the decision of the Council of State of 17 December 1992.[35] The case concerned J.M. Sisson, the chairman and leader of the Communist Party in the Philippines. He applied for asylum in the Netherlands on the basis of his fear of persecution in the Philippines. His application was rejected on the basis of Article 1F(c) because he was considered to have committed acts contrary to the purposes and principles of the UN. Details of the allegations were not provided. The Council of State decided that Article 1F(c) should be

32 *Raad van State Afdeling rechtspraak*, 8 April 1991, No. R02.88.0417.

33 Dev Genç is a radical Turkish political group that was banned by the Turkish authorities.

34 *Raad van State Afdeling rechtspraak*, 8 April 1991, No. R02.88.0417, *RV* 1991, 5, with annotation by Vermeulen.

35 *Raad van State Afdeling rechtspraak,* 17 December 1992, RO2.90.4943, *NAV* 1993, No. 1, p. 60 and *RV* 1992, 12 with annotation by Vermeulen.

interpreted restrictively.[36] The court set aside the decision on the basis that the authorities had insufficiently outlined which acts committed by the applicant were the justification for invoking Article 1F(c). Attention should have been paid to the fact that the applicant could expect an unfair trial in the country of origin and would possibly be a victim of discriminatory prosecution or disproportionate punishment. The international reputation of the applicant had also not been considered sufficient to guarantee a fair trial, according to the Council of State.

In 1995 Sisson was again refused refugee status.[37] This time the grounds of Article 1F(a) and (b) were invoked. He appealed once more and again the Council of State reversed the order of questions and started by considering whether the applicant would fall within the criteria of Article 1F, before dealing with the question whether the applicant was to be considered a refugee or not (Article 1A).[38] According to the Council of State there was reason to believe that the applicant had tried to instigate several terrorist acts in the Philippines. However, the Council of State found that:

> the relevant material contained too little evidence to determine that the applicant guided the activities and was responsible to such an extent that it can be maintained that there were serious reasons to assume that he actually committed the crimes.[39]

The decision was accordingly quashed.

After 11 September 2001, the assets of Sisson were frozen in accordance with the UN resolution on the freezing of assets of terrorist organisations. Apparently Sisson appeared on one of the many lists of terrorists.

From these two decisions it appears that, in effect, the Council of State required a fairly high threshold of evidence from the State when it alleged the national security exception in respect of asylum seekers. Notwithstanding the Council of State's acceptance to consider the issues of national security before those of protection, the result was a relatively high standard of proof against the State.

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36 This interpretation differs from paragraph 149 of the *Handbook on Procedures and Criteria for Determining Refugee Status* of the UNHCR, which states that the whole article should be applied restrictively: "Considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive".

37 *Raad van State Afdeling bestuursrechtspraak*, 21 February 1995, R02.93.2274, *RV* 1995, 2.

38 Annotation Vermeulen, *RV1992*, 12.

39 Unofficial translation.

4.3 The Commissions 'Mulder' and 'Zeevalking'

The issue of the reception of asylum applicants and the determination of their applications became increasingly pressing in Dutch politics in the late 1980s. As a result, on 25 June 1990, a Commission, under the direction of A. Mulder, was asked to consider the matter. Another Commission, under the direction of H.J. Zeevalking, was appointed on 14 March 1990. The Commission Zeevalking, as it became known, was assigned the task of preparing an advisory report concerning the "termination of the use of social services by illegally residing persons and the putting into place of internal controls on foreigners".[40]

In June 1991, the government presented two reports and its reaction to these reports. The Commission on National Aliens Control's (the Commission Zeevalking) report was the first report and the Commission on the Analysis of the Asylum Procedure and the Reception of Asylum Seekers (the Commission Mulder) was responsible for the second report. The government's standpoint remained that the Netherlands was not an immigration country. Despite the growing number of asylum seekers, it did not consider itself a host country for refugees.

The measures envisaged by the government were threefold. First of all the government stated its intention to improve the procedures for the processing of asylum applications with a view to shortening the period of uncertainty for the asylum seeker. A decision would have to be taken within one year on whether an asylum seeker could or could not remain in the Netherlands.[41] The second aim was to create a consistent and dissuasive policy that would diminish the number of illegally residing persons and relieve the pressure on the administration and the housing market. The final aim was to put into place an effective control mechanism that would include a humane and effective expulsion policy. The government stated that, notwithstanding the objectives, this policy should not worsen the position of migrants and asylum seekers already resident in the Netherlands.[42]

As a follow-up of the Mulder Report, on 4 December 1991, a policy was established for persons whose application for refugee status had been turned down, but who could not be returned to their country of origin on account of the situation there.[43] The policy addressing this problem entailed the creation of a status for this group that entitled them to stay in the Netherlands for three years. During this period their right to remain could be withdrawn. On expiry of a period of three years they would be granted an unrestricted permit that

40 P. Boeles, "Kroniek Vreemdelingenrecht 1989-1990", *NJB* (1990 - 45/46) p. 1855.

41 *Tweede Kamer*, 1990-1991, 22146, No. 1, 3 June 1991, p. 1.

42 *Ibid.*, p. 2.

43 This policy is generally referred to as the *gedoogdenregeling*, literally translated as 'the toleration policy', but maybe better translated as 'turn a blind eye policy'.

allowed them to stay in the Netherlands.[44] This was not what the Commission Mulder had recommended, but rather the result of the political discussions.

As a result of the Zeevalking report, data exchange was permitted between the Central Register of Aliens and the Municipal Administration.[45] In addition, as of 11 November 1991, a social security number could only be granted to EC citizens and third country nationals who stayed in the Netherlands with the permission of the Aliens Police.[46]

In June 1991, in a letter concerning the review of the asylum procedure, the Minister of Justice stated that the Netherlands would continue to admit immigrants seeking admission under the rules for family reunification. He realised that this would entail a considerable number of immigrants coming to the Netherlands. The government, therefore, felt forced to consider how this could be contained with due regard to the principles of international law.[47] In 1993, the Minister reiterated that the generally restrictive admission policy did not apply to family reunification or formation on account of Dutch obligations under international treaties and humanitarian considerations.[48]

4.4 Naturalisation

A new policy rule (*circulaire*), issued on 20 January 1991, established the right to maintain one's original nationality when seeking to become a Dutch citizen. This was done to promote naturalisation of permanently residing aliens in the Netherlands. Symbolically, this change was very significant as it recognised, for the first time, that persons taking on Dutch nationality still retain important links and affiliations with their country of origin. The implicit message that underlines dual nationality is that multiple identities are legitimate. To be Dutch, an individual is not required to abandon his or her country of origin's customs or habits; these can actually be compatible with the new citizenship status. This policy was reversed, at least in part, by an amendment to the law, which was enacted in 2000.[49] While dual nationality was in principle no longer an option, new provisions allowed persons applying for naturalisation to keep their original nationality if they could bring themselves within one of the 12 exceptions or, alternatively, if it proved impossible for them to divest themselves of their old citizenship (as for instance is the case for Moroccans).

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44 A Kuijer and J.D.M. Steenbergen, *Nederlands Vreemdelingenrecht* (Nederlands Centrum Buitenlanders, Utrecht, 1992-1996) p. 80.

45 Tweede Nota van wijziging bij het ontwerp wet GBA, *Tweede Kamer,* 1992-1993, 21123, No. 13.

46 Circulaire 11 November 1991, 157522/91/DVZ/SBO, reproduced in *Migrantenrecht* 1992, pp. 88-91. See also, *Tweede Kamer*, 1992-1993, 22981, No. 2.

47 *Tweede Kamer,* 1990-1991, 22146, No. 1, p. 1.

48 *Tweede Kamer*, 1991-1992, 22314, No. 2, p. 4.

49 Wet van 21 december 2000, *Staatsblad* 2000, 618.

4.5 Passport Act

On 1 January 1992, the Passport Act entered into force regulating the right to passports for Dutch nationals. In addition, Articles 9 to 17 of the Passport Act set out rules for the issuing of aliens' travel documents. The procedure for review against a refusal of an application for a travel document was taken out of the hands of the local authorities and put in the hands of the Minister of Interior Affairs.[50] This meant that the control over the issuing of identity documents was centralised.

4.6 Detention

In Dutch law, asylum seekers whose applications have been rejected and who have exhausted their remedies must leave the country (i.e. the Schengen territory). Asylum seekers (and persons illegally present in the Netherlands) who are unwilling or unable to leave the territory can be detained for the purpose of expulsion. They can be held in detention until the moment of departure or expulsion. During the period under consideration, the different forms of detention increased. The two original forms of detention – *ophouding* (retention)[51] and *vreemdelingenbewaring* (detention)[52] – were supplemented, in 1989, with the possibility of detention of refused aliens at the border[53] (including, in 1991, those arriving by boat)[54] and, in 1991, the detention of asylum seekers who had exhausted all judicial remedies.[55] Other changes, which were introduced in December 1991, are:

- the obligation to report at a certain place during the procedure for admission;[56]
- asylum seekers whose request is refused in the first instance, and whose request for reconsideration does not have suspensive effect, can be restricted in their freedom of movement or detained;[57]
- a new model for admission and reception was implemented in Amsterdam on 1 January 1992;

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50 *Paspoortuitvoeringsregeling Nederland*, amended by Decision of 19 August 1992 (IBI92/U962- RD), entered into force: 1 September 1992.

51 Art. 19 Vw 1994, art. 50 Vw 2000 – detention for up to six hours for the purpose of verifying identity, nationality and legal basis of stay.

52 Art. 26 Vw old, art. 59 Vw 2000 – administrative measure, which may be taken for the purpose of execution of an expulsion decision.

53 Art. 7a Vw 1994, art. 6 Vw 2000. See, Hoge Raad, 9 December 1988, *RV* 1988, with annotation by Boeles.

54 *Tweede Kamer*, 1990-1991 and 1991-1992, 21975.

55 Art. 18b Vw 1994, art. 58 Vw 2000.

56 Art. 17a Vw 1994, art 55, section 1, Vw 2000.

57 Art. 18a Vw 1994.

– a centre was opened to detain asylum seekers refused admission to the Netherlands (the Border Hospice).[58]

More possibilities of detention that could be applied following the rejection of an application for asylum were created[59] and, in November 1992, regulations concerning detention possibilities were tightened up.[60]

4.7 Expulsion

As a reaction to the Zeevalking report, the government stated that two specific problems concerning expulsion practice had to be addressed. The first problem related to the question of how to deal with people whose identity could not be established as they did not possess a passport. The second problem addressed the question of how to deal with people whose nationality was known, but who could not be sent back due to the lack of flights to the country of origin. The latter was the case for a few States in the Middle East during the First Gulf War.

5 The Dutch Political and Social Setting in 2001-2004

The period of 2001-04 has seen two substantial changes in the Dutch political and social setting. First of all, in 2002, the traditional Dutch political structure was disrupted by a new charismatic political leader, Pim Fortuyn, who held controversial views[61] and became synonymous with the expression of previously impermissible anti-immigrant sentiments. He sought to change the Dutch political consensus through an injection of confrontation. Among other things, he used his homosexuality openly in debate, shocking some and delighting others. On 6 May 2002, shortly before the elections, Fortuyn was shot dead, an event which stunned the Netherlands. On 15 May 2002, even without a leader, his party won 26 of 150 seats in Parliament thus making it a participant in the coalition government which followed the elections. A special post of Minister for Migrant Affairs and Integration was created in July 2002.

Secondly, friction between the Dutch categorised as Muslims and *allochtoon* and those who saw themselves as *autochtoon* increased considerably. The debate found expression in gender politics. Hirsi Ali, a young woman of Somali origin and an ex-Muslim, questioned the way Islam was dealt with and, more specifically, the way in which Islamic women were treated in the Netherlands.

58 P. Boeles, "Kroniek van het Migratierecht sinds 1990", *NJB* (1993 – 19) p. 708.

59 Wet van 12 december 1991, houdende regeling betreffende het toezicht op vreemdelingen gedurende de behandeling of na afwijzing van hun verzoek om toelating. *Staatsblad* 1991, 691.

60 Besluit van 6 november 1992, houdende wijziging van het Vreemdelingenbesluit, *Staatsblad* 1992, 590.

61 See above n. 9.

She stated, as Fortuyn had done earlier, that Islam was 'backward' – a statement that she withdrew later – and pointed out that the shelter houses for women were full of Muslim women, something she considered a direct consequence of the failure of Islam to protect and promote equality and the safety of women. She questioned why left-wing politicians had abandoned their progressive views on the emancipation of women when considering foreigners. She gained much support in liberal and progressive circles. This is explained by the links she made between Islam, poverty and the 'backward' position of Muslim women. Some saw her as the new feminist,[62] whereas others, both Muslims and non-Muslims, criticised her for the negative tone of her discourse. The latter alleged that her extreme conclusions were the result of her own personal – unfortunate – experiences with Islam: she had been forced into marriage in Somalia and had subsequently sought refuge in the Netherlands. In September 2002, threats against her made by extreme Muslim groups became so severe that the police decided that she had to go into hiding. She stayed in Amsterdam for a couple of weeks, before she went to the USA. When she returned in October 2002, she once more caused much controversy by announcing her resignation from the progressive *Wiarda Beckman Foundation*[63] and then switching to the VVD party (conservative in policies). She was described as 'Bolkenstein's daughter', the leader of the party at the beginning of the 1990s, who, addressing Muslims in the Netherlands, said that "European culture is superior, otherwise [they] would not have come here".[64]

An opposite expression of gender politics is found in the rise of the leader of the Arab European League (AEL), Dyab Abu Jahjah, in Antwerp (Belgium). He sought the support of young Moroccans of the second and third generation in the Netherlands by preaching the emancipation of Arab and Islamic minorities in Europe through equal rights based on a separate identity and not through integration or assimilation.[65]

What started as a change of alliances, with progressive political figures embracing cultural criticisms of Islam on the grounds of gender politics, ended up in the traditional framework with the figurehead of that criticism, Hirsi Ali herself, joining the conservatives, and gender politics settling back into its traditional alliance with multiculturalism against the integrationalist/assimilationist approaches of the conservative parties in the Netherlands.

Pim Fortuyn's party, the LPF (List Pim Forteyn) was part of the coalition government that did not outlive 2002. The inability of the coalition government to rule was to no small extent the result of a rather impressive lack of discipline

62 Margreet Fogteloo, "Een moeizame maar hard nodige strijd", *Groene Amsterdammer*, 28 September 2002.

63 A scientific institute linked to the social democratic party, PvdA.

64 Hans Wansink, "De dochter van Bolkenstein", *Volkskrant*, 2 November 2002.

65 http://www.risq.org/modules.php?name=News&file=article&sid=67.

amongst the LPF deputies. On 22 January 2003, new elections were held and the LPF was reduced from 26 seats to 8. The new government was a coalition formed by the CDA, VVD and D'66 with Balkenende (CDA) as Prime Minister, Donner (CDA) as Minister of Justice and Remkes (VVD) as Minister of Internal Affairs. Rita Verdonk (VVD) was appointed as Minister for Migrant Affairs and Integration. Despite the ailing economic situation, the coalition government was able to initially pursue its tasks in a relatively stable climate until the second half of 2004 when two Members of Parliament, Hirsi Ali (VVD) and Wilders (former VVD member who had founded his own party, the Group Wilders), went into hiding after having received death threats and the film producer and author, Theo van Gogh, was murdered whilst cycling to work. Theo van Gogh was murdered on 2 November 2004 by Mohammed B., who turned out to be a member of a European network of Muslim fundamentalists. Van Gogh was murdered following the production of a film depicting the position of Muslim women, which he made with Hirsi Ali. He was found dead with a letter of warning addressed to Hirsi Ali fixed to him with a knife. Mohammed B. confessed to the murder and was sentenced to life imprisonment on 26 July 2005.[66] Following the murder of Van Gogh, fire was set to several mosques and Islamic schools and after an impressive siege Jason W. and Ismail A. were arrested in the Hague because of their adherence to Muslim fundamentalism. The two are suspected of planning the murder of the MPs Hirsi Ali and Wilders, as well as the lord mayor of Amsterdam, Job Cohen, and Aboutaleb, alderman in Amsterdam responsible for the integration policy. The latter was threatened in the same fashion as Hirsi Ali had been, albeit his death threat was placed in the form of a letter on the internet. Aboutaleb was accused of recognising the separation in politics between the State and religion, thus revealing a lack of knowledge of Islam or, alternatively, establishing himself as an obstinate non-believer.[67]

6 Dutch Engagement with the 'War on Terrorism'

The Netherlands was among one of the first countries to express their condolences to the US following the 11 September 2001 attacks.[68] The Dutch Minister assured the US State Secretary that "the Netherlands will do everything in its power to assist the United States to track down those accountable …" As regards specific action, however, the Dutch authorities carefully aligned themselves with the position of the European Union. They did not engage in unilat-

66 Rechtbank Amsterdam, 26 July 2005, 13/129227-04.

67 P. Cliteur, "Godslastering en zelfcensuur na de moord op Theo van Gogh", 79 *Nederlands Juristenblad* (2004 – 45/46) p. 2328.

68 Telegram from the Minister of Foreign Affairs, Van Aartsen, to the Secretary of State, Colin Powell, 11 September 2001.

eral discussions or actions,[69] although the Dutch Minister did call on the UN special representative to act quickly, confirming that the Dutch government's support for UN-led action was geared to reconstruction and the improvement of security in the region.

The Dutch government supported the US-led action in Afghanistan notwithstanding reservations and opposition in the country. It also strongly supported the UN-led measures for the reconstruction of Afghanistan after hostilities had formally been ended.

On 10 February 2003 the Dutch and Germans assumed joint command of the International Security Assistance Force in Afghanistan (ISAF).[70] The ISAF provided security in Kabul and some other centres in Afghanistan. Earlier that month the Dutch government had put forward a proposal to hand over the command of ISAF to NATO. The Netherlands provided substantial funding for the reconstruction of the country. On 18 December 2002 an announcement was made to the effect that a further 35 million Euro would be made available, in addition to a total of 118 million Euro already spent in the preceding year on aid: 63 million Euro on humanitarian aid and 55 million Euro on recovery and reconstruction.[71]

The Netherlands did not, however, join the US-led coalition against Iraq. Following the UN and EU multilateralist perspective, it remained outside the military campaign of March 2003. Although trying to walk a fine line between British fervour for military interventionism and French opposition to the use of force without more substantial evidence of an immediate threat from President Hussein's Iraq, the Netherlands did call for action within the UN remit. On 17 March 2003, the Dutch cabinet held a special meeting to discuss the developments on Iraq and issued a press release stating that:

> … broad international support for military intervention is [still] lacking. In the Netherlands, too, there is no widespread backing for military support in the event of action against Saddam. This is true of the Dutch public and of our parliament. The Cabinet has therefore decided that it can lend political support in the event of an action against Iraq, but that it will not make a military contribution.

In general the Dutch government preferred a UN response notwithstanding the fact that the UK was only in favour of such a position if the EU would support US action. This did not withhold the Netherlands from offering 600 military

69 Minister of Foreign Affairs Van Aartsen, in Open Debate, UN Security Council, 13 November 2001.

70 Originally created on 20 December 2001 by UN Security Council Resolution 1386.

71 Press Release, Ministry of Foreign Affairs, the Netherlands, 18 December 2002.

personnel as peacekeepers.[72] In addition, the transport of materials through the Netherlands was permitted. The first Dutch troops arrived in South Iraq in May 2003 and were involved in patrols there for a period of 20 months. They also assisted in creating a situation in which the Iraqis themselves could be charge of political and economic reconstruction. Fortunately for the Dutch, the situation in that area was, relatively speaking, quiet during their presence. In June 2004, the decision was taken to withdraw Dutch troops from Iraq in March 2005. This extension of the mandate allowed the Dutch troops to be present in the run up to, and during, the elections that were held in January 2005. In March 2005, the control of camp Smitty was transferred to the British troops at a point when regional control in al-Muthana had been achieved. [73]

7 Anti-Terrorism Measures with an Impact on Foreigners Post-9/11[74]

A debate in Parliament shortly after 11 September 2001 addressed the question of measures to provide greater security within the State. A number of rather loose suggestions were made, including the reintroduction of internal border controls and the temporary suspension of free movement of persons within the European Union. None of these proposals actually became policy. The government organised meetings with representatives of Muslim organisations in the country in an effort to create better understanding and confidence. On 18 September 2001 the Ministerial Anti-Terrorism and Security Steering group was established, chaired by the Prime Minister. It issued an action plan within approximately two weeks, the so-called Anti-Terrorism and Security Action Plan (ATAP), published on 5 October 2001. The Action Plan provided for increased powers for the intelligence services and new measures ensuring more efficient criminal investigations and the prosecution of terrorist acts, money laundering and arms and drugs.[75] Proposals included in the Action Plan concern:

– the expansion of intelligence and security services (Action 1);
– the development of biometrical identification methods (Action 3);

72 Theo Koele, "Nederland biedt 600 man aan voor vredesmacht", *Volkskrant*, 11 April 2003.

73 Brieven aan de Kamer, Nederlandse bijdrage tot medio mart 2005, 12 november 2004, http://www.mindef.nl/nieuws/parlement/brieven/20041112_irak.html and Ministers of Foreign Affairs and Defence, Kamerbrief inzake eerste Nederlandse militaire bijdrage trainingsmissie in Irak, 14 januari 2005, http://www.minbuza.nl/default.asp?CMS_ITEM.

74 This section relies heavily on the research of P. Catz, 'The Netherlands: Small Steps on Beaten Tracks', in E. Brouwer, P, Catz and E. Guild (eds), *Immigration, Asylum and Terrorism: A Changing Dynamic in European Law*, Recht & Samenleving 19, (Nijmegen, 2003).

75 *Tweede Kamer*, 2001-2002, 277925, No. 10.

- a harmonised visa policy (Action 4);
- an extra team for dealing with exclusion of asylum seekers (1F cases) (Action 4a);
- intensified external border control (Action 7);
- intensified airport and airline control (Action 8);
- the intensification of the fight against human trafficking (Action 13).

A creative interpretation of existing powers was all that was required for the implementation of the ATAP. Regarding the intelligence services the plan states:

> … this must lead to a better informed position with regard to radical anti-western movements among minorities and with regard to situations (reactions of violence against aliens), as well as to a better and broader understanding of home countries and migration movements and of new minorities in our country.[76]

In relation to the EU framework decision on combating terrorism,[77] the Dutch government put forward a proposal for a law on anti-terrorist measures that would tighten criminal law and established that terrorist crimes belonged to the most severe crimes.

The Explanatory Memorandum of the proposal[78] establishes the main duties as being, *inter alia*:

- to punish, as a terrorist crime, acts committed with a terrorist purpose;
- to place a higher sentence on the crimes of preparation or perpetration of a terrorist act;
- to place a minimum sentence of eight or 15 years respectively on complicity in, or leadership of, an organisation which aims at the commission of terrorist acts;
- to extend the jurisdiction of terrorist crimes.

The purpose of the proposal is to draw a line between crimes with and without a terrorist objective and to apply higher sentences for the first group of crimes. The government opted for a wide interpretation of the EU framework decision on combating terrorism. Thus, not only the content of the decision is integrated into Dutch policy, but also the underlying reasoning.

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76 First update ATAP 26 October 2001, *Tweede Kamer*, 2001-2002, 27925, No. 21; Second update ATAP 14 December 2001, *Tweede Kamer,* 2001-2002, 27925, No. 34; Third update ATAP 15 March 2002, *Tweede Kamer,* 2001-2002, 27925, No. 50.

77 OJ 2002 L 164/3.

78 *Tweede Kamer*, 2001-2002, 28463, No. 3.

Article 83 of the Penal Code sets out the definition of a terrorist crime. A 'terrorist crime' is any of a number of serious crimes contained in a list (with the addition of Article 83a Penal Code), committed with the aim of:

– seriously intimidating a population, or
– unduly compelling a Government or international organisation to perform or abstain from performing any act, or
– seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.[79]

Article 83(1) lists the crimes which, if committed and on conviction, carry a sentence of life or a maximum of 20 years' imprisonment. Article 83(2) provides the legal grounds for the sentence and 83(3) the specific terrorist crimes.[80] Existing criminal offences are extended and judicial powers are widened.[81] Two more anti-terrorist measures were adopted: the extension of Article 140 of the Penal Code (dealing with participation in a criminal organisation) to include participation in a terrorist organisation;[82] transposition of the UN resolution concerning sanctions against Al Qa'eda and related groups and the EU regulation requiring the freezing of assets of persons and organisations on a blacklist.[83] These organisations, however, were not banned in the Netherlands until 2003 as was the case in other European Member States. Several proposals in Parliament were put

79 "Het oogmerk om de bevolking of een deel der bevolking van een land vrees aan te jagen dan wel een overheid of een internationale organisatie te dwingen iets te doen, niet te doen of te dulden, dan wel de politieke, constitutionele, economische of sociale structuren van een land, of een internationale organisatie ernstig te ontwrichten of te vernietigen".

80 *Tweede Kamer*, 2001-2002, 28463, No. 3, p. 3.

81 *Tweede Kamer*, 2001-2002, 28463, No. 3.

82 Artikel 140 (J) reads:
"1. Deelneming aan een organisatie die tot oogmerk heeft het plegen van misdrijven, wordt gestraft met gevangenisstraf van ten hoogste zes jaren of geldboete van de vijfde categorie.
2. Deelneming aan de voortzetting van de werkzaamheid van een rechtspersoon die bij onherroepelijke rechterlijke beslissing verboden is verklaard en deswege is ontbonden wordt gestraft met gevangenisstraf van ten hoogste een jaar of geldboete van de derde categorie.
3. Ten aanzien van de oprichters, leiders of bestuurders kunnen de gevangenisstraffen met een derde worden verhoogd."

83 Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No. 337/2000, OJ 2001 L 67/1.

forward to make this possible.[84] The Civil code already permitted withdrawal of recognised status from an organisation on public policy grounds. The Minister of Foreign Affairs, De Hoop Scheffer, indicated that in his view a strong legal argument would have to be made for this provision to be changed.[85]

7.1 Secret and Intelligence Service Reports on Islamic Fundamentalism

In a report on *Integration Policy and Ethnic Minorities*, the government stated that, since the mid-1990s, the Netherlands had increasingly been confronted with activities of persons and organisations with a political Islamic background. Some mosques were alleged to have been involved in these activities. The Secret and Intelligence Services were keeping a watch on this phenomenon. After September 2001 and the killing in suspicious circumstances of two Dutch boys of Moroccan origin in Kashmir, in January 2002, investigations were intensified. An investigation by the Secret and Intelligence Service, AIVD, indicated that the boys had been recruited in the Netherlands for the *Jihad*. This triggered a debate in the Dutch Parliament. Further investigations were made and by the end of 2002 the AIVD published a report concerning *Jihad* recruitment in the Netherlands.[86]

Investigations were also conducted against some mosques and imams. This revealed that several mosques had apparently been built with financial aid from non-governmental organisations and individuals in Saudi Arabia. The head of the AIVD called on the Islamic community to put a stop to radicalisation and *Jihad* recruitment. The Minister for Urban Centres and Integration Policy took the initiative to start a dialogue with the representatives of the Muslim community. Setting up organisational contacts to maintain dialogue between the government and the different Muslim organisations was thought to be important.[87]

8 Changes in Asylum and Immigration Law and Practice[88]

8.1 Asylum Law

A number of issues that had been irritating the administrative authorities regarding asylum procedures were changed in the 2001 Act. The amendments included withdrawing an applicant's right to have a second opinion on the application for asylum. In any case the rejection of a first application precluded a right to hous-

84 *Tweede Kamer* 2002-2003, 28600-V, No. 28, Motion by Members of Parliament Eurlings, Van Aartsen en Palm.

85 Handelingen II 2002/2003, No. 29, 4 December 2002, p. 2080.

86 Handelingen II 2002/2003, No. 34, 17 December 2002, p. 2589.

87 *Tweede Kamer*, 2001-2002, 28006, No. 11, July 2002, p. 8.

88 This section also owes a heavy debt to P. Catz, above n. 74.

ing and support, if a second application was filed, thus leaving a person in this position at the mercy of charities.[89]

Another issue was the accelerated procedure in the Netherlands, the so-called AC-procedure.[90] A proposal was put forward to place the preliminary request for suspensive effect of the appeal at the beginning of the procedure and not, as is currently the case, within 14 days after submission. Currently the judges consider the appeal of the asylum decision and the request for suspensive effect at the same time. Separate consideration of preliminary requests linked to these two demands means that, when the preliminary request is not granted, the applicant will be expelled immediately, i.e. before the actual asylum decision has been dealt with by the court. In the current procedure, the asylum seeker can at least wait for consideration of the preliminary request and the decision on his or her asylum request, before he or she can be expelled.

Until the end of 2002, the policy was that permission to remain was granted after a period of three years if no negative preliminary decision had been handed down and the delay was not the result of the applicant's own actions. This policy has since been withdrawn. The new Act was supposed to speed up the procedure but the consequence of no longer following the aforementioned policy has actually meant that there was to be no longer an automatic end to the procedure after three years.

8.1.1 Article 1F Cases

Article 1F of the Refugee Convention and its application to asylum seekers considered to be a terrorist threat for the Netherlands became the focus of increased attention in the asylum process. Already in 1994, a team had been established within the administration to bring some order into the consideration of asylum applications and exclusion under Article 1F. The NOJO (Netherlands Investigation Team for War Crimes) was to deal specifically with cases concerning people from the former Yugoslavia in the light of concerns that war criminals from that area were coming to and finding refuge in the Netherlands. In 1998, the NOJO was replaced by the NOVO (Netherlands War Crimes Tribunal Investigation Team) and its remit extended to all asylum applications. This team looked into possibilities of criminal prosecution of people who were excluded under Article 1F. The number of cases referred to this team appears to be substantial, at least from the figures available about backlogs. For instance, 152 Afghan cases out of a total of 170 were awaiting consideration. Notwithstanding published commitments to reduce the backlog, by May 2002 it had risen to 1,330 cases. The political pressure to prosecute asylum seekers for relevant international crimes was

89 *Tweede Kamer*, 2002-2003, 19637, No. 716, p. 9.

90 AC is the abbreviation for Aanmeld Centrum, which means Application Centre, a reception centre in which, upon arrival in the Netherlands, the alien has to apply for asylum after which the procedure will start.

not in doubt. The problem was finding and prosecuting the cases. None were found, perhaps an indication of the difference of standard between an administrative suspicion about the veracity of an individual's claim of fear and the standard of proof required in criminal law regarding conviction of citizens. A Dutch university, commissioned to carry out a study on the NOVO, concluded, rather mildly, that there was a difference between seeking to exclude asylum seekers and getting serious about bringing criminal prosecution against them (or indeed any citizen).[91]

The review of the handling of Article 1F cases became a point of focus after September 2001. New procedural rules were introduced in December 2001 that:

– extended the remit of the Article 1F team from asylum claims to all types of applications;
– allowed the exclusion of family members who might represent a risk to the State even where the person they were to be reunited with in the Netherlands was accepted not to be such a risk;
– provided for greater exchange of information between the immigration department and the police over possible Article IF cases.

The National Security Service became involved in information exchange with the immigration department about possible abuse of the asylum system with the acquiescence of the Dutch Data Protection Authority, provided adequate guarantees were included. Further, a Government report confirmed that Article 1F cases could result in the individual being designated an undesirable alien.[92]

8.2 Immigration Law

The Dutch Aliens Act 2000 (which entered into force in April 2001) provides that permission to stay can be refused or ended if the alien constitutes a danger to public order or national security. This includes the objective of good international relations and undesired political activities. When applying the public order concept, a difference is made between a refusal of an application for first admission and the termination of permission to stay.

An application for permission to stay for a defined period (in asylum and immigration law) can be refused if the alien constitutes a threat to public order or national security, provided this does not conflict with obligations under international treaties. A special admissibility procedure was created for teachers of religion and preachers/imams. This group cannot be exempted from the

91 A. Beijer, A. Klip, M. Oomen & M. van der Spek, *Opsporing van oorlogsmisdrijven, Evaluatie van het Nationaal Opsporingsteam voor Oorlogsmisdrijven: 1998 – 2001* (Kluwer, Deventer, 2002).

92 *Tweede Kamer*, 2001-2002, 27925, No. 58, 17 May 02.

MVV-visa[93] requirement (see below at 8.2.1). Thus the immigration department can always consider whether granting a residence status to religious teachers or preachers/imams might possibly amount to a threat to public order or national security before they are permitted to come to the Netherlands.

When public order is involved in requests for an extension of stay, the duration of legal residence in the Netherlands is considered in the light of the length of any criminal sentence given. Permission to remain can be withdrawn at any time on the basis of the public order or policy exception. In both cases, the principle of the 'sliding scale'[94] is used. The Aliens Act 2000 extended the grounds on which permission to remain could be withdrawn or the extension of a residence permit could be refused.[95] Whereas in the old Aliens Act the term 'breach' of public order was used, in the new law the term 'danger' to public order is used. The consequences of this change is that permission to stay for an unlimited period can be withdrawn as a result of having committed a crime which carries a prison sentence of at least three years. Thus, for instance, even a minor crime such as shoplifting can be a reason to withdraw residence permission. Under the old Act withdrawal of a residence permit was only possible after committing a serious breach of the public order. This new rule caused controversy both in Parliament and outside.[96]

8.2.1 Long Stay Visa

The MVV is a visa that has to be applied for in the county of origin and enables an alien to travel to the Netherlands where he or she can apply for permission to stay. Without this document it is not possible to switch status to a long stay category (except for asylum seekers). Prior to the issuing of a MVV, a thorough check will be conducted to ascertain that the alien satisfies all conditions for stay in the Netherlands. If the conditions are satisfied, the MVV will be issued by a Dutch embassy or consulate.

93 MVV is the abbreviation for *Machtiging tot voorlopig verblijf,* which authorises its bearer to stay in the country on a provisional basis.

94 For an explanation of the sliding scale, see K. Groenendijk, E. Guild and R. Barsilay, *Legal Status of Third Country Nationals who are Long Term Residents in a Member State of the European Union* (European Commission, Brussels, 2000).

95 Articles 18 and 19 Aliens Act.

96 See, C.A. Groenendijk, "De positie van "reguliere" vreemdelingen in het ontwerp: einde van het minderhedenbeleid, 'einzelgang' in Europa of onachtzaamheid?", in P. Boeles (ed), *De Vreemdelingenwet 2000: analyses en kritiek* (Den Haag, Sdu, 2000) pp. 23-34 (pp. 29-30).

8.2.2 Renewal of Permission to Stay

On 1 May 2002, the fees for nearly all regular residence permits were raised by 100 to 650 per cent.[97] Groenendijk called it "an intentional attack on the wallet of regular migrants or their family members, staying in the Netherlands" and "in breach of the standstill clauses in Article 13 of Decision 1/80 of the Association Council EC-Turkey, Article 41 of the Protocol to the Treaty and Article 18(2) of the European Social Charter".[98] The increase in price exceeds the amount that is actually needed to cover the costs of the processing of an application and constitutes a financial barrier to obtaining or renewing permission to stay.[99]

8.2.3 Illegally Residing Persons

Another change concerns the criminalisation of illegally residing persons on Dutch territory. An alien who stays in the Netherlands after being declared unwanted is guilty of a crime under Article 197 of the Penal Code.[100] In order to be able to declare an alien as unwanted and to prosecute him or her, the condition must be fulfilled that the alien will be expelled in the near future.[101]

In 2001, in his yearly presentation on the state of the nation, the former Prime Minister Kok promised to consider the possibility of putting persons who have not been granted permission to reside in the Netherlands and are involved in criminal activities in aliens' custody from the moment they have completed their prison sentence until they can be expelled. The former Secretary of State asked the Advisory Commission for Alien Affairs (ACVZ) for an opinion on this matter. In a letter of 8 May 2002 this Commission delivered its report entitled *Aliens in custody: Advice on aliens' custody and expulsion of 'criminal' illegally residing persons*. The report found no reason to oppose the Government's position: there were no legal obstacles to the detention of aliens convicted of criminal offences for the exclusive purpose of subsequently expelling them.

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97 TBV 2002/5, 27 March 2002, *Staatscourant,* 10 April 2002, No. 69.

98 C.A. Groenendijk, "Exorbitante verhoging leges: Justitie als grootgrutter met oogkleppen", *Migrantenrecht* (2002-3) pp. 90, 91.

99 A. Terlouw, "Kroniek van het Migratierecht", *NJB* (2002 – 31) p. 1571.

100 Artikel 197 *Wetboek van Strafrecht*:
"Een vreemdeling die in Nederland verblijft, terwijl hij weet of ernstige reden heeft te vermoeden, dat hij op grond van een wettelijk voorschrift tot ongewenste vreemdeling is verklaard, wordt gestraft met een gevangenisstraf van ten hoogste zes maanden of geldboete van de derde categorie." An alien who stays in the Netherlands while he knows, or has serious reasons to believe that he is declared as an unwanted alien on the basis of the law, will be punished with a sentence to prison of six months maximum or a fine of the third category (unofficial translation).

101 *Tweede Kamer*, 2001-2001, 28006, No. 11.

8.2.4 Detention

As a result of the 2000 Aliens Act, the system of legal protection accorded to aliens subjected to detention measures changed. One of the changes entailed the shortening of the period during which the judge has to adjudicate on the legality of the detention measure. Another change was the introduction of periodical judicial review of the duration of a detention measure. Both changes increased the courts' workload (absorbing 40 per cent of their capacity) and consequently resulted in tremendous delays. Therefore, the former Secretary of State proposed to amend the Aliens Act 2000 and return to the old system. This point of view was endorsed by the Balkenende I government.[102]

Amendments to the Aliens Act made it easier for the authorities to detain aliens and to keep them in detention by withdrawing the government's obligation to provide for periodical review of the continuation of a detention measure. If the alien does not appeal against the continuation of detention, the first judicial review of the detention measure will take place at a later point in time and periodical review will not take place at all. A consequence of this proposal is a lower level of legal protection for aliens. The Minister of Justice, however, maintained that this was justified in the light of the workload of the courts and the fact that an alien could still appeal at any moment during the procedure. The Minister also argued that the proposal was in accordance with Article 5(4) ECHR by referring to a statement made by that Court regarding a provision in the old Aliens Act which was nearly identical to the new proposal:[103]

> … Further, noting the possibility under the Aliens Act to challenge the lawfulness of detaining aliens before the regional court at any point in time (…) the Court finds no indication that the applicant's rights under Article 5(4) ECHR have been breached.[104]

Another change permitted the use of the ground of public order to continue detention of an alien where provision for his or her return had already been made or was near completion. Detention under these circumstances must be justified by serious reasons and is limited to a maximum period of four weeks. Nonetheless, this has created new possibilities for detaining aliens.[105]

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102 *Tweede Kamer*, 2001-2002, 28375, No. 5, p. 17.

103 *Tweede Kamer*, 2002-2003, 28749, No. 3, pp. 2, 3.

104 *Tekdemir* v *the Netherlands*, Application No. 46860/99; see also *Arslan* v *the Netherlands*, Application No. 49860/99.

105 Art. 5g(2) Vw 2000.

8.2.5 Intensification of Aliens' Control

In its response to the government's report, *Towards a safer society,*[106] the Commission of Internal Affairs and Kingdom Relations put several questions to the government, all related to the control of the population. In the answers given to these questions, the main topics of control are dealt with. The general theme is a policy of intensification of controls over aliens in order to accomplish a "structural and consistent way to fulfil the immigration legislation, which will have a preventive effect by itself". This policy consists of the following elements:

- preventive controls on illegal stay of aliens, such as controls in the workplace, hotels, and camp sites;
- control of actual departure from the country on expiry of the period for which permission to stay was granted;
- the prevention of, and fight against, human trafficking and smuggling; and
- the prevention of, and fight against, the (industrial) falsification of identity papers.[107]

An important policy goal is to expell a more significant number of aliens. Arrangements were made with the Royal Military Police to achieve an expulsion rate of 18,000 through Schiphol Airport in 2003 (compared to 13,000 in 2002). In 2004, the government aimed to realise 24,000 expulsions.[108] The government also stated that control at the borders had to be treated separately from the internal controls on aliens. As a consequence of the Anti-Terrorist Action Plan additional border control personnel has already been employed.

9 Conclusions

Immigration, asylum and terrorism issues seem to intersect when measures taken in one field are justified by developments in other policy fields. Thus, in 1991, when the Intelligence Services were seeking to redefine their role, they sought to deploy the debate around the position of Muslims in Dutch society as a ground for their activities. In the 2001-04 period, the relationship is less clear. In this period, the immigration and asylum authorities sought to implement more draconian measures against asylum seekers and immigrants. The contents of these measures are less and less clearly related to the threat of terrorism, although the measures are implicitly justified on this ground.

The field of asylum is particularly instructive as within this field special powers and administrative capacities were created to investigate asylum seekers suspected of terrorist activities. The capacity to deploy resources for this purpose increased constantly from 1994 onwards, even in the absence of evidence that

106 *Tweede Kamer*, 2002-2003, 28684, No. 1.

107 *Tweede Kamer*, 2002-2003, 28684, No. 3, p. 9.

108 *Tweede Kamer*, 2002-2003, 28684, No. 3, p. 33.

they had any success. Thus, the existence of a team vetting asylum seekers for terrorist activities and the expansion of this team becomes part of the discussion on how asylum seekers in general should be treated. In April 2003 Human Rights Watch issued a damning report on the Dutch asylum system, including in particular disturbing charges regarding the mistreatment of children and abuse by the authorities of the asylum procedure. While the report does not focus on the terrorism link nor indeed does it refer to the terrorism question specifically, one cannot but wonder about the interaction between the social construction of asylum seekers as potential terrorists and what appears to be public acquiescence to rather horrifying human right abuses against a group of vulnerable people.

The increasing interest of the Security Services in foreigners and the linking of activities of foreigners at home with those abroad – through the issue of *Jihad* and the training of young Dutch Muslims – reinforced the traditional perspective of Dutch society as divided not on the basis of nationality but on the basis of *allochtoon-autochtoon*, i.e. those who really belong and those who do not. Also important to the period under consideration was the transformation of immigration and asylum law induced by the Schengen process and the transfer of powers in the immigration and asylum field to the EU. The margin of action of the Dutch authorities as regards what measures can be taken on security grounds in the field is increasingly circumscribed. While Parliament has discussed reintroducing border controls with other Member States, these ideas have not been acted upon. The scope of the Dutch authorities to act on their own has been transformed.

A central part of the framework within which the response to immigration and asylum takes place is the lack of certainty of where the inside ends and the outside begins. Schengen, enlargement, *allochtoon* and *autochtoon,* and other such issues make the division more and more difficult. The legal framework is found in the transfer of the measures of control to the consular officials abroad with the expansion of the MVV and other visa requirements. The insistence on increasing the number of expulsion measures and enhancing external borders is met with interest by some authorities, for instance the Royal Military Police, whose interests are closely related to the concept of the border. Elsewhere, however, such definitions are increasingly difficult.

The two main legal mechanisms the State may use to take exceptional measures against non-nationals are Article 1F of the Refugee Convention and the concept of public order as a ground of exclusion or expulsion. There appear to be two tendencies. First that exceptionalism in the treatment of individuals appears increasingly locked into these two measures; secondly that the State seeks to widen its exceptional powers by identifying and preventing some non-nationals from arriving at the borders. The State's margin for manoeuvre is much wider before the non-national can claim rights on the territory. Hence the emphasis has shifted to the category of illegally residing aliens and unwanted aliens seeking to come to the State.

Chapter 7 Terrorism, Asylum and Immigration in Italian Law

*Paolo Bonetti**

1 Terrorism and Regulation of Immigration and Asylum in Italian Law Before and During the First Gulf War (1991)

1.1 Domestic Terrorism and International Terrorism in the Italian Experience Up To 1990

Since its inception in the late 1960s, terrorism has almost always been perpetrated by one of the numerous Italian criminal organisations, composed of Italian citizens, with opposing political views. In 1975, a sweeping criminal and police legislation was passed to counteract this phenomenon, which gradually grew more powerful and diversified, but it still does not provide for specific sanctions against foreigners convicted of acts of terrorism. As a result, sanctions against these individuals arise from the application of domestic laws relating to foreigners and domestic regulations dealing with the prevention and suppression of terrorism.

From the late 1960s to the early 1990s, Italy was besieged by hundreds of terrorist attacks perpetrated by individuals with varying political views, hundreds of persons were killed and injured, and thousands of arrests and convictions were made by the magistrature that all but wiped out domestic terrorism. In contrast, before 1991, there were only two major episodes of international terrorism in Italy that involved foreign nationals. Both occurred in 1985 and were related to the Palestinian issue.

The first one occurred in October 1985, when four Palestinian terrorists seized the Achille Lauro cruise ship near the Egyptian coast and threw a Jewish-American wheelchair-bound passenger overboard. The Italian and Egyptian Governments negotiated with the head of the Palestine Liberation Organisation (PLO), Abu Abbas, to grant the terrorists safe passage to Belgrade in exchange

* Translation by Kelly O'Connor.

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for the lives of the other passengers. However, the US Government opposed this deal and the US air force intercepted the terrorists' aircraft, forcing it to land at the Sigonella NATO base, and subsequently arrested the terrorists, claiming the right of the United States to capture, pursue and punish terrorists wherever they were found. The Italian military encircled the US aircraft and the then Prime Minister, Bettino Craxi, demanded that the terrorists be handed over, arguing that the sovereignty of the Italian nation was at stake. The US Government was compelled to reverse its decision: after frantic negotiations between top government officials, it was decided that the four perpetrators of the terrorist attack would be arrested and detained by the Italian authorities.

The second occurred in December 1985: at the international airport of Fiumicino in Rome terrorists of the extremist group, Abu Nidal, using automatic weapons and grenades, brought carnage to the boarding area of the Israeli El Al and the American TWA airlines. By the time it was over, 13 passengers were dead, 70 were wounded and four terrorists had been killed by the police.

1.2 Terrorism in Legislation and in Italian Immigration and Asylum Practices Since 1990

Italy did not enact specific legislation dealing with terrorist attacks by foreigners following the first Gulf War in 1991, nor are there any reports of the ordinary anti-terrorism legislation having been applied to foreigners. According to official statistics of 1991, of the foreigners arrested, none was arrested or reported for crimes of massacre, arson, or violent attack,[1] nor for other terrorist crimes. Foreigners were, however, subject to specific 'national security' provisions in the criminal and immigration field, which provided authorities with a wide degree of discretion in terms of admitting access to asylum determination procedures, denying entry, allowing for deportation and the regularisation of status.

It is noteworthy that until 30 June 1990, aliens illegally residing in the territory of the State were permitted to regularise their status under Law Decree 416 of 30 December 1989, which was modified and converted to Law 39 of 28 February 1990.

1.2.1 Terrorism as an Impediment to Filing an Application for Recognition of Refugee Status

Article 1, subsection 4 lett. d) of Law 39/1990 (still in force) provides that the impediments to admissibility of applications for recognition of refugee status include the situation in which the foreigner (a) is convicted in Italy of one of the crimes included in Article 380, subsections 1 and 2 of the Code of Criminal Procedure, (b) is a threat to State security, or (c) belongs to organised crime groups

1 Cf. Caritas of Rome, *Immigrazione dossier statistico 1992*, (Rome: Sinnos editrice, 1992), p. 142; Caritas of Rome, c138.

(mafia) or other organisations dealing in drug trafficking or terrorist organisations.

Article 380 of the Code of Criminal Procedure – in 1991 and today – identifies the crimes requiring the arrest of an individual under suspicion of committing those crimes. One of these provisions is found under Article 380 section 2 lett. 1), which cites crimes committed for the purpose of spreading terror or subversion of the constitutional order, for which the law establishes a conviction and sentence of between five and ten years in prison. In these cases, the border police can deny entry to the foreigner applying for asylum and execute the order, with immediate escort to the border. The order can be appealed to the Regional Administrative Tribunal (TAR) without any suspensive effect on filing the petition.

Authorities have criticized this provision because it does not correspond to the *criminality provision* of Article 1(F) of the 1951 Convention on the Status of Refugees (Refugee Convention) and thus appears as an inadmissible exception to the principle of non-*refoulement* established by Article 33 of the same Convention. Furthermore, it does not provide that the impediment is applicable only in the case of final conviction for one of the crimes cited in Article 380 of the Code of Criminal Procedure.[2] In addition, it is not clear if the case of belonging to terrorist organisations can also involve situations in which the alien was neither convicted nor investigated and the information originated from confidential and unverifiable police sources.

1.2.2 Terrorism as an Impediment to Regularisation of Status and a Ground for Judicial or Administrative Expulsion or Deportation of Aliens

Law 39/1990 also provides (Art. 9, section 1) that the only aliens present in Italy at the date of 31 December 1989, whose legal status could not be regularised, were those who had been convicted in Italy with a sentence passed without appeal of one of the crimes cited in Article 380, sections 1 and 2 of the Code of Criminal Procedure, or who were considered a threat to State security. In 1991, there had been no orders denying regularisation of status as a result of conviction for crimes of terrorism or affiliation with terrorist groups.

Furthermore, with regard to entry and residence, the same Law 39/1990 made terrorism an impediment to the issuing of entry permits, entry to the territory of the State and issuing of residence permits and a reason that legitimised the judicial or administrative deportation of aliens. Border police stations were required to deny entry at the border – by means of a written and reasoned order – to non-EU nationals (even valid visa holders) if there were reports of these individuals being a threat to State security or belonging to organised crime

2 Cf. F. Pedrazzi, "Comments on Art. 1", in B. Nascimbene, *La condizione giuridica dello straniero*, (Padua: CEDAM publishers, 1995), p. 138.

groups (mafia), organisations dealing in drug trafficking or terrorist organisations (Article 3 subsection 5 of Law 39/1990). This provision afforded a large degree of discretion because the law did not specify where the reports had to come from or what they had to say, nor did the provision define the concept of 'threat to State security'. Moreover, the Chief of Police had the power to deny the issuing of a residence permit for, amongst other things, well-grounded reasons relating to the protection of State security and public order or health (Article 4 subsection 12 of Law 39/1990). These were general provisions that afforded a large degree of discretion. The 'reasons relating to State security and public order' seemed to allude to the very foreigners who, despite holding a visa, would have been denied entry at the border (cfr. Article 4 subsection 5 and 6 of Law 39/1990), as these were foreigners who had been deported or reported as a threat to State security or as persons belonging to organised crime groups (mafia), organisations dealing in drug trafficking or terrorist organisations.

At that time, terrorism was more or less expressly included as a ground for judicial or administrative deportation of the non-EU foreigner from the territory of the State. In particular – then as now – deportation as a measure of security must be applied by the criminal courts against the alien who has been convicted of a serious offence (and who has served the prison sentence) or against foreigners sentenced to imprisonment for a period of no less than ten years (Article 235 subsection 1 Penal Code) or probation (regardless of its duration) for one of the crimes against the status of the State, punished in the Penal Code (Article 312 Penal Code). These crimes include conspiracy for the purposes of terrorism or subversion of the democratic order (Article 270-*bis*), terrorist attacks or acts of subversion (Article 280 Penal Code), and abduction for the purposes of terrorism or subversion (Article 289-*bis*).

After 1994, numerous members of Islamic terrorist organisations were investigated and frequently convicted in Italy, in some cases with final sentences. However, their convictions primarily involved crimes of criminal conspiracy (Article 416 Penal Code) with the intention of promoting illegal immigration, trafficking, counterfeiting, as well as other specific crimes. This was contingent on the fact that – as illustrated later in this chapter – in the Italian legal system, the crime of criminal conspiracy for the purposes of *international or domestic* terrorism was inserted in Article 270-*bis* Penal Code with Law Decree 374 of 18 October 2001, converted into Law 438 of 15 December 2001. Therefore, in the sentences in question, while it was explicitly recognised that the conduct of those convicted did indeed fall within criminal conspiracy with Islamic terrorism groups, this conduct was punished with less serious penalties than those provided under the new Article 270-*bis* Penal Code.

Law 39/1990 also envisages mandatory deportation ordered as an administrative measure by the Prefecture against the alien sentenced without appeal for one of the crimes provided under Article 380 subsection 1 and 2 Code of

Criminal Procedure (Article 7 subsection 1 Law 39/1990), which as already mentioned, include crimes of terrorism.

Finally, there was the provision (comparable to the one in force today) which provided that in exceptional cases, for reasons of protection of public order or State security, deportation could be ordered (non-mandatory deportation) by the Ministry of the Interior against the foreigner either in transit or resident in the territory of the State (Article 7 subsection 5 of Law 39/1990). A comparable measure was adopted based on specific agreements with Members States of the European Community[3] when the incident involved foreign nationals reported for the purposes of barring entry or who were considered threats to public order, national safety or the international relations of one of the contracting States. The measure was executed, with immediate escort to the border, and could be appealed to the Regional Administrative Tribunal (TAR) of Lazio.

It is important to remember that the concepts of public order and national security are some of the most ambiguous in the Italian legal system. The Constitutional Court had several times attempted to define the concept of 'public order' frequently construing it as the "legal order underpinning community life",[4] the "institutional order of the prevailing regime" which results from a "legal system in which objectives permitted to co-members and social groups can only be achieved using the instruments and through the measures envisaged by the law and amendments or exceptions to these cannot be introduced through forms of coercion or even violence"[5] or, in a more comprehensive definition, as the set of the "fundamental rules set forth by the Constitution and the laws underpinning the legal institutions in which the positive order is expressed in its constant adaptation to the evolution of society".[6] As a result, the Court had regarded that the threat posed by an individual with respect to public order:

> cannot consist in simple demonstrations of a social or political nature, which are regulated by other legal provisions, but rather, external manifestations of restiveness or rebellion to the legislative precepts and the legitimate orders of public authority, manifestations that can easily give rise to states of alarm and violence clearly threatening for the general welfare of the citizens.

In practice, this deportation on public order grounds was implemented against Albanians convicted of committing acts of devastation or looting in some of the places where they were given shelter after a group of refugees arrived in Italy in February 1991, but not against terrorist suspects.

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3 Cfr. the Convention applying the Schengen Agreement.

4 Cfr. Constitutional Court, ruling 2/1956, 25/1965, 138/1985.

5 Constitutional Court, ruling 19/1962.

6 Constitutional Court, ruling 18/1982.

The notion of State security seems to have been inserted to refer to cases in which serious political or international tensions arise against citizens of a country whose government has become hostile or in cases where it is certified that a foreigner is in some way involved in espionage or other terrorist conduct against the State of Italy, perceived as a State-community and as a State-apparatus. In practice, deportation on State security grounds was implemented in the 1990s in a few cases against foreign spies or against high-level foreign exponents of Islamic fundamentalist organisations, against whom there was insufficient evidence to incriminate them for terrorist crimes.

2 Terrorism and Aliens in Italian Law from 2001 to Today

The Italian Government did not respond to the terrorist attacks of September 2001 by enacting specific provisions against foreign terrorists. As a result, to date, preventive and repressive measures against aliens suspected of, or convicted for, committing acts of terrorism arise from the application of the ordinary provisions that aim to prevent and punish terrorism (since 2001 expressly extended to acts of international terrorism) and the application of the general provisions on the status of foreigners, which were radically changed between 1998 and 2002. After 11 September, Italy adopted a more selective approach to the entry of foreign nationals into Italy and paid heightened attention to irregular immigration and resident foreign nationals.[7]

2.1 A General Overview of Italian Criminal Legislation and Law of Procedure as it Relates to International Terrorism after 2001

Italy responded swiftly to the terrorist threat after 11 September 2001, in compliance with the relevant resolutions taken by the United Nations and with several regulatory instruments adopted by the European Union.

Pursuant to Law 438/2001, urgent measures were taken for preventing and counteracting crimes committed for the purposes of international terrorism: the new provision regards and punishes as criminal offences acts of promotion, organisation, sponsorship and support of groups present on the national territory whose objectives are to carry out terrorist activities abroad; it also attributes more power to the investigative and repressive apparatus, including new provisions regarding covert surveillance and seizures, but ensures control of the judicial authorities over these operations.

Under Italian criminal law, pursuant to the amendments introduced by Law 438/2001, conspiracy for the purposes of international terrorism is a crime (Article 270-*bis* Penal Code). Therefore, today, promotion, establishment, organisation, running, or sponsorship of groups whose objectives are to carry out acts

7 A. Geddes, "Italy: Emphasizing Exclusion", in E. Brouwer, P. Catz, E. Guild (eds), *Immigration, Asylum and Terrorism: A Changing Dynamic in European Law* (Nijmegen: Rechts & Samenleving 19, 2003).

of violence for the purposes of international or domestic terrorism, carries a prison sentence of seven to 15 years, while participation in these terrorist groups carries a prison sentence of five to ten years. In addition, a new Article 270-*ter* of the Penal Code states that providing co-operation to the members of terrorist groups carries a penalty of incarceration for up to four years.

The major innovation of the amendment to Article 270-*bis* Penal Code is its extended definition of the purposes of terrorism. Subsection 3 of the provision establishes that the objectives of terrorism also apply when the acts of violence are committed against a foreign State or international institution or organisation. This provision appears very broad, the concept of international institutions and organisations being wide-ranging. While the former can include institutions established through international conventions, such as the UN, NATO, and the European Union, difficulties arise in determining the exact boundaries of the notion of 'international organisation'. It is not clear whether, by using this form of expression, the intention was to specify only supranational organisations with legal status or also private associations with international scope.[8] It would be preferable to adopt a more extensive interpretation of the notion of organisation because terrorist attacks on private associations could have a high demonstrational value (consider for example a terrorist attack intending to wreak havoc on one of the many NGOs that deal with daily problems related to violence and peace-keeping around the world). It is worth remembering that the efforts by the legislature to provide a definition of international terrorism has been resolved in the explanation of the international scope of the crime, while the real definition of the phenomenon is resolved in ineffectual repetition: namely, that terrorism is a violent act committed for purpose of spreading terror. In the absence of a domestic provision to use as reference for interpretation of the new provision, the only possibility is to make reference to international provisions that have attempted to provide a definition of terrorism but which are fairly incomplete in many aspects.

In any case, in compliance with the Italian Constitution, the legal asset protected by the provision continues to be the status of the State of Italy, in that Italy must be considered an international public entity, holder of the duty-right (undertaken internationally) to repress any act of violence that can endanger international security, perceived as the peaceful cohabitation of people and States. The objective of the new provision is to provide protection against acts of terrorism, thus expressing repudiation for any form of violence as foreseen by Article 11 of the Constitution, under which Italy agrees to limitations on its sovereignty where these are necessary to allow for an international system of peace and justice between nations.

8 Cfr. Pistorelli, in *Guida al Diritto*, 3 November 2001, No. 42, p. 84.

In addition to the regulations introduced in 2001, for the purposes of suppressing acts of terrorism, other provisions contained in the Penal Code are relevant. These include:

- Article 110, which attaches responsibility to complicity with others in the crime and, therefore, makes it possible to criminalise sponsorship of individual acts of terrorism;
- Article 240, subsection 1, which makes it possible to seize sources of financing;
- Articles 273 and 274, making punishable the illicit establishment of and participation in international associations, respectively;
- other cases in point, for example terrorist attacks, devastation, looting and massacre and violent attacks against the constitutional bodies or regional assemblies are provided for under Articles 280, 285, and 289;
- Article 289-*bis*, establishing the penalty for abduction of persons for the purposes of terrorism;
- Article 294, which involves the possibility of attacks against the political rights of citizens;
- Article 306, punishing the formation of and participation in armed groups;
- Article 312, providing for security measures ordering the deportation of aliens from the territory of the State if convicted for the aforementioned crimes; the alien is deported after first serving out the prison sentence.

Furthermore, Article 1 of Law 15/1980 provides that in the cases where the objective of terrorism or subversion of the democratic system is not considered a crime, the penalty provided under the law for any crime punishable with sentences other than life imprisonment is increased by half, when the crime is committed for such purposes.

The provisions introduced with Law 438/2001 also establish the possibility of using preventive telephone surveillance. However, preventive measures can be authorised only when there are investigative elements that justify such precautionary action. Telephone surveillance can be carried out for 40 days and may only be extended for another 20. This surveillance is valid only for investigative purposes and cannot be used in criminal proceedings or for public disclosure. Publishing the texts of the wire taps, or broadcasting them over the radio can carry a penalty of six months to three years' imprisonment. The provision also states that information or security services agents or the police cannot be punished if, during an attempt to thwart international crimes of terror, they themselves commit crimes such as acquisition, substitution, or concealment of cash, weapons, documents or drugs. In any event, these operations must be authorised by the Chief of Police, the General Commander of the Carabinieri, and the Financial Police, who must inform the public prosecutor's office.

Under the new provision enacted in 2001, the ability to operate 'under cover' under judicial control is certainly important from a preventive perspective, especially during investigations for crimes of terrorism. Even the ability to make preventive telephone surveillance, under the direct responsibility of the prosecuting attorney and for an appropriate amount of time, provides a tool of knowledge of the contexts that have demonstrated excellent potential as regards national and international security. Investigations are underway in Rome of crimes of international terrorism in relation to the 11 September tragedy in New York, for which the Italian judicial system has partial jurisdiction due to the fact that Italian citizens were involved. There are also other preliminary investigations underway against Algerian nationals suspected of belonging to organisations connected to Al Qa'eda.

2.1.1 Responses Offered by the Italian Legislature

Taking a closer look at the contents of Law Decree 98/2001, converted into Law 196/2001; Law Decree 353/2001, converted into Law 415/2001; Law Decree 369/2001; Law Decree 374/2001 converted into Law 438/2001; Law 7/2003; and Law 34/2003, we can see that all of these laws together represent the responses offered by Italian legislation at various levels to counteract the resurgence of criminal activity for the purposes of domestic terrorism or sedition and, especially, international terrorism.

These provisions have modified the Penal Code, the Code of Criminal Procedure, the Penitentiary System, and the regulations in force regarding measures of prevention and have authorised the ratification and execution of the International Convention on Repression of Sponsorship of Terrorism and Suppression of Terrorist Bombings, dictating the provisions for adaptation into Italian law.

In evaluating the above set of legislative provisions, especially Law Decree 374/2001, converted with amendments into Law 438/2001, it is important to remember that the final text resulting from its conversion into law by Parliament is slightly different from the text that was approved by the Government.

First, Article 1 of Law 438/2001, dedicated to "conspiracy with international terrorist groups", defines and/or adapts the cases relevant for criminal purposes in order to include criminal actions committed in the country, but whose objective is aggression against a foreign State, an international institution or an international organisation. In converting Law Decree 374/2001, the legislature decided to work through substitution of Article 270-*bis* of the Penal Code (previously entitled "groups with objectives of terrorism and subversion of the constitutional order"), inserting into the index the specification "domestic or international" after the phrase "objectives of terrorism" and introducing a third subsection, according to which "for the purposes of criminal law, the objectives of terrorism also apply when acts of violence are carried out against a foreign country, an international institution, or international organisation". This wording represents 'an authentic interpretation' of the purposes of terrorism that can

have repercussions on Article 1 of Law 15/1980, a provision that introduces the aggravation of the purposes of terrorism as a special circumstance.

Also worthy of note is that in addition to the leaders, promoters and organisers of the groups in question, there is also included the figure of 'sponsor' (whose definition is included in Article 18 of Law 152/1975, which makes the anti-mafia prevention measures, pursuant to Law 575/1965, also applicable to various categories of 'subversive' or potentially subversive individuals, according to the specific definitions given). A sponsor of terrorism is "any person who supplies amounts of money or other assets, conscious of the purposes they will be used for". Even this provision is modified by Article 7 of Law 438/2001, by inserting crimes with the objectives of domestic or international terrorism, along with crimes intended to undermine public order in the State.

For 'apical' individuals of the group, as identified in subsection 1 of Article 270-*bis* of the Penal Code, the penalty is imprisonment of seven to ten years, while conversion into law increased the penalty for those taking part in the association to five to ten years in prison.

Subsection 1-*bis* of Article 1 of Law 438/2001 inserts into the Penal Code Article 270-*ter* punishing with up to four years in prison the crime of providing co-operation and assistance to members of a group with domestic or international terrorist objectives (punishable under Article 270-*bis* of the Penal Code), while subsection 2 of the Article in question inserts biological and radioactive weapons into the notion of weapons of mass destruction under Article 1 of Law 110 of 18 April.

As a result of these amendments, nearly every crime of terrorism is included in the crimes specified in subsection 2 of Article 380 of the Code of Criminal Procedure, under which officials and police officers must arrest any person caught in the act of committing a crime. These crimes also legitimate arresting a person suspected of a crime even if not caught in the act but where the individual is considered at risk of absconding. The police generally make arrests for suspects of crimes punishable by at least two years and a maximum of six years of imprisonment, or for crimes involving weapons of mass destruction.

Crimes committed for the purposes of domestic or international terrorism must be subjected to the common evaluation of the precautionary needs provided under Article 274 of the Code of Criminal Procedure, even if, in these cases, the precautionary needs can be quite remarkable because they are nearly always 'serious crimes', often involving the use of weapons or other means of personal violence, as well as crimes related to organised crime according to the provisions under letter c) of the aforementioned article, or are committed by individuals who are considered at risk of absconding.

After the amendments introduced by Law 196/2001, crimes of subversive conspiracy (Article 270 subsection 3 Penal Code) and armed association (Article 306 subsection 2 Penal Code) are expressly inserted in subsection 2 letter a) number 4 of Article 407 of the Code of Criminal Procedure. There are multiple

consequences of interpolation of the text of Article 407 subsection 2 letter a) number 4 of the Code of Criminal Procedure, caused by the provisions cited above. First, the maximum duration for preliminary investigations for the crimes considered rises to the maximum (two years) and the procedure for extending the term, by effect of the express applicability of paragraph 5-*bis* of Article 406 of the Code of Civil Procedure, to the crimes under review, is made without the cross-examination foreseen by subsection 3-4-5 of the same Article 406 of the Code of Civil Procedure. The intervention is justified as these are crimes for which certification the investigations are usually quite complex and necessitate the strictest confidentiality. Other repercussions are found with regard to the term of preventive detention.

The result is that acts of terrorism falling under the provisions under Article 407 Code of Criminal Procedure are included in the list of 'acts of organised crime'. In fact, after all the variations imported by the anti-Mafia legislation, the Supreme Court of Cassation[9] now believes that the notion of organised crime – initiated by Law 15/80 in the section that supersedes the previous Article 340 Code of Criminal Procedure – hinges on Articles 274 and 407 of the Code of Criminal Procedure. The inclusion of terrorism into the notion of organised crime has required a parameterisation of this phenomenon to other aspects, procedural and otherwise, once normally used in the criminal system against organised crime. As a result, sections 3 and 4 of Law 438/2001 regulate the means of finding proof, such as through searches, surveillance, and 'undercover' operations by the police, adapting them to the higher incisiveness required by the nature and characteristics of the criminal conduct to investigate.

Furthermore, Law 431/2001 established the Financial Security Committee (FSC), set up within the Ministry of Economics and Finance, and chaired by the Director General of the Treasury. It is comprised of 11 members and includes representatives of the Ministries of the Interior, Economy and Finance, Justice, and Foreign Affairs, the Bank of Italy, the National Commission for Companies and the Stock Exchange (CONSOB), the Italian Banking Association, the Italian Exchange Office, the Police Forces, the Carabinieri Corps, the Financial Police, and the National Anti-Mafia Bureau. The FSC is responsible for preventing terrorist organisations from exploiting the Italian financial system; it co-ordinates the Italian action to combat sponsorship of terrorism; and it is responsible for measures of freezing the assets of individuals or bodies related to terrorist organisations. To carry out its monitoring and co-ordination functions, the Committee acquires information in the possession of the public administrations, including the exception to the provisions regarding confidentiality of office, and can ask the Italian Exchange Office and the Monetary Police Department to make investigations. In addition, the law establishes the penalties for failure to comply with European Community regulations banning the transfer

9 Cf. Cass. VI Criminal section, ruling 7 January-4 March 1997, Pacini Battaglia.

of financial assets, services or resources that directly or indirectly involve persons or organisations related to terrorism. The Committee monitors implementation of the EU regulations that govern these matters. The FSC also supervises application of the sanctions adopted by the Security Council and approves the proposals for insertion of individuals or authorities in the list of the Penalty Committee against Al Qa'eda and the Taliban. As of 31 December 2004, the total value of financial assets frozen by the Italian administrative authorities amounted to approximately 500,000 Euro; in addition, assets and property were seized on the orders of the judicial authorities for another 4 million Euro.

Finally, Law 7/2003 authorised ratification of the New York Convention of 9 December 2002 regarding repression of sponsorship of terrorism, completing the regulations that give effect to the international treaties against international terrorism. Under this law, authorities or companies suspected of or found to be involved in sponsoring terrorism are ordered to pay fines of up to 500,000 Euro and to close down their activity. The law also sets out that any amounts seized are to be allocated to a fund for victims of terrorism, to which all victims of international terrorism have access. The law extends these measures to the crime of money laundering, as well as to crimes related to sponsoring terrorism, if committed in the conduct of banking or professional business or other activity subject to authorisation, license, registration or other qualifying title.

2.2 Criminal Proceedings and Judicial Divergence in Applying to Foreign Nationals the New Criminal Laws Relating to International Terrorism

The difficulties in the action to legally counteract international terrorism – which must involve efficiency and guarantees, avoiding shortcuts or gaps in the evidence-gathering phase – arise from interpretational differences, due to the lack of a consolidated law on the new types of international terrorism provided by the crimes listed under Article 270-*bis* Penal Code, as regards participation in an association for the purposes of international terrorism.

Since 1993, there have been reports of several isolated episodes of violent radicalisation against the West or Christianity in the Islamic community in Italy, for the most part made up of foreign nationals, which generally erupted during demonstrations against the participation in the war in Bosnia and in Chechnya and later, after 2001, in support of international terrorist groups such as Al Qa'eda, or military groups that operated against the American military occupation in Iraq. In this regard, the investigative action led to the arrest of several individuals (nearly all foreigners); some were subsequently convicted (based on the anti-terrorism legislation approved in 2001) and others were released by the magistrates because the charge of inciting violence or participation in international terrorism was not proved, or because the action of resistance to military forces of occupation was considered not punishable. The aliens found not guilty of crimes of terrorism were still convicted of other crimes or were nevertheless deported (pursuant to a removal order by reason of protection of public order

or national security issued by the Ministry of the Interior), despite the fact that ordinary and administrative judges, by request of the parties involved, subsequently revoked the orders due to a lack of evidence of the concrete and current threat to public order or national security.

Since the anticipation of punishability cannot be reduced to persecution for ideas, the boundary between ideological support of fundamentalist radicalism and participation in terrorist associations needs to be identified. It is not merely a problem of evidence-gathering. It is primarily a legal problem. The problem had already come up with the enactment of the old Article 270-*bis* of the Penal Code, which only punished terrorism or subversion of the constitutional order.

According to the Court of Cassation,[10] Article 270-*bis* was considered a crime of abstract threat, but, in order to not run into objections based on unconstitutionality, it was necessary to certify elements of conduct that offended the rights protected. Especially interesting was the ruling issued in 2000 (726/2000) during the preliminary hearing at the Court of Bologna in relation to a trial against foreign (non-EU) nationals accused of conspiring to commit crimes in foreign countries (in particular Algeria). The prosecutors had considered applicable the hypothesis of crime under Article 270-*bis* Penal Code in the original text, arguing that, at least indirectly, the Italian constitutional system was impaired by a violent subversive association whose actions are against a foreign country, since it would be in the interest of the State to protect its relationship with other foreign States. The judge pronounced a ruling to not proceed with the trial since the legal asset protected by the provision in question was only the constitutional system, and as a result, the conduct directed at striking foreign countries did not fall into the area of the criminal offence.

Pursuant to similar rulings pronounced after the attacks of September 2001, Article 270-*bis* of the Penal Code was modified by introducing conspiracy for the purposes of international terrorism. In this regard, the previous paragraph demonstrated the continuing indistinctness and ambiguity of the notion of international terrorism and this appears confirmed by the legal debates that have come up on the subject.

In fact, the ruling of the judge of the preliminary investigations of the Court of Milan pronounced in January 2005 created a sensation.[11] In the proceedings of the trial against Noureddine Drissi (Morocco), Kamel Ben Mouldi Hamarouni (Tunisia) and other foreign (non-EU) nationals, charged with the crime under Article 270-*bis* of the Penal Code (conspiracy to terrorism), for having carried out the role of direction, organisation or simply participation in the criminal plot (against "governments, military forces, institutions, international organisations, civilians, and other objectives – regardless of where they are located, in

10 Cfr. Cass. I Criminal section, ruling 21 November 2001.

11 Cfr. Court of Milan, GIP Milan, Forleo, ord. 24 January 2005, no. 28491/04 R.G. N.R., N.5774/04 R.G. G.I.P.

Western countries or otherwise, considered 'infidels' or enemies ...") and charged with the crime under Articles 110, 81 cpv Penal Code and Article 12, paragraphs 1 and 3 of the Consolidated Immigration and Foreigners' Status Act approved with Legislative decree 286/1998 (modified in Law 189/2002), to have procured "illegal entry of a number of individuals into the territory of the State, or ... in other countries" with the aggravating circumstance of the objectives of terrorism (Section 1 of Law 15/1980). The magistrate declared he did not have jurisdiction over the case and ordered the 'immediate' transfer of the documents to the Prosecuting Attorney in Brescia, who revoked the precautionary detention measure against two of the accused, excluding the existence of the aggravating circumstances of the objectives of terrorism provided under Article 1 of Law 15/1980, in the wake of a contention which aimed to eliminate the definition of terrorist from the charges against the defendants standing trial, which would have allowed their release from prison even if limited to the disputed hypothesis of crime. In short, at the conclusion of the preliminary investigative phases, the court found it expedient to separate the definition of 'warrior' from the more compromising, serious and dangerous one of 'terrorist' because the judge considered the individuals standing trial to be the former type of enemy combatant ('warrior') and not the latter ('terrorist'). The decision clearly dismantled a significant portion of the charges against the aliens. The logic gathered from the interpretation of that ruling is that it considers the plot by foreigners against a certain armed coalition of States – of which the host State is a member – an action of war waged in the context of an international conflict, and therefore legitimate from the perspective of international law and not an offence or a risk to the civil community, where the plot is uncovered.

In actual fact, exoneration of the suspects was structured on two generally relevant legal problems. The first problem relates to the charges that can be filed before the judge for the purposes of the verdict. The judge defined as information from confidential and approximate sources and 'non-evidence' the so-called 'intelligence sources', namely investigative acquisitions not otherwise specified, reports from American organisations or the German Federal Criminal Police Office (BKA), emerging from 'international cooperation contexts'.

The second problem relates to the notion of global terrorism. Article 270-*bis* Penal Code punishes international terrorism but fails to define it (due to this generic definition, the discussion centred on a 'crime of variable geometry', an expression that has nothing to do with the need for the area of intervention of criminal law to be carefully defined). If a plot of violent acts to be committed by foreigners outside of Italy and in times of peace is uncovered, but, as part of armed conflicts underway in other countries, the judge must make the distinctions that the law, starting with international law, suggests. Therefore, the Judge of Milan underlined that the 'cell', of which the suspects were part, operated in the context of the American attack on Iraq and the military occupation of that country (the definition used by the United States and Great Britain as occupying

powers is found in Resolution 1483 in May 2004 of the UN Security Council). Then, that judge looked at the distinction laid down by scholars of international law between guerrilla warfare and terrorism, with particular reference to the objectives of the acts of violence. Therefore, by arguing broadly and basing the arguments on the international conventions approved or currently in negotiation between countries (which made the ruling subject to criticism because it is not possible to apply provisions that are not yet in force), the judge deemed that groups which, to achieve various objectives, strike both military and civil objectives, are terrorists as they spread indiscriminate terror in the population; on the other hand, guerrilla warfare applies to the fight against a foreign occupying power by using a clandestine and paramilitary apparatus, directing acts of violence against military targets, even if, at times, this action has unintended effects on the civilian population. The magistrate also confirmed that even if one was to extend the concept of terrorism to every act of violence committed in the context of war or foreign military occupation by non-institutional forces, the result would be to strip people of their right to self-determination and independence. Having established this, the next step was to evaluate the evidence gathered against the defendants on a case-by-case and time-by-time basis in order to identify the particular context in which these defendants committed their actions.

However, several of the judicial declarations expressed by the aforementioned ruling of the magistrate in Milan were immediately debatable: 1) based on the 1999 draft UN Global Convention on Terrorism, justification could be found for those who practice violent acts or guerrilla warfare in the context of wars, even if they are not acting as institutional militias, provided international human rights provisions are not violated; 2) lacking an exact regulatory definition of 'terrorism' the definition may include actions intended to sow terror and shock "indiscriminately in the civilian population in the name of an ideological and/or religious belief, posing as crimes against humanity"; 3) the extension of the criminal protection to acts of guerrilla warfare, even if violent, would lead to "an unjustified support of one of the forces on the field".

As a result, in a case recently heard by the magistrate in Milan, the magistrate presiding over the preliminary inquiries at the Court of Brescia pronounced a completely contradictory ruling.[12] In his opinion, the assertions were the result of a poor application of the provisions because:

1) The UN Global Convention on Terrorism in 1999, which allegedly provided justification for the 'acts or guerrilla warfare' was merely 'work in progress', and as a result, could not be used as a reference to the 'prevailing international law', its lack of approval being due to the States' disagreement over its content. Furthermore, even if it had been approved, it would only become part of the Italian legal system upon ratification.

12 Cf. Court of Brescia, GIP Spanò, ord. 31 January 2005 no.13805 / 2002 RGNR, N. 17692 / 2003 RG GIP.

2) In the ruling issued by the Milanese magistrate, information from so-called 'open sources' was declared invalid. However, no explanation was given as to the criteria on which this judgment was based, nor how they were filtered through the rules of procedure. Even the assertion to prefer not to show support "for one of the forces on the field" can have uncertain boundaries, where the distinction between 'justified guerrilla warfare' and 'terrorism' is made according to the 'tyrannical' nature of the adversary; in any event, the magistrate should not have taken one of the debatable positions, because the exclusively 'political' assessment required of a judge in assigning significance to the expression 'terrorism objectives' considered in Article 270-*bis* of the Penal Code is the one indicated in Article 12 subsection 1 of the provisions of the law in general, which elevates the 'intention of the legislature' to a primarily interpretative criteria. In light of the common opinion of the political community (or better, the political communities) which produced Article 270-*bis* of the Penal Code (along with other comparable provisions), violent acts committed using 'kamikaze' methods by individuals touting Islamic extremist ideologies against military units currently deployed in Asia (including an Italian contingent) cannot qualify as legitimate and justified 'guerrilla' acts but can only be defined as acts of 'terrorism'.
3) As the Supreme Court of Cassation has repeated several times, the crime of cross-border involvement is a crime of presumed *de jure* danger; an estimate of the scope of the danger in question cannot be made based on the evidence of what the defendants concretely intended to do (or better, based on the absence of proof regarding what they would be able to do), otherwise it would generally be necessary to wait for the deadly results of the violent acts to accurately define what kind of crime is being dealt with. Besides, it does not appear possible to draw a dividing line between 'guerrilla warfare' and 'terrorism' since, regardless of the terminological questions, once the organisation is set up to execute a plan of violence, it is impossible to know if this will act surgically and 'humanitarianly' with respect to specific military targets or if it will use cruel and inhuman methods against unarmed and defenceless civilians and a diverse range of unintended objectives.

Precisely that investigation, according to the magistrate in Brescia, supplies the proof of how the Cremona-based cell, initially only involved in sponsoring, training and recruiting guerrillas, unexpectedly decided to diversify its strategy against the foreign policies of the Italian Government – deemed excessively close to the United States – by conceiving of organising two attacks in Cremona and Milan with the objective of murdering the highest possible number of civilians. Moreover, observation of the scenes of daily bloodshed can offer plenty of examples of how opposition to institutional armies by Islamist combatants, equipped, according to the magistrate in Milan, with "the highest levels of offen-

sive potential", precisely by reason of imbalance of the forces in play, is not carried out predominantly on the military or guerrilla field, but with hateful and inhuman actions directed at causing the widest media resonance. However, on the point, the reasoning of the Milanese magistrate appeared to the magistrate in Brescia to be confused, since the latter excluded the terrorist nature of Ansar Al Islam, while admitting that the organisation gravitates in "areas notoriously marked by terrorist inclinations" and despite the fact that it includes among its members individuals who openly declare terrorist objectives ("terrorist objectives, most likely held by only some of its members"). Therefore, on a logical level, it seems difficult to conceive how the same organisation, having a unitary ideological extremist violent matrix, can have supporters who practice group retaliation while terrorism is exercised by these members only as individuals.

On the other hand, the Court of Cassation, in limiting the area of criminal relevance, made a distinction for the purposes of punishability for the crime under Article 270-*bis* of the Penal Code, between the conduct of association with violent plots and the mere assumption of ideological positions ("the crime ascribed to the defendants, representing a potential threat, provides protection for one specific plan of violence and against those persons who take part in the plot, proposing the task of carrying out acts of violence; they do not consider the merely ideological positions, not accompanied by tangible and real violence, provided that these positions receive protection from the democratic and pluralistic system that is being fought against"),[13] while never making reference to the distinction made by the Milanese magistrate.

2.3 Application of the Provisions on Extradition of Aliens Suspected of Acts of International Terrorism

It is worth mentioning apparently contradictory case law concerning extradition of aliens suspected of acts of international terrorism, including consideration of Article 10, subsection 4 of the Constitution that prohibits extradition of foreigners for political offences, except for crimes of genocide. Two proceedings with different outcomes are of particular interest.

In the first, the VI Criminal Section of the Court of Cassation, in application of the International Convention for the Suppression of Terrorist Bombings (adopted by the General Assembly of the United Nations on 15 December 1997 and ratified and executed in Italy pursuant to Law 34 of 14 February 2003) found that the extradition of an Egyptian national detained in Italy was lawful since achieved by a warrant for the international search and apprehension in reference to the Madrid train bombing by terrorists on 11 March 2004. The Supreme Court proclaimed that the purpose of international conventions is to establish the jurisdiction between States in the event that two States proceed to

13 Cfr. Cass., VI Criminal section, ruling 13 October 2004, Laagoub.

prosecute for the same event, with an exclusive preference for the country where the terrorist crime was perpetrated (in this case, Spain), notwithstanding the fact that if, in the course of investigations underway in Italy, investigators uncover formation and operation of a terrorist conspiracy separate from the conspiracy that is the subject of the investigation in the Kingdom of Spain, the Italian judicial authorities can claim jurisdiction.[14]

A contradictory decision[15] was pronounced in the case of the former Imam, Rafik Mohamed, suspected of involvement in the violence that caused 24 deaths in Casablanca. Rafik was not extradited to Morocco and will soon be released, unless he is detained for another reason, as a result of a ruling of the VI Criminal Section of the Court of Cassation, overturning the decision of the Appeals Court of Brescia, which in February 2004 had issued a ruling in favour of the request for extradition filed by the Attorney's Office of Rabat. Rafik, charged with "conspiracy to carry out acts of terrorism, collection of funds for execution of acts of terrorism and possession and use of explosives" was arrested in October 2003 on the execution of an international arrest warrant issued by the Public Prosecutor's office at the Court of Appeals in Rabat. The indictments included his connections with the terrorist 'Salafiya Jihadiya' group. The Supreme Court denied the existence of grounds for extradition and ordered the immediate release of the defendant based on the principle contained in Article 25 of the Constitution, according to which "no punishment is allowed unless provided by a law already in force when the offence has been committed".

2.4 Application to Foreign Terrorists of the Italian Legislation Regarding Immigration and Asylum

Italian legislation on immigration and the legal status of aliens was completely rewritten pursuant to the Consolidated Immigration and Foreigners' Status Act (Consolidated Act), approved by Legislative Decree 286 of 25 July 1998, modified and amended several times, notably by Law 189/2002. In the terms of this comprehensive law on immigration, terrorism is not specifically mentioned but is implicitly included (a) as one of the impediments to entry and residence of the foreign national in Italy, and (b) as one of the prerequisites for orders to expel the foreign national from Italy, either by denial of entry and/or via an administrative or judicial deportation order. Terrorism is also one of the impediments to filing applications of recognition of refugee status, as illustrated in section 1.2.1 above.

14 Cf. Cass., VI Criminal section, ruling 3 December 2004, n.47039/2004.

15 Cf. Cass., VI Criminal section, ruling 27 January-15 February 2005, n.5708/2005.

2.4.1 Terrorism as An Impediment to the Entry And Residence of Aliens in the Territory of the State

Terrorism represents an implicit ground to preclude the entry and residence of the alien in the territory of the State, partly because terrorism is defined as a threat to public order and national security and partly because, as illustrated above, crimes of terrorism fall under the crimes indicated by Article 380 Code of Criminal Procedure. Terrorism represents an impediment to entry by the alien in the territory of the State from two main perspectives:

1) according to Article 4, subsection 3 of the Legislative Decree 286/1998, as modified by Law 189/2002, Italy shall deny entry to any foreign national who is considered a threat to public order or national security or the security of one of the countries with which Italy has signed agreements for removal of internal border controls and free movement of persons, or who has been convicted of the crimes specified under Article 380 Code of Criminal Procedure;
2) Article 4, subsection 6 of the Legislative Decree 286/1998 provides that foreign nationals who, based on international treaties or conventions in effect in Italy, must be deported or have been reported for deportation or denial of entry on serious grounds relating to the protection of public order, national security or international relations, shall not enter the territory of the State and shall be denied access at the border, unless they have obtained special authorization or the period of the ban on access has elapsed.

For the reasons specified in points 1 and 2, a foreign national convicted or suspected of terrorism or included on the lists of individuals drawn up by the European Union as members or sponsors of terrorist organisations or reported as such by Italy or other countries in the SIS (Schengen Information System) cannot obtain an entry visa and must be denied entry at the border. Italy, as part of the Schengen Convention, ratified pursuant to Law 388/1993, must make cross-checks of the names on the SIS for every visa application and, for citizens of sensitive countries, make security checks in consultation with other Member States. It is important to remember that, under Article 2 subsection 2 of the Schengen Convention, a contracting party can consult with the other contracting States and decide that checks be made on the national borders for a certain period of time according to the needs of the situation. If the protection of public order or national security requires that immediate action be taken, the contracting State involved adopts the measures necessary and informs the other contracting States of these measures as soon as possible. Also, subsection 2 of Article 4 of Legislative Decree 286/1998, as modified by Law 189/2002, provides that short-term denial of an entry visa need not be motivated by reasons of public order or national security in order to protect the confidentiality of sources of information and the safety of Italian diplomats abroad with regard to criminal threats.

Secondly, since terrorism is one of the impediments to entry into the territory of Italy, reports of individuals suspected or convicted of crimes of terrorism (including subsequent to regular entry of the foreign national in the territory of the State) prevents the issuing and renewal of residence permits and represents a lawful reason for their revocation. Under Article 5, subsection 5 and 6, of Legislative Decree 286/1998, the decision denying or revoking a residence permit can be adopted pursuant to international conventions or agreements, given effect in domestic law, when the alien does not meet the conditions of residence applicable in one of the contracting States, save for applicability of serious reasons, in particular of a humanitarian nature or resulting from the constitutional or international obligations of the Italian State.

Thirdly, suspected involvement in terrorism or conviction for acts of terrorism precludes entitlement to indefinite residence after six years of legal, consecutive residence and which nearly always prevents the foreign national from being deported from the territory of the State. In fact, the residence permit cannot be issued to any alien who has a judgment or conviction, final or preliminary, pending against him or her for one of the crimes specified under Article 380 Code of Criminal Procedure, which includes crimes of terrorism. After the residence permit is issued, it must be revoked if a preliminary or final conviction ruling was issued for one of these crimes (Section 9, subsection 3 of Legislative Decree 286/1998). Added to this is the fact that any alien holding a residence permit, who is suspected of terrorism but not investigated or convicted by the Italian magistrature, can still be deported on serious grounds relating to the protection of public order or national security (Article 9, subsection 5 and Article 19, subsection 2, lett. b) of Legislative Decree 286/1998).

2.4.2 Terrorism as a Prerequisite in the Administrative or Judicial Orders of Expulsion

Terrorism is an implicit reason that legitimates adoption of administrative or judicial orders of expulsion of the foreign national from the territory of the State because terrorism is one of the threats to public order and national security, and because, as illustrated above, crimes of terrorism are included in the crimes specified by Article 380 Code of Criminal Procedure. Firstly, as illustrated in section 2.3.1, terrorism is a ground for an order of denial of entry at the border, which is executed with immediate escort to the border and repatriation by the carrier. Secondly, conviction of a crime of terrorism requires that the magistrate order the deportation of the alien convicted of the crime. This measure is executed with immediate escort to the border as soon as the individual has served the related prison sentence (Article 312 Penal Code; Article 15 Legislative Decree 286/1998). Under Article 16, subsection 5 of Legislative Decree 286/1998, as modified by Law 189/2002, the alien convicted of terrorist crimes must serve out the entire sentence in Italy because this type of crime is among those specified by Article 407, subsection 2, lett. a) Code of Criminal

Procedure, which does not allow deportation of the alien as replacement for, or as an alternative to, imprisonment.

Furthermore, the alien investigated in Italy for one of the crimes of terrorism cannot be deported from the territory of the State until conclusion of the criminal procedure that concerns him. In fact, Article 13, subsection 3-*sexies* of Legislative Decree 286/1998, introduced by Law 189/2002, provides that the magistrate cannot grant authorisation to the execution of the administrative deportation order when taken against a foreign national for one of the crimes indicated by Article 407, subsection 2, lett. a) Code of Criminal Procedure, which, as already mentioned, also includes crimes of terrorism.

Thirdly, the Ministry of the Interior can order an administrative deportation order for reasons of protection of public order or national security against any alien, even in transit or who holds a valid residence permit. This order is executed by immediate escort to the border by the police and can be appealed only by formal petition, which does not stay execution of the order (Article 13, subsection 1 of Legislative Decree 286/1998).

In recent administrative practice, the Ministry of the Interior has made use of this exceptional deportation order for reasons of protection of public order or national security against an alien for which the magistrature had ordered acquittal from crimes of terrorism, but which the authorities for public security suspected of belonging to criminal associations having terrorist objectives.

In truth, the prerequisites of the administrative order issued by the Ministry of the Interior refer to vague notions (public order and national security) that lend themselves to wide discretion and are streaked with political considerations.[16] On its own, the notion of security can be connected to a situation where citizens are assured, to the extent possible, the peaceful exercise of their rights and freedoms guaranteed by the Constitution.[17] However, with reference to national security, the legislature intended to allude not only to the security and safety of its citizens (State-community) but also the security of public powers (State-apparatus). Public security is ensured not only when there is current compliance with, or expected future observance of, the legal provisions that govern ordinary civil life, but when there is 'public order' perceived as a tangible state of peace.[18]

In any event, the prerequisites are so briefly stated that it enables a wide variety of interpretations and applications, including in consideration of the fact

16 With regard to the analogous ministerial deportation order that was provided by Law 39/1990, M. Cuniberti, *La cittadinanza*, Padua, 1997, pp. 282-283 argued that it was an act of a distinctly political nature especially when its prerequisites comply with the grave needs of international policy.

17 See also, the Constitutional Court, 23 June 1956, no. 2, in *Giur. cost*., 1956, p. 651.

18 Also, A. Pace, *Problematica delle libertà costituzionali. Parte speciale*, Padua, 1992, pp. 285-286.

that the order is immediately executive and applies to foreign nationals legally resident in Italy, including those holding a valid residence permit, and minors. However, in the case of a deportation order to be executed against an alien who is a minor, preventive jurisdictional vetting would be applicable, as provided for by Article 31, paragraph 4 of the Consolidated Act: in that case, the Ministry of the Interior has to order the Police Chief to submit a request to the competent juvenile court to execute the order.

Moreover, the legislature does not provide that the grounds must refer to real and current threat or danger, founded on objective circumstances. As a result, the order could be implemented merely on the basis of uncorroborated suspicions or circumstances no longer current or even based wholly on considerations of political expediency. In fact, in the past, jurisprudence has emphasised that the presence of an alien can disrupt public order even beyond his or her current behaviour[19] and can be based solely on his or her presence in the territory of the State when his or her nationality, ideas held, or attitudes demonstrated even in a previous period cause alarm or 'turmoil' in public opinion, or represent an immediate threat for State security (such as, for example, due to the presence of the alien in zones of military interest).[20] Similar concepts of the grounds of protection of public order – frequently reflecting provisions enacted during the Fascist regime and which were subsequently repealed – appear to be of dubious compatibility with the current constitutional and legislative order.

From a legislative perspective, these concepts appear to be partly outdated given that in the prevailing provisions, threats or danger to national security based on the presence of the alien in zones of military interest – provided such presence is involuntary – might be handled with a less drastic instrument than a ministerial deportation order. The administration has an alternative tool that could be similarly effective without the need to implement an order that would strip the alien of his or her ability to reside in the country and would prohibit his or her legal return to Italy and the other Schengen countries for ten years. Article 5, subsection 6 of Legislative Decree 286/1998 gives the Prefect discretion to prohibit residence of aliens in municipalities or areas that are sensitive to the defence of the State. This prohibition, which must be communicated to the alien concerned by the local public security authorities or by public notice, is executed with removal of the alien by the police; it is implicit that such removal is not an expulsion from the territory of the State but rather, only a removal from locations subject to 'no residence' regulations.

Furthermore, it is important to note that the order could be adopted in consideration not only of the behaviour of the foreign national (for example, acts of espionage or co-operation with terrorist groups), but of the mere pres-

19 Cf. G. Biscottini, "L'ammissione ed il soggiorno dello straniero", in *Scritti giuridici in memoria di V.E. Orlando*, 1, Padua, 1957, p. 192.

20 A. BARBERA, *I principi costituzionali della libertà personale*, Padua, 1967, p. 216.

ence of the foreign national on the territory of the State, which could lead to hostile or threatening actions against Italy by other countries or to the impairment of international relations of the country or other allied nations, which apply the Schengen Agreements.

It is quite clear that the vagueness of the prerequisites of this administrative deportation order can lead to a limitation on the freedom of travel and residence, based on reasons of security and on political reasons. Even in this latter case, it is possible that the legislature has drawn up an unconstitutional measure, since a restrictive measure founded on these grounds is expressly prohibited by Article 16 of the Constitution and, as regards legally resident aliens, this would infringe on Article 2 of Protocol 4 of the European Convention on Human Rights (ECHR). In any event, under Article 4 of Protocol 4 ECHR which prohibits the collective deportation of foreigners, a deportation order would be wholly illegitimate if implemented against a person only on the ground that the individual is a citizen of a certain country.

Beyond the attempts to lay down limits to this type of deportation, there is still the consideration – which absorbs every other – that an administrative deportation order, founded on vague references to public order, is unconstitutional because it violates the legal reservations pursuant to Article 10, subsection 2 of the Italian Constitution. The Ministry of the Interior has the right to adopt the order in relation to facts or conduct that are not even vaguely identified by legislative provisions, but whose contents only the Ministry itself is called to identify. On the other hand, ministerial deportation orders founded on mere circumstance that the presence of the foreigner in Italy can cause alarm or protests in Italian public opinion, for the type of legitimate association, the ideas professed, or attitudes demonstrated (including during legitimate meetings or in the context of publications) can barely be considered to be in compliance with the constitutional system which protects the freedom of assembly, association, and the manifestation of ideas. Yet, this is exactly what has happened in recent administrative practice.

On 17 November 2003, the Ministry of the Interior issued a decree ordering the deportation from Italy of eight foreign (non-EU) nationals, who were legally resident in Italy, on suspicion of serious threats to public order and national security. Specifically, the Minister of the Interior, Giuseppe Pisanu, ordered the deportation of Fall Mamour, alias Abdul Kadel, alias el Fkih, citizen of Senegal, otherwise known as the 'imam of Carmagnola', for "disturbing public order and being a threat to national security". According to a press release issued by the Ministry of the Interior, the Senegalese had already been reported for his involvement as a collector of suspicious finances and for a long time had become a major player in dangerous initiatives, especially in the current context of international terrorism. The action, on the grounds of material discovered in Mamour's home pursuant to a search, caused scandal because the alien deported professed himself to be a minister of an Islamic cult and was a fairly well-known public figure

because of his ambiguous declarations justifying the actions of the most notable members of the international Islamic terrorist group, with whom he stated to be in contact. He was also married to an Italian citizen and has children of Italian citizenship. His family decided to follow him to Senegal at the time of execution of the deportation order. This is the only type of order for which there is no ban on deportation due to parentage or marriage to an Italian citizen. Furthermore, the Ministry also ordered deportation of seven other Islamic fundamentalists. They were suspected of having ties with international terrorism and had been previously arrested and escorted to the Police precincts of Turin. These were: Assam Kalid, Hamrad Nabil, Bouchraa Said, and Boutkayoud Mbarek from Khourjbga (Morocco); Sadraoui Azzeddine from Ouled M'Hamed (Morocco); Lamor Noureddine, from Bani Smir (Morocco); Charef Macine, from Boufark Blida (Algeria). According to a press release issued by the Ministry of the Interior, these individuals were also deported on the basis of reports that they were proselytising, promoting and co-operating with Islamic terrorist groups and several of them allegedly participated in training sessions in paramilitary camps for the 'mujaheddin'. Two of the individuals had links with militiamen taken prisoner in Afghanistan by the US military. In particular, the name of Noureddine Lamor appears in the investigation co-ordinated by the prosecuting attorney at the Court of Milan, Mr Stefano Dambruoso, who, through numerous arrests and convictions, successfully dismantled the Milanese extremist network, which provided support to the 'Salafiya Jihadiya Group of Preaching and Combat' and was also responsible for recruiting combatants to send to training camps in Afghanistan. One of the seven Moroccans, Said Bouchraa, resides in Reggio Emilia where he was a member of the Mosque in Via Adua, in which he occasionally filled the role of Imam, and is the brother of the former president of the Islamic Cultural Center, annexed to the mosque. The Police of Turin stated that the seven individuals had been the focus of investigations by the DIGOS for the past three years.

These deportation orders engendered considerable public debate because the magistrate responsible for overseeing the preliminary investigations at the Court of Turin had refused the demand by the prosecuting attorney's office of Turin to issue preventive detention orders against the seven deportees. Moreover, in November 2004,[21] the Administrative Tribunal (TAR) of Lazio issued the cancellation of the administrative deportation order issued by the Ministry of the Interior against Fall Mamour because the TAR considered that it was based on inconsistent and uncorroborated claims of threat and danger posed by the person concerned and on his public contradictory statements.

21 Cf. TAR Lazio, I ter. section, ruling no. 15336 of 11 November 2004, in *Diritto, immigrazione cittadinanza*, n. 4/2004, pp. 148-152.

2.5 Developments in the Police Investigations and Criminal Proceedings Against Foreigners Investigated for Crimes of Terrorism After 2001

The heightened political concern in the post-September 2001 period on the relationship between foreigners and terrorism has given rise to increased numbers of investigations. Since 2001, investigations in progress on foreign nationals accused of crimes of terrorism are so frequent that press information estimates that as many as several hundred foreigners present in Italy are involved, but in actual fact, many investigations are founded primarily on circumstantial evidence against the foreigners and are unable to reach a conviction. The information on investigations must, however, be read in the light of the fact that the effectiveness of the police authorities responsible for carrying out investigations depends on the public presentation of 'results' which satisfy the political concern of the moment. It seems appropriate, therefore, to interpret this information with some caution. As illustrated in section 2.4.2 above, the strict application of legal principles by the judges and magistrates had led to the dismissal even of those cases which in the end have been considered sufficiently strong to proceed to trial.

Investigations began in February 2002 in the wake of intelligence information regarding the risk posed to several embassies. Three Moroccan citizens were arrested, found to be in possession of a detailed map of the area around the British Embassy in Rome, in addition to tools suitable for document forgery. The operation was completed with the arrest of another six Moroccan citizens, who were in possession of maps of the water supply system of Rome and four kilograms of potassium ferrocyanide, as well as several blank resident permits forms. In April 2004, the Second Court of Assizes in Rome acquitted the foreign nationals accused of being Islamic militants and suspected of having ties with cells close to Al Qa'eda. According to the magistrates of the Court of Assizes, the evidence of the charges levelled against the defendants did not exist and, therefore, they were acquitted. The judgement completely overturned the arguments of the public prosecutor that the accused belonged to an organisation with terrorist intentions, whose leader was allegedly the Pakistani citizen, Naseer Ahmad. The only defendant to be sentenced to six months in jail was the Moroccan, Faycal Carifi, who despite having only one leg, was accused of receiving a stolen motor scooter. All the defendants spent nearly a year and half in preventive detention.

On the other hand, reports on the state of security sent by the Ministry of the Interior to Parliament between 2002 and 2004 illustrate the comprehensive and far-reaching picture of investigative actions carried out in Italy against aliens involved in crimes of terrorism, even if the trial results of the investigations appear to disprove related security concerns.

In any case, in 2001-2002, in response to a perceived rise in the level of terrorist threats, the Ministry of the Interior laid down new counter strategies that would provide an even more effective response to the challenges posed by international terrorist networks. Impetus for more intensive international co-opera-

tion on preventive and investigative policing was provided within the European Union and other bilateral and multilateral forums. From a strictly operative perspective, co-operation with the services of the specialised police forces of European partners, the United States and other States of the international anti-terror coalition was further enhanced, with a view to developing joint investigative activities.

Substantial efforts have been made in the fight against sponsorship of terrorism between 2001 and 2002. The work done by the Financial Security Committee (FSC) set up at the Ministry of Economics and Finance, and the information gathered by police have made it possible to 'freeze' the assets and cash belonging to 67 suspects. Furthermore, in 2002, the police completed several investigations against Islamic terrorist networks operating in Italy, which led to the arrest of 55 individuals (some of whom have already been convicted) suspected of involvement or support, giving logistical assistance, and in some cases, direct participation in such groups. In September 2002, the police in Gela arrested 15 Pakistani citizens in possession of forged documents discovered on board the 'Sara' mercantile ship, reported by international intelligence sources as a vehicle belonging to Al Qa'eda. Investigations on an international scale were initiated against the suspects, who are still being held in Italy. Another important success was the capture on 28 September 2002 of the Tunisian citizen, Baazaoui Mondher Ben Mohsen, a key player in Islamic terrorist activities. Finally, also quite important was the operation which led the investigating magistrate in Milan to issue, in October 2004, a preventive detention order against Maghreb citizens considered members of the radical Islamist cell 'Hamza il libico', located in Milan and formed mainly of Tunisians supplying forged documents.

Between 2003 and 2004, reports of investigations continued to grow. On 18 November 2003, as part of the inquiry that led to the administrative deportation orders against the Moroccans (discussed above at section 2.4.2), 23 house search warrants were executed and the public prosecutor's office of Turin issued 11 writs of summons for involvement in international terrorism and forged documents. Also as part of the preventive initiatives, on 2 April 2003, the police, working with the Carabinieri Corps, set up a wide-reaching operation against more than 100 non-EU citizens resident in Italy, whose names emerged in the course of investigations or information in connection with radical Islamist activities. Some 70 house search warrants have been executed and 90 foreign nationals were brought in for questioning at the respective police headquarters. Forty-six individuals were arrested during investigations conducted by the police in Italy between July 2003 and June 2004 as part of the inquiry on international terrorism. The action to counteract Islamist organisations focused on breaking up the specialized logistics structures supporting radical groups or members originating from their home countries and identifying and dismantling several cells operating in Italy, nearly always composed of persons trained ideologically and militarily in the training camps in Afghanistan, whose primary objective was to

recruit and select volunteers to dispatch to areas of inter-ethnic conflict, such as Iraq or Chechnya. Specifically, the Ministry of the Interior reported the following operations:

- 18 October 2003: arrest of three Moroccan citizens suspected of involvement in the Casablanca bombing on 16 May 2003 and wanted in Morocco for the crimes of setting up terrorist organisations, contract execution of terrorist acts, and possession and use of explosives.
- 28 October 2003: arrest of two Algerian citizens, suspected militants of the Islamic fundamentalist group, Takfir Wa'l Hijra, charged with criminal conspiracy for the purposes of promoting illegal immigration, counterfeiting and receiving forged documents, along with other crimes.
- 28 November 2003: arrest of six members of the so-called Mera'i Group suspected of criminal conspiracy for the purposes of international terrorism. Preventive detention orders in Italian jails were executed at the end of the second phase of the investigations which in March and April 2003 had led to the arrest in Milan of five Islamists suspected of belonging to a cell actively involved in recruiting and dispatching mujaheddin in training camps managed by the Ansar Al Islam terrorist organisation.
- 24 February 2004: arrest of four Moroccan citizens for their involvement in international terrorism, suspected of being members of a radical Islamic structure whose primary objective was to recruit and select volunteers to dispatch to areas of inter-ethnic and religious conflict. The arrests took place at the end of a lengthy investigative activity, surrounding a plot by Islamic fundamentalist groups to attack the Duomo in Cremona and the underground train system in Milan. The criminal proceedings were still in progress as of June 2005.
- 1 April 2004: arrest of five alleged members of the Turkish terrorist group DHKP-C. The preventive detention orders in Italian jails were executed, pursuant to Article 270-*bis* Penal Code, by the special units (DIGOS) of the Police headquarters in Perugia and by the special unit (ROS) of the Carabinieri against three Italians (belonging to the Anti-imperialist movement) and two Turkish nationals. At the same time, five more warrants were issued against as many Turkish nationals resident abroad, suspected of the same crime.
- 9 May 2004: arrest of five alleged fundamentalist Islamist terrorists, four Tunisians and one Algerian, resident in the province of Florence and Siena, considered members of a Salafiya structure responsible for indoctrination and recruitment of combatants to dispatch to Iraq through Syria. At the same time, several searches were executed at the homes of other aliens, alleged to have ties with this group, during which documents and other computerised material – in Arabic – were seized.
- 7 June 2004: arrest of two Islamic extremists investigated for allegedly belonging to an international terrorism organisation, with other members

resident in Belgium, France and Spain. In particular, one of them, presumed to be a member of the Egyptian terror group, Al Jihad, was believed to be one of the planners of the 11 March terrorist attack in Madrid. At the same time in Belgium, police arrested 13 individuals of primarily Maghreb origin.

The results acquired in the most recent investigations conducted in Italy would seem to confirm the theory that there is a far-reaching logistical network which has completely reorganised the mujaheddin movement, transforming it from an assembly of individual groups operating without a unified combat strategy into an authentic international organisation fighting for the Jihad.

Investigations conducted in Milan and Parma between April and November 2003 revealed the existence of an association of Islamic extremists, with connections in Syria, particularly active in recruiting and dispatching mujaheddin into areas of inter-ethnic or religious conflict, such as Afghanistan and north-eastern Iraq, where there were training camps for unconventional weapons, controlled by the fundamentalist organisation, Ansar Al Islam, closely connected with Al Qa'eda. The cell, with branches in other cities in northern Italy and Germany, comprised mainly of individuals trained ideologically and militarily in the training camps in Afghanistan, were responsible for logistical support of the movement, through procurement of forged identification and dispatch of large sums of money to combatants, while two Kurdish Iraqi citizens, arrested during the operation, were found to be involved in promoting illegal immigration of their countrymen into Italy. Two of the individuals arrested on 4 April 2003 for conspiracy in international terrorism, formerly resident in Germany, were found to have had contact with members of the so-called Group of Hamburg, headed by Mohamed Atta, operating co-ordinator of the 11 September attacks.

One specific threat indicator in Italy was the audio-message broadcast on 18 October 2003 and attributed to Osama Bin Laden, in which the Saudi sheik – who had cited Italy in a similar message on 12 November 2002 – maintains "the right to strike all countries that co-operate in military operations with the Americans", among them Italy. Hence Italy, like the other Western allied partners, is believed to be exposed to the risk of Islamic terrorist acts.

At the same time, *the investigative activity* conducted in Italy has permitted completion of several operations, while intensive technical work of prevention is also being done. The operations include:

– The arrests of the so-called Mera'i Group, which confirmed the existence of a wide-reaching logistics network that completely reorganised the movement of the cross-border mujaheddin made up of foreigners of several ethnic groups and in contact with similar groups operating in Europe (especially Belgium, Great Britain, France, Germany, and Spain) and on other continents. The 14 restrictive orders issued by the judicial authorities of Milan at the end of the two different phases of the operation (April and

November 2003) involved six foreign nationals, among whom for the first time, were individuals of Kurdish Iraqi and Somali citizenships, attracted to places of Islamic worship in Lombardy and Emilia.

– In the course of the 'Bazar' investigation conducted by the Carabinieri Corps of the military, three preventive detention orders were executed, on 1 April 2003, against three Tunisian citizens for crimes of involvement in international terrorism.
– On 18 October 2003, police agents in Cremona arrested the Imam of the Florence mosque, a Moroccan originally from Casablanca, wanted in Morocco for crimes in connection with terrorist involvement, contract execution of terrorist acts, possession and use of explosives. The alien was suspected by the Rabat authorities of belonging to the Salafiya Jihadiya Islamic fundamentalist group, whose sympathizers were alleged to have had connection with the engineering and execution of the Casablanca bombings the previous May. This individual was being monitored for the radical tone of his preaching in the mosques of Florence and Cremona, and had already been investigated in a criminal trial in connection with a plot to attack the Duomo of Cremona and the underground train system in Milan, for which an order for his arrest was issued as a suspect in the crime, but later reduced to preventive detention order. On the same day, the State police in Varese made the arrest for extradition of a Moroccan Islamic extremist, a 33-year-old man originally from Casablanca, wanted in Morocco for the crimes of founding a terrorist group, contract execution of terrorist acts, collection of funds to be used to sponsor terrorism, and use and fabrication of forged passports. This individual, resident in Italy and already investigated in the 1990s, was suspected of belonging to the Moroccan Islamic Combat Group, an armed organisation set up in 1993/1994 by the veterans of the war in Afghanistan, which intended to overturn the institutions of the Kingdom of Morocco. Simultaneously and as part of the same investigation, another Moroccan citizen, also wanted internationally, was arrested in Florence.
– On 19 August 2003, following identification in Switzerland and subsequent escort to the border by the Swiss authorities, the Carabinieri Corps of the military arrested a Tunisian fugitive already convicted by the Court of Bologna for 'criminal conspiracy' as part of the 'Winds of War' investigation.
– On 28 October 2003, during the ongoing investigations of a cell of Algerian extremists, State police agents executed three orders of preventive detention issued by the judiciary authorities of Cassino against two Algerians and one Italian for crimes of criminal conspiracy to promote illegal immigration, counterfeiting, and receiving false documents, with the assistance of others. One of the suspects, an Algerian citizen, previously resident in Frosinone and subsequently domiciled in France, and his brother were suspected by the Public Prosecutor's Office of Paris of sponsoring a group of Salafiya

Jihadiya terrorists operating in Algeria through the proceeds made from the illegal trade of counterfeit goods. The second Algerian was detained because he had been previously arrested on the force of an international arrest warrant issued by the Algerian authorities for his involvement in terrorist associations while the Italian citizen, resident in Cassino, had specific previous charges against him and was suspected of having provided false statements of employment for 20 foreign nationals for the purposes of regularising their status in the country.

– In Turin and in seven other provincial capitals, on 18 November 2003, police agents executed 23 house search warrants with the connected writs of summons for suspected involvement in international terrorism and forged documents, as part of the investigations of a group of Maghrebins attracted to orthodox Islam and suspected of having recruited and dispatched young mujaheddin to the Al Qa'eda training camps in Afghanistan. During the operation, notice of deportation orders was served on six Moroccans and one Algerian for compulsory escort to the border for serious disturbance of the public order and threat to State security.
– In Milan, on 28 November 2003, the Carabinieri Corps of the military arrested and detained a Moroccan citizen on the restrictive order issued by the prosecutor's office of Milan as part of the 'Bazar' investigations.

Annexes

Resolution 1373 (2001)

Adopted by the Security Council at its 4385th meeting, on 28 September 2001

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

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 territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that all States shall:
(a) Prevent and suppress the financing of terrorist acts;
(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:
(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or

support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. *Calls* upon all States to:

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. *Decides* to remain seized of this matter.

Council Framework Decision of 13 June 2002 on Combating Terrorism

(2002/475/JHA)

The Council of the European Union,

Having regard to the Treaty establishing the European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission,[1]

Having regard to the opinion of the European Parliament,[2]

Whereas:

(1) The European Union is founded on the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms. It is based on the principle of democracy and the principle of the rule of law, principles which are common to the Member States.

(2) Terrorism constitutes one of the most serious violations of those principles. The La Gomera Declaration adopted at the informal Council meeting on 14 October 1995 affirmed that terrorism constitutes a threat to democracy, to the free exercise of human rights and to economic and social development.

(3) All or some Member States are party to a number of conventions relating to terrorism. The Council of Europe Convention of 27 January 1977 on the Suppression of Terrorism does not regard terrorist offences as political offences or as offences connected with political offences or as offences inspired by political motives. The United Nations has adopted the Convention for the suppression of terrorist bombings of 15 December 1997 and the Convention for the suppression of financing terrorism of 9 December 1999.

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1 OJ C 332 E, 27.11.2001, p. 300.

2 Opinion delivered on 6 February 2002 (not yet published in the Official Journal).

A draft global Convention against terrorism is currently being negotiated within the United Nations.

(4) At European Union level, on 3 December 1998 the Council adopted the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice.[3] Account should also be taken of the Council Conclusions of 20 September 2001 and of the Extraordinary European Council plan of action to combat terrorism of 21 September 2001. Terrorism was referred to in the conclusions of the Tampere European Council of 15 and 16 October 1999, and of the Santa Mar'a da Feira European Council of 19 and 20 June 2000. It was also mentioned in the Commission communication to the Council and the European Parliament on the biannual update of the scoreboard to review progress on the creation of an area of 'freedom, security and justice' in the European Union (second half of 2000). Furthermore, on 5 September 2001 the European Parliament adopted a recommendation on the role of the European Union in combating terrorism. It should, moreover, be recalled that on 30 July 1996 twenty-five measures to fight against terrorism were advocated by the leading industrialised countries (G7) and Russia meeting in Paris.

(5) The European Union has adopted numerous specific measures having an impact on terrorism and organised crime, such as the Council Decision of 3 December 1998 instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property;[4] Council Joint Action 96/610/JHA of 15 October 1996 concerning the creation and maintenance of a Directory of specialised counter-terrorist competences, skills and expertise to facilitate counter-terrorism cooperation between the Member States of the European Union;[5] Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network,[6] with responsibilities in terrorist offences, in particular Article 2; Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union;[7] and the Council Recommendation of 9 December 1999 on cooperation in combating the financing of terrorist groups.[8]

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3 OJ C 19, 23.1.1999, p. 1.

4 OJ C 26, 30.1.1999, p. 22.

5 OJ L 273, 25.10.1996, p. 1.

6 OJ L 191, 7.7.1998, p. 4.

7 OJ L 351, 29.12.1998, p. 1.

8 OJ C 373, 23.12.1999, p. 1.

(6) The definition of terrorist offences should be approximated in all Member States, including those offences relating to terrorist groups. Furthermore, penalties and sanctions should be provided for natural and legal persons having committed or being liable for such offences, which reflect the seriousness of such offences.
(7) Jurisdictional rules should be established to ensure that the terrorist offence may be effectively prosecuted.
(8) Victims of terrorist offences are vulnerable, and therefore specific measures are necessary with regard to them.
(9) Given that the objectives of the proposed action cannot be sufficiently achieved by the Member States unilaterally, and can therefore, because of the need for reciprocity, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity. In accordance with the principle of proportionality, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.
(10) This Framework Decision respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they emerge from the constitutional traditions common to the Member States as principles of Community law. The Union observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.
(11) 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, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision,

Has Adopted this Framework Decision:

Article 1

Terrorist offences and fundamental rights and principles

1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:
   – seriously intimidating a population, or

– unduly compelling a Government or international organisation to perform or abstain from performing any act, or
– seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed to be terrorist offences:

(a) attacks upon a person's life which may cause death;
(b) attacks upon the physical integrity of a person;
(c) kidnapping or hostage taking;
(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
(e) seizure of aircraft, ships or other means of public or goods transport;
(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
(i) threatening to commit any of the acts listed in (a) to (h).

2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2

Offences relating to a terrorist group

1. For the purposes of this Framework Decision, 'terrorist group' shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. 'Structured group' shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.
2. Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:
   (a) directing a terrorist group;
   (b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities

in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.

Article 3

Offences linked to terrorist activities

Each Member State shall take the necessary measures to ensure that terrorist-linked offences include the following acts:

(a) aggravated theft with a view to committing one of the acts listed in Article 1(1);

(b) extortion with a view to the perpetration of one of the acts listed in Article 1(1);

(c) drawing up false administrative documents with a view to committing one of the acts listed in Article 1(1)(a) to (h) and Article 2(2)(b).

Article 4

Inciting, aiding or abetting, and attempting

1. Each Member State shall take the necessary measures to ensure that inciting or aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable.
2. Each Member State shall take the necessary measures to ensure that attempting to commit an offence referred to in Article 1(1) and Article 3, with the exception of possession as provided for in Article 1(1)(f) and the offence referred to in Article 1(1)(i), is made punishable.

Article 5

Penalties

1. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 1 to 4 are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.
2. Each Member State shall take the necessary measures to ensure that the terrorist offences referred to in Article 1(1) and offences referred to in Article 4, inasmuch as they relate to terrorist offences, are punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent required pursuant to Article 1(1), save where the sentences imposable are already the maximum possible sentences under national law.
3. Each Member State shall take the necessary measures to ensure that offences listed in Article 2 are punishable by custodial sentences, with a maximum sentence of not less than fifteen years for the offence referred to in Article 2(2)(a), and for the offences listed in Article 2(2)(b) a maximum sentence of not less than eight years. In so far as the offence referred to in Article 2(2)(a) refers only to the act in Article 1(1)(i), the maximum sentence shall not be less than eight years.

Article 6

Particular circumstances

Each Member State may take the necessary measures to ensure that the penalties referred to in Article 5 may be reduced if the offender:

(a) renounces terrorist activity, and

(b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:

(i) prevent or mitigate the effects of the offence;

(ii) identify or bring to justice the other offenders;

(iii) find evidence; or

(iv) prevent further offences referred to in Articles 1 to 4.

Article 7

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for any of the offences referred to in Articles 1 to 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on one of the following:
   (a) a power of representation of the legal person;
   (b) an authority to take decisions on behalf of the legal person;
   (c) an authority to exercise control within the legal person.
2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of any of the offences referred to in Articles 1 to 4 for the benefit of that legal person by a person under its authority.
3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in any of the offences referred to in Articles 1 to 4.

Article 8

Penalties for legal persons

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties, such as:

(a) exclusion from entitlement to public benefits or aid;

(b) temporary or permanent disqualification from the practice of commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order;
(e) temporary or permanent closure of establishments which have been used for committing the offence.

Article 9

Jurisdiction and prosecution

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 1 to 4 where:
   (a) the offence is committed in whole or in part in its territory. Each Member State may extend its jurisdiction if the offence is committed in the territory of a Member State;
   (b) the offence is committed on board a vessel flying its flag or an aircraft registered there;
   (c) the offender is one of its nationals or residents;
   (d) the offence is committed for the benefit of a legal person established in its territory;
   (e) the offence is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that Member State.
2. When an offence falls within the jurisdiction of more than one Member State and when any of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State. To this end, the Member States may have recourse to any body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action. Sequential account shall be taken of the following factors:
   – the Member State shall be that in the territory of which the acts were committed,
   – the Member State shall be that of which the perpetrator is a national or resident,
   – the Member State shall be the Member State of origin of the victims,
   – the Member State shall be that in the territory of which the perpetrator was found.
3. Each Member State shall take the necessary measures also to establish its jurisdiction over the offences referred to in Articles 1 to 4 in cases where it refuses to hand over or extradite a person suspected or convicted of such an offence to another Member State or to a third country.
4. Each Member State shall ensure that its jurisdiction covers cases in which any of the offences referred to in Articles 2 and 4 has been committed in

whole or in part within its territory, wherever the terrorist group is based or pursues its criminal activities.

5. This Article shall not exclude the exercise of jurisdiction in criminal matters as laid down by a Member State in accordance with its national legislation.

Article 10

Protection of, and assistance to, victims

1. Member States shall ensure that investigations into, or prosecution of, offences covered by this Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed on the territory of the Member State.
2. In addition to the measures laid down in the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings,[9] each Member State shall, if necessary, take all measures possible to ensure appropriate assistance for victims' families.

Article 11

Implementation and reports

1. Member States shall take the necessary measures to comply with this Framework Decision by 31 December 2002.
2. By 31 December 2002, Member States shall forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report drawn up from that information and a report from the Commission, the Council shall assess, by 31 December 2003, whether Member States have taken the necessary measures to comply with this Framework Decision.
3. The Commission report shall specify, in particular, transposition into the criminal law of the Member States of the obligation referred to in Article 5(2).

Article 12

Territorial application

This Framework Decision shall apply to Gibraltar.

9 OJ L 82, 22.3.2001, p. 1.

Article 13

Entry into force

This Framework Decision shall enter into force on the day of its publication in the Official Journal.

Done at Luxembourg, 13 June 2002.

For the Council
The President
M. RAJOY BREY

Guidelines on Human Rights and the Fight against Terrorism

adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies

Preface

Since the terrorist attacks of 11 September 2001, the fight against terrorism has become a top political priority. In addition to the sufferings caused and the threats posed to our society for the future, the attacks have been perceived as a direct assault on the fundamental values of human rights, democracy and the rule of law which are our shared heritage.

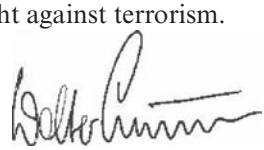
The Council of Europe lost no time in reacting. It immediately set up a range of initiatives, both on the legal front and in terms of prevention, the central pillar of which was the drawing up of guidelines to help States strike the right note in their responses to terrorism. The temptation for governments and parliaments in countries suffering from terrorist action is to fight fire with fire, setting aside the legal safeguards that exist in a democratic state. But let us be clear about this: while the State has the right to employ to the full its arsenal of legal weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would only undermine the fundamental values they seek to protect. For a State to react in such a way would be to fall into the trap set by terrorism for democracy and the rule of law.

It is precisely in situations of crisis, such as those brought about by terrorism, that respect for human rights is even more important, and that even greater vigilance is called for.

At the same time, as I have continually stressed since the attacks, the need to respect human rights is in no circumstances an obstacle to the efficient fight against terrorism. It is perfectly possible to reconcile the requirements of defending society and the preservation of fundamental rights and freedoms. The guidelines presented here are intended precisely to aid States in finding the right balance. They are designed to serve as a realistic, practical guide for anti-terrorist policies, legislation and operations which are both effective and respectful of human rights.

These guidelines are the first international legal text on human rights and the fight against terrorism. In adopting them on 11 July 2002, the Committee of Ministers considered it of the utmost importance that they be known and applied by all authorities responsible for the fight against terrorism, both in the member States of the Council of Europe and in those States that are associated with the work of the Council of Europe as observers.

This is the purpose of this publication, which will, I believe, constitute a key reference for all those involved in the fight against terrorism.



Walter Schwimmer
Secretary General, Council of Europe
September 2002

Annex 3

Guidelines

of the committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism

adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies

Preamble

The Committee of Ministers,

[a] Considering that terrorism seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society;

[b] Unequivocally condemning all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed;

[c] Recalling that a terrorist act can never be excused or justified by citing motives such as human rights and that the abuse of rights is never protected;

[d] Recalling that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law;

[e] Recalling the need for States to do everything possible, and notably to cooperate, so that the suspected perpetrators, organisers and sponsors of terrorist acts are brought to justice to answer for all the consequences, in particular criminal and civil, of their acts;

[f] Reaffirming the imperative duty of States to protect their populations against possible terrorist acts;

[g] Recalling the necessity for states, notably for reasons of equity and social solidarity, to ensure that victims of terrorist acts can obtain compensation;

[h] Keeping in mind that the fight against terrorism implies long-term measures with a view to preventing the causes of terrorism, by promoting, in particular, cohesion in our societies and a multicultural and inter-religious dialogue;

[i] Reaffirming States' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights;

adopts the following guidelines and invites member States to ensure that they are widely disseminated among all authorities responsible for the fight against terrorism.

I. States' obligation to protect everyone against terrorism

States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.

II. Prohibition of arbitrariness

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III. Lawfulness of anti-terrorist measures

1. All measures taken by States to combat terrorism must be lawful.
2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

IV. Absolute prohibition of torture

The use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.

V. Collection and processing of personal data by any competent authority in the field of State security

Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular:

(i) are governed by appropriate provisions of domestic law;
(ii) are proportionate to the aim for which the collection and the processing were foreseen;
(iii) may be subject to supervision by an external independent authority.

VI. Measures which interfere with privacy

1. Measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and use of undercover agents) must be provided for by law. It must be possible to challenge the lawfulness of these measures before a court.
2. Measures taken to fight terrorism must be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to

lethal force and, within this framework, the use of arms by the security forces must be strictly proportionate to the aim of protecting persons against unlawful violence or to the necessity of carrying out a lawful arrest.

VII. Arrest and police custody

1. A person suspected of terrorist activities may only be arrested if there are reasonable suspicions. He/she must be informed of the reasons for the arrest.
2. A person arrested or detained for terrorist activities shall be brought promptly before a judge. Police custody shall be of a reasonable period of time, the length of which must be provided for by law.
3. A person arrested or detained for terrorist activities must be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court.

VIII. Regular supervision of pre-trial detention

A person suspected of terrorist activities and detained pending trial is entitled to regular supervision of the lawfulness of his or her detention by a court.

IX. Legal proceedings

1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law.
2. A person accused of terrorist activities benefits from the presumption of innocence.
3. The imperatives of the fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to:
   (i) the arrangements for access to and contacts with counsel;
   (ii) the arrangements for access to the case-file;
   (iii) the use of anonymous testimony.
4. Such restrictions to the right of defence must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

X. Penalties incurred

1. The penalties incurred by a person accused of terrorist activities must be provided for by law for any action or omission which constituted a criminal offence at the time when it was committed; no heavier penalty may be imposed than the one that was applicable at the time when the criminal offence was committed.

2. Under no circumstances may a person convicted of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it may not be carried out.

XI. Detention

1. A person deprived of his/her liberty for terrorist activities must in all circumstances be treated with due respect for human dignity.
2. The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to:
   (i) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client;
   (ii) placing persons deprived of their liberty for terrorist activities in specially secured quarters;
   (iii) the separation of such persons within a prison or among different prisons,

on condition that the measure taken is proportionate to the aim to be achieved.

XII. Asylum, return ("*refoulement*") and expulsion

1. All requests for asylum must be dealt with on an individual basis. An effective remedy must lie against the decision taken. However, 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 refused to that person.
2. It is the duty of a State that has received a request for asylum to ensure that the possible return ("*refoulement*") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion.
3. Collective expulsion of aliens is prohibited.
4. In all cases, the enforcement of the expulsion or return ("*refoulement*") order must be carried out with respect for the physical integrity and for the dignity of the person concerned, avoiding any inhuman or degrading treatment.

XIII. Extradition

1. Extradition is an essential procedure for effective international co-operation in the fight against terrorism.
2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:

(i) the person whose extradition has been requested will not be sentenced to death; or
(ii) in the event of such a sentence being imposed, it will not be carried out.

3. Extradition may not be granted when there is serious reason to believe that:
   (i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment;
   (ii) the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person's position risks being prejudiced for any of these reasons.
4. When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.

XIV. Right to property

The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court.

XV. Possible derogations

1. When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.
2. States may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law.
3. The circumstances which led to the adoption of such derogations need to be reassessed on a regular basis with the purpose of lifting these derogations as soon as these circumstances no longer exist.

XVI. Respect for peremptory norms of international law and for international humanitarian law

In their fight against terrorism, States may never act in breach of peremptory norms of international law nor in breach of international humanitarian law, where applicable.

XVII. Compensation for victims of terrorist acts

When compensation is not fully available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State must contribute to the compensation of the victims of attacks that took place on its territory, as far as their person or their health is concerned.

Texts of Reference

used for the preparation of the guidelines on human rights and the fight against terrorism

Preliminary note

This document was prepared by the Secretariat, in co-operation with the Chairman of the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER). It is not meant to be taken as an explanatory report or memorandum of the guidelines.

Aim of the guidelines

The guidelines concentrate mainly on the limits to be considered and that States should not go beyond, under any circumstances, in their legitimate fight against terrorism.[1] [2] The main objective of these guidelines is not to deal with other important questions such as the causes and consequences of terrorism or measures which might prevent it, which are nevertheless mentioned in the Preamble to provide a background.[3]

Legal basis

The specific situation of States parties to the European Convention on Human Rights ("the Convention") should be recalled: its Article 46 sets out the compul-

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1 The Group of Specialists on Democratic Strategies for dealing with Movements threatening Human Rights (DH-S-DEM) has not failed to confirm the well-foundedness of this approach:

> "On the one hand, it is necessary for a democratic society to take certain measures of a preventative or repressive nature to protect itself against threats to the very values and principles on which that society is based. On the other hand, public authorities (the legislature, the courts, the administrative authorities) are under a legal obligation, also when taking measures in this area, to respect the human rights and fundamental freedoms set out in the European Convention on Human Rights and other instruments to which the member States are bound".

See document DH-S-DEM (99) 4 Addendum, para. 16.

2 The European Court of Human Rights has also supported this approach:

> "The Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate", Klass and Others v. Germany, 6 September 1978, Series A no. 28, para. 49.

3 See below, p. 18.

sory jurisdiction of the European Court of Human Rights ("the Court") and the supervision of the execution of its judgments by the Committee of Ministers). The Convention and the case-law of the Court are thus a primary source for defining guidelines for the fight against terrorism. Other sources such as the UN Covenant on Civil and Political Rights and the observations of the United Nations Human Rights Committee should however also be mentioned.

General considerations

The Court underlined on several occasions the balance between, on one hand, the defence of the institutions and of democracy, for the common interest, and, on the other hand, the protection of individual rights:

> "The Court agrees with the Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention".[4]

> The Court also takes into account the specificities linked to an effective fight against terrorism:

> "The Court is prepared to take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism".[5]

Definition. Neither the Convention nor the case-law of the Court gives a definition of terrorism. The Court always preferred to adopt a case by case approach. For its part, the Parliamentary Assembly

> "considers an act of terrorism to be 'any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of

4 Klass and Others v. Germany, 6 September 1978, Series A no. 28, para. 59. See also Brogan and Others v. the United Kingdom, 29 November 1999, Series A no. 145-B, para. 48.

5 Incal v. Turkey, 9 June 1998, para. 58. See also the cases Ireland v. the United Kingdom, 18 January 1978, Series A no. 25, paras. 11 and following, Aksoy v. Turkey, 18 December 1996, paras. 70 and 84; Zana v. Turkey, 25 November 1997, paras. 59-60; and, United Communist Party of Turkey and Others v. Turkey, 30 November 1998, para. 59.

terror among official authorities, certain individuals or groups in society, or the general public'."[6]

Article 1 of the European Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism gives a very precise definition of "terrorist act" that states:

"3. For the purposes of this Common Position, 'terrorist act' shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aims of:
   i. seriously intimidating a population, or
   ii. unduly compelling a government or an international organisation to perform or abstain from performing any act, or
   iii. seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
      a. attacks upon a person's life which may cause death;
      b. attacks upon the physical integrity of a person;
      c. kidnapping or hostage-taking;
      d. causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
      e. seizure of aircraft, ships or other means of public or goods transport;
      f. manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
      g. release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
      h. interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
      i. threatening to commit any of the acts listed under (a) to (h);
      j. directing a terrorist group;

6 Recommendation 1426 (1999), European democracies facing up to terrorism (23 September 1999), para. 5.

k. participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, which knowledge of the fact that such participation will contribute to the criminal activities of the group.

For the purposes of this paragraph, 'terrorist group' shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. "Structured group" means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."

The work in process within the United Nations on the draft general convention on international terrorism also seeks to define terrorism or a terrorist act.

Preamble

The Committee of Ministers,

[a] Considering that terrorism seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society;

The General Assembly of the United Nations recognises that terrorist acts are

"activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and having adverse consequences for the economic and social development of States".[7]

[b] Unequivocally condemning all acts, methods and practises of terrorism as criminal and unjustifiable, wherever and by whomever committed;

[c] Recalling that a terrorist act can never be excused or justified by citing motives such as human rights and that abuse the abuse of rights is never protected;

7 Resolution 54/164, Human Rights and terrorism, adopted by the General Assembly, 17 December 1999.

[d] Recalling that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law;

[e] Recalling the need for States to do everything possible, and notably to co-operate, so that the suspected perpetrators, organisers and sponsors of terrorist acts are brought to justice to answer for all the consequences, in particular criminal and civil, of their acts;

The obligation to bring to justice suspected perpetrators, organisers and sponsors of terrorist acts is clearly indicated in different texts such as Resolution 1368 (2001) adopted by the Security Council at its 4370th meeting, on 12 September 2001 (extracts):

> "The Security Council, […] Reaffirming the principles and purposes of the Charter of the United Nations, […] 3. Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks […]".

Resolution 56/1, Condemnation of terrorist attacks in the United States of America, adopted by the General Assembly on 12 September 2001 (extracts):

> "The General Assembly, Guided by the purposes and principles of the Charter of the United Nations, […] 3. Urgently calls for international cooperation to bring to justice the perpetrators, organizers and sponsors of the outrages of 11 September".

[f] Reaffirming the imperative duty of States to protect their populations against possible terrorist acts;

The Committee of Ministers has stressed

> "the duty of any democratic State to ensure effective protection against terrorism, respecting the rule of law and human rights […]".[8]

[g] Recalling the necessity for States, notably for reasons of equity and social solidarity, to ensure that victims of terrorist acts can obtain compensation;

8 Interim resolution DH (99) 434, Human Rights action of the security forces in Turkey: Measures of a general character.

[h] Keeping in mind that the fight against terrorism implies long-term measures with a view to preventing the causes of terrorism, by promoting, in particular, cohesion in our societies and a multicultural and inter-religious dialogue;

It is essential to fight against the causes of terrorism in order to prevent new terrorist acts. In this regard, one may recall Resolution 1258 (2001) of the Parliamentary Assembly, Democracies facing terrorism (26 September 2001), in which the Assembly calls upon States to

> "renew and generously resource their commitment to pursue economic, social and political policies designed to secure democracy, justice, human rights and well-being for all people throughout the world" (17 (viii)).

In order to fight against the causes of terrorism, it is also essential to promote multicultural and inter-religious dialogue. The Parliamentary Assembly has devoted a number of important documents to this issue, among which its Recommendations 1162 (1991) Contribution of the Islamic civilisation to European culture,[9] 1202 (1993) Religious tolerance in a democratic society,[10] 1396 (1999) Religion and democracy,[11] 1426 (1999) European democracies facing terror-

9 Adopted on 19 September 1991 (11th sitting). The Assembly, *inter alia*, proposed preventive measures in the field of education (such as the creation of a Euro-Arab University following Recommendation 1032 (1986)), the media (production and broadcasting of programmes on Islamic culture), culture (such as cultural exchanges, exhibitions, conferences etc.) and multilateral co-operation (seminars on Islamic fundamentalism, the democratisation of the Islamic world, the compatibility of different forms of Islam with modern European society, etc.) as well as administrative questions and everyday life (such as the twinning of towns or the encouragement of dialogue between Islamic communities and the competent authorities on issues like holy days, dress, food etc.). See in particular paras. 10-12.

10 Adopted on 2 February 1993 (23rd sitting). The Assembly, *inter alia*, proposed preventive measures in the field of legal guarantees and their observance (especially following the rights indicated in Recommendation 1086 (1988), paragraph 10), education and exchanges (such as the establishment of a "religious history school-book conference", exchange programmes for students and other young people), information and "sensibilisation" (like the access to fundamental religious texts and related literature in public libraries) and research (for instance, stimulation of academic work in European universities on questions concerning religious tolerance). See in particular paras. 12, 15-16.

11 Adopted on 27 January 1999 (5th sitting). The Assembly, *inter alia*, recommended preventive measures to promote better relations with and between religions (through a more systematic dialogue with religious and humanist leaders, theologians, philosophers and historians) or the cultural and social expression of religions (including religious buildings or traditions). See in particular paras. 9-14.

ism,[12] as well as its Resolution 1258 (2001), Democracies facing terrorism.[13] The Secretary General of the Council of Europe has also highlighted the importance of multicultural and inter-religious dialogue in the long-term fight against terrorism.[14]

adopts the following guidelines and invites member States to ensure that they are widely disseminated among all authorities responsible for the fight against terrorism.

I. States' obligations to protect everyone against terrorism

States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.

The Court indicated that:

> "the first sentence of Article 2 para. 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B. v. the United Kingdom* judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, p. 1403, para. 36). This obligation […] may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (*Osman v. the United Kingdom*

12 Adopted on 23 September 1999 (30th sitting). The Assembly underlined *inter alia* that "The prevention of terrorism also depends on education in democratic values and tolerance, with the eradication of the teaching of negative or hateful attitudes towards others and the development of a culture of peace in all individuals and social groups" (para. 9).

13 Adopted on 26 September 2001 (28th sitting). "[…] the Assembly believes that long-term prevention of terrorism must include a proper understanding of its social, economic, political and religious roots and of the individual's capacity for hatred. If these issues are properly addressed, it will be possible to seriously undermine the grass roots support for terrorists and their recruitment networks" (para. 9).

14 See "The aftermath of September 11: Multicultural and Inter-religious Dialogue – Document of the Secretary General", Information Documents SG/Inf (2001) 40 Rev.2, 6 December 2001.

judgment of 28 October 1998, Reports 1998-VIII, para. 115; *Kiliç v. Turkey*, Appl. No. 22492/93, (Sect. 1) ECHR 2000-III, paras. 62 and 76)."[15]

II. Prohibition of arbitrariness

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

The words "discriminatory treatment" are taken from the Political Declaration adopted by Ministers of Council of Europe member States on 13 October 2000 at the concluding session of the European Conference against Racism.

III. Lawfulness of anti-terrorist measures

1. All measures taken by States to combat terrorism must be lawful.
2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

IV. Absolute prohibition of torture

The use of torture or of inhumane or degrading treatment or punishment, is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.

The Court has recalled the absolute prohibition to use torture or inhuman or degrading treatment or punishment (Article 3 of the Convention) on many occasions, for example:

"As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and

15 Pretty v. the United Kingdom, 29 April 2002, para. 38.

> no derogation from it is permissible under Article 15 para. 2 even in the event of a public emergency threatening the life of the nation […]. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see the *Chahal v. the United Kingdom* judgment of 15 November 1996, Reports 1996-V, p. 1855, para. 79). The nature of the offence allegedly committed by the applicant was therefore irrelevant for the purposes of Article 3."[16]

> "The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals."[17]

According to the case-law of the Court, it is clear that the nature of the crime is not relevant:

> "The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[18]

V. Collection and processing of personal data by any competent authority in the field of State security

Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular:

(i) are governed by appropriate provisions of domestic law;

16 Labita v. Italy, 6 April 2000, para. 119. See also Ireland v. the United Kingdom, 18 January 1978, Series A no. 25, para. 163; Soering v. the United Kingdom, 7 July 1989, Series A no. 161, para. 88; Chahal v. the United Kingdom, 15 November 1996, para. 79; Aksoy v. Turkey, 18 December 1996, para. 62; Aydin v. Turkey, 25 September 1997, para. 81; Assenov and Others v. Bulgaria, 28 October 1998, para. 93; Selmouni v. France, 28 July 1999, para. 95.

17 Tomasi v. France, 27 August 1992, para. 115. See also Ribitsch v. Austria, 4 December 1995, para. 38.

18 Chahal v. the United Kingdom, 15 November 1996, para. 79; see also V. v. the United Kingdom, 16 December 1999, para. 69.

(ii) are proportionate to the aim for which the collection and the processing were foreseen;
(iii) may be subject to supervision by an external independent authority.

As concerns the collection and processing of personal data, the Court stated for the first time that:

> "No provision of domestic law, however, lays down any limits on the exercise of those powers. Thus, for instance, domestic law does not define the kind of information that may be recorded, the categories of people against whom surveillance measures such as gathering and keeping information may be taken, the circumstances in which such measures may be taken or the procedure to be followed. Similarly, the Law does not lay down limits on the age of information held or the length of time for which it may be kept.
>
> […]
>
> The Court notes that this section contains no explicit, detailed provision concerning the persons authorised to consult the files, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained.
>
> […] It also notes that although section 2 of the Law empowers the relevant authorities to permit interferences necessary to prevent and counteract threats to national security, the ground allowing such interferences is not laid down with sufficient precision".[19]

VI. Measures which interfere with privacy

1. Measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and use of undercover agents) must be provided for by law. It must be possible to challenge the lawfulness of these measures before a court.

The Court accepts that the fight against terrorism may allow the use of specific methods:

> "Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must

19 Rotaru v. Romania, 4 May 2000, paras. 57-58.

> be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime."[20]

With regard to tapping, it must to be done in conformity with the provisions of Article 8 of the Convention, notably be done in accordance with the "law". The Court, thus, recalled that:

> "tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated (see the above-mentioned *Kruslin* and Huvig judgments, p. 23, para. 33, and p. 55, para. 32, respectively)".[21]

The Court also accepted that the use of confidential information is essential in combating terrorist violence and the threat that it poses on citizens and to democratic society as a whole:

> "The Court would firstly reiterate its recognition that the use of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives of citizens and to democratic society as a whole (see also the *Klass and Others v. Germany* judgment of 6 September 1978, Series Ano. 28, p. 23, para. 48). This does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts or by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (ibid., p. 23, para. 49)."[22]

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20 Klass and Others v. Germany, 6 September 1978, Series A no. 28, para. 48.

21 Kopp v. Switzerland, 25 March 1998, para. 72. See also Huvig v. France, 24 April 1990, paras. 34-35.

22 Murray v. the United Kingdom, 28 October 1994, para. 58.

2. Measures taken to fight terrorism must be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force and, within this framework, the use of arms by the security forces must be strictly proportionate to the aim of protecting persons against unlawful violence or to the necessity of carrying out a lawful arrest.

Article 2 of the Convention does not exclude the possibility that the deliberate use of a lethal solution can be justified when it is "absolutely necessary" to prevent some sorts of crimes. This must be done, however, in very strict conditions so as to respect human life as much as possible, even with regard to persons suspected of preparing a terrorist attack.

> "Against this background, in determining whether the force used was compatible with Article 2, the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force."[23]

VII. Arrest and police custody

1. A person suspected of terrorist activities may only be arrested if there are reasonable suspicions. He/she must be informed of the reasons for the arrest.

The Court acknowledges that "reasonable" suspicion needs to form the basis of the arrest of a suspect. It adds that this feature depends upon all the circumstances, with terrorist crime falling into a specific category:

> "32. The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5para.1(c). […] [H]aving a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances. In this respect, terrorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged

23 McCann and Others v. the United Kingdom, 27 September 1995, para. 194. In this case, the Court, not convinced that the killing of three terrorists was a use of force not exceeding the aim of protecting persons against unlawful violence, considered that there had been a violation of Article 2.

> to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge.
>
> […] [T]he exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness 'to the point where the essence of the safeguard secured by Article 5 para. 1
> (c) is impaired […].
>
> […]
>
> 34. Certainly Article 5 para. 1 (c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism […]. It follows that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity.

Nevertheless the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 para. 1 (c) has been secured. Consequently the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence."[24]

2. A person arrested or detained for terrorist activities shall be brought promptly before a judge. Police custody shall be of a reasonable period of time, the length of which must be provided for by law.
3. A person arrested or detained for terrorist activities must be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court.

The protection afforded by Article 5 of the Convention is also relevant here. There are limits linked to the arrest and detention of persons suspected of terrorist activities. The Court accepts that protecting the community against terrorism is a legitimate goal but that this cannot justify all measures. For instance, the

24 Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, paras. 32 and 34.

fight against terrorism can justify the extension of police custody, but it cannot authorise that there is no judicial control at all over this custody, or, that judicial control is not prompt enough:

> "The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3, keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.
>
> The difficulties, alluded to by the Government, of judicial control over decisions to arrest and detain suspected terrorists may affect the manner of implementation of Article 5 para. 3, for example in calling for appropriate procedural precautions in view of the nature of the suspected offences. However, they cannot justify, under Article 5 para. 3, dispensing altogether with "prompt" judicial control."[25]
>
> "The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its ownsufficient to ensure compliance with the specific requirements of Article 5 para. 3."[26]
>
> "The Court recalls its decision in the case of *Brogan and Others v. the United Kingdom* (judgment of 29 November 1988, Series Ano. 145-B, p. 33, para. 62), that a period of detention without judicial control of four days and six hours fell outside the strict constraints as to time permitted by Article 5 para. 3. It clearly follows that the period of fourteen or more days during which Mr Aksoy was detained without being brought before a judge or other judicial officer did not satisfy the requirement of 'promptness'."[27]
>
> "The Court has already accepted on several occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see the *Brogan and Others v. the United Kingdom* judgment of 29 November 1988, Series A no. 145-B, p. 33, para. 61, the *Murray v. the United Kingdom* judgment of 28 October 1994, Series Ano. 300A, p. 27, para. 58, and the above-mentioned *Aksoy* judgment, p. 2282, para. 78). This does not mean,

25 Brogan and Others v. the United Kingdom, 29 November 1998, Series A no. 145-B, para. 61.

26 Brogan and Others v. the United Kingdom, 29 November 1998, Series A no. 145-B, para. 62. See also Brannigan and Mc Bride v. the United Kingdom, 26 May 1993, para. 58.

27 Aksoy v. Turkey, 12 December 1996, para. 66.

> however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (see, *mutatis mutandis*, the above-mentioned *Murray* judgment, p. 27, para. 58).
>
> What is at stake here is the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. Judicial control of interferences by the executive is an essential feature of the guarantee embodied in Article 5 para. 3, which is intended to minimise the risk of arbitrariness and to secure the rule of law, 'one of the fundamental principles of a democratic society …, which is expressly referred to in the Preamble to the Convention' (see the above-mentioned *Brogan and Others* judgment, p. 32, para. 58, and the above-mentioned *Aksoy* judgment, p. 2282, para. 76)."[28]

VIII. Regular supervision of pre-trial detention

A person suspected of terrorist activities and detained pending trial is entitled to regular supervision of the lawfulness of his or her detention by a court.

IX. Legal proceedings

1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law.

The right to a fair trial is acknowledged, for everyone, by Article 6 of the Convention. The case-law of the Court states that the right to a fair trial is inherent to any democratic society.

Article 6 does not forbid the creation of special tribunals to judge terrorist acts if these special tribunals meet the criterions set out in this article (independent and impartial tribunals established by law):

> "The Court reiterates that in order to establish whether a tribunal can be considered 'independent' for the purposes of Article 6 para. 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other

28 Sakik and Others v. Turkey, 26 November 1997, para. 44.

authorities, the *Findlay v. the United Kingdom* judgment of 25 February 1997, Reports 1997-I, p. 281, para. 73).

As to the condition of 'impartiality' within the meaning of that provision, there are two tests to be applied: the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. […] (see, *mutatis mutandis*, the *Gautrin and Others v. France* judgment of 20 May 1998, Reports 1998-III, pp. 1030-31, para. 58)."[29]

"Its (the Court's) task is not to determine *in abstracto* whether it was necessary to set up such courts (special courts) in a Contracting State or to review the relevant practice, but to ascertain whether the manner in which one of them functioned infringed the applicant's right to a fair trial. […] In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (see, among other authorities, the *Hauschildt v. Denmark* judgment of 24 May 1989, Series A no. 154, p. 21, para. 48, the *Thorgeir Thorgeirson* judgment cited above, p. 23, para. 51, and the *Pullar v. the United Kingdom* judgment of 10 June 1996, Reports 1996-III, p. 794, para. 38). In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see, *mutatis mutandis*, the *Hauschildt* judgment cited above, p. 21, para. 48, and the *Gautrin and Others* judgment cited above, pp. 1030–31, para. 58).

[…] [T]he Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces. It follows that the applicant could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case."[30]

2. A person accused of terrorist activities benefits from the presumption of innocence.

Presumption of innocence is specifically mentioned in Article 6, paragraph 2, of the European Convention on Human Rights that states: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty accord-

29 Incal v. Turkey, 9 June 1998, para. 65.

30 Incal v. Turkey, 9 June 1998, paras. 70-72.

ing to law". This article therefore applies also to persons suspected of terrorist activities.

Moreover,

> "the Court considers that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities".[31]

Accordingly, the Court found that the public declaration made by a Minister of the Interior and by two high-ranking police officers referring to somebody as the accomplice in a murder before his judgment

> "was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. There has therefore been a breach of Article 6 para. 2".[32]

3. The imperatives of the fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to:
   (i) the arrangements for the access to and contacts with counsel;
   (ii) the arrangements for access to the case-file;
   (iii) the use of anonymous testimony.
4. Such restrictions to the right of defence must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

The Court recognises that an effective fight against terrorism requires that some of the guarantees of a fair trial may be interpreted with some flexibility. Confronted with the need to examine the conformity with the Convention of certain types of investigations and trials, the Court has, for example, recognised that the use of anonymous witnesses is not always incompatible with the Convention.[33] In certain cases, like those which are linked to terrorism, witnesses must be protected against any possible risk of retaliation against them which may put their lives, their freedom or their safety in danger.

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31 Allenet de Ribemont v. France, 10 February 1995, para. 36.

32 Id., para. 41.

33 See Doorson v. the Netherlands, 26 March 1996, paras. 69-70. The Doorson case concerned the fight against drug trafficking. The concluding comments of the Court can nevertheless be extended to the fight against terrorism. See also Van Mechelen and Others v. the Netherlands, 23 April 1997, para. 52.

> "the Court has recognised in principle that, provided that the rights of the defence are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities, for his own or his family's protection and so as not to impair his usefulness for future operations"[34]

The Court recognised that the interception of a letter between a prisoner – terrorist – and his lawyer is possible in certain circumstances:

> "Il n'en demeure pas moins que la confidentialité de la correspondance entre un détenu et son défenseur constitue un droit fondamental pour un individu et touche directement les droits de la défense. C'est pourquoi, comme la Cour l'a énoncé plus haut, une dérogation à ce principe ne peut être autorisée que dans des cas exceptionnels et doit s'entourer de garanties adéquates et suffisantes contre les abus (voir aussi, *mutatis mutandis*, l'arrêt Klass précité, ibidem)."[35]

The case-law of the Court insists upon the compensatory mechanisms to avoid that measures taken in the fight against terrorism do not take away the substance of the right to a fair trial.[36] Therefore, if the possibility of non-disclosure of certain evidence to the defence exists, this needs to be counterbalanced by the procedures followed by the judicial authorities:

> "60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the *Brandstetter v. Austria* judgment of 28 August 1991, Series A no. 211, paras. 66, 67). In addition Article 6 para. 1 requires, as indeed does English law (see paragraph 34 above), that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see the above-mentioned *Edwards* judgment, para. 36).
>
> 61. However, as the applicants recognised (see paragraph 54 above), the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the

34 Van Mechelen and Others v. the Netherlands, 23 April 1997, para. 57.

35 Erdem v. Germany, 5 July 2001, para. 65, text available only in French.

36 See notably, Chahal v. the United Kingdom, 15 November 1996, paras. 131 and 144, and Van Mechelen and Others v. the Netherlands, 23 April 1997, para. 54.

need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the *Doorson v. the Netherlands judgment* of 26 March 1996, Reports of Judgments and Decisions 1996-II, para. 70). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 para. 1 (see the *Van Mechelen and Others v. the Netherlands* judgment of 23 April 1997, Reports 1997-III, para. 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see the above-mentioned *Doorson* judgment, para. 72 and the above-mentioned *Van Mechelen and Others* judgment, para. 54).

62. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them (see the above-mentioned *Edwards* judgment, para. 34). Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused."[37]

X. Penalties incurred

1. The penalties incurred by a person accused of terrorist activities must be provided for by law for any action or omission which constituted a criminal offence at the time when it was committed; no heavier penalty may be imposed than the one that was applicable at the time when the criminal offence was committed.

This guideline takes up the elements contained in Article 7 of the European Convention on Human Rights. The Court recalled that:

"The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide

37 Rowe and Davies v. the United Kingdom, 16 February 2000, paras. 60-62.

effective safeguards against arbitrary prosecution, conviction and punishment (see the *S.W. and C.R. v. the United Kingdom* judgments of 22 November 1995, Series 38 A nos. 335-B and 335-C, pp. 41-42, para. 35, and pp. 68-69, para. 33 respectively)."[38]

"The Court recalls that, according to its case-law, Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence and the sanctions provided for it must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts'interpretation of it,what acts and omissions will make him criminally liable.

When speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see the *Cantoni v. France* judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1627, para. 29, and the *S.W. and C.R. v. the United Kingdom* judgments of 22 November 1995, Series Anos. 335-B and 335-C, pp. 41-42, para. 35, and pp. 68-69, para. 33, respectively)."[39]

2. Under no circumstances may a person convicted of terrorist activities be sentenced to the death penalty; in the event of such sentence being imposed, it may not be carried out.

The present tendency in Europe is towards the general abolition of the death penalty, in all circumstances (Protocol No. 13 to the Convention). The member States of the Council of Europe still having the death penalty within their legal arsenal have all agreed to a moratorium on the implementation of the penalty.

XI. Detention

1. A person deprived of his/her liberty for terrorist activities must in all circumstances be treated with due respect for human dignity.

38 Ecer and Zeyrek v. Turkey, 27 February 2001, para. 29.

39 Baskaya and Okçuoglu v. Turkey, 8 July 1999, para. 36.

According to the case-law of the Court, it is clear that the nature of the crime is not relevant:

> "The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.".[40]

It is recalled that the practice of total sensory deprivation was condemned by the Court as being in violation with Article 3 of the Convention.[41]

2. The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to others prisoners, in particular with regard to:
   (i) the regulations concerning communications and surveillance of correspondence, including that between councel and his/her client.

With regard to communication between a lawyer and his/her client, the case-law of the Court may be referred to, in particular a recent decision on inadmissibility in which the Court recalls the possibility for the State, in exceptional circumstances, to intercept correspondence between a lawyer and his/her client sentenced for terrorist acts. It is therefore possible to take measures which depart from ordinary law:

> "65. Il n'en demeure pas moins que la confidentialité de la correspondance entre un détenu et son défenseur constitue un droit fondamental pour un individu et touche directement les droits de la défense. C'est pourquoi, comme la Cour l'a énoncé plus haut, une dérogation à ce principe ne peut être autorisée que dans des cas exceptionnels et doit s'entourer de garanties adéquates et suffisantes contre les abus (voir aussi, *mutatis mutandis*, l'arrêt *Klass* précité, *ibidem*).
>
> 66. Or le procès contre des cadres du PKK se situe dans le contexte exceptionnel de la lutte contre le terrorisme sous toutes ses formes. Par ailleurs, il paraissait légitime pour les autorités allemandes de veiller à ce que le procès se déroule dans les meilleures conditions de sécurité, compte tenu de l'impor-

40 Chahal v. the United Kingdom, 15 November 1996, para. 79; see also V. v. the United Kingdom, 16 December 1999, para. 69.

41 See Ireland v. the United Kingdom, 18 January 1978, notably paras. 165-168.

tante communauté turque, dont beaucoup de membres sont d'origine kurde, résidant en Allemagne.

67. La Cour relève ensuite que la disposition en question est rédigée de manière très précise, puisqu'elle spécifie la catégorie de personnes dont la correspondance doit être soumise à contrôle, à savoir les détenus soupçonnés d'appartenir à une organisation terroriste au sens de l'article 129a du code pénal. De plus, cette mesure, à caractère exceptionnel puisqu'elle déroge à la règle générale de la confidentialité de la correspondance entre un détenu et son défenseur, est assortie d'un certain nombre de garanties : contrairement à d'autres affaires devant la Cour, où l'ouverture du courrier était effectuée par les autorités pénitentiaires (voir notamment les arrêts *Campbell, et Fell et Campbell* précités), en l'espèce, le pouvoir de contrôle est exercé par un magistrat indépendant, qui ne doit avoir aucun lien avec l'instruction, et qui doit garder le secret sur les informations dont il prend ainsi connaissance. Enfin, il ne s'agit que d'un contrôle restreint, puisque le détenu peut librement s'entretenir oralement avec son défenseur; certes, ce dernier ne peut lui remettre des pièce écrites ou d'autres objets, mais il peut porter à la connaissance du détenu les informations contenues dans les documents écrits.

68. Par ailleurs, la Cour rappelle qu'une certaine forme de conciliation entre les impératifs de la défense de la société démocratique et ceux de la sauvegarde des droits individuels est inhérente au système de la Convention (voir, *mutatis mutandis*, l'arrêt *Klass* précité, p. 28, para. 59).

69. Eu égard à la menace présentée par le terrorisme sous toutes ses formes (voir la décision de la Commission dans l'affaire *Bader, Meins, Meinhof et Grundmann c/Allemagne* du 30 mai 1975, Requête nº 6166/75), des garanties dont est entouré le contrôle de la correspondance en l'espèce et de la marge d'appréciation dont dispose l'Etat, la Cour conclut que l'ingérence litigieuse n'était pas disproportionnée par rapport aux buts légitimes poursuivis."[42]

(ii) placing persons deprived of their liberty for terrorist activities in specially secured quarters;
(iii) The separation of such persons within a prison or among differnt prisons.

With regard to the place of detention, the former European Commission of Human Rights indicated that:

42 Erdem v. Germany, 5 July 2001, paras. 65-69. The text of this judgment is available in French only. See also LŸdi v. Switzerland, 15 June 1992.

> "It must be recalled that the Convention does not grant prisoners the right to choose the place of detention and that the separation from their family are inevitable consequences of their detention".[43]

on condition that the measure taken is proportionate to the aim to be achieved.

> "[…] the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is 'necessary in a democratic society' regard may be had to the State's margin of appreciation (see, amongst other authorities, *The Sunday Times v. the United Kingdom* (No. 2) judgment of 26 November 1991, Series A no. 217, pp. 28-29, para. 50)."[44]

XII. Asylum, return ("refoulement") and expulsion

1. All requests for asylum must be dealt with on an individual basis. An effective remedy must lie against the decision taken. However, 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 refused to that person.

Article 14 of the Universal Declaration of Human Rights states:

> "1. Everyone has the right to seek and enjoy in other countries asylum from persecution".

Moreover, a concrete problem that States may have to confront is that of the competition between an asylum request and a demand for extradition. Article 7 of the draft General Convention on international terrorism must be noted in this respect:

> "States Parties shall take appropriate measures, in conformity with the relevant provisions of national and international law, including international human rights law, for the purpose of ensuring that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offence referred to in Article 2".

It is also recalled that Article 1Fof the Convention on the Status of Refugees of 28 July1951 provides:

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43 Venetucci v. Italy (Appl. No. 33830/96), Decision as to admissibility, 2 March 1998.

44 Campbell v. the United Kingdom, 25 March 1992, Series A no. 233, para. 44.

> "F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations".

2. It is the duty of a State that has received a request for asylum to ensure that the possible return ("*refoulement*") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion.
3. Collective expulsion of aliens is prohibited.

This guideline takes up word by word the content of Article 4 of Protocol No. 4 to the European Convention on Human Rights.

The Court thus recalled that:

> "collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group (see Andric v. Sweden, cited above)"[45].

4. In all cases, the enforcement of the expulsion or return ("*refoulement*") order must be carried out with respect for the physical integrity and for the dignity of the person concerned, avoiding any inhuman or degrading treatment.

See the comments made in paragraph 15 above and the case-law references there mentioned.

45 Conka v. Belgium, 5 February 2002, para. 59.

XIII. Extradition

1. Extradition is an essential procedure for effective international co-operation in the fight against terrorism.
2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:
   (i) the person whose extradition has been requested will not be sentenced to death;
   or
   (ii) in the event of such a sentence being imposed, it will not be carried out.

In relation to the death penalty, it can legitimately be deduced from the case-law of the Court that the extradition of someone to a State where he/she risks the death penalty is forbidden.[46] Accordingly, even if the judgment does not say *expressis verbis* that such an extradition is prohibited, this prohibition is drawn from the fact that the waiting for the execution of the sentence by the condemned person ("death row") constitutes an inhuman treatment, according to Article 3 of the Convention. It must also be recalled that the present tendency in Europe is towards the general abolition of the death penalty, in all circumstances (see guideline X, *Penalties incurred*).

3. Extradition may not be granted when there is serious reason to believe that:
   (i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment;
   (ii) the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person's position risks being prejudiced for any of these reasons.

As concerns the absolute prohibition to extradite or return an individual to a State in which he risks torture or inhuman and degrading treatment or punishment see above, para. 44.

46 See Soering v. the United Kingdom, 7 July 1989, Series A no. 161.

4. When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.

The Court underlined that it

> "does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."[47]

Article 5 of the European Convention for the suppression of terrorism[48] states:

> "Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."

The explanatory report indicates:

> "50. If, in a given case, the requested State has substantial grounds for believing that the real purpose of an extradition request, made for one of the offences

47 Soering v. the United Kingdom, 7 July 1989, Series A no. 161, para. 113. Position confirmed by the Court in its judgment in the case Drozd and Janousek v. France and Spain, 26 June 1992, Series A no. 240, para. 110:

> "As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international co-operation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice (see, *mutatis mutandis*, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no.161, p. 45, para. 113)."

and in its final decision on admissibility in the case Einhorn v. France, 16 October 2001, para. 32.

48 ETS No. 90, 27 January 1977.

> mentioned in Article 1 or 2, is to enable the requesting State to prosecute or punish the person concerned for the political opinions he holds, the requested State may refuse extradition.
> The same applies where the requested State has substantial grounds for believing that the person's position may be prejudiced for political or any of the other reasons mentioned in Article 5. **This would be the case, for instance, if the person to be extradited would, in the requesting State, be deprived of the rights of defence as they are guaranteed by the European Convention on Human Rights**."[49]

Moreover, it seems that extradition should be refused when the individual concerned runs the risk of being sentenced to life imprisonment without any possibility of early release, which may raise an issue under Article 3 of the European Convention on Human Rights. The Court underlined that

> "it is […] not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention (see Nivette, cited above, and also the *Weeks v. the United Kingdom* judgment of 2 March 1987, Series Ano. 114, and *Sawoniuk v. the United Kingdom* (dec.), Appl. No. 63716/00, 29 May 2001)".[50]

XIV. Right to property

The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the unlawfulness of such a decision before a court.

See notably Article 8 of the United Nations Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999):

> "1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in Article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

49 Emphasis added.

50 Einhorn v. France, 16 October 2001, para. 27.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in Article 2 and the proceeds derived from such offences.

3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in Article 2, paragraph 1, subparagraph (a)or(b), or their families.

5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith."

The confiscation of property following a condemnation for criminal activity has been admitted by the Court.[51]

XV. Possible derogations

1. When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.
2. States may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law.

51 See Phillips v. the United Kingdom, 5 July 2001, in particular paras. 35 and 53.

3. The circumstances which led to the adoption of such derogations need to be reassessed on a regular basis with the purpose of lifting these derogations as soon as these circumstances no longer exist.

The Court has indicated some of the parameters that permit to say which are the situations of "public emergency threatening the life of the nation".[52]

The Court acknowledges a large power of appreciation to the State to determine whether the measures derogating from the obligations of the Convention are the most appropriate or expedient:

> "It is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other (see the above-mentioned *Ireland v. the United Kingdom* judgment, Series A no. 25, p. 82, para. 214, and the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 23, para. 49)".[53]

Article 15 of the Convention gives an authorisation to contracting States to derogate from the obligations set forth by the Convention "in time of war or other public emergency threatening the life of the nation".

Derogations are however limited by the text of Article 15 itself ("No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7" and "to the extent strictly required by the exigencies of the situation").

> "As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 para. 2 even in the event of a public emergency threatening the life of the nation […]."[54]

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52 See Lawless v. Ireland, Series A no. 3, 1 July 1961.

53 Brannigan and McBride v. the United Kingdom, 26 May 1993, para. 59.

54 Labita v. Italy, 6 April 2000, para. 119. See also Ireland v. the United Kingdom, 18 January 1978, Series A no. 25, para. 163; Soering v. the United Kingdom, 7 July 1989, Series A no. 161, para. 88; Chahal v. the United Kingdom, 15 November 1996, para. 79; Aksoy v. Turkey, 18 December 1996, para. 62; Aydin v. Turkey, 25

The Court was led to judge cases in which Article 15 was referred to by the defendant State. The Court affirmed therefore its jurisdiction to control the existence of a public emergency threatening the life of the nation:

> "whereas it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case".[55]

Examining a derogation on the basis of Article 15, the Court agreed that this derogation was justified by the reinforcement and the impact of terrorism and that, when deciding to put someone in custody, against the opinion of the judicial authority, the Government did not exceed its margin of appreciation. It is not up to the Court to say what measures would best fit the emergency situations since it is the direct responsibility of the governments to weigh up the situation and to decide between towards efficient measures to fight against terrorism or the respect of individual rights:

> "The Court recalls that it falls to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, pp. 78-79, para. 207).
>
> Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision (*ibid.*). At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation."[56]

September 1997, para. 81; Assenov and Others v. Bulgaria, 28 October 1998, para. 93; Selmouni v. France, 28 July 1999, para. 95.

55 Lawless v. Ireland, 1 July 1961, A no. 3, para. 22.

56 Brannigan and Mc Bride v. the United Kingdom, 26 May 1993, para. 43.

Concerning the length of the custody after arrest, and even if the Court recognizes the existence of a situation that authorises the use of Article 15, seven days seems to be a length that satisfies the State obligations given the circumstances,[57] but thirty days seems to be too long.[58]

General comment No. 29 of the UN Human Rights Committee[59] on Article 4 of the International Covenant on Civil and Political Rights (16 December 1966) need also to be taken into consideration. This general observation tends to limit the authorised derogation to this Covenant, even in cases of exceptional circumstances.

XVI. Respect for peremptory norms of international law and for international humanitarian law

In their fight against terrorism, States may never act in breach of peremptory norms of international law nor in breach of international humanitarian law, where applicable.

XVII. Compensation for victims of terrorist acts

When compensation is not fully available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State must contribute to the compensation of the victims of attacks that took place on its territory, as far as their person or their health is concerned.

First, see Article 2 of the European Convention on Compensation of Victims of Violent Crimes (Strasbourg, 24 November 1983, ETS No. 116):

> "1. When compensation is not fully available from other sources the State shall contribute to compensate:
>
> a. those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;
>
> b. the dependants of persons who have died as a result of such crime.
>
> 2. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished."

57 See Brannigan and McBride v. the United Kingdom, 26 May 1993, paras. 58-60.

58 See Aksoy v. Turkey, 18 December 1996, paras. 71-84.

59 See Aksoy v. Turkey, 18 December 1996, paras. 71-84.

See also Article 8, para.4, of the International Convention for the Suppression of the Financing of Terrorism (New York, 8 December 1999):

> "Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in Article 2, paragraph 1, sub-paragraph (a)or(b), or their families."

In these unsettling times, terrorism, or the threat of it, is a problem which affects most countries in the world. The Council of Europe, which has a long history in developing measures to combat terrorism, believes that governments seeking to combat it must find effective counter-measures, but at the same time not lose sight of the need to respect fundamental human rights. With this in mind, the Council of Europe's Committee of Ministers has adopted these guidelines as recommendations both to member and non-member states.

The guidelines reaffirm states' obligation to protect everyone against terrorism, and reiterate the need to avoid arbitrariness. They also stress that all measures taken by states to combat terrorism must be lawful, and that torture must be prohibited. The framework set out in the guidelines concerns, in particular, the collecting and processing of personal data, measures which interfere with privacy, arrest, police custody and pre-trial detention, legal proceedings, extradition and compensation of victims.

The Council of Europe has forty-four member states, covering virtually the entire continent of Europe. It seeks to develop common democratic and legal principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. Ever since it was founded in 1949, in the aftermath of the second world war, the Council of Europe has symbolised reconciliation.

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Guidelines on International Protection:

Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees

UNHCR issues these Guidelines pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992)*. These Guidelines summarise the *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (4 September 2003) which forms an integral part of UNHCR's position on this issue. They supersede *The Exclusion Clauses: Guidelines on their Application* (UNHCR, Geneva, 1 December 1996) and *Note on the Exclusion Clauses* (UNHCR, Geneva, 30 May 1997), and result, *inter alia*, from the Second Track of the Global Consultations on International Protection process which examined this subject at its expert meeting in Lisbon, Portugal, in May 2001. An update of these Guidelines was also deemed necessary in light of contemporary developments in international law.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees

I. Introduction

A. Background

1. Paragraph 7(d) of the 1950 UNHCR Statute, Article 1F of the 1951 Convention relating to the Status of Refugees (hereinafter "1951 Convention") and Article I(5) of the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa

(hereinafter "OAU Convention") all oblige States and UNHCR to deny the benefits of refugee status to certain persons who would otherwise qualify as refugees. These provisions are commonly referred to as "the exclusion clauses". These Guidelines provide a summary of the key issues relating to these provisions – further guidance can be found in UNHCR's Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (hereinafter "the Background Note"), which forms an integral part of these Guidelines.

2. The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied "scrupulously" to protect the integrity of the institution of asylum, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.

3. The exclusion clauses in the 1951 Convention are exhaustive. This should be kept in mind when interpreting Article I(5) of the OAU Convention which contains almost identical language. Article 1F of the 1951 Convention states that the provisions of that Convention "shall not apply to any person with respect to whom there are serious reasons for considering" that:
   (a) he [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
   (b) he [or she] has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; or
   (c) he [or she] has been guilty of acts contrary to the purposes and principles of the United Nations.

B. Relationship with other provisions of the 1951 Convention

4. Article 1F of the 1951 Convention should be distinguished from **Article 1D** which applies to a specific category of persons receiving protection or assistance from organs and agencies of the United Nations other than UNHCR.[1] Article 1F should also be distinguished from **Article 1E** which deals with

1 See, UNHCR, "Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees", October 2002.

persons not in need (as opposed to undeserving) of international protection. Moreover the exclusion clauses are not to be confused with **Articles 32 and 33(2)** of the Convention which deal respectively with the expulsion of, and the withdrawal of protection from *refoulement* from, recognised refugees who pose a danger to the host State (for example, because of serious crimes they have committed there). Article 33(2) concerns the future risk that a recognised refugee may pose to the host State.

C. Temporal scope

5. Articles 1F(a) and 1F(c) are concerned with crimes whenever and wherever they are committed. By contrast, the scope of Article 1F(b) is explicitly limited to crimes committed outside the country of refuge prior to admission to that country as a refugee.

D. Cancellation or revocation on the basis of exclusion

6. Where facts which would have led to exclusion only come to light after the grant of refugee status, this would justify **cancellation** of refugee status on the grounds of exclusion. The reverse is that information casting doubt on the basis on which an individual has been excluded should lead to reconsideration of eligibility for refugee status. Where a refugee engages in conduct falling within Article 1F(a) or 1F(c), this would trigger the application of the exclusion clauses and the **revocation** of refugee status, provided all the criteria for the application of these clauses are met.

E. Responsibility for determination of exclusion

7. States parties to the 1951 Convention/1967 Protocol and/or OAU Convention and UNHCR need to consider whether the exclusion clauses apply in the context of the determination of refugee status. Paragraph 7(d) of UNHCR's Statute covers similar grounds to Article 1F of the 1951 Convention, although UNHCR officials should be guided by the language of Article 1F, as it represents the later and more specific formulation.

F. Consequences of exclusion

8. Although a State is precluded from granting refugee status pursuant to the 1951 Convention or the OAU Convention to an individual it has excluded, it is not otherwise obliged to take any particular course of action. The State concerned can choose to grant the excluded individual stay on other grounds, but obligations under international law may require that the person concerned be criminally prosecuted or extradited. A decision by UNHCR to exclude someone from refugee status means that that individual can no longer receive protection or assistance from the Office. 9. An excluded individual may still be protected against return to a country where he or she is at risk of ill-treatment by virtue of other international

instruments. For example, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits the return of an individual to a country where there is a risk that he or she will be subjected to torture. Other international and regional human rights instruments contain similar provisions.[2]

II. Substantive Analysis

A. Article 1F(a): Crimes against peace, war crimes and crimes against humanity

10. Amongst the various international instruments which offer guidance on the scope of these international crimes are the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the four 1949 Geneva Conventions for the Protection of Victims of War and the two 1977 Additional Protocols, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the 1945 Charter of the International Military Tribunal (the London Charter), and most recently the 1998 Statute of the International Criminal Court which entered into force on 1 July 2002.
11. According to the London Charter a **crime against peace** involves the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing". Given the nature of this crime, it can only be committed by those in a high position of authority representing a State or a State-like entity. In practice, this provision has rarely been invoked.
12. Certain breaches of international humanitarian law constitute **war crimes**.[3] Although such crimes can be committed in both international and non-international armed conflicts, the content of the crimes depends on the nature of the conflict. War crimes cover such acts as wilful killing and torture of civilians, launching indiscriminate attacks on civilians, and wilfully depriving a civilian or a prisoner of war of the rights of fair and regular trial.
13. The distinguishing feature of **crimes against humanity**,[4] which cover acts such as genocide, murder, rape and torture, is that they must be carried out as part of a widespread or systematic attack directed against the civilian population. An isolated act can, however, constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated

2 For further details, see Annex A of the Background Note accompanying these Guidelines.

3 For instruments defining war crimes, see Annex B of the Background Note.

4 For instruments defining crimes against humanity, see Annex C of the Background Note.

acts. Since such crimes can take place in peacetime as well as armed conflict, this is the broadest category under Article 1F(a).

B. Article 1F(b): Serious non-political crimes

14. This category does not cover minor crimes nor prohibitions on the legitimate exercise of human rights. In determining whether a particular offence is sufficiently **serious**, international rather than local standards are relevant. The following factors should be taken into account: the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime. Thus, for example, murder, rape and armed robbery would undoubtedly qualify as serious offences, whereas petty theft would obviously not.
15. A serious crime should be considered **non-political** when other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed. Where no clear link exists between the crime and its alleged political objective or when the act in question is disproportionate to the alleged political objective, non-political motives are predominant.[5] The motivation, context, methods and proportionality of a crime to its objectives are important factors in evaluating its political nature. The fact that a particular crime is designated as non-political in an extradition treaty is of significance, but not conclusive in itself. Egregious acts of violence, such as acts those commonly considered to be of a "terrorist" nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective. Furthermore, for a crime to be regarded as political in nature, the political objectives should be consistent with human rights principles.
16. Article 1F(b) also requires the crime to have been committed "outside the country of refuge prior to [the individual's] admission to that country as a refugee". Individuals who commit "serious non-political crimes" within the country of refuge are subject to that country's criminal law process and, in the case of particularly grave crimes, to Articles 32 and 33(2) of the 1951 Convention.

C. Article 1F(c): Acts contrary to the purposes and principles of the United Nations

17. Given the broad, general terms of the purposes and principles of the United Nations, the scope of this category is rather unclear and should therefore be read narrowly. Indeed, it is rarely applied and, in many cases, Article 1F(a) or 1F(b) are anyway likely to apply. Article 1F(c) is only triggered in

5 See paragraph 152 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, reedited 1992.

extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category. Given that Articles 1 and 2 of the United Nations Charter essentially set out the fundamental principles States must uphold in their mutual relations, it would appear that in principle only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts. In cases involving a terrorist act, a correct application of Article 1F(c) involves an assessment as to the extent to which the act impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security.

D. Individual responsibility

18. For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F. Specific considerations in relation to crimes against peace and acts against the purposes and principles of the UN have been discussed above. In general, individual responsibility flows from the person having committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice.
19. The fact that a person was at some point a senior member of a repressive government or a member of an organisation involved in unlawful violence does not in itself entail individual liability for excludable acts. A presumption of responsibility may, however, arise where the individual has remained a member of a government clearly engaged in activities that fall within the scope of Article 1F. Moreover, the purposes, activities and methods of some groups are of a particularly violent nature, with the result that voluntary membership thereof may also raise a presumption of individual responsibility. Caution must be exercised when such a presumption of responsibility arises, to consider issues including the actual activities of the group, its organisational structure, the individual's position in it, and his or her ability to influence significantly its activities, as well as the possible fragmentation of the group. Moreover, such presumptions in the context of asylum proceedings are rebuttable.
20. As for ex-combatants, they should not necessarily be considered excludable, unless of course serious violations of international human rights law and international humanitarian law are reported and indicated in the individual case.

E. Grounds for rejecting individual responsibility

21. Criminal responsibility can normally only arise where the individual concerned committed the material elements of the offence with knowledge and intent. Where the **mental element** is not satisfied, for example, because of ignorance of a key fact, individual criminal responsibility is not established. In some cases, the individual may not have the mental capacity to be held responsible a crime, for example, because of insanity, mental handicap, involuntary intoxication or, in the case of children, immaturity.
22. Factors generally considered to constitute **defences** to criminal responsibility should be considered. For example, the defence of superior orders will only apply where the individual was legally obliged to obey the order, was unaware of its unlawfulness and the order itself was not manifestly unlawful. As for duress, this applies where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him- or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided. Action in self-defence or in defence of others or of property must be both reasonable and proportionate in relation to the threat.
23. Where **expiation** of the crime is considered to have taken place, application of the exclusion clauses may no longer be justified. This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any expression of regret shown by the individual concerned. In considering the effect of any pardon or amnesty, consideration should be given to whether it reflects the democratic will of the relevant country and whether the individual has been held accountable in any other way. Some crimes are, however, so grave and heinous that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty.

E. Proportionality considerations

24. The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention. The concept has evolved in particular in relation to Article 1F(b) and represents a fundamental principle of many fields of international law. As with any exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion. Such a proportionality analysis would, however, not normally be required

in the case of crimes against peace, crimes against humanity, and acts falling under Article 1F(c), as the acts covered are so heinous. It remains relevant, however, to Article 1F(b) crimes and less serious war crimes under Article 1F(a).

G. Particular acts and special cases

25. Despite the lack of an internationally agreed definition of **terrorism**,[6] acts commonly considered to be terrorist in nature are likely to fall within the exclusion clauses even though Article 1F is not to be equated with a simple anti-terrorism provision. Consideration of the exclusion clauses is, however, often unnecessary as suspected terrorists may not be eligible for refugee status in the first place, their fear being of legitimate prosecution as opposed to persecution for Convention reasons.
26. Of all the exclusion clauses, Article 1F(b) may be particularly relevant as acts of terrorist violence are likely to be disproportionate to any avowed political objective. Each case will require individual consideration. The fact that an individual is designated on a national or international list of terrorist suspects (or associated with a designated terrorist organisation) should trigger consideration of the exclusion clauses but will not in itself generally constitute sufficient evidence to justify exclusion. Exclusion should not be based on membership of a particular organisation alone, although a presumption of individual responsibility may arise where the organisation is commonly known as notoriously violent and membership is voluntary. In such cases, it is necessary to examine the individual's role and position in the organisation, his or her own activities, as well as related issues as outlined in paragraph 19 above.
27. As acts of **hijacking** will almost certainly qualify as a "serious crime" under Article 1F(b), only the most compelling of circumstances can justify non-exclusion. Acts of torture are prohibited under international law. Depending on the context, they will generally lead to exclusion under Article 1F.
28. The exclusion clauses apply in principle to **minors**, but only if they have reached the age of criminal responsibility and possess the mental capacity to be held responsible for the crime in question. Given the vulnerability of children, great care should be exercised in considering exclusion with respect to a minor and defences such as duress should in particular be examined carefully. Where UNHCR conducts refugee status determination under its mandate, all such cases should be referred to Headquarters before a final decision is made.
29. Where the main applicant is excluded from refugee status, the dependants will need to establish their own grounds for refugee status. If the latter are recognised as refugees, the excluded individual is not able to rely on the

6 For instruments pertaining to terrorism, see Annex D of the Background Note.

right to family unity in order to secure protection or assistance as a refugee.

30. The exclusion clauses can also apply in situations of **mass influx**, although in practice the individual screening required may cause operational and practical difficulties. Nevertheless, until such screening can take place, all persons should receive protection and assistance, subject of course to the separation of armed elements from the civilian refugee population.

III. Procedural Issues

31. Given the grave consequences of exclusion, it is essential that rigorous procedural **safeguards** are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the **regular refugee status determination procedure** and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made. The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion, but there is no rigid formula. Exclusion may exceptionally be considered without particular reference to inclusion issues (i) where there is an indictment by an international criminal tribunal; (ii) in cases where there is apparent and readily available evidence pointing strongly towards the applicant's involvement in particularly serious crimes, notably in prominent Article 1F(c) cases, and (iii) at the appeal stage in cases where exclusion is the question at issue.
32. **Specialised exclusion units** within the institution responsible for refugee status determination could be set up to handle exclusion cases to ensure that they are dealt with in an expeditious manner. It may be prudent to defer decisions on exclusion until completion of any domestic criminal proceedings, as the latter may have significant implications for the asylum claim. In general, however, the refugee claim must be determined in a final decision before execution of any extradition order.
33. At all times the **confidentiality** of the asylum application should be respected. In exceptional circumstances, contact with the country of origin may be justified on national security grounds, but even then the existence of the asylum application should not be disclosed.
34. The **burden of proof** with regard to exclusion rests with the State (or UNHCR) and, as in all refugee status determination proceedings, the applicant should be given the benefit of the doubt. Where, however, the individual has been indicted by an international criminal tribunal, or where individual responsibility for actions which give rise to exclusion is presumed, as indicated in paragraph 19 of these Guidelines, the burden of proof is reversed, creating a rebuttable presumption of excludability.
35. In order to satisfy the **standard of proof** under Article 1F, clear and credible evidence is required. It is not necessary for an applicant to have been convicted of the criminal offence, nor does the criminal standard of proof

need to be met. Confessions and testimony of witnesses, for example, may suffice if they are reliable. Lack of cooperation by the applicant does not in itself establish guilt for the excludable act in the absence of clear and convincing evidence. Consideration of exclusion may, however, be irrelevant if non-cooperation means that the basics of an asylum claim cannot be established.

36. Exclusion should not be based on **sensitive evidence** that cannot be challenged by the individual concerned. Exceptionally, anonymous evidence (where the source is concealed) may be relied upon but only where this is absolutely necessary to protect the safety of witnesses and the asylum-seeker's ability to challenge the substance of the evidence is not substantially prejudiced. Secret evidence or evidence considered in camera (where the substance is also concealed) should not be relied upon to exclude. Where national security interests are at stake, these may be protected by introducing procedural safeguards which also respect the asylum-seeker's due process rights.

Parliamentary Assembly Resolution 1400 (2004)

Challenge of terrorism in Council of Europe member states

1. The Parliamentary Assembly is outraged by the recent wave of acts of terrorism which have plunged several Council of Europe member states into mourning, killing and injuring hundreds of innocent people. It extends its deepest sympathy to the victims' families and all who have suffered from these odious crimes.
2. In spite of the international community's efforts, the scourge of terrorism continues to spread throughout the world, assuming ever more terrible and murderous forms. The resurgence of acts of terrorism of an extreme brutality shows that the international community, including the countries of Europe, have not been sufficiently alert to the gravity of the danger and have failed to take effective action to counter a new-style terrorism which stops at nothing.
3. Through its barbaric methods, terrorism attacks the fundamental values of society and challenges the very existence of democracy.
4. The protection of human rights plays a key role in the fight against terrorism. These rights are central to our credibility. Any violation of these rights weakens the international coalition in the fight against terrorism and drives new supporters into the hands of the terrorists.
5. The Assembly refers in particular to Recommendation 1426 (1999) on European democracies facing up to terrorism where it considered an act of terrorism to be "any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society or the general public".
6. All attempts to provide terrorists with political, material, financial and other forms of support should be resolutely condemned.

7. Terrorism heeds neither law nor morality and must not be allowed to exploit the freedoms and advantages of modern democratic societies.
8. The Assembly considers that no cause can justify terrorism. Public expressions of support for terrorist actions may amount to incitement to violence and as such be the subject of restrictive measures in conformity with the European Convention on Human Rights.
9. The Assembly firmly reiterates its condemnation and utter rejection of terror as a means of achieving political ends. Every act of terrorism, regardless of the reasons given, aims pursued, methods used or demands made by the terrorists, is a challenge to democracy and must be considered a crime against humanity. It is unacceptable and dangerous to apply double standards to terrorists, depending on their alleged motives. There are no "good" or "bad" terrorists.
10. Democracy cannot compromise over terrorism. For terrorists, human life, which is the supreme value in a democratic society, is a bargaining counter.
11. The Assembly is concerned about the fact that the threat or effects of terrorism can profoundly alarm and unsettle the community and affect the institutions and machinery of democracy. It believes that action must be taken to ensure that terror can exert no direct influence on democratic choices.
12. In accordance with the principles recorded in paragraph 5, the Assembly reaffirms its position of principle that the fight against terrorism must always be compatible with the fundamental freedoms and human rights which it has the task of protecting, taking as its basis the absolute primacy of the fundamental and inalienable right to life, which implies the right to protection from terrorism and all other attacks on human life and health. There should be no exceptions to the human rights standards of the Council of Europe, as well as to the legitimate right to resist oppression. Obligations under the United Nations Convention relating to the Status of Refugees must likewise be fully respected. All the member states of the Council of Europe must avoid any erosion of these standards and ensure that the action they take against terrorism respects the principles on which democratic states are founded, their international commitments and the standards of their internal legislation. In this connection, it welcomes the adoption by the Committee of Ministers of the Council of Europe of guidelines on human rights in the fight against terrorism.
13. The Assembly reiterates that the fight against terrorism does not justify the introduction of new and/or additional restrictions on freedom of expression, which is one of the fundamental pillars of democracy that terrorists want to destroy. The Assembly welcomes the drafting of a declaration on freedom of expression and information in the media in the context of the fight against terrorism by the end of the year.

14. The Assembly remains convinced that the deep-rooted causes – poverty, exclusion, inequality, despair, widespread disorder, impunity for serious human rights violations and crimes, and blatant disregard for the rights of national minorities – which provide fertile soil for terrorism, must be carefully analysed and systematic action taken to remove them. This work must be undertaken in parallel with necessary urgent lawful measures to prevent further acts of terrorism.
15. The Assembly accordingly calls on national parliaments:
    i. to adopt an integrated and co-ordinated approach to countering terrorism at all its stages, including drawing up a legislative framework aimed at:
        a. removing the factors contributing to the development of a favourable environment for terrorism;
        b. suppressing the sources and channels of finance, recruitment and propaganda;
        c. organising operational co-operation between special services, police and justice systems as part of anti-terrorist and preventive action;
        d. protecting, rehabilitating and compensating victims of terrorist acts;
        e. developing mechanisms and a legal basis for protecting witnesses, collaborators of justice and reformed criminals;
    ii. to pass laws for reinforcing public security, consistent with human rights and fundamental freedoms, and obligations under international law and conventions;
    iii. to make full use of their powers in promoting intensified international co-operation in the fight against terrorism, with paramount emphasis on harmonising Council of Europe member states' anti-terrorism law so as to create a unified European legal area in anti-terrorism matters;
    iv. to ratify, using the accelerated procedure, the protocol amending the European Convention on the Suppression of Terrorism (ETS No. 190), so that it can take effect as soon as possible;
    v. to ensure that their states, if they have not already done so, sign, ratify and effectively implement the Council of Europe instruments concerned with action against terrorism and particularly:
        – the European Convention on the Suppression of Terrorism (1977);
        – the European Convention on Extradition (1957) and its protocols (1975 and 1978);
        – the European Convention on Mutual Assistance in Criminal Matters (1959) and its Protocols (1978 and 2001);
        – the European Convention on the Transfer of Proceedings in Criminal Matters (1972);

- the European Convention on the Compensation of Victims of Violent Crimes (1983);
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990);
- the Convention on Cybercrime (2001) and its protocol (2003).

16. The Assembly calls on all the political forces in member states:
    i. to resolutely condemn all terrorist action, regardless of the country in which it takes place, as well as all activity whose purpose is to organise, finance or incite to acts of terrorism or harbour terrorists;
    ii. to prevent manifestations of ethnic hatred, racism and xenophobia and also the justification of terrorism;
    iii. to consolidate democratic institutions and interaction with civil society in order to ensure maximum support for national and international anti-terrorism measures;
    iv. to rally society around the principles of total rejection of and opposition to terror and that any form of psychologically pressurising the population is unacceptable;
    v. to support measures to prevent persons implicated in terrorism from abusing any kind of institution or organisation, governmental or non-governmental, for the purpose of planning or preparing terrorist acts;
    vi. to promote social cohesion and intercultural and inter-confessional dialogue for the purpose of removing factors contributing to the development of fertile breeding grounds for terrorism and preventing the spread of extremist theories seeking to justify acts of terrorism.
17. Moreover, the Assembly deems it necessary:
    i. to elaborate a comprehensive Council of Europe convention against terrorism;
    ii. to analyse the effectiveness of Council of Europe conventions and other international instruments on combating terrorism and, on the basis of that analysis, draw up protocols to render those instruments capable of responding to the new terrorist threats;
    iii. to instigate the extension of the list of offences in the 1998 Rome Statute of the International Criminal Court (ICC) so as to include certain offences of a terrorist nature, thereby widening ICC jurisdiction to encompass such offences;
    iv. to review European Union experience with the European arrest warrant and to look into creating a legal basis for extending its applicability to Council of Europe member states;
    v. to intensify work on drawing up a Council of Europe convention on reinforcing the protection of witnesses and reformed criminals in the context of acts of terrorism, the protocol to the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from

Crime, and a recommendation on special investigation techniques in relation to acts of terrorism;

vi. to begin the groundwork for setting up a European register of national and international standards so as to provide a system for computer access to the law of member states of the Council of Europe and other European organisations and for exchange of legal information;

vii. to establish a partnership between the Council of Europe and the European Union, and create, in addition to the EU's own anti-terrorism co-ordination work, a joint framework for practical co-operation and information sharing which involves all Council of Europe member states and develop enhanced co-operation with the United Nations, the Organization for Security and Co-operation in Europe and other international organisations;

viii. to initiate a special programme, enabling exchanges of experience and best practice, for persons with operational responsibilities in the member states for handling concrete crisis situations, in order to ensure that they are highly professional and adequately trained so as to minimise risks to human lives;

ix. to finalise as soon as possible the elaboration of guidelines on the rights of victims and the corresponding duties of member states to provide all necessary assistance and to create a forum for the exchange of good practice and training experiences between member states.

18. A serious study should be undertaken by the Council of Europe on the acceptable limits of freedom of expression and the possible abuse of that freedom by terrorists.

19. The Assembly decides to follow closely, through its relevant committees, international developments concerning terrorism, action by member governments and by national parliaments and the activities of the Council of Europe's Committee of Ministers in this field.

ECRI General Policy Recommendation No. 8
On Combating Racism While Fighting Terrorism

Adopted on 17 March 2004

The European Commission against Racism and Intolerance:

Having regard to the European Convention on Human Rights, and in particular to its Article 14;

Having regard to Protocol N° 12 to the European Convention on Human Rights;

Having regard to the International Covenant on Civil and Political Rights, and in particular to its Articles 2, 4 (1), 20 (2) and 26;

Having regard to the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees;

Having regard to the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism;

Recalling the Declaration adopted by ECRI at its 26th plenary meeting (Strasbourg 11-14 December 2001);

Recalling ECRI General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination and ECRI General Policy Recommendation N° 5 on combating intolerance and discrimination against Muslims;

Recalling the Convention on cybercrime and its additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems as well as ECRI General Policy Recommendation N° 6 on combating the dissemination of racist, xenophobic and antisemitic material via the Internet;

Recalling the European Convention on the Suppression of Terrorism, the Protocol amending the European Convention on the Suppression of Terrorism and other international instruments against terrorism, notably those adopted in the framework of the United Nations;

Firmly condemning terrorism, which is an extreme form of intolerance;

Stressing that terrorism is incompatible with and threatens the values of freedom, democracy, justice, the rule of law and human rights, particularly the right to life;

Considering that it is therefore the duty of the State to fight against terrorism;

Stressing that the response to the threat of terrorism should not itself encroach upon the very values of freedom, democracy, justice, the rule of law, human rights and humanitarian law that it aims to safeguard, nor should it in any way weaken the protection and promotion of these values;

Stressing in particular that the fight against terrorism should not become a pretext under which racism, racial discrimination and intolerance are allowed to flourish;

Stressing in this respect the responsibility of the State not only to abstain from actions directly or indirectly conducive to racism, racial discrimination and intolerance, but also to ensure a firm reaction of public institutions, including both preventive and repressive measures, to cases where racism, racial discrimination and intolerance result from the actions of individuals and organisations;

Noting that the fight against terrorism engaged by the member States of the Council of Europe since the events of 11 September 2001 has in some cases resulted in the adoption of directly or indirectly discriminatory legislation or regulations, notably on grounds of nationality, national or ethnic origin and religion and, more often, in discriminatory practices by public authorities;

Noting that terrorist acts, and, in some cases, the fight against terrorism have also resulted in increased levels of racist prejudice and racial discrimination by individuals and organisations;

Stressing in this context the particular responsibility of political parties, opinion leaders and the media not to resort to racist or racially discriminatory activities or expressions;

Noting that, as a result of the fight against terrorism engaged since the events of 11 September 2001, certain groups of persons, notably Arabs, Jews, Muslims, certain asylum seekers, refugees and immigrants, certain visible minorities and persons perceived as belonging to such groups, have become particularly vulnerable to racism and/or to racial discrimination across many fields of public life including education, employment, housing, access to goods and services, access to public places and freedom of movement;

Noting the increasing difficulties experienced by asylum seekers in accessing the asylum procedures of the member States of the Council of Europe and the progressive erosion of refugee protection as a result of restrictive legal measures and practices connected with the fight against terrorism;

Stressing the responsibility of the member States of the Council of Europe to ensure that the fight against terrorism does not have a negative impact on any minority group;

Recalling the pressing need for States to favour integration of their diverse populations as a mutual process that can help to prevent the racist or racially discriminatory response of society to the climate generated by the fight against terrorism;

Convinced that dialogue, including on culture and religion, between the different segments of society, as well as education in diversity contribute to combating racism while fighting terrorism;

Convinced that thorough respect of human rights, including the right to be free from racism and racial discrimination, can prevent situations in which terrorism may gain ground;

Recommends to the governments of member States:

- to take all adequate measures, especially through international co-operation, to fight against terrorism as an extreme form of intolerance in full conformity with international human rights law, and to support the victims of terrorism and to show solidarity towards the States that are targets of terrorism;
- to review legislation and regulations adopted in connection with the fight against terrorism to ensure that these do not discriminate directly or indirectly against persons or groups of persons, notably on grounds of "race", colour, language, religion, nationality or national or ethnic origin, and to abrogate any such discriminatory legislation;

- to refrain from adopting new legislation and regulations in connection with the fight against terrorism that discriminate directly or indirectly against persons or groups of persons, notably on grounds of "race", colour, language, religion, nationality or national or ethnic origin;
- to ensure that legislation and regulations, including legislation and regulations adopted in connection with the fight against terrorism, are implemented at national and local levels in a manner that does not discriminate against persons or groups of persons, notably on grounds of actual or supposed "race", colour, language, religion, nationality, national or ethnic origin;
- to pay particular attention to guaranteeing in a non discriminatory way the freedoms of association, expression, religion and movement and to ensuring that no discrimination ensues from legislation and regulations – or their implementation – notably governing the following areas:
- checks carried out by law enforcement officials within the countries and by border control personnel
  - administrative and pre-trial detention
  - conditions of detention
  - fair trial, criminal procedure
  - protection of personal data
  - protection of private and family life
  - expulsion, extradition, deportation and the principle of *non-refoulement*
  - issuing of visas
  - residence and work permits and family reunification
  - acquisition and revocation of citizenship;
- to ensure that their national legislation expressly includes the right not to be subject to racial discrimination among the rights from which no derogation may be made even in time of emergency;
- to ensure that the right to seek asylum and the principle of *non-refoulement* are thoroughly respected in all cases and without discrimination, notably on grounds of country of origin;
- to pay particular attention in this respect to the need to ensure access to the asylum procedure and a fair mechanism for the examination of the claims that safeguards basic procedural rights;
- to ensure that adequate national legislation is in force to combat racism and racial discrimination and that it is effectively implemented, especially in the fields of education, employment, housing, access to goods and services, access to public places and freedom of movement;
- to ensure that adequate national legislation is in force to combat racially motivated crimes, racist expression and racist organisations and that it is effectively implemented;

- to draw inspiration, in the context of ensuring that legislation in the areas mentioned above is adequate, from ECRI General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination;
- to ensure that relevant national legislation applies also to racist offences committed via the Internet and to prosecute those responsible for these kinds of offences;
- to ensure the existence and functioning of an independent specialised body to combat racism and racial discrimination competent, *inter alia*, in assisting victims in bringing complaints of racism and racial discrimination that may arise as a result of the fight against terrorism;
- to encourage debate within the media profession on the image that they convey of minority groups in connection with the fight against terrorism and on the particular responsibility of the media professions, in this connection, to avoid perpetuating prejudices and spreading biased information;
- to support the positive role the media can play in promoting mutual respect and countering racist stereotypes and prejudices;
- to encourage integration of their diverse populations as a mutual process and ensure equal rights and opportunities for all individuals;
- to introduce into the school curricula, at all levels, education in diversity and on the need to combat intolerance, racist stereotypes and prejudices, and raise the awareness of public officials and the general public on these subjects;
- to support dialogue and promote joint activities, including on culture and religion, among the different segments of society on the local and national levels in order to counter racist stereotypes and prejudices.

Council of Europe Convention on the Prevention of Terrorism

Warsaw, 16.V.2005

The member States of the Council of Europe and the other Signatories hereto,

Considering that the aim of the Council of Europe is to achieve greater unity between its members;

Recognising the value of reinforcing co-operation with the other Parties to this Convention;

Wishing to take effective measures to prevent terrorism and to counter, in particular, public provocation to commit terrorist offences and recruitment and training for terrorism;

Aware of the grave concern caused by the increase in terrorist offences and the growing terrorist threat;

Aware of the precarious situation faced by those who suffer from terrorism, and in this connection reaffirming their profound solidarity with the victims of terrorism and their families;

Recognising that terrorist offences and the offences set forth in this Convention, by whoever perpetrated, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and recalling the obligation of all Parties to prevent such offences and, if not prevented, to prosecute and ensure that they are punishable by penalties which take into account their grave nature;

Recalling the need to strengthen the fight against terrorism and reaffirming that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms as

well as other provisions of international law, including, where applicable, international humanitarian law;

Recognising that this Convention is not intended to affect established principles relating to freedom of expression and freedom of association;

Recalling that acts of terrorism have the purpose by their nature or context to seriously intimidate a population or unduly compel a government or an international organisation to perform or abstain from performing any act or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation;

Have agreed as follows:

Article 1 – Terminology

1 For the purposes of this Convention, "terrorist offence" means any of the offences within the scope of and as defined in one of the treaties listed in the Appendix.

2 On depositing its instrument of ratification, acceptance, approval or accession, a State or the European Community which is not a party to a treaty listed in the Appendix may declare that, in the application of this Convention to the Party concerned, that treaty shall be deemed not to be included in the Appendix. This declaration shall cease to have effect as soon as the treaty enters into force for the Party having made such a declaration, which shall notify the Secretary General of the Council of Europe of this entry into force.

Article 2 – Purpose

The purpose of the present Convention is to enhance the efforts of Parties in preventing terrorism and its negative effects on the full enjoyment of human rights, in particular the right to life, both by measures to be taken at national level and through international co-operation, with due regard to the existing applicable multilateral or bilateral treaties or agreements between the Parties.

Article 3 – National prevention policies

1 Each Party shall take appropriate measures, particularly in the field of training of law enforcement authorities and other bodies, and in the fields of education, culture, information, media and public awareness raising, with a view to preventing terrorist offences and their negative effects while respecting human rights obligations as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

2 Each Party shall take such measures as may be necessary to improve and develop the co-operation among national authorities with a view to preventing terrorist offences and their negative effects by, *inter alia*:
   a exchanging information;
   b improving the physical protection of persons and facilities;
   c enhancing training and coordination plans for civil emergencies.
3 Each Party shall promote tolerance by encouraging inter-religious and cross-cultural dialogue involving, where appropriate, non-governmental organisations and other elements of civil society with a view to preventing tensions that might contribute to the commission of terrorist offences.
4 Each Party shall endeavour to promote public awareness regarding the existence, causes and gravity of and the threat posed by terrorist offences and the offences set forth in this Convention and consider encouraging the public to provide factual, specific help to its competent authorities that may contribute to preventing terrorist offences and offences set forth in this Convention.

Article 4 – International co-operation on prevention

Parties shall, as appropriate and with due regard to their capabilities, assist and support each other with a view to enhancing their capacity to prevent the commission of terrorist offences, including through exchange of information and best practices, as well as through training and other joint efforts of a preventive character.

Article 5 – Public provocation to commit a terrorist offence

1 For the purposes of this Convention, "public provocation to commit a terrorist offence" means 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.
2 Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Article 6 – Recruitment for terrorism

1 For the purposes of this Convention, "recruitment for terrorism" means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group.

2 Each Party shall adopt such measures as may be necessary to establish recruitment for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Article 7 – Training for terrorism

1 For the purposes of this Convention, "training for terrorism" means to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose.

2 Each Party shall adopt such measures as may be necessary to establish training for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Article 8 – Irrelevance of the commission of a terrorist offence

For an act to constitute an offence as set forth in Articles 5 to 7 of this Convention, it shall not be necessary that a terrorist offence be actually committed.

Article 9 – Ancillary offences

1 Each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law:
   - a Participating as an accomplice in an offence as set forth in Articles 5 to 7 of this Convention;
   - b Organising or directing others to commit an offence as set forth in Articles 5 to 7 of this Convention;
   - c Contributing to the commission of one or more offences as set forth in Articles 5 to 7 of this Convention by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
     - i be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in Articles 5 to 7 of this Convention; or
     - ii be made in the knowledge of the intention of the group to commit an offence as set forth in Articles 5 to 7 of this Convention.

2 Each Party shall also adopt such measures as may be necessary to establish as a criminal offence under, and in accordance with, its domestic law the attempt to commit an offence as set forth in Articles 6 and 7 of this Convention.

Article 10 – Liability of legal entities

1 Each Party shall adopt such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal entities for participation in the offences set forth in Articles 5 to 7 and 9 of this Convention.
2 Subject to the legal principles of the Party, the liability of legal entities may be criminal, civil or administrative.
3 Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

Article 11 – Sanctions and measures

1 Each Party shall adopt such measures as may be necessary to make the offences set forth in Articles 5 to 7 and 9 of this Convention punishable by effective, proportionate and dissuasive penalties.
2 Previous final convictions pronounced in foreign States for offences set forth in the present Convention may, to the extent permitted by domestic law, be taken into account for the purpose of determining the sentence in accordance with domestic law.
3 Each Party shall ensure that legal entities held liable in accordance with Article 10 are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Article 12 – Conditions and safeguards

1 Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.
2 The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.

Article 13 – Protection, compensation and support for victims of terrorism

Each Party shall adopt such measures as may be necessary to protect and support the victims of terrorism that has been committed within its own territory. These measures may include, through the appropriate national schemes and subject to domestic legislation, *inter alia*, financial assistance and compensation for victims of terrorism and their close family members.

Article 14 – Jurisdiction

1 Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in this Convention:
   a when the offence is committed in the territory of that Party;
   b when the offence is committed on board a ship flying the flag of that Party, or on board an aircraft registered under the laws of that Party;
   c when the offence is committed by a national of that Party.

2 Each Party may also establish its jurisdiction over the offences set forth in this Convention:
   a when the offence was directed towards or resulted in the carrying out of an offence referred to in Article 1 of this Convention, in the territory of or against a national of that Party;
   b when the offence was directed towards or resulted in the carrying out of an offence referred to in Article 1 of this Convention, against a State or government facility of that Party abroad, including diplomatic or consular premises of that Party;
   c when the offence was directed towards or resulted in an offence referred to in Article 1 of this Convention, committed in an attempt to compel that Party to do or abstain from doing any act;
   d when the offence is committed by a stateless person who has his or her habitual residence in the territory of that Party;
   e when the offence is committed on board an aircraft which is operated by the Government of that Party.

3 Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in this Convention in the case where the alleged offender is present in its territory and it does not extradite him or her to a Party whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested Party.

4 This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

5 When more than one Party claims jurisdiction over an alleged offence set forth in this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

Article 15 – Duty to investigate

1 Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in this Convention may be present in its territory, the Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2 Upon being satisfied that the circumstances so warrant, the Party in whose territory the offender or alleged offender is present shall take the appropri-

ate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

3 Any person in respect of whom the measures referred to in paragraph 2 are being taken shall be entitled to:
   a communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;
   b be visited by a representative of that State;
   c be informed of that person's rights under subparagraphs a. and b.

4 The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the Party in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5 The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any Party having a claim of jurisdiction in accordance with Article 14, paragraphs 1.c and 2.d to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

Article 16 – Non application of the Convention

This Convention shall not apply where any of the offences established in accordance with Articles 5 to 7 and 9 is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State, and no other State has a basis under Article 14, paragraph 1 or 2 of this Convention, to exercise jurisdiction, it being understood that the provisions of Articles 17 and 20 to 22 of this Convention shall, as appropriate, apply in those cases.

Article 17 – International co-operation in criminal matters

1 Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in Articles 5 to 7 and 9 of this Convention, including assistance in obtaining evidence in their possession necessary for the proceedings.

2 Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other agreements on mutual legal assistance that may exist between them. In the absence of such treaties or agreements, Parties shall afford one another assistance in accordance with their domestic law.

3 Parties shall co-operate with each other to the fullest extent possible under relevant law, treaties, agreements and arrangements of the requested Party with respect to criminal investigations or proceedings in relation to the offences for which a legal entity may be held liable in accordance with Article 10 of this Convention in the requesting Party.

4 Each Party may give consideration to establishing additional mechanisms to share with other Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to Article 10.

Article 18 – Extradite or prosecute

1 The Party in the territory of which the alleged offender is present shall, when it has jurisdiction in accordance with Article 14, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that Party. Those authorities shall take their decision in the same manner as in the case of any other offence of a serious nature under the law of that Party.

2 Whenever a Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that Party to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this Party and the Party seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

Article 19 – Extradition

1 The offences set forth in Articles 5 to 7 and 9 of this Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Convention. Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2 When a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, the requested Party may, if it so decides, consider this Convention as a legal basis for extradition in respect of the offences set forth in Articles 5 to 7 and 9 of this Convention. Extradition shall be subject to the other conditions provided by the law of the requested Party.

3 Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences set forth in Articles 5 to 7 and 9 of this Convention as extraditable offences between themselves, subject to the conditions provided by the law of the requested Party.

4 Where necessary, the offences set forth in Articles 5 to 7 and 9 of this Convention shall be treated, for the purposes of extradition between Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the Parties that have established jurisdiction in accordance with Article 14.

5 The provisions of all extradition treaties and agreements concluded between Parties in respect of offences set forth in Articles 5 to 7 and 9 of this Convention shall be deemed to be modified as between Parties to the extent that they are incompatible with this Convention.

Article 20 – Exclusion of the political exception clause

1 None of the offences referred to in Articles 5 to 7 and 9 of this Convention, shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence, an offence connected with a political offence, or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

2 Without prejudice to the application of Articles 19 to 23 of the Vienna Convention on the Law of Treaties of 23 May 1969 to the other Articles of this Convention, any State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession of the Convention, declare that it reserves the right to not apply paragraph 1 of this Article as far as extradition in respect of an offence set forth in this Convention is concerned. The Party undertakes to apply this reservation on a case-by-case basis, through a duly reasoned decision.

3 Any Party may wholly or partly withdraw a reservation it has made in accordance with paragraph 2 by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.

4 A Party which has made a reservation in accordance with paragraph 2 of this Article may not claim the application of paragraph 1 of this Article by any other Party; it may, however, if its reservation is partial or conditional, claim the application of this Article in so far as it has itself accepted it.

5 The reservation shall be valid for a period of three years from the day of the entry into force of this Convention in respect of the Party concerned. However, such reservation may be renewed for periods of the same duration.

6 Twelve months before the date of expiry of the reservation, the Secretary General of the Council of Europe shall give notice of that expiry to the Party concerned. No later than three months before expiry, the Party shall notify the Secretary General of the Council of Europe that it is upholding, amending or withdrawing its reservation. Where a Party notifies the Secretary General of the Council of Europe that it is upholding its reservation, it shall provide an explanation of the grounds justifying its continuance. In the absence of notification by the Party concerned, the Secretary General of the Council of Europe shall inform that Party that its reservation is considered to have been extended automatically for a period of six months.

Failure by the Party concerned to notify its intention to uphold or modify its reservation before the expiry of that period shall cause the reservation to lapse.

7 Where a Party does not extradite a person in application of this reservation, after receiving an extradition request from another Party, it shall submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution, unless the requesting Party and the requested Party agree otherwise. The competent authorities, for the purpose of prosecution in the requested Party, shall take their decision in the same manner as in the case of any offence of a grave nature under the law of that Party. The requested Party shall communicate, without undue delay, the final outcome of the proceedings to the requesting Party and to the Secretary General of the Council of Europe, who shall forward it to the Consultation of the Parties provided for in Article 30.

8 The decision to refuse the extradition request on the basis of this reservation shall be forwarded promptly to the requesting Party. If within a reasonable time no judicial decision on the merits has been taken in the requested Party according to paragraph 7, the requesting Party may communicate this fact to the Secretary General of the Council of Europe, who shall submit the matter to the Consultation of the Parties provided for in Article 30. This Consultation shall consider the matter and issue an opinion on the conformity of the refusal with the Convention and shall submit it to the Committee of Ministers for the purpose of issuing a declaration thereon. When performing its functions under this paragraph, the Committee of Ministers shall meet in its composition restricted to the States Parties.

Article 21 – Discrimination clause

1 Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested Party has substantial grounds for believing that the request for extradition for offences set forth in Articles 5 to 7 and 9 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

2 Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to torture or to inhuman or degrading treatment or punishment.

3 Nothing in this Convention shall be interpreted either as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to the death penalty or, where the law of the requested Party does not allow for life imprisonment, to life imprisonment

without the possibility of parole, unless under applicable extradition treaties the requested Party is under the obligation to extradite if the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be imposed or, where imposed, will not be carried out, or that the person concerned will not be subject to life imprisonment without the possibility of parole.

Article 22 – Spontaneous information

1 Without prejudice to their own investigations or proceedings, the competent authorities of a Party may, without prior request, forward to the competent authorities of another Party information obtained within the framework of their own investigations, when they consider that the disclosure of such information might assist the Party receiving the information in initiating or carrying out investigations or proceedings, or might lead to a request by that Party under this Convention.

2 The Party providing the information may, pursuant to its national law, impose conditions on the use of such information by the Party receiving the information.

3 The Party receiving the information shall be bound by those conditions.

4 However, any Party may, at any time, by means of a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to be bound by the conditions imposed by the Party providing the information under paragraph 2 above, unless it receives prior notice of the nature of the information to be provided and agrees to its transmission.

Article 23 – Signature and entry into force

1 This Convention shall be open for signature by the member States of the Council of Europe**,** the European Community and by non-member States which have participated in its elaboration.

2 This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3 This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which six Signatories, including at least four member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 2.

4 In respect of any Signatory which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the expression of its consent to be bound by the Convention in accordance with the provisions of paragraph 2.

Article 24 – Accession to the Convention

1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting with and obtaining the unanimous consent of the Parties to the Convention, may invite any State which is not a member of the Council of Europe and which has not participated in its elaboration to accede to this convention. The decision shall be taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Parties entitled to sit on the Committee of Ministers.

2 In respect of any State acceding to the convention under paragraph 1 above, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 25 – Territorial application

1 Any State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

2 Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the declaration by the Secretary General.

3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 26 – Effects of the Convention

1 The present Convention supplements applicable multilateral or bilateral treaties or agreements between the Parties, including the provisions of the following Council of Europe treaties:

- European Convention on Extradition, opened for signature, in Paris, on 13 December 1957 (ETS No. 24);
- European Convention on Mutual Assistance in Criminal Matters, opened for signature, in Strasbourg, on 20 April 1959 (ETS No. 30);
- European Convention on the Suppression of Terrorism, opened for signature, in Strasbourg, on 27 January 1977 (ETS No. 90);

- Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg on 17 March 1978 (ETS No. 99);
- Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg on 8 November 2001 (ETS No. 182);
- Protocol amending the European Convention on the Suppression of Terrorism, opened for signature in Strasbourg on 15 May 2003 (ETS No. 190).

2 If two or more Parties have already concluded an agreement or treaty on the matters dealt with in this Convention or have otherwise established their relations on such matters, or should they in future do so, they shall also be entitled to apply that agreement or treaty or to regulate those relations accordingly. However, where Parties establish their relations in respect of the matters dealt with in the present Convention other than as regulated therein, they shall do so in a manner that is not inconsistent with the Convention's objectives and principles.

3 Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

4 Nothing in this Convention shall affect other rights, obligations and responsibilities of a Party and individuals under international law, including international humanitarian law.

5 The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a Party in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

Article 27 – Amendments to the Convention

1 Amendments to this Convention may be proposed by any Party, the Committee of Ministers of the Council of Europe or the Consultation of the Parties.

2 Any proposal for amendment shall be communicated by the Secretary General of the Council of Europe to the Parties.

3 Moreover, any amendment proposed by a Party or the Committee of Ministers shall be communicated to the Consultation of the Parties, which shall submit to the Committee of Ministers its opinion on the proposed amendment.

4 The Committee of Ministers shall consider the proposed amendment and any opinion submitted by the Consultation of the Parties and may approve the amendment.
5 The text of any amendment approved by the Committee of Ministers in accordance with paragraph 4 shall be forwarded to the Parties for acceptance.
6 Any amendment approved in accordance with paragraph 4 shall come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof.

Article 28 – Revision of the Appendix

1 In order to update the list of treaties in the Appendix, amendments may be proposed by any Party or by the Committee of Ministers. These proposals for amendment shall only concern universal treaties concluded within the United Nations system dealing specifically with international terrorism and having entered into force. They shall be communicated by the Secretary General of the Council of Europe to the Parties.
2 After having consulted the non-member Parties, the Committee of Ministers may adopt a proposed amendment by the majority provided for in Article 20.d of the Statute of the Council of Europe. The amendment shall enter into force following the expiry of a period of one year after the date on which it has been forwarded to the Parties. During this period, any Party may notify the Secretary General of the Council of Europe of any objection to the entry into force of the amendment in respect of that Party.
3 If one third of the Parties notifies the Secretary General of the Council of Europe of an objection to the entry into force of the amendment, the amendment shall not enter into force.
4 If less than one third of the Parties notifies an objection, the amendment shall enter into force for those Parties which have not notified an objection.
5 Once an amendment has entered into force in accordance with paragraph 2 and a Party has notified an objection to it, this amendment shall come into force in respect of the Party concerned on the first day of the month following the date on which it notifies the Secretary General of the Council of Europe of its acceptance.

Article 29 – Settlement of disputes

In the event of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to an arbitral tribunal whose decisions shall be binding upon the Parties to the dispute, or to the International Court of Justice, as agreed upon by the Parties concerned.

Article 30 – Consultation of the Parties

1 The Parties shall consult periodically with a view to:
   a making proposals to facilitate or improve the effective use and implementation of this Convention, including the identification of any problems and the effects of any declaration made under this Convention;
   b formulating its opinion on the conformity of a refusal to extradite which is referred to them in accordance with Article 20, paragraph 8;
   c making proposals for the amendment of this Convention in accordance with Article 27;
   d formulating their opinion on any proposal for the amendment of this Convention which is referred to them in accordance with Article 27, paragraph 3;
   e expressing an opinion on any question concerning the application of this Convention and facilitating the exchange of information on significant legal, policy or technological developments.
2 The Consultation of the Parties shall be convened by the Secretary General of the Council of Europe whenever he finds it necessary and in any case when a majority of the Parties or the Committee of Ministers request its convocation.
3 The Parties shall be assisted by the Secretariat of the Council of Europe in carrying out their functions pursuant to this Article.

Article 31 – Denunciation

1 Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
2 Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

Article 32 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the European Community, the non-member States which have participated in the elaboration of this Convention as well as any State which has acceded to, or has been invited to accede to, this Convention of:
   a any signature;
   b the deposit of any instrument of ratification, acceptance, approval or accession;
   c any date of entry into force of this Convention in accordance with Article 23;
   d any declaration made under Article 1, paragraph 2, 22, paragraph 4, and 25;
   e any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Warsaw, this 16th day of May 2005, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the European Community, to the non-member States which have participated in the elaboration of this Convention, and to any State invited to accede to it.

Appendix

1 Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
2 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971;
3 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on 14 December 1973;
4 International Convention Against the Taking of Hostages, adopted in New York on 17 December 1979;
5 Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980;
6 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988;
7 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988;
8 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988;
9 International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997;
10 International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999.

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