

Strasbourg, 10 November 2006

**Consultative Council of European Judges (CCJE)**

**Opinion no 8 (2006) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on “the role of judges in the protection of the rule of law and human rights in the context of terrorism”**

This Opinion has been adopted by the CCJE at its 7th meeting (Strasbourg, 8-10 November 2006).

**A. INTRODUCTION**

**a. General context**

1. In order to implement the Action Plan adopted at the 3<sup>rd</sup> Summit of the Heads of state and Government of the Council of Europe<sup>1</sup>, inviting European states to ensure an efficient protection of human rights while intensifying the fight against terrorism, the Committee of Ministers entrusted the Consultative Council of European Judges (CCJE) with the task to adopt in 2006 an Opinion on *the role of the Judge and the balance between protection of the public and human rights, in the context of the fight against terrorism*<sup>2</sup>.

2. The Council of Europe has made specific efforts in the fight against terrorism, in order to strike a proper balance between the safeguard of individual rights and freedoms and public security. The Council of Europe’s actions are based on three objectives:

- strengthening legal action against terrorism ;
- safeguarding fundamental democratic values;
- addressing the causes of terrorism.

3. This specific action has resulted in a number of legal instruments of the Council of Europe, which are *inter alia* the following:

- European Convention on the Suppression of Terrorism [ETS No. 90 ] and Amending Protocol [ETS No. 190 ] ;
- European Convention on Extradition [ETS No. 24 ] and first and second Additional Protocols [ETS No. 86 and ETS No. 98 ] ;
- European Convention on Mutual Assistance in Criminal Matters [ETS No. 30 ] and first and second Additional Protocols [ETS No. 99 and ETS No. 182 ] ;
- European Convention on the Transfer of Proceedings in Criminal Matters [ ETS No. 73] ;
- European Convention on the Compensation of Victims of Violent Crimes [ETS No. 116 ] ;
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime [ETS No. 141 ] ;
- Convention on Cybercrime [ETS No. 185] and Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems [ETS No. 189 ] ;
- Council of Europe Convention on the Prevention of Terrorism [CETS No. 196] ;
- Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism [CETS No. 198].

4. In the context of this Opinion, the CCJE also refers to other relevant international instruments by the European Union (see in particular the EU Action Plan on combating terrorism)<sup>3</sup> and by the United Nations, and *inter alia*:

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973 ;
- International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979 ;
- International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997 ;
- International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999 ;
- International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005 ;
- Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963 ;
- Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970 ;
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971 ;
- Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980 ;
- Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988 ;
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988 ;
- 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 ;
- Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991.

5. As some of their provisions are relevant in this specific context, the CCJE also wishes to recall the Geneva Conventions of 12 August 1949:

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- Convention (III) relative to the Treatment of Prisoners of War;
- Convention (IV) relative to the Protection of Civilian Persons in Time of War.

6. The CCJE additionally wishes to recall its Opinion No. 6 (2004) on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement and Opinion No. 7 (2005) on justice and society.

#### **b. Reconciliation of Human Rights with the need to take measures against terrorism**

7. The Council of Europe has already underlined on several occasions that the fight against terrorism is possible, while respecting human rights.

8. With this aim in July 2002 the Committee of Ministers adopted<sup>4</sup> the Guidelines on human rights and the fight against terrorism. These guidelines affirm the obligation of the state to protect everyone against terrorism, while reiterating the need to avoid arbitrary measures, and to ensure that all measures taken to combat terrorism be lawful, and that torture be prohibited.

9. The legal 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 the compensation of victims.

10. Pursuant to this, in March 2005 the Committee of Ministers adopted<sup>5</sup> the Guidelines on the protection of victims of terrorist acts which recognise their suffering and the need to support them.

11. Everyday experience and current events show that, while terrorism is not a new problem, it has recently taken on an unprecedented international scale. Fighting terrorism is a specific and particularly difficult challenge for the states and law enforcement agencies and subsequently for the court system, which must react creatively, within the framework of the European Convention of Human Rights.

12. There is an obvious conflict between terrorism and the exercise of individual rights and freedoms because terrorism not only seriously jeopardises fundamental rights, including the right to life and to bodily integrity, and undermines the principles of rule of law and pluralist democracy, but it also is likely to lead states to impose restrictions which themselves, unless care is taken, might be detrimental to human rights.

13. Within this framework the CCJE has considered it appropriate, as a body composed solely of judges, to examine the role of the judge in the protection of the Rule of law and Human Rights in the context of terrorism.

14. The CCJE considers that the judge, charged with the dual functions of dealing with transgressions of the law and protecting constitutional rights and freedoms of individuals, must have an essential role in the legal frameworks devised by the states, and must be granted all necessary powers to fruitfully perform such tasks.

15. The CCJE considers that, if terrorism must be regarded as creating a special situation justifying temporary and specific measures which limit certain rights because of the exceptional danger it poses, these measures must be determined by the law, be necessary and proportionate to the aims of a democratic society (see, as regards the right of expression, Article 10 paragraph 2 of the European Convention of Human Rights, and, in general, principle 3 of the Guidelines on human rights and the fight against terrorism), and be subject to scrutiny and control with regard to their legitimacy by those judges that, according the legal traditions of the several states, ordinarily have jurisdiction in the area of the law concerned (civil, criminal or administrative courts – as opposed to *tribunaux d'exception* operating outside the ordinary legal system – see also paragraphs 26, 33-34 and 42 and following below).

16. These measures may in no case infringe the citizens' rights and freedoms to such an extent that the basic principles of democratic societies are themselves put at risk.

17. In view of the above general considerations, it is appropriate to examine the implications of measures that may be taken within the frameworks of administrative law (part B) and criminal law (part C) in the fight against terrorism, and also the role of the judge in the protection of freedom of expression (part D).

## **B. ADMINISTRATIVE LAW MEASURES**

18. In the discharge of their duty to protect their populations by preventing terrorist acts, states may through their administrative authorities take measures which are distinct from the criminal sanctions applied to terrorist offences already committed.

19. Deportation of foreigners, visa and residence permits requirements, identity controls, prohibition of associations, prohibition of assemblies, wire-tapping, installation of video-cameras and monitoring activities by use of information technology are all examples of such preventive measures.

20. Such preventive measures - like penal measures - require that a balance be maintained between the obligation to protect people against terrorist acts and the obligation to safeguard human rights.

21. Judges should have a very important role to play in ensuring that such a balance is properly struck. Of course, it is primarily for the states to enact and the administrative authorities to apply the measures necessary to strike such a balance. When the courts take due account of the legislation passed to combat perceived terrorist threats, such legislation and administrative actions must be subject to judicial scrutiny and review to ensure that they are legal, necessary and proportionate.
22. In this context international and European legal instruments must be observed, including the obligations which stem from the European Convention on Human Rights. The protection of national security may result in the restriction of some individual rights of the Convention<sup>6</sup>.
23. Preventive measures against terrorism must, however, never breach fundamental rights such as right to life (Article 2 of the European Convention on Human Rights) or prohibition of torture or inhuman or degrading treatment or punishment (Article 3 of the European Convention on Human Rights).
24. With respect to Article 3, the CCJE notes that the European Court of Human Rights states that terrorism cannot justify derogation from the absolute prohibition of torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct<sup>7</sup>. The Court took the view that, in assessing whether there is a real risk of treatment in breach of Article 3 in expulsion cases, the fact that the person is perceived as a danger to the national security of the state is not a material consideration<sup>8</sup>.
25. Effective access to judicial review of administrative acts aimed at preventing terrorism should be ensured as provided by Recommendation [Rec\(2004\)20](#) of the Committee of Ministers to member states on judicial review of administrative acts<sup>9</sup>. To be effective under Article 13 of the European Convention on Human Rights the remedy should exist regardless of the question whether the person concerned is perceived as a danger to national security<sup>10</sup>.
26. Judicial review comprises the review of any violation of law by those judges that, according to the legal traditions of the several states, ordinarily have jurisdiction in the area of the law concerned (for this and the following requirements, see [Rec\(2004\)20](#) mentioned in paragraph 25). The court – usually a civil or an administrative court – should be in a position to examine all of the legal and factual issues and should not be bound by the fact-finding of the authorities.
27. The right to a fair hearing in particular shall be guaranteed (Article 6 of the European Convention on Human Rights). This implies *inter alia* that there shall be equality of arms between the parties to the proceedings and that the proceedings shall be adversarial in nature.
28. The right to a fair hearing requires that all evidence admitted by the court should in principle be made available to the parties with a view to adversarial arguments<sup>11</sup>. The question arises as to what extent limitations to access to documents, witnesses or other sources of evidence might be admissible, if security reasons are involved. When access to evidence is granted to lawyers and not to the parties personally, because direct disclosure to persons concerned of sources of evidence may jeopardise the public interest, potentially difficult issues arise as to whether it is or not a substantial limitation of effective remedy and of defense<sup>12</sup>. Whatever the solution might be as regards access to evidence by the parties and defence lawyers, the CCJE is of the opinion that no limitations should apply to the possibility for the judge to have direct and personal access to documents, witnesses and other sources of evidence, in order to allow the court to ascertain all relevant facts and thus rule on an effective remedy (Article 13 of the European Convention on Human Rights).
29. The above stated principles also apply to the decisions concerning expulsion or deportation of an alien or refusal of a residence permit or of any form of protection (for example refugee status or subsidiary protection), if charges of a terrorist danger are involved.

30. Although Article 6 of the European Convention on Human Rights is not applicable as regards expulsion and deportation of aliens,<sup>13</sup> the right to a fair hearing has to be observed also with respect to these measures (see Recommendation [Rec\(2004\)20](#), paragraph 4).

31. The CCJE considers that similar judicial supervisory powers should be effectively guaranteed with regard to the application of limitations to aliens' freedom of movement pending procedures of expulsion or deportation. In addition, surveillance on conditions of such limitations should be guaranteed on a similar basis as for detention conditions.

32. At any rate no irreparable action can be taken while proceedings are pending<sup>14</sup>. This means that a deportation during proceedings is never admissible if absolute rights such as those protected by Article 2 or Article 3 of the European Convention on Human Rights are at risk<sup>15</sup>. Interests of public order or national security – as for example mentioned by Article 1 of the Protocol No. 7 to the European Convention on Human Rights of 22 November 1984 – are immaterial, if absolute rights are involved.

33. The CCJE considers that, because of the delicate task of guaranteeing fundamental rights and freedoms, supervision of all administrative law measures concerning expulsion of aliens (as well as their provisional surveillance), visa requirements, identity controls, prohibition of association, prohibition of assemblies, wire-tapping, installation of video-cameras, the search for persons by use of information technology, should be entrusted to ordinary courts (including administrative courts) composed of professional judges, established by the law, with full guarantees of independence.

34. The task of providing an effective remedy may only be entrusted to the ordinary judiciary and/or judges, as they are established according to the legal traditions of some countries, having specialised knowledge (e.g. administrative judges – see paragraph 26 above).

### **C. CRIMINAL LAW MEASURES**

35. The need for a response to acts of terrorism by criminal law measures has long since been affirmed in Council of Europe texts (see Recommendation 703(1973) of the Parliamentary Assembly on international terrorism); such a response entails the taking by the states of appropriate measures concerning substantive law (a); part (b) will be devoted to the unchanged role of the judge in terrorist criminal proceedings.

#### **a. Substantive law**

36. Many states have included the specific offence of "terrorism" in their domestic criminal laws, thus reflecting a common desire expressed in various international instruments of the United Nations, the Council of Europe and the European Union.

37. In view of the gravity of the offences which are regarded as terrorist as well as of procedural consequences stemming from them, it is important that the basic principles of criminal law be applicable to terrorist offences as to any other criminal offence, and that the elements of such offence be clearly and precisely defined.

38. Compliance with these criteria is essential, not only for proof of guilt in offences involving direct attack on persons or property, but also in any case in which domestic legislations provide for classifying certain other conducts, such as preparation for or financing of terrorist activities, as terrorist.

39. As terrorism does not respect national boundaries, the states' legal response to it must be international. Existing international legal instruments in this field provide a common normative basis for the fight against terrorism. It would assist national judges, especially in the field of inter-state cooperation (e.g. in relation to exchange of information and judicial assistance), if the international community were to develop agreed definitions of terrorist offences conforming to the standards of Article 7 of the European Convention on Human Rights. Judges,

as interpreters of the law, should - on their part - keep into account the international dimension of the phenomenon when applying the law.

### **b. The role of the judge remains unchanged in terrorist criminal proceedings**

40. In the context of criminal law also, judges have a central role in ensuring that a proper balance is struck, as regards both substantive and procedural law, between the need to detect and pursue offences of terrorism and the safeguarding of the human rights of those suspected of and charged with such offences.

41. Having regard to the above mentioned needs, some questions concerning the role of the judge in proceedings in the field of terrorism may be addressed.

#### **i. The refusal of "*tribunaux d'exception*"**

42. The CCJE notes that a virtually universal response by European states to the requirement of a balance between security against terrorism and the safeguarding of human rights has been the refusal to establish "*tribunaux d'exception*" (see paragraph 15 above) as a reaction to the current threat posed by terrorism.

43. States should trust their existing court structures to strike such a balance - in compliance with the law generally applicable in democratic states, including international Conventions and in particular the European Convention of Human Rights.

44. The CCJE considers that the role of the judge in cases concerning terrorist acts must not differ from the role of the judge plays in relation to the other offences, and that the nature of the subject matter does not justify a departure from ordinary rules governing the courts' competence.

45. Nonetheless, the importance of terrorism suggests that crimes relating of category should be dealt with by courts having jurisdiction to hear and determine the most serious crimes, where such competence is divided between national courts.

46. The CCJE acknowledges that local circumstances or needs pertaining to judges' security may sometimes justify the recourse to specialised courts competent for terrorist cases.

47. At any rate, it is important that these particular courts are composed of independent judges and apply ordinary rules of procedure fully respecting the right of defence and, in principle, the right to a public hearing, in such a way that fairness of the proceeding is in all cases guaranteed.

48. It is necessary to avoid a situation where on the one hand investigators have specific expertise in the area of terrorism, but, on the other hand judges and public prosecutors may encounter difficulties because of a lack of information and knowledge.

49. Training of judges must address all the areas of criminal and financial law relevant for the understanding of terrorist activities, and must involve an international dimension with the aim of promoting creation of judicial networks that are essential for exchange of information and other forms of cross-border co-operation.

50. Training initiatives should also aim at emphasising the particular function of judges, who must always preserve a balance between the necessity of repressing crime and respect of fundamental rights even when dealing with terrorist activities.

#### **ii. The role of the judge during investigations**

51. The CCJE considers that, however serious the offence may be, the courts should, at all stages of investigations, ensure that restrictions of individual rights be limited to those strictly

necessary for the protection of public interest<sup>16</sup>. The courts should evaluate the validity and legitimacy of evidence collected by investigators and have the legal power to refuse evidence obtained by means of torture or inhuman or degrading treatment, or by violating the rights of the defence, or by other illegal actions. The courts should ensure that decisions concerning investigations be in accordance with the rules of fair trial and equality of arms.

52. Although investigations are conducted in some states by special information services, which are an essential instrument for investigation or prevention of crime, the activities of such information services must not develop in violation of applicable laws, and must be subjected to democratic control conforming to requirements of the European Convention of Human Rights<sup>17</sup>.

53. The CCJE considers that all orders of freezing, seizure or confiscation of assets, aimed at preventing financing of terrorism, should be strictly prescribed by law and ultimately be subject to the court's authorisation and regular supervision, as they can seriously infringe the rights of privacy and property.

54. The Council of Europe adopted a Recommendation [Rec\(2005\)10](#) of the Committee of Ministers to member states on special investigation techniques in relation to serious crimes including acts of terrorism<sup>18</sup>.

55. This recommendation stresses that use of special investigation techniques is a crucial tool in the context of fight against serious crimes, actually committed or at the preparatory stage, but it also stipulates that such techniques may be only resorted to within the framework and under conditions that must be clearly defined by the law, under adequate supervision of judicial authorities or other "independent bodies". The CCJE doubts that supervision may be possibly entrusted to the competence of "independent bodies" other than those judges that, according the legal traditions of the several states, ordinarily have jurisdiction in the area of the law concerned (see paragraph 26 above); the concept of "independent bodies" lacks precision and does not guarantee fairness of the proceeding as required by Art. 6 paragraph 1 of the European Convention of Human Rights.

56. The CCJE considers that such special investigation techniques must respect the principles of legality and proportionality; that they must in any case be viewed as temporary measures and their application should be regularly supervised (including, in principle, a previous authorisation) by the competent court.

### **iii. The role of the judge during detention**

57. The CCJE recalls that the provisions of Article 5 paragraphs 3 and 4 of the European Convention of Human Rights shall be respected as to pending trial detention and conviction of persons in relation to terrorist charges<sup>19</sup>. Detention is a sanction to be imposed by a court on persons whose guilt has been established. However, under exceptional cases, persons can be detained before a judicial decision has been taken as a preventive measure (custody, refusal of bail before a formal charge, etc., both before and during trial).

#### **· Detention of suspects**

58. As to custody or detention prior to a decision establishing guilt, the practice differs from state to state in the scope of the measures restricting human rights which each tolerates. Thus, while certain countries have, in terrorist cases, extended the period of police custody, or even detention on remand, for which the ordinary law provides, others do not intend to depart from the provisions of ordinary law.

59. As freedom of movement is one of fundamental rights of democratic states, the CCJE considers not only that measures likely to interfere with the exercise of this right must be clearly determined by the law, but also that judges – in their capacity as guarantors of

individual freedoms – must have the task to supervise custody and detention measures ordered before guilt has been established.

60. This supervision implies that the judge should be able to verify the existence of legal and factual conditions for detention (therein included the verification of suspicion grounds, on the basis of charges that should be readily made known to the person detained), to make sure that personal dignity and the right of defence be guaranteed, to ensure that restrictions to these rights made necessary by the nature of facts are strictly proportional to the goal to be achieved and that they do not adversely affect the principle itself of a right to defence, to test that the person detained be not subjected to torture or any other inhuman or degrading treatment, to declare as unlawful detention measures that are secret, or unlimited in duration (it being for the judge to set the period of detention), or that do not provide for appearance before a court established according to the law. If, in performing such functions, the judge learns that a person may have been subject to secret arrest, detention and/or transportation, he should refer the matter to the authorities responsible for criminal investigations.

#### · **Post trial detention**

61. As for detention of persons whose guilt has been established, the CCJE considers that the seriousness of terrorist crimes does not justify any derogation from general rules established by the law in the area of criminal proceedings and detention measures; in particular it cannot authorise a judge to apply a criminal sanction according to standards of evidence that derogate from general rules.

#### · **Detention conditions**

62. This Opinion is not the appropriate place to discuss conditions of detention, though this matter deserves further consideration in a future Opinion by the CCJE<sup>20</sup>. This subject reflects the difficulty of meeting the requirements of both human rights and protection of the public interest. In many countries there is a great temptation to give automatic priority to security matters, which may entail a risk of abuse.

63. The CCJE, for present purposes only, draws the attention to Recommendation [Rec\(2006\)2](#) of the Committee of Ministers to member states on the European Prison Rules, adopted on 11 January 2006.

64. Persons detained as terrorist suspects should be guaranteed prompt access to legal assistance and representation by a lawyer of their choice, wherever they are detained. Courts should be able to grant appropriate relief and make appropriate orders to ensure that detained persons are not subject to inhuman or degrading treatment or punishment and, to that end, should be able (if they so determine, also of their own motion) to inspect any place of detention and have free access to any person detained there.

#### **iv. The role of the judge in the protection of witnesses, victims and collaborators of justice**

65. Trials for terrorist offences are often based on testimony of people who are closely connected to terrorist groups and who are more vulnerable than others to the use of intimidation against them or against people close to them; this poses the question of protection of these persons.

66. Victims of terrorist acts should also be protected against pressures or threats that may be likely to prevent them from appearing in court.

67. Protection of witnesses would prove difficult on a merely national basis, given the conditions in the country where they are located. International co-operation which accords with standards that have already been developed in other fields is therefore necessary<sup>21</sup>.

68. A judge has to strike a balance between the need for protection of the witnesses/victims of the crime and the right of the defendant to a fair trial. This balance poses difficulties when the witnesses and victims are under a protection programme, in which cases contact between the suspects and/or their defence lawyers may be prevented, even during a trial.

69. The CCJE suggests that, since the role of the judge includes fully ensuring right to defence and equality of arms, judges – in cases in which witnesses are absent from court or anonymous and therefore the defendant was unable to challenge and question them - should base no conviction solely or to a decisive extent on the statements of witnesses to investigators.

70. Further challenges face the court systems when the fight against terrorism is based on elements obtained from intelligence services (often involving the transfrontier provision of intelligence). The protection of sources, witnesses and intelligence service members is there at stake. The CCJE considers that in this field similar principles as those mentioned in paragraph 69 must be applied.

71. On the other hand, the CCJE considers that the judge should also take into account the international legal provisions, including anti terrorist legislation, safeguarding the position of the victims of serious crimes, especially when they are witnesses in a case. It is for the judge to ensure at every stage of the procedure that all effective measures are taken for the alleged victims to fully exercise their rights while at the same time fully respecting the rights of the defendant. When the relevant power is not entrusted to other authorities, or in cases where such authorities fail to provide adequate measures, the judge should be able to ensure the safety of the victims, the protection of their family and private life, their access to justice, and fair treatment, free legal aid. No unreasonable limitation should be placed on such power by other organs of the state for financial or other reasons.

72. The CCJE also suggests that, when specific conditions to be set by the law are met, the victim be granted adequate compensation, for example from the state or by the confiscation of the property of the perpetrators in order to be used to compensate the victims<sup>22</sup>.

73. Finally the CCJE stresses that it is necessary for the state to ensure the safety of investigators, judges and personnel in the judiciary involved in dealing with terrorism matters.

#### **D. THE ROLE OF THE JUDGE IN THE PROTECTION OF FREEDOM OF EXPRESSION AND OTHER RIGHTS AND FREEDOMS**

74. Terrorism strikes at the very fabric of democracy.

75. Despite the increase of terrorist activities, the CCJE considers that the national judge should always respect the basic principles of the rule of law, which are essential in democratic society, including the freedom of expression and other individual rights. As the fight against terrorism must never lead to the undermining of the values and freedoms that terrorists intend to destroy, it is vital for democracies that courts remain the guardians of the crucial demarcating line between a democratic society and a society that fights back using methods that themselves unduly curtail freedom of expression or infringe other rights and freedoms, such as the rights of minorities or political freedoms.

76. In discussing the role of the judge, as interpreter of the law, in the process of identifying conducts coming under the definition of terrorism, the CCJE may make reference, e.g., to the Council Framework Decision 2002/475/JHA by which the European Union has required member states to treat as terrorist offences and to punish a list of national offences "which, given their nature or context, may seriously damage a country or an international organization where committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country of an international organization". Member states are also

required to make punishable intentional acts of "directing a terrorist group" or participating in its activities .... with knowledge that such participation will contribute to its criminal activities and to make punishable inciting or aiding or abetting, or generally attempting to commit any of the offences previously referred to.

77. However, recital (10) of the Framework Decision records that nothing in it is to be interpreted as being intended to reduce or restrict fundamental rights or freedoms (including the right of assembly and association, freedom of expression, the right to join trade unions, to strike and demonstrate, etc.); article 5 provides also that the penalties to be imposed must be not merely effective and dissuasive, but also proportionate. The CCJE shares such an approach.

78. In particular, the CCJE understands and accepts the need and duty of states to secure a free and safe society, but it considers that this should be achieved through the law and its due application without sacrificing fundamental freedoms.

79. Specific problems are posed by voices that seek to justify terrorism as a reaction to suggested political, ideological, religious and economic oppression in particular areas of the world. Since in some instances these conducts may represent a danger for democratic societies, the extended prohibition of expressions of praise or glorification ("*Apologie du terrorisme*") has thus become, in recent times, a significant additional response to the threat of terrorism.

80. A clear distinction exists in principle between statements or other conducts representing the exercise of fundamental rights and freedoms, even though highly contentious or politically motivated, and illegitimate incitement, encouragement, support or praise for acts of criminal terrorism. This distinction needs in the first instance to be drawn by legislatures and applied by the executive, but the way in which it is drawn and applied must remain susceptible to review by the courts. While the courts in a democracy can and should take account of the views of other branches of the state, they have an independent duty to consider the need for and proportionality of measures which may infringe fundamental rights guaranteed by the national constitution or the European Convention on Human Rights.

81. Terrorist offences should be defined in legislation and subject to the ordinary criminal law. The determination of whether a particular activity contravenes the law should also be made by the ordinary courts, in accordance with the rule of law and the European Convention on Human Rights and on the basis of evidence obtained by admissible means, not involving any improper pressure. Courts may take pre-emptive measures available in the civil and criminal law fields to prohibit or restrain the preparation or dissemination of material the issue or use of which would involve or incite the commission of a terrorist offence.

82. Judges face difficult and sometimes controversial decisions when determining whether national legislation complies with fundamental rights or freedoms and when determining whether particular conduct constitutes a terrorist offence within the scope of such legislation. The difficulties may be particularly acute when the issue is whether words or conduct amount to illegitimate incitement to commit a terrorist act, or to praising terrorism. Practice also shows that judges, on the basis of present definitions of terrorism at the national and international level, may face difficulties to determine whether certain violent political actions, usually committed or to be committed abroad, and/or their financing or the training or recruiting in order to commit the same, should be regarded as terrorist acts or should not, as may happen in some cases involving individual or collective self-defence under article 51 of the Charter of the United Nations.

83. Terrorist cases, and especially those posing the above mentioned difficulties, are usually closely followed by the media and the general public, often with criticism and debate concerning judicial decisions. The efforts of States to prevent terrorism have led to criminalising of certain acts the classification of which as a crime is separated by a thin line from actions which might constitute the exercise of freedom of expression or political

freedoms. The CCJE considers that the decision of the States to entrust judges the responsibility of making such distinction makes it necessary that such trials be conducted in a calm atmosphere.

84. It is for both politicians and the media to refrain from attempting to apply pressure on or to attack judges, beyond what may be considered legitimate criticism. It is the duty of an appropriate independent body to react to such attacks (see the CCJE's Opinion No. 6, paragraph C.13). The CCJE considers that the judiciary, on its part, should ensure that trials are conducted by well trained professional judges; appropriate training actions should help judges develop their understanding of terrorism and of its historical, political and social context.

85. The basic message is that the threats to security and the Rule of law posed by terrorism should not give rise to measures which themselves tend to undermine fundamental democratic values, human rights or principles of the Rule of law. This is a message which, if put into effect, reduces the risk that measures taken with a view to countering terrorism will themselves fuel new tensions or even promote terrorism itself. It is a message which needs to be understood and accepted in democracies by the public, politicians, media and courts alike.

### **SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS**

**In the light of the above considerations, the CCJE recommends that the states:**

**a. consult the national judiciaries when elaborating a legislation that might affect substantial and procedural rights and ensure that all administrative or repressive measures taken, which would affect the rights of people in the fight against terrorism, be controlled by an independent judicial authority;**

**b. refuse to establish *tribunaux d'exception* or legislation incompatible with universally recognised rights, either in the context of administrative actions to prevent acts of terrorism or in the context of a criminal trial ;**

**c. to be vigilant that the fundamental principles of criminal law apply in the same way to acts of terrorism as they do to any other offences, and to ensure that the constitutive elements of these offences are clearly and precisely defined;**

**d. to facilitate international cooperation in the fight against terrorism, particularly when elaborating, under the auspices of the international organizations, concerted definitions of offences related to terrorism;**

**e. to guarantee the security of witnesses and victims of acts of terrorism, as well as of investigators, judges and other judicial staff involved in these cases;**

**The CCJE also recommends that national judiciaries:**

**a. develop their understanding of terrorism and of its historical, political and social context, as well as their knowledge of relevant national and international legal instruments;**

**b. in discharging their functions as interpreters of the law and guarantors of individual rights and freedoms, ensure, on the one hand, that the offence of "terrorism" (including incitement, preparations to commit such acts and the financing of such acts) reaches the goal set by legislators, and, on the other hand, that prosecutions for "terrorism" are not abused in its scope, and to see that the protection of the public interest is reconciled with respect for human rights and fundamental freedoms;**

**c. to constantly ensure that a balance is struck between the need to protect witnesses and the victims of acts of terrorism and the rights of the persons involved in these acts.**

<sup>1</sup> Warsaw, 16 - 17 May 2005.

<sup>2</sup> 956th meeting of Ministers' Deputies (15 February 2006).

<sup>3</sup> Council of the European Union, 5771/1/06.

<sup>4</sup> 804th meeting of Ministers' Deputies, 11 July 2002.

<sup>5</sup> 917th meeting of Ministers' Deputies, 2 March 2002.

<sup>6</sup> Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), and Article 11 (freedom of assembly and association).

<sup>7</sup> See European Court of Human Rights, judgement *Chahal v. the United Kingdom* (15.11.1996), paragraph 79: "[the European Court of Human Rights] 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."

<sup>8</sup> See European Court of Human Rights, judgement *Chahal v. the United Kingdom* (15.11.1996), paragraphs 80 and 149.

<sup>9</sup> Adopted by the Committee of Ministers on 15 December 2004.

<sup>10</sup> See European Court of Human Rights, judgement *Chahal v. the United Kingdom* (15.11.1996), paragraph 151: "In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny 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."

<sup>11</sup> See Recommendation [Rec\(2004\)20](#): The proceedings should be adversarial in nature. All evidence admitted by the tribunal should in principle be made available to the parties with a view to adversarial argument (paragraph B.4.d).

<sup>12</sup> The European Court of Human Rights deals with the access to evidence of the parties and defence lawyers in the *Chahal* judgement by referring indirectly to the Canadian legislation: ""The intervenors (...) were all of the view that judicial review did not constitute an effective remedy in cases involving national security. Article 13 required at least that some independent body should be appraised of all the facts and evidence and entitled to reach a decision which would be binding on the Secretary of State. In this connection, Amnesty International, Liberty, the AIRE Centre and JCWI (...) drew the Court's attention to the procedure applied in such cases in Canada. Under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988), a Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant."

<sup>13</sup> See, for example, European Court of Human Rights, judgement *Maaouia v. France* (5.10.2000), paragraph 40: "The Court concludes that decisions regarding the 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".

<sup>14</sup> See European Court of Human Rights, judgement *Mamatkulov and Askarom v. Turkey*, 4.02.2005, paragraph 124: "Indeed it can be said, that, whatever the legal system is question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending".

<sup>15</sup> See also the already mentioned *Chahal* judgement, according to which the Convention prohibits in absolute terms torture.

<sup>16</sup> See also, for the role that the public prosecution services may play in ensuring protection of human rights, Recommendation [Rec\(2000\)19](#) on the role of public prosecution in the criminal justice. The CCJE will examine in detail, in a future opinion, the relations between the judiciary and public prosecution (see Framework Global action plan for Judges in Europe, Document CCJE (2001) 24).

<sup>17</sup> See for instance: "Venice Commission: Internal Security Services in Europe" (CDL/Inf (98)6).

<sup>18</sup> According to the Recommendation [Rec\(2005\)10](#), special investigation techniques are: "techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons".

<sup>19</sup> Article 5 paragraph 3 of the European Convention of Human Rights: "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." ; Article 5 paragraph 4 of the European Convention of Human Rights: "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." Furthermore, in the judgement *Brogan and others v. the United Kingdom* (29.11.1988), the European Court of Human Rights states in paragraph 61 that the investigation of terrorist offences undoubtedly presents the authorities with special problems. The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in the case at hand "has the effect of prolonging the period during which the authorities may, without violating Article 5 paragraph 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 paragraph 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 paragraph 3 dispensing altogether with "prompt" judicial control". The Court adds that the scope for flexibility in interpreting and applying the notion of "promptness" is very limited (paragraph 62). In the Court's view, even the shortest of the four periods of detention in the case at hand, four days and six hours spent in police custody, falls outside the strict constraints as to time permitted by the first part of Article 5 paragraph 3. "The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 paragraph 3."

<sup>20</sup> See Framework Global action plan for Judges in Europe, adopted by the Committee of Ministers at its 740<sup>th</sup> meeting, Document CCJE (2001) 24.

<sup>21</sup> Recommendation [Rec\(2005\)9](#) of the Committee of Ministers of the Council of Europe to Member States on the protection of witnesses and collaborators of justice. See also Guidelines on the Protection of Victims of Terrorist Acts, adopted by the Committee of Ministers of the Council of Europe on 2 March 2005, Recommendation [Rec\(85\)11](#) of the Committee of Ministers to Member States on the position of the victim in the framework of criminal law and procedure and Recommendation [Rec\(97\)13](#) of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defence.

<sup>22</sup> See Guidelines on the protection of victims of terrorist acts: "Victims of terrorist acts should receive fair, appropriate and timely compensation for the damages which they suffered. When compensation is not available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State on the territory of which the terrorist act happened must contribute to the compensation of victims for direct physical or psychological harm, irrespective of their nationality (principle 7.1)".