

HUMAN RIGHTS WATCH
rue Van Campenhout 15
1000 Brussels, Belgium
Telephone: 32-2-732-2009
Fax: 32-2-732-0471
Email: hrwatcheu@hrw.org
Website: http://www.hrw.org

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HUMAN
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WATCH

Brussels, November 8 2001

Dear Minister,

VSGW

Human Rights Watch is deeply concerned that the European Union's recent proposals to combat terrorism threaten to violate basic human rights. While we understand the need to develop E.U.-wide security measures, we also believe that such measures must ensure that fundamental civil liberties and the rights of refugees and migrants are not undermined in the process.

Please find enclosed the Human Rights Watch commentary on the proposed E.U. security measures, *'Human Rights Implications of European Union Internal Security Proposals and Measures in the aftermath of the 11 September Attacks in the United States'*. Human Rights Watch is seriously concerned with the broad definition of terrorism that threatens freedom of speech, assembly and association; the lack of fair trial guarantees in the proposal for a European arrest warrant; and threats to the international refugee protection system. Human Rights Watch also urges the E.U. to hold accountable international criminals who may be responsible for terrorist acts under the doctrine of universal jurisdiction.

Due to the unprecedented speed at which the proposals are being debated, there is a clear need for input from civil society. Human Rights Watch also calls on the E.U. to convene an expert panel to review all new security proposals for compliance with international human rights standards. Actions by E.U. member states should uphold democratic principles, make governments accountable to European and international law, and ensure that personal liberty and other fundamental rights are protected.

We thank you in advance for your attention to our concerns regarding these matters, and we stand ready to respond to your requests for additional information. You can contact Julia Hall (Tel. +1.716.803.1127 or Email: Hallj@hrw.org) or Lotte Leicht (Tel. +32.2.732.2009 or Email: lotte.leicht@skynet.be).

Sincere yours,


Lotte Leicht

Brussels Director

Human Rights Watch


Elizabeth Andersen

Director Europe and Central Asia Division

Human Rights Watch

HUMAN RIGHTS WATCH

350 Fifth Avenue, 34th Floor
New York, NY 10118
Phone: 212-290-4700
Fax: 212-736-1300
hrwnyc@hrw.org
Website: <http://www.hrw.org>

EUROPE AND CENTRAL ASIA DIVISION

Elizabeth Andersen
Executive Director
Rachel Denber
Deputy Director
Diederik Lohman
Moscow Office Director
Julia Hall
Senior Researcher
Alexander Anderson
Matilda Bogner
Julie Chadbourne
Bogdan Ivanisevic
Darian Pavii
Acacia Shields
Jonathan Sugden
Research Associates
Alexander Petrov
Deputy Director, Moscow Office
Liudmila Beiova
Rachel Bien
Elizabeth Eagen
Giorgi Gogia
Maria Pulzetti
As

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**HUMAN
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HUMAN RIGHTS WATCH

Human Rights Implications of European Union Internal Security Proposals and Measures in the Aftermath of the 11 September Attacks in the United States

November 2001

Context Post-September 11: General Concerns

Human Rights Watch understands the interest in developing European Union-wide internal security measures in the aftermath of the 11 September attacks in the United States. However, a number of recent E.U. proposals to combat terrorism and other proposed internal security measures contain elements that raise serious human rights concerns. Accordingly, we urge the E.U. to proceed with caution to ensure that any security measures taken provide adequate safeguards to guarantee the protection of individual civil liberties. Moreover, we recommend that any new E.U. legislation contain a specific provision guaranteeing that it is in full conformity with international human rights law, international humanitarian law, and international refugee protection standards.

The European Commission's proposed new security measures to combat terrorism and to establish a European arrest warrant have been introduced and are being deliberated at an unprecedented pace. The commission documents as well as the 20 September conclusions adopted by the Justice and Home Affairs Council and the conclusions and plan of action adopted at the extraordinary session of the European Council on 21 September contain provisions that implicate member states' obligations under international and European human rights law. The declaration issued by E.U. member states at the extraordinary European Council meeting at Ghent on 19 October notes that numerous operations detailed in the 21 September action plan had already been initiated and urged the council to move forward with additional measures "which must be put into effect as soon as possible." Human Rights Watch is concerned that in the rush to agree these proposals, critical public debate and input from civil society are being sacrificed. This undermines ongoing efforts to create transparent and

participatory processes meant to give nationals of member states a stake in the E.U. The lack of critical consideration of the impact of these proposals on citizens, refugees, and migrants in the E.U. could result in laws and policies that erode essential liberties and freedoms.

The conclusions adopted by the Justice and Home Affairs Council on 20 September included an invitation to the commission "to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments" (Conclusion 29). Human Rights Watch fears that this proposal may result in the exclusion or expulsion of refugees and migrants from member states without adequate safeguards. Government statements in the aftermath of 11 September equating the fight against illegal immigration with the war on terrorism raise concern that proposed anti-terrorism measures coupled with changes in immigration and asylum policy and practices are keyed toward excluding refugees and migrants from Western Europe, possibly undermining the right to seek asylum and the fundamental human rights of migrants, refugees, and asylum seekers. Thus, the E.U. must clarify for member states their obligations to comply with such established principles of customary international law as nonrefoulement and the prohibition against arbitrary detention.

While it is crucial for the E.U. to reaffirm its commitment to individual human rights and refugee protection in the face of terrorist acts and other security threats, the E.U. can also play a role in answering the call for accountability for international crimes, such as crimes against humanity, that permit the prosecution of a suspect in any country under the doctrine of universal jurisdiction. E.U. member states must comply with the principle of nonrefoulement and remain firm in their rejection of extraditing any person to a jurisdiction where the death penalty might be imposed. However, complying with these obligations and commitments should not amount to impunity for persons who have committed international crimes and are apprehended in member states. If the evidence against a suspect meets internationally recognized standards and no other relevant jurisdiction can offer a suspect a fair trial by an independent and impartial tribunal, E.U. member states should examine their responsibility to bring international criminals to trial in the member state in which the suspect is found under the doctrine of universal jurisdiction.

E.U. Proposals: Specific Concerns

Definition of Terrorism

The European Commission Proposal for a Council Framework Decision to Combat Terrorism of 19 September 2001 provides a broad definition of terrorism that could be used against legitimate dissent. To be qualified as a "terrorist offence," the proposal requires the intentional commission of an act against one or more countries, their institutions or people by an individual or group with "the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of these countries." The explanatory memorandum accompanying the proposal contains a list of terrorist offences that includes "unlawful seizure of or damage to" public transport, government facilities, places of public use, and public and private property, including "acts of urban violence."

The proposal's definition as it stands would cover numerous activities that appear to require a public order – not an anti-terrorist – response. Human Rights Watch is concerned that public demonstrations and protests could be subject to the provisions of the proposal, thus quelling legitimate peaceful dissent. Moreover, the commission proposal makes “promoting of, supporting of or participating in a terrorist group” a criminal offense with a penalty of up to seven years imprisonment. Human Rights Watch is deeply concerned that broad, undefined terms such as “promoting” will result in findings of “guilt by association” for persons sharing the same political ideology, nationality, or ethnicity as persons who commit acts of terrorism.

Concerns regarding the broad definition of terrorism, the motivation for acts of political violence, and the possibility of guilt by association under the commission proposal were expressed in a letter from Human Rights Watch to E.U. officials on 27 September 2001. In mid-October, Human Rights Watch met with E.U. officials to advocate for a more precise definition. One official informed Human Rights Watch that the definition of terrorism in the original commission proposal had been vigorously debated at the Justice and Home Affairs Council meeting on 16 October as some member states believed it to be too broad and thus open to abuse. Human Rights Watch encourages all member states to ensure that the definition of terrorism at the E.U. level is precisely worded to ensure that it cannot be used either as a deterrent to suppress legitimate dissent and/or protest or to unduly infringe on the rights to freedom of expression, assembly, and association.

European Arrest Warrant

The European Commission Proposal for Council Framework Decision on the European Arrest Warrant of 19 September 2001 is meant to replace the current system of extradition between E.U. member states. The state-to-state nature of extradition is thus replaced by the principle of mutual recognition of court orders and/or judgments giving rise to court-to-court relations between judicial authorities of member states. The proposal provides that the arrest warrant will be issued based on an order or decision from a court empaneled in the issuing state and that the warrant will be honored by the so-called surrendering state. Human Rights Watch is concerned that the European arrest warrant proposal may not be in complete conformity with internationally recognized fair trial standards that afford persons in the criminal justice system of any state basic protections against arbitrary action or abuse by that state.

The new warrant system is predicated on the notion that there is uniform adherence throughout the E.U. to the fair trial standards enshrined in the European Convention on Human Rights. However, even a cursory survey of European Court of Human Rights cases from the last decade indicates that fair trial standards have been frequently violated in a number of E.U. member states and in most of the forty-three Council of Europe member states governed by the ECHR, including many E.U. accession countries. Human Rights Watch is deeply concerned that adequate safeguards be included in the arrest warrant proposal to ensure that fair trial standards will be observed in any procedure in the issuing and surrendering states. This is particularly important with respect to some of the accession states that will undoubtedly join the E.U. before they can claim to be in conformity with internationally recognized fair trial standards.

The warrant proposal should also contain an explicit reference that prohibits the return of any person to a country where he or she has not or will not receive a fair trial in conformity with international standards or who would be subject to serious human rights violations, including torture or the application of the death penalty.

Refugees and Migrants:

Protection Obligations, Human Rights, and Security Concerns

The Conclusions adopted by the extraordinary meeting of the Justice and Home Affairs Council of 20 September 2001 included an invitation to the commission "to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments" (Conclusion 29). This conclusion suggests that E.U. authorities will be exploring ways in which member states can expel or exclude from their territory a refugee or migrant suspected of past criminal activity or who poses a threat to the national security of a country. Human Rights Watch urges member states to consider fully their obligations under the 1951 Convention Relating to the Status of Refugees (Refugee Convention), the European Convention on Human Rights (ECHR), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 United Nations Convention against Torture (CAT), and under customary international law in their deliberations regarding the exclusion or expulsion of persons suspected of terrorist activity from the territories of member states.

The guiding principle underpinning international refugee protection standards is the prohibition against refoulement, enshrined in Article 33 of the 1951 Refugee Convention which states that no convention party "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 principle of nonrefoulement applies both to direct refoulement to a particular country and to indirect measures that may effectively return a refugee to a country where his life or freedom would be threatened.

The Refugee Convention does contain provisions permitting the exclusion of a person from refugee status—and thus from the protection of the principle of nonrefoulement—if there are "serious reasons" to consider that he has committed a) a crime against peace, a war crime or a crime against humanity; b) a past serious non-political crime outside the country of refuge; or c) acts contrary to the purposes and principles of the United Nations [Article 1(f)(a-c)]. These exclusionary clauses are of an exceptional nature, however, and should be applied strictly and in full accordance with their terms. Article 1(f) indicates a high evidentiary standard ("serious reasons") and the requirement that the crimes were committed by the individual being considered for exclusion (not simply by an organization with which the individual might be associated). Moreover, standard procedural guarantees under international criminal law should apply to exclusion proceedings, including the right of the individual to defend against the charge that he or she committed criminal acts of the grave nature contemplated by the exclusionary clauses and safeguards against discriminatory exclusions based solely on nationality, ethnicity or religion.

The Refugee Convention also contemplates the expulsion of a refugee from a country of asylum for national security purposes. Article 32 permits the expulsion of a refugee on grounds

of national security or public order pursuant only to a decision reached in accordance with internationally recognized procedural guarantees. However, under no circumstances can a refugee subject to expulsion under Article 32 be sent to a place where his life or freedom would be threatened. The general principle of nonrefoulement therefore qualifies Article 32, so that even where national security concerns dictate expulsion, a refugee may not be returned, directly or indirectly (i.e. sent to another country where his life or freedom would be threatened).

The only instance provided for under the Refugee Convention in which a host country could expel a recognized refugee and return him to a place where his life or freedom would be threatened is under Article 33. Article 33(2) states that protection against refoulement "may not 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 judgment of a particularly serious crime, constitutes a danger to the community of that country." The two qualifications included in this provision, however, require a direct link between the presence of the refugee within a territory and a national security threat to that country. Therefore, a refugee is still protected against refoulement if he does not presently constitute a threat to the security of the country of asylum. Although no procedural guarantees are explicitly articulated in Article 33, Human Rights Watch believes that the procedural guarantees provided for expulsions under Article 32 should also apply to Article 33 because the potential consequences of Article 33(2) are much more severe than those stemming from Article 32.

E.U. member states must consider their international refugee protection obligations not simply in light of the Refugee Convention, however, but also with respect to their obligations under European and international law. The principle of nonrefoulement is enshrined in Article 3 of the European Convention on Human Rights (ECHR), Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the U.N. Convention against Torture (CAT), and it has risen to the level of customary international law. The U.N. Human Rights Committee and other authoritative interpreters of these conventions have said that even a person excluded from protection under the Refugee Convention cannot be sent to a place where he will be subjected to various serious abuses, including torture, or inhuman or degrading treatment. Article 3 of the European Convention on Human Rights (ECHR) has been interpreted by the European Court of Human Rights to prohibit signatories from returning any person to a place where he would be "subjected to torture or to inhuman or degrading treatment or punishment." Parties to the ECHR, including all E.U. member states, cannot derogate from Article 3. The prohibition against refoulement enshrined in Article 3 is an absolute requirement for compliance with the convention. The U.N. Convention against Torture expressly prohibits a state party from expelling, returning, or extraditing a person "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." In General Comment No. 1 regarding the individual communications procedure under the CAT and states parties obligations under Article 3, the U.N. committee against torture has interpreted the phrase "another State" to refer to either the state to which an individual concerned is being expelled, returned or extradited, as well as any State to which the individual may subsequently be expelled, returned or extradited.

Human Rights Watch urges E.U. members states to ensure that internal security measures introduced in the aftermath of the 11 September attacks do not undermine member states'

obligations under international refugee, human rights, and customary law—most importantly the prohibition against refoulement by which all member states are bound.

Arbitrary Detention

Some E.U. member states have proposed that persons suspected of acts of terrorism who cannot be returned to their own country or to a different country due to the Article 3 concerns detailed above, should be indefinitely detained as national security threats and released only when they no longer pose such a risk or at such time when a third country agrees to accept them and protect them from Article 3 violations. Proposals keyed toward indefinite detention would require member states to invoke their ability to derogate from the ECHR under Article 15 and then to officially derogate from Article 5 of the convention, which guarantees the right to liberty and security of person, and enshrines the prohibition against arbitrary detention.

Indefinite prolonged detention without charge or adequate access to judicial review amounts to arbitrary detention, a violation of both conventional and customary international law. Even in states of emergency, Human Rights Watch rejects the use of indefinite detention without charge in the absence of basic procedural guarantees against arbitrary detention (e.g. access to counsel, right to judicial review, etc.). Human Rights Watch is deeply concerned that any exploration of international protection obligations at the E.U. level in light of security concerns take account of the ways in which states might comply with certain rights guarantees such as the prohibition against refoulement, at the expense of others, in this case the prohibition against arbitrary detention.

The Death Penalty

Human Rights Watch views the European Union's progressive opposition to the death penalty and its attempts to persuade third countries to abolish capital punishment as a model of multilateral state action on behalf of human rights. In the aftermath of the 11 September attacks, we urge the E.U. to remain staunch in its opposition to the death penalty. We call upon the E.U. to continue to answer any request from a third country for the extradition of a person suspected of involvement in the attacks by seeking conclusive confirmation that the death penalty will not be imposed if the suspect is to be extradited.

Moreover, we are deeply concerned that E.U. members, under pressure from third countries, may seek to avoid securing such confirmation simply by using the current exemptions provided in refugee law to exclude or expel persons based on past criminal activity or national security concerns, thus potentially putting such individuals in danger of transfer to a jurisdiction where the death penalty could be imposed.

Accountability for International Crimes in the European Union

In the aftermath of the September 11 attacks, the E.U. also has the opportunity to confirm its commitment to holding accountable those persons responsible for the most egregious international crimes. Customary and conventional international law hold that certain crimes (crimes against humanity, genocide, torture, and war crimes) are so abhorrent that—in the name

of the international community—any state can prosecute these crimes, based on the doctrine of universal jurisdiction, regardless of where they were committed and by whom. While key E.U. member states have been at the forefront of the effort to establish an International Criminal Court (ICC) with jurisdiction over certain international crimes and violations of international humanitarian law, many member states have resisted the call to commit to the principle of universal jurisdiction and to enact enabling legislation to allow their own domestic courts to try perpetrators for international crimes.

All E.U. member states have ratified the U.N. Convention against Torture (CAT) and the Geneva Conventions. Some have enacted legislation to permit domestic prosecution of such crimes based on universal jurisdiction, while others have failed to adopt implementing legislation permitting prosecutions. This piecemeal approach to ending impunity for the most heinous international crimes has given rise to concerns that parts of the E.U. might serve as a “safe haven” for international criminals. In fact, the lack of a uniform approach to accountability for international crimes has, in the past, led to the failure of some E.U. member states to hold accountable war criminals and torturers who have found refuge in their countries.

Human Rights Watch and others consider the 11 September attacks to be crimes against humanity. U.N. High Commissioner for Human Rights Mary Robinson on 20 September stated:

Under existing norms of international criminal law the 11 September attacks in the US can be characterized as a crime against humanity, because of its large scale nature and because it was directed against the civilian population. The international nature of this crime creates a duty on all states to assist in bringing the culprits to justice.

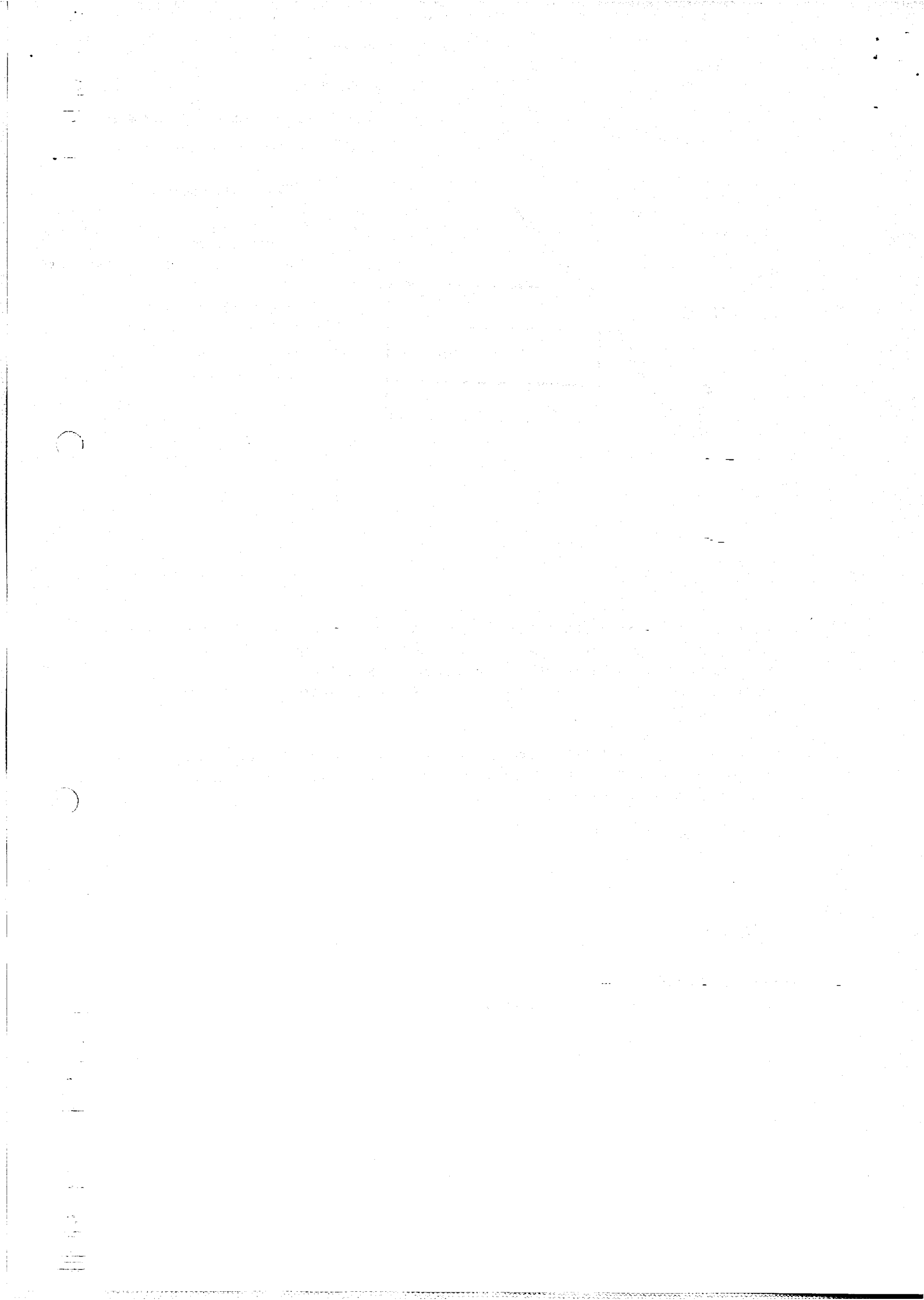
Crimes against humanity are defined as acts—such as murder, torture, rape, or inhumane acts—which form part of a widespread or systematic attack directed against a civilian population. Although most adjudicated cases of crimes against humanity address crimes committed in the context of armed conflict and organized under state authority, the Rome Statute of the International Criminal Court (ICC) and recent jurisprudence from the ad hoc international criminal tribunal Rwanda has held that crimes against humanity can be committed in armed conflict or in peacetime.

As noted above, crimes against humanity give rise to universal jurisdiction, meaning that any state may try suspected perpetrators, regardless of the nationality of the suspect or the location of the crime. Whether a state can take advantage of universal jurisdiction, however, depends on whether its domestic law gives such powers to its national courts. The courts of many E.U. member states lack the requisite powers to prosecute persons responsible for the worst international crimes, including crimes against humanity.

Human Rights Watch believes not only that the E.U. should uphold individual civil liberties and refugee protection in the face of growing concerns over internal security, but that it should explicitly make accountability and the prevention of the most egregious international crimes part of its commitment to create the “area of freedom, security and justice” contemplated by the 1999 Tampere European Council conclusions. In the face of serious and compelling obligations not to

return any person to a place where his or her life or physical well-being are threatened—and in light of the E.U.'s consistent opposition to extradite any person to a jurisdiction where the death penalty could be imposed—the E.U. must then take the necessary steps to ensure that no E.U. country becomes a safe haven for those responsible for crimes against humanity and other egregious violations of international criminal and humanitarian law.

To that end, Human Rights Watch recommends that, in addition to ensuring speedy ratification and entry into force of the ICC statute (in line with the newly adopted E.U. common position on the ICC), E.U. member states commit to the principle of universal jurisdiction and no safe haven for the perpetrators of crimes against humanity, genocide, torture, and war crimes. The E.U. should thus enact legislation giving the courts of all member states jurisdiction over these crimes, wherever committed. The legislation should designate the competent court to hear such cases, define the crimes in conformity with international law and enumerate appropriate penalties. Moreover, the legislation should require member states to cooperate fully with the efforts of other members to bring to justice those responsible for crimes in violation of international law. This can be done as part of the continuing effort to adopt implementing legislation for the ICC treaty.





Poul Skytte CHRISTOFFERSEN
 Permanent Representation of Denmark
 Rue d'Arlon 73
 B-1040
 BRUXELLES

VELLESREPRESENTATIONEN BRYSSEL		
		1 BILAG
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3 Gray's Inn Square
 Gray's Inn
 London
 WC1R 5AH
 Tel: 020 7520 5600
 Fax: 020 7520 5607
 Email: clerks@3gis.co.uk
 Website: www.3gis.co.uk

Your Excellency,

I wrote to you on 5 November 2001 regarding the above proposals. I stated that the ECBA would forward its observations on these proposals in due course. The ECBA has completed its consideration of the Commission's proposals on the European Arrest Warrant. I enclose a copy of the ECBA's observations. If you have any queries, please contact me.

We have not yet completed our observations on the proposals regarding combating terrorism. As soon as we have completed our deliberations on terrorism we shall forward our observations to you.

Yours sincerely

John

pp Rock Tansey QC
 Chair, European Criminal Bar Association

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<p><i>Introduction and General Matters</i></p> <p>The proposal for a Council Framework Decision [COM 2001/522) is prefaced by a detailed explanatory memorandum. The proposal refers to "the implications of mutual recognition" (paragraph 2).</p>		<ul style="list-style-type: none"> • This response recognises and builds on the fact that domestic States within the EU area cannot exist in isolation, but that EC/EU measures must strive to respect the wishes of Member States to preserve their national authority, constitutional principles, domestic legal systems, traditions and culture. Nevertheless, it is also recognised that law within the EU area will evolve in order to give effect to common positions held by Member States. • Crucially, this process requires law/policy makers to diligently ensure that standards applicable within the EU are of the highest, but consistent with overarching objectives of the EU to promote an area of freedom, justice, and democracy. It follows, that in as far as law must evolve in order to achieve those goals, that compromise should not admit a reduction of standards. Thus, Article 34 of the EU Treaty (that enables measures to be binding on Member States as to the results to be achieved, but not as to the form and methods in order to achieve them) should be purposively construed in that light. The incorporation of minimum standards in a EU/EC legislative measure is as much a part of the 'result', as the 'result' itself. • Mutual recognition is an important concept in the development of law within the EU. It is also one means by which the requisite minimum standards may be established. Given that mutual recognition is rooted in

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		<p>trust and respect for the constitutional and legal principles of national legal systems, it is essential that Member States engender confidence (and therefore trust) by incorporating minimum standards into their national law.</p> <ul style="list-style-type: none"> • For those reasons, we do not believe that it is appropriate to regard mutual recognition as recognising, merely <i>ipso facto</i>, acts or decisions of a Member State. • The concept of mutual recognition will itself develop. There is, we believe, a case for a thorough EU audit (with periodic reviews) of domestic legal systems. We do not believe that the ECHR, and the Charter of Fundamental Rights of the European Union, are sufficient to ensure the existence of a uniform level of fairness and justice in all Member States. Those two instruments provide irreducible minimums. On the other hand, we do not subscribe to the view that they are necessarily confined to procedural rights. Individual rights can emerge and/or be protected under the umbrella of each instrument. Nevertheless, in the absence of audits, there is a need for this Framework Directive to address problem areas, and to include a package of safeguards, applicable at national level, to avoid standards being determined by the State that has the least number of legal protections and rights. • We broadly welcome the proposal that the procedure should be primarily judicial. We

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		<p>do not believe that a prosecuting agency [which in any event excludes the police: see note (b) to article 3 of the explanatory memorandum] should be a 'judicial authority' for the purposes of the Framework Decision.</p> <ul style="list-style-type: none"> • We are very concerned about the proposed abolition of the 'speciality rule': see paragraph 4.6 of the explanatory memorandum. It is undesirable, that upon surrender, the requested person may find himself tried for offences other than (or in addition to) those that were the subject of an EAW. We also believe that it is undesirable that there will be little or no bar to the requested person being transferred to a third State – a process that carries risks of unfair process in his case.
<p><i>Article 1 – Subject-matter</i> The purpose of this Framework Decision is to establish the rules under which a Member State shall execute in its territory a European arrest warrant issued by a judicial authority in another Member State.</p>	<ul style="list-style-type: none"> • Whether the purpose should be as absolute as suggested. • Whether there is confidence in the criminal justice system of member states. 	<ul style="list-style-type: none"> • The framework assumes the existence of minimum safeguards and standards operating within the jurisdiction of Member States. Given that framework decisions operate within a widening single area, we question whether that is an assumption that is safe to make, and we advocate specific protections. We regard causes of 'races to the bottom' as detrimental to the aims and objectives of the EC/EU treaties that promote provide citizens with a high level of safety within an area of freedom, security and justice [EU Article 29 (ex Article K.1)].

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		<ul style="list-style-type: none"> The ECBA does not share the confidence implicit in the structure and content of the Framework decision. We submit that there should be a full audit of the criminal justice system of Member States, and that problems identified in such an audit, should be removed.
<p><i>Article 2 - Scope</i> A European arrest warrant may be issued for: (a) final judgements in criminal proceedings, and judgements in absentia, which involve deprivation of liberty or a detention order of at least four months in the issuing Member State; (b) other enforceable judicial decisions in criminal proceedings which involve deprivation of liberty and relate to an offence, which is punishable by deprivation of liberty or a detention order for a maximum period of at least twelve months in the issuing Member State.</p>	<ul style="list-style-type: none"> Whether "final judgements" should be narrowly defined for the purposes of the Decision. Whether specific protections should be included in the Decision relating to judgments in absentia. Whether the Decision should particularise with clarity other enforceable decisions. Whether the maximum period of 12 months is appropriate. 	<ul style="list-style-type: none"> Whilst recognising that sentencing is a matter within the appreciation of domestic courts in Member States, we suggest that the threshold of 4 months is too low and should be set at a minimum of 6 months. The court of the executing State should be required to examine the extent of the rights of the requested person (if any) to apply in the issuing State for the judgement made in absentia to be reconsidered, reopened, or reinvestigated. We question whether a warrant should be available in respect of fine defaulters or those subject to terms of imprisonment in default of payment of other orders including asset recovery orders. There should be a minimum period – not a maximum period. The least sentence should be 12 months.
<p><i>Article 3 - Definitions</i> For the purposes of this Framework Decision, the following definitions shall apply: (a) "European arrest warrant" means a request, issued by a judicial authority of a Member State,</p>	<ul style="list-style-type: none"> Whether the public prosecutor should be empowered to issue a request. 	<ul style="list-style-type: none"> The issuing of such a warrant is a major step that should attract the supervision of a court.

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<p>and addressed to any other Member State, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subject to a judgement or a judicial decision, as provided for in Article 2;</p> <p>(b) "issuing judicial authority" means the judge or the public prosecutor of a Member State, who has issued a European arrest warrant ;</p> <p>(c) "executing judicial authority" means the judge or the public prosecutor of a Member State in whose territory the requested person sojourns, who decides upon the execution of a European arrest warrant;</p> <p>(d) "judgement in absentia" means any judgement rendered by a court after criminal proceedings at the hearing of which the sentenced person was not personally present. It shall not include a judgement given in proceedings in which it is clearly established that the person was effectively served with a summons, in time to enable him or her to appear and to prepare his or her defence, but he or she deliberately decided not to be present or represented, unless it is established that his or her absence and the fact that he or she could not inform the judge thereof were due to reasons beyond his or her control;</p> <p>(e) "detention order" means any order involving deprivation of liberty which has been made in criminal proceedings in addition to or instead of a prison sentence;</p> <p>(f) "requested person" means a person in respect of whom a European arrest warrant is issued.</p>	<ul style="list-style-type: none"> • Whether separation of powers is appropriate. • Whether public prosecutor should be the appropriate authority for executing a Eurowarrant. 	<p>We suggest that no warrant should be issued unless the application has first been considered and granted by a court. The person subject to the warrant should be afforded the right to be legally represented if his/her whereabouts are know (but who nevertheless declines to voluntarily return to the jurisdiction of the requesting State). Notice of an intended application for a warrant should be sent to that person's last known address (or served on his/her legal advisor if known).</p>
<p><i>Article 4 - Competent judicial authorities</i> Each Member State shall designate according to its national law the judicial authorities that are competent to</p>	<ul style="list-style-type: none"> • Whether Member States should be subject to some restriction as to its ability to 	<ul style="list-style-type: none"> • No warrant should be issued unless the application has first been considered by a

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<p>(a) issue a European arrest warrant (b) take decisions under Section 4 of Chapter II without prejudice to Article 5(4).</p>	<p>designate a judicial authority.</p>	<p>court in the Issuing State.</p>
<p><i>Article 5 - Central authority</i> 1. Each Member State shall designate a central authority, or when its constitutional system so requires, more than one central authority for the purposes of this Framework Decision. 2. The central authority shall assist the competent judicial authority. In particular, the central authority shall provide translation, administrative and practical facilities, and general information. 3. Each Member State may decide that its central authority shall be responsible for the practical transmission and reception of the European arrest warrant as well as for other official correspondence relating to it. 4. Each Member State may indicate that its central authority may decide on matters covered by Articles 31, 37 and 38. The Member State shall ensure that the requested person is given the opportunity to express his or her views on the question which will be decided by the central authority. The executing judicial authority shall decide on the execution of the European arrest warrant on the basis of the central authority's decision.</p>		<ul style="list-style-type: none"> • The decision to issue a warrant must be made by a court, and only if the rights of the represented person have been respected. In any event, the fact that a warrant has been issued should only have the effect of empowering the central authority to seek the execution of the warrant, but not oblige the authority to do so.
<p><i>Article 6 - Content of the European arrest warrant</i> The European arrest warrant shall contain information set out in accordance with the form in the Annex regarding:</p>	<ul style="list-style-type: none"> • Whether the contents should contain more information. 	<ul style="list-style-type: none"> • There must be full and candid disclosure, both to the lawyer of the requested person and to the court, of all matters relevant to the

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<p>(a) the identity of the requested person, (b) the issuing judicial authority , (c) whether there is a final judgement or any other enforceable judicial decision, within the scope of Article 2, (d) whether the European arrest warrant results from a judgement <i>in absentia</i>, and if so, a statement as to the right to lodge an opposition and on the applicable procedure in conformity with the second subparagraph of Article 35(1), (e) the nature and legal classification of the offence, (f) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person, (g) the penalty, if there is a final judgement, or else, the prescribed scale of penalty, (h) if possible, other consequences of the offence, (i) whether the requested person has already been arrested for the same offence, and let free, or released after some pre-trial detention under condition of return, or whether the person has escaped from prison.</p>	<ul style="list-style-type: none"> • Whether a mere description is sufficient. 	<p>execution of the warrant, save in respect of material that it would not be in the public interest to disclose. That rule includes the prosecutor's dossier, which resulted in the decision giving rise to the application for a warrant.</p> <ul style="list-style-type: none"> • There should be an obligation to provide details of the evidence, and an assessment of the credibility of the witnesses. • Surrender should not be founded only on the alleged confession of the requested person. • Surrender should not be founded on material that has not been disclosed to the defence. • No warrant should be issued unless the judicial authority of the Issuing State gives a reasoned judgement for doing so. A copy of that judgement must be made available to the requested person's legal adviser, to the central authority of the Issuing and Requested State, and to any court in the Requested State.
<p><i>Article 7 - Communication between authorities</i> 1. If the whereabouts of the requested person are known, the issuing judicial authority shall communicate the European arrest warrant directly to the executing judicial authority.</p>		

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<p>person.</p>		
<p><i>Article 10 – Coercive measures</i> An executing Member State may take necessary and proportionate coercive measures against a requested person according to the conditions laid down by its national law, including the provisions on judicial review that are applicable when a person is arrested with a view to extradition.</p>	<ul style="list-style-type: none"> • Whether rules and/or minimum standards should exist to ensure coercive measures are both necessary and proportionate. 	<ul style="list-style-type: none"> • The ECHR does not afford, by itself, sufficient protection. There should be rules relating to detention; conditions in detention; methods of restraint; and matters that affect the social, religious and economic well being of a requested person.
<p><i>Article 11 - Rights of a requested person</i> 1. When a requested person is arrested on the territory of another Member State, the competent authority of the latter state shall, in accordance with its national law, inform that person of the warrant and of its content, and of the possibility of consenting to surrender to the issuing judicial authority. 2. From the moment a requested person is arrested for the purpose of the execution of a European arrest warrant, that person shall have a right to be assisted by a legal counsel, and, if necessary by an interpreter.</p>	<ul style="list-style-type: none"> • Identifying the rights to be afforded the requested party. • Whether the framework should particularise the quality of legal counsel and the jurisdiction from which the lawyer might be drawn to assist. 	<ul style="list-style-type: none"> • From moment the Requested Person is arrested, or agrees to voluntarily present himself pursuant to a warrant, he must be offered the right to free legal representation by a qualified and competent legal practitioner, and (as appropriate) an interpreter and/or other specialists able to meet the special needs of that person. The condition in article 11(2) to the provision of an interpreter 'if necessary' is too restrictive. • There must be full and candid disclosure, both to the lawyer of the requested person and to the court, of all matters relevant to the execution of the warrant, save in respect of material that it would not be in the public interest to disclose. That rule includes the prosecutor's dossier which resulted in the decision giving rise to the application for a warrant. Matters that might justify the judicial authority and central authority of the Requested State, refusing the execution of an EAW, should also be disclosed: see for example, Articles 27 to 39 inclusive. • There should be legal aid, and a list of lawyers

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		<p>from which the requested person may choose.</p> <ul style="list-style-type: none"> • It should be clarified whether a requested person may be interviewed following his/her arrest and there should be a right for a lawyer to be present and advise during an interview. The requested person should be legally represented on all occasions he is before a court, and/or before the prosecuting authority. • Interviews should be limited to matters going to form (for example, the name address and nationality of the arrested person) rather than to the allegation. However, a requested person should not be prevented from making a statement if they wish to do so and that the decision has been made following legal advice. • Interviews should be tape-recorded and the requested person advised that he need not answer questions unless he wishes to do so. A failure to answer questions should not be the subject of adverse inferences. There should be proper disclosure of information to enable the person to make informed decisions. The matter of bail should be explained to the requested person. That person should be entitled to a lawyer for the purpose of making representations regarding bail. There should be a presumption in favour of bail. • Powers of the police should be clarified, for example, power to search the person, or property including vehicles. Searches should be conducted in the presence of the requested person, and if practicable in the presence of that

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		<p>person's lawyer.</p> <ul style="list-style-type: none"> The rights of the requested person should include the services of a lawyer at the earliest stage, including the option of using a defence lawyer from both the issuing State and requesting State. Issues relating to disclosure need to be specifically addressed.
<p><i>Article 12 - Notification to the judicial authorities</i> The issuing judicial authority and the executing judicial authority shall immediately be notified of the arrest.</p>		
<p><i>Article 13 - Verification and suspension</i></p> <p>1. Immediately after notification of an arrest, the issuing judicial authority shall inform the executing judicial authority whether it maintains the European arrest warrant.</p> <p>2. If the issuing judicial authority does not maintain the European arrest warrant, the arrested person shall be released immediately.</p> <p>3. The issuing judicial authority may decide to suspend the warrant, under the condition that the arrested person undertakes to present himself or herself, at a certain date and place, on a voluntary basis. That undertaking shall be received by the judicial authority of the executing Member State and notified to the issuing judicial authority. The issuing Member State may add a flag accordingly in the SIS. If the arrested person fails to respect the undertaking the issuing judicial authority may reactivate the European arrest warrant, and complement the information contained in the</p>	<ul style="list-style-type: none"> Whether the requested person might nevertheless be transferred to a third jurisdiction in the event that proceedings are concluded in the issuing State. Whether rules should prescribe conditions that must be satisfied before such an undertaking may be given. 	<ul style="list-style-type: none"> There should be no such transfer unless the matter was first raised in the executing State and considered by the court in that State. The executing State should be informed of any matters relevant to the human rights record of the interested third jurisdiction e.g. existence of the death penalty in that jurisdiction. Undertakings must be given freely, and after the requested person has been informed of a right to a lawyer. The decision of the requested person must be informed, that is to say, he has received all relevant information relating to the application for the warrant, and he has been advised of the consequences of presenting himself voluntarily.

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<p>European arrest warrant, in particular as regards the information referred to in Article 6(i). The person shall be informed of all the consequences of a non respect of the undertaking.</p>		
<p><i>Article 14 - Provisional release</i></p> <p>1. When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person shall remain in detention. If the executing judicial authority has reason to believe that the arrested person will not escape, continue to commit offences or destroy evidence with respect to the offence(s) on which the European arrest warrant is based, and if the arrested person undertakes to remain available for the execution of the European arrest warrant, the executing judicial authority may decide to release that person until a later date fixed in the agreement between the issuing Member State and the executing Member State. If necessary, the release shall be submitted to the respect by the requested person of conditions laid down by the executing judicial authority in accordance with the law of the executing Member State. The arrested person shall be informed of all the consequences of a non respect of the undertaking to remain available for the execution of the European arrest warrant.</p> <p>2. If the requested person does not respect the undertaking to remain available for the execution of the European arrest warrant, the executing judicial authority shall inform the issuing judicial authority. In that case, the latter may complement the information contained in the European arrest warrant in particular as regards the information referred to in Article 6(i).</p>	<ul style="list-style-type: none"> • Whether there should be a presumption in favour of granting bail. • Whether the requested person should be entitled to a lawyer regarding bail. • What the test for the refusal to grant bail should be. 	<ul style="list-style-type: none"> • There should be a presumption in favour of bail – not, as envisaged, a presumption against bail. • Legal assistance should be offered as a matter of course. • The test should be where there exists a serious risk that the requested person will (a) fail to comply with the directions and/or orders of a court, (b) will commit offences, (c) will destroy evidence, or (d) or otherwise obstruct the course of justice. • The requested person should be brought before a court no later than 24 hours following his arrest under the EAW.

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<p><i>Article 15 - Examination of the European arrest warrant</i></p> <p>The European arrest warrant shall be examined by the executing judicial authority as quickly as possible and in any case no later than ten calendar days after the arrest.</p>	<ul style="list-style-type: none"> • Whether the warrant should be examined by a court. • Whether a warrant should be examined less than 10 days. 	<ul style="list-style-type: none"> • The warrant should be independently examined, namely by a court, and not by the prosecuting authority that sought the warrant. Such an authority should not be judge in its own cause. • The requested person should be brought before a court no later than 24 hours following his arrest under the EAW.
<p><i>Article 16 – Consent to surrender</i></p> <p>1. If the arrested person consents to his or her surrender, he or she shall be surrendered as provided for in Article 23.</p> <p>2. The consent shall be given to the executing judicial authority in accordance with its national law.</p> <p>3. The consent shall be established in such a way as to show that the person concerned has expressed it voluntarily and in full awareness of the consequences.</p> <p>4. Consent shall be recorded in accordance with the national law of the executing Member State.</p> <p>5. Consent may not be revoked.</p> <p>6. Consent shall immediately be notified to the issuing judicial authority.</p>	<ul style="list-style-type: none"> • Whether the Decision should identify the circumstances in which 'consent' may be given. • Whether 'consent' must be given to a court and to the court's satisfaction (for example that the person has made an informed decision aware of his/her rights). • Whether consent can be revoked • Whether consent can be revoked in particular circumstances (e.g. new information). 	<ul style="list-style-type: none"> • Consent should be given by the requested person on the same terms as an undertaking to present himself on a voluntary basis. • There must be minimum safeguards and protections in place in addition to those provided by the ECHR. Those standards must be incorporated into national law in the interests of consistency. • Notice of consent shall be valid only if the requested person gave his consent freely and in full knowledge of all relevant facts and matters. • A Notice of Consent must be validated in a court by the requested person (either appearing in person or by a document signed by him and his legal adviser). • Consent should be capable of being revoked in exceptional circumstances, or where

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<p>or her surrender; (b) in cases referred to in Articles 17(2) and (3). The issuing Member State may be represented or submit its observations before the court.</p>		<p>and Charter of Fundamental Rights of the European Union, as well as ensuring that the conditions and standards indicated by us (above) have been met: see for example, articles 6, 11 of the Framework Direction. The hearing shall include the right for the parties to advance oral legal argument, and to make written submissions. The judicial authority of the Requested State shall refuse to execute the warrant if it would not be reasonable to do so and/or there has been a lack of disclosure and/or there has been delay such that the process amounts to an abuse of process.</p> <ul style="list-style-type: none"> • The Requested Person should have the right of appeal to higher courts.
<p><i>Article 19 - Supplementary information</i> If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on the execution of a European arrest warrant, it shall request the necessary supplementary information urgently and may fix a time-limit for the receipt thereof.</p>		
<p><i>Article 20 – Time limit for the decision whether to execute the European arrest warrant</i> The decision on whether to execute the European arrest warrant shall be taken as soon as possible and in any case no later than 90 calendar days after the arrest of the requested person.</p>	<ul style="list-style-type: none"> • Whether the time limits are appropriate. 	
<p><i>Article 21 – Refusal and expiry of the time limit</i> 1. If the executing judicial authority refuses to</p>		

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<p>surrender the requested person, or if no decision on the surrender of the requested person is taken within the period provided for in Article 20, the arrested person shall be released immediately unless it is necessary to maintain him or her in detention pursuant to Article 33, or on another ground for detention.</p> <p>2. Reasons shall be given for any refusal to execute a European arrest warrant or on the reason of expiry of the time limit provided for in Article 20 without a decision.</p>		
<p><i>Article 22 – Notification of the decision on whether to execute the European arrest warrant</i> The executing judicial authority shall immediately notify the decision on whether to execute the European arrest warrant to the issuing judicial authority .</p>		
<p><i>Article 23 – Time limit for the surrender of the requested person</i> 1. The requested person shall be surrendered as soon as possible on a date agreed between the authorities concerned.</p> <p>2. Subject to paragraph 3 the requested person shall be surrendered no later than twenty calendar days after either: (a) the consent of the arrested person, (b) the decision of the executing judicial authority provided for in Article 17(1), or (c) the decision of the court pursuant to Article 18, to execute the European arrest warrant. After the expiry of that period , if the person is being held, he or she shall be released in the</p>	<ul style="list-style-type: none"> • Whether the time limits should be strict or whether a requested person should be admitted to bail (conditionally or otherwise) sooner than set out in article 23, if time limits cannot be complied with. 	<ul style="list-style-type: none"> • 20 days is an excessive period of time. The Requested Person should be surrendered as soon as reasonably practicable.

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<p>territory of the executing Member State.</p> <p>3. Should the surrender of the requested person within the period laid down in paragraph 2 be prevented by circumstances beyond the control of the executing Member State, the executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within twenty calendar days of the new date thus agreed. If the person in question is still being held after the expiry of that period, he or she shall be released unless the delay is linked to the personal situation of the requested person.</p> <p>4. The time limits provided for in paragraphs 2 and 3 shall not apply where Article 39 (1), (2) and (4) apply.</p>		
<p><i>Article 24 - Deduction of the period of deprivation of liberty from the sanction</i></p> <p>1. The issuing Member State shall deduct from the total period of deprivation of liberty which is imposed any period of deprivation of liberty arising from the execution of a European arrest warrant .</p> <p>2. To this end, all the information concerning the duration of the deprivation of liberty of the requested person on the basis of the European arrest warrant shall be transmitted to the issuing Member State.</p>		
<p><i>Article 25 - End of effect</i></p> <p>The issuing judicial authority shall ensure that the European arrest warrant shall cease to have effect</p>		

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<p>as from the date of the surrender and where necessary.</p>		
<p><i>Article 26 - General provision</i> The executing judicial authority may refuse to execute a European arrest warrant under the circumstances described in Articles 27 to 34.</p>		
<p><i>Article 27 - List of exceptions</i> Without prejudice to the objectives of article 29 TCE, each Member State may establish an exhaustive list of conduct which might be considered as offences in some Member States, but in respect of which its judicial authorities shall refuse to execute a European arrest warrant on the grounds that it would be contrary to fundamental principles of the legal system in that State. The list and any change to it shall be published in the <i>Official Journal of the European Communities</i> at least three months before a Member State may invoke the first paragraph in respect of the conduct concerned.</p>	<ul style="list-style-type: none"> • Whether 	<ul style="list-style-type: none"> • The requirement of three months is unreasonable. A Member State may fail to include relevant material, due to error, inadvertence, or ignorance of the law in another Member State. • The principle of speciality is an important safeguard against manipulation and abuse of procedures. This principle should remain a key safeguard of a requested person.
<p><i>Article 28 - Principle of territoriality</i> The executing judicial authority may refuse to execute a European arrest warrant issued in respect of an act which is not considered an offence under the law of the executing Member State and which did not occur, at least in part, on the territory of the issuing Member State.</p>	<ul style="list-style-type: none"> • Whether a dual criminality test should exist, and if so, to what extent. • Whether the principle of territoriality should exist and if so, to what extent. 	<ul style="list-style-type: none"> • Further consideration needs to be given to this matter. Although Art.28 refers to 'act', we assume that this provision is aimed at 'conduct' consisting of one several acts. It is acknowledged that the matter is complex and does not lend itself to a workable set of principles that will produce fair and just results in all case. There may be concern that Art.28 places too much emphasis on acts giving rise to the commission of an offence according to the substantive law of the executing State and insufficient attention

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		to conduct lawful in the Requested State but directed against the interests of the Issuing State.
<p><i>Article 29 - Ne bis in idem</i></p> <p>1. The executing judicial authority shall refuse to execute a European arrest warrant, if a judicial authority in the executing Member State has passed final judgement upon the requested person in respect of the offence for which the European arrest warrant has been issued.</p> <p>2. The execution of a European arrest warrant shall be refused if the judicial authorities of the executing Member State have decided either not to institute or to terminate proceedings in respect of the offence for which the European arrest warrant has been issued.</p>		<ul style="list-style-type: none"> • The reasoning behind this provision is explained in Com 2001/522 and suffice to say that we support its inclusion in the Framework Decision. • The same provision should apply if convicted in any other State.
<p><i>Article 30 - Amnesty</i></p> <p>The executing judicial authority may refuse to execute a European arrest warrant in respect of an offence covered by an amnesty in the executing Member State where that Member State was competent to prosecute the offence under its own criminal law.</p>		
<p><i>Article 31 - Immunity</i></p> <p>The execution of a European arrest warrant shall be refused if the legal system of the executing Member State grants immunity to the requested person.</p>		
<p><i>Article 32 - Lack of necessary information</i></p> <p>The executing judicial authority may refuse to</p>		

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<p>execute a European arrest warrant, if: (a) the European arrest warrant does not contain the information referred to in Article 6, or (b) the identity of the requested person cannot be established.</p>		
<p><i>Article 33 - Principle of integration</i> 1. The execution of a European arrest warrant in respect of a requested person may be refused if this person would have better possibilities of reintegration in the executing Member State, and if he or she consents to serve the sentence in this Member State. In that case, the sentence pronounced in the issuing Member State shall be served in the executing Member State in accordance with the laws of the latter Member State. The sentence pronounced in the issuing Member State shall not be substituted by a sanction prescribed by the law of the executing Member State for the same offence.</p> <p>2. The final judgement on the basis of which the European arrest warrant was issued, as well as all the necessary documents shall be transmitted to the competent judicial authority of the executing Member State in order to enable the execution of the sentence.</p>	<ul style="list-style-type: none"> • Whether the principle of integration is consistent with the principle of mutual recognition and the desirability of empowering Member States within the EU to enforce, in its jurisdiction, final judgements. • Whether domestic integration should be permitted on condition that the issuing State consents to such an outcome. 	<ul style="list-style-type: none"> • This provision goes further than the 1983 Convention on the Transfer of Sentenced Persons, and the Agreement on the Application between the Member States of the European Communities, of the Convention of the Council of Europe on the Transfer of Sentenced Persons (25 May 1987). Given that the provision is aimed at rehabilitation, and social inclusion, the provision makes no comment about the law and practice of the issuing Member State. We support the wider principle of integration. • The explanatory notes to the Framework Decision makes it clear that the consent of the requested person is required, but not (it seems) the issuing State. We anticipate that in practice, most issuing States would consent to such a course.
<p><i>Article 34 - Videoconference</i> 1. The executing judicial authority may refrain from surrendering the requested person if: (a) it is possible by means of a videoconference system for the requested person to take part from a place in the executing Member State in criminal proceedings conducted in the issuing Member</p>		

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<p>State;</p> <p>(b) the executing Member State and the issuing Member State accept such proceedings. The proceedings shall be conducted in accordance with the national law of the Member States concerned and relevant international instruments, including the 1950 European Convention for the Protection of Human rights and fundamental freedoms.</p> <p>2. The detailed arrangements for those proceedings shall be agreed between the executing judicial authority and the issuing judicial authority.</p> <p>3. In case of application of paragraph 1, the executing judicial authority shall decide, in conformity with the provisions of its national law, on the detention of the requested person.</p>		
<p><i>Article 35 - Judgements in absentia</i></p> <p>1. If the European arrest warrant has been issued on the basis of a judgement <i>in absentia</i>, a new hearing of the case shall take place in the issuing Member State after the surrender. The executing judicial authority shall inform the arrested person of his or her right to lodge an opposition to the judgement and on the procedure for lodging it.</p> <p>2. Each Member State shall enable its judicial authorities to receive the opposition lodged by a person subject to a judgement <i>in absentia</i> and to inform the issuing judicial authority of this opposition.</p>		
<p><i>Article 36 - Return to the executing Member State</i></p>		

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<p>executing Member State, the execution of the European arrest warrant may be deferred until the final judgement in that proceeding or the completion of the sentence imposed, if any, in the executing Member State.</p> <p>2. Where a European arrest warrant has been issued on the basis of a final judgement against a person serving a sentence in the executing Member State, the execution of the European arrest warrant may be deferred until the completion of any sentence imposed in the executing Member State.</p> <p>3. Where a European arrest warrant has been issued on the basis of another enforceable judicial decision or a judgement in absentia against a person serving a sentence in the executing Member State, the European arrest warrant may be executed under the condition that after the final decision in the issuing Member State, the person returns to the executing Member State to serve the remaining part of the sentence, unless Article 34 applies.</p> <p>4. Where the European arrest warrant has been issued on the basis of another enforceable judicial decision or a judgement in absentia against a person subject to a criminal proceeding in the executing Member State, the temporary transfer of the requested person in order to enable the procedure to take place on the condition that the person returns, shall be subject to agreement between the issuing and the executing Member State, unless Article 34 applies.</p> <p>5. In cases referred to in paragraphs (3) and (4),</p>		

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<p>the issuing and the executing Member States shall determine by mutual agreement the duration and conditions of the transfer.</p> <p>6. In cases referred to in paragraphs (3) and (4), the issuing Member State shall ensure that the requested person will remain available for the executing Member State, either by enforcing in its territory the final judgement of the executing Member State or, where appropriate, on the basis of a pre-trial decision issued by its judicial authority.</p>		
<p><i>Article 40 - Multiple requests</i></p> <p>1. If two or more Member States have issued a European arrest warrant for the same person, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial authority with due regard to all the circumstances and especially the relative seriousness and place of the offences, and the respective dates of the European arrest warrants. All the judicial authorities involved shall cooperate closely in order to enable the prosecutions to take place in each of the Member States as soon as possible.</p> <p>2. If multiple requests are made, they may be submitted to Eurojust, which shall deliver its opinion as soon as possible.</p> <p>3. In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country party to the European Convention on Extradition of 13 December 1957, the decision on whether the European arrest warrant or the extradition request takes precedence</p>		

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<p>shall be taken by the executing judicial authority with due consideration of all circumstances, in particular those mentioned in Article 17 of the said convention. In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country which is not a party to that convention, the execution of the European arrest warrant shall take precedence.</p> <p>4. In the event of conflict between a European arrest warrant and a request for surrender presented by an international criminal court, whether or not that court is recognized by all the Member States, consultations shall take place between the Member States concerned as to how to meet the requirements of the statute of the criminal court before any decision is taken.</p>		
<p><i>Article 41 - Other offences</i> A person who has been surrendered pursuant to a European arrest warrant may, in the issuing Member State, be prosecuted, sentenced or detained for an offence other than that for which the European arrest warrant was issued, except where that offence has been entered by the executing Member State in the list referred to in Article 27, or with respect to Articles 28 or 30.</p>		
<p><i>Article 42 - Handing over of property</i> 1. The executing judicial authority shall, insofar as its law permits, at the request of the issuing judicial authority, or on its own initiative, seize and hand over property which: (a) may be required as evidence, or (b) has been acquired by the requested person as a result of the offence .</p>		<ul style="list-style-type: none"> • The rights of third parties in the relevant property should be fully respected. Property should not be handed over if evidence relating to it can be adduced in another way (e.g. photographs; video; documents of title). Where it is proposed that such property should be forfeited by an

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<p>2. The property referred to in paragraph 1 shall be handed over even if the European arrest warrant cannot be carried out owing to the death or escape of the requested person .</p> <p>3. If the property referred to in paragraph 1 is liable to seizure or confiscation in the territory of the executing Member State, the latter may, if the property is needed in connection with pending criminal proceedings, temporarily retain it or hand it over to the issuing Member State, on condition that it is returned.</p> <p>4. Any rights which the executing Member State or third parties may have acquired in the property referred to in paragraph 1 shall be preserved. Where such rights exist, the issuing Member State shall return the property without charge to the executing Member State as soon as possible after the trial.</p>		<p>order of a judicial authority in the Issuing State, the property should not be handed over unless the Issuing State undertakes to ensure that (a) the lawful interests and rights in the property shall be preserved; (b) that even if the 3rd party acquired tainted property, the 3rd party shall be afforded a right to be heard before a court in the Issuing State, to be legally represented, and to appeal against a decision concerning that property.</p>
<p><i>Article 43 – Relation to other legal instruments</i></p> <p>1. The following legal instruments or provisions of instruments shall cease to apply between Member States from 1 July 2004:</p> <p>(a) The European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;</p> <p>(b) the Agreement between the Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;</p>		

EXISTING ARTICLE	PROBLEM AREAS	SUBMISSIONS
<p>(c) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union; and (d) the Convention of 27 September 1996 relating to Extradition between the Member States of the European Union.</p> <p>2. This Framework Decision shall not affect the application of simplified proceedings or conditions existing in bilateral or multilateral agreements or agreed on the basis of uniform or reciprocal laws between Member States.</p>		
<p><i>Article 44 - Provisions relating to the Schengen acquis</i></p> <p>1. Without prejudice to Article 8 of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's' association with the implementation, application and development of the Schengen acquis, this Framework Decision shall enter into force for Iceland and Norway [...].</p> <p>2. Articles 59 to 66, 94(4) and 95, of the Convention implementing the Schengen Agreement, as far as extradition is concerned, shall cease to apply from 1 July 2004.</p>		
<p><i>Article 45 - Transit</i></p> <p>1. Each Member State shall permit the transit through its territory of a requested person who is being surrendered provided that it has been given:</p> <p>(a) information on the identity of the requested person ; (b) a copy of the European arrest warrant and its translation in the official language or one of the</p>		

EXISTING ARTICLE	PROBLEM AREAS	SUBMISSIONS
<p>official languages of the Member State of transit; (c) a copy of the decision of the executing judicial authority to execute the European arrest warrant and its translation in the official language or one of the official languages of the Member State of transit.</p> <p>2. In the case of transport by air without a scheduled stopover, if an unscheduled landing occurs, the issuing Member State shall provide the Member State concerned with the information and documents provided for in paragraph 1.</p>		
<p><i>Article 46 - Transmission of documents</i></p> <p>1. The issuing Member State may transmit the European arrest warrant by any secure means capable of producing written records under conditions allowing the executing Member State to establish the authenticity of transmission.</p> <p>2. All difficulties concerning the transmission or the authenticity of any document needed for the execution of the European arrest warrant shall be dealt with by direct contacts between the judicial authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States.</p>		
<p><i>Article 47 - Language</i></p> <p>1. The European arrest warrant may be sent in the official language or languages of the issuing or the executing Member State(s).</p> <p>2. When appropriate, the central authority of the executing Member State shall arrange or a prompt</p>		

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EXISTING ARTICLE	PROBLEM AREAS	SUBMISSIONS
<p>1. Member States shall communicate to the General Secretariat of the Council and to the Commission before 31 December 2002 the information relating to the central authority provided for in Article 5. This information shall be published in the <i>Official Journal of the European Communities</i>.</p> <p>2. Member States shall communicate the list provided for in Article 27 and any change to it to the General Secretariat of the Council and to the Commission. The General Secretariat of the Council shall immediately inform the other Member States of any changes on this list made by one of the Member States.</p>		
<p><i>Article 51 - Transitional provision</i> The legal instruments and provisions of instruments referred to in Articles 43 and 44 shall continue to apply to extradition requests submitted before the measures necessary to comply with this Framework Decision have entered into force.</p>		
<p><i>Article 52 - Implementation</i> Member States shall take the necessary measures to comply with this Framework Decision by [31 December 2002]. They shall communicate to the General Secretariat of the Council and to the Commission the text of any provisions they adopt and information on any other measures they take to comply with this Framework Decision. On that basis the Commission shall, by [31 December 2003], submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied, where necessary, by legislative proposals. The Council</p>		

EXISTING ARTICLE	PROBLEM AREAS	SUBMISSIONS
shall assess the extent to which Member States have complied with this Framework Decision.		
<p><i>Article 53 - Entry into force</i> This Framework Decision shall enter into force on the twentieth day following its publication in the Official Journal of the European Communities.</p>		

FAIR TRIALS ABROAD



MEMORANDUM TO COREPER¹: PROPOSED EUROPEAN ARREST WARRANT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

BACKGROUND:

As this memorandum is being written, a most serious breach of Article 5 ECHR (Right to Liberty and Security) and remediable breach of Article 6 (Fair trials) has been perpetrated by a Greek Judge in the "Plane spotters" espionage case. Details of the case are considered; the issues that arise are discussed. The aim of this Memorandum is to point to the inherent dangers of over-reliance on member states' compliance with the European Convention on Human Rights and the Charter of Fundamental Freedoms. As part of a Scoreboard control to monitor implementation, we set out practical, minimum strategies to ensure that compliance by all member states with Articles 5 and 6 ECHR is accomplished by December 2002.

THE "PLANE SPOTTERS" ESPIONAGE CASE.

On Thursday 8th November 2001 an organised tour of 14 Dutch and British Plane spotters (Persons whose pastime is the classification and inspection of types of aircraft) were arrested at a public air display on grounds of suspicious behaviour. It was established early on by both Judge and defence lawyers that there was no conspiracy (which would involve a group charge against all 14 prisoners) and that no evidence existed against an unspecified number of the accused. There is, as at present advised, no prospect of the individual cases being examined until Monday 26th November.

Key issues:

By Monday 26th November an unspecified number of individuals within the group will have been held in Greek custody for 18 days despite the absence of evidence or proper foundation for holding them. Provisions under Art.5 ECHR, combined with decided case law of the European Court of Human Rights, make clear that persons arrested within the European Union must be brought promptly (upper limit of 7

¹ COREPER is the committee consisting of the permanent representatives in Brussels of the Governments of the European Union. It is the appropriate Government ministers who will be taking the decisions on the European Warrant framework on December 7th.

days) before a judge who must free them immediately if no foundation for their detention exists. Whilst it is clear that no foundation ever existed for the detention of those against whom there was no evidence, the situation must have been clear to the Judge by at the latest Friday 16th and these individuals should have been released forthwith.

Further under Article 6 of the convention those against whom there is evidence have the right to be present and rights to cross examine when evidence is being presented against them. The Security forces gave evidence to the Judge with regard to potential charges in the absence of those defendants who might be affected or their lawyers. This is a correctable irregularity.

The only probable explanation for the current disgraceful state of affairs is that this lower tier judge is not conversant with the European Convention of Human Rights and its application to circumstances as they arise. Other cases of breach of ECHR experienced by this organisation suggest that the problem of lack of training for Junior Judges is widespread in Greece and extends to other Countries within the EU e.g. Belgium.

GENERAL ISSUES

The argument that the European Arrest Warrant as envisaged is not an abuse of fundamental rights rests on the premise that the appropriate provisions of the European Convention of Human Rights are adhered to in practice. It is irrefutable that the whole protection system of the European Convention of Human Rights is ultimately dependant upon the ability of every single judge in the European Union to be, at least, fully conversant with it and its applicability to circumstances as they arise.

Judicial Standards

It follows that the key precondition for civil society to place its confidence in the European Warrant is that, as clearly shown by the plane spotters case, all criminal judges of first instance in the European Union will have completed a course of appropriate training by December 2002.

Other preconditions are :

Access To justice (Communication)

Everyone charged with a criminal offence must have a clear understanding of the nature and cause of the accusations against him and all subsequent proceedings. Research shows that there is frequently little or no compliance with the requirements of Art.5 and 6 ECHR throughout the EU. In spite of jurisprudence arising out of

the European Court of Human Rights over the last two decades, the situation is slow to improve. In the meantime, there are two measures which can be implemented immediately which will ensure minimum standards as set out in law:

1. All courts should have a comprehensive budget for the payment of interpreters as and when required by citizens appearing in court under criminal charges. Adequate remuneration will at least ensure that interpreters and/or translators act professionally and in accordance with best practice. Volunteers and adhoc provision of interpreters/translators is not acceptable.
2. All oral proceedings with, or examinations of, persons who do not speak the language of the courts should be tape recorded. Thus the original and authentic statements are preserved enabling verification in case of dispute.

Access to Justice (Legal aid)

The requirement under Art.6 for legal assistance free of charge for those who cannot afford to pay and where the interests of justice demand cannot be fulfilled unless adequate public funds are supplied. As above, all member states should have budgets in place by December 2002.

Bail

The importance of a properly functioning European wide bail system is an indispensable precondition for the European Warrant which would otherwise discriminate against those transferred to countries other than their own.

Fair Trials Abroad
November 2001

BENCH HOUSE, HAM STREET, RICHMOND, TW10 7HR
TEL: 44(0)20 8332 2800; FAX: 44(0)20 8332 2810;
STEPHENJAKOBI@COMPUSERVE.COM

FAIR TRIALS ABROAD IS A REGISTERED CHARITY NO.1079079

Jørn Vestergaard
lektor, lic. jur.
Det Retsvidenskabelige Institut D
Sankt Peders Stræde 19
1453 København K

Den 15. november 2001

Jmt. Mdt.

15 NOV. 2001

Jmt. modt

16 NOV. 2001

Til Justitsministeriet
Slotsholmsgade 10
1216 København K

Udtalelse
vedrørende de strafferetlige aspekter ved
udkast af 30. oktober 2001 til forslag
til
Lov om ændring af straffeloven m.v.
(initiativer til bekæmpelse af terrorisme mv. – "anti-terrorpakken")

1. Der peges i det følgende på en række betænkeligheder ved den del af lovudkastet, som vedrører ændringer i straffeloven. Først skal der imidlertid understreges, at der helt åbenbart er mange gode grunde til at underkaste lovgivning og praksis et grundigt eftersyn med henblik på at effektivisere bekæmpelsen af politisk vold i den udstrækning denne direkte eller indirekte kan indebære angreb på danske nationale interesser af væsentlig betydning. Behovet for sådanne initiativer er selvsagt i meget høj grad blevet aktualiseret i lyset af begivenhederne den 11. september. Den afsky og ængstelse, som disse begivenheder har fremkaldt indebærer imidlertid også i forskellige henseender en betydelig risiko for overreaktion og tilsidesættelse af grundlæggende hensyn til individets retssikkerhed.

De ændringer, som i lovudkastet foreslås i den øvrige lovgivning vil ikke blive behandlet i det følgende. Det skal blot bemærkes, at de foreslåede ændringer i retsplejeloven samt i lov om konkurrence- og forbrugerforhold på telemarkedet langt hen ad vejen må betragtes som rimelige udtryk for en opdatering, hvorved der dels tages højde for den teknologiske udvikling, dels skabes bedre sammenhæng i reglerne ved at stoppe nogle huller. Hermed er der ikke taget stilling til enkeltheder i denne del af lovudkastet.

Forslagene vedrørende modernisering af udleveringelovene har i den i lovudkastet foreliggende form meget for sig, men de seneste meldinger om en markant slækkelse af kriterierne for udlevering af egne statsborgere må give anledning til stor bekymring, da en sigtet alt andet lige kan risikere at blive langt dårligere stillet under strafforfølgning i et fremmed land, hvor det kan på grund af sprogproblemer og

(rets)kulturelle forskelle kan volde betydelige vanskeligheder at opstille et effektivt forsvar.

Som baggrund for de her fremførte bemærkninger kan der henvises til min artikel: Straffelovens såkaldte »terrorismeparagraf«. Kriminalistisk Instituts Årsberetning 1989, *Kriminalistisk Instituts Stencilserie 1989*, s. 117-133.

2.1. I lovudkastet foreslås det bl.a. at indsætte *en særlig terrorismeparagraf* i straffeloven som ny § 114. Dette sker i udtrykkelig erkendelse af, at en lang række af de forbrydelser, der typisk betegnes som terrorhandlinger, i dag kan straffes efter gældende bestemmelser i straffeloven. Således kan f.eks. forsætligt manddrab straffes efter straffelovens § 237, uanset hvad gerningsmandens motiv for handlingen har været. Regeringen ønsker imidlertid »i højere grad at signalere, at terrorisme i alle dens former er uacceptabel i et demokratisk samfund«. Med lovforslaget foreslås det derfor, at der i straffeloven indsættes en terrorismeparagraf, der indeholder en *definition af begrebet terrorisme*. Den foreslåede nye § 114 omfatter ifølge det i lovudkastet anførte meget alvorlige forbrydelser, og det foreslås derfor, at strafmaksimum fastsættes til fængsel på livstid. Det oplyses yderligere i lovudkastet, at den foreslåede bestemmelse samtidig tilsigter at gennemføre det forslag til rammeafgørelse om bekæmpelse af terrorisme, som for tiden forhandles i EU.

2.2. Den foreslåede nye bestemmelse i § 114 er som nævnt ikke beregnet til at kriminalisere forhold, som ikke i forvejen er strafbare, og en eventuelt lovfæstelse af udkastet vil heller ikke afstedkomme noget sådant. Der er tale om at skærpe strafferammen for visse forbrydelser, hvis disse begås med forsæt til at bevirke visse opregnede følger.

Den anvendte lovteknik indebærer ud over det nævnte, at tilstedeværelsen af et forsæt som det angivne i almindelighed kommer til at virke som en strafskærpende omstændighed. På den ene side er der ikke noget principielt nyt heri, da domstolene selvsagt også efter gældende ret vil kunne tage den strafskyldiges subjektive forhold i betragtning som et skærpende moment ved fastsættelsen af den konkrete straf. I den forstand tilføjer den foreslåede bestemmelse ikke nødvendigvis retstilstanden noget. På den anden side er det nærliggende at regne med, at vedtagelsen af en sådan bestemmelse, ikke mindst i lyset af dens baggrund, motivering og strafmaksimum, vil kunne give sig udslag i, at en skærpet strafudmåling vil blive mere udtalt end efter gældende ret. Der kan næppe siges noget entydigt om, hvorvidt en sådan stramning er påkrævet eller ønskelig, og dette er til dels et rent politisk spørgsmål.

De i den foreslåede § 114 opregnede delikter er af temmelig forskelligartet beskaffenhed og vil også kunne være af meget forskelligartet strafværdighed.

I den ene ende af skalaen figurerer forståeligt nok forsætligt manddrab, som i forvejen har livstidsstraf som maksimum. I den anden ende af skalaen finder man en række meget varierende delikter, som normalt har strafferammer med maksimum på fire års fængsel, herunder også delikter som i praksis anvendes og kan tænkes anvendt som straffehjemmel i tilfælde, hvor der er forskydte helt korte fængselsstraffe (husfredskrænkelser efter § 264, stk. 2, f.eks. for at skaffe materiale om politiske modstandere; groft hærværk efter § 291, stk. 2, f.eks. betydelige

ødelæggelser ved graffiti eller rudeknusning, mere bekostelig ødelæggelse af bilers motorer ved at hælde noget i benzintanken; grove overtrædelser af våbenlovgivningen efter § 192 a; grov miljøkriminalitet efter § 196; omfattende forstyrrelse i driften af almindelige samfærdselsmidler, f.eks. demonstrationer der involverer blokade af en havn med fiskerbåde eller busterminaler.

Det forekommer at være meget uheldigt, at der i den foreslåede bestemmelse under ét opereres med en strafferamme på fængsel indtil livstid. Derved overlader lovgivningsmagten det inden for hele området blankt til domstolene at foretage den konkrete strafudmåling. Det kan på ingen måde udelukkes, at domstolene i en konkret sag vil være i stand til at udmåle en efter omstændighederne passende straf i den nederste del af en sådan strafferamme, hvis de pådømte forhold er af mindre alvorlig beskaffenhed. Det er imidlertid et forvirrende signal at sende til domstole og almenhed, at forhold som de opregnede alle skulle være ligestillede i henseende til den hjemlede maksimumstraf, hvis det angivne videregående forsæt foreligger. Det må med andre ord betragtes som problematisk, at der ikke differensieres under hensyntagen til strafværdighed i relation til specifikke deliktstyper.

Lovudkastet indeholder ingen nærmere begrundelse for, hvorfor det skulle være nødvendigt, hensigtsmæssigt eller rimeligt at operere med en fælles strafferamme med et maksimum af fængsel på livstid. I lovudkastets bemærkninger til de enkelte bestemmelser siges det blot lakonisk om den foreslåede strafferamme i den nye § 114: »Som følge af den meget alvorlige karakter af de pågældende forbrydelser indeholder bestemmelsen en maksimumsstrafferamme på fængsel indtil livstid.«

At kvalificere de omhandlede delikter ved under ét at hæve strafferammen til livstid indebærer i øvrigt, at der ikke vil være nogen *forældelse* af strafansvaret for nogen af de omfattede forhold, cf. straffelovens § 93. For så vidt angår visse af de forhold, som vil være omfattet af den foreslåede bestemmelse, er dette utvivlsomt både rimeligt og hensigtsmæssigt. Det er imidlertid også i denne henseende stærkt problematisk, at der ikke differensieres under hensyntagen til strafværdighed.

2.3. Den følge, som skal være omfattet af det i den foreslåede nye § 114 særligt angivne forsæt, betegnes som »at tilføje et lands eller en international organisations politiske, økonomiske eller samfundsmæssige strukturer alvorlig skade, navnlig ved at skræmme befolkningen, eller ødelægge disse strukturer«. Det kan med god grund betvivles, om den i denne sammenhæng benyttede lovgivningsteknik opfylder sædvanlige krav til klarhed, bestemthed og præcision.

Det er velkendt, at det såvel i lovgivningssammenhæng som ved udførelse af internationale aftaler volder store vanskeligheder at opstille og komme til enighed om definitioner på terrorisme. Allerede dette forhold maner til betydelig eftertænkning.

Den i lovudkastet benyttede formulering er tydeligvis ikke blot inspireret af det udkast til rammeafgørelse, som for tiden er under forhandling, men er i dansk oversættelse ganske enkelt identisk med den i nævnte dokument benyttede formulering. Dette indebærer, at der med lovudkastet på dette punkt lægges op til anvendelse af en særdeles uheldig lovgivningsteknik. Det er én ting, at der i et instrument som en rammeafgørelse benyttes

meget brede og vage vendinger, for noget sådant kan efter omstændighederne være forsvarligt og nødvendigt, da der trods alt er tale om mere overordnede policy statements, principerklæringer eller hensigtstilkendegivelser, som - om end de er bindende for de kontraherende medlemsstater - i det specifikke tilfælde kan befinde sig på et forholdsvis højt abstraktionsniveau, og som forudsætter en konkret udmøntning i de enkelte medlemsstater. Noget helt andet er, om tilsvarende vendinger er egnede til anvendelse ved udformning af strafferetlige delikter, hvor idealet alt andet lige vil trække i retning af en højere grad af klarhed, bestemtthed og præcision.

Den benyttede formulering er først og fremmest særdeles åben og vidtgående i kraft af anvendelsen af udtrykket »tilføje ... *samfundsmæssige strukturer* alvorlig skade« [kursiv tilføjet her]. Selv om det kan være nærliggende umiddelbart at forbinde begrebet »samfundsmæssige strukturer« med sociologisk sprogbrug, kan det udtrykket godt i den specifikke sammenhæng have en juridisk betydning, som er forskellig fra, herunder snævrere, end den sociologiske. Dette må da også antages at være tanken bag lovudkastet, når dette forstås ud fra sin baggrund og sammenhæng, for ellers ville der ikke være synderlige bidrag at hente til en afgrænsning af bestemmelsen i det nævnte udtryk. Dette vil kunne omfatte infrastruktur, erhvervsstruktur, organiseringen af statslige og kommunale institutioner, medier, private organisationer mmm. i særdeles bred forstand. Det kunne medføre en vis grad af klargøring, hvis formuleringen i det mindste blev strammet op, så den kom til at lyde »tilføje ... *grundlæggende* samfundsmæssige strukturer alvorlig skade«; men problemet med en høj grad af ubestemtthed ville bestå.

I lovudkastet søges begrebet "politiske, økonomiske og samfundsmæssige strukturer" forklaret med angivelse af, at der »tænkes ikke blot på et lands eller en organisations øverste statsmyndigheder, men også på lokale, administrative og retlige myndigheder, ligesom handlingen kan tilsigte at ramme landets økonomiske struktur«. Bestemmelsens begrænsning skulle angiveligt være, at »handlingen skal have haft til hensigt at tilføje "alvorlig skade" til eller ødelægge den politiske, økonomiske eller samfundsmæssige opbygning i et land eller en international organisation.« Hertil må det bemærkes, at en uklarhed om afgrænsningen af de omfattede beskyttelsesobjekter ikke ryddes af vejen på denne måde, for både et omfattet og et ikke-omfattet beskyttelsesobjekt kan selvsagt tænkes udsat for "alvorlig skade".

Det skal i øvrigt bemærkes, at den foreslåede nye § 114 ikke som i de i lovudkastet anførte bemærkninger kræver »hensigt« forstået som direkte forsæt, idet den foreslåede bestemmelse bredt vil kriminalisere forsæt i alle former, sådan som en tilsvarende lovgivningsteknik også er anvendt i en række andre straffebestemmelser med såkaldt "fremrykket fuldbyrdelsesmoment" eller krav om "subjektivt overskud".

Det kan næppe siges at være befordrende for hensynet til fornøden klarhed, at der i lovudkastets bemærkninger til de enkelte bestemmelser ad den foreslåede § 114 benyttes udtrykket »med henblik på hensigt«, når der efter ordlyden i den foreslåede bestemmelse kræves (et videregående) forsæt. Også et udtryk for det anførte kan give et muligvis fejlagtigt indtryk af, at der kræves direkte forsæt i form af hensigt. Det samme gælder brugen af vendingen »for at«, som også forekommer i bemærkningerne. I oversættelsen af udkastet af 10. oktober til rammeafgørelse anvendes i øvrigt et helt andet udtryk, nemlig »med det *formål* at tilføje«, og herved

refereres der efter sædvanlig strafferetlig sprogbrug snarere til gerningsmandens motiv/bevæggrund end til vedkommendes tilregnelser.

I motiverne til den foreslåede nye § 114 anføres det i øvrigt, at denne - ligesom den gældende bestemmelse i straffelovens § 114 - skal omfatte både handlinger, der har et videregående politisk formål samt handlinger, hvis mål alene er at skabe almindelig uro og økonomisk kaos. Uanset berettigelsen af en sådan betragtningsmåde sætter der imidlertid ikke hermed nogen begrænsninger for bestemmelsens anvendelsesområde, tværtimod.

I de ovenfor citerede motivbemærkninger er ordet »opbygning« i øvrigt anvendt som synonymt med »samfundsmæssige strukturer«.

Det skal tilføjes, at begrebet »samfundsmæssige strukturer« ikke anvendes noget sted i dansk lovgivning. Der er ikke i motiverne til lovudkastet nogen ansats til anvisning på, hvorledes begrebet skal fortolkes i en strafferetlig sammenhæng. Ud fra en legalitetsbetragtning er dette dybt betænkeligt, ikke mindst i lyset af, at der opereres med en strafferamme, der uden differensiering går op til fængsel på livstid.

Til illustration af, hvad »samfundsmæssige strukturer« i øvrigt kan tænkes at være for noget, kan der f.eks. henvises til lov om aktindsigt i miljøoplysninger, hvor udtrykket »bygningsmæssige strukturer« er anvendt. Museumsloven fastslår, at den arkæologiske kulturarv omfatter spor af menneskelig virksomhed, der er efterladt fra tidligere tider, herunder bl.a. »strukturer«.

Anvendelsen af begrebet »strukturer« i lovudkastet kan tænkes at bero på, at det i EU-relateret materiale ofte anvendes i betydningen »institutioner«, hvilket sprogligt egentlig ikke er det samme. Det kan tænkes, at dette udtryk ville være mere adækvat i den givne sammenhæng.

Det er en udbredt opfattelse, at der i en definition på – i hvert fald nogle former for – terrorisme kan eller skal medtages noget om, at det drejer sig om virksomhed, der rammer uskyldige civile, sigter til at skræmme almenheden, eller noget i den retning. I forskellige henseender har sådanne antagelser ganske givet meget for sig. Sprogligt set er den i lovudkastet anvendte formulering imidlertid uklar og kan give anledning til misforståelser. Den kan nemlig med føje forstås således, at det særlige forsæt ikke nødvendigvis skal omfatte den virkning, der består i at skræmme befolkningen, men at dette moment kun er medtaget som eksemplificering, hvorved formuleringen i denne henseende ikke skal opfattes som et udtømmende udtryk for, hvilke forhold bestemmelsen omfatter. Ud fra det foreliggende lader det sig ikke afgøre, om anvendelse af bestemmelsen forudsætter forsæt til med forbrydelsen at skræmme befolkningen. Hvis dette er meningen, bør det i hvert fald anføres med en mere entydig formulering, f.eks. ved i slutningen af bestemmelsens indledende passus at skrive »og herved skræmme befolkningen«. I øvrigt ville det muligvis være hensigtsmæssigt under alle omstændigheder at erstatte begrebet »befolkningen« med »almenheden« eller »brede(re) befolkningsgrupper«. Det skal bemærkes, at man godt kan forestille sig forskellige former for terrorisme, der ikke sigter til at skræmme bredere kredse, men til at tvinge en myndighed eller organisation til noget, sådan som det f.eks. er nævnt i FN's terrorfinansieringskonvention.

I det fremlagte forslag til ny § 114 præsenteres det overordnede beskyttelsesobjekt som nævnt som »et lands eller en international organisations politiske, økonomiske eller samfundsmæssige strukturer«. Sprogligt set virker denne vending i sin helhed ejendommelig. Et land har politiske, økonomiske og samfundsmæssige institutioner, og en organisation har økonomiske samt eventuelt politiske strukturer. Det falder svært at se, hvordan en organisation - uden anvendelse af en meget særegen og anstrengt sprogbrug - skulle kunne have samfundsmæssige strukturer.

2.4. Det overordnede beskyttelsesobjekt kan efter det fremlagte forslag til ny § 114 som nævnt være »et lands ... politiske, økonomiske eller samfundsmæssige strukturer«. Bestemmelsen skal - i modsætning til den nuværende bestemmelse i straffelovens § 114 - også værne udenlandske offentlige anliggender og samfundsordener. Dette har baggrund i et ønske om bedre at kunne tage højde for terrorismens globale karakter. Der lægges således op til, at ikke kun angreb på nationale danske interesser skal være værnet af bestemmelsen, selv om denne tænkes placeret i straffelovens kapitel 13, der handler om forbrydelser mod statsforfatningen og de øverste statsmyndigheder mv., dvs. samfundsundergravende virksomhed rettet mod nationale danske interesser ("den indre fred", "den indre sikkerhed").

Det forekommer at være meget vidtgående, at en bestemmelse som den foreslåede, med alle dens indbyggede svagheder i form af uklarhed og ubestemthed, skal være så vidtgående, at enhver stat - herunder også diktaturstater og de mest undertrykkende regimer - i princippet er omfattet af kredsen af beskyttelsesobjekter.

Det forekommer ikke nærliggende at søge den foreslåede bestemmelses anvendelsesområde i denne eller andre sammenhænge afgrænset ved som i visse gældende straffebestemmelser udtrykkeligt at fremhæve, at det pågældende forhold skal være udøvet »uberettiget« el.lign. En sådan begrænsning kunne muligvis give mening i relation til nogle af de mindre alvorlige blandt de i bestemmelsen opregnede lovovertrædelser, men ville selvsagt give langt mindre mening i relation til drab, flykapring, bombesprængning etc.

På samme måde som det er tilfældet med hensyn til de i lovudkastet foreslåede §§ 114 a-d, der er tænkt som afløser for den nugældende § 114, ville det formentlig være langt at foretrække, hvis en rimelig udvidelse af rækkevidden ud over snævre danske interesser blev tilvejebragt på den måde, at det lovgivningsmæssigt blev slået fast, at bestemmelserne også omfatter tilfælde, hvor væsentlige danske nationale interesser krænkes i kraft af, at en nært allieret stat, med hvem Danmark har et åbenbart interessefællesskab, angribes på en nærmere angivet måde. Muligheden for, at den nugældende § 114 kan fortolkes og anvendes på en sådan måde står åben, og der kan være gode grunde til at lovfæste og klargøre en sådan forståelse.

Hverken lovudkastet eller motiverne hertil indeholder noget bud på, hvilke internationale organisationer, som er omfattet af det særlige strafferetlige værn i den foreslåede nye § 114. Det er næppe tanken at lade private organisationer være omfattet. Der findes imidlertid et væld af halvofficielle organisationer og internationale organisationer med statslig eller anden officiel repræsentation, og det er ganske uklart, i hvilket omfang sådanne måtte være omfattet af den særlige beskyttelse.

Det skal tilføjes, at begrebet »internationale organisationer« ikke anvendes noget sted i dansk lovgivning. Der er ikke i motiverne til lovudkastet nogen ansats til anvisning på, hvorledes begrebet skal fortolkes i en strafferetlig sammenhæng. Ud fra en legalitetsbetragtning er dette dybt betænkeligt, ikke mindst i lyset af, at der opereres med en strafferamme, der uden differensiering går op til fængsel på livstid.

2.5. Formålet med forslaget om en rammeafgørelse til bekæmpelse af terrorisme er »indbyrdes at tilnærme medlemsstaternes lovgivning« på området.

Forslaget til rammeafgørelse indebærer, at begrebet terrorisme [terrorist offences] skal fastlægges med henvisning til en række grove forbryder, der defineres i overensstemmelse med medlemsstaternes lovgivning, og som begås under særlig kvalificerede omstændigheder. Medlemsstaterne forpligtes til at straffe disse handlinger som terrorisme. Det er altså ikke tilstrækkeligt at henvise til, at de forhold, der omfattes af definitionen, som f.eks. drab og bombesprængning, allerede er strafbare i overensstemmelse med særskilte bestemmelser herom. Det er imidlertid heller ikke nødvendigt at indføre et særskilt delikt af den type, som er foreslået i lovudkastets forslag til ny § 114.

2.6. Efter straffelovens § 118 a er en række af de i lovens kapitel 12 omhandlede forbrydelser undergivet offentlig påtale, der sker efter justitsministerens påbud. Denne påtalsregel vil også gælde for den foreslåede nye § 114, hvis denne i en eller anden form skulle blive vedtaget. Ordningen indebærer på den ene side en vis udsigt til, at der i praksis kun vil blive rejst tiltale for de mest oplagte forhold. På den anden side skaber ordningen en risiko for vilkårlighed og politisering af spørgsmålet om strafforfølgning. Under alle omstændigheder bidrager en sådan ordning ikke i sig selv på nogen måde til at klargøre den materielle retstilstand for borgerne. Den er tværtimod begrundet i, at en række af delikterne i straffelovens kapitler 11 og 12 om statsforbrydelserne er særdeles vagt beskrevet og af uvis rækkevidde samt til dels præget af politisk betonedede komponenter. Det samme gælder i øvrigt med hensyn til de nedenfor omtalte forslag til nye bestemmelser, der ifølge lovudkastet skal indsættes i straffeloven som §§ 114 a-d.

2.6. I bemærkningerne til lovudkastet anføres det, at artikel 1 i den rammeafgørelse, som for tiden er under forhandling, skulle indebære en forpligtelse til »særskilt at kriminalisere terrorisme«. Det er ifølge bemærkningerne som følge heraf, at udkastet til lovforslag indeholder forslaget til en ny særskilt »terrorismeparagraf« i straffelovens § 114.

Efter det foreliggende er det langt fra utvivlsomt, at rammeafgørelsen vil indebære en forpligtelse som den nævnte, i hvert fald ikke hvis den i sin endelige form får et indhold, der i det væsentlige svarer til de udkast, som hidtil har været fremme.

I det forslag til rammeafgørelse, som i lovudkastet er optaget som bilag 3, står der i udkastet til artikel 1 kun, at den enkelte medlemsstat pålægges en forpligtelse til at træffe de nødvendige foranstaltninger for at sikre, at [i det mindste] en række opregnede lovovertrædelser, »defineret i medlemsstaternes nationale ret«, skal betragtes som terrorhandlinger, når gerningsmandens subjektive indstilling er af den ovenfor drøftede type.

Det nævnte bilag indeholder et udkast af 10. oktober 2001 fra Formandskabet for i det i

medfør af EU-traktatens artikel 36 nedsatte koordinationsudvalg. I Kommissionens udkast af 19. september optræder en tilsvarende bestemmelse med diverse variationer som artikel 3. I de bemærkninger, der ledsager sidstnævnte udkast, siges det, at medlemslandene forpligtes til at sikre, at de relevante handlinger »straffes som terrorhandlinger«. Det overlades i øvrigt til medlemslandene at beslutte, hvordan de vil »fastlægge en præcis definition af strafbare handlinger« [introduce the precise definition of the offences] med henblik på at gennemføre rammeafgørelsen. Der er ikke i udkastene til rammeafgørelse noget som helst, der forpligter medlemsstaterne til at anvende en lovgivningsteknik som den, der forelås i lovudkastet. Dette bliver yderligere klart, når man i sine overvejelser inddrager de følgende bestemmelser i Kommissionens udkast og tolker dette i sin helhed.

Artikel 5 i Kommissionens udkast til rammeafgørelse handler om »Straffe og sanktioner« [Penalties and sanctions]. I stk. 2 pålægges medlemsstaterne at sikre, at der i national lovgivning er visse mindste maksimumsstraffe for handlinger, som er omfattet af den opstillede definition på terrorisme. Der opereres her med et differensieret sæt af strafferammer, idet der for de mest alvorlige forbrydelser mindst skal være en maksimumstraf på tyve års fængsel, og for de mindst alvorlige lovovertrædelser skal være en strafferamme på mindst to års fængsel. Efter stk. 3 og 4 skal medlemsstaterne til og med sikre, at der for sådanne handlinger kan idømmes »supplerende eller alternative sanktioner« i form af samfundstjeneste m.v. samt bøder.

I Rådets forslag til rammeafgørelse gentfinder man ikke nogen bestemmelse svarende til artikel 5, stk. 2 - 4, i Kommissionens udkast. I stedet skal det efter forslaget artikel 4, stk. 2, bestemmes, at medlemsstaterne forpligtes til at træffe de nødvendige foranstaltninger for at sikre, at »terrorhandling« m.v. kan straffes »med strengere frihedsstraffe end dem, der er fastsat i national ret for sådanne handlinger i tilfælde, hvor der ikke er tale om forsæt, jf. artikel 1, stk. 1,« (medmindre handlingerne allerede straffes med den maksimumstraf, der kan idømmes i medfør af national ret). Sætningen skal formentlig forstås således, at der forudsættes et videregående forsæt til »terrorhandling«, for det giver selvfølgelig ikke mening at opfatte henvisningen som refererende til uagtsomhedsdelikter.

Uanset om udgangspunktet tages i Rådets eller Kommissionens udkast er det klar, at der ikke med nogen af teksterne vil blive skabt en forpligtelse for medlemsstaterne til

- at operere med et kvalificeret delikt, der er udformet med en fælles strafferamme for en række lovovertrædelser, der kan være omfattet af definitionen på »terrorhandling«, eller
- at lade lovens strengeste straf, fængsel på livstid, være den fælles maksimumstraf for de kvalificerede delikter, der er omfattet af definitionen på »terrorhandling«.

Det ville være fuldt tilstrækkeligt – og langt mere tilfredsstillende – at opfylde forpligtelserne i henhold til de nævnte bestemmelser i en endeligt fastlagt rammeafgørelse, hvis man f.eks. opstillede en (eller flere) forhøjede strafferammer for de relante forbrydelser. Der kunne eventuelt udformes en fælles bestemmelse, der indebar, at straffen for givne lovovertrædelser forhøjes med indtil det halve, hvis gerningsmanden har haft et videregående forsæt eller et motiv, der falder ind under den opstillede definition på terrorisme. En anden teknik kunne

være at skrive noget sådant ind i de enkelte delikter, hvilket dog formentlig ville blive unødigt kompliceret. Uanset valg af skriveteknik ville det herved opnås

- at der stadig opereres med differensierede strafferammer, jf. bemærkningerne ovenfor, samt
- at definitionen på terrorisme ikke skaber helt så udtalte problemer, som det er tilfældet i relation til afgrænsningen af et strafbart gerningsindhold, jf. bemærkningerne ovenfor.

Som allerede bemærket – og som fremhævet i bemærkningerne til såvel lovudkastet som de forskellige udkast til rammeafgørelse – kan og vil der ved den konkrete strafudmåling i en given sag blive taget hensyn til, om lovovertrædelsen er begået med terroristiske intentioner, hvilket i en eller anden grad vil indgå i bedømmelsen som en strafskærpende omstændighed, uanset hvad lovgivningen i øvrigt måtte sige eller ikke sige om spørgsmålet. Det er i den sammenhæng ingenlunde irrelevant, hvorledes terrorisme defineres, men der må betragtes som langt mindre afgørende at kunne operere med en klar og præcis definition, end hvis det drejer sig om at bedømme, om et kvalificeret gerningsindhold er realiseret. Det er således velkendt, at bedømmelsen af et forholds strafværdighed ofte vil kunne foregå ud fra friere overvejelser og rimelighedsbetragtninger i lyset af de konkrete omstændigheder i sagen som helhed. I grænsetilfælde kan det ofte være nærliggende at afstå fra anvendelse af den kvalificerede bestemmelse for i stedet at henføre et forhold under et grunddelikt, hvis dettes strafferamme er rummelig nok til at tage højde for det konkrete forholds strafværdighed.

3.1. I lovudkastet foreslås der nogle vidtgående udvidelser af den nugældende bestemmelse i straffelovens § 114. Det foreslås gjort strafbart i videre omfang end i dag at yde eller formidle økonomisk støtte til en terrororganisation eller på anden måde medvirke til at fremme dens kriminelle virksomhed. De foreslåede bestemmelser skal efter forslaget betegnes § 114 a-d. Efter forslaget kommer bestemmelserne i § 114 a og § 114 b til at omfatte nykriminaliserede forhold, mens gerningsindholdene i de (mere) subsidiære bestemmelser i § 114 c og § 114 d rummer forhold, som efter gældende ret er omfattet af § 114, stk. 1 og 2.

3.2. Med den foreslåede nye § 114 a, stk. 1, udvides kriminaliseringen af forhold, der indebærer deltagelse i militante grupper betragteligt i forhold til den gældende bestemmelse, idet gruppens virksomhed nu ikke længere er begrænset til at angå angreb på nationale danske interesser. Om betænkelighederne herved, se bemærkningerne ovenfor.

Det siges i øvrigt i bemærkningerne til lovudkastet, at da ledelse af og deltagelse i en terrorgruppe være strafbart som krævet i rammeafgørelsen, jf. artikel 2, stk. 2, litra a og b, jf. stk. 1, »er det nødvendigt særskilt at kriminalisere deltagelse i en gruppe eller sammenslutning, der begår eller har til hensigt at begå terrorhandlinger omfattet af den foreslåede bestemmelse i § 114. En bestemmelse af denne karakter foreslås indsat i straffeloven som § 114 a, stk. 1«. Allerede den gældende bestemmelse i straffelovens § 114 omfatter sådanne forhold, så begrundelsen er ejendommelig.

3.3. Med den foreslåede § 114 a, stk. 2, udvides kriminaliseringen af støtte til militante

grupper betragteligt. Efter den gældende bestemmelse i straffelovens § 114, stk. 1, forudsætter strafansvar, at der er ydet »væsentlig støtte« til en sådan gruppe. Denne regel skal ses i sammenhæng med muligheden for at inddrage en række andre bestemmelser i straffelovens almindelige og specielle del, således at der kan statuere strafansvar.

Efter gældende ret kan den, der finansierer strafbar virksomhed ifalde strafansvar som gerningsmand eller medvirkende til den konkrete handling, jf. straffelovens § 23. Dette forudsætter, at den pågældende har haft et til en vis grad konkretiseret forsæt til den pågældende forbrydelses fuldbyrdelse.

Foreligger der ikke en tilstrækkelig konkret medvirken til en bestemt handling, kan væsentlig finansiel støtte til en militant gruppe straffes efter den gældende bestemmelse i straffeloven § 114, hvis der er tale om en gruppe, der har hensigt til ved magtanvendelse at øve indflydelse på offentlige danske anliggender eller fremkalde forstyrrelse af den danske samfundsordenen. Finansiering af militante eller i øvrigt samfundsundergravende grupper, hvis beredskab alene er rettet mod andre landes eller mod udenlandske organisationers interesser kan derimod ikke straffes efter § 114.

Det har givet anledning til tvivl, i hvilket omfang det efter gældende ret er muligt at straffe finansiering af organisationer, hvis virksomhed både omfatter humanitære opgaver og begår terrorhandlinger. På den – og efter det foreliggende kun den – baggrund har i lovudkastet fundet anledning til at foreslå en ny bestemmelse i § 114 a, stk. 2, der bl.a. skal omfatte personer, der giver egne penge eller indsamler penge til en organisation, der udtrykkeligt indsamler penge til anskaffelse af våben eller sprængstoffer, og som af de pågældende er kendt for – blandt andet – at begå terrorhandlinger.

Bestemmelsen omfatter endvidere personer, der giver eller indsamler penge til en organisation, selv om pengene ikke udtrykkeligt skal anvendes til anskaffelse af våben eller sprængstoffer, når blot organisationen af bidragsyderen er kendt for blandt andet at begå terrorhandlinger. Det er i den forbindelse uden betydning, om den konkrete indsamling angiveligt har et humanitært formål, hvis organisationen er kendt for at begå terrorhandlinger.

Der kan næppe rejses indvendinger mod forsøget på at klargøre, at strafansvar ikke nødvendigvis forudsætter, den pågældende gruppe har terrorisme som sit eneste eller hovedsagelige virke. Imidlertid vil en sådan klargøring ikke på nogen måde bidrage til at præcisere, hvad der er omfattet af begrebet terrorisme, jf. bemærkningerne ovenfor.

I øvrigt forekommer denne del af forslaget at være særdeles vidtgående, når den hidtidige forudsætning om, at der er ydet »væsentlig« støtte bortfalder og foreslås erstattet med vendingen »direkte eller indirekte«, således at gerningsholdet beskrives således:

- § 114, stk. 2. På samme måde straffes den, som
- direkte eller indirekte yder økonomisk støtte til,
 - direkte eller indirekte tilvejebringer eller indsamler midler til, eller
 - direkte eller indirekte stiller penge, andre formuegoder, eller finansielle eller andre lignende ydelser til rådighed for
- person, en gruppe eller en sammenslutning, der begår eller har til hensigt at begå

terrorhandlinger omfattet af § 114. [Kursivering tilføjet her.]

Den foreslåede bestemmelses nr. 3 har ifølge bemærkningerne til lovudkastet sin baggrund i et ønske om at kunne opfylde kravene i FNs terrorfinansieringskonvention, som indeholder et forbud mod at stille finansielle midler eller ydelser til rådighed for terrorister mv., jf. artikel 1, litra d, samt FNs Sikkerhedsråds resolution nr. 1373 (2001).

Det skal være strafbart for pengeinstitutter, andre finansielle institutter og enkeltpersoner at stille penge eller andre finansielle tjenesteydelser til rådighed for terrorister mv., uanset om det sker med viden om, at midlerne eller ydelserne vil blive anvendt til at fremme eller udføre terrorhandlinger. Der skal alene være forsæt til, at de nævnte ydelser stilles til rådighed for personer, der begår eller har til hensigt at begå eller fremme eller deltage i terrorhandlinger.

Ifølge bemærkningerne til lovudkastet er det angiveligt ikke muligt med de gældende straffebestemmelser at straffe et pengeinstitut, der stiller en finansiell tjenesteydelse til rådighed for en terrorist til andre formål end at begå terrorhandlinger. Finansiering af terrorhandlinger kan efter omstændighederne straffes som medskyldighed i den konkrete forbrydelse, se bemærkningerne ovenfor. Låner et pengeinstitut imidlertid midler ud til en person i den tro, at pengene skal bruges til legitime formål, kan der ifølge bemærkningerne i lovudkastet ikke efter gældende ret straffes for medvirken til terrorhandlingen, uanset pengeinstituttets eventuelle viden om, at den pågældende kunde er terrorist. På dette punkt skulle FNs Sikkerhedsråds resolution nr. 1373 (2001) derfor kræve en lovændring, der gør det muligt at straffe pengeinstitutter mv. i ovennævnte omfang. Det forekommer ikke at være overbevisende, at aktiviteter som de anførte ikke skulle være omfattet af den gældende bestemmelse i straffelovens § 114, og der kan næppe findes holdepunkter for en sådan antagelse i sædvanlige fortolkningsbidrag eller doktrinen. Det er ikke af de angivne grunde påkrævet at indføre en bestemmelse, der efter sin ordlyd er så vidtgående som den foreslåede, og en sådan lovgivningsteknik har et foruroligende præg.

3.3. Det foreslås i lovudkastet at hæve normalstrafferammen for overtrædelser som de nævnte fra fængsel indtil 6 år til fængsel indtil 10 år. Der anføres ikke noget specifikt begrundelse for denne del af forslaget, hvilket forekommer ejendommeligt, når det tages i betragtning, at de gældende regler på området aldrig har fundet anvendelse som grundlag for en domfældelse, og at der er tale om forhold på lang afstand af og uden elementer af direkte indblanding i den terroristiske virksomhed som sådan. I bemærkningerne til lovudkastet siges det alene, at man hermed ønsker at signalere, at terrorhandlinger, herunder finansiering, planlægning og forberedelse af sådanne, er alvorlige forbrydelser, der skal straffes under hensyntagen til deres alvorlige karakter.

3.4. Som en nyskabelse foreslås det i lovudkastet at indføre en bestemmelse som ny § 114 b i straffeloven. Bestemmelsen indeholder en »udvidet medvirkensregel«, der omfatter enhver form for støtte til terrororganisationer, selv om støtten ikke kan henføres til konkrete terrorhandlinger.

§ 114 b. Den, som i øvrigt ved tilskyndelse, råd eller dåd medvirker til at fremme den kriminelle virksomhed eller det fælles formål for en gruppe eller sammenslutning, som foretager en eller flere handlinger omfattet af § 114 eller § 114 a, stk. 2, nr. 2.

når virksomheden eller formålet indebærer, at en eller flere handlinger af denne karakter begås, straffes med fængsel indtil 6 år.

Den foreslåede bestemmelse indebærer, at der kan blive tale om at straffe »en person, der i relation til den konkrete terrorhandling kan være medvirkende i tredje eller fjerde led«. Det erkendes i bemærkningerne til lovudkastet, at en udvidelse af det strafferetlige medvirkensbegreb bredt til at omfatte enhver form for støtte til organisationer, uden at støtten kan henføres til konkrete terrorhandlinger, kan rejse principielle betænkeligheder. Heroverfor anføres det imidlertid, »at der er tale om yderst alvorlige forbrydelser af almenfarlige karakter«. Det skal hertil bemærkes, at den foreslåede bestemmelse netop ikke i sig selv kriminaliserer »yderst alvorlige forbrydelser af almenfarlige karakter«, men forhold, som er kendetegnet ved en betydelig fjernhed i forhold til sådanne.

Ifølge bemærkningerne til de enkelte bestemmelser i lovudkastet sigter bestemmelsen i den foreslåede § 114 b navnlig til at opfylde kravene i FN's terrorfinansieringskonvention, jf. artikel 2, stk. 5, litra c, 1. led, der vedrører »medvirken ... i den hensigt at fremme gruppens generelle kriminelle virksomhed eller formål«. Den har dog et bredere anvendelsesområde, idet den ikke kun omfatter medvirken til terrorfinansiering, men medvirken til alle terrorhandlinger.

Den foreslåede bestemmelse er efter sin ordlyd identisk med en bestemmelse i FN's terrorbombekonvention, jf. artikel 2, stk. 3, litra c, 1. led. Om opfyldelsen af denne har Justitsministeriet tidligere tilkendegivet den opfattelse, at der ikke er "huller" i dansk strafferet. Dette skete i forbindelse med de ændringer, der var nødvendige før, at Danmark med lov 280, 2001 kunne ratificere terrorbombekonvention. I bemærkninger til lovforslaget blev følgende anført:

»En person, som forsætlig fremmer den kriminelle virksomhed eller formål hos en gruppe personer med kendskab til gruppens generelle formål, og som dermed bidrager til en af de lovovertrædelser, der er omfattet af konventionen, må på den baggrund anses for at have forsæt til en lovovertrædelse, som er tilstrækkelig konkretiseret til at kunne medføre medvirkensansvar.« (Folketingstidende 2000-01, tillæg A, s. 2905).

I lovudkastet gøres det nu gældende, at den foreslåede bestemmelse alligevel skulle »kunne være af betydning for anvendelsen af« den nævnte bestemmelse i terrorbombekonventionen. Der redegøres dog ikke for den foreslåede bestemmelses betydning i så henseende.

I de almindelige bemærkninger til lovudkastet anføres det som begrundelse for denne del af forslaget, at det med henblik på opfyldelse af rammeafgårelsen om bekæmpelse af terrorisme skal være »strafbart at yde støtte til en terrorgruppe, herunder ved tilvejebringelse af informationer eller materielle midler, herunder finansiering af dens aktiviteter«, jf. udkastet af 10. oktober til rammeafgårelse artikel 2, stk. 2, litra c, hvor der tales om »støtte til en terroristgruppe med henblik på at begå terrorhandlinger gennem tilvejebringelse af informationer eller materielle midler, herunder finansiering af dens aktiviteter«.

Så vidt det ses, indeholder Kommissionens udkast af 19. september til rammeafgørelse ikke specifikt en tilsvarende bestemmelse, men blot et krav om medvirken til og forsøg på terrorvirksomhed.

For at opfylde kravet om kriminalisering af »tilvejebringelse af informationer« kunne sådanne aktiviteter efter behov have været medtaget i den foreslåede § 114 a, stk. 2, der i udkastet kun er kommet til at omfatte materielle ydelser, se herom ovenfor.

3.5. For så vidt angår den del af den foreslåede § 114 b, som vedrører medvirken til overtrædelse af den foreslåede § 114, a, stk. 2, nr. 2, lægges der op til en så usædvanlig nyskabelse i dansk strafferet som indførelse af strafansvar for medvirken til medvirken, ovenikøbet forstået som medvirken til fjernere deltagelse af en karakter, der ikke i sig selv kvalificerer til betegnelsen medvirken. En sådan konstruktion kunne nok berettige til nogle forholdsvis udførlige lobmærkninger.

I bemærkningerne til de enkelte bestemmelser i lovudkastet siges det i øvrigt bredt om anvendelsen af den foreslåede § 114 b, at en person, »som forsætlig fremmer den kriminelle virksomhed eller formål hos en gruppe personer med kendskab til gruppens generelle terrorformål, og som dermed yder en form for bidrag til, at der foretages en terrorhandling som defineret i lovforslaget, vil kunne straffes efter den særlige medvirkenregel, selv om den pågældende ikke har forsæt til at medvirke til en konkretiseret terrorhandling.« Med de gengivne bemærkninger efterlades der flere løse ender. Hvad vil det sige at fremme »formål hos en gruppe personer med kendskab til gruppens generelle terrorformål«? Og hvad betyder det, at der ydes »en form for bidrag til, at der foretages en terrorhandling«?

4. De foreslåede bestemmelser i den del af lovudkastet, som vedrører de enkelte forbrydelser, giver anledning til store betænkeligheder med hensyn til udsigterne til at realisere idealerne om en ensartet og rimelig håndhævelse uden utilbørlig politisering. I lyset af, at strafværdige forhold i det væsentlige kan straffes efter allerede eksisterende bestemmelser, er det ganske vist svært at forestille sig en praksis, hvorefter der ofte eller jævnligt blev rejst tiltale eller dømt efter sådanne bestemmelser, så i den henseende er der grund til at forestille sig, at de foreslåede bestemmelser først og fremmest vil komme til at fungere som symbol- eller signallovgivning. De praktiske betænkeligheder ved en gennemførelse af forslaget i den foreliggende form knytter sig derfor især til udsigten til anvendelse af bestemmelserne i efterforskningsmæssig sammenhæng, hvor risikoen for en udglidning vil være betragtelig.

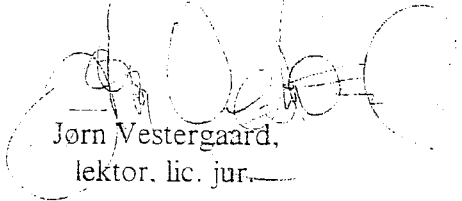
Bestemmelser som de foreslåede er – i endnu højere grad end den gældende § 114 – egnede til at bevirke vilkårlighed samt overdreven beredvillighed med hensyn til at give grønt lys for indgribende efterforskningsskridt over for grupper, som betjener sig af voldsforherligende retorik eller på anden måde kan give indtryk af at have et militant beredskab.

Anvendelse af begrebet terrorisme i straffeloven kan bero på berettigede ønsker om at opnå opnå en understregning og tydeliggørelse af beskyttelsesinteressernes vægt; men virkningen kan let blive en anden end den tilsigtede og påberåbte. Terrorismeparagraffer kan også bevirke en udviskning af skellet mellem væsentligt og uvæsentligt. Anvendelse af betegnelsen terrorisme i beskrivelsen af en lovovertrædelse kan beklageligvis bidrage til en sproglig

inflation, der slører det egentlige budskab. Formodningen bliver let, at over for terrorister er alting tilladt! Anerkender man en sådan tankegang eller underkender man dens magt over sindene, kan grundlæggende retsprincipper blive sat over styr. Dette gør sig med ekstra styrke gældende, hvis gerningsbeskrivelserne ikke udformes med den yderste omhyggelighed med henblik på at opnå en rimelig og afbalanceret afgrænsning samt størst mulig klarhed, bestemthed og præcision.

Ovenstående er tilkendegivet i fuld bevidsthed om og anerkendelse af, at det i allerhøjeste grad er velbegrunderet, at beredskabet også fra dansk side udbygges og styrkes med henblik på at imødegå forskellige terror-bevægelser angreb og at værne demokratiet, den frie udøvelse af menneskerettighederne og en god økonomisk og social udvikling på nationalt og globalt plan.

Med venlig hilsen

A handwritten signature in black ink, appearing to be 'Jørn Vestergaard', written over a horizontal line. The signature is somewhat stylized and loops around the line.

Jørn Vestergaard,
lektor. lic. jur.

