



Strasbourg, 5 July 2010

CDL-AD(2010)022
Or. Engl.

Study no. 500/2008

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPORT

**ON COUNTER-TERRORISM MEASURES
AND HUMAN RIGHTS**

**Adopted by the Venice Commission
at its 83rd Plenary Session
(Venice, 4 June 2010)**

on the basis of comments

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I. Introduction

1. In its Resolution 1634 (2008) on "Proposed law on forty-two-day pre-charge detention in the United Kingdom", the Parliamentary Assembly of the Council of Europe (PACE) requested the Venice Commission's assistance in the preparation of a thorough study on *"fighting terrorism while respecting human rights and the rule of law"* (§ 7). Ms Koufa, and Messrs Van Dijk, Cameron and Neppi Modona were appointed as rapporteurs.

2. In 2009, the Venice Commission, in co-operation with PACE and the European University Institute, organised a Round Table on *"Fight against Terrorism: Challenges for the Judiciary"*, which took place in Florence from 18 to 19 September.

3. *The following report was drawn up on the basis of comments by the rapporteurs and their reports at the Round Table in Florence (CDL(2009)141, CDL(2009)142, CDL(2009)143); it was adopted by the Venice Commission at its 83rd Plenary Session (Venice, 4 June 2010).*

II. Scope of the report

4. It is important to clarify at the outset the scope of the present report. The request of PACE was made in 2008, in the context of concerns raised by draft legislation with regard to counter terrorism in the United Kingdom. PACE then considered that the British draft legislation should be examined within a more general comparative study of anti-terrorism legislation in Council of Europe member States in order to assess, in particular, the compatibility of such legislation with the requirements of the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR). The draft law in question has subsequently been withdrawn from the British Parliament, after the House of Lords had rejected the proposal by 191 votes.

5. In the Venice Commission's opinion, a thorough insight into and knowledge of the most important issues of national counter-terrorism legislation and their possible negative impacts on human rights is crucial for all those who are involved in drafting and monitoring relevant national laws. It is also important for enabling the competent national authorities to understand and anticipate the most serious impacts that counter-terrorism measures may have on the enjoyment of individual human rights.

6. However, a comparative analysis of the compatibility of national counter-terrorism measures, adopted by the Council of Europe member States, with fundamental human rights is a highly complex exercise. While specific legislation may exist, or be passed, to provide, for example, for exceptional powers of detention and trial to deal with terrorist suspects, in most cases these suspects can also be dealt with under general powers. The same is true for search and surveillance of suspects. This broadens the area of possible counter-terrorism measures considerably. Moreover, to be complete, a comparative analysis would also need to address the implementation of the relevant legislation, because the severity of either general or special legislation may be tempered simply by not applying it or by applying it in a manner generous to the accused. In that respect, the legal culture of the major actors such as the police, the relevant security agencies, the immigration authorities or the prosecutor as well as their relationships are equally important.

7. It is not the ambition of the Venice Commission to proceed with such a detailed, comparative study. This report does not therefore deal with specific anti-terrorist measures in different countries or the way that domestic courts have responded to those measures. It outlines only the most recurring issues which have arisen at the national level, and the range of their possible incompatibilities under the European Convention on Human Rights and Fundamental Freedoms (ECHR). It draws in most part on the case-law of the European Court of Human Rights (ECtHR) which demonstrates how fundamental human rights and the fight against terrorism may complement each other without unduly compromising their respective aims.

8. The Commission has already touched upon a number of these issues in its reports on Private Military and Security Firms and Erosion of the State Monopoly on the use of force¹, on the Democratic Control over the Armed Forces², and on the Democratic Oversight of the Security Services³ as well as in its opinions on Video Surveillance by Private Operators in the Public and Private Spheres and by Public Authorities in the Private Sphere and Human Rights

¹ CDL-AD(2009)038, *Report on Private Military and Security Firms and Erosion of the State Monopoly on the use of force*, adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009).

² CDL-AD(2008)004, *Report on the Democratic Control of the Armed Forces*, adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008).

³ CDL-AD(2007)016, *Report on Democratic Oversight of the Security Forces*, adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007).

Protection⁴; on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights⁵; on the International legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners⁶; and its opinion on Pace Recommendation 1713(2005) on Democratic Oversight of the Security Sector in Member States⁷. The present report can usefully be read together with these earlier reports and opinions.

III. Background

9. One of the notable features of governmental action in response to the terrorist attacks of 11 September was that, while governments at both national and international level stood firmly in favour of the rule of law and the cause of human rights, and called for restraint in order not to disproportionately impair the protection of human rights⁸, several concrete measures did not show adequate concern on the part of the responsible authorities to strike a fair balance between security measures and human rights protection⁹.

10. Widely and deeply felt outrage about the human calamity and its aftermath created an appeal to, and a determination on the part of, the authorities to take effective preventive measures for the future. Police and security authorities have the primary responsibility for preventing terrorist outrages, and naturally tend to wish greater powers in order not to be found wanting in a crisis. In their desire to be seen as taking effective measures against terrorism certain governments responded by adopting new domestic rules and procedures or changing the interpretation and application of existing procedures, which were seen as standing in the way of an effective prevention of, and fight against terrorism. New international norms were also put in place, imposing obligations on States to introduce changes in criminal law and procedure. Many of these changes resulted in a weakening of the rule of law and human rights. This one-sided focus on security concerns also brought about a number of particularly invasive measures which severely threatened human rights: extraterritorial abductions, extreme delays in indicting arrested individuals, obtaining confessions through interrogation techniques that amount to torture or cruel, inhuman or degrading treatment of detainees, trials before organs falling short of a properly constituted court of law or in which normal procedural protections was

⁴ CDL-AD(2007)027, [Opinion on video surveillance by private operators in the public and private spheres and by public authorities in the private sphere and human rights protection, adopted by the Venice Commission at its 71st Plenary Session \(Venice, 1-2 June 2007\)](#).

⁵ CDL-AD(2007)014, [Opinion on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights, adopted by the Venice Commission at its 70th Plenary Session \(Venice, 16-17 March 2007\)](#).

⁶ CDL-AD(2006)009, [Opinion on the International legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners adopted by the Venice Commission at its 66th Plenary Session \(17-18 March 2006\)](#).

⁷ CDL-AD(2005)033, [Opinion on Pace Recommendation 1713\(2005\) on Democratic Oversight of the Security Sector in Member States adopted by the Venice Commission at its 64th Plenary Session, \(Venice, 21-22 October 2005\)](#).

⁸ See e.g., *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers of the Council of Europe at its 804th meeting on 11 July 2002: "All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision" (Guideline II); Resolution 1624(2005) of the United Nations Security Council of 14 September 2005: "Stresses that States must ensure that any measures taken to implement paragraphs 1, 2 and 3 of this resolution [i.e. security and anti-terrorist measures] comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law" (§ 4); the Report on Terrorism and Human Rights of the Inter-American Commission on Human Rights of 22 October 2002, which contains recommendations to States to fulfil their international human rights obligations when adopting and executing anti-terrorism measures, including the right to judicial review. See also the Charter on Preventing and Combating Terrorism of the Organisation on Security and Cooperation in Europe of 7 December 2002.

⁹ See e.g., at the international level: Resolution 1390(2002) of the Security Council of the United Nations of 16 January 2002 concerning the black list or suspected terrorists and terrorist organizations, and at the national level, among many examples, the United Kingdom 2006 Terrorist Act and the 2007 Bill on 42-days pre-charge detention.

reduced or denied. These are just a few among many measures which have had an adverse effect on traditional rights of the accused, such as the right to liberty and security, as well as the right to a fair trial and freedom from inhuman treatment.

11. The Venice Commission already stated that the security of the State and its democratic institutions, and the safety of its population, are vital public and private interests that deserve protection, if necessary at high costs¹⁰. States are even obliged to provide protection. As the ECtHR has held, the protection of the right to life "*may also imply in certain well-defined circumstances a positive obligation on the part of the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual*".¹¹ Some claim even that the right to safety and to effective protection constitutes an independent human right ("*freedom from fear*").¹²

12. However, States not only have the duty to protect State security, and the individual and collective safety of their inhabitants; they also have the duty to protect the (other) rights and freedoms of those inhabitants. Real security means that everybody in society can exercise his or her basic human rights without being threatened by violence; maintaining security is meant to be in the interest of ensuring human rights, and thus should respect those rights. State security and fundamental rights are, consequently, not competitive values; they are each other's precondition. In the long run, security is best protected by the enhancement and not by a weakening of the rule of law, democratic principles and the protection of human rights¹³.

13. Both the ECHR and other human rights treaties provide to a great extent the mechanisms for ensuring the compatibility between the fight against terrorism and respect for human rights.

IV. Derogations from human rights: conditions of application

14. Article 15 ECHR constitutes the legal foundation which allows States to derogate from most of their obligations under the ECHR "*in time of war or other public emergency threatening the life of the nation*". Some rights, however, are declared non-derogable by Article 15¹⁴. These are so-called absolute rights: the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and of slavery, and the *nullum crimen, nulla poena* principle. This is important to emphasize, since State practice shows that also these rights may be under severe threat in situations of a proclaimed state of emergency.

15. The Venice Commission described the test of "*public emergency threatening the life of the nation*", set out through the case-law of the former European Commission of Human Rights¹⁵ and the ECtHR, in its opinion on the Protection of Human rights in Emergency Situations¹⁶.

¹⁰ Cf. CDL-AD(2006)015, *Opinion on the Protection of Human Rights in Emergency Situations*, § 5.

¹¹ ECtHR, *Osman v. United Kingdom*, Judgment of 28 October 1998, § 115 and ECtHR, *LCB v. UK*, Judgment of 9 June 1998, §36.

¹² Cf. CDL-AD(2006)015, *cit.*, § 5.

¹³ See the eighth paragraph of the Preamble of the Council of Europe Convention on the Prevention of Terrorism, CETS No. 196: "Recalling the need to strengthen the fight against terrorism and reaffirming that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms as well as other provisions of international law, including, where applicable, international humanitarian law". See also CDL-AD(2007)016, *Report on the Democratic Oversight of the Security Services* "The protection of internal security must include the protection of the fundamental values of the State which, for a liberal democratic State, means inter alia democracy and human rights: However, in practice, the values of freedom and security can easily be perceived as opposing values" §58.

¹⁴ Cf. for example, ECtHR, *Aksoy v. Turkey*, Judgment of 18 December 1996, § 62.

¹⁵ See Greek case, 12 YB 1, *Opinion of the Commission*, § 53.

¹⁶ CDL-AD(2006)015, §§ 9-14.

"10. ... On that occasion, the Commission set out the following characteristics of a situation that would justify such an emergency:

- (1) It must be actual or imminent;*
- (2) Its effects must involve the whole nation;*
- (3) The continuance of the organised life of the community must be threatened;*
- (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate. In 1961 the ECtHR stressed that there must be a "threat to the organised life of the community".*

11. When an emergency situation pertains and a Contracting State wishes to use its power of derogation, it is imperative for the State in question to make a formal derogation under Article 15 ECHR indicating the rights and the territory to which the derogation applies. Moreover, in case of such derogation, the third paragraph of Article 15 requires that the State concerned keep the Secretary General of the Council of Europe fully informed of the measures that it has taken and the reasons therefore, as well as of the moment these measures have ceased to operate".

16. Article 4 §1 of the International Covenant on Civil and Political Rights is expressed in terms very similar to those of article 15 §1 ECHR. This has particular relevance for those States that are not members of the Council of Europe¹⁷.

17. Derogations may only last for as long as, and may only have a scope that is "strictly required by the exigencies of the situation". The exceptional nature of derogations also requires that the circumstances which led to the adoption of such derogations *"...are reassessed on a regular basis with the purpose of lifting them as soon as these circumstances no longer exist"*¹⁸.

18. Whenever anti-terrorist legislation constitutes a derogation of one or more human rights, it is therefore required that the measures in question comply with all the conditions of application of derogations set out in international human rights treaties; in particular, that they are exceptional, temporary, strictly necessary and proportional to the imminent threat to the nation. Their necessity and proportionality must be subject to domestic and international supervision¹⁹, and the keeping in force of the legislation concerned must be regularly reviewed.

V. Limitations of human rights

19. When the security situation of the State does not justify derogation measures, it is possible for the State in order to counter terrorism to introduce limitations to the enjoyment of certain fundamental rights. Such limitations may be justified on grounds of national interest and public safety, and for the protection of the rights and freedoms of others²⁰. The survey of national legislation of the member States provides examples of constitutional provisions and laws which allow restricting, for example, personal freedom, freedom of movement, principles of a fair trial, and the principle of equality before the law.

¹⁷ *Ibidem*, § 11.

¹⁸ *Guidelines on Human Rights and the Fight against Terrorism, cit., Guideline XV.3.*

¹⁹ Cf. *European Commission for Democracy through Law, Emergency powers, Collection Science and technique of democracy No. 12 (1995), p. 4; Human rights and the functioning of the democratic institutions in emergency situations, Collection Science and technique of democracy No. 17 (1996), p. 143.*

²⁰ *For the ECHR, see e.g. Articles 8§2, 9§2, 10§2 and 11§2. See also Article 17. Cf. CDL-AD(2006)015, cit., §6.*

20. Limitations can apply to rights and freedoms of both those who have committed or are suspected of having committed a terrorist act, but also of the population at large, even those of actual or possible victims of terrorist acts.

21. One of the leading considerations in weighing the value of the human rights that are restricted against the necessity of their limitations will be that, without certain temporary restrictions, threats to these very human rights cannot be effectively fought against. These threats, if not stopped or prevented, will or may restrict these rights and freedoms even further. Temporarily limiting certain human rights may thus be a matter of priority dictated by the circumstances; it is not a matter of conflicts of rights but rather a matter of reconciliation of rights.²¹ At the same time, such measures should not lead to an *arbitrary* limitation of human rights nor should they affect these rights and freedoms in their core. Moreover, the weighting must follow, or be based upon, a democratic process and be subject to independent review. As it was stated by the Parliamentary Assembly of the Council of Europe in a recent resolution, *"terrorism can and must be fought with means that fully respect human rights and the rule of law, excluding all forms of arbitrariness. Injustice breeds terrorism and undermines the legitimacy of the fight against it"*²²

22. In this regard, the Venice Commission recalls that when limiting the rights and freedoms of the persons involved, or suspected of being involved in terrorist acts, the normal justification requirements apply. This means first, that the right or freedom must not be of an absolute character that does not allow for any limitation, such as the prohibition of torture. Second, one of the limitation grounds exhaustively listed in the human-rights provision concerned must be at stake. Third, the limitation must be "prescribed by law", which requires its regulation in a sufficiently transparent and accessible legal provision. Since the fundamental rights and freedoms are, as a rule, guaranteed at national level in the Constitution or in a legal instrument with constitutional status, the possibility of and conditions under which some of them may be restricted should also have a constitutional foundation.²³ Finally, the limitation must be "necessary in a democratic society". The latter requirement amounts, according to standing case-law of the European Court of Human Rights, to that of "a pressing social need". It implies in particular that the measure taken must be effective and that the scope and effects of the resulting limitation must be proportional in relation to the importance of the interests to be protected.²⁴

23. This means that the interests of national security and public safety, and the protection of the rights and freedoms of others may justify limitations of the enjoyment by the (suspected) perpetrators of certain of their human rights, but that such justification is subject to rather strict conditions. As it is stated in the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism *"When a measure restricts human rights, it must be defined as precisely as possible and be necessary and proportionate to the aim pursued"* (Guideline III.2).

24. In this regard, the Commission wishes to stress that the general principles of legality, necessity and proportionality concern both the legislation itself and its implementation in practice.

²¹ See Françoise Tulkens, "Les conflits entre droits fondamentaux regards croisés sur les articles 9 et 10 de la Convention européenne des droits de l'homme", in: Venice Commission, *Tackling blasphemy, insult and hatred in a democratic society*, Council of Europe (2008), p. 273 at pp. 283-284.

²² Resolution 1634 (2008) on the "Proposed law on forty-two-day pre-charge detention in the United Kingdom", 2 October 2008.

²³ See Venice Commission, *Emergency powers*, cit., pp. 18-19. See also Recommendation a. at ibidem, p. 22.

²⁴ See P. van Dijk, F. van Hoof a.o., *Theory and Practice of the European Convention on Human Rights*, 4th edition, Antwerp/Oxford, Intersentia (2006), pp. 333-350.

25. The above conditions lead the Venice Commission to the opinion that the introduction of legal provisions providing for the limitation of human rights and *a fortiori* for derogation from such rights, should be subjected to parliamentary approval or, in urgent cases, to posterior parliamentary control, while measures and action by which such limitations or derogations are applied, should be under independent review for their legality, necessity and proportionality.

26. In addition, the existence and effectiveness of such national guarantees should be promoted by the existence of speedy and effective international supervision. The margin of appreciation left to the national authorities should not be so broad as to make national and international supervision practically meaningless.

VI. Counter-terrorism measures and fundamental human rights at risk

27. As demonstrated above, human rights are not an obstacle to measures necessary to protect the security of the State and its institutions, and the safety of its population. They constitute rather an appropriate legal framework for the application of such measures in practice.

28. The important question for the purposes of the present report is the extent to which the relevant human rights standards which apply to various issues in anti-terrorism legislation, permit derogations or limitations in order to accommodate the particular difficulties which may arise in the prosecution of terrorism offences and in fighting terrorism.

A. Terrorist offences and principle of legality

29. The core of the rule of law in criminal law is the principle of the legality of penal prohibition and punishment (*nullum crimen, nulla poena sine lege*), laid down in Article 7 ECHR. The latter is a non-derogable clause²⁵. In the words of the ECtHR, “...It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment”²⁶.

30. In several countries the relevant counter-terrorism legislation prohibits a series of acts without giving an overall definition of terrorism. The offences are often vaguely and/or broadly defined such as “being concerned with terrorism” or “belonging to a proscribed organisation”. In other countries, the definition of terrorism in national laws may be so broad that it encompasses a wide range of acts of differing gravity. This carries a risk that certain crimes or offences are incorporated in the category of terrorist act that, by nature, do not belong there. Or that a crime or an offence committed in a political context be considered as a terrorist act²⁷.

31. During the last years, some States have also been drawing up official lists of groups deemed to be terrorists. Belonging to or collaborating with a so-called terrorist group becomes a crime, *ipso facto*. “Blacklisting” of terrorist suspects or groups involves major problems for their legal security and several of their human rights (see below, paras. 71-74). As it operates to criminalize activities in support of a given violent (terrorist) political movement, there is a considerable risk that it may have an overspill effect on non-violent movements which have the same political goals as the target group, but which do not advocate (terrorist) violence in obtaining these goals. This may lead to infringements of the freedom of association and freedom of speech of the persons concerned.

²⁵ Cf. Article 15 ECHR.

²⁶ ECtHR, *Kafkaris v Cyprus*, Judgment 12 February 2008, § 137.

²⁷ *Fédération Internationale des Ligues des Droits de l'Homme, Analysis Report on Counter-Terrorism versus Human Rights : the Key to Compatibility*, n°429/2, October 2005, p.22.

32. Furthermore, expanding the criminal liability to mere expressions of adherence to terrorist ideologies conflicts with the principle that only acts may be punished, and not also declarations of thought, intention or sympathy, as long as the latter do not amount to speech by the person him- or herself that amounts to incitement to violence or hatred (see § 33)²⁸. Article 7 ECHR links the principle of legality to the commission of an act or an omission; a crime should thus consist in a material behaviour. The rights of the accused, notably the right of defence, would be nullified if the suspected person could be charged on the basis of mere expressions of terrorist ideology or support for terrorism and terrorist criminal acts: no defence is possible if the charge does not relate to facts, actions or behaviour.

33. Another category of offences that raises significant human rights concerns are “new” crimes for speech that is seen to encourage, directly or indirectly, terrorism²⁹. Restrictions have expanded from existing prohibitions on incitement to much broader and less defined areas such as “apology”, “praising”; “glorification or indirect encouragement” or “public justification” of terrorism. These “new” offences often criminalise the dissemination, publication and possession of material which are considered to fall foul of the incitement provisions. These provisions generally tend towards a weakening of the causal link that is normally required in law between the original speech (or other form of expression) and the danger that criminal acts may be committed³⁰. Such offences are particularly worrisome when applied to the media. The ECHR provides for strong protection of freedom of expression (Article 10) while allowing States to protect national security. According to the Strasbourg case-law, under article 10 ECHR incitement can only be prohibited in limited circumstances, which are highly context based³¹. As recommended in the Council of Europe Guidelines on protecting freedom of expression and information in times of crisis, “*Member States should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined*”.³²

34. In this regard, the Venice Commission recalls that anti-terror offences should conform to three fundamental principles of criminal law which represent the pre-condition for the protection of the rights of the accused: 1) any new offence must be introduced by an ordinary law, discussed and approved by Parliament through the normal legislative procedure, and not by mere acts of the executive, without parliamentary control; 2) any new offence must address actual facts which it must be possible to ascertain materially and objectively; and 3) any new offence must relate to facts which are committed after the entry into force of the new law. It is for the judiciary and the constitutional justice – national and international – to assess whether the legislative responses to terrorist threats comply with the principle of legality, and, if need be, to declare the legislation introducing the new offences inadmissible or non applicable, depending on the specific features of the relevant legal order.

²⁸ See Venice Commission, *Blasphemy, insult and hatred: finding answers in a democratic society*, Council of Europe, Science and Technique of Democracy No. 47, 2010, pp. 22-31.

²⁹ A review by the Council of Europe in 2004 found that all member states had laws on incitement as part of their criminal codes and a handful had specific provisions on incitement of terrorism.

³⁰ Cf. International Commission of Jurists (ICJ), *Assessing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human rights*, ICJ, 2009, at p. 128-129.

³¹ Cf. for example, EctHR, *Leroy v. France*, Judgment of 6 April 2009, §§ 44-45; *Karatas c. Turquie*, Judgment of 8 July 1999, § 51.

³² *Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis*, adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies, Guideline IV, § 19.

35. Associative crimes may be an effective and useful tool to fight terrorism in countries whose legal and cultural tradition accept them: this kind of crimes respects the principle that only facts entail criminal liability in that they presuppose that an actual organisational structure exists, that the means to achieve the aims of the organisation exist and that the role and tasks of the members of the association be defined. The proof of associative crimes might, however be facilitated if a favourable treatment were foreseen for those accused who decided to collaborate with the judiciary by revealing the names of the accomplices, as well as the programmes and the aims of the criminal organisation. This differential treatment – favours for the terrorists who collaborate and longer prison sentences for those who do not - has been fruitful in several countries (the US, Italy, Germany for example), without affecting the fundamental guarantees of criminal law.

B. Surveillance powers

36. Most, if not all member States allow the use of electronic surveillance to investigate serious crimes. Often, interceptions for national security purposes such as terrorism investigations are subject to less requirements and oversight. Technological advances allow an increased amount of information about a person's activities to be obtained; internet usage can reveal significant details about a user's professional and private life and activities. Mobile telephones provide detailed records about a user's location. Data are increasingly being kept on all users for both commercial and national security purposes. Governments are increasingly asking telecommunication providers to automatically collect and retain information on all users' activities. The Venice Commission has earlier dealt in detail with the need for improved control over surveillance technologies, and models for this.³³

37. Various surveillance measures can have a profound impact on several fundamental human rights, for example the right to respect for private life (Article 8 ECHR). According to the ECtHR case-law, "*powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions*"³⁴. National laws allowing for interception of communication must be "particularly precise" in the types of conditions that interference with Article 8 ECHR will be conducted³⁵. Further, they must be sufficiently clear in their terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures³⁶. There must also be "adequate and effective guarantees against abuse"³⁷. In its case-law on secret measures of surveillance, the ECtHR has developed the minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed³⁸. States "...*may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate*"³⁹. In *Iordachi and Others v. Moldova*⁴⁰,

³³ See CDL-AD(2007)016, *Report on the Democratic Oversight of the Security Services*.

³⁴ *ECtHR, Klass and others v. Germany, Judgment of 6 September 1978, § 42.*

³⁵ *ECtHR, Liberty and others v. the UK, § 58.*

³⁶ *Ibidem, § 93.*

³⁷ *ECtHR, Klass and others v. Germany, Judgment of 6 September 1978 § 50.*

³⁸ *Cf. inter alia, Kruslin c. France, Judgment of 24 April 1994, § 35; Huvig c. France, Judgment of 24 April 1990, § 34; Prado Bugallo v. Spain, Judgment of 18 May 2005, § 30; Liberty and others v. the UK, Judgment of 1 July 2008, § 95.*

³⁹ *Liberty and others v. the UK, cit., § 49.*

⁴⁰ *No. 25198/02, 10 February 2009.*

the Court stressed that “telephone tapping is a very serious interference with a person’s rights and that only *very serious reasons* based on a *reasonable suspicion* that the person is involved in *serious criminal activity* should be taken as a basis for authorising it” (emphasis added). This general point obviously applies to any surveillance technology which involves a similar degree of interference, such as bugging.

38. At the national level, following a challenge filed by 30 000 citizens, the German Federal Constitutional Court recently overturned the law on data retention that had implemented the EU’s data retention directive⁴¹, stating that it posed a “grave intrusion” to personal privacy. The court found that the law stood in contradiction to the basic right to protection of the secrecy of telecommunications, since it was not structured in a manner adapted to the principle of proportionality, transparency and legal protection.⁴²

39. As regards the usage of intelligence material, its use as evidence in judicial proceedings is amongst major challenges to the right to a fair trial (see below, paras. 66-70).

C. Requiring disclosure of information

40. Many anti-terrorist laws also require individuals to proactively disclose information, and provide broad powers to officials to demand information from any person with very little procedural protections compared to traditional search and seizure powers under the criminal law. In a recent case of *Gillan and Quinton v. UK*, the ECtHR stressed the importance that the relevant law is adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual - if need be with appropriate advice - to regulate his conduct⁴³. In the words of the Court, “*In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise*”⁴⁴.

41. This kind of power(s) can also have a strong impact on the freedom of expression (Article 10 ECHR), especially when applied to journalists with the purpose of identifying a journalist’s sources. In *Goodwin v. the UK*, the ECtHR stressed that the protection of journalists sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information adversely affected. In that sense, an order of source disclosing “*cannot be compatible with article 10 ECHR unless it is justified by an overriding requirement in the public interest*”⁴⁵.

⁴¹ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, Official Journal, L 105(2006), pp.54-63. The directive requires all EU member states to adopt rules on data retention and to allow for collecting and holding information for up to two years.

⁴² Cr. BVerfG, 1 BvR 256/08 vom 2.3.2010, Absatz-Nr. (1 - 345), http://www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html.

⁴³ ECtHR, *Guillan and Quinton v. UK*, Judgment of 12 January 2010, § 76.

⁴⁴ ECtHR, *Rotaru v. Romania*, Judgment of 4 May 2000, § 55 ; *Hasan and Chaush v. Bulgaria*, Judgment of 26 October 2000, § 4; *Guillan and Quinton v. UK*, cit., § 77.

⁴⁵ *Goodwin v. the UK*, Judgment of 27 March 1996, § 39; *Voskuil v. Netherlands*, Judgment of 22 February 2008, § 65.

42. The Venice Commission supports the UN Special Rapporteur in recommending that search and surveillance measures should be as unintrusive as possible and that new powers are developed with appropriate safeguards and limitations, effective oversight and authorization as well as regular reporting and review⁴⁶. In a previous opinion, the Commission discussed the relevance of the effective oversight of the security services. It underlined the need for the use of intelligence and security services to be adequately controlled by Parliament and the executive and by the courts, to avoid developing a State within the State. It also stated that efforts to collect and interpret relevant information, should not lead to an abusive or illegitimate use of the State's powers in general, and of the information collected in particular.⁴⁷

43. Monitoring intelligence agencies and their assessments is a difficult task, because not all information and their sources may be revealed and, more importantly, those who do the monitoring will usually lack sufficient insight into the political and tactical background and context. Therefore, it is of vital importance that an independent expert body functions either as an effective preventive control or an effective post hoc supervisory body. In addition, there must be an effective complaints mechanism.⁴⁸

D. Arrest, interrogations and length of detention

44. In their efforts to fight terrorism, there is a tendency to increase the number of arbitrary arrests and preventive detentions, to extend the time that detainees are held *incommunicado*, and to exclude the intervention of judicial authorities. In doing so, the authorities show an apparent lack of confidence in the capacity of their laws and courts to judge and condemn terrorists. Such measures raise concern with respect to several human rights, notably the prohibition of inhuman treatment or punishment (Article 3 ECHR), the presumption of innocence (Article 6 § 2 ECHR), the right to liberty (Article 5 ECHR) and the right to a fair trial (Article 6 ECHR).

45. Article 5 ECHR leaves some well-defined room for limitations in order to accommodate specific concerns which arise from the nature of terrorism. It allows arrest and detention only in an exhaustively listed number of cases⁴⁹ and "in accordance with a procedure prescribed by law". "Law" has an autonomous meaning; it refers first of all to substantive and procedural domestic law, but the deprivation must also be consistent with recognised European standards, *inter alia* the (other) provisions of the ECHR. In particular, any deprivation of liberty must be consistent with the purpose of Article 5 ECHR, i.e. to provide protection against arbitrariness.⁵⁰ Moreover, a detained person has the right to have the lawfulness of his or her arrest decided speedily by a court and his or her release ordered if the detention is not lawful (a guarantee of so called *habeas corpus*) (Article 5§4 ECHR).

46. The effective guarantee of these requirements also implies a positive obligation on the part of the authorities to safeguard against the risk of disappearance and to conduct a prompt and effective investigation in case of a substantiated claim that a person has been taken into State custody and has not been seen since.⁵¹

⁴⁶ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/13/37, of 28 December 2009, §§ 59-71.

⁴⁷ See CDL-AD(2007)016, Report on the Democratic Oversight of the Security Services .

⁴⁸ See CDL-AD(2007)016, Report on the Democratic Oversight of the Security Services §149-250.

⁴⁹ ECtHR, Ireland v. United Kingdom, Judgment of 18 January 1978, § 194.

⁵⁰ ECtHR, Ashingdane v. United Kingdom, Judgment of 28 May 1985, § 44.

⁵¹ ECtHR, Kurt v. Turkey, Judgment of 25 May 1988, § 124.

47. General restrictions of the freedom of movement with respect to the population as a whole such as a curfew in reaction to an attempted or actual terrorist act does not fall under Article 5. The same holds good for restrictions of free movement that do not amount to deprivation of liberty; they are covered by Article 2 of Protocol 4 to the ECHR.

48. Cases of deprivation of liberty that are not covered by any of the grounds of Article 5, e.g. detentions for urgent security reasons or in order to get important intelligence information, without the intention to bring the person concerned before a criminal court, may be justified only if the State concerned has formally derogated from Article 5 under Article 15 ECHR.

49. Interrogation to determine whether the person concerned is involved in a terrorist act or its planning which leads to keeping that person for a considerable time at the location of interrogation without there being a concrete suspicion, was considered by the former Commission on Human Rights to be a deprivation justified under Article 5.1(b) ECHR to "secure the fulfilment of any obligation prescribed by law"⁵². The same would most probably apply in case of arrest for not complying with a police cordon placed around an area in an anti-terrorist operation.

50. If there is a suspicion of involvement in a terrorist act or its preparation, the arrest and detention would fall under Article 5, §1(3) which reads as follows⁵³: "1. *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: /.../ (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*"⁵³. In relation to terrorist crimes the ECtHR appears to be less strict as to the requirement of "reasonableness" of the suspicion, because of the need to act speedily to avert terrorist violence and to keep intelligence sources secret. However, the Court has pointed out that "*the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5 § 1 (c) is impaired*".⁵⁴

51. Similarly, the Court has afforded a degree of flexibility in the interpretation of "prompt judicial control" in Article 5 §3 ECHR, acknowledging that the difficulties of judicial control over the arrest of terrorists might justify extending the period of lawful detention to investigate terrorist crimes; but again this flexibility is strictly circumscribed. In *Brogan and others v. UK*⁵⁵, the ECtHR held that a delay of four days and six hours was a violation of the right to "prompt" judicial control. In *Demir and others v. Turkey* the ECtHR pointed out that the State can hardly insist that inquiries are completed before bringing a suspect before a judge: Article 5 (3) is intended to apply precisely when inquiries or investigations are proceeding.⁵⁶ In fact, in terrorist cases, there are good reasons for demanding even *more* prompt appearance before a judge. An important reason behind this requirement is to minimize the risk of torture or ill-treatment. Where too much time is allowed to elapse between arrest and being brought before a judge, the marks of ill-treatment could heal.⁵⁷ Related to long periods of detention is the desire to refuse access to a lawyer, in order to make interrogation easier.

⁵² *Apps. 8022/77, 8025/77 and 8027/77, McVeigh, O'Neil and Evans v. United Kingdom, Report of the Commission, 18 March 1981, (1982) 25 DR 15.*

⁵³ *ECtHR, Brogan and Others v. United Kingdom, judgment of 29 November 1988, § 51.*

⁵⁴ *ECtHR, Fax, Campbell and Hartley v. United Kingdom, Judgment of 30 August 1999, § 32.*

⁵⁵ *EctHR, Brogan v. UK (1989), cit., § 62.*

⁵⁶ *EctHR, Demir and others v. Turkey, Judgment of 23 September 1998, § 52.*

⁵⁷ *EctHR, Aksoy v. Turkey, Judgment of 18 December 1996, §§ 80 - 83.*

52. The massive and indiscriminate recourse to preventive detention represents a serious violation of the right of defence: the accused, even if represented by a lawyer, chosen by him or appointed *ex officio*, lives in isolation and is not allowed to speak freely with his lawyer, thus remaining for a long time, sometimes months, deprived of legal assistance and of the possibility of organising effectively his own defence.

53. The Venice Commission considers that access to a lawyer from the very beginning of the proceedings would not only enhance the accused's right of defence, but could also facilitate his or her collaboration with the judiciary in a manner respectful of his fundamental rights; this collaboration is a crucial tool in countering and preventing terrorism.

E. Treatment of detainees

54. During the whole period in which the person concerned is under the jurisdiction of a State party to the ECHR, he or she shall be treated with due respect for human dignity⁵⁸. He or she is also entitled to the protection of Article 3 ECHR which prohibits torture or inhuman or degrading treatment or punishment. This holds good also if the arrest and detention take place at the order of a third State, or are executed by foreign private individuals.⁵⁹ If the State provides detention facilities and housing for international prosecution authorities and judicial bodies on the basis of a specific host agreement, the treatment to which the detainee is entitled depends on the international legal regime concerned. However, prohibition of torture will apply in any case as a rule of *ius cogens*. And under no circumstances may a State facilitate *incommunicado* detention and interrogations at secret places.⁶⁰

55. The crucial distinction between "torture", "inhuman treatment" and "degrading treatment" lies in the degree of suffering caused. Since the ECHR is a "living instrument which must be interpreted in the light of present-day conditions", acts which were classified in the past as "inhuman and degrading treatment" may have to be classified as "torture" in the future. According to the ECtHR, "... *complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason*"⁶¹.

56. The European standards concerning treatment and punishment have been further elaborated upon in the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment as interpreted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Here, again, the standards do not only contain a set of prohibitions, but also imply a positive obligation on the part of the domestic authorities. If they have reasonable grounds to believe that torture or inhuman or degrading treatment has been committed, they have the duty to effectively investigate whether and in which circumstances such ill-treatment has been committed.

57. In particular, maximum security prisons, where terrorists are usually detained, apply special harsh regimes as they have been originally set up to prevent escapes, communications, and contacts between the accused and the external terrorist organisation. The prolonged isolation, the limited space available, the uninterrupted audiovisual control have however transformed this detention, in breach of Article 3 ECHR, into inhuman and degrading treatment, which is consciously imposed, beyond the security needs, in order to weaken the resistance of the accused and push them to confess any of their own responsibilities or those of the others.

⁵⁸ *Guidelines on Human Rights and Fight against Terrorism, cit., Guideline XI § 1.*

⁵⁹ *ECtHR, Ilascu and Others v. Moldova and Russia, Judgment of 8 July 2004, § 318.*

⁶⁰ *Cf. CDL-AD(2006)009, Opinion on the international legal obligations of Council of Europe member states in respect of secret detention facilities and inter-state transport of prisoners, §§ 123-130.*

⁶¹ *ECtHR, Ocalan v. Turkey, Judgment of 12 May 2005, §§ 231-232.*

58. Detentions that come under Article 5 §1(f) "with a view to deportation or extradition" may last a considerable time if the person concerned is considered a terrorist risk in the home State but deportation or extradition appears complicated because there is a real risk of a violation of Articles 2 and 3, or a serious violation of Articles 6 and 8, by the State to which he or she would be deported or extradited.⁶² (see below, para.77) However, under Article 5 § 4 the person concerned is "entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". Since not only the arrest and detention, but also the deportation or extradition aimed at have to be lawful, a disguised deportation or extradition at the request of another State in the framework of that State's anti-terrorist policy but in violation of the law of the requested State, is in violation of Article 5.⁶³

F. Military and special tribunals

59. When the security of a State is threatened, the independence of its system of justice also tends to be put under strain. Terrorist threats thus often prompt States to appoint extraordinary or specialised judges to hear security cases, to establish special security courts or to resort to military tribunals to bring individuals to justice for alleged acts of terrorism. Such proceedings can violate the principle of independence and impartiality required by the right to a fair trial (Article 6 § 1 ECHR).

60. The requirements of independence and impartiality are closely linked: a court which is not independent from the executive may not be impartial towards the parties, if one of them is the State. In *Campbell and Fell v. UK* the ECtHR said that the requirement of independence entails safeguards relating to "*the manner of appointment of judges, the duration of their office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.*"⁶⁴ The requirement of impartiality means that the members of the tribunal shall not have any personal stake in the case before them. They may not in any way be related to or have more than incidental personal contacts with any of the persons or institutions involved in the case, and may not have shown bias or prejudice with respect to any of the issues to be decided but must base that decision on objective arguments. They may also not have had any previous involvement in the case that may give rise to doubt as to their impartiality.⁶⁵ It is a matter of subjective and objective elements, in which the perception of the accused or of fair-minded members of the public is highly relevant, although not always decisive.⁶⁶

61. The requirement that the tribunal be "established by law" does not prohibit the establishment of special courts by government decree, as long as this is not done on an *ad hoc* basis, but is foreseen by law.⁶⁷ Military courts are allowed, provided that their members also fulfil the requirements of subjective and objective independence and impartiality, which means first of all that there are guarantees of independence from the chain of command.⁶⁸ However, a

⁶² ECtHR, *Chahal v. United Kingdom*, Judgment of 15 November 1996: a detention period of six years was held not to be excessive.

⁶³ ECtHR, *Bozano v. France*, Judgment of 18 December 1986, §§ 58-60.

⁶⁴ ECtHR, *Campbell and Fell v. UK*, Judgment of 28 June 1984, § 78. See also, Council of Europe, Committee of Ministers Recommendation No. R (94) 1 on the independence, efficiency and role of judges.

⁶⁵ ECtHR, *Piersack v. Belgium*, Judgment of 1 October 1982, §§ 30-31; ECtHR, *Kleyn and Others v. Netherlands*, Judgment of 6 May 2003, § 191.

⁶⁶ ECtHR, *Kleyn and Others v. Netherlands*, cit., § 194.

⁶⁷ ECtHR, *X. and Y. v. Ireland*, Decision of 10 October 1980, concerning the Special Criminal Court.

⁶⁸ ECtHR, *Findlay v. United Kingdom*, Judgment of 25 February 1997, §§ 75-80.

court martial may not have jurisdiction over civilians, since the latter could have reasonable ground for doubting the independence of the former.⁶⁹

62. The Venice Commission has examined the issue of specialist security judges in its report on the Democratic Oversight of the Security Services and set out various recommendations and best practices.⁷⁰ Its recent report on the independence of the judicial system takes up the question of the right to “a lawful judge”, and recommends that a judge is selected according to objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations⁷¹.

G. Modifications of ordinary judicial procedures

63. Article 6 ECHR also allows for certain limitations in view of the special circumstances of the case concerned. In some cases, terrorism threats have led to making special exceptions in ordinary judicial proceedings dealing with security cases. These include limits to the publicity of the trial, to the cross-examination of witnesses and to the discovery of the evidence in pre-trial investigation in the name of State secret and national security.

64. Some modifications of ordinary criminal procedure are permissible without conflicting with the right to a fair trial (Article 6 ECHR). States have to employ means “*which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice*”⁷². For example, Article 6 allows exclusion of the public and press from all or part of the trial in the interest of *inter alia* national security. Consequently, lesser restrictions of publicity to serve the same ends may also be allowed under specific circumstances and conditions, such as anonymous witnesses, the exclusion of certain persons from attending the hearing, the treatment of certain relevant facts or information as confidential *etc.*⁷³

65. The fairness of the trial may be seriously prejudiced by an “initial failure to comply with its provisions”, since the evidence obtained during this phase determines the framework in which the offence charged will be considered at the trial. Thus, preserving lawfulness at the pre-trial stage becomes a prerequisite to the fairness of the examination by the court at the trial stage. When a certain line is crossed (for instance when the evidence was obtained through coercion of the accused or entrapment), it must be ensured that the “fruit of evil” (i.e. the unlawfully obtained evidence) is not allowed to taint the trial. In addition, the accused must be shown sufficient evidence to know the case against him.

66. It is equally important that intelligence information gathered during the investigation phase can be turned into admissible evidence before a judge in a criminal court.

Use of intelligence material as evidence in proceedings

67. The requirement of “equality of arms”, which is a core element of fair trial, demands that all material evidence *pro* and *contra* the accused is disclosed to the defence.⁷⁴ This principle may be put under pressure in trials involving issues of State security in several ways, because of the

⁶⁹ ECtHR, *Incal v. Turkey*, Judgment of 9 June 1998.

⁷⁰ §195-217.

⁷¹ See CDL-AD(2010)004, Report on the independence of the judicial system. Part I: The Independence of judges, §§73-82.

⁷² ECtHR, *Al-Nashif v. Bulgaria*, Judgment of 20 September 2002, para. 97.

⁷³ See ECtHR, *Campbell and Fell v. United Kingdom*, Judgment of 28 June 1984, §§ 87-88.

⁷⁴ ECtHR, *Edwards v. United Kingdom*, Judgment of 16 December 1992, § 36.

tendency of security officials to keep information and sources as well as working methods secret from the accused. In a context of narcotic offences, the ECtHR has accepted that certain offences may justify the use of special investigative methods and the use of undercover agents and informers.⁷⁵ However, it has also held that this does not mean that the information gathered and evidence obtained may be unrestrictedly used in the subsequent trial. This depends, among others, upon whether the prosecution has shown on objective grounds that it was strictly necessary to resort to these obstacles to the rights of the defence, upon the extent to which non-disclosure has put the defence at a significant disadvantage, upon whether there has been some form of compensatory mechanism, and upon whether the confidential evidence has been supported by additional, public evidence.⁷⁶ The domestic courts – as well as the defence – have to pay close attention to these elements, under the supervision of the ECtHR.

68. The use of evidence obtained in a manner which is illegal under domestic law or ⁷⁷ under the ECHR is nevertheless permissible in certain legal systems. The ECtHR, as a rule, leaves it to the domestic courts to judge on the admissibility of evidence and will take this aspect into account as one of the elements for judging on the fairness of the trial as a whole.⁷⁸ In that respect, it will be of importance whether the verdict was based exclusively or mainly on the evidence thus obtained⁷⁹.

69. The problem of revealing, or refusing to reveal, intelligence and proactive policing material in judicial proceedings is not limited to the issue of fair trial in criminal cases, but can apply to other procedures, in particular deportation procedures. The ECtHR has required that mechanisms be in place to guarantee fair, quasi-judicial procedures in such cases.⁸⁰

70. The scope for modification of procedures is thus limited: the procedure must preserve the very essence of the rights protected. Ultimately, the requirement of adversarial proceedings and equality of arms must be complied with. Anything less does not amount to effective “judicial” control by a “court”.

71. Another significant issue related to judicial proceedings in “terrorist” cases regards the question of the security of trial judges and jurors. One possible means of protecting the security of trial judges and jurors, and of making it more likely that a “terrorist” trial can be completed, is that the law provide (as it did in Italy in the 1970’s and 1980’s) that additional judges and jurors attend from the beginning of the trial in order to replace a judge or juror who might become the victim of a terrorist attack or a serious threat.

72. As for preliminary investigations, one means of frustrating the impact of possible terrorist attacks or serious threats can be to put together a team of specialist public prosecutors and investigating judges. Where the members of the team all share the same basic knowledge of investigations into terrorist offences, a successful terrorist attack against any one of them will not sabotage ongoing investigations.

⁷⁵ ECtHR, *Teixeira de Castro v. Portugal*, Judgment of 9 June 1998, §§ 32 and 36.

⁷⁶ *Ibidem*; ECtHR, *Van Mechelen v. Netherlands*, Judgment of 23 April 1997, §§ 58- 60.

⁷⁷ The ECtHR’s subsidiary role may imply a certain reticence on its part: ECtHR, *Brickmont v. Belgium*, Judgment of 7 July 1989, §§ 78-91.

⁷⁸ ECtHR, *Schenk v. Switzerland*, Judgment of 12 July 1988, §§ 46-49.

⁷⁹ See, in particular ECtHR, *Doorson v. Netherlands*, Judgment of 26 March 1996, *Van Mechelen v. Netherlands*, Judgment of 23 April 1997, *Krasniki v. Czech Republic*, Judgment of 28 February 2006.

⁸⁰ See in particular, ECtHR, *Chahal v. UK*, *cit.*; *Al-Nashif and others v. Bulgaria*, *cit.*

H. Targeted sanctions against individuals or groups ("Blacklists")

73. Another counter-terrorism measure that can have significant impact on fundamental human rights are targeted sanctions against individuals or specific groups (so-called "blacklists") required by the UN Security Council and the Council of the European Union⁸¹.

74. According to these instruments, States must effectively implement three sanctions measures, namely: (a) to freeze the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities; (b) to prevent the entry into, or transit through, their territories of these individuals; and (c) to prevent the direct or indirect supply, sale, or transfer to these individuals, groups, undertakings of arms and related material of all types including weapons and ammunition, military vehicles and so on. Sanctions such as travel restrictions and freezing of assets have a direct impact on both substantive and procedural human rights. Perhaps the most serious human rights impact regards the right to a fair trial.

75. While procedural rights do vary in civil and criminal proceedings⁸², certain "fair trial" guarantees must be respected in any kind of proceedings. The "blacklist" regimes, however, provide a very limited protection of fundamental procedural rights. The possibility that individuals or organisations might be listed based on mistaken identity remains, and the "obligatory" notification does not necessarily include the reasons why the respective parties were listed. Although individuals and entities listed under the EU sanctions regimes in theory can appeal their listing, the fact that the listing is based on secret evidence makes it rather difficult to succeed. Further, it appears extremely difficult to challenge the legality of the underlying UNSC resolutions and EU decisions. Finally, parties listed under targeted sanctions regimes lack adequate remedies to address any cases of unlawful listing.⁸³

76. The problems of human rights and accountability involved with the EU sanctions and EU implementation of UN Security Sanctions differ in nature and are complex, concerning as they do colliding legal orders.⁸⁴ The effectiveness of blacklists against suspected terrorist financiers is highly doubtful and has not been subjected to any empirical analysis. The discussions in both the EU and UN contexts has so far been about improving procedures for putting people on the lists, and improving remedies for those on the list. The European Court of Justice (ECJ) has rightly considered that the implementation in EU law of the UN Security Council sanctions is incompatible with basic human rights⁸⁵. The latest attempt from the Security Council to improve

⁸¹ See Cameron, *UN Targeted Sanctions, Legal Safeguards and the ECHR*, 72 *Nordic Journal of International Law* 1-56 (2003). Cameron, *The ECHR, Due Process and UN Security Council Counter-terrorism Sanctions*, Report to Council of Europe, 6 February 2006, PACE Resolution 1597 (2008) on UN Security Council and European Union blacklists, and the Report of the Committee on Legal Affairs and Human Rights, Rapporteur Mr Dick Marty, of 16 November 2007 (Doc. 11454).

⁸² The characterisation of sanctions as criminal charges, civil obligations, or measures of a different kind is important because it determines what type of evidence is required for listing. If the sanctions are considered as criminal charges, the evidence has to meet the "beyond a reasonable doubt" standard, but if they are characterised as civil, the evidentiary burden for listing is much lower. Second, the characterisation has direct consequences for the requirements of a review mechanism (See PACE Resolution 1597 (2008)).

⁸³ Report of the Committee on Legal Affairs and Human Rights, Rapporteur Mr Dick Marty, of 16 November 2007 (Doc. 11454).

⁸⁴ For detailed discussions of the UN problems, see Cameron, note 75 above. For detailed discussions of the EU problems, see Cameron *EU Anti-terrorist Blacklisting* 3 *Human Rights Law Review*, 225-256 (2003) and Cameron, *Respecting Human Rights and Fundamental Freedoms and EU/US Sanctions: State of Play*, European Parliament, Policy Department, External Policies, October 2008, <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=23608>.

⁸⁵ See *ECJ Judgment in Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission on the right to have measures adopted by the EC to implement UN Security Council resolutions reviewed by the EC courts*. In its judgment, the Court of Justice quashed the judgments of the Court of First Instance in Case T-306/01 Yusuf and Al Barakaat International Foundation v. Council and Commission and in Case T-315/01 Kadi v. Council and Commission and annulled the EC measures because the

the remedies is the creation of an Ombudsperson.⁸⁶ But no independent observer can regard this mechanism as being equivalent to having access to an independent and competent court.⁸⁷ As regards EU sanctions, remedies have been created after negative judgments of the ECJ and the Court of First Instance (CFI). However, major problems still exist in creating a genuinely effective remedy for EU sanctions. At the root of this problem is the technique of blacklisting itself. If blacklists are to be retained at all, then the Venice Commission concurs with the PACE rapporteur Dick Marty that they should apply for a limited period of time only, and this only if clear procedures are provided for and if the relevant procedural and substantive human rights are guaranteed.⁸⁸

I. Asylum, return ("refoulement"), expulsion and extradition

77. With reference to the security concerns and the fight against terrorism many States have tightened their asylum and immigration policies, by limiting access to asylum procedures, making criteria for granting asylum more restrictive, strengthening immigration procedures and reinforcing border controls. In those cases of restriction of free movement that are not covered by Article 5 ECHR, such measures may raise concern under the right to respect for private life (Article 8 ECHR), the freedom of movement (Article 2 Protocol 4 ECHR), the procedural safeguards relating to expulsion of aliens (Article 1 Protocol 7 ECHR) as well as, in particular situations, the right to life and the freedom from torture, and humiliating and degrading treatment (Articles 2 and 3 ECHR).

78. The ECHR places only limited control on a State's sovereign right to determine which aliens it admits, and which aliens are to be granted permanent residence or citizenship. States may thus use existing rules, or introduce new admission/expulsion rules which may be general in application, but which are intended to be used against people considered to be security threats. Aliens may be refused entry to the country, for instance on the ground of assumed danger to State security, even in cases where they apply for family reunion (Article 8 § 2 ECHR). Aliens without a stay permit who are held or presumed to constitute such a danger, may be limited to a particular area, may need permission to travel and/or may have to register periodically with police or immigration authorities. Nationals and aliens with a stay permit may, in certain circumstances, be forbidden to enter or stay in a certain area after they have committed a certain crime or in order to prevent them from committing a crime. These restrictions however, must be necessary in a democratic society in, *inter alia*, the interest of national security or public safety. Although the ECHR does not guarantee the right to a certain nationality nor the right to enter a certain country, because of possible links with the right to respect for private and family life as a "civil right" and a right protected under the ECHR, there may be the right of access to court under Article 6 ECHR or at least the right to an effective remedy under Article 13 ECHR.

79. In cases not involving a security or political dimension, expulsion or extradition of a suspect to a non-democratic State may be possible on the basis of diplomatic guarantees of fair trial, non-application of the death penalty and guarantees against torture. But the Venice Commission has earlier stated that diplomatic guarantees are inadequate as regards people

right to be heard, the right to effective judicial review and the right to property were infringed by the Council and the Commission when they implemented the UN Security Council resolutions.

⁸⁶ Security Council Res 1904 (2009).

⁸⁷ The inadequacy of the Ombudsperson was noted *inter alia* by the UK Supreme Court in *HM Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC)* [2010] UKSC 2.

⁸⁸ *Ibidem*, § 5.

suspected of security or political offences.⁸⁹ The ECtHR has also stressed that diplomatic guarantees are not adequate in cases where there is a documented practice of torture.⁹⁰

80. With regard to asylum, the Venice Commission recalls that according to the Guidelines on Human Rights and the Fight against Terrorism, “*All requests for asylum must be dealt with on an individual basis. An effective remedy must lie against the decision taken*” (Guideline XII.1). Furthermore, the asylum applicant should not be returned (“*refoulement*”) to countries where he or she may be exposed to death penalty, torture or inhuman or degrading treatment or punishment⁹¹. The same applies to expulsion and extradition. In the recent case *Al-Saadoon and Mufdhi v. UK*, the Court has clearly held that Article 2 ECHR provides for a *non-refoulement* obligation: there can be no extradition or deportation of an individual to another State “*where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there*”⁹².

VII. Concluding remarks

81. There is today a real and substantial threat from terrorism in different parts of the world, and States are entitled to take preventive and repressive measures to counter that threat. They have a positive duty to protect people within their jurisdiction. Such measures, however, must be taken within the framework set out by international human rights law.

82. Some areas of criminal justice system are especially exposed to the risk that fundamental human rights be sacrificed most in the fight against terrorism: they are, above all, the principle of legality in defining terrorist offences, the right of defence, personal liberty of the accused and the presumption of innocence, inhuman and degrading treatment over the lengthy periods of preventive detention.

83. In particular, persons who have been arrested and detained, are particularly vulnerable for intrusions upon their rights and freedoms; and if they are suspects of terrorist crimes, there is the additional risk that the public officers and institutions dealing with them may be inclined to set aside some of their rights focused as they are on security as an end which justifies all means.

84. The Venice Commission reiterates its view that “*state security and fundamental rights are not competitive values; they are each other’s precondition*”⁹³. As pointed out by the President of the European Committee for the Prevention of Torture and Cruel, Inhuman or Degrading Punishment or Treatment, departing from democratic values in the fight against those whose aim is to destroy them “*would be to sink to the level of the terrorist and could only undermine the foundations of our democratic societies*”⁹⁴.

⁸⁹ Cf. CDL-AD(2006)009, *Opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-State transport of prisoners*, §§141-143.

⁹⁰ ECtHR, *Saadi v. Italy*, Judgment of 28 February 2008, “*the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.*” §147.

⁹¹ Guideline XII § 2. Article 33 UN Refugee Convention.

⁹² ECtHR, *Al-Saadoon and Mufdhi v. UK*, Judgment of 2 March 2010, §§122-123.

⁹³ Cf. CDL-AD(2006)015, *cit.*, §31.

⁹⁴ *Statement to the Ministers’ Deputies on 4 October 2001*, CoE doc CPT/Inf (2001) 24.

85. International human rights law was elaborated in the wake of war, and with the aim to guarantee people's safety. It thus allows security concerns to be accommodated by way of a system of limitation clauses and by making provision, in genuine emergencies, for the temporary suspension of some rights and freedoms⁹⁵. Recent decisions by several domestic courts in Europe and beyond have confirmed that the current legal framework is sufficiently adaptable to counter any current or future threats⁹⁶.

86. An effective criminal justice system based on respect for human rights and the rule of law is, in the long term, the best possible protection for society against terrorism.

87. Any counter-terrorist legislation adopted since 2001 should carefully and periodically be reviewed for its necessity and effectivity, and where necessary, modified to ensure it is human rights compatible. The gravity of the potential harm that counter-terrorism measures may cause requires that they be measured to the extent to which they can be demonstrated to enhance the ability to identify, apprehend and prosecute individuals planning terrorist attacks whilst remaining within the framework of the rule of law and human rights. In other words, against the international tests of legality, necessity, proportionality and non-discrimination.

88. The Venice Commission wishes to underline that it is of vital importance, both for their legality and for their acceptability in society, that such far-reaching police powers as those relating to data-matching, surveillance, arrest, search and seizure - both their legal regulation and their application in practice - are eventually reviewed for their full conformity with the general principles of legality, necessity, proportionality and non-discrimination. Thus, criminal trials are a safeguard not only as regards the guilt or innocence of the accused, but also as a *preventive* measure of human rights protection, discouraging over-use of pre-trial coercive measures. The same preventive function may be performed, *mutatis mutandis*, by civil and administrative proceedings.

89. Measures for protecting the security of judges, prosecutors and jurors might be desirable in order to ensure that proceedings in cases of terrorism be completed despite possible threats or attacks.

90. In addition to parliamentary control and internal executive checks, judicial review thus remains of the utmost importance, with as an extra guarantee supervision by an international independent tribunal.

⁹⁵ ICJ, « Assessing damage, urging action », *cit.*, at p. 24.

⁹⁶ Cf. CDL-AD(2006)015, *cit.* §30.