Parliamentary Assembly
Assemblée parlementaire
https://pace.coe.int

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Doc. 12712
16 September 2011

Human rights and the fight against terrorism

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Lord John E. TOMLINSON, United Kingdom, Socialist Group

Summary

Terrorism has a direct impact on human rights. It can destabilise and undermine entire societies, jeopardise peace and security and threaten social and economic development. Terrorism attacks the pillars of democracy and the rule of law upon which the respect of human rights is based.

States must be in a position to take appropriate measures to fight terrorism. However, there is no need for a trade-off between human rights and effective counterterrorist action, as safeguards exist in human rights law itself. The European Convention on Human Rights, like other international human rights instruments, can be applied in such a way as to allow states to take reasonable and proportionate action to defend democracy and the rule of law against the threat of terrorism.

The report's aim being to add an incremental contribution to the ongoing quest for protecting human rights when it comes to countering terrorism, it presents an overview of the Council of Europe standards applicable to human rights in the fight against terrorism and deals with selected human rights concerns in this context.

Terrorists are criminals and should be dealt with primarily by the criminal justice system, with in-built and well-tested safeguards to protect the innocent. Coercive administrative measures for preventive purposes should be of limited duration, only applied as a last resort and be subject to strict conditions, including minimum requirements regarding evidence and judicial or appropriate political oversight.

1. Reference to committee: Doc. 11973, Reference 3598 of 2 October 2009.

Contents **Page**

A. Draft resolution [2]

1. Terrorism has a direct impact on human rights, with consequences for the enjoyment of the right to life, liberty and physical integrity of individuals, especially victims of terrorism. It can destabilise and undermine entire societies, jeopardise peace and security and threaten social and economic development. It seeks to impose upon the majority the views of a minority and stops at nothing in the pursuit of its aims. Terrorism attacks the pillars of democracy and the rule of law upon which the respect of human rights is based.

2. States must be in a position to take appropriate measures to fight terrorism. There is no need for a "trade-off" between human rights and effective counter-terrorist action, as safeguards exist in human rights law itself. The European Convention on Human Rights (ETS No. 5, “the Convention”), like other international human rights instruments, can be applied in such a way as to allow states to take reasonable and proportionate action to defend democracy and the rule of law against the threat of terrorism.

3. The concept of “war on terror” is misleading and unhelpful. Terrorists are criminals, not soldiers, and terrorist crimes do not amount to acts of war.

4. There is a danger that temporary measures to combat terrorism, even if considered necessary at the time of their introduction, become permanent even when circumstances have changed. The need for any restrictions placed on individual freedoms must be assessed continuously as long as the restrictions remain in place.

5. States Parties to the European Convention on Human Rights and its protocols are duty-bound to secure within their jurisdiction the rights and freedoms guaranteed therein:

5.1. In particular, they shall ensure that no exception whatsoever is made to the non-derogable rights to life and to the prohibition of torture. This includes respecting the principle of *non-refoulement*, in particular when the European Court of Human Rights has indicated an interim measure under Article 39 of its Rules of Court, and treating diplomatic assurances with utmost caution.

5.2. As for derogable rights under the Convention, any limitation must be strictly necessary to protect the public and be proportionate to the legitimate aim pursued, in line with the case law of the Court. In particular, administrative detention should be limited to rare exceptions and subject to appropriate control. Surveillance, interception and related measures must be available to the state, but be clearly circumscribed by law and subject to judicial or appropriate political supervision.

5.3. Measures limiting human rights must be phrased clearly and interpreted narrowly, in particular when criminal liability is involved, and must be accompanied by adequate judicial or political review.

6. As terrorists are criminals, the Parliamentary Assembly considers that they should be dealt with primarily by the criminal justice system, with its in-built and well-tested safeguards to protect the innocent. Coercive administrative measures for preventive purposes should be of limited duration, be only applied as a last resort and be subject to strict conditions, including minimum requirements regarding evidence and judicial or appropriate political oversight.

2. Draft resolution adopted unanimously by the committee on 7 September 2011.

B. Explanatory memorandum by Lord Tomlinson, rapporteur

1. Procedure to date

1. On 6 October 2009, the Parliamentary Assembly decided to refer to the Committee on Legal Affairs and Human Rights, for report, the motion for a resolution "Human rights and fight against terrorism". [3] At its meeting on 16 November 2009, the committee appointed me as its rapporteur.

2. On 17 November 2010, in order to gain an overview of the legislative and administrative situation in several member states, where the topic of human rights and the fight against terrorism is high on the legal and political agenda, the committee held an exchange of views [4] with the following experts:

– – Mr Álvaro Gil-Robles, former Commissioner for Human Rights of the Council of Europe, former People's Defender, Spain,

– Ms Julia Hall, Amnesty International, expert on Counter-Terrorism and Human Rights, London,

– Mr Vladimir Lukin, Ombudsman of the Russian Federation, Moscow,

– Ms Ekaterina Sokirianskaya, Hot Spots Program, Memorial Human Rights Centre, St Petersburg,

– Mr Timothy Otty QC, Barrister-at-Law, London.

3. On 25 March 2011, I met Mr Gilles de Kerchove, European Union Counter-terrorism Coordinator, in Brussels in order to gain a more complete picture of European Union policy in the area of counterterrorism and to discuss a number of issues related to this report.

2. Introduction

4. Terrorism, however it is defined, has a direct impact on human rights, with consequences for the enjoyment of the right to life, liberty and the physical integrity of victims. In addition to these individual costs, terrorism can destabilise and undermine societies, jeopardise peace and security and threaten social and economic development. This too has an impact on the enjoyment of human rights.

5. Terrorism seeks to impose upon the majority the views of a minority and stops at nothing in pursuit of its aims. [5] It attacks the pillars of democracy and the rule of law upon which human rights structures rest.

6. States must be in a position to fight terrorism by taking appropriate measures. Human rights law, while obliging states not to overstep certain boundaries, can accommodate that need.

7. The relationship between human rights and terrorism is inherent in the subject matter of terrorism and is not new. A number of international organisations and bodies closely follow this issue. Two recent studies seem to me to be of particular relevance.

8. First, a report entitled "Assessing Damage, Urging Action" of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, [6] commissioned at the initiative of the International Commission of Jurists (ICJ). This independent body published its report in 2009, following a three-year, worldwide investigation into the impact of counterterrorism laws and practices on human rights, during which 16 hearings were held, covering 40 countries in all regions of the world. It was found that in the formulation and implementation of counterterrorism policies, established principles of international human rights and humanitarian law were being questioned and at times ignored. [7]

---

3. See Assembly Doc. 11973.
4. See the declassified proceedings of the hearing on human rights and fight against terrorism held in Paris on 17 November 2010, http://assembly.coe.int/CommitteeDocs/2011/ajdoc07_2011.pdf.
5. Hedigan J., "The European Convention on Human Rights and Counter-Terrorism", Fordham International Law Journal, Vol 28 [2005], p. 392, at 403.
6. http://ejp.icj.org/IMG/EJP-Report.pdf.
7. In particular, the report drew attention to the increasing power of intelligence agencies and the central role that they have in counterterrorism policies; to the use of unsubstantiated and possibly faulty intelligence to take action against individuals and organisations that can have devastating consequences for them; to the cloak of secrecy that surrounds detention and interrogation to gather intelligence; to methods used for that purpose including torture and cruel, inhuman or degrading treatment; and to the impunity afforded to those who engage in these practices.

9. Secondly, a report on counter-terrorism measures and human rights, adopted by the European Commission for Democracy through Law (Venice Commission) on 4 June 2010, [8] prepared at the request of the Parliamentary Assembly. This report deals, in a more general way, with the most recurrent issues that have arisen on a national level. It does not include an analysis of individual laws at the member state level.

10. Mention should also be made of a briefing paper, issued in 2010, of the policy department of the Directorate General for external policies of the European Parliament on "Current challenges regarding respect of human rights in the fight against terrorism". [9]

11. It is not the purpose of this report to repeat or summarise studies which have recently been carried out on the subject. Rather, the report starts from the assumption that, since the European Convention of Human Rights (ETS No. 5, "the Convention") permits some temporary and proportionate restrictions or suspension of specific rights, it is sufficiently adaptable to counter any current or future threats.

12. I shall start by giving an overview of the Council of Europe standards applicable to human rights in the fight against terrorism. I shall then briefly portray European Union and United Nations action on the matter. Pursuant to this, I shall turn to selected human rights concerns in the fight against terrorism.

13. The aim of this report is therefore to add an incremental contribution to the ongoing quest for protecting human rights when it comes to countering terrorism. In the knowledge that it is impossible to draw a complete picture of the state of play regarding human rights and terrorism in Europe, I shall point to selected examples of human rights concerns, under the heading of the most pertinent articles of the Convention.

3. Council of Europe reference texts

3.1. Conventions

14. The Council of Europe has set a number of standards for the relationship between human rights and terrorism. [10] These standards have then been applied and interpreted by the various organs of our Organisation.

15. The European Convention on Human Rights and its protocols, as interpreted by the European Court of Human Rights ("the Court"), are the main standard of reference, also for this report. Indeed, over the past fifty years, the Court has been called upon to rule on cases involving terrorism on numerous occasions. Case law of the Court stretches back to a time when terrorism was not yet a global phenomenon and had not yet entered the world stage in the sense that it was more or less confined to individual states or regions. [11] Early case law of the Court mainly dealt with phenomena arising in Germany, Ireland, Spain, Turkey and the United Kingdom.

16. More recently, the Council of Europe has adopted a number of conventions addressing specifically the issue of terrorism. These new texts supplement earlier texts such as the 1957 European Convention on Extradition (ETS No. 24) and the 1983 Convention on the Compensation of Victims of Violent Crimes (ETS No. 116).

17. The Council of Europe Convention on the Prevention of Terrorism (ETS No. 196), which entered into force on 1 June 2007, aims to prevent terrorism by measures taken at national level and through international co-operation. It establishes as criminal offences acts such as public provocation, recruitment and training, which may lead to the commission of acts of terrorism. It reinforces co-operation on prevention, both at domestic level, in the context of national prevention policies, and internationally by supplementing and, where necessary, modifying existing extradition and mutual assistance arrangements. The convention ensures the protection and compensation of victims of terrorism. Furthermore it contains several provisions concerning the

---

8. Report on counterterrorism measures and human rights, Study No. 500/2008, www.venice.coe.int/docs/2010/CDL-AD%282010%29022-e.pdf. This report focuses on terrorist offences and the principle of legality, surveillance powers, disclosure of information, detention and treatment of detainees, military and special tribunals, modifications of ordinary judicial procedures, blacklists and asylum, return, expulsion and extradition.
9. "Current challenges regarding respect of human rights in the fight against terrorism", www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=31111.
10. For a comprehensive list, see www.coe.int/t/dlapil/codexter/conventions_en.asp.
11. For a summary of the Court's case law: www.echr.coe.int/NR/rdonlyres/13BF0C6A-F463-4CE9-B79F-9E9F3EF67B8F/ 0/FICHES_Terrorism_EN.pdf.

protection of human rights and fundamental freedoms, in terms of both reinforcing co-operation at national and international levels (including grounds for refusal of extradition and mutual assistance) and implementing the criminalisation of new offences in the form of conditions and safeguards.

18. Article 12, paragraph 2, of the convention requires each party to apply the principle of proportionality in accordance with the relevant principles of its domestic laws. For the member states of the Council of Europe, this means the principles of the European Convention on Human Rights, as interpreted by the European Court of Human Rights.

19. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) is the first international treaty to cover both preventive measures and the combating of money laundering and the financing of terrorism. This convention, which entered into force on 1 May 2008, updates and expands on the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) to take into account the need to deprive terrorists and other criminal groups of their assets and funds as the key to successful preventive and repressive measures and, ultimately, to disrupting their activities. In order to prevent and combat money laundering and the financing of terrorism more effectively, the convention facilitates the rapid tracing of property or bank accounts and the rapid freezing of funds, quick access to financial information or information on assets held by criminal organisations, the setting-up of financial intelligence units in each state party to exchange information on suspected cases of money laundering and terrorist financing in order ultimately to confiscate assets.

20. The 1977 European Convention on the Suppression of Terrorism (ETS No. 90) is designed to facilitate the extradition of terrorists by listing offences (namely acts of particular gravity, hijacking of aircraft, kidnapping and taking of hostages, etc.) which should not be considered as political offences. It expressly provides that nothing in the convention shall be interpreted as imposing an obligation upon a party to extradite a person who might then be prosecuted or punished solely on the grounds of race, religion, nationality or political opinion. The 2003 Protocol amending this Convention (ETS No. 190) introduces the following significant changes: a substantial extension of the list of offences which may never be regarded as political or politically motivated, to include all offences covered by the United Nations anti-terrorist conventions; the introduction of a simplified amendment procedure allowing new offences to be added to the list; the opening of the convention to observer states and, subject to a Committee of Ministers decision, to other non-member states; the refusal to extradite offenders to countries where they risk the death penalty, torture or life imprisonment without parole; a significant reduction in the possibility of refusing extradition on the basis of reservations to the convention with the implementation of a specific follow-up procedure applicable to such refusals and to the follow-up of any obligation under the convention as amended.

21. The 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126) should also be mentioned at this point. As interpreted by the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment (CPT), it has contributed to the general establishment of a legal framework for the fight against terrorism.

3.2. Assembly reports

22. The relationship between human rights and terrorism has on numerous occasions been raised and discussed in the Assembly, mostly on the basis of reports of the Committee on Legal Affairs and Human Rights. [12] In recent years, the Assembly has taken position on the issue, reiterating that terrorism can and must be combated effectively by means that fully respect human rights and the rule of law. The Assembly has thus unveiled and denounced the existence of secret detentions and illegal transfers ("renditions") involving Council of Europe member states, questioned the fairness of "blacklisting" terrorism suspects by the United Nations Security Council and the Council of the European Union, called for the need to eradicate impunity, including in the North Caucasus Region, criticised some aspects of the United States' "war on terror" and examined the protection of human rights in emergency situations.

23. In addition to this, the Committee on Legal Affairs and Human rights has also prepared a report on the abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations. [13] That report, which addresses some of the legal and policy issues which the rapporteur, Mr Dick

12. For an overview of the work of the Committee on Legal Affairs and Human Rights on issues relating to human rights and terrorism, see the following Background information document, prepared by the Secretariat: http://assembly.coe.int/CommitteeDocs/2010/20101108_infogenerale_E.pdf.

13. See Doc. 12714.

Marty, encountered in the course of preparing his reports on renditions and secret detentions, [14] focuses primarily on the question of accountability for human rights violations committed by members of special services.

24. Back in 2006, our former colleague, Mr Valery Grebennikov (Russian Federation, EDG) presented an introductory memorandum to the Committee on Legal Affairs on Human Rights on the topic of this report. [15] The Assembly never adopted a resolution or a recommendation as Mr Grebennikov's mandate expired before a draft report could be submitted to the committee.

25. The Assembly's work on the matter, however, goes further back in time. Even before 11 September 2001, the Assembly had voiced its concern about the threat posed by international terrorism, and in the immediate aftermath of the New York attacks, the Assembly, on 26 September 2001, underlined that "introducing additional restrictions on freedom of movement, including more hurdles for migration and for access to asylum, would be an absolutely inappropriate response to the rise of terrorism". The Assembly called on all member states "to refrain from introducing such restrictive measures". [16]

3.3. Other forms of Council of Europe "soft law"

26. In addition to these conventions, there are other important initiatives, such as the Guidelines adopted by the Committee of Ministers on Human rights and the fight against terrorism (2002) [17] and on the Protection of Victims of Terrorist Acts (2005), [18] which confirm the established case law of the European Court of Human Rights and lay down key standards for counterterrorism policies in Europe.

27. The European Commission against Racism and Intolerance (ECRI), for its part, has adopted General Policy Recommendations No. 8 on combating racism while fighting terrorism (2004) [19] and No. 11 on combating racism and racial discrimination in policing. [20]

28. Finally, the Committee of Experts on Terrorism (CODEXTER) has drawn up and regularly updates country profiles on counter-terrorism capacity. [21]

29. The body of law just described shows that the Council of Europe is at the forefront of standard setting in the domain of human rights and terrorism, as concerns both binding and "soft-law" measures. It is telling that the late Tom Bingham, in his seminal work on "The Rule of Law", concludes the chapter "Terrorism and the rule of law" with a reference to the 2002 Committee of Ministers Guidelines on human rights and the fight against terrorism. [22]

4. Developments in other international fora

4.1. European Union

30. In line with the gradual widening of its competences, the European Union has in recent years also become active in the domain of counterterrorism.

31. On the political side, a counterterrorism strategy [23] was adopted in 2005, evolving around the four main objectives of prevention, protection, pursuit and response. To this end, a Counter-terrorism co-ordinator has been appointed within the structure of the Council of the European Union. His task is to co-ordinate the work of the Council of the European Union in the field of counterterrorism, maintain an overview of all the

---

14. See footnote 12.
15. Introductory memorandum on the respect for human rights in the fight against terrorism, rapporteur: Mr Valery Grebennikov, 12 December 2006, document AS/Jur (2006) 29, www.assembly.coe.int/CommitteeDocs/2007/20061212_ajdoc29.pdf.
16. For an overview, see Grebennikov memorandum, ibid., paragraphs 11 et seq.
17. www.echr.coe.int/NR/rdonlyres/176C046F-C0E6-423C-A039-F66D90CC6031/0/LignesDirectrices_EN.pdf.
18. Ibid.
19. www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n8/recommendation_8_EN.asp?.
20. www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n11/recommendation_11_EN.asp?.
21. Available at www.coe.int/t/dlapil/codexter/4_Theme_Files/Country_Profiles/default_en.asp#TopOfPage.
22. See Bingham T., The Rule of Law, Allen Lane, London, 2010, pp. 158 et seq.
23. The European Union Counter-Terrorism Strategy, http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf.

instruments at the Union's disposal, monitor the implementation of the European Union counterterrorism strategy, foster better communication between the European Union and third countries and ensure that the Union plays an active role in the fight against terrorism.

32. As far as legislation is concerned, the European Union has adopted a considerable array of measures specifically in the domain of terrorism [24] or being otherwise relevant [25] for counterterrorism policy. Space precludes a full appraisal of these measures. Of special interest in the context of this report is the EU regime regarding data protection and retention.

33. The latest instrument proposed by the European Commission is a European terrorist finance tracking system, [26] allowing the European Union to stop transferring bulk data to the United States for anti-terrorism purposes by establishing a legal and technical framework for extraction of data on EU territory. Although this proposal is still in its early stages and only outlines different possible options, it has been criticised by a number of MEPs for being too costly. [27] The European Parliament's Civil Liberties, Justice and Home Affairs Committee, on 15 June 2011, adopted a report calling for a review of whether anti-terror measures have led to increased security.

4.2. United Nations

34. Many United Nations bodies have dealt with the relationship between human rights and terrorism. [28]An exhaustive appraisal would go beyond the scope of this report. Suffice it to point to the Counter-Terrorism Committee (CTC), set up on 28 September 2001 by Resolution 1373 (2001) and comprising 15 members of the Security Council. This Committee is responsible for the implementation of that resolution, namely for monitoring countries' progress in the fight against terrorism and for helping them to meet their obligations. Resolution 1373 (2001) only made passing reference to human rights and it was not until 2005 that the Security Council, in its Resolution 1624 (2005), explicitly included human rights in the CTC's mandate to implement the resolution.

35. In March 2005, the post of special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism was created. The rapporteur's task is to support states in their efforts in this context and make concrete recommendations to them. In recent years, the rapporteur has delivered six reports. Among other things, he has questioned the legality of the CTC's action under Chapter VII of the United Nations Charter, arguing that the implementation of Resolution 1373 (2001) exceeds the powers conferred on the Security Council by that Chapter and continues to pose risks to the protection of a number of international human rights standards. [29]

5. Selected human rights concerns in the fight against terrorism

36. I have decided to be selective in the choice of Convention articles and examples and have not tried to deal with all rights enshrined in the Convention and its protocols. [30]

---

24. See, for example, Council Framework Decision of 13 June 2002 on combating terrorism, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:164:0003:0003:EN:PDF.
25. See, for example, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF.
26. Communication from the Commission to the European Parliament and Council – A European terrorist finance tracking system: available options, COM(2011)429final of 13 July 2011, http://ec.europa.eu/home-affairs/news/intro/docs/110713/1_EN_ACT_part1_v15.pdf.
27. The Commission paper puts the cost of creating an EU terrorist finance tracking system at 33 to 47 million euros, with estimated annual running costs of 7 to 11 million euros. The three options it outlines each combine EU-level and national functions. The results of an impact assessment are expected by the end of the year, focusing on the need for and proportionality of possible measures – issues that have come under intense scrutiny during the first year of the SWIFT agreement. With a nod to the impact assessment, the paper sidesteps the most contentious questions concerning a future EU programme, notably its scope, retention periods, and individuals' rights to access and deletion. The paper acknowledges the "political importance of the issue" and its "legal and technical complexity", and pleads for "sufficient time" before the Commission has to submit a legislative proposal to member states and MEPs.
28. For a comprehensive overview, see the Sixth report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 6 August 2010, UN Doc. A/65/258, paragraphs 17 et seq., www.un.org/ga/search/view_doc.asp?symbol=A/65/258.
29. Ibid, paragraphs 33 et seq.

5.1. Non-derogable rights under the European Convention on Human Rights

37. Non-derogable rights are ones which a state must guarantee, without exception, at all times, including in times of war or other public emergencies threatening the life of the nation. Article 15 of the Convention is clear in this respect. The non-derogable rights are Article 2 (right to life), Article 3 (prohibition of torture, inhuman or degrading treatment or punishment), Article 4, paragraph 1 (prohibition of slavery), and Article 7 (no punishment without law). Nor is any derogation permitted to Protocol No. 13 (abolition of the death penalty).

5.1.1. Article 7 and the definition of terrorism from a human rights perspective

38. There is no universally agreed upon, comprehensive and concise definition of terrorism. [31]Yet, there is broad agreement on what constitutes terrorism. For the purposes of this report and for ease of reference, I shall therefore concur with the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr Martin Scheinin, and base myself on United Nations Security Council Resolution 1566 (2004), which refers to "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purposes to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act".

39. While the international community is concerned with international terrorism, individual states affected by purely domestic forms of terrorism may also legitimately include in their definition of terrorism conduct that corresponds to elements of a serious crime as defined by its national law, when combined with the other characteristics of Resolution 1566 (2004). [32] However, the general rules on the legal definition of a criminal act must apply. Laws penalising acts of terrorism must be formulated with precision so as to comply with the principle of *nulla poena sine lege*, enshrined in Article 7 of the Convention.

40. Doubts in this respect arise in particular with regard to the Russian Law on counteracting terrorism of 2006 which includes in its definition of punishable terrorist activities, *inter alia*, advocating the ideas of terrorism, calling for terrorist action or justifying or defending such actions, as well as any informational or other complicity in the preparation and the realisation of a criminal act.

5.1.2. Article 2 – Right to life

41. Article 2 of the Convention, which requires that everyone's life shall be protected by law, enshrines one of the most fundamental values of our democratic societies. This article permits no derogation even in times of public emergency, threatening the life of the nation within the meaning of Article 15 of the Convention, also for the fight against terrorism and organised crime. [33] According to the case law of the Court, the state has the duty to minimise risks for life in any anti-terrorist activities it carries out. [34] In this context, investigations into any killings must be immediate, effective and independent, and capable of leading to the identification and punishment of those responsible. [35]

42. These principles, self-evident as they would appear, must be strictly observed when it comes to the application of counterterrorist laws. In particular, security forces and military personnel, who are at the forefront of anti-terrorist operations, must be properly trained so as to ensure that excessive force is avoided.

43. Here, the Russian 2006 Law on counteracting terrorism, which authorises anti-aircraft artillery to shoot down a plane after confirmation that it has been highjacked and poses a threat to cities, must be applied with utmost vigilance. [36]

---

30. There are numerous other issues that would merit being treated, such as, for instance, Terrorist Asset Freezing Bills under the right to property under Article 1 of the first protocol to the Convention and other rights, see, for example, United Kingdom Human Rights Joint Committee – Third Report Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report), 22 October 2010, www.publications.parliament.uk/pa/jt201011/jtselect/jtrights/41/4102.htm.
31. See Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr Martin Scheinin, 22 December 2010, UN Doc. A/HRC/16/51, paragraph 27.
32. Ibid.
33. Labita v. Italy, Application No. 26772/95, paragraph 119.
34. McCann et al. v. United Kingdom, paragraph 213; Oneryildiz v. Turkey.
35. Jordan v. United Kingdom, judgment of 4 May 2001, paragraphs 106-108.
36. A similar provision in the German Law on Air Security of 2005 was declared unconstitutional in a judgment of the Federal Constitutional Court of 15 February 2006.

5.1.3. Article 3 – Prohibition of torture

44. Furthermore, the prohibition of torture and inhuman or degrading treatment or punishment is absolute. Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. As the Court has held, Article 3 enshrines one of the most fundamental values of a democratic society. The Court indicated that it was well aware of the immense difficulty faced by states in modern times in protecting their populations from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victims' own conduct. [37]

45. This prohibition is equally absolute in extradition and expulsion cases and gives Article 3 a certain extra-territorial effect. It is settled case law of the Court that extradition or expulsion of a person by a member state may give rise to an issue under Article 3 where substantial grounds have been shown for believing that the person in question would, if extradited or expelled, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country (principle of *non-refoulement*). [38] This absolute nature of the *non-refoulement* obligation was challenged before the Court in *Saadi* v. *Italy,*[39] where it was argued that the risk of terrorist suspects being treated contrary to Article 3 by a third state should be weighed against the threat they posed to the community. The Court held that "it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a state is engaged under Article 3, even when such treatment is inflicted by another state" [40] and that protection of national security could not justify a higher risk of torture or inhuman or degrading treatment. [41]

46. This approach can only be welcomed. Claiming to balance the right of the individual at risk of torture upon return and the supposed needs of society as a whole departs from a false premise. While with respect to derogable rights, a balance between majority and minority interests has to be struck regularly, this is not a relevant consideration where there is a risk of torture. Torture is absolutely prohibited. This special status of the prohibition of torture in the Convention would be ignored if governments could invoke the need to balance the risk of torture against other public policy considerations. Once such a boundary is overstepped, "the door back to medievalism and barbarism opens all too readily", as John Hedigan, former judge at the European Court of Human Rights so aptly puts it. [42]

47. In some cases, states have extradited or deported suspected terrorists despite an indication by the Court under Rule 39 of the Rules of Court (interim measures) to refrain from so doing until further notice. For example, in *Ben Khemaisv.Italy,* the applicant, sentenced in Tunisia in his absence to ten years' imprisonment for membership of a terrorist organisation, was deported to Tunisia on account of his role in the activities of Islamic extremists, despite the indication from the Court of an interim measure under Rule 39 that he should remain in detention in Italy.

48. Such practice is most regrettable and, indeed, illegal.

49. Given the absolute prohibition under Article 3, the practice of member states of expelling persons to countries where torture and ill-treatment are frequently practised, relying on so-called diplomatic assurances from the receiving states, raises particular concerns. [43] There is already an argument against diplomatic assurances at the outset: the perceived need for such guarantee is itself an acknowledgement that a practice of torture or other ill-treatment may exist in the receiving state. Furthermore, diplomatic assurances have been widely criticised as unenforceable and allowing for no redress where they are breached. [44] Among those highly critical of reliance on such assurances are the Venice Commission, [45] the Council of Europe Commissioner for Human Rights [46] and the United Nations Special Rapporteur on Torture. [47]

---

37. See Chahal v. United Kingdom, 15 November 1996, paragraph 131.
38. Chahal v. United Kingdom, Shamayev and Others v. Georgia and Russia, Saadi v. Italy.
39. Judgment of 28 February 2008.
40. Paragraph 138 of the judgment.
41. Paragraph 140 of the judgment.
42. Hedigan J., op. cit., p. 392, at 413.
43. See the Grebennikov memorandum, op. cit., paragraph 56.
44. European Parliament, "Current challenges regarding respect of human rights in the fight against terrorism", p. 35.
45. Opinion No. 363/2005.
46. Viewpoint: "The protection against torture must be strengthened", 18 February 2008.
47. UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, Note by the Secretary-General, 30 August 2005, A/60/316, paragraph 51, available at: www.unhcr.org/refworld/docid/43f30fb40.html.

50. The Court's case law has been less clear-cut. Although it considered in individual cases that diplomatic assurances against torture did not provide a sufficiently reliable guarantee against the risk of ill-treatment to satisfy the obligation of *non-refoulement*[48] it has not ruled them out entirely.

51. It is my contention that diplomatic assurances are highly problematic. Responsibility for the absolute prohibition of torture is effectively delegated to the receiving country. This undermines the international nature of the duty to prevent and prohibit torture. [49] If applied, they require very careful follow-up and particular caution has to be exercised with regard to countries where there is documented systematic or widespread use of torture and ill-treatment.

5.2. Derogable rights under the European Convention on Human Rights

5.2.1. Article 5 – Right to liberty and security

52. Article 5 of the Convention, which provides for the right of liberty and security of person in general, contains a number of provisions relating to the lawfulness of detention, [50] to being informed of the reasons for the arrest [51], to being brought before a judge, [52] to *habeas corpus* proceedings [53] and to an adversarial hearing. [54] Subject to the derogation provisions of Article 15, the exceptions set out in Article 5, paragraph 1, are exhaustive and must be interpreted narrowly. This article leaves some room for limitations in order to accommodate specific concerns which arise from the nature of terrorism, notably regarding detention issues. Here, the Court has held that states' investigating authorities cannot arrest suspects for questioning without effective control by the domestic courts or by the Convention supervisory mechanism. [55] In particular, Article 5, paragraph 3, of the Convention stipulates that everyone arrested shall be brought promptly before a competent judicial authority. Although the Court has not specified an exact time-limit for bringing arrested persons before a competent judicial authority, its case law offers some guidance. In the case of *Brogan and others v.United Kingdom,*[56] the Court held that detention periods ranging from four days and six hours to six days and 16 hours before being brought before a competent judicial authority violated Article 5, paragraph 3. Although the Court acknowledged that the arrest and detention of the applicants were undoubtedly inspired by the legitimate aim of protecting the community as a whole from terrorism, this was not on its own sufficient to ensure compliance with the specific requirements of Article 5, paragraph 3. According to the Court, "[t]o attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word 'promptly' and an interpretation to this effect would import into Article 5, paragraph 3, a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision".

53. One sensitive issue in this respect is preventive (administrative) detention, that is imprisoning someone without charge or trial. There has been a trend in some member states to establish preventive or administrative legal responses to terrorism, in parallel to criminal sanctions, which are based on secret intelligence information that the person concerned can barely be informed of, let alone contest. [57] Such measures can take the form of preventive detention, control orders and deportation on national security grounds. Such measures should not be viewed as more convenient alternatives to criminal prosecutions. They may have a greater impact on the lives of individuals than criminal sanctions.

54. The Assembly has already dealt with the question of the length of such administrative detention. [58]

---

48. See, for instance Ismoilov v. Russian Federation, Application No. 2947/06, paragraph 127, and Ben Khamais v. Italy, Application No. 246/07, paragraph 61.
49. Assessing Damage, Urging Action, p. 105.
50. Article 5, paragraph 1, of the Convention.
51. Article 5, paragraph 2, of the Convention.
52. Article 5, paragraph 3, of the Convention.
53. Article 5, paragraph 4, of the Convention.
54. Article 5, paragraphs 3 and 4, in combination with Article 6, paragraph 3, of the Convention.
55. Murray v. United Kingdom, 28 October 1994, paragraph 58.
56. Brogan and others v. United Kingdom, Applications Nos. 11209/84, 11234/84, 11266/84; 11386/85, judgment of 29 November 1988.
57. Assessing Damage, Urging Action, p. 94.
58. See Resolution 1634 (2008) on the proposed law on forty-two-day pre-charge detention in the United Kingdom. The critical stance of the Assembly is to be kept in mind in the current ongoing discussion in the United Kingdom on a possible extension of detention from 14 to 28 days. See concerns by Mr David Anderson QC, the independent reviewer of terrorism

55. I would like to illustrate the issue of general challenges facing national authorities with regard to administrative detention with an example from the United Kingdom, which is illustrative of the challenges faced by member states trying to comply with the international human rights framework.

56. In the United Kingdom, control orders, a form of house arrest, were made possible through the 2005 Act on the Prevention of Terrorism. [59] They were introduced in an attempt by the government to comply with Articles 3 and 5 of the Convention. The problem to be dealt with at the outset was the following: How to deal with foreign nationals who had no right to live in the United Kingdom, who were suspected of involvement in terrorism, but who could not be deported to their home countries because of the above-mentioned principle of *non-refoulement.*[60] In order to tackle such a situation, the British government, by virtue of Article 15 of the Convention, decided to derogate from Article 5 in order to permit the detention of foreign nationals suspected in involvement of terrorism, even where they could not be deported. The matter went to the House of Lords, which ruled in the "Belmarsh case", that such a regime, allowing the Secretary of State for the Home Department to detain a suspected international terrorist with a view to his intended deportation, was incompatible with the right to liberty under the Convention.

57. Control orders were introduced as a less restrictive measure. This legislative intent should be taken into account when appraising the system of control orders.

58. Two conditions must be satisfied for a control order to be granted. By section 2 of the Act on the Prevention of Terrorism, the United Kingdom Home Secretary must have "reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity" and show that "it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual". The Home Secretary can therefore restrict an individual's liberty for the purpose of protecting members of the public from a risk of terrorism.

59. In this context "Special advocates" are employed. They are barristers who have been appointed by the government and given security clearance to represent the interests of terror suspects at secret court hearings. They are cleared to see secret or "closed" documents from the intelligence services, but are not allowed to speak to the suspect or his lawyers once they have seen this information.

60. It seems that the United Kingdom is the only country implementing such a system. However, its practical application leaves room for improvement. As was seen at the expert hearing on 17 November 2010 in Paris, [61] hearsay evidence is still permitted on a routine basis. Corporate evidence of what is described as a "mosaic" of allegations is being deployed, often by quite junior security service officers who are not necessarily very familiar with the case at issue. The standard of proof under the statute remains very low. The Secretary of State only needs to show a reasonable suspicion of terrorism-related activity, without having to prove any conduct at all on the part of the individual in question. In contrast to a convicted prisoner, the controlled person does not even know when the restrictions he or she faces will come to an end. Control orders can be renewed for successive, and unlimited, one-year periods. The controlled person is in some cases left in a position where, even after the House of Lords' interventions, the key evidence against him or her is set out in the closed case and in closed judgments. In such cases he or she is deprived of the most basic right of any disappointed litigant: knowing why he or she has lost.

61. A proposal is currently under consideration to replace control orders by Terrorism Prevention and Investigation Measures (TPIMs), [62] which will impose less severe restrictions upon a terrorist suspect.

62. The current bill introduces increased safeguards for the civil liberties of individuals subject to the measures, including a tougher test for the measures to be imposed than that applicable to control orders and a maximum time-limit of two years (further measures can only be imposed if the person has re-engaged in terrorism). Restrictions that impact on an individual's ability to follow a normal pattern of daily life will be kept to the minimum necessary to protect the public, and will have to be proportionate and clearly justified. The

---

legislation www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8646031/New-terrorism-laws-are-flawed-watchdog-says.html. See also Mr Anderson's first Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006, issued in July 2011. passim, http://terrorismlegislationreviewer.independent.gov.uk/.

59. www.legislation.gov.uk/ukpga/2005/2/contents.

60. Such was the case of Mr Chahal, a Sikh separatist, suspected of terrorism in his native India and at risk of torture by Punjabi forces if he were deported to his homeland. As a result of the ruling of the European Court of Human Rights in Chahal v. United Kingdom, the United Kingdom could not deport him to India.

61. See intervention of Mr Otty at the hearing on 17 November 2010, http://assembly.coe.int/CommitteeDocs/2011/ajdoc07_2011.pdf.

62. See Terrorism Prevention and Investigation Measures Bill, www.publications.parliament.uk/pa/bills/cbill/2010-2012/0193/2012193.pdf. See also comments of David Anderson Q.C, Independent Reviewer, footnote 58.

type of restrictions which can and cannot be imposed will be made clearer. For instance, lengthy curfews will be replaced by a more flexible overnight residence requirement, the possibility of relocation to another part of the country without consent will be scrapped, geographical boundaries will be replaced with the more limited power to impose tightly-defined exclusions from particular areas, individuals subject to the measures must be permitted a landline and a mobile telephone, and a computer with Internet connection. Importantly, there shall be a broad judicial oversight of the system with high court permission being needed to impose the measures (or to immediately confirm measures imposed in urgent cases), a full automatic review of each case in which measures will be imposed and rights of appeal for the individual against the refusal of a request to revoke or vary the measures. Furthermore, the bill proposes a duty on the Secretary of State to consult on the prospects of prosecuting an individual before measures may be imposed, and a duty to keep the continued need for the measures under review as long as they are in force. The independent reviewer of terrorism legislation will publish an annual review of the operation of the system.

63. While the bill should, in principle, be welcomed as an improvement, practice will show whether such TPIMs will comply with the Convention. This will depend on whether courts will insist on the best evidence available being produced at a hearing and on whether there shall be greater use of *in camera* procedures (procedures where the public is excluded from the courtroom) instead of closed procedures (procedures whereby certain material can be withheld from the suspect when its disclosure would be contrary to the public interest), as is currently the case. There should be also a relaxation of the rules on the extent to which special advocates can communicate with other advocates. And finally, from the outset there should be an express undertaking by the Secretary of State that the government would compensate any person subjected to a control order if a court subsequently established that the control order was not justified.

5.2.2. Article 6 – Right to a fair trial

64. Article 6 provides for the right to a fair trial, which includes a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

65. Under the Spanish Law on Criminal Procedure a judge can order a detainee to be held *incommunicado.* During this time, the detainee only has the right to be assisted by an assigned lawyer, instead of one freely chosen by the suspect; oral communication is not allowed and all communication in writing is controlled by a judge. The requirement of an officially appointed lawyer is motivated by the need to prevent the use of lawyers working themselves for terrorist organisations or maintaining links between detainees and such organisations.

66. Such restrictions of access to legal counsel can only be in compliance with Article 6 if they are strictly necessary and proportionate to the legitimate aim pursued. An accused person's right to communicate with his or her legal counsel in private is part of the basic requirements of a fair trial and follows from Article 6, paragraph 3. [63] This applies to all stages of detention. In the recent leading case of *Salduz v. Turkey* a minor was charged with, and subsequently convicted of, participation in an unauthorised demonstration in support of the PKK. The applicant, in the absence of a lawyer, had made a statement while in police custody admitting his guilt. The Court held that even though the applicant had been able to contest the charges at his trial, the fact that he could not be assisted by a lawyer while in police custody had irretrievably affected his defence rights, especially as he was a minor. Access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. [64]

5.2.3. Article 8 – Right to respect for private and family life

67. The right to privacy, as provided for by Article 8 of the Convention, is at risk of interference by the state in the fight against terrorism. The second paragraph of Article 8 sets out the circumstances in which interferences with the rights protected by these articles may be justified. Nevertheless, in order to avoid arbitrariness, any interference with these rights must have a legal basis; that is any interference must be "in accordance with the law" or "prescribed by law". [65] In this connection, the Court requires, firstly, "that the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the

63. Murray v. United Kingdom, Application No. 18731/91, judgment of 8 February 1996, paragraph 58.
64. Salduz v. Turkey, Application No. 36391/02, judgment of 27 November 2008, paragraph 55.
65. See Article 8 and Articles 9 to 11 of the Convention, respectively.

consequences which a given action may entail". [66] A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference. [67] Once it is established that a restriction has been "prescribed by law", the Court considers whether the restriction is "necessary in democratic society". In assessing this, the Court considers whether the restriction pursues one of the legitimate aims, as specified in Article 8, paragraph 2, whether it is proportionate to the legitimate aim, and whether the reasons given by the national authorities to justify the restriction are relevant and sufficient under Article 8, paragraph 2. [68]

68. The most obvious measures to be closely appraised in the light of Article 8 are surveillance, interception, and the installation of closed-circuit television.

69. The Court has recognised the need for states to use anti-terrorism measures such as secret surveillance. [69] The second paragraph of Article 8 explicitly permits restrictions when its aim is one of those specified in the paragraph, including the protection of public safety and national security. Nevertheless, "Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate". [70] The Court must be satisfied that, whatever measures are adopted, there exists adequate and effective guarantees against abuse. [71] Such an assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by law. [72] In other words, powers of secret surveillance are tolerable under the Convention only in so far as they are strictly necessary for safeguarding the democratic institutions. [73]

70. It emerges from the Court's case law that states may have very good reasons to carry out surveillance, interception, to install closed-circuit television and to monitor movements of funds in the fight against terrorism. Such actions are legitimate and may be necessary. They must, however, be accompanied by appropriate judicial safeguards. Regarding covert surveillance schemes, the Court requires that there be effective safeguards such as an independent monitoring body. [74]

71. In this context, particular attention must be paid to the application of the Russian Law on Counteracting Terrorism of 2006. This law does not define the "area of counter-terrorist operation" which means that a counter-terrorist operation can be carried out in a "territory with a substantial number of residents" without any special limits. The area of counter-terrorist operation is determined by the official in charge. The counter-terrorist regime allows for ID checks, tapping of telephone conversations, letters and other means of communication, restrictions on movement of vehicles and pedestrians, unhindered access to private homes and land plots and restrictions or bans on the sale of certain goods, including alcohol. All this is not accompanied by any judicial oversight. The law provides that the chief operational headquarters may decide to resettle the population from the area of anti-terrorist operations. Thus, anti-terrorist operations often seem to be carried out regardless of the situation of women and minors who happen to be in the same household or civilians in the same block of flats where the operation takes place. Journalists have no access to the areas where a counter-terrorist operation is carried out.

72. The lack of judicial oversight is particularly worrying in this respect. It was reported at the hearing in Paris that in one instance, the counter-terrorist operation in a village in the Republic of Dagestan lasted for almost nine months, during which time journalists had not been able to enter the village. [75] In several instances, journalists were deported from Ingushetia when anti-terrorist measures were carried out. Under former President Zyazikov, counter-terrorist operations were reportedly used as pretexts to prohibit anti-government demonstrations.

---

66. Sunday Times v. the United Kingdom (No. 1), Application No. 6538/74, judgment of 26 April 1979, p. 30, paragraph 49.
67. Müller and Others v. Switzerland, judgment of 24 May 1988, p. 20, paragraph 29.
68. Sunday Times v. United Kingdom.
69. Klass and Others v. Germany, Application No. 5029/71, judgment of 6 September 1978.
70. Ibid., paragraph 49.
71. Ibid., paragraph 50.
72. Ibid.
73. Klass and Others v. Germany, Application No. 5029/71, judgment of 6 September 1978, paragraph 42.
74. Ibid., paragraph 55.
75. See footnote 4.

73. Such action appears disproportionate and seems difficult to reconcile with the above-mentioned case law of the Court.

74. Within the legislative framework of the European Union, member states have stepped up exchanges of information between domestic intelligence services and law enforcement bodies.

75. In particular, the Data Retention Directive, [76] adopted on the basis of the European Union's competence to harmonise domestic laws concerning the functioning of the internal market, [77]obliges EU member states to store citizens' telecommunications data for six to 24 months stipulating a maximum time period. Under the Directive the police and security agencies will be able to request access to details such as IP address and time of every e-mail, phone call and text message sent or received.

76. This Directive must be interpreted in the light of fundamental human rights. While it is useful to share information when there are genuine reasons of national security, the need must be well-documented and safeguards put in place. With such safeguards in place and given that, under the Directive, any request to access the information will require a court order, the Data Retention Directive seems to me to strike a good balance. I am also pleased to see that the European Commission, in its recent evaluation report on this directive, sees fit to interpret it in the light of fundamental and human rights and makes specific and detailed reference to the Convention. [78]

5.2.4. Article 10 – Freedom of expression

77. The Convention sets out binding standards regarding freedom of expression. It also recognises that there can be valid limitations placed on the right. Speech and other forms of expression can incite terrorism and it is legitimate to criminalise such activities. Article 10 of the Convention guarantees freedom of expression and also sets out the circumstances in which interferences with this right may be qualified or restricted for reasons which are limitatively enumerated. In this context, the Court has acknowledged, with due regard to the circumstances and a state's margin of appreciation, that a balance has to be struck between the individual's right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations. [79] Any limitation must, however, respect the case law of the Court and not limit forms of expression that are merely controversial and do not incite to violence.

78. The right to freedom of speech does not mean a right to incite violence. [80] Article 5 of the Council of Europe Convention on the Prevention of Terrorism therefore foresees the criminalisation of public provocation to terrorism. [81]

79. In recent years, a number of states have created new offences for this purpose. The Spanish Penal Code thus criminalises "praising or justification, through any means of public expression or broadcasting, of the offences". [82] The United Kingdom Terrorism Act 2006 provides for offences that "intend members of the public to be directly or indirectly encouraged or otherwise induced (to terrorism) … or is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced". This provision includes every statement which glorifies the commission or preparation (whether in the past, in the future or generally) of such acts and offences [83] or indirect encouragement or public justification of terrorist acts. The Russian Law on Counteracting Terrorism of 2006 amended the Penal Code to introduce a new offence of public justification of terrorism, which is punishable by up to four years of prison (and five years if mass media are used). Here, public justification of terrorism is understood as public statements which recognise the terrorist ideologies and practice as legitimate and deserving to be supported and emulated. [84]

---

76. 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, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF.

77. Article 114 of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 95 EC).

78. See Report from the Commission to the Council and European Parliament – Evaluation report on the Data Retention Directive (Directive 2006/24/EC), 18 April 2011, COM(2011) 225 final, p. 28 et seq., http://ec.europa.eu/commission_2010-2014/malmstrom/archive/20110418_data_retention_evaluation_en.pdf.

79. Zana v. Turkey, Application No. 18954/91, judgment of 25 November 1997; Incal v. Turkey, Application No. 22678/93, judgment of 9 June 1998; Karatas v. Turkey, Application No. 23168/94, judgment of 8 July 1999.

80. Zana v. Turkey, Application No. 18954/91, paragraph 60, and Hacer Termikan v. Turkey, Application No. 41990/98, judgment of 19 September 2002.

81. See also United Nations Security Council Resolution 1624 (2005), paragraph 1.

82. Article 578 of the Spanish Penal Code.

83. Section 1 of the United Kingdom Terrorism Act 2006.

84. Russian Law No. 153-FZ, amending the Penal Code.

80. In so far as such provisions are phrased in a very general and abstract way and weaken the causal link between the original speech and the danger that criminal acts may be committed, they are to be regarded with great caution. [85]

81. In this context, the Russian Federal law on Counteraction of Extremist Activity [86] appears problematic. It includes “extremist” activities in the notion of terrorist activities, using very vague and broad definitions. This law raises questions as to foreseeability and legal certainty and may lend itself to arbitrary enforcement. [87]

82. In addition to this, organisations, including non-governmental organisations and media organisations, which distribute materials containing public appeals justifying terrorism or have an “extremist” nature can be closed down. [88] One of the experts at the hearing in Paris stated that the prohibition of justifying terrorism encouraged arbitrary restrictions of the freedom of expression as well as editorial self-censorship, since justification of terrorism was defined very broadly. Moreover, the law on media stipulates that procedures for gathering information by journalists in the territory or on the site of a counter-terrorist operation shall be determined by the chief of the counter-terrorist operation. This provision could be used to unduly restrict the freedom of information.

83. Still in Russia, in July 2010, new provisions were added to the law on the Federal Security Service (FSB) allowing the FSB to issue “warnings” to individuals, organisations, and media outlets. The warnings require individuals or organisations to stop any activities the FSB considers as actually or even potentially “extremist”. [89] Such a law is alarming, for it risks putting the FSB above the law. It not only appears to be in breach of the freedom of expression, but of the rule of law in general. The fact that, in response to protests from human rights activists, lawmakers earlier withdrew an amendment allowing the FSB to summon people to their offices to hand out the warnings and also publish their warnings in the media, does not make matters any better. The chilling effect on individuals such as journalists, who are only doing their job, remains immense.

6. Conclusion

84. It has been shown that within the normative framework of the European Convention on Human Rights, states dispose of the necessary flexibility to fight terrorism and protect all individuals living under their jurisdiction. The modern human rights framework, after the Second World War, was designed to maintain security in times of emergency, with an eye on combating potential abuse.

85. There is no need for a "trade-off" between human rights and effective counter-terrorism practices, as safeguards exist in human rights law itself. As has been shown, the Convention, like other international human rights instruments, can be applied in such a way as to allow states to take reasonable and proportionate action to defend democracy and the rule of law against the threat of terrorism.

86. The primacy of the criminal justice system must not be given up. States should resist the temptation to resort to coercive measures outside established criminal procedures and their safeguards designed to protect the innocent. Here, I can only fully subscribe to the view of the Eminent Panel of the International Commission of Jurists which states that “all acts of terrorism are crimes. Take away the terrorist label and these acts – murder, hostage taking, highjacking and violence against civilians – are all very serious criminal offences under any legal system. If the criminal justice system is inadequate to the new challenges posed, it must be made adequate”. [90]

87. In this context, the concept of “war on terror” is misleading and unhelpful in that it is the rights of civilian victims which are challenged by terrorism and terrorist crimes do not amount to acts of war.

88. I would like to finish my report with a remark of a general nature. Following the terrorist attacks of 11 September 2001, a number of states enacted provisional laws in order to confront a perceived imminent danger of terrorism. Ten years after this atrocious event would be a good moment for states to review such laws and consider whether they are still necessary. [91] Obviously, this decision is to be taken by each state. I

---

85. See also Assessing Damage, Urging Action, p. 129.
86. Federal Law No. 114-FZ of 25 July 2002 on the Counter-action of Extremist Activity, www.medialaw.ru/e_pages/laws/russian/extrimist.htm.
87. This point was already made in 2006 by our former colleague Valery Grebennikov, op. cit., paragraph 99.
88. Assessing Damage, Urging Action, p. 130.
89. See “Russia to introduce 'draconian' Minority Report-style law”, The Guardian 29 July 2010, www.guardian.co.uk/world/2010/jul/29/russia-minority-report-law-fsb.
90. Assessing Damage, Urging Action, p. 123.

can, however, only urge states to critically review their legislation in the light of the substantive work that has been carried out by organisations such as ours on the topic of human rights and the fight against terrorism. There is a danger that temporary measures, even if considered necessary at the time, become permanent even when circumstances have changed. It is extremely difficult to reinstate appropriate human rights protection standards once they have been abolished or reduced in scope.

91. A recent example is Germany, where it was just decided to prolong laws, adopted in the wake of 9/11 for another four years, Such laws mainly deal with gathering and processing data.
www.faz.net/artikel/C30923/einigung-nach-langem-streit-anti-terror-gesetze-werden-um-vier-jahre-verlaengert-30450599.html.