EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Research and Library Division
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Background paper for the seminar Opening of the Judicial Year January 2016[1]

INTERNATIONAL AND NATIONAL COURTS CONFRONTING LARGE-SCALE VIOLATIONS OF HUMAN RIGHTS

- Terrorism -

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[1]. This document has been prepared by the Research and Library Division of the Registry and does not bind the Court.

Questions for the written contributions on Terrorism

1. How are the concepts of national security, public safety and terrorism defined in national law and case-law?

2. Does national legislation regulate mass surveillance (or strategic surveillance) of communications, in particular electronic communications? What guarantees exist against arbitrary use of such measures?

3[2]. Can evidence which has been obtained in violation of Articles 3, 5, 6 and 8 of the Convention be considered admissible in a trial for terrorist offences? If so, under which conditions?

Contributors are requested to observe the following guidelines:

(i) Contributions should be concise, with a suggested upper limit of 10 pages.

(ii) Please use one of the Court's official languages, English or French.

(iii) Contributions should reach the Court no later than **Monday 18 January**. Please use this e-mail address to the submit contributions: valerie.schwartz@echr.coe.int

[2] Please note that this question has been expanded to include Article 6 as well.

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INTRODUCTION

Since the entry into force of the Convention, virtually every European country has been confronted with terrorism. While the various terrorist movements sometimes had an international dimension linked to the Cold War or the Israeli-Palestinian conflict, the phenomena were nevertheless relatively specific to each national context. Nowadays, the threat is much more global and, in both qualitative and quantitative terms, no longer bears any relation to the threat of the 1960s, 1970s or 1980s. In what way does the very extensive body of case-law established by the European Court of Human Rights ("the Court") over a number of decades apply to the fight against terrorism today? This working paper, which for reasons of concision does not claim to be exhaustive[3], charts the Court's case-law. It takes a very practical approach, looking at each stage of an anti-terrorist operation: first the surveillance stage, then the contact/arrest stage and finally the prosecution and punishment stage. Some particularly relevant aspects can already be highlighted in view of the current context.

The Court's case-law concerning terrorism cases has been constructed around the balancing of the different interests at stake: on the one hand, the protection of the fundamental rights of the terrorists or suspected terrorists, and on the other hand the interests of national security, the preservation of public order and the protection of the rights of others. While most of the terrorism-related judgments and decisions delivered by the Court concern applications lodged by terrorists or suspected terrorists, some recent applications lodged by victims of terrorism will provide the Court with an opportunity to further define the scope of **States' positive obligations when it comes to preventing terrorist attacks**.

This last aspect is likely to assume considerable importance in view of the growing number of terrorist acts carried out by individuals who in some cases were already the subject of surveillance measures or were in any event on file with the intelligence services of the various European countries as posing a potential threat (Toulouse, 2012; Brussels, 2014; Paris, January 2015; Copenhagen, February 2015; and Paris again, November 2015). Difficulties of coordination between the intelligence services and the judicial authorities appear to be a particularly live issue as regards the phenomenon of "*foreign terrorist fighters*", whose radicalisation and travel to sensitive countries are in some cases known to the intelligence services but who, in spite of everything, succeed in carrying out attacks without having been arrested as a preventive measure. There are tens of "*dormant*" individuals resident in European countries, in most cases quite lawfully, who are ready at any moment to carry out attacks against poorly protected targets without the need for major planning or technical preparation. It can logically be assumed that preventive surveillance measures, and in particular **mass surveillance of the telephone and electronic communications networks**, will be stepped up exponentially in response to this phenomenon. In the recent case of *Roman Zakharov v. Russia* [GC] (no. 47143/06, 4 December 2015), the Court has further clarified the scope of the safeguards which must accompany this type of surveillance from the standpoint of Article 8 of the Convention. One case that is currently pending, *Big Brother Watch and Others v. the United Kingdom* (no. 58170/13, communicated on 7 January 2014 (statement of facts)), will provide the Court with an opportunity to flesh out its case-law with regard to strategic surveillance of electronic communications.

Another major challenge arises in connection with the **use in court of intelligence, and evidence generally**, in the course of criminal proceedings against persons accused of terrorism. In terrorism cases, "*information*" is perhaps more important than "*evidence*", and the police authorities may consider it justifiable to sacrifice the effectiveness of future criminal proceedings in order to prevent a terrorist attack in the short term. In the current climate it is therefore conceivable that the security services, either by choice or because of a shortage of time and resources, might conduct unorthodox listening operations or searches or hold persons in police custody without a lawyer, to say nothing of using information from third countries where doubts persist as to the observance of human rights during police questioning. The Court's case-law concerning the admissibility of evidence from the

[3]. For a more detailed list of cases, see the Factsheet on Terrorism.

viewpoint of Article 6, which guarantees the right to a fair trial, is well established. Will it be further clarified on account of the scale of the current terrorist threat?

I. THE COURT'S CASE-LAW ON SURVEILLANCE MEASURES

Surveillance measures, and in particular covert surveillance measures, may raise an issue under Article 8 of the Convention. The first paragraph of Article 8 defines the principle of respect for "*private and family life*", the "*home*" and "*correspondence*". The second paragraph provides for the possibility for States to restrict this right, particularly in the interests of national security and to protect public order. The Court applies a three-stage test.

A. Determination of the interference

Surveillance measures may take various forms which are almost invariably regarded by the Court as interference – albeit of varying degrees of severity – with the right of the persons concerned to respect for their private life, home or correspondence. Most of the examples cited below concern ordinary proceedings, but the same reasoning obviously applies to terrorism cases.

This is true of the interception of **telephone communications** (*Amann v. Switzerland* [GC], no. 27798/95, ECHR 2000-II, and *Malone v. the United Kingdom*, 2 August 1984, Series A no. 82), and especially those operations conducted in a non-judicial context, as in the case of *Klass and Others v. Germany* (6 September 1978, Series A no. 28). In this last judgment the Court addressed the issue of standing to act in cases of covert surveillance and concluded that it was not necessary for an applicant to have actually been subjected to such a measure in order to be allowed to lodge an application in Strasbourg. The mere risk is sufficient in order to claim victim status. The Court's reasoning on this issue has been further clarified in the case of *Kennedy v. the United Kingdom* (no. 26839/05, 18 May 2010), and recently in the case of *Roman Zakharov v. Russia* [GC], cited above. In order to assess an applicant's victim status, the Court will look at the scope of the legislation permitting secret surveillance measures as well as at the availability and effectiveness of remedies at national level.

The monitoring of **electronic communications** (emails and Internet usage) is also regarded as an interference (*Copland v. the United Kingdom*, no. 62617/00, ECHR 2007-I)[4]. The same is true of the **installation of listening devices in premises**, whether private (including those of a third party: *Vetter v. France*, no. 59842/00, 31 May 2005) or business premises, or in detention facilities (including during prison visits: *Wisse v. France*, no. 71611/01, 20 December 2005); **personal listening devices and those placed in vehicles** (*Heglas v. the Czech Republic*, no. 5935/02, 1 March 2007); **CCTV surveillance** (*Khmel v. Russia*, no. 20383/04, 12 December 2013), including in public places (*Peck v. the United Kingdom*, no. 44647/98, ECHR 2003-I); **GPS tracking** (*Uzun v. Germany*, no. 35623/05, ECHR 2010 (extracts)); the **registering of journeys** by train and plane (*Shimovolos v. Russia*, no. 30194/09, 21 June 2011); the **taking of fingerprints and cellular samples or DNA profiling** (*S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008); and, of course, **searches** (*Sher and Others v. the United Kingdom*, no. 5201/11, 20 October 2015 (not final)), especially in the case of persons such as lawyers who enjoy a higher degree of protection (*Sérvulo & Associados – Sociedade de Advogados, RL and Others v. Portugal*, no. 27013/10, 3 September 2015 (not final)).

More generally, the Court regards the mere fact of gathering personal information as an interference with the right to respect for private life (*Amann v. Switzerland* [GC], cited above, and *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V).

The only surveillance measures that do not appear to have been the subject of any rulings to date are **visual checks** and **"*discreet*" searches**, that is to say, searches of private or business premises carried

[4]. Electronic surveillance may also, in some cases, give rise to a violation of Article 10 of the Convention (freedom of expression) in the event of refusal to allow access to the data gathered (*Youth Initiative for Human Rights v. Serbia*, no. 48135/06, 25 June 2013).

out without a search warrant, without the target person having knowledge of it and without any items being removed.

Likewise, there does not appear to be any case-law concerning the use of drones, satellites or aerial reconnaissance equipment in a military context, which might, among other matters, raise the issue of extraterritorial jurisdiction where this type of surveillance is carried out in connection with anti-terrorist operations outside the country (Mali, Iraq, Syria, Somalia, in international waters, etc.). In the case of *Weber and Saravia v. Germany* (dec.) (no. 54934/00, ECHR 2006-XI), the applicants maintained that the strategic monitoring of telecommunications abroad by the German intelligence services was contrary to international law because it infringed the sovereignty of the States concerned. The Court found that this had not been established since the monitoring and data processing systems had been located on German territory. However, it did not directly address the issue of the extraterritorial application of the Convention. Can an individual who is the subject of video surveillance by a British, French, Italian or Russian drone flying above his or her home in Libya or Syria invoke the extraterritorial application of Article 8?

B. In accordance with the law

In order for a surveillance measure, and especially a covert surveillance measure, not to be found contrary to Article 8, it must be in accordance with the law and the legislation must contain sufficient safeguards against abuse (*Klass and Others v. Germany*, cited above, and, very recently, *R.E. v. the United Kingdom* (no. 62498/11, 27 October 2015 (not final)).

This 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 them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided for by national law. In the case of *Weber and Saravia v. Germany* (dec.), cited above, the Court examined in particular the German legislation governing the **strategic monitoring** of communications by the intelligence services and found that the law provided for sufficient safeguards. The Court found in particular as follows:

> "116. Moreover, the Court notes, with regard to the implementation of surveillance measures and the processing of the data obtained, that safeguards against abuse were spelled out in detail. Monitoring measures remained in force for a fairly short maximum period of three months and could be renewed only on a fresh application and if the statutory conditions for the order were still met. Monitoring had to be discontinued immediately once the conditions set out in the monitoring order were no longer fulfilled or the measures themselves were no longer necessary. As regards the examination of personal data obtained by the Federal Intelligence Service, the Federal Constitutional Court strengthened the existing safeguards by ordering that such data had to be marked as stemming from strategic monitoring and were not to be used for ends other than those listed in section 3(1). The transmission of data to the Federal Government and to other authorities under section 3(3) and (5) was also subject to conditions (which will be examined in more detail below). Moreover, the G 10 Act contained strict provisions concerning the storage and destruction of data. The responsibility for reviewing stored files on a six-month basis was entrusted to an official qualified to hold judicial office. Data had to be destroyed as soon as they were no longer needed to achieve the purpose pursued (see in more detail below, paragraphs 130-132).
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> 117. As regards supervision and review of monitoring measures, the Court notes that the G 10 Act provided for independent supervision by two bodies which had a comparatively significant role to play. Firstly, there was a Parliamentary Supervisory Board, which consisted of nine members of parliament, including members of the opposition. The Federal Minister authorising monitoring measures had to report to this board at least every six months. Secondly, the Act established the G 10 Commission, which had to authorise surveillance measures and had substantial power in relation to all stages of interception. The Court observes that in its judgment in the *Klass and Others* case (cited above, pp. 24-28, §§ 53-60) it found this system of supervision, which remained essentially the same under the amended G 10 Act at issue here, to be such as to keep the interference resulting from the contested legislation to what was 'necessary in a democratic society'. It sees no reason to reach a different conclusion in the present case.
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> 118. Consequently, strategic monitoring under section 3(1) was embedded into a legislative context providing considerable safeguards against abuse."

The issue of mass surveillance has particular resonance in the context of the current terrorist threat. The Court has recently clarified the scope of the guarantees required under Article 8 with regard to secret surveillance of mobile telephone communications in its judgement in the case of *Roman Zakharov v. Russia* [GC], cited above. It will be called upon to develop its case-law relating to strategic surveillance of electronic communications in examining the case of *Big Brother Watch and Others v. the United Kingdom*, cited above, which is currently pending.

C. Necessary in order to protect a legitimate interest

The legitimate interests capable of justifying interference with private life are exhaustively listed in the second paragraph of Article 8. The fight against terrorism is invariably viewed by the Court as a legitimate aim within the meaning of that provision, as it comes under the heading of defending national security and of protecting public order (see, for instance, *Klass and Others v. Germany*, cited above, and *Uzun v. Germany*, cited above).

II. MOVING FROM THE INTELLIGENCE-GATHERING STAGE TO THE ACTION STAGE – POSITIVE OBLIGATION TO PROTECT THE POPULATION

A. A positive obligation to protect the population (Articles 2 and 3)

The Court has long accepted that Articles 2 and 3 entail a positive obligation for States to protect the life and well-being of the persons within their jurisdiction. As far back as the judgment in *Osman v. the United Kingdom* (28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII), it held as follows:

> "The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."

See also *Opuz v. Turkey* (no. 33401/02, ECHR 2009); *Mastromatteo v. Italy* [GC] (no. 37703/97, ECHR 2002-VIII); and *Maiorano and Others v. Italy* (no. 28634/06, 15 December 2009).

The Court will be called upon in the near future to clarify the scope of States' positive obligations when it comes to preventing terrorist attacks, in the context of the case of *Tagayeva and Others v. Russia* (dec.) (no. 26562/07, 9 June 2015). This case, which was declared partly admissible on 9 June 2015 and is currently pending, concerns the 2004 hostage-taking in a Beslan school. One of the issues raised by the applicants concerns the absence of preventive measures despite the fact that the intelligence services had been informed of the risk of terrorist attacks and of the presence of terrorists in the area.

B. *Arrest and detention of terrorists or suspected terrorists (Articles 5 and 8)*

1. *Reasonable grounds*

Article 5 § 1 (c) of the Convention authorises arrest and detention in particular in the event of a criminal offence or the risk of commission of an offence. Nevertheless, the authorities must have "*reasonable*" suspicions and the respondent Government must provide the Court with sufficient information to substantiate those suspicions. In its judgment in *Fox, Campbell and Hartley v. the United Kingdom* (§ 34, 30 August 1990, Series A no. 182), the Court stated as follows:

> "Nevertheless the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) (art. 5-1-c) has been secured. Consequently the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence. This is all the more necessary where, as in the present case, the domestic law does not require reasonable suspicion, but sets a lower threshold by merely requiring honest suspicion."

This requirement may run up against obstacles, particularly in the context of terrorism cases, if the information in question is covered by State secrecy. The issue of secret information was addressed by the Court in its judgment in *Al Nashiri v. Poland* (no. 28761/11, §§ 365 and 366, 24 July 2014), from the standpoint of Article 38 of the Convention (examination of the case), in the following terms:

> "365. The judgment by the national authorities in any particular case that national security considerations are involved is one which the Court is not well equipped to challenge. Nevertheless, in cases where the Government have advanced confidentiality or security considerations as the reason for their failure to produce the material requested, the Court has had to satisfy itself that there were reasonable and solid grounds for treating the documents in question as secret or confidential. Where such legitimate concerns exist, the Court may consider it necessary to require that the respondent Government edit out the sensitive passages or supply a summary of the relevant factual grounds (see, among other examples, *Nolan and K. v. Russia*, no. 2512/04, § 56, 12 February 2009 and *Janowiec and Others*, cited above, §§ 205-206).
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> Furthermore, such concerns may, depending on the document, be accommodated in the Court's proceedings by means of appropriate procedural arrangements, including by restricting access to the document in question under Rule 33 of the Rules of Court, by classifying all or some of the documents in the case file as confidential *vis-à-vis* the public and, *in extremis*, by holding a hearing behind closed doors (see *Janowiec and Others*, cited above, §§ 45 and 215, and *Shamayev and Others*, cited above, §§ 15-16 and 21).
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> 366. The procedure to be followed by the respondent Government in producing the requested classified, confidential or otherwise sensitive information or evidence is fixed solely by the Court under the Convention and the Rules of Court (see also paragraph 358 above). The respondent Government cannot refuse to comply with the Court's evidential request by relying on their national laws or the alleged lack of sufficient safeguards in the Court's procedure guaranteeing the confidentiality of documents or imposing sanctions for a breach of confidentiality (see *Nolan and K*. cited above; *Shakhgiriyeva and Others v. Russia*, no. 27251/03, §§ 136-140, 8 January 2009; and *Janowiec and Others*, cited above, §§ 210-211).
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> The Convention is an international treaty which, in accordance with the principle of *pacta sunt servanda* codified in Article 26 of the Vienna Convention on the Law of Treaties, is binding on the Contracting Parties and must be performed by them in good faith. Pursuant to Article 27 of the Vienna Convention, the provisions of internal law may not be invoked as justification for a failure by the Contracting State to abide by its treaty obligations. In the context of the obligation flowing from the text of Article 38 of the Convention, this requirement means that the respondent Government may not rely on domestic legal impediments, for instance an absence of a special decision by a different agency of the State, to justify a failure to furnish all the facilities necessary for the Court's examination of the case (see, for instance, *Nolan and K*. cited above and *Janowiec and Others*, § 211)."

In addition, the "offence" must be specific and concrete: preventive detention of individuals viewed by the State as presenting a danger on account of their continuing propensity to crime is not allowed (see, for instance, *Shimovolos v. Russia*, cited above).

2. *Preventive detention for an indefinite period*

In the case of *A. and Others v. the United Kingdom* [GC] (no. 3455/05, ECHR 2009), the Court held in particular that there had been a violation of Article 5 § 1 of the Convention because the derogations allowing persons suspected of terrorism to be placed in detention for an indefinite period discriminated between United Kingdom nationals and foreign nationals. In the same case the Court also found that a large-scale terrorist threat constituted a "*public emergency threatening the life of the nation*" within the meaning of **Article 15 of the Convention**, which allows States to derogate from some of their obligations. The Court found as follows:

> "180. As previously stated, the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al-Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, which were better placed to assess the evidence relating to the existence of an emergency.
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> 181. On this first question, the Court accordingly shares the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation."

The issue of the derogations authorised by **Article 15** of the Convention is especially topical. For instance, on 24 November 2015, in the wake of the attacks of 13 November 2015 in Paris and the subsequent implementation of a state of emergency throughout the national territory, France made a declaration to the Secretary General of the Council of Europe under this provision according to which some of the preventive measures that it might take in order to prevent further terror attacks might derogate its obligations under the Convention.

3. *Secret detention*

The Court has had occasion to find, *inter alia*, a violation of Article 5 of the Convention on account of secret detention, in a series of cases concerning the "*extraordinary renditions*" carried out in Europe by agents of the American intelligence services (*El-Masri v. the Former Republic of Macedonia* [GC], no. 39630/09, ECHR 2012, and *Al Nashiri v. Poland*, cited above). These cases also raised the issue of State responsibility for the actions of foreign agents. Secret detention may also entail a violation of Article 8.

C. *Use of force (Articles 2 and 3)*

1. *Use of lethal force*

The use of lethal force, which is sometimes unavoidable given the determined nature of the current terrorist threat (Moscow, 2002; Toulouse, 2012; Paris, January and November 2015), may give rise to a violation of the substantive aspect of Article 2 both on account of poor preparation of the anti-terrorist operation (*McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324) and on account of the disproportionate nature of the methods used (*Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, 24 February 2005: use of heavy weapons). Furthermore, the use of weapons by the security forces, and even by the armed forces, must be sufficiently regulated (regarding the use of special weapons, see *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, ECHR 2011 (extracts)). Obligations under Article 2 in this respect apply with regard to innocent victims (hostages and bystanders, eventually members of the security forces) as well as terrorists.

2. Torture and ill-treatment

The Court's case-law on torture and ill-treatment in terrorism cases is very extensive and covers widely varying scenarios, ranging from full-body searches in prison (*Frérot v. France*, no. 70204/01, 12 June 2007) to aggressive interrogation methods, particularly in the course of secret detention (*El-Masri v. the Former Republic of Macedonia* [GC], cited above, and *Al Nashiri v. Poland*, cited above). The prohibition of treatment contrary to Article 3 of the Convention is absolute and cannot be subject to derogations even under Article 15.

D. Extraterritorial jurisdiction and State responsibility

The issue of extraterritorial jurisdiction in cases involving the use of force is especially topical, given that a number of Contracting Parties to the Convention, such as France (Mali, Syria, Iraq, Afghanistan), the United Kingdom (Syria, Iraq, Afghanistan), Italy (Syria, Iraq, Afghanistan) and Russia (Syria) are currently engaged in military operations described as anti-terrorist operations, outside Europe and even in international waters (Indian Ocean, Gulf of Sidra, Strait of Sicily). While the issue seems to have been dealt with as regards arrest and detention (*Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010; *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011; and *Hassan and Others v. France*, no. 46695/10, 4 December 2014), it cannot be ruled out that the Court will be called upon to rule again on the issue of lethal action including airstrikes, missile attacks, commando operations on the ground or large-scale war operations, which might lead it to further clarify its case-law (*Banković And Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII, and *Pad and Others v. Turkey* (dec.), no. 60167/00, 28 June 2007; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011) in the light of the current situation.

There is also the question of responsibility (*Al-Jedda v. the United Kingdom*, cited above) when operations are conducted in a multilateral framework (the EU in the Indian Ocean and the Mediterranean; NATO in Afghanistan).

External operations have also given the Court an opportunity to further define the relationship between the Convention and international humanitarian law, particularly from the perspective of Article 5 of the Convention (*Hassan v. the United Kingdom* [GC], no. 29750/09, ECHR 2014).

III. CONDUCT OF THE CRIMINAL PROCEEDINGS

A. Types of offence

1. Criminal-law classification and scope of the penalty

The Court's case-law under Article 7 of the Convention (no punishment without law) requires that the law should define clearly the different offences and the corresponding penalties (see, for instance, *E.K. v. Turkey*, no. 28496/95, 7 February 2002) and that it should not be applied retroactively as regards either the definition of the offence or the scope of the penalty (see, for instance, *Del Río Prada v. Spain* [GC], no. 42750/09, ECHR 2013).

In the current climate, characterised by a high degree of radicalisation in certain circles, particularly on the Internet, and by the phenomenon of foreign terrorist fighters who travel to conflict zones for training, the issue of the criminal-law classification of certain acts (storage and sharing of videos or photos, participation in online discussions or in certain types of gatherings, travel to certain countries, etc.) and the penalties to be imposed is inescapable. In some cases, bringing charges, for instance for publicly defending terrorism or for criminal conspiracy, might be the only means of removing the threat posed by potential terrorists before they can carry out an attack.

2. *Conflict with freedom of religion, expression and association (Articles 9, 10 and 11)*

Owing to the particular nature of terrorist-type crimes and offences – which, unlike ordinary criminal offences, usually have a political or even religious motive – the Court has frequently had to weigh up, on the one hand, a State's interest in tackling terrorism in all its forms and, on the other hand, **freedom of expression** (*Leroy v. France*, no. 36109/03, 2 October 2008); **freedom of religion** (*Güler and Uğur v. Turkey*, nos. 31706/10 and 33088/10, 2 December 2014); or **freedom of assembly and association**, especially in the political sphere (*Herri Batasuna and Batasuna v. Spain*, nos. 25803/04 and 25817/04, ECHR 2009, and *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II).

B. Right to a fair trial

1. *Special courts (military courts, special tribunals)*

Recourse to special courts, and in particular military courts, may prove attractive to a country confronted with a large-scale terrorist threat. However, this option does not exempt States from their obligations under Article 6 of the Convention, particularly as regards the **independence and impartiality of the court** (see, for instance, *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV).

2. *Use and admissibility of evidence obtained in breach of the Convention*

a. Evidence obtained in breach of Article 3

Article 6 does not address the admissibility of evidence as such. This is primarily for the domestic courts to assess, and the Court's examination is confined to the impact which the use of a particular piece of evidence has had on the overall fairness of the criminal proceedings.

As regards Article 3 of the Convention, the Court has ruled on several occasions that the use of evidence obtained in breach of this provision will invalidate the proceedings as a whole, irrespective of the seriousness of the charges, and will automatically entail a violation of Article 6.

This aspect assumes particular importance in the context of international judicial cooperation on terrorism (*El Haski v. Belgium*, no. 649/08, 25 September 2012, and *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, ECHR 2012 (extracts)). In its judgment in *El Haski* (§ 99), the Court found as follows:

> "In the Court's view, the foregoing information, which emanates from diverse, objective and concurring sources, establishes that there was, at the material time, a 'real risk' that the impugned statements had been obtained in Morocco using treatment prohibited by Article 3 of the Convention. Article 6 of the Convention thus required the domestic courts not to admit them in evidence, unless they had first verified, in view of elements specific to the case, that they had not been obtained in such manner. As indicated above, in dismissing the applicant's request for the exclusion of those statements, the Brussels Court of Appeal merely found that he had not adduced any 'concrete evidence' that would be capable of raising 'reasonable doubt' in this connection.
>
> This is sufficient for the Court to find that there has been a violation of Article 6 in the present case, without it being necessary to ascertain whether, as the applicant contends, that provision has also been breached for other reasons."

b. Evidence obtained in breach of Article 8

As regards the use of evidence obtained in breach of provisions of the Convention which do not contain absolute prohibitions, such as Article 8, the Court generally assesses the importance of the different items of evidence in securing a conviction and examines whether the defence enjoyed sufficient safeguards capable of counterbalancing the unlawful elements (*Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V, and *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009).

c. USE OF EVIDENCE COVERED BY STATE SECRECY

i. In the domestic courts

In terrorism cases, given the important role played by the intelligence services, it frequently happens that evidence – whether in the form of statements given by protected witnesses or special technical means – is covered by State secrecy. In such situations, if the domestic courts decide, for instance, to restrict in one way or another the right of the defence to question a witness (*Edwards and Lewis v. the United Kingdom*, nos. 39647/98 and 40461/98, 22 July 2003; *Al-Khawaja and Tahery v. the United Kingdom*, nos. 26766/05 and 22228/06, 20 January 2009; and *Schatschaschwili v. Germany*, no. 9154/10, 17 April 2014 (pending before the Grand Chamber)), or decide to conduct a trial in camera (*Belashev v. Russia*, no. 28617/03, 4 December 2008), these restrictions must be justified and the defence must have been granted sufficient guarantees to counterbalance them, if there is not to be a violation of Article 6.

ii. In the Strasbourg proceedings

In dealing with cases, and in particular terrorism cases, that involve examining information covered by State secrecy, the Court may decide to declare all or part of the file to be confidential and to hold hearings *in camera* in order to establish the facts of the case (*Al Nashiri v. Poland*, cited above).

3. *Presence of a lawyer in police custody*

In its judgment in *Salduz v. Turkey* [GC] (no. 36391/02, § 55, ECHR 2008), which concerned a terrorism case, the Court held for the first time as follows:

> "… in order for the right to a fair trial to remain sufficiently 'practical and effective' (see paragraph 51 above), Article 6 § 1 requires that, as a rule, 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. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 (see, *mutatis mutandis*, *Magee*, cited above, § 44). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

In the more recent judgment in *Ibrahim and Others v. the United Kingdom* (nos. 50541/08, 50571/08, 50573/08 and 40351/09, 16 December 2014 (pending before the Grand Chamber)), concerning the arrest of four individuals suspected of involvement in terror attacks, a Chamber of the Court held that the risk of further attacks constituted an **"exceptionally serious and imminent threat to public safety"** and that this threat provided compelling reasons which justified the temporary delay of the applicants' access to lawyers. This case is currently pending before the Grand Chamber of the Court, which held a hearing on 25 November 2015.

IV. SECURITY MEASURES, CONFISCATION ORDERS, DISSOLUTION OF PARTIES AND ASSOCIATIONS, EXTRADITION, FORFEITURE OF NATIONALITY

Efforts to combat terrorism, especially in its present forms, may prompt States to take administrative and judicial measures of a preventive or punitive nature above and beyond imposing a criminal penalty in the strict sense, including in the context of international sanctions (*Nada v. Switzerland* [GC], no. 10593/08, ECHR 2012, and *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, 26 November 2013). These measures may include a **compulsory residence order** hampering the individual's freedom of movement (*De Tommaso v. Italy*, no. 43395/09, 18 October

2011 (communicated case pending before the Grand Chamber – statement of facts: Article 5 and Article 2 of Protocol No. 4); the **confiscation of assets** (Article 1 of Protocol No. 1); the **dissolution of political movements or religious association**s (*Jehovah's witnesses of Moscow and Others v. Russia*, no. 302/02, 10 June 2010; *Herri Batasuna and Batasuna v. Spain*, cited above; and *Refah Partisi (the welfare Party) and Others v. Turkey* [GC], cited above); **extradition or expulsion** (*Saadi v. Italy* [GC], no. 37201/06, ECHR 2008; *Trabelsi v. Belgium*, no. 140/10, ECHR 2014 (extracts); *Othman (Abu Qatada) v. the United Kingdom*, cited above; and *Z. and T. v. the United Kingdom* (dec.), no. 27034/05, ECHR 2006-III); a **prohibition on leaving the territory** (*Gochev v. Bulgaria*, no. 34383/03, 26 November 2009); or even the **forfeiture of nationality**. This last measure may raise issues under Articles 7, 8 and 14 of the Convention.

INDEX OF JUDGMENTS AND DECISIONS

The Court delivers its judgments and decisions in English and/or French, its two official languages. The hyperlinks to the cases cited in this working paper are linked to the original text of the judgment or decision. The Court's judgments and decisions can be found in the HUDOC database on the Court website (www.echr.coe.int). HUDOC also contains translations of many important cases into some twenty non-official languages, and links to around one hundred online case-law collections produced by third parties.

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