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Committee on Legal Affairs and Human Rights

Human Rights and the fight against terrorism

Introductory memorandum

Rapporteur: Lord John E. Tomlinson, United Kingdom, Socialist Group

1. Introduction

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” ([Doc. 11973](#)). At its meeting on 16 November 2009, the Committee appointed me rapporteur.

2. This memorandum is intended to launch the implementation of this mandate. I will begin with a brief overview of previous work done by the Assembly and the Committee on this subject, with a view to defining the scope of this report. Then I shall describe the methodology to apply for the background research of this report, before briefly stating the main human rights concerns I can make out at present with respect to the fight against terrorism. Finally, before concluding, I shall recall the main Council of Europe reference texts in the matter.

2. Scope of this report

3. The relationship between human rights and terrorism has on numerous occasions been raised and discussed within the Assembly. 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.¹

4. In addition to this, the Committee on Legal Affairs and Human rights is currently also preparing a report with the title “Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations”. That report, which addresses some of the legal and policy issues which the Rapporteur, Mr Marty, encountered in the course of preparing his reports on renditions and secret

¹ *Proposed 42-day pre-charge detention in the United Kingdom: PACE voiced "grave doubts" (10/2008)*; see AS/Jur Report (Doc. 11725 - <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11725.htm>) and Resolution 1634 (2008); *PACE questioned the fairness of blacklisting by the United Nations Security Council and the European Union (01/2008)*; see AS/Jur Report (Doc. 11454 - <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11454.htm>) and Addendum - <http://assembly.coe.int/Documents/WorkingDocs/doc07/edoc11454add.htm>; Resolution 1597 (2008) and Recommendation 1824 (2008); *PACE: detainees have been imprisoned in secret detention centres operated by the CIA in Europe (06/2007)*; see AS/Jur Report (Doc. 11302 rev - <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11302.htm>) and Addendum - <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302add.htm>; Resolution 1562 (2007) and Recommendation 1801 (2007); *PACE revealed a global "spider's web" of detention and transfers operated by the United States, and points to the active involvement of certain Council of Europe member states (06/2006)*; see AS/Jur Report (Doc. 10957 - <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10957.htm>) and Addendum - <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc06/edoc10957add.htm>; Resolution 1507 (2006) and Recommendation 1754 (2006).

detentions², shall primarily focus on the question of accountability for human rights violations committed by members of special services.

5. My report, in turn, intends to examine the compatibility of counter-terrorism legislation and its application with the Council of Europe standards applicable to human rights, including in the fight against terrorism. In this context, it aims to look at the way in which member states may encroach upon the human rights of suspected terrorists or even of journalists or members of the public at large, who suffer restrictions of different kinds in the name of the fight against terrorism.

6. Back in 2006, our colleague Mr Valery Grebennikov (Russia/EDG) presented an Introductory memorandum to the Committee on Legal Affairs on Human rights on the topic of this report.³ The Parliamentary Assembly never adopted a Resolution or a Recommendation as Mr Grebennikov's mandate expired before a draft could be submitted to the Committee. Building on the memorandum by Mr. Grebennikov, I shall endeavour to present a fair picture of counter-terrorism legislation currently in force in a number of member states. The purpose of this report is, therefore, to examine the way in which these states have responded to the terrorist threat in legislative and administrative terms and compare these measures with the requirements of the Council of Europe standards applicable to human rights in the fight against terrorism.⁴

7. There are certainly many other issues that could be dealt with under the theme of "Human rights and the fight against terrorism" such as an obligation of states to take appropriate measures to protect the public against terrorist attacks. I am of the opinion, however, that such issues, important as they are, deserve to be dealt with in a future separate report as they would certainly go beyond the tabled motion. This said, the protection aspect must of course be taken into account in the assessment of the proportionality of certain measures in view of the gravity of the threat to the general population.

3. Fact-finding method

8. I intend to primarily resort to the method of a hearing with experts in the field of human rights and the fight against terrorism. Such a hearing should shed light on the legislative and administrative situation in several member states, where the topic is high on the legal and political agenda.

4. Main human rights concerns concerning the fight against terrorism

9. In line with the above-mentioned motion for a resolution, this report starts from the following assumption: as the European Convention of Human Rights permits some temporary and proportionate restrictions on or suspension of specific rights, it is sufficiently adaptable to counter any current or future threats. But 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 human rights protections once they have been abolished or reduced in scope. 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.

10. The main issues I would like to address in the report revolve around the legality and conditions of pre-trial detention of suspected terrorists. The following questions come to mind:⁵

- When exactly is detention considered as lawful?
- Is the reason for an arrest provided promptly and in sufficient detail?
- Is there prompt judicial review?
- Is there a possibility for *habeas corpus* proceedings?
- Is the criminal procedure followed fully adversarial? Is criminal prosecution intended at all? If not, what shall take its place? For how long?
- What are acceptable length and conditions of detention?

² See footnote 1.

³ Introductory memorandum on *Respect for human rights in the fight against terrorism*, Rapporteur: Valery Grebennikov, 12.12.2006, document AS/Jur (2006) 29, [http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/3_codexter/working_documents/2007/CODEXTER%20\(2007\)%2014%20E%20PACE.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/3_codexter/working_documents/2007/CODEXTER%20(2007)%2014%20E%20PACE.pdf), hereafter "Grebennikov memorandum".

⁴ Paragraph 6 of the Grebennikov memorandum.

⁵ See also paragraph 33 of *Proposed 42-day pre-charge detention in the United Kingdom: PACE voiced "grave doubts" (10/2008)*; see AS/Jur Report (Doc. 11725).

- What oversight mechanisms exist? Are they compatible both with the principle of democracy and that of the separation of powers?
- Exactly what types of “terrorist threats” require or justify a derogation from the Convention?

11. I should like to indicate at this stage that in previous Reports presented to the Committee on Legal Affairs and Human Rights, States Parties to the ECHR have had to face criticism with respect to their counter-terrorism legislation.⁶ For example, the Grebennikov memorandum noted that Spanish law requires detainees to be brought before a judge in person after a maximum period of five days and that the length of this period raises questions in the light of the case-law under Article 5 § 3 ECHR. The same questions arise with respect to French legislation which allows a terrorism suspect to be held in police custody from four to six days before being brought before a competent judicial authority, and for a considerable length of time even without access to a lawyer. Spain was also criticised for the possibility to extend pre-trial detention in terrorist cases for an additional two years, thus allowing for detention before trial for up to four years. In 2008, Human Rights Watch published a report criticising France for its repressive counterterrorism system.⁷ The report pointed out the low standard of proof upon which an arrest can be based, the limited access to a lawyer and the long periods of police custody and pre-trial detention.

12. Furthermore, I would like to deal with the conditions of extradition and deportation of suspected terrorists and the impact of some laws on freedom of expression and information.

13. As an indication, the Grebennikov memorandum criticised some legislation in the light of the Convention’s provisions other than Articles 5 or 6 ECHR: Turkish security forces are purportedly authorised, when surrender orders are ignored, to use their guns without any hesitation against the target; similarly, official statements would appear to urge the security forces in the North Caucasus region to “eliminate” or “exterminate” all terrorists⁸ (problematic with regard to Article 2 ECHR: right to life); France’s, Spain’s and Italy’s legislation would appear to allow judges to expel foreigners to prevent terrorism also to countries where they fear torture and ill-treatment (problematic with regard to Article 3 ECHR: prohibition of torture and inhuman and degrading treatment); Italian law permits preventive surveillance for up to 40 days in order to prevent the commission of a crime (see Article 8 ECHR: Right to respect for private and family life); and finally, Russia and Turkey appear to provide for vaguely-defined and broad restrictions on the freedom of expression and the right of association (problematic with regard to Articles 10 and 11 ECHR: freedom of expression and freedom of assembly and association).

5. Reference texts – Council of Europe standards applicable to Human Rights in the fight against terrorism

14. The Council of Europe provides for a substantial set of norms and reference texts in this area.⁹

15. The European Convention on Human Rights (ECHR)¹⁰, its protocols, as interpreted by the European Court of Human Rights (hereinafter “the Court”) are the main standard of reference for this report. Indeed, over the past fifty years, the Court was 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. A summary of the Court’s case-law on human rights and terrorism, recently prepared by the Court’s registry, is appended to this memorandum.

16. Other Council of Europe Conventions to be taken into account include

- the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment¹¹ as interpreted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);

⁶ See paragraphs 10 and 11 of *Proposed 42-day pre-charge detention in the United Kingdom: PACE voiced “grave doubts” (10/2008)*; see AS/Jur Report (Doc. 11725).

⁷ “Preempting Justice: Counterterrorism Laws and Procedures in France”, Human Rights Watch, July 2008, <http://hrw.org/reports/2008/france0708/france0708web.pdf>.

⁸ See report by Dick Marty on *Legal Remedies in the case of Human Rights Violations in the North Caucasus region of the Russian Federation*, paragraph. 29 (doc. 12276) <http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc10/EDOC12276.htm>.

⁹ For a comprehensive list, see http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/2_adopted_texts/Relevant%20instruments%20and%20documents.asp#TopOfPage.

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 005.

¹¹ CETS No. 126, <http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm>.

- the European Convention on the Suppression of Terrorism;¹²
- the Council of Europe Convention on the Prevention of Terrorism;¹³
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.¹⁴

17. In addition to these conventions and their respective mechanisms, note can also be taken of other important initiatives, such as:

- the Committee of Ministers Guidelines on Human Rights and the Fight against Terrorism (2002)¹⁵ and on the Protection of Victims of Terrorist Acts (2005);¹⁶
- European Commission against Racism and Intolerance (ECRI): General Policy Recommendations N° 8 on combating racism while fighting terrorism (2004)¹⁷ and N° 11 on combating racism and racial discrimination in policing.¹⁸

18. Finally, the numerous Recommendations and Resolutions of the Parliamentary Assembly itself serve as an important yardstick.

6. Concluding remarks

19. As can be detected from the case-law of the Strasbourg Court, there sometimes exists a temptation to respond to terrorism with a strong-armed approach that gives public security precedence over the respect for human rights.¹⁹

20. Against the background of the non-derogability of Article 3 ECHR (prohibition of torture) and the natural tension between individual liberties and member states' interests to lawfully prevent terrorist activity and to pursue terrorists – as circumscribed by the case law of the Strasbourg Court - my report seeks to contribute to determining to what extent, and if so how, states can lawfully curtail and prevent terrorism. Issues of importance in this respect include states' activities such as surveillance, interception, hearing of anonymous witnesses, the installation and (ab)use of closed-circuit television and monitoring of monetary movements. Also, it would be interesting to look into how member states may or may not use information obtained by secret services as legally admissible evidence and how they can resort to data from, e.g., ID cards and SWIFT operations.

21. One of the principal objectives of this report will be to make a contribution to the discussion of these issues.

Appendix: Link to summary of the Strasbourg Court's case law on terrorism²⁰

http://www.echr.coe.int/NR/ronlyres/13BF0C6A-F463-4CE9-B79F-9E9F3EF67B8F/0/FICHES_Terrorism_EN.pdf

¹² CETS No. 90, <http://conventions.coe.int/Treaty/en/Treaties/Html/090.htm>.

¹³ CETS No. 196, <http://conventions.coe.int/Treaty/EN/Treaties/Html/196.htm>, in force since 1 June 2007.

¹⁴ CETS No. 198, <http://conventions.coe.int/Treaty/EN/Treaties/Html/198.htm>, in force since 1 May 2008.

¹⁵ http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/2_adopted_texts/Guidelines%20HR%202005%20E.pdf. These guidelines essentially confirm the established case-law of the Strasbourg Court.

¹⁶ Ibid.

¹⁷ http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/2_adopted_texts/ECRI%20Rec%208%20E.pdf.

¹⁸ http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/2_adopted_texts/ECRI%20GP%20Rec%2011%20racism%20and%20policing%20E.pdf.

¹⁹ See paragraph 1 of the Grebennikov memorandum and the Appendix to this introductory memorandum.

²⁰ Information note issued in September 2010 by the Court's registry.