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Commission des questions juridiques et des droits de l'homme

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Committee on Legal Affairs and Human Rights

Hearing on Human rights and fight against terrorism held in Paris on 17 November 2010

Declassified proceedings

Rapporteur: Lord John Tomlinson, United Kingdom, SOC

Hearing with the participation of:

- Mr Álvaro Gil-Robles, Former Commissioner for Human Rights of the Council of Europe, former People's Defender, Spain
- M. Vladimir Lukin, Ombudsman of the Russian Federation, Moscow, Russian Federation
- Dr Ekaterina Sokiryanskaya, Hot Spots Programme, Memorial Human Rights Center, St Petersburg, Russian Federation
- Mrs Julia Hall, Amnesty International, Expert on Counter-Terrorism and Human Rights, London
- Mr Timothy Otty, QC, Barrister-at-Law, London

Reference documents : [AS/Jur (2010) 44];[AS/Jur/Inf (2010) 03]

The Chair presented and welcomed the experts as well as an observer to the hearing, **Ms Christiane Höhn**, Adviser to the EU Counter-terrorism Co-ordinator Mr de Kerchove. He gave the floor to **Lord Tomlinson**, the rapporteur.

The rapporteur recalled that the aim of the report was to contribute to determining to what extent and how states could lawfully curtail and prevent terrorism. This should be done against the background of the non-derogability of Article 3 ECHR (prohibition of torture) in the light of the case law of the Strasbourg Court and the natural tension between individual liberties and member states' interests to lawfully prevent terrorist activity.

Mr Gil Robles focused on the situation in Spain, in particular on the question of detention. A suspected terrorist could be held in administrative detention by the police for three days. This could be extended by a further two days upon request of the police and following a court's motivated decision. There was the possibility of *incommunicado* detention. During this time, suspects only had the right to an official lawyer nominated by the bar and not to their personal one. After the five days, a judge decided whether suspects went to prison under a judge's authority. Until the end of *incommunicado* they could not take a personal lawyer. The official lawyer was necessary in order to avoid that lawyers worked themselves for terrorist organisations or established links between subjects and such organisations. Mr Gil Robles explained that in the Basque country, cameras were installed in police stations to protect the police from possible allegations

of misbehaviour. This practice was not followed in Madrid. The period of preventive detention could be extended up to four years (not only for terrorism). Mr Gil Robles found this excessive. Concerning the expulsion of foreigners, he stated that foreign terror suspects could not be extradited to non-safe countries. The European convention on extradition was being applied in Spain. Two recent problematic cases of extradition were explained.

Mr Lukin pointed out that there was no common international definition of terrorism and this despite a UN global anti-terrorism strategy and the Council of Europe's guidelines in the matter. Russia had a history of adapting legislation to new realities of terrorist threats and had, in this respect, enacted a range of laws. For instance, the criminal code now foresaw a mandatory life sentence for terrorist acts. Russia had also ratified in 2006 the CoE convention on the prevention of terrorism. In the summer of 2010, the Russian Federal Security Service (FSB) had been given additional tools to detain citizens who were on the verge of violating laws, including those against terrorism. The legislative situation in Russia was optimal. Two thirds of the Russian population was in favour of harsh measures to combat terrorism, even if this meant that constitutional rights were limited. Human rights NGOs in Russia were working hard for the respect of human rights in Russia. Just a few months ago, the President had met representatives from human rights NGOs for a frank discussion. For winter 2010, a conference with human rights NGOs concerning the Caucasus area was planned. This area constituted a particularly difficult one in which complex and well entrenched terrorist structures existed. Mr Lukin was of the opinion that the United States were stricter in their counter-terrorism legislation than Russia. He called for the creation of a group of experts to analyse the current situation and elaborate European rules.

Ms Sokiryanskaya stressed that in the Russian Federation terrorism represented a real and acute threat. In 2010, Russia had already lived through four major terrorist acts hitting "soft targets" and taking the lives of 63 people while injuring a further 221. Since 2004, each major terrorist act had been followed by changes in legislation, which limited democratic participation and gave additional power to the security services. An example was a terrorist act in Beslan, which was followed by the abolition of elections of regional leaders and changes to the proportional electoral system for the Russian State Duma. None of these changes had anything to do with terrorism. The central piece of legislation on terrorism was the "Law on countering terrorism", adopted on 6 March 2006. Terrorist activities included, inter alia, advocating the ideas of terrorism, calling for terrorist action or justifying or defending such actions as well as informational or any kind of other complicity in the preparation and the realisation of a criminal act. Classifying "informational complicity" as a terrorist act limited the freedom of the press. For example, publicising the demands of the terrorists or releasing information about the actual number of hostages captured by terrorists (if this number was being concealed by the authorities as was the case in Beslan) could be classified as a terrorist action. Responsible journalism could result in accusing a reporter of a very serious crime. The law on terrorism provided an easy framework for the restriction of civil rights and liberties. The Russian constitution allowed for certain restrictions of rights and liberties in a state of emergency. But the federal constitutional law required that the introduction of the state of emergency was subject to numerous restraints and controls (a Presidential decree had to be approved by the Federation Council, with notification of the State Duma and it presupposed the immediate notification of the UN and Council of Europe Secretary Generals). The counter-terrorism regime imposed the same restriction of rights and liberties in a state of emergency, but did not require accountability and was free from any parliamentary or international controls. It was also unlimited in time and space. The previous 1998 Law on Combating Terrorism had also implied substantial restrictions of civil rights and liberties but it had clearly defined the area of anti-terrorist operations as particular areas of land or water, vehicles, buildings, structures, installations or premises within which the aforementioned operation is carried out. The 2006 Law on Counteracting Terrorism did not, however, define the "area of counter-terrorist operation". Now a counter terrorist operation could be carried out in a "territory with a substantial number of residents" without any special limits. The area of counter-terrorist operation (CTO) was determined by the official in charge. The counter-terrorist regime allowed 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 was not accompanied by any judicial oversight. The law provided that the chief operational headquarters may decide to resettle population from the area of anti-terrorist operations. Thus, very often the anti-terrorist operations were carried out regardless of the situation of women and minors who happened to be in the same household or civilians in the same block of flats where the operation takes place. Journalists had no access to the areas where CTO has been introduced. In one instance the CTO in a village in the Republic of Dagestan had lasted for almost nine months and journalists had not been able to enter the village. In several instances, journalists were deported from Ingushetia when anti-terrorist measures were carried out. Sometimes, in Ingushetia under President Zyazikov, CTO was used as a pretext to prohibit anti-government demonstrations.

After the Federal Law on Countering Terrorism was adopted in 2006 and after Russia had ratified the Council of Europe Convention on the Prevention of Terrorism, a number of laws were amended, which in fact significantly restricted freedom of expression, privacy, judicial protection and the system of checks and balances in the state. First, an amendment to the Federal Law on Mass Media banned media from disseminating material which contains public calls to terrorist activity or publicly justifies terrorism, and other extremist materials. The prohibition of justifying terrorism encouraged arbitrary restrictions of the freedom of expression as well as editorial self-censorship, since the justification of terrorism allowed for very broad definitions. Moreover, the law on media states that procedures for gathering information by journalists in the territory or site of a counter-terrorist operation shall be determined by the chief of the counterterrorist operation. Secondly, following an amendment of the Criminal Procedural Code, public appeals for terrorist activity or public justification of terrorism are punishable by up to four years of prison (and five years if mass media are used). Prosecution *in absentia* was allowed in exceptional cases if the defendant was outside Russia or in hiding, provided that the same case involving the same defendant was not tried by a foreign court. No guidelines were offered as to what makes a case exceptional. Trials *in absentia* were unconstitutional, as they violated the right to defence, the right to self-defence and the right to know what one is tried for. Thirdly, a 2004 amendment to the Criminal Procedural Code allowed pre-trial detention of terrorist suspects for up to 30 days without formal charges. All other suspects had to face charges within ten days of their detention. In 2008 an amendment to the Criminal Procedural Code abolished jury trials for people accused of terrorism. Now these crimes were being processed by troikas of professional judges. Given the lack of independence of the Russian judicial system, this may deny people accused of terrorism a fair trial. Finally, in July 2010 President Medvedev had signed an amendment to the law on the FSB which grants the FSB the right to issue admonitions or warnings to citizens about the inadmissibility of actions, which create conditions for crimes. Ms Sokiryanskaya concluded by pointing out that, as regards the practice, most of what is done within the framework of anti-terrorism happens outside the scope of any law, even the permissive laws just mentioned.

Ms Hall referred to Amnesty International's latest report "Open Secret – mounting evidence of Europe's complicity in rendition and secret detention" which had been released in Brussels on 15 November 2010. Governments should learn from the past by ensuring accountability for their actions. She gave an overview of the way in which the findings in the reports by Dick Marty on CIA rendition flights and secret detentions had been followed up in different countries. In Poland, a very dynamic criminal investigation was ongoing into the allegation of a secret detention centre in which a victim had been granted formal status. This was the first time that the name of a victim was linked to an alleged secret detention centre. This development was to be welcomed. Another very good development was the fact that Mr El-Masri's case was now pending before the Strasbourg Court. In the UK, a comprehensive enquiry into post-2001 practices had been launched. The convictions in Italy of 22 CIA agents was a good development even though the fact that they were tried *in absentia* was problematic. Lithuania had launched an examplary Parliamentary enquiry after it had emerged last year that it had hosted secret detention centres. On a more critical note, Ms Hall called on the Committee to note that the Macedonian government still denies that its agents had acted unlawfully with respect to Mr El-Masri and that Romania still immunises itself from criticism that secret detention site despite proof from official sources. She encouraged the Committee to continue to follow up Dick Marty's valuable work in the area.

Mr Otty started his intervention by stating that there have been a series of significant judgments this year both at first instance and at the appellate level in the domain of human rights and terrorism in the UK. The Supreme Court had struck down executive orders relating to asset freezing on the basis that they went beyond the terms of United Nations resolutions. The Court of Appeal had rejected attempts to create a closed process for the trial of civil damages claims against the Intelligence Services for complicity in torture. In another ruling, Lady Justice Hallett, the Coroner presiding over the Inquest into the terrorist attacks of 7 July 2005, had reached a similar conclusion in rejecting an attempt by MI5 to establish a closed procedure to address the extent to which those attacks could have been prevented. The government was appealing both rulings. In another case, the Court of Appeal had also upheld the Divisional Court's view that evidence of torture by the United States in at least one case should not be suppressed on public interest grounds. In yet another case, the Court of Appeal had opened the way to damages claims for individuals made subject to control orders but then not provided them with adequate disclosure of the case against them. Finally, at first instance, the Special Immigration Appeals Commission had refused to sanction deportations to Pakistan on the basis of private assurances said to protect against torture. But it had also upheld deportations to Ethiopia on the basis of a public memorandum of understanding, and notwithstanding the absence of any independent monitoring body or functioning human rights community.

As regards legislation, two proposals merited a particular mention. The first was the Terrorist Asset Freezing Bill currently before Parliament which sought to respond to the Supreme Court's judgment on

asset freezing in *Ahmed v HM Treasury* but which, itself, seemed likely to present further problems. One major concern in the current draft was the proposed test of reasonable grounds of belief as the threshold for imposition of an asset freezing order, the Supreme Court having already rejected the reasonable suspicion test as going beyond what was required by the United Nations. The second proposal was the forthcoming green paper on claims involving the intelligence services, foreshadowed in an announcement by the Prime Minister to Parliament in July. Any suggestion that the intelligence services could or should not be held to account before the ordinary Courts if they committed civil wrongs would require very careful consideration. The announcement of the green paper had come alongside the very welcome appointment of Sir Peter Gibson and two other Privy Counsellors to chair an enquiry into allegations of complicity.

The new Government had also committed itself to a review of all terrorism legislation. There were three concerns requiring particular attention. First, concerning the continuing ban on the use of intercept evidence in criminal proceedings, the UK remained isolated on this issue and the intelligence services' apparent insistence on the maintenance of the ban continued to cause serious difficulties both in terms of successful prosecution and in terms of the legislative devices created to cope with it. Secondly, there were two aspects to this concern as to the ability of the Courts to act as watchdogs in this area. The first arose out of the continuing attempts to expand the use of closed processes and secret hearings in the regular Courts. The use of Special Advocates to safeguard the position of a party excluded from his own litigation had now spread far beyond the original immigration context relating to national security deportations. This was in danger of bringing the judicial system into disrepute whatever the excellence of the Special Advocates concerned, and however great the integrity and rigour of the judges who preside over such cases. The second aspect of this concern related to the lack of expedition with which the Courts were able to address matters. Restrictive measures were often in place for months or years before any corrective remedy could be obtained - and even when it was obtained it may achieve little. The third concern was the ongoing use of the Control Order system which Mr Otty illustrated with a case of one of his clients.

He emphasised that there were five major problems in relation to the control order system: First, hearsay evidence was still permitted on a routine basis. Secondly, corporate evidence of what is described as a "mosaic" of allegations was deployed, often by quite junior Security Service officers. Those officers were not necessarily particularly familiar with the case in issue. Thirdly, the standard of proof under the Statute remained very low. All that the Secretary of State needed to show was a reasonable suspicion of terrorism related activity. He need not actually prove any conduct at all on the part of the individual affected. Fourthly, in contrast to a convicted prisoner the controlled person still did not even have know that the restrictions he faced would come to an end at a certain point. Control orders could be renewed for successive, and unlimited, one year periods. Fifthly, the controlled person would in some cases still be left in the position where, even after the House of Lords' interventions, the key evidence against him was set out in the closed case and in closed judgments. He would in these cases be deprived of the most basic right of any disappointed litigant: knowing why he had lost. To Mr Otty, the regime would have, if retained, to be altered in at least six respects. First, the standard of proof would have to be raised. Secondly, there would have to be a clear temporal limit on all control orders. They should be available only once, and for a short period. Thirdly, the courts should be required to insist on the best evidence available being produced at a hearing. Fourthly, there should be far greater use of *in camera* procedures instead of closed procedures. Fifthly, there should be a relaxation of the extent to which Special Advocates should be able to communicate with open advocates. And sixthly and finally there should be an express undertaking by the Secretary of State from the outset that the Government will compensate any person subjected to a control order if, at a subsequent court challenge, it were established that the control order was not justified. The best thing, however, would be to repeal the control order regime entirely, which was also the conclusion of the Joint House of Lords and House of Commons Human Rights Committee in February of this year. Mr Otty concluded by stating that no other country had such a control order system, that the UK did without such a system between 2001 and 2005 and that one of the former Ministers in the Labour Government with greatest experience of control orders and who was in fact personally responsible for signing many of them – Mr Tony McNulty - had now concluded that they should be abolished and had publicly said so.

In the ensuing discussion, **Mr Fedorov** expressed his support for the points made by Mr Lukin. Russia had learnt from the practice in other countries. In recent years, in Moscow alone more than 100 terrorist acts had been foiled. The state could not always be transparent when carrying out an operation which meant that there were certain things the media could not know. **Mr Salles** pointed to the situation in France where in 2004 a law provided for the possibility of an extended custody (from 24h to four days to six days) in case of suspicion of terrorism. *Habeas corpus* proceedings were very important. **Mr Marty** pointed to the role of international organisations, who had an increasing amount of competencies while lacking democratic legitimacy. The invocation by the United States of Article 5 of the NATO treaty had lead to increased secrecy. It had been proven by statistics that terrorism was not the first danger for citizens. He feared that the public was passive in reacting to counter-terrorist measures because mostly Muslim citizens were

affected by them. Not only individual liberties were restrained, however. The executive became stronger at the expense of the legislator and the judiciary. Democratic institutions were being de-legitimised and often simply defended governments. Finally, he hoped that the issue of blacklists would be included in the report. **Ms Turkone** pointed to a recent bombing in Istanbul where 17 civilians and 15 police officers were wounded. She pointed to States' responsibility to respect Human Rights. This was not, however, what terrorists did. A clear definition of what constitutes terrorism was needed. Hearing about Turkey's experience would be beneficial for the Committee. **Mr Frunda** claimed that under the pretext of the fight against terrorism, there was a fight against churches, human rights activists and other parts of civil society. Russia often fought against her own population. He wondered whether Mr Lukin had received any complaints on this. **Mr Cilevičs** took up Mr Lukin's argument that large parts of the population were in favour of strict measures to fight terrorism including violations of human rights and stressed that the neglect of human rights never led to a more efficient fight against terrorism. **Mr Kühnel** underlined that protection of citizens is a primary task for the state. Terrorists should respect international humanitarian law. He wondered whether the Red Cross and Amnesty International had called on terrorists to respect international norms in this "asymmetric war". **Mr Vitali** agreed with Mr Frunda and was of the opinion that judges often interpreted laws in different way than intended by legislature.

Ms Höhn presented the EU approach to counter-terrorism. The EU framework for the respect of fundamental rights had been strengthened by the Lisbon Treaty through the elevation of the EU Charter on Fundamental Rights to primary law, the stronger role of the EU Court of Justice in matters of Justice and Home Affairs and the intended EU accession to the European Convention on Human Rights. The multi-annual Stockholm Programme for Justice and Home Affairs adopted by the European Council in December 2009 had reaffirmed that respect for the rule of law, fundamental rights and freedoms was the basis of the Union's overall counter-terrorism work. It had also stated that the accession of the EU to the ECHR would allow the case law of the ECJ and the ECHR to develop in step, reinforcing the creation of a uniform European fundamental and human rights system. Since 2006, EU legal advisers and the legal adviser of the US State Department had engaged in a dialogue about international law issues related to the fight against terrorism. This dialogue continued with Legal Adviser Koh. The EU had welcomed the policy changes introduced by President Obama, such as the end of secret detention, the end of "enhanced interrogation" and the closure of Guantanamo. The EU had created a framework to enable EU Member States and Schengen partners to receive Guantanamo detainees. This framework, which included a joint EU-US statement, was based on the new course in US counter-terrorism policy and in the expectation of further policy changes. Since then, 23 Guantanamo detainees had been re-settled in twelve EU Member States and Schengen partner Switzerland. Ms Höhn welcomed the Amnesty International study on ongoing accountability processes in EU Member States regarding renditions and secret detention. The oversight of security services was in the sole competence of EU Member States. The European Commission had urged and encouraged full, in-depth investigations in the countries affected and would continue to follow up and ensure these are really carried out. The Single European Sky would help to monitor the actual movement of aircraft. Regarding financial sanctions, the EU welcomed the creation of the Office of the Ombudsperson at the UN as it constituted a step forward in ensuring an independent review of listing decisions and offered the genuine possibility of providing significant administrative due process for delisting. The recent ruling by the EU General Court in *Kadi* reaffirmed the plaintiff's personal rights but provided a challenge for EU Member States, which are subject to two conflicting sets of international legal order: EU and UN. The EU institutions were currently considering whether to appeal the ruling. The EU had a general desire for a strengthened role for the UN. Finally, Ms Höhn stressed that after the judicial reforms carried out by Turkey, courts in EU Member States are increasingly willing to extradite terrorist suspects to Turkey.

The rapporteur concluded by stressing that states had to fight terrorism to protect their citizens and there was an absolute need to combat terrorism and duty to protect citizens and obligation to protect human rights. In his report, he would be looking at the difficult question of striking the right balance between fighting terrorism and the respect of human rights.