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Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

14 January 2022

Submission by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in the cases of *Cédric DOMENJOUD and Joël DOMENJOUD v. France* (Applications no. 34749/16 and 79607/17) before the European Court of Human Rights.

INTRODUCTION

1. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism established pursuant to Human Rights Council resolution 40/16 has the honor to submit this amicus brief in the cases of ***Cédric DOMENJOUD and Joël DOMENJOUD v. France*** for the consideration of the European Court of Human Rights.

2. The submission of the present amicus brief is provided by the Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on mission, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for this position and views to be expressed as Special Rapporteur, in full accordance with the independence afforded to the mandate, will neither be sought nor be given by the United Nations, the United Nations Human Rights Council, the Office of the United Nations High Commissioner for Human Rights, or any of the officials associated with those bodies.

3. The Special Rapporteur on the promotion and protection of human rights while countering terrorism (A/HRC/RES/15/15) reports regularly to the United Nations Human Rights Council and General Assembly. The Special Rapporteur on the promotion and protection of human rights while countering terrorism takes this opportunity to set out her views, a significant portion of which are already in the public domain.[1] The Special Rapporteur is in a unique position to assess the broad human rights challenges and implications of states of emergency in the context of countering terrorism of the present cases.

[1] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism, A/HRC/37/52, 1 March 2018.

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4. In France, following the terrorist attacks in Paris and suburbs on 13 November 2015, the government declared a state of emergency, for an initial period of 12 days.[2] On 20 November, the Parliament adopted a new law extending the state of emergency for three months, until 26 February 2016. The law also amended the previous law on the state of emergency (Law No. 55-385 of 3 April 1955).[3]

5. France notified the state of emergency and the relevant derogations it entailed to the Secretary General of the Council of Europe and the UN Secretary General on 24 and 25 November 2016 respectively, specifically noting that the measures might involve a derogation from its obligations with regard to the rights to liberty, freedom of movement and privacy.[4] It expressly indicated that the state of emergency was necessary "*to prevent the perpetration of further terrorist attacks"(own translation).*

6. The Special Rapporteur wishes to reaffirms her Mandate's extensive and continuous positive dialogue and constructive engagement with the French authorities in particular in the context of her 2018 country visit to France.[5] In her end of mission report to France, the Special Rapporteur concluded that the state of emergency ("état d'urgence") based on the 1955 law gave both prefects and the Ministry of the Interior "sizeable powers to search homes and other premises, subject persons to house arrest, dissolve associations and restrict movement without judicial warrant". She recalled that "while the state of emergency has formally ended, there remain outstanding consequences from the use of these powers, including unresolved legal consequences and necessary remedies for persons whose rights were disproportionately impinged upon during the period of exigency."[6] In 2019, in her final report submitted to the Human Rights Council, the Special Rapporteur gave serious consideration to the status of this law under the prevailing international standards concerning emergency powers. While acknowledging the welcome move from constantly declaring states of emergency, the Special Rapporteur is of the view that the law, situated within the broad array of counter-terrorism powers already available to the State, constitutes a *de facto* state of qualified emergency in ordinary French law.[7]

7. The cases of ***Cédric DOMENJOUD and Joël DOMENJOUD v. France*** offer an opportunity for the European Court of Human Rights (ECtHR), in addressing these important issues, to set international best practice regarding contemporary practice on States of emergency to ensure full compliance with human rights standards.

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[2] The State of Emergency in France was proclaimed by decree the night of the 13th and 14th November 2015 during the terrorist attacks in Paris and its suburbs. The permanent representatives of France to the United Nations and to the Council of Europe notified on the 23rd and 24th November that France would use its right to derogate from certain provisions of the ICCPR and ECHR in line with article 2.3 of the ICCPR and 15.1 of the ECHR. The notification sent to the Council of Europe reads as follows *« Le 13 novembre 2015, des attentats terroristes de grande ampleur ont eu lieu en région parisienne. La menace terroriste en France revêt un caractère durable, au vu des indications des services de renseignement et du contexte international. Le Gouvernement français a décidé, par le décret n° 2015-1475 du 14 novembre 2015, de faire application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence […] De telles mesures sont apparues nécessaires pour empêcher la perpétration de nouveaux attentats terroristes» (*Note verbale de la représentation permanente de la France au Secrétaire général du Conseil de l'Europe).

[3] Decree No. 2015-1475 of 14 November 2015 on the application of law No. 55-385 of 3 April 1955, JORF No. 0264 of 14 November 2015, p. 21297; Decree No. 2015-1493 of 18 November 2015 on the application overseas of law No. 55-385 of 3 April 1955, JORF No. 0268 of 19 November 2015, p. 21517.

[4] These were characterized, according to the French authorities, by significant and extensive use of exceptional powers, with over 700 people places under house arrest from November 2015 to March 2017 alone. See www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Bilan-de-l-etat-d-urgence.

[5] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Visit to France, A/HRC/40/52/Add.4, 8 May 2019.

[6] See https://antiterrorisme-droits-libertes.org/spip.php?article53. The Special Rapporteur notes the reports and recommendations of the French Human Rights Ombudsperson in respect of a range of rights infringements during the state of emergency (see www.defenseurdesdroits.fr/fr/mots-cles/etatdurgence), particularly those related to minors and the need for access to adequate compensation for damages. See also, A/HRC/40/52/Add.4, 8 May 2019.

[7] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/40/52/Add.4, 8 May 2019, Para 23.

STATES OF EMERGENCY GENERAL REQUIREMENTS

8. As a matter of international law grounded in treaty agreement, States may derogate from certain rights and freedoms provided by Article 4.1 of the International Covenant on Civil and Political Rights (ICCPR) which guided the wording, at the regional level, of Article 15.1 of the European Convention on Human Rights (ECHR). These provisions enable States to limit the full exercise of derogable human rights when are faced with exceptional challenges affecting the 'life of the nation' requiring legitimate, proportionate and necessary restrictions to human rights consistent with the State's other obligations under international law.

9. Before a State invokes article 15 of the Convention, two fundamental conditions must be met: the situation must amount to an emergency which "threatens the life of the nation", and the State must have officially proclaimed a state of emergency.

10. On a procedural level, the State availing itself of this right to derogate is subject to an international regime of proclamation and notification which is closely linked to the goal of legality. Derogation to the Convention requires information-sharing with the Secretary General of the Council of Europe and States parties in a timely manner. States must inform the Council and States Parties with "full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law".[8] The State must equally inform when such measures have ceased to operate and the provisions of the Convention are again being fully executed.[9] The Special Rapporteur underscores the importance of the proclamation which "promotes rule of law, transparency and the possibility of contestation if the emergency powers are excessive, disproportionate or at odds with other legal rules in the jurisdiction".[10]

11. On a substantive level, for a State to lawfully trigger the derogation mechanism of article 15 of the Convention, the scale of the threat must amount to a "time of war or other public emergency threatening the life of the nation". The threshold is one where "a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question".[11] The "public emergency" is defined by four characteristics: it must be actual or imminent; its effects must involve the whole nation; the continuance of the organized life of the community must be threatened; and the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[12]

12. While the European Court of Human Rights holds the position that the national authorities are better placed than an international court to decide on the presence of a threat of an exceptional nature[13], the Special Rapporteur has noted that "this culture of accommodation is in acute need of revision to address the widespread abuse of emergency powers, the practice of utilizing emergency powers in the absence of a sustained domestic interrogation of their necessity and the overlap between states of emergency and high level of human rights violations".[14] The longer or more entrenched the emergency, the narrower the margin of deference that should be ceded to the State, particularly when

[8] General Comment no. 29 on article 4, CCPR/C/21/Rev.1/Add.11 (2001). Para.17; see Note verbale de la représentation permanente de la France au Secrétaire général du Conseil de l'Europe.
[9] ECHR, Article 15(3).
[10] A/HRC/37/52, 1 March 2018.
[11] See, *Lawless v. Ireland*, application No. 332/57 (A/3), judgment of 1 July 1961, affirmed in *A. and Others v. the United Kingdom*, application No. 3455/05, judgment of 19 February 2009, para. 176.
[12] See, European Commission of Human Rights, *The Greek Case*, application Nos. 3321–3323 and 3344/67, Report of the Commission (1969).
[13] See, *A. and Others v. the United Kingdom*, application No. 3455/05, judgment of 19 February 2009, para 173.
[14] A/HRC/37/52, para. 26.

there is sustained evidence of systematic human rights violations resulting from the counter-terrorism and/or emergency measures. Indeed, the nature and depth of the scrutiny engaged by the Court for complex, layered, persistent and *de facto* emergencies should be higher, commensurate with the broader obligation to ensure respect for human rights contained in Article 1 of the Convention. The Special Rapporteur has broadly articulated her growing concern about the gap between the practice of emergencies in national settings and the oversight needed to ensure the protection of human rights.[15]

13. In any case, States do not enjoy "an unlimited discretion" nor is the state of emergency a blanket mechanism.[16] First, only derogable rights may be subject to limitations during an emergency.[17] Article 15.2 prohibits any derogation in respect of the right to life (except in respect of death resulting from lawful acts of war), freedom from torture, inhuman and degrading treatment, freedom from slavery and the right not to be subject to *post facto* application of the law. Second, a state of Emergency must remain an exceptional and temporary regime. The use of exceptional national security measures should provide a positive basis by which to return to the full protection of human rights within a reasonable time frame; never forgetting that the state's predominant objective should always be the restoration of normalcy.[18] Third, derogations from other rights shall be in conformity with international humanitarian law or peremptory norms of international law.

14. States must reach the same threshold of necessity and proportionality for each measure taken, and

15. Consequently, regarding those rights and freedoms that may be limited, each measure must be narrowed down to what is strictly required by the exigencies of the situation, which requires a careful analysis based on an objective assessment - *in concreto* - of the actual situation.[19] The measure should be "strictly required" in the sense of a "genuine response to the emergency situation, fully justified by the special circumstances of the emergency" and with "adequate safeguards provided against abuse".[20]

16. It follows therefore that the Court will evaluate matters such as whether ordinary laws would have been sufficient to meet the challenges caused by the public emergency,[21] whether the exceptional measures are a genuine response to an emergency situation,[22] whether the exceptional measures were used for the purpose for which they were granted,[23] whether the derogation is limited in scope and the reasons advanced in support of it[24] and whether judicial control of the measures was practicable and enforced.[25]

17. Fundamentally, when monitoring the action of States in their implementation of article 15 of the Convention, it bears consistent reminding that the actions that may be taken are limited in their duration, material scope and geographical coverage via the stringent test

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15 Cf. Covid 19: States should not abuse emergency measures to supress human rights (March 16, 2020) https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E

16 Human Rights Committee, General Comment No. 29, Derogations during a State of Emergency (Art. 4)(CCPR.C/21/Rev.2/Add.11)(24 July 2001) para.3.

17 See generally Human Rights Committee in General Comment 29 *id,* as well as non-governmental sources, such as the 1984 Siracusa Principles and the 2013 Global Principles on National Security and the Right to Information (Tshwane Principles).

18 Human Rights Committee, General Comment No. 29, Derogations during a State of Emergency (Art. 4)(CCPR.C/21/Rev.2/Add.11)(24 July 2001) para 1,2 and *A. and Others v. the United Kingdom*, application No. 3455/05, judgment of 19 February 2009, para 178.

19 Human Rights Committee, General Comment No. 29, Derogations during a State of Emergency (Art. 4)(CCPR.C/21/Rev.2/Add.11)(24 July 2001), para. 6.

20 See, *A. and Others v. the United Kingdom*, application No. 3455/05, judgment of 19 February 2009, para 184.

21 See, Lawless v. Ireland (no. 3), 1961, § 36; Ireland v. the United Kingdom, 1978, § 212.

22 See, Brannigan and McBride v. the United Kingdom, 1993, § 51; Alparslan Altan v. Turkey, 2019, § 118.

23 See, Lawless v. Ireland (no. 3), 1961, § 38.

24 See, Brannigan and McBride v. the United Kingdom, 1993, § 66.

25 See, Ireland v. the United Kingdom, 1978, §78, Brannigan and McBride v. the United Kingdom, 1993, § 59 and: Demir and Others v. Turkey, 1998, §§ 49-58; Nuray Şen v. Turkey, 2003, §§ 25-29; Elçi and Others v. Turkey, 2003, § 684; Bilen v. Turkey, 2006, §§ 44-50.

of what is "strictly required by the exigencies of the situation". Each counter-terrorism measure taken by a State that functions as an emergency power by modifying the existing protection of human rights under the ordinary law must reach the same threshold of legality, legitimacy and legitimate purpose limitation, necessity and proportionality and be measured by the same tests and requirements and each measure shall be "directed to an actual, clear, present or imminent danger".[26] To do otherwise is to enable a new species of counter-terrorism exceptionalism to be practiced by States without necessary judicial oversight and accountability.

EXCEPTIONAL PRACTICES IN A COUNTER-TERRORISM AND NATIONAL SECURITY CONTEXT

18. Relevant United Nations resolutions[27] in line with the jurisprudence of the Convention require that States ensure that any measure — including activation of an emergency — taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with all of their obligations under international law, in particular international human rights law, refugee law and humanitarian law.

19. While terrorism may trigger the conditions of emergency, that does not mean *per se* that States must use emergency powers to regulate terrorism, or that emergency powers are the most effective or adequate means especially when the ordinary law of the State is sufficient and robust. The Special Rapporteur recalls that "derogation from certain treaty obligations in emergency situations is legally distinct from restrictions allowed in normal times" and States may respond to emergency situations, including terrorism, by limiting specific rights rather than derogating from them. Indeed, States are under a strict scrutiny to demonstrate that resorting to emergency powers is strictly necessary to implementing counter-terrorism measures that limit the exercise of human rights.[28] Hence, any emergency measure must be fine-tuned to an immediate and urgent crisis and not be used as a means to limit legitimate dissent, protest, expression, religious expression and the work of civil society.

20. The Special Rapporteur stresses that a clear tipping point to exceptionality arises when counter-terrorism measures engage profound, sustained and potentially disproportionate effects on the enjoyment of human rights.

21. This may be the case when the scope of the measures taken in the name of the state of emergency bypass the initial legitimate purpose that triggered the derogation and which in turn, by their inherent nature, have the consequence of shielding the individuals affected by these measures of the right to an effective remedy as understood by article 6 of the Convention.

OVER-BROADENING OF THE PRINCIPLE OF LEGITIMACY: EXCEPTIONAL MEASURES UNRELATED TO THE PERMISSIBLE GROUNDS THAT TRIGGERED ARTICLE 15 DEROGATION ARE DISPROPORTIONATE

22. The Special Rapporteur recalls that when exceptional measures are taken unrelated to the permissible grounds triggering the original derogation, such measures exceed what is "strictly required by the exigencies" of the situation. Using exceptional measures to defuse a potential risk to public order not associated with the state of emergency highlights the inherent danger of overbroad emergency measures.

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[26] See: Siracusa Principles on the Limitation and derogation of Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex), principle 9.

[27] www.un.org/counterterrorism/ctitf/en/international-legal-instruments.

[28] See, European Court of Human Rights, James and Others v. the United Kingdom (application No. 8793/79), judgment of 21 February 1986, para. 50; and Refah Partisi (the Welfare Party) and Others v. Turkey, judgment of 13 February 2003, para. 133.

23. In the context of France, while the authorities notified the Council of Europe that the aim of the state of Emergency was to fight against terrorism, according to the French National Ombudsman (Défenseur des droits), the state of emergency has been used in situations far removed from terrorism and threats to public security [29] and it did not prevent the executive authorities from using exceptional administrative measures to "prevent" other alleged threats to security and public order, even though these were seemingly not related to terrorism.[30].

24. The Special Rapporteur is concerned that—as reflected in French administrative court case law —the 1955 Law in France has led to measures on grounds wholly unrelated to those justifying the declaration of a state of emergency (i.e. the "prevention of the commission of further terrorist attacks") to justify the imposition of measures such as house arrests or searches against individuals with no apparent link to countering terrorism. The Special Rapporteur notes, in particular, the 11 December 2016 decision of the Council of State (Conseil d'Etat), the highest administrative Court, which rejected the appeals brought by environmental activists challenging their order of assigned residence. The Council's decision[31] reads that while "the declaration and subsequent extension of the state of emergency were intended to deal with Islamist terrorism [...], such an objective of combating terrorism "<u>does not prevent</u> the measures it provides for from being implemented within the framework <u>of the prevention of other threats to security and public order</u>, in particular to enable law enforcement to carry out their mission" (own translation). [32] The Council considered that "the house arrest, its duration, the conditions of its application, and any additional obligations with which it may be combined must be justified and proportionate to the reasons for the measure in the particular circumstances that led to the declaration of the state of emergency".[33] The Special Rapporteur views such extended use of these measures as wholly inconsistent with Article 15.

25. As noted by the Commission Nationale Consultative des droits de l'Homme (CNCDH), "the requirement of consistency between the measure taken and the purposes sought is thus not respected when a police measure is pronounced on the basis of reasons which lack any connection with the imminent danger that had led to the declaration of the state of emergency".[34]

26. The Special Rapporteur notes the highly problematic nature of any exceptional widening of the purpose used to justify the imposition of the state of emergency, which in turn

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[29] See: Ce qui reste(ra) toujours de l'urgence, Rapport de recherche Convention n°2016 DDD/CREDOF Défenseur des droits. ("Many individuals who were subject to administrative measures during the COP21 and the demonstrations against the Labour Law had nothing in common with potential jihadists; they were in reality simple environmental or far-left activists. How, then, can we justify the application of these measures, initially and officially intended to combat terrorism, to such individuals? The only explanation is that of the misuse of the law of the state of emergency in order to control political contestation by restricting freedoms by measures that do not exist in ordinary law" (own translation).

[30] See: CE, Sect., 11 December 2015, M. J. Domenjoud, n°394989.

[31] See, www.conseil-etat.fr/Actualites/Communiques/Assignations-a-residence-prononcees-a-l-occasion-de-la-COP-21-dans-le-cadre-de-l-etat-d-urgence.

[32] See, CE, Section, 11 December 2015, M. D. n° 395009 CE, Section, 11 décembre 2015, M. G. n°394990 le Conseil d'Etat relève que "l'article 6 de la loi, qui permet l'assignation à résidence de toute personne résidant dans la zone couverte par l'état d'urgence « et à l'égard de laquelle il existe des raisons sérieuses de penser que son comportement constitue une menace pour la sécurité et l'ordre publics » dans ces zones, n'établit pas de lien entre la nature de la menace pour la sécurité et l'ordre public justifiant cette mesure et la nature du « péril imminent ou de la calamité publique » qui, aux termes de l'article 1er de la loi, a justifié la déclaration de l'état d'urgence. Pour prononcer l'assignation à résidence d'une personne résidant dans la zone couverte par l'état d'urgence, le ministre doit toutefois, dans l'appréciation des raisons sérieuses qui donnent à penser que le comportement de cette personne constitue une menace pour la sécurité et l'ordre publics, tenir compte du péril imminent ou de la calamité publique ayant conduit à la déclaration de l'état d'urgence, et notamment de la mobilisation des forces de l'ordre qu'elle implique. En l'espèce, le Conseil d'Etat juge, en l'état de l'instruction, qu'en prononçant une mesure d'assignation à résidence d'une personne ayant notamment participé à la préparation d'actions violentes de contestation de la COP21, dans un contexte où les forces de l'ordre demeurent particulièrement mobilisées, le ministre n'a pas porté une atteinte grave et manifestement illégale à la liberté d'aller et venir".

[33] See, Constitutional Council 22 December 2015, No. 2015-527 QPC, § 12

[34] Statement of Opinion on the State of Emergency, 18 February 2016, CNCDH.

extends the applicability of the measures adopted on the basis of the declaration of emergency (in this case, pre-emptive administrative measures) to a very broad range of "behaviours" and actions far beyond their initial legitimate purpose. It dilutes and, in extreme cases, does away with the requirement that the state of emergency itself, and any measure taken as a result of its imposition, be legitimate. She recalls that a key aspect of the principle of legitimacy and of purpose limitation is to ensure that States are always in a position to demonstrate, when deploying exceptional measures that affect the full enjoyment of human rights, the precise nature of the threat. She questions the compliance of overly extensive interpretative practices with the principles of legality and certainty, with the principle of proportionality as well as with the wording and case law pertaining to Article 15 on the limited scope of the permissible grounds for the justification of derogatory measures.

THE USE OF ADMINISTRATIVE MEASURES IN A COUNTER-TERRORISM CONTEXT

27. The Special Rapporteur is well aware that, in many countries, the use of derogations, including under Article 15.1, often leads States to activate far reaching and wide-ranging exceptional national security powers premised on elevated public security risks, operated and reviewed through the administrative law system[35]. Such administrative control measures, implemented directly by the executive power without any judicial oversight engage significant limitations and restrictions to a number of rights, including to the rights to fair trial, freedom of movement, work and the right to private and family life.[36]

Use of Intelligence and Secret Evidence

28. According to the Special Rapporteur, administrative measures based on suspicion, or secret intelligence, raise extremely serious concerns about the right to the presumption of innocence, due process and fair trial.[37] Indeed, the human rights complaint use of intelligence material in administrative and pre-judicial proceedings are key to the effectiveness of fair trial rights.

29. In the context of the French state of emergency, the CNCDH has noted[38] that administrative measures are often solely based on information which stems from *notes blanches* collected by the intelligence services. The Special Rapporteur notes that the so-called "white notes" are generally succinct, unsigned and undated documents drafted by the intelligence services, attesting —without fully disclosing why—that an individual poses a threat to public order and security. She has found that defense lawyers have struggled to advance contradictory proof as to why their clients were considered a threat to national security or public order or were suspected of involvement in criminal activity because of the opaqueness of these notes.[39]

30. The Special Rapporteur has continuously criticized the fact that the use of such documents hinders the presumption of innocence and weakens the principle of equality

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[35] A/HRC/37/52, 1 March 2018.

[36] Implementation of Security Council Resolution 2178 (2014) by States affected by foreign terrorist fighters, S/2015/975 Annex – Third report - 29 December 2015, para 2 & 155 e), www.un.org/en/sc/ctc/docs/2015/N1545987_EN.pdf ("According to the United Nations Security Council Committee established pursuant to Resolution 1373 (2001), administrative measures should be utilized "[...] as preventive alternatives to prosecution [only] in cases in which it would not be appropriate to bring terrorism-related charges, while ensuring that such measures are employed in a manner compliant with applicable international human rights law and national legislation and are subject to effective review.").

[37] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 29 April 2016, A/HRC/31/65.

[38] Statement of Opinion on the State of Emergency, 18 February 2016, CNCDH.

[39] See, Amnesty International, Dangerously disproportionate, the ever expanding national security sate in Europe, EUR 01/5342/2017, January 17, 2017,

of arms and the rights of defense.[40] She contends that un-tested and un-corroborated intelligence "evidence" does not provide a legitimate basis for the authorization of coercive and rights-limiting counter-terrorism (administrative) measures. When the measures adopted on this basis includes a punitive aspect, such evidence and the chain of custody attached to it must be subject to review by the defendant before an independent court and before any measure is adopted.

Insufficient Judicial Control

31. The increased reliance of States on exceptional administrative measures that restrict the fundamental rights and freedoms of individuals suspected of, but not charged with, terrorism-related offences raise serious fair trial concerns. The Special Rapporteur identifies a very clear trend in counter-terrorism legislation and policy of measures being adopted in the "pre-criminal" space, which includes a shift away from criminal proceedings towards administrative action on security grounds. She is clear that the clear aim of the increased use of these administrative measures is to bypass the *"constraints of criminal procedure",* including by significantly reducing "*liberties which normally belong to the realm of criminal law*"[41] such as procedural fair trial rights, prior judicial review and appropriate standard of proof.

32. Indeed, one of the consequences of classifying measures such as house arrests as an administrative pre-emptive measure is to deprive the person concerned of the guarantees of criminal procedure. While the administrative judge has jurisdiction to review administrative measures it may only do so *ex post facto* either through the procedure for an excess of power or by way of *référé-liberté.*[42]

33. She notes that most counter-terrorism pre-emptive administrative measures are decided by the executive, without any prior judicial authorization and are based on intelligence evidence. Covert surveillance measures may legitimately justify the absence of prior judicial authorization in very limited and specific circumstances, nonetheless the Special Rapporteur is very clear that other coercive or punitive administrative measures should systematically be subject to prior independent judicial authorization and that the entity authorizing the measure must be different from the one in charge of the oversight mechanism.

34. While administrative measures are usually classified by States as preventive and precautionary measures that "permit intervention against terrorist planning and preparations before they mature into action,"[43] when these measures include a coercive aspect, such as warrantless arrests, detention or restrictions to the right to liberty and security, deportation of suspects, restrictions to freedom of movement or the use electronic surveillance, it becomes difficult to draw a clear line between preventive and punitive measures.

35. The Special Rapporteur is clear that, using the European Court's own doctrine of "autonomous meaning,"[44] when preventive counter-terrorism administrative measures affect or impact the substantive right of the person affected, the protection of article 6 of the Convention should apply, regardless of the State's own portrayal and qualification of the measures.

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[40] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Visit to France, A/HRC/40/52/Add.4, 8 May 2019.

[41] https://icct.nl/wp-content/uploads/2016/12/ICCT-Boutin-Administrative-Measures-December2016-1.pdf

[42] See, Sharon Weill, Terrorisme et Etat d'Urgence : jurisprudence des hautes jurisdictions françaises, Avril 2017 Loi n° 2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives, art. 5

[43] Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments, p.3.

[44] See, Welch v. the United Kingdom, 9 February 1995, § 27, Series A no. 307-A; Jamil v. France, 8 June 1995, § 30, Series A no. 317-B.

36. The determination and subsequent applicability of protection regimes has been extensively discussed in the context of non-judicial disciplinary measures before the ECtHR, where a three-stage approach to determine whether an offence amounted to a criminal charge for the purposes of Article 6 of the ECHR relating to the right to a fair trial was developed: the legal classification of the offence in question in domestic law, the nature of the offence and the nature and degree of severity of the penalty to which the person concerned is liable. For example, in *Lauko v Slovakia,*[45] the classification by Slovakia of a minor offence as an "administrative" offence did not prevent the Court from concluding that the nature of the offence and the punitive character of the penalty meant that the proceeding was a criminal one, for the purpose of Article 6 of the ECHR.

37. Similarly, where the stated purpose of any administrative measures is prevention, "looking behind appearances at the reality of the situation whatever the characteristic of the measure"[46] some of these should be characterized as punitive or repressive because of the use of coercion, by depriving individuals based on a suspected and unproven "dangerosity" of some of their rights and freedoms to prevent the commission of terrorism-related offences.

38. The Special Rapporteur has stressed that administrative pre-criminal counter-terrorism measures which inherently lack pre-judicial authorization represents a potentially serious challenge to the overall balance of security and rights and necessarily impacts the oversight role that the judicial branch is to play in order to determine the necessity, proportionality and legality of the measures.

Fair trial and due process rights

39. The Special Rapporteur underscores that administrative measures that are repressive and right-limiting should be considered as falling within the criminal arena with the applicable regime applicable thereto.[47] This is the case with measures that seriously impede on the freedom to come and go from the home by order of state authorities, usually on security grounds, without intent to prosecute them in a criminal trial in her view amounts to administrative detention which prevents the fair trial safeguards of criminal proceedings.

40. The question of the "privative" or "restrictive" nature of administrative pre-emptive house arrests measures does not only constitute a doctrinal theoretical debate as it is precisely the nature of these measures that will later determine the applicable legal regime under the Convention. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance:[48] "mere restrictions on liberty of movement" are governed by Article 2 of Protocol No. 4. On the other hand, to determine whether someone has been "deprived of his liberty" within the meaning of Article 5: "(…) the starting point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question[49].

41. In France, under Article 6 of the law 55-385 of 3 April 1955, the executive power can impose house arrests on individuals when there are "serious reasons to believe that a person's behavior constitutes a threat to security and public order". These measures usually included a night curfew up to 12 hours in the house, a prohibition on travel outside the territory of a specific municipality and the requirement to report daily to a police station up to three times a day. Except for the assigned residence orders imposed on

[45] See, Lauko v. Slovakia, 2 September 1998, §53.
46 See, M. v. Germany, 17 December 2009, §120.
[47] See, Klass and others v Germany, (5029/71), European Court of Human Rights, 6 September 1978, para 55; and Szabo and Vissy v Hungary, (37138/14), European Court of Human Rights, 12 January 2016, para 75
[48] See, *De Tommaso v. Italy* no. 43395/09, ECtHR, 23 February 2017.
49 See, *De Tommaso v. Italy* para 17

climate activists during the COP21, which were bound to the duration of the event (12 December 2015), most house arrest orders did not include specific information about the length of time the order will be in force.

42. The Special Rapporteur argues that if the Court determines that the measure has a punitive or repressive nature - even if officially classified as a preventive measure - such an assessment may have a consequence on the oversight regime that should apply according to international law and jurisprudence. Consequently, the person affected by preventive measures of an "excessively punitive nature" shall have the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law pursuant to article 6 of the Convention which is a non-derogable right even in the context of a state of emergency.

43. The jurisprudence of the Court supports that claim clearly. In *Klass and others v Germany*[50] the Court emphasized that "the rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure". In December 2015, in *Roman Zakharov v Russia*, the Grand Chamber held that the regime in Russia for the surveillance of telecommunications violated the ECHR as it did not require prior judicial authorization based on individualized reasonable suspicion of wrongdoing.

44. By analogy, in the context of surveillance, according to the Venice Commission's report of 2007 "there is an obvious advantage of requiring prior judicial authorization for special investigative techniques, namely that the security agency has to go "outside of itself" and convince an independent person of the need for a particular measure. It subordinates security concerns to the law, and as such it serves to institutionalize respect for the law. If it works properly, judicial authorization will have a preventive effect, deterring unmeritorious applications and/or cutting down the duration of a special investigative measure. The Parliamentary Assembly has earlier expressed a clear preference for prior judicial authorization of special investigative measures (depending on the type of measures)."[51] At the European Union level, the Court of Justice of the European Union ruled that both a court or an administrative body could have authority to authorize a measure as long as that body was independent and that the review was an *a priori* authorization.[52]

45. In the context of the French State of emergency, in order to guarantee the rule of law and prevent arbitrary procedures, UN human rights experts urged France to protect fundamental freedoms while countering terrorism through the "adoption of prior judicial controls over anti-terrorism measures".[53] Along those lines, the CNCDH has since 2006 also regularly raised the concern of "the increasing power of administrative police to the detriment of judicial authority, which is normally "the sole guardian of liberty"[54].

CONCLUSIONS

[50] (5029/71), ECtHR, 6 September 1978, para 55

[51] European Commission for Democracy Through Law (2007), Venice Commission Report 2007.
Report on the Democratic oversight of the Security Services adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) (CDL-AD(2007)016-e).

[52] See,Tele2 Sverige AB v Post-och telestyrelsen and C-698/15 Secretary of State for the Home Department v Tom Watson and Others, CJEU Judgment in Joined Cases C-203/15I120 "(…) access of the competent national authorities to retained data should, as a general rule, except in cases of validly established urgency, be subject to a prior review carried out either by a court or by an independent administrative body, and that the decision of that court or body should be made following a reasoned request by those authorities submitted, inter alia, within the framework of procedures for the prevention, detection or prosecution of crime".

[53] www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16966&LangID=E#sthash.Nhe0NlOe.dpuf.

[54] CNCDH, "Note sur le projet de loi relatif à la lutte contre le terrorisme," 14 December 2015.

46. The Special Rapporteur stresses that any use of emergency powers requires close and sustained oversight by international human rights oversight bodies. She underscores the conclusions that she made following her visit to France in 2018. She recalls in particular the importance for States utilizing counter-terrorism laws that result in states of emergency to maintain robust and independent judicial access and oversight. Judicial oversight is necessary at all phases of the emergency powers practice and the longer the emergency, the more compelling and important the need for judicial review. Administrative measures that are coercive and/or of a punitive nature shall be bound to prior judicial authorization. The absence of effective safeguards such as prior-judicial authorization and the use of undisclosed intelligence evidence to justify human rights derogations not directly aimed at "preventing the commission of further terrorist acts", question the legality of the administrative counter terrorism measure taken in the context of the declared a state of emergency. Executive discretionary powers require adequate safeguards, including judicial review, to ensure that they are not exercised arbitrarily. The Special Rapporteur also notes the risks of widening the legitimate purpose that justified initial derogatory powers, which allows the seeping of emergency powers to a range of other areas wholly un-envisaged when the exceptional powers were sought or granted, ultimately infecting the totality of the ordinary legal system and undermining the rule of law.