**IN THE EUROPEAN COURT OF HUMAN RIGHTS** **App No 24960/15**

**BETWEEN:**

**TEN HUMAN RIGHTS ORGANISATIONS- v - THE UNITED KINGDOM**

**WRITTEN OBSERVATIONS OF EUROPEAN NETWORK OF NATIONAL HUMAN RIGHTS INSTITUTIONS**

**INTRODUCTION**

1. On 26 February 2016[1] the European Court of Human Rights ('ECtHR') granted liberty to the European Network of National Human Rights Institutions ('ENNHRI') to intervene in this Application by way of written submissions in accordance with Art 36(2) of the European Convention on Human Rights ('ECHR') and Rule 44(3) of the Rules of Court.

2. ENNHRI is a registered association representing National Human Rights Institutions ('NHRIs') within the Council of Europe region. Its membership currently comprises 39 NHRIs from 35 countries across Europe of which 36 are accredited with 'A' or 'B' status under the United Nations ('UN') 'Paris Principles'.[2] As NHRIs, ENNHRI members are bodies or institutions separate from both government and civil society organisations with a broad constitutional or legal mandate to promote and protect human rights.

3. Many NHRIs have, as part of their statutory functions, the ability to appear as *amicus curiae* in human rights('HR') cases before national, regional and/or international courts and tribunals in cases concerning constitutional and international HR provisions. In this capacity NHRIs regularly appear before the ECtHR as neutral parties providing expertise on HR matters which the parties may not put before the Court.

4. In these submissions ENNHRI addresses substantive international HR standards relevant to:

   a. The conformity with Article 6 ECHR of the procedure in the Investigatory Powers Tribunal (IPT) which has exclusive jurisdiction within the UK to hear challenges to the interception at issue in this case.

   b. The protection of freedom of expression of Non-Governmental Organisations under Article 10;

   c. Article 14 protection from discrimination on grounds of nationality of individuals not known to be in the British Isles who are subject to surveillance by the UK regime and in respect of whom a lower standard of protection applies;

5. It is established that, in interpreting ECHR provisions and the scope of the States' obligations in specific cases, the ECtHR will look '*for any consensus and common values emerging from the practices of European States and specialised international instruments... as well as giving heed to the evolution of norms and principles in international law.*'[3]

6. These submissions do not address the facts or merits of the case. Nor do they address the significance of substantive international HR standards relevant to the Art 8 claims raised by the Applicants which are

[1] Received 4 March 2016.
[2] These principles were adopted by the UN General Assembly in Resolution 48/134 of 20 December 1993, and set out objective criteria against which NHRIs are tested for their independence, pluralism, impartiality and accountability.
[3] *Opuz v Turkey* (2010) 50 EHRR 28.

materially similar to those raised in App. No. 58170/13, *Big Brother Watch v the UK*. These submissions should be read in conjunction with the Written Observations of ENNHRI in that case. ENNHRI would however draw the Court's attention to the First Report of the Special Rapporteur on the right to privacy (8 March 2016), which highlighted the statement in the recent decision of the CJEU in Case C-362/14 that:

> "94. … legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter."[4]

7. The special Rapporteur went on to "invite the UK Government to show greater commitment to protecting the fundamental right to privacy of its own citizens and those of others and also to desist from setting a bad example to other states by continuing to propose measures, especially bulk interception and bulk hacking, which *prima facie…* run counter to the most recent judgements of the [CJEU & ECHR], and undermine the spirit of the very right to privacy."[5]

**ISSUE 1: Article 6**

8. Among the issues raised in this application are the compliance with Article 6 of the Convention of IPT proceedings in which it is said the IPT:
   a. refused to direct disclosure by the intelligence services of internal guidance concerning the treatment of confidential material of the non-governmental organisations (§37(1) & (2) Applicants' case);
   b. refused to determine whether the application of the Respondent State's policy of 'neither confirming nor denying' the existence of particular interception programmes was justified on the facts of the present cases (§37(4));
   c. considered whether the Respondent state's regime governing the bulk interception by foreign intelligence services of material, and the receipt of such material by the UK, was 'In accordance with law' in a closed hearing at which the Applicants were not represented (§37(3) & (6));
   d. placed reliance in deciding that the Respondent State's regime was in accordance with law on secret arrangements which were not disclosed to the Applicants and on which the Respondent was permitted to make submissions during closed proceedings (§37(5)).

9. The Court has asked the parties to address the questions whether the proceedings before the IPT involved the determination of 'civil rights and obligations' and, if so, whether the restrictions were, taken as a whole, disproportionate and/or impaired the very essence of the right to a fair trial.

**International law analysis**

10. The right to a fair trial is of fundamental significance in international and EU law. The object and purpose of Art 6 is 'to enshrine the fundamental principle of the rule of law' (*Salabiaku v France*[6]) and it is clear from decisions such as that in *Delcourt v Belgium* and *Moreira de Azevedo v Portugal*[7] that Art 6 is to be given a broad and purposive interpretation. The right to procedural fairness was recognised in the UK by the Magna

[4] Schrems v Data Protection Commissioner of Ireland C-362/14.
[5] Report of the Special Rapporteur on the right to privacy. Joseph Cannataci. HRC, 8 March 2016, at paragraph 39.
[6] (1988) 13 EHRR 379 §28.
[7] Respectively (1970) 1 EHRR 355 §25 and (1990) 13 EHRR 721 §66.

Carta of 1215. It is protected by constitutional arrangements in, *inter alia*, the USA, Canada, Ireland, South Africa and New Zealand.[8] It was acknowledged by the UN Declaration of Human Rights in 1958 (Arts 10 & 11) and is protected by, *inter alia*, the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

11. Art 14 ICCPR is of particular relevance as a draft version of this provision appears to have influenced the drafting of Art 6 ECHR.[9] It provides, so far as relevant here, that "All persons shall be equal before the courts and tribunals" and that "In the determination of … his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…" (see Annex for full text).

*Rights applicable to all judicial hearings*

12. In reaching its conclusion as to whether the proceedings before the IPT involved the determination of civil rights or obligations under Art 6 ENNHRI suggests that the Court take account of the approach taken by the Human Rights Committee (HRC) to Article 14 ICCPR. In General Comment (GC) 32 (2007) the HRC stated that the guarantee of equality before the courts 'not only applies to courts and tribunals addressed in the second sentence of this paragraph of article 14, but must also be respected whenever domestic law entrusts a judicial body with a judicial task' (emphasis added).[10] It relied on *Perterer v Austria* in which, further, it stated that 'the principles of impartiality, fairness and equality of arms' were 'implicit' in the guarantee (§9.2).[11] The Committee further stated that 'The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination'.[12]

13. 'Equality of arms' means, according to the HRC, 'that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant'. In support of that statement the Committee cited Communication No. 1347/2005, *Dudko v Australia*, in which it had found that art 14 ICCPR was breached when an unrepresented prisoner was not permitted to attend the hearing of her application for leave to appeal from conviction. She had been permitted to make written submissions which were considered by the High Court and the HRC accepted (§7.2) that the 'disposition of an appeal does not necessarily require an oral hearing'. But where the other party was represented and heard at such a hearing the State had (§6.4) to establish 'that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the author' (emphasis added).

14. In GC 32 the HRC confirmed that 'The principle of equality between parties applies also to civil proceedings, and demands, *inter alia*, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party', citing in support of this proposition *Äärelä and Näkkäläjärvi v Finland*, which

[8] Respectively, the 5th and 14th amendments to the US Constitution, s7 of the Charter of Rights and Freedoms, Art 40.3.1 of the Irish Constitution, s33 South African and s27 New Zealand Bills of Rights.
[9] *Feldbrugge v Netherlands* (1986) 8 EHRR 425, joint dissenting opinion §20.
[10] UN Doc CCPR/C/GC/32 (2007), II.
[11] Communication No. 1015/2001. See similarly Communication No 961/2000, *Everett v Spain*, §6.4.
[12] Fn 9 above, II.

concerned the failure of an appeal court to provide the authors an opportunity to comment on submissions made absent the authors' knowledge by the other party to litigation in which they were involved.[13] At §7.4:

> "it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party. The Court of Appeal states that it had 'special reason' to take account of these particular submissions made by the one party, while finding it 'manifestly unnecessary' to invite a response from the other party. In so doing, the authors were precluded from responding to a brief submitted by the other party that the Court took account of in reaching a decision favourable to the party submitting those observations. The Committee considers that these circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14(1) of the Covenant."

*The right to a fair trial*

15. The second sentence of Art 14(1) applies the right to a fair and public hearing to determinations of rights and obligations, providing in limited cases for the exclusion of the media and the public (see Annex) but not, notably, for the exclusion of a party to the case. In *Morael v France* the HRC, having confirmed the application of Art 14(1) to civil cases, ruled that 'a "fair hearing" in a suit at law … should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformatio in pejus*[14] and expeditious procedure".

16. In GC 32 the HRC confirmed that 'All trials … related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large.' It is clear that exceptions are permitted to the principle of open justice. But there appear to be no such circumstances in which the ICCPR contemplates proceedings in the absence of a party to the case.

17. ENNHRI also draws the attention of the Court to Arts 47 and 52(1) of the EU Charter of Fundamental Rights (see Annex). In *ZZ (France) v SSHD* the CJEU ruled that "[t]o be consistent with article 47 … the infringement of the rights of the defence and effective judicial protection … must be counterbalanced by appropriate procedural mechanisms capable of guaranteeing a satisfactory degree of fairness in the procedure".[15]

**ISSUE 2: Article 10**

1. The issues arising concern whether the United Kingdom's conduct is:
   a. In accordance with the law (has a basis in domestic law, is compatible with the rule of law, is accessible and foreseeable);
   b. Necessary in a democratic society in pursuit of a legitimate aim and proportionate to that aim.

[13] Communication No 779/1997. See also Communication Nos. 846/1999 *Jansen-Gielen v The Netherlands* in which the Committee stated at §8.2 that "it was the duty of the Court of Appeal… to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant."
[14] Communication No. 207/1986. *Ex officio* correction worsening an earlier verdict.
[15] Case C-300/11, [2013] QB 1136 §83.

18. The first of these matters raises the same questions as the Art 8 challenge. It has been discussed in ENNHRI's Written Observations in *Big Brother Watch v the UK* and will not be repeated here. These submissions will focus on the second of the questions raised above. Insofar as material relevant to this has been discussed in ENNHRI's Written Observations in *Big Brother Watch* it will, similarly, not be repeated here. ENNHRI would however draw the Court's attention to the statement of the Council of Europe's Human Rights Commissioner that 'the human rights implications' of mass surveillance activities 'are too significant to be authorised by the executive alone or (worse) auto-authorised by security services. External authorisation of these measures should be done by a judicial or quasi-judicial body, or through a combination of one [of] these bodies and the executive'.[16]

**International law analysis**

19. The starting point is Art 19 ICCPR which provides, *inter alia*, that: '2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'. Art 19(3) then provides that the exercise of the right:

> "carries with it special duties and responsibilities [and] … may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals" [emphasis added].

*'Legitimate aim'*

20. The aim which the UK seeks to pursue by the activities here in issue is national security. As was made clear in *Big Brother Watch* §§105-112, that term is widely interpreted in domestic law to cover 'the many, varied and (it may be) unpredictable ways in which the security of the nation may best be promoted'.[17]

21. The HRC's GC 32 states that 'Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society [and] … constitute the foundation stone for every free and democratic society…' (§2). 'Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights' (§3). At §11 GC 32 demands that States 'guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers'. And at §12 it provides that Art 19(2) 'protects all forms of expression and the means of their dissemination…. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions … [and] all forms of audio-visual as well as electronic and internet-based modes of expression'. As to the permissible limitations on expression, restrictions on freedom of expression "may not put in jeopardy the right itself... the relation between right and restriction and between norm and exception must not be reversed".[18] Further (and leaving to one side the requirement that restrictions be 'provided by law'), restrictions (§22):

[16] *Democratic and effective oversight of national security services*. Commissioner for Human Rights, Issue paper, May 2015 at page 62.
[17] Citing *Secretary of State for the Home Department v Rehman* [2003] AC 153 §35 *per* Lord Woolf MR.
[18] Citing GC 27, §13 of which goes on to state that "The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution."

"may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of para 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in para 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."[19]

22. The HRC warns that restrictions imposed on free expression to protect the rights of others 'must be constructed with care'. 'Extreme care must be taken … to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of para 3. It is not compatible with para 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information'.[20]

23. In Communication No. 458/1991 *Mukong v Cameroon* the Committee rejected the Respondent State's claim that the imprisonment, on grounds of national security, of a journalist who had campaigned for the introduction of multi-party democracy, was justified by national security and/or public order considerations because he had exercised his right 'without regard to the country's political context and continued struggle for unity'. According to the Committee (§9.7):

"… the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this regard, the question of deciding which measures might meet the 'necessity' test in such situations does not arise."

*The Siracusa and Johannesburg Principles*

24. The Siracusa Principles adopted in 1985 by the UN's Economic and Social Council[21] provide, *inter alia*, that:

"29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse."

25. Those principles were circulated by the 41st session of the UN Commission on Human Rights.[22] In 1995 they were endorsed in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. Principles 6-8 of the Johannesburg Principles ('Expression That May Threaten National Security') provide, *inter alia*, that 'expression may be punished as a threat to national security' only where it can be demonstrated that the expression intended and was likely to incite imminent violence; that 'the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security

[19] Citing the Committee's General Comment 22 §8.
[20] Concluding observations on Uzbekistan (CCPR/CO/71/UZB).
[21] Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).
[22] UN Doc E/CN.4/1987/17.

or subjected to any restrictions or penalties'(emphasis added), and that expression which 'advocates non-violent change of government policy or the government itself', 'constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials' or 'is directed at communicating information about alleged violations of international human rights standards or international humanitarian law' 'shall not constitute a threat to national security'.

26. The Johannesburg principles, which were drawn up by 36 international experts, have no formal legal force but they have in turn been repeatedly endorsed by the UN Special Rapporteurs on Freedom of Opinion and Expression in their reports to the UN Commission on Human Rights and repeatedly noted in the annual resolutions of the that Commission, replaced by the Human Rights Council in 2003. They have been referred to by courts around the world, including by the High Court of Kenya in *Coalition for Reform and Democracy and Others v Kenya*,[23] and by the ECtHR in *Taranenko v Russia*.[24]

27. The UN Special Rapporteur's 2013 Annual Report to the UN General Assembly warned (§3) that 'national laws regulating what would constitute the necessary, legitimate and proportional State involvement in communications surveillance are often inadequate or non-existent. Inadequate national legal frameworks create a fertile ground for arbitrary and unlawful infringements of the right to privacy in communications and, consequently, also threaten the protection of the right to freedom of opinion and expression.'[25] The Special Rapporteur criticised the broad approach to 'national security' taken by many states:

> "60. The use of an amorphous concept of national security to justify invasive limitations on the enjoyment of human rights is of serious concern. The concept is broadly defined and is thus vulnerable to manipulation by the State as a means of justifying actions that target vulnerable groups such as human rights defenders, journalists or activists. It also acts to warrant often unnecessary secrecy around investigations or law enforcement activities, undermining the principles of transparency and accountability."

28. It is of course the case that the restriction on freedom of expression which is complained of in the instant case is indirect rather than (as in the case of treason and sedition laws, direct). But the impact of surveillance on freedom of expression was highlighted in a 'Tenth anniversary joint declaration: Ten key challenges to freedom of expression in the next decade' issued in 2011 by the UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information.[26] Among the ten challenges to which the joint report drew attention was that posed by 'national security' which 'notion … has historically been abused to impose unduly broad limitations on freedom of expression, and this has become a particular problem in the aftermath of the attacks of September 2001, and renewed efforts to combat terrorism'. And among the factors about which particular concern was expressed was '[v]ague and/or overbroad definitions of key terms such as security and terrorism' and '[e]xpanded use of surveillance techniques and reduced oversight of surveillance operations, which exert a chilling effect on freedom of expression …'

[23] [2015] 5 LRC 182.
[24] (2014) 37 BHRC 285.
[25] Report on 'the implications of States' surveillance of communications on the exercise of the human rights to privacy and to freedom of opinion and expression': https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/133/03/PDF/G1313303.pdf?OpenElement
[26] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/125/34/PDF/G1012534.pdf?OpenElement

29. The UN Special Rapporteur on Freedom of Expression commented in his 2013 report (at §52) on the 'chilling effect' that '[e]ven a narrow, non-transparent, undocumented, executive use of surveillance may have ... without careful and public documentation of its use, and known checks and balances to prevent its misuse', and concluded at §79 that:

> "States cannot ensure that individuals are able to freely seek and receive information or express themselves without respecting, protecting and promoting their right to privacy. Privacy and freedom of expression are interlinked and mutually dependent; an infringement upon one can be both the cause and consequence of an infringement upon the other. Without adequate legislation and legal standards to ensure the privacy, security and anonymity of communications, journalists, human rights defenders and whistleblowers, for example, cannot be assured that their communications will not be subject to States' scrutiny."

*Proportionality*

30. The HRC's GC 34 provides (§§33-34) that restrictions 'must be "necessary" for a legitimate purpose … must not be overbroad [but] … "must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected… The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law"[27] [and] … must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain'. And, importantly:

> "35.When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[28]
>
> 36. The Committee reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression necessary.[29] In this regard, the Committee recalls that the scope of this freedom is not to be assessed by reference to a "margin of appreciation"[30] and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression."[31]

**ISSUE 3: Article 14**

[27] Citing GC 27, §14.
[28] Citing communication No. 926/2000, *Shin v Republic of Korea*.
[29] Citing communication No. 518/1992, *Sohn v Republic of Korea*.
[30] Citing communication No. 511/1992, *Ilmari Länsman, et al v Finland*.
[31] Citing communications Nos. 518/92, *Sohn v Republic of Korea*; No. 926/2000, *Shin v Republic of Korea*.

31. The issue arising on the application is whether the different safeguards applicable to persons inside and outside the United Kingdom amount to (unjustified) discrimination on grounds of nationality. This, in turn, raises the questions:

    a. Whether there is differential treatment falling within the scope of Article 14; and (if so)

    b. Whether such differential treatment is justified.

32. The particular complaint raised by the Applicants is that the framework established by s8(4) of the Regulation of Investigatory Powers Act 2000 (RIPA) framework is indirectly discriminatory on grounds of nationality and national origin since section 16 RIPA grants additional safeguards to people known to be in the British Islands but denies them to those abroad. The majority of the applicants are based outside the British Islands and complain they are disproportionately likely to have their private communications intercepted and accessed.

**International law analysis**

*Discrimination on grounds of nationality*

33. The ICCPR (Art 26) provides that:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

34. The HRC has found in a significant number of cases that Art 26 ICCPR was breached by differential treatment on grounds of nationality.[32] In relation to the practices challenged in this case it expressed concern in 2015 about the differential treatment provided for by RIPA (see §29 of ENNHRI's written observations in the *Big Brother Watch* case).

35. Art 1 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD) provides that 'Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality'. Notwithstanding this restriction on the scope of the Convention, the CERD Committee in 2003 expressed itself 'deeply concerned about provisions of the [UK's] Anti-Terrorism Crime and Security Act which provide for the indefinite detention without charge or trial, pending deportation, of non-nationals of the United Kingdom who are suspected of terrorism-related activities'. The Committee accepted that the UK had national security concerns, but drew:

> "the State party's attention to its statement of 8 March 2002 in which it underlines the obligation of States to "ensure that measures taken in the struggle against terrorism do not discriminate <u>in purpose or effect</u> on grounds of race, colour, descent, or national or ethnic origin" [emphasis added][33]

[32] See, for example, CCPR/C/57/D/586/1994, *Adam v Czech Republic*; CCPR/C/72/D/857/1999, *Blazek v Czech Republic*; CCPR/C/84/D/945/2000, *Marik v Czech Republic* and CCPR/C/7/D/965/2000 *Karakurt v Austria*.

[33] Conclusions and recommendations, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CERD/C/63/CO/11 (2003).

36. As that statement shows, discrimination on grounds of nationality may breach CERD.

*Indirect discrimination*

37. Indirect as well as direct discrimination is expressly regulated by CERD, Article 1 of which refers to 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life' (emphasis added). In its General Recommendation 19 (1993) the CERD Committee drew attention to 'the obligation placed upon States parties by article 2, paragraph 1 (c), to nullify any law or practice which has the effect of creating or perpetuating racial discrimination' and stated that 'In seeking to determine whether an action has an effect contrary to the Convention, [the Committee] will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.'

38. The ICCPR does not define 'discrimination' but the HRC's GC 18 (1989) took into account, *inter alia*, the definition of discrimination adopted by CERD in declaring that 'discrimination' for the purposes of Art 26 ICCPR 'should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms' (emphasis added).

**CONCLUSION**

39. ENNHRI submits that the clear implication from the international materials set out above is that the principle of equality of arms, which is a core aspect of Art 6 ECHR, is incompatible with the exclusion of one party from a hearing in which the other party participates, other than in exceptional cases where adequate procedural safeguards provide *de facto* protection from unfairness and no disadvantage ensues. As to Art 10, the chilling effects of mass surveillance on freedom of expression, as well as its intrusion on private life, are such as to require strong and individualised justification, and that the requirement for such justification should not be obscured by too easy a resort to arguments of national security, and/or an excessively wide approach to this concept. Finally, as regards the questions arising under Art 14 ECHR, ENNHRI reminds the Court that nationality discrimination breaches international human rights law and that, accordingly, appropriate justification has to be provided for the adoption of measures the effect of which is to distinguish between persons or groups on grounds of their nationality and/or residence.

**ENNHRI**
**18 March 2016**