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Setting up an active network of
independent non judicial human rights structures

*“The role of National
Human Rights Structures
as regards anti-terrorists measures”*

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WORKSHOP DEBRIEFING PAPER

University of Padua
Interdepartmental Centre on
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Université de Padoue
Centre Interdépartemental pour
les Droits de la Personne et les Droits des Peuples

The present publication¹ was prepared by STEFANO VALENTI, of the Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua, on the basis of workshop's notes taken by ORSOLYA JENEY.

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INTRODUCTION

The Joint European Union – Council of Europe Programme “*Peer-to-Peer Project*”, aims to empower national human rights structures (NHRs) to help prevent and find solutions to human rights violations more effectively at domestic level. Through a series of workshops, where international legal norms are explained and participants discuss their respective experiences to implement these norms, specialised staff members of the NHRs can strengthen their own human rights competences and increase their awareness of the possibilities for action at domestic level and for co-operation with international mechanisms.

In 2009, the third workshop of the “*Peer-to-Peer Project*” was organised on “The role of National Human Rights Structures as regards anti-terrorists measures” in Padua (Italy) on 9–11 June. The workshop consisted of an opening session and three working sessions, corresponding to three specific aspects of the general issue, where NHRs have an important role to play

The first working sessions dealt with counter-terrorist measures and the rights of members of the public at large, with a specific focus on arbitrary procedures for terrorist black-listing and potential violation of the right to privacy, the right to property, the right of association, the right to travel and freedom of movement; correlation between counter-terrorist measures and the protection of the freedom of the media; correlation between counter-terrorist measures and freedom of expression, in particular the crime of apology of terrorism and incitement to terrorism.

The second working session dealt with the protection of the rights of victims of terrorism, with a specific focus on protection and compensation of victims of terrorism, protection of witnesses and collaborators of justice; in

addition the effectiveness of national judicial system in their responses to terrorism was examined in this session.

The third and last session dealt with the protection of the rights of suspected or convicted terrorists, with a specific focus on the respect for the absolute prohibition of torture, also in connection with extradition and expulsion, arrest and detention of terrorists, their right to a fair trial and the fairness of the penalties applied to them.

There were 32 participants representing NHRs mainly from non EU Countries, in addition to experts and organisers.

As a follow up to this event, it was decided to produce this workshop debriefing paper, which summarises the findings of the workshop and provides practical information to the NHRs and references to documents concerning their role. Each chapter lists points most relevant to the topics and discussions of the workshop, including summaries of experts' contribution to the workshop.

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CHAPTER 1

*Counter-terrorist measures and protection of human rights: issues at stake**A. Theory*

While there is no universal definition of terrorism yet, the work in progress within the United Nations for a comprehensive convention on international terrorism is seeking to define terrorism and terrorist act. So far only the European Union (EU) has adopted in 2002 a framework decision “*to fight more efficiently against terrorism*”², containing a definition of terrorist offences, infringements linked to terrorist acts, behaviours which may contribute to such acts and the level of sanctions between member States. The EU Framework Decision explicitly guarantees the respect for fundamental rights.

A common concept of terrorist offences to be included in all domestic legal system and the setting of the minimum level of penal sanctions for this type of offence have the objective to prevent terrorists being able to find refuge in a more lenient State. The lack of a universally accepted definition of terrorism can hamper international legal cooperation, in the sense that certain crimes can be defined as terrorist acts by certain domestic legislations while other legislations do not regard the same acts as terrorist acts.

In any case, beyond any future universal definition, terrorist acts not only violate fundamental human rights, such as the right to life or the right to property of the direct victims of their attacks, but, even more, they are con-

² Council of the European Union Framework Decision of 13 June 2002 on combating terrorism http://ec.europa.eu/justice_home/fsj/criminal/terrorism/fsj_criminal_terrorism_en.htm

ducive of an atmosphere of fear and chaos. So that all individuals under their jurisdiction can live a life without fear, States have the “*imperative duty*”³ to intercept and prosecute terrorists and terrorist networks as well as to prevent terrorism with measures that address the conditions conducive to the spread of terrorism.

“States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect.... Upholding human rights in the fight against terrorism is first and foremost a matter of upholding our values, even with regard to those who may seek to destroy them. There is nothing more counterproductive than to fight fire with fire, to give terrorists the perfect pretext for martyrdom and for accusing democracies of using double standards. Such a course of action would only serve to create fertile breeding grounds for further radicalisation and the recruitment of future terrorists”⁴.

It is important to underline that human rights violations are both:

- the *direct* effect of acts of terrorism, or
- the *indirect* effect of acts of terrorism. Its “*collateral damage*” may affect the victim’s relatives, ethnic, social or religious group to which the victim belongs, local community, etc. Indirect effects often affect economic, social and cultural rights.

Counter-terrorism measures need to abide by the dual standard of offering effective protections against terrorism and of not violating fundamental rights while doing so.

³ *Preamble of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism.*

⁴ *European Court of Human Rights, case of Saadi v. Italy, concurring opinion of Judge Myjer joined by Judge Zagrebelsky.*

In order to provide adequate security, it could be that counter terrorism limits certain human rights. In line with the pertinent case law of the European Court of Human Rights (ECtHR), there are permissible limitations to human rights which may be introduced by States, but only provided that they are:

- prescribed by law;
- pursuing a legitimate aim;
- necessary in a democratic society.

INHERENT FLEXIBILITY OF (MOST) HUMAN RIGHTS STANDARDS DOES NOT MEAN THAT ALL HUMAN RIGHTS CAN BE DEROGABLE.

1. EXAMPLES OF NON- DEROGABLE RIGHTS:

- *Right to life*
 “Everyone’s right to life shall be protected by law.” (Article 2 of the ECHR).
 “The death penalty shall be abolished. No one shall be condemned to such penalty or executed.” (Protocol 6 and Protocol 13 to the ECHR);
- *The prohibition of torture*
 “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” (Article 3 of the ECHR).

2. EXAMPLES OF RIGHTS WHICH CAN BE RESTRICTED:

- *Right to liberty and security* (Article 5 of the ECHR);
- *Right to a fair trial* (Article 6 of the ECHR);
- *Right to respect for private and family life* (Article 8 of the ECHR);
- *Freedom of thought, conscience and religion; freedom of expression and freedom of assembly and association* (Articles 9, 10 and 11 of the ECHR);
- *Protection of property* (Article 1 of Protocol 1 to the ECHR);
- *Freedom of movement* (Article 2 of Protocol 4 to the ECHR).

B. Practice

With regard to the evolution of counter terrorism we can see roughly three recent phases:

1. In the Vienna Declaration of 1993, terrorism was mentioned along with organized crime, drug trafficking and viewed mainly as a threat to the territorial integrity and stability of legitimately constituted Governments⁵.

2. The tragic events on “9/11” made these threats divorce. Moreover the “war on terror” implied the take over by the military, intelligence and police from the judiciary the overview of measures to counter terrorism (and thus protect human rights) that often resulted in further violation of human rights. Counter terrorism measures may pose serious challenges to human rights:

- Targeted killings of suspected;
- Shoot-to-kill policies;
- Prolonged pre-trial detention;
- “Profiling” biometric data, collecting mass surveillance and data mining of sensible information.

After “9/11” the international co-operation for the suppression of terrorism was fostered.

3. The third phase aims at preventing terrorism by eliminating the fertile ground for terrorism. This involves the complex task of identifying the factors that are radicalising people and making them turn to violence or join terrorist groups, and subsequently addresses those factors through well tar-

⁵ *“The acts, methods and practices of terrorism in all its forms and manifestations as well as linkage in some countries to drug trafficking are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments”.*

geted policies. These efforts brought renewed attention of the CoE on issues such as:

- the concepts of “apology of terrorism” and “incitement to terrorism”;
- action to prevent terrorists from accessing funding sources;
- protection, support and compensation of victims of terrorist acts;
- young persons as terrorist offenders and targets of terrorist propaganda;
- cyberterrorism and misuse of the Internet for terrorist purposes;
- insurance schemes to cover terrorism-related damages;
- combating and preventing terrorism through culture.

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CHAPTER 2

The Council of Europe's activities in the field of the fight against terrorism

A. Main Policies

The Council of Europe's activities in the fight against terrorism are built on three cornerstones⁶:

1. **Strengthening legal action against terrorism.** The Council of Europe has drafted a number of international legal instruments and standards which reflect the importance it attaches to combating terrorism;
2. **Safeguarding fundamental values.** The underlying message of the Organisation is that it is possible to fight efficiently against terrorism while upholding the basic values that are the common heritage of the European continent;
3. **Addressing the causes of terrorism.** The Organisation has focussed its action on long term measures, such as intercultural and inter-religious dialogue, in order to address the causes of terrorism and to avoid the fertile breeding grounds for further radicalisation and the recruitment of future terrorists.

B. Hard Law

The Council of Europe pioneered the international legal cooperation to fight terrorism with the first most significant normative effort, the 1977 European Convention on the Suppression of Terrorism⁷, which was designed to facilitate the extradition of terrorists by listing offences (namely acts of

⁶ http://www.coe.int/t/dc/files/themes/default_en.asp

⁷ <http://www.conventions.coe.int/Treaty/en/Treaties/Html/090.htm>

particular gravity, hijacking of aircraft, kidnapping and taking of hostages, etc.) that should not be considered as political offences. Twenty years after, in order to increase the effectiveness of existing international texts on the fight against terrorism, in particular public provocation to commit terrorist offences and recruitment and training for terrorism, the Council of Europe adopted a new Convention on the Prevention of Terrorism that entered into force 1 June 2007⁸. It aims to strengthen the efforts of member States to prevent terrorism and contains specific provisions on the protection of human rights and fundamental freedoms and provision on the protection and compensation of victims of terrorism⁹.

COE CONVENTION ON THE PREVENTION OF TERRORISM

It prevents terrorism by measures taken at national level and through international co-operation;

- *Establishes as criminal offence acts such as:*
 1. *public provocation;*
 2. *recruitment;*
 3. *training, that may lead to the commission of acts of terrorism.*
- *Consolidate the protection of human rights in terms of both reinforcing co-operation at national and international level (including grounds for refusal of extradition and mutual assistance) and implementing the criminalisation of the new offences in terms of conditions and guarantees.*

The title of the Convention does not presuppose that this treaty is exhaustive in providing for all the means that may contribute to the prevention of terrorism. Clearly, it only provides some means and concentrates on policy and legal measures. The Convention purports to achieve this objective, by establishing as criminal offences certain acts that may lead to the com-

⁸ <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/196.htm>

⁹ *For the status of ratification see:* <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=196&CM=1&DF=&CL=ENG>

mission of terrorist offences, namely: public provocation, recruitment and training (Articles 5 – 7). They are coupled with a provision on accessory (ancillary) offences (Article 9) providing for the criminalisation of complicity (such as aiding and abetting) in the commission of all of the three aforementioned offences and, in addition, of attempts to commit an offence under Articles 6 and 7 (recruitment and training).

INNOVATIVE PROVISIONS OF THE CONVENTION

ARTICLE 5 – PUBLIC PROVOCATION TO COMMIT A TERRORIST OFFENCE [INCLUDES THE PROHIBITION OF INDIRECT PROVOCATION]

For the purposes of this Convention, “public provocation to commit a terrorist offence” means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

ARTICLE 6 – RECRUITMENT FOR TERRORISM

For the purposes of this Convention, “recruitment for terrorism” means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group.

Each Party shall adopt such measures as may be necessary to establish recruitment for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

ARTICLE 7 – TRAINING FOR TERRORISM

For the purposes of this Convention, “training for terrorism” means to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose.

One of the key provisions of the Convention purports to enhance the efficiency of the fight against terrorism, while ensuring the protection of human rights and fundamental freedoms. Freedom of expression, association and religion are key elements in the protection of human rights should be respected in counter terrorist measures.

RECONCILING PROTECTION OF HUMAN RIGHTS AND COUNTER TERRORIST MEASURES

ARTICLE 12 – CONDITIONS AND SAFEGUARDS

Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.

C. Soft Law

A considerable body of relevant standards, designed to protect human rights at all stages of the fight against terrorism has been developed. Many of the standards are to be considered as part of the corpus of human rights law; in other areas, particularly on issues such as protection of victims or prevention of terrorism, the standards are still emerging and are often contained in soft law such as:

COMMITTEE OF MINISTERS

Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims.

PARLIAMENTARY ASSEMBLY

Recommendation 1687 (2004) on Combating terrorism through culture.

EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE¹⁰

ECRI General Policy Recommendation n° 8: Combating racism while fighting terrorism.

GUIDELINES

The Council of Europe believes that an effective fight against terrorism fully respecting human rights is possible. To facilitate the work of Governments in this field the Organisation has issued a practice oriented guideline on the issue, as well as additional guidelines on specific issues related to antiterrorist measures.

- [Guidelines on Human Rights and the fight against terrorism \(2002\)](#)

The Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002, affirm states' obligation to protect everyone against terrorism, and reiterate the need to avoid arbi-

¹⁰ http://www.coe.int/t/dgbl/monitoring/ecri/default_en.asp

trariness. They also stress that all measures taken by states to combat terrorism must be lawful, and that torture must be prohibited. The legal framework set out in the Guidelines concerns, in particular, the collecting and processing of personal data, measures which interfere with privacy, arrest, police custody and pre-trial detention, legal proceedings, extradition and compensation of victims.

- Guidelines on the protection of victims of terrorist acts (2005)

The Guidelines on the protection of victims of terrorist acts, adopted by the Committee of Ministers on 5 March 2005, recognise the suffering endured by the victims and consider that they must be shown national and international solidarity and support. States are encouraged by these Guidelines to provide to victims and, in appropriate circumstances, to their close family, an emergency and continuing assistance. In addition, the Guidelines deal with key issues, such as the need for granting a fair and appropriate compensation to victims, facilitating their access to the law and to justice, as well as protecting their private and family life, their dignity and security.

- Guidelines on protecting freedom of expression and information in times of crisis (2007)

The Guidelines on protecting freedom of expression and information in times of crisis were adopted as an extension and complement to the “Guidelines on human rights and the fight against terrorism” adopted on 11 July 2002, and member States are invited to ensure that they are widely disseminated and observed by all relevant authorities. In particular, these guidelines invite states to ensure appropriate working conditions of media professionals in crisis situations; to guarantee against misuse of defamation legislation and thus safeguarding freedom of expression. The guidelines invite national governments, media organisations, national or international governmental and non-governmental organisations to ensure the protection of freedom of expression and information in times of crisis through dialogue and co-operation.

D. Expertise work

The Council of Europe has created a committee of experts on terrorism (CODEXTER)¹¹, in order to co-ordinate the work as far as international law and action against terrorism are concerned, to identify possible additional priority activities against terrorism and to make appropriate proposals to the Committee of Ministers and with a view to intensifying the Council of Europe's action in the field of the fight against terrorism, including preventive measures, while preserving and promoting human rights and fundamental freedoms.

The CODEXTER is an inter-governmental committee of experts of the highest possible rank with the following desirable qualifications: experts with a detailed knowledge of legal or financial questions concerning terrorism.

The CODEXTER is currently focusing on:

- the preparation of country profiles on counter-terrorism capacity;
- exchanges of information and best practice on compensation and insurance schemes for the victims of terrorism;
- identifying gaps in international law and action against terrorism with a view to proposing ways and means to fill them;
- monitoring the signatures and ratifications and promoting the effective implementation of the Council of Europe conventions applicable to the fight against terrorism, in particular the Council of Europe Convention on the Prevention of Terrorism.

¹¹ http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism

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CHAPTER 3

Counter - terrorist measures and the rights of members of the public at large

A. Intelligence as counter-terrorist measure

Terrorism is becoming more sophisticated: this development triggers more sophisticated counter terrorist measures. Thus, more and more intelligence measures are used to counter terrorism. There is a need to find the balance between the protection of human rights and efficient functioning of state institutions responsible for security. Moreover, developments in surveillance technology are potential threat when such instruments are used in the struggle against terrorism. A deeper reflection is required on the balance between methods of preventing terrorism and the protection of private life¹².

For that it's essential to have efficient supervision over surveillance activities. Counter terrorism measures should:

- “go back” under the control of the judiciary;
- be prescribed by law in order to be able to be challenged¹³.

¹² *In the past two years, the ECtHR has heard a number of cases on interception powers, related to national security and terrorism. As described further in this publication, in two of the cases the Court found that the laws did not provide sufficient safeguards and thus the laws violated Article 8. In one of the cases, the ECtHR recognised that interception of communications could violate Article 10 rights to freedom of expression, especially if they were used to identify a journalist's sources. It concluded that for the intrusion to be justified, the monitoring needed to be limited, not done for the purpose of identifying sources, and subject to strict safeguards and oversight.*

¹³ *See on that “Assessing damage, urging action” report published by the International Commission of Jurists on terrorism, counter terrorism and human rights.*

B. The case law of the European Court of Human Rights

I. ARBITRARY PROCEDURES FOR TERRORIST BLACK-LISTING AND VIOLATION OF THE RIGHT TO PRIVACY

As written by the Commissioner for Human rights of the Council of Europe “Blacklisting¹⁴ is indeed a striking illustration of how human rights principles have been ignored in the fight against terrorism. The term refers to procedures under which the United Nations or the European Union may order sanctions which target individuals or entities suspected of having links with terrorism. These sanctions include the freezing of financial assets.”¹⁵ The Council of Europe’s Parliamentary Assembly found that “the procedural and substantive standards currently applied by the United Nations Security Council and the Council of the European Union...in no way fulfil the minimum standards laid down ... and violate the fundamental principles of human rights and the rule of law”¹⁶ The Council of Europe’s Committee of Ministers reiterated that “it is essential that these sanctions be accompanied by the necessary procedural guarantees”.¹⁷ What follows is an overview of the pertinent case law of the ECtHR.

1. Youssef Nada v. Switzerland

This case is pending before the European Court of Human Rights, which will have to rule eventually on the conflict between the UN member states’ duty to comply with the resolutions of the Security Council, including those of its Sanctions Committee, and their duty to protect individuals’ fundamental rights under the ECHR.

¹⁴ The formal basis is a Security Council resolution which in 2001 established a list of individuals suspected of having connections with Al-Qaida, Usam Bin Laden and the Taliban.

¹⁵ Viewpoint “Arbitrary procedures for terrorist black-listing must now be changed”.

¹⁶ Parliamentary Assembly Resolution 1597 (2008).

¹⁷ Committee of Ministers of the Council of Europe, Reply to the Recommendation 1824 (2008).

2. Amann v. Switzerland and Rotaru v. Romania

These are two cases relating to intelligence accountability dealt with the “accordance with law” requirement. In several European States aspects of the legal basis have been found to be inadequate.

3. Klass and Others v. Germany and Weber and Saravia v. Germany

These Cases regard the control systems for security intelligence, in relation to the specific issues of surveillance and records/screening.

4. Leander v. Sweden and Segerstedt-Wiberg v. Sweden

Two cases concerning (lack of) remedies as regards security screening.

5. S. and Marper v. UK

The case concerned the retention by the authorities of the applicants’ fingerprints, cellular samples and DNA profiles after criminal proceedings against them were terminated by an acquittal and were discontinued respectively.

II. CORRELATION BETWEEN COUNTER TERRORIST MEASURES AND FREEDOM OF EXPRESSION

The restrictions of freedom of expression in order to protect national security can of course be perfectly legitimate under the ECHR. For example, in the judgment of the Grand Chamber of the ECtHR in the case of *Stoll v. Switzerland*¹⁸, the Court decided compatible with Article 10 of the Convention the applicant’s conviction for publishing a classified document as confidential, namely a diplomatic note on the dormant accounts of Holocaust victims in Swiss bank accounts and the attitude of the Swiss authorities during negotiations on this issue. However, the limitation of freedom of expression for reasons of national security can also be clearly abusive.

The method of the Court to review whether a restriction to a right is legitimate under the ECHR is very similar to the one applied to the right to freedom of expression as to any other guaranteed rights susceptible of restrictions. The ECtHR reasoning follows three stages:

¹⁸ See *Stoll v. Switzerland* (No. 69698/01), 10 December 2007.

- Is the restriction to freedom of expression required by law?¹⁹
- Does the restriction of freedom of expression pursue a legitimate aim, namely one of the purposes specified in Article 10 paragraph 2?
- Is the restriction of freedom of expression proportionate and necessary in a democratic society?

It must be noted that the third criterion is more difficult to assess, because in this context the Court conducts a real “test of proportionality” and tries to establish a balance between the need to protect the right to freedom of expression and the need to protect other rights guaranteed by the Convention.

As it is explained further, the Court takes into consideration all the facts of the case, puts them into context, analyzes the decisions already taken by the national courts and the reasoning and conclusions adopted at the domestic level, so as to see if the sanction imposed could be considered proportionate to the aim pursued. The more severe the punishment the more convincing has to be the evidence.

1. Weber and Saravia v. Germany

In this case one of the applicant was a free lance journalist and she complained about the extension of the powers of the German Federal Intelligence Service with regard to the recording of telecommunications in the course of so-called strategic monitoring. The aim of this action was to identify and avert serious dangers, such as an armed attack on its territory or the commission of international terrorist attacks and certain other serious offences. The journalist complained also about the use of personal data obtained thereby and their transmission to other authorities.

The Court found that the interference with the applicant’s right to freedom of expression was prescribed by law, pursued a legitimate aim, namely,

¹⁹ *It should be noted that the term “law” used by the Court must be understood in a broad sense and it includes not only acts as defined by the legislation, but also regulatory acts or case law applied in a constant manner.*

the protection of the interests of national security and/or the prevention of crime, and it was not aimed at monitoring journalists. Surveillance measures were, in particular, not directed at uncovering journalistic sources but in order to prevent terrorist acts.

III. THE CRIME OF APOLOGY OF TERRORISM AND INCITEMENT TO TERRORISM²⁰

In its assessment of incriminating statements, which national courts have judged as inciting violence, or encouraging, justifying or supporting terrorism, the ECtHR takes a number of factors into consideration:

1. First of all, it considers the potential impact of the statement. Statements made in meetings of a commemorative character (see the case of *Gerger v. Turkey*), literary narratives (see the cases of *Arslan v. Turkey* and *Polat v. Turkey*), poetry (see the case of *Karatas v. Turkey*) or academic essays (see the case of *Baskaya and Okcuoglu v. Turkey*) have less impact than those made through the mass media. Therefore, the limits of permissible criticism in such publications are wider than in the mass media.
2. Likewise, the ECtHR holds that, regardless of their form, under Article 10, paragraph 2, of the ECHR there is little scope for restrictions of political speech (see the case of *Ceylan v. Turkey*), unless it contains incitement to violence. Moreover, the ECtHR considers who is voicing the criticism and against whom this criticism is directed. Therefore, the freedom of expression of political representatives is particularly protected (see the cases of *Castells v. Spain* and *Jerusalem v. Austria*), especially if they represent the opposition (*Castells*), because they defend the interests of their voters. The context in which the statement is made is also taken into account. Should an incriminating statement coincide with attacks or acts of violence, it is more likely to be regarded as a direct incitement to or justification of these acts (*Zana, Özgür Gündem*).

²⁰ See for more information on ECtHR cases mentioned in this paragraph [www.coe.int/t/dgbl/standardsetting/media/ConfAntiTerrorism/CODEXTER\(2004\)19_en.pdf](http://www.coe.int/t/dgbl/standardsetting/media/ConfAntiTerrorism/CODEXTER(2004)19_en.pdf)

3. Moreover, the ECtHR holds that the “*duties and responsibilities*” of media professionals assume special significance in times of conflict, when the media can become a vehicle for the dissemination of violence (see the cases of *Erdogdu v. Turkey* and *Dnce v. Turkey*). However, if the ECtHR is “*not convinced*” that the incriminating statement, although giving moral support to terrorist movements, could have had any “*harmful effect on the prevention of disorder and crime*” (Öztürk), then the statement falls under the scope of Article 10 of the ECHR. The decisive criterion in the ECtHR’s assessment is whether the statement incites people to violence or communicates that violence is a necessary and justified measure (see the cases against Turkey *Süreç no. 1, no. 3, and Zana*). If this is the case, penalties are regarded as a “*pressing social need*” and are therefore justified under Article 10, paragraph 2, of the ECHR²¹.
4. Finally, the ECtHR considers the severity of the measures taken in order to determine whether they were reasonably proportionate to the legitimate aims of preventing crime and disorder and could be justified as necessary in a democratic society (See the cases against Turkey *Ceylan, Mehdi Zana No. 2, Muslum Gündüz No. 2*).

Leroy v. France

The case concerns an attempt to defend acts of terrorism, praise and justify them. The impugned form of expression in this case was a cartoon representing the attack of 11 September 2001, with a caption parodying an advertising slogan: “*We all dreamt about it ... Hamas did it*”.

The court concluded, that the applicant’s conviction for complicity in condoning terrorism was justified and proportionate as “*the cartoon does not*

²¹ However in a judgment dealing with an alleged violation of Article 11 of the ECHR (*Refah*) the Grand Chamber of the ECtHR held that the Turkish government was justified in dissolving a political party that advocated a long-term policy of setting up a regime based on sharia, because this party did not explicitly exclude recourse to force in order to implement this policy.

criticise American imperialism [as the applicant suggested], but supports and glorifies its destruction by violent means”, thus freedom of expression was not impugned²².

C. Role of The National Human Rights Structures

I. IRELAND

The Irish Human Rights Commission (IHRC) keeps under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights, and makes such recommendations to the Government as it deems appropriate in relation to the measures which the IHRC considers should be taken to strengthen, protect and uphold human rights in the State.

For example, when the Criminal Justice (Surveillance) Bill 2009 was passed, IHRC made few observations, partly included in the final text of the law. The 2009 Bill provides the necessary legal framework for surveillance activities, including a number of vital safeguards, such as the requirement for judicial supervision of an authorisation for surveillance in most circumstances. For example, in applying for or authorising the exercise of surveillance powers the officer, superior officer or district court judge as the case may be, should be satisfied that the surveillance is the least intrusive means available, that the surveillance is proportionate to its objectives having regard to the likely impact on the rights of the person and that the duration of the measure is reasonably required to achieve its objectives. However, the Bill does not apply to surveillance carried on by private individuals.

In other circumstances the IHRC has urged the Government to advance legislative reform to effectively protect the right to private life in a manner that does not disproportionately impact upon the protection of other human rights.²³

²² *Case of Leroy v, France, application No. 36109/03 of 2 October 2008.*

²³ *See further recommendations of the Law Reform Commission in the Report on Privacy, Surveillance and the Interception of Communications, 1998; Consultation Paper on Privacy, Surveillance and the Interception of Communications, 1996.*

II. ESTONIA

The second main function of the Chancellor of Justice of Estonia is to serve as an ombudsman (i.e. like a commissioner or legal referee) and to verify whether institutions and officials who perform public functions comply with the constitutional rights and freedoms of persons and the principles of good governance. In this context, the Chancellor of Justice has reviewed the compatibility with the Estonian Constitution of the national mechanism of surveillance, which in Estonia is specified by four major legal acts. The main constitutional problem at securing internal and external security of the State consists in finding the balance between the fundamental rights of individuals and efficient functioning of state institutions responsible for security. For that it is essential to have an efficient supervision over surveillance activities. The main points of the expertise's review of the Office of the Chancellor of Justice are the followings:

How to achieve this balance?

- All legal acts have to be compatible with the constitution;
- A competent body must monitor this compatibility.

How is this monitoring implemented?

- The Prime Minister and the relevant ministers shall inform the committee of the activities of the security authorities and surveillance agencies and of supervision over their activities and submit an overview of such issues to the committee at least once in every six months;
- In order to perform its functions, the committee has the right to summon persons and require documents for examination;
- The committee shall submit an overview of the activities of the committee and the results thereof to the Riigikogu (Parliament of Estonia) at least once a year;
- If an offence is detected, the committee is required to forward the relevant materials to an investigative body or the Chancellor of Justice.

But there are still questions unanswered:

- Are these procedures effective?
- Should there be a separate ombudsman for these specific tasks?
- What should be the working method of this independent supervision mechanism (case-by-case, pick-and-choose, complaints etc)?

Last but not least:

- A negative aspect of the parliamentary committee's work is the lack of appropriate expertise, since MPs are mainly lawyers, with little experience on intelligence work.

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CHAPTER 4

*The protection of the rights of victims of terrorism**A. Not only a question of definition*

The growing concern for the victims of terrorism, in particular their protection, compensation and support are reflected in recent developments in international law. Good examples are at universal level the UN Security Council resolutions, including Resolution 1566 (2004) of 8 October 2004, and the International Convention for the Suppression of the Financing of Terrorism (Article 8, paragraph 4). Also a growing concern is manifested by the UN Global Counter-Terrorism Strategy, which was adopted by the General Assembly in 2006 and the organisation in Autumn 2008 of the first UN Symposium for the Victims of Terrorism.

The lack of a universal definition of torture triggers the lack of a definition for victims of terrorism. This issue is a key question in the context of the UN Global Counter Terrorism strategy of international victim support. In the framework of the United Nations, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted on 29 November 1985 by the General Assembly (A/RES/40/34) gives the following definition:

“Victims’ means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power”.

The Council of Europe is contributing to the UN work on the victims of terrorism with its European Convention on Compensation of Victims of

Violent Crimes (ETS No. 116, Article 2), the already mentioned Council of Europe Guidelines on Human Rights and the Fight against Terrorism (Guideline No. XVII), and the additional Guidelines on the protection of victims of terrorism (principle No. 1). In addition, there is also the already mentioned Committee of Ministers Rec.(2006)8, which is at present the most comprehensive CoE document for short and long term assistance and compensation, as well as for the definition of victims of terrorism.

Moreover, a specific article in the binding provision of the CoE Convention on Prevention of Terrorism (article 13) provides that *“Each Party shall adopt such measures as may be necessary to protect and support the victims of terrorism that has been committed within its own territory. These measures may include, through the appropriate national schemes and subject to domestic legislation, inter alia, financial assistance and compensation for victims of terrorism and their close family members”*.

The Commissioner for Human Rights considers that the protection afforded to victims might also include many other aspects, such as emergency and long-term assistance, psychological support, effective access to the law and the courts (in particular access to criminal procedures), access to information and the protection of victims’ private and family lives, dignity and security, particularly when they co-operate with the courts²⁴.

B. Case law of the European Court of Human Rights

Neither the European Convention on Human Rights nor the case law of the Court gives a definition of victim of a terrorist act, nor even of the word “victim”. The Court always preferred to adopt a case-by-case approach. The ECtHR never stated that there is a positive obligation of the states to compensate for the victims of terrorism. The relationship between victims of

²⁴ See the Commissioner’s Viewpoint *“Serious human rights violations during anti-terror campaign must be corrected - and never repeated”* (2008).

terrorism and the national justice systems, in particular the role of victims in legal proceedings and the existence of adequate safeguards for the protection of their dignity should be carefully explored and it will be dealt in chapter 5. However two cases against Italy dealt specifically with this matter.

1. *Mastromatteo v. Italy*²⁵

Complaint: the case concerns the death of the applicant's who was murdered by three criminals who were making their getaway after robbing a bank. It was subsequently proved that two of the three had been serving prison sentences pursuant to final criminal convictions for repeated violent offences.

Finding of the Court: in this case the Court observed that Article 2 of the Convention did not impose on States an obligation to provide compensation on the basis of strict liability.

2. *Maiorano and Others v. Italy*²⁶

Complaint: the case concerns the killing of the mother and the sister of the applicants, who were assassinated in 2005 by Mr Izzo at a time when the latter was serving a prison sentence on day-release. Relying in particular on Article 2 (right to life), the applicants alleged that by allowing Mr Izzo to benefit from a day-release scheme, the authorities had failed to protect their relatives' lives.

Finding of the Court: the Court found a violation of Article 2 (right to life) of the Convention, since the State was responsible in respect of a double murder committed by a dangerous offender on day release and failed to conduct a satisfactory investigation into individual negligence within the judicial system. In this case the Court imposed on the Italian State to compensate non-pecuniary damages to the relatives of the victims with a total amount of 45,000 Euros.

²⁵ *Mastromatteo v. Italy*, application No. 37703/97, 24 Ottobre 2002.

²⁶ *Case of Maiorano and Others v. Italy*, application No. 28634/06, 15 December 2009.

C. Examples of NHRs Action

I. DAGESTAN (RUSSIAN FEDERATION)

As said by Commissioner Hammanberg “There are of course also indirect victims of terrorism. One such category is formed by those who –though innocent– have been targeted by misdirected counter-terrorism actions. Human rights violations have been committed in the so-called war on terror. Such incompetent and unprincipled policies are of course no consolation to the direct victims of terrorist attacks – rather the opposite”²⁷.

The Russian Regional Ombudsman of Dagestan Region has provided participants with her experience of her dealing with victims of anti – terrorism actions conducted by the Russian military forces. Her briefing could be summarised as follows:

- The Ombudsman has a great deal to do in relation with the question of the legality of the actions of the law enforcement forces in anti terrorists activities. As results of these actions and the lack of effective judicial remedies civilians turn to the ombudsman office.
- Compensation should be paid from the budget of the Republic, which implies a practical financial issue involved in the compensation of victims, since there is no a separate system or budget allocated to compensation.
- While the way counter terrorist operations should be conducted are prescribed by law, they are carried out in a worrisome way²⁸.

²⁷ *Commissioner’s Viewpoint “Serious human rights violations during anti-terror campaign must be corrected - and never repeated” (2008).*

²⁸ *“The scope of Russia’s counterterrorism measures has been traditionally confined to military operations and security services’ efforts. This follows from Russia’s understanding of terrorism as an attack on the state rather than an assault on individual rights. Subsequently, in Russia, concerns over human rights have always receded to the background of counterterrorism planning and operations”. Russia’s Counterterrorism Policy: Variations on an Imperial Theme By Mariya Y. Omelicheva.*

www.terrorismanalysts.com/pt/index.php?option=com_rokzine&view=article&id=70

The Council of Europe, and in particular the European Court of Human Rights, has dealt with the issue extensively: an example of the exchanges on the issue between Russian authorities and the CoE Committee of Ministers could be found in the Information document CM/Inf/DH(2008)33 Addendum of 28 November 2008 *“Actions of the security forces in the Chechen Republic of the Russian Federation: general measures to comply with the judgments of the European Court of Human Rights”*²⁹.

²⁹ <https://wcd.coe.int/ViewDoc.jsp?id=1378559&Site=CM>

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CHAPTER 5

The protection of the rights of suspected or convicted terrorists

As seen before, there seems to be a lack of democratic control in matters of national security and more specifically as concerns anti-terrorists measures: the margin of appreciation left to the States is too broad. National Parliaments do not have sufficient investigative mechanisms at their disposal to counter the phenomenon.

The issue of the (lack of) protection of the rights of suspected or convicted terrorists is not an exception. The case of rendition flights is a striking example for which national investigation mechanisms have proved weak. The judiciary cannot solve this problem alone as it is made weak by the lack of political will and, in a few cases, it has proven to be deferential towards the executive. In a widespread situation where human rights are perceived to be opposed to national security arguments it has to be stressed once more that:

- a. Terrorism is a real threat and has to be fought;
- b. A proper system of check and balances is necessary;
- c. Human rights and strategic realism can coexist.

In this context, we have listed the following points to show possible areas of synergies between the judiciary and the NHRs in order to enhance protection of the rights of suspected or convicted terrorists.

A. Synergies between role of the judiciary and role of the NHRs

Supervision by the judiciary of counter terrorist activity (e.g. special police forces):

NHRSS' ROLE

- *to visit and monitor detention facilities, police stations, immigration centres, etc. (without intruding on the power of judiciary)*
- *to make pressure on the executive and the judiciary to prevent abuse of discretionary power and*
- *to oppose the recourse to the intelligence instead of "ordinary" investigative methods*

Application by the judiciary of criminal law to punish convicted terrorists:

NHRSS' ROLE

- *to advise the legislator*
- *to advise the executive*

Granting compensation to victims terrorism and victims of counter terrorism measures:

NHRSS' ROLE

- *Advocating in support of vulnerable groups/persons*
- *Supporting NGOs and victims associations*

Supervision of the serving of the sentence:

NHRSS' ROLE

- *to visit and monitor detention facilities*

Additional roles:

NHRSS' ROLE

- *to raise awareness,*
- *to counter stereotypes*
- *to submit test cases to national courts and the ECtHR*
- *to remind structural/ social causes of terrorism*
- *to support civil society structures and human rights defenders*

B. Case law of the European Court of Human Rights

I. EFFECTIVENESS OF THE NATIONAL JUDICIAL SYSTEM IN THE RESPONSE TO TERRORISM

The habitual criteria measuring the effectiveness of a judicial system assume particular significance where the fight against terrorism is concerned. *“That means that all the investigative means appropriate to both the discovery and the suppression punishment of terrorist offences must be used in such a way that they also comply with the principles deriving from the European Convention on Human Rights”*³⁰. It is therefore possible to speak of an efficient response by the judicial systems only in so far as the response does not overstep the bounds thus determined, while at the same time taking into account the evolutionary nature of the case-law of the Court.

1. Osmanoglu v. Turkey

In this case the applicant alleged that his son was abducted by the Turkish security forces and that he subsequently disappeared and that the authorities’ failed to carry out an adequate investigation into those allegations. Also relying on Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life), the applicant complained about the prolonged distress and anguish caused by his son’s disappearance and lack of an effective investigation Judgment- disappearance of applicant’s son.

The Court concluded that there had also been a violation of Article 2 on account of the total failure to carry out an investigation into the disappearance and presumed death of the applicant’s son. The Court also found that the applicant had suffered, and continued to suffer, distress and anguish as a result of the disappearance of his son and his inability to find out what had happened to him. The manner in which his complaints had been dealt with by the authorities had to be considered to constitute inhuman treatment, in violation of Article 3.

³⁰ *European Commission for the Efficiency of Justice (CEPEJ) Evaluation Report on the efficiency of the national judicial systems in their responses to terrorism* Document prepared by Mr Ph. de Koster (Belgium). [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2004\)13&Sector=secDGHL&Language=lanEnglish&Ver=rev1&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2004)13&Sector=secDGHL&Language=lanEnglish&Ver=rev1&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6)

2. *Ouldh Dah v. France*

The Court declared inadmissible the application concerning the conviction of a Mauritanian army officer by a French court for acts of torture committed in Mauritania. The application was lodged with the European Court of Human Rights on 22 April 2003. Relying on Article 7 of the European Convention on Human Rights (no penalty without law), Mr Ould Dah complained that he had been prosecuted and convicted in France for an offence committed in Mauritania, whereas he could not have foreseen that French law would override Mauritanian law.

The Court reiterated the “absolute necessity” of prohibiting and penalising torture thus justified, in the exercise of universal jurisdiction (i.e. the right of States to prosecute the perpetrators of acts of torture committed outside their own jurisdiction), not only that the French courts declared that they had jurisdiction to try the case, but also that they would apply French law. Otherwise, application of the Mauritanian amnesty law, which served merely to grant impunity to the perpetrators of torture, would deprive the universal jurisdiction provided for by the United Nations Convention of 1984 of its substance. Like the United Nations Committee of Human Rights and the International Criminal Tribunal for former Yugoslavia, the Court considered that an amnesty law was generally incompatible with the duty on States to investigate acts of torture or barbarity.

3. *Salduz v. Turkey*

In this case the applicant, relying on Article 6 §§ 1 and 3 (c) of the ECHR, complained that he had been denied legal assistance while in police custody and that he had not had access to the written opinion of the Principal Public Prosecutor at the Court of Cassation.

The Court considered that, even though the applicant had had the opportunity to challenge the evidence against him at his trial and subsequently on appeal, the absence of a lawyer during his period in police custody had irretrievably affected his defence rights. There had therefore been a violation of Article 6 § 3 (c) in conjunction with Article 6 § 1. Moreover as concerns the non-communication of the written opinion of the Principal

Public Prosecutor at the Court of Cassation, the Court considered, that the applicant's right to adversarial proceedings has been breached and there had therefore been a violation of Article 6 § 1.

II. ABSOLUTE PROHIBITION OF TORTURE ALSO IN CONNECTION TO EXTRADITION AND EXPULSION

Starting from the leading case of *Soering v. United Kingdom*³¹ the Court has constantly affirmed that a contracting state is in violation of its obligations under the ECHR if it exposes a person to the likelihood of treatment contrary to Article 3 in a place outside its own jurisdiction. In the case of *Chahal v. United Kingdom*, the Court reiterated that the prohibition of deportation to face treatment contrary to Article 3 is absolute, irrespective of the victim's conduct and residential status. More recently, in the case of *Saadi v. Italy*³², the Strasbourg Judges have noted that even if the terrorist threat has increased, the new circumstances would not call into question the conclusions of the Chahal judgment concerning the consequences of the absolute nature of Article 3, despite the fact that the applicant entered and stayed in Italy irregularly and was suspected by the Ministry of Interior of Italy to be a terrorist.

1. N. v. Finland

The Court affirmed that contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including their obligations under the Convention, to control the entry, residence and expulsion of aliens. However States cannot escape their duties under the ECHR by arguing that immigration control is a key attribute to their national sovereignty.

³¹ Application no. 14038/88, 7 July 1989 <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695496&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

³² Application no. 37201/06, 28 February 2008 <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=829510&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

2. Soering v. UK

A leading case affirming that a contracting state is in violation of its obligations under the ECHR if it exposes a person to the likelihood of treatment contrary to Article 3 in a place outside its own jurisdiction.

3. Chahal v. UK

A case reiterating that the prohibition of deportation to face treatment contrary to Article 3 is absolute, irrespective of the victim's conduct.

4. Saadi v. Italy

Case noting that even if the terrorist threat has increased, the new circumstances would not call into question the conclusions of the Chahal judgment concerning the consequences of the absolute nature of Article 3.

C. Examples of NHRSs Action

I. MONTENEGRO

The action of the Ombudsman of Montenegro is a good example on how NHRSs can put pressure on the judiciary to act in accordance with fair trial ECtHR standards in the following way:

- The Ombudsman is currently reviewing the compatibility of the criminal law and law on police with international standards and the constitution of Montenegro.
- Recently the law on police intelligence services was reformed, in the sense that it allows for a monitoring mechanism by the parliament, civil society, and ombudsman.
- The Ombudsman in the past was involved in the aftermath of the “flight of the eagle” operation where various people were arrested on suspicion of preparing a terrorist act. Some of the suspected filed a complaint to the ombudsman claiming they had been ill treated (including torture) in order to get information. The case was referred to the public prosecutor. The Ombudsman also started an investigation on whether this police behaviour was according to the law. This inves-

tigation established that torture occurred, police behaviour was unlawful and the public should be informed. The Ombudsman concluded that there cannot be any justification to torture: even when persons are suspected terrorist they deserve the same procedural rights as others

II. IRELAND

The broad overall power of the Irish Human Rights Commission is to review adequacy and effectiveness of law and practice in relation to human rights and to make recommendations to the government on the measures that should be taken. In accordance with power the IHRC initiated a dialogue with the Department of Foreign Affairs on the issue of “extraordinary rendition³³” flights in 2005 following reports on US aircrafts landing on Irish territory. In its first letter to the Minister of Foreign Affairs IHRC pointed out the unlawfulness of these practices under the CAT, ECHR. Meanwhile a number of investigations were initiated in relation to the issue. In particular:

1. The Parliamentary Assembly of the Council of Europe commissioned an investigation by Dick Marty, which concluded that there was no doubt that “extraordinary rendition” took place and that a number of secret detention centres existed in Europe. The report also concluded that details flight logs clearly indicated aircraft involved in the “*extraordinary rendition*” has stopped over in Ireland.
2. The Secretary General of the Council of Europe, Mr Terry Davis invoked the seldom used article 52 procedure under the ECHR.
3. A temporary Committee of the European Parliament was established to investigate the issue.
4. IHRC through law released a legal opinion concluding that the Council of Europe Member states are under the obligation to prevent a prisoner’s exposure to risk of torture.

³³ *Kidnapping of an individual by the agents of state followed by their transfer to a secret prison in another state where s/he can be subjected to torture or other ill- treatment.*

CONCLUSIONS

Throughout all this debriefing paper, for each of the topics mentioned above, the NHRS's action tools were examined. However, it appears relevant to deliver a synthesis of the role of NHRSs. The discussions showed that a number of NHRSs represented at the workshop have dealt with anti terrorists measures, either in the context of individual cases or by commenting and advising on their countries' action to counter terrorism.

A. At national level

As regards the respect of human rights in counter-terrorists measures, NHRSs are in the unique position to be close to the “powerbrokers” in their respective countries while their task is to monitor and safeguard the respect of human rights. Concerning long term measures to address the causes of terrorism and to avoid the fertile breeding grounds for further recruitment of future terrorists, NHRSs have the know-how and the credibility in the society “to initiate, insist on and facilitate dialogue between conflicting parties within a common consensual framework”³⁴. As concerns the proper conduct of counter-terrorist measures by the State within human rights parameters, NHRSs “play a vital role in reviewing and commenting on the human rights aspects of security legislation”³⁵ and are well placed to monitor the application of legislation and administrative provisions. NHRSs' role includes therefore:

- Stimulating the judiciary as mentioned in chapter 5;
- Advising on legislation and advising the executive;
- Assisting in oversighting the accountability mechanisms, of law enforcement personnel, state officers, including auditing counter terrorism structures;

³⁴ *Welcoming Speech by Mr Morten Kjaerum Chairperson of the ICC at the 2004 Seoul Conference of NHRI*

³⁵ *Seoul Declaration adopted at the 2004 Seoul Conference of NHRI*

- Visiting places of detention;
- Lobbying for the establishment of OPCAT national preventive mechanisms (NPM) where they do not exist;
- Opposing to the recourse solely to the intelligence instead of ordinary investigative methods;
- Advocating in support of vulnerable groups/persons;
- Supporting NGOs and victims associations;
- Advising individuals and the public and sustaining human rights defenders;
- Underlining structural and social causes of terrorism;
- Countering hate speech in the media.

EXAMPLES OF MONITORING GOVERNMENT’S COMPLIANCE WITH HUMAN RIGHTS STANDARDS:

- 1) Ireland. *The statute of the Human Rights Commission (IHRC) according to its 2000 Act indicates as its tasks: “to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights”, and to make recommendations to Government about measures “to strengthen, protect and uphold human rights in the State”. In this context it is relevant to mention the activity of the IHRC in relation to the transfer of persons to locations where they may be subjected to torture, inhuman and degrading treatment (rendition flights).*
- 2) Montenegro. *Complaints concerning police behaviour were submitted in relation to an anti-terrorist action of the police “Eagle’s flight” in autumn 2006. The Ombudsman called for attention to the need for appropriate police behaviour.*

B. At international level

The activities of the European Group (EG) of National Human Rights Institutions (NHRIs) are good examples of NHRs role at international level³⁶. The EG comprises around 20 “A” status members and around 15 observer members. The French HR Commission chaired the European Group

³⁶ <http://www.nhri.net>

from 2002 to 2006. Presently the Irish HR Commission is chairing the EG. The EG gives a significant place to the counter-terrorism issue, within its own internal strategy. This work is reflected in the Berlin and Athens declarations, as well as in the EG Strategic Plan for 2009-2010 which identifies, as one of the two priority areas, the networking on the respect of rule of law in counter-terrorism measures.

A. The Berlin declaration (2004) on the protection of human rights in the context of the fight against terrorism

Basic principles:

- to uphold human rights standards in the context of counter-terrorism measures;
- to uphold the importance of the rule of law including precise legal definitions of terrorism- related and other crimes.

Commitments of the NHRIs:

- to scrutinise measures taken or proposed by States to combat terrorism so that there are corresponding safeguards adequately protecting human rights and the rule of law;
- to ensure that governments do not permit anti-terrorism measures to be applied abusively in contexts such as immigration control and criminal activities resulting in unjustifiable discrimination;
- to scrutinise the activities of police and surveillance agencies, the decisions taken by data protection authorities and the judgments of courts in order to assess their compliance with international human rights standards;
- to raise awareness and understanding;
- to share experience.

B. The Athens Declaration and Plan of Action (2006) on potential follow-up role for NHRIs on the question of rendition flights raised in the Council of Europe

Basic principles:

- all counter-terrorism measure adopted by States must be in strict compliance with international human rights law, refugee law, and humanitarian law.

Commitments of the NHRIs:

- to call on states to fulfil their obligations;
- to give careful consideration to proposals by the Secretary General of the Council of Europe regarding the elaboration:
 1. of basic principles and guidelines for the legislative and administrative framework for the organisation and functioning of security services;
 2. of human rights model clauses to be inserted in bilateral or multilateral agreements concerning over flight;
 3. of legal instruments regarding waivers of State immunity in cases of serious human rights violations;
- to provide advice to State authorities on the adoption of policy and legislative measures and should draw attention to the need to ensure that there be an adequate parliamentary and judicial control of the activities of security agencies.

C. Work of the European Group with the Council of Europe

1. The work with CODEXTER (intergovernmental committee of experts on terrorism)

The European Group participated in the work of the CODEXTER when drafting the Convention on the Prevention of Terrorism of 2005, following an invitation by the office of the Commissioner for HR to NHRIs, asking them to make comments on the draft Convention to the Commissioner.

2. The work with DH-S-TER (Group of specialists on HR and the fight against terrorism)

The DH-S-TER benefited from the very active contribution of the observers who submitted texts on behalf of the EG and participated in the discussion. The EG commented the draft Guidelines on the Protection of Victims of Terrorist Acts in October 2004. The EG then drafted a common position in December 2005 on the use of diplomatic assurances in the context of expulsion procedures and the appropriateness of drafting a legal instrument relating to such use at the time when the DH-S-TER was examining the

possibility and opportunity of adopting an instrument regulating the use of diplomatic insurances. In its paper the EG asked not to draft minimal norms or conditions, as this would give a de facto legitimacy to practices that are incompliant with international law.

D. Work of the European Group of experts in EU migration and asylum

In 2007, the EG has set up a network of experts in EU migration and asylum issues, with the long-term goal to have an impact on EU legislation and practices in that area. The German Institute for human and the Belgian Centre for equal opportunity and opposition to racism act as coordinators of the network. At its first meeting, it was decided that the network would focus on the topic of rights and status of persons, who cannot be expelled and to adopt a common position on this matter. This common position should be the basis for common action of the European National Human Rights Institutions throughout the 2nd stage of harmonization of EU-legislation in immigration and asylum law (envisaged to last till 2010). A questionnaire was sent to members of the network to get an overview of national legislation on this matter.

E. Conclusions

To conclude, work regarding counter-terrorism has taken place both at a national level by NHRs acting individually on policies commonly agreed on, or at a European level by the EG as such. This has allowed for expertise sharing, brought more weight to NHRs arguments, given visibility to their work and has been an essential element in the current context, when most of the legislation on counter terrorism measures is being drafted at the European level.

APPENDIXES

List of background documents

UNITED NATIONS

Treaties

- Instruments developed under the auspices of the United Nations and its specialized agencies and the International Atomic Energy Agency (IAEA).
- 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft (Aircraft Convention)
- 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Unlawful Seizure Convention)
- 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Civil Aviation Convention)
- 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (Diplomatic agents Convention)
- 1979 International Convention against the Taking of Hostages (Hostages Convention)
- 1980 Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention)
- 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Extends and supplements the Montreal Convention on Air Safety) (Airport Protocol)
- 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Maritime Convention)
- 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
- 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (Fixed Platform Protocol)
- 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention)

- 1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention)
- 1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention)
- 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention)

COUNCIL OF EUROPE

Treaties

- European Convention on Human Rights
<http://www.echr.coe.int>
- European Convention on the Suppression of Terrorism [ETS No. 90] and Amending Protocol [ETS No. 190]
- European Convention on Extradition [ETS No. 24] and first and second Additional Protocols [ETS No. 86 and ETS No. 98]
- European Convention on Mutual Assistance in Criminal Matters [ETS No. 30] and first and second Additional Protocols [ETS No. 99 and ETS No. 182]
- European Convention on the Transfer of Proceedings in Criminal Matters [ETS No. 73]
- European Convention on the Compensation of Victims of Violent Crimes [ETS No. 116]
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime [ETS No. 141]
- Convention on Cybercrime [ETS No. 185] and Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems [ETS No. 189]
- Council of Europe Convention on the Prevention of Terrorism [CETS No. 196]
- Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism [CETS No. 198]

Committee of Ministers

- Resolution (74) 3 on International terrorism
- Declaration on Terrorism (1978)

- Recommendation R (82) 1 concerning International Co-operation in the Prosecution and Punishment of Acts of Terrorism
- Tripartite Declaration on Terrorist Acts (1986)
- Recommendation (2001) 11 concerning Guiding Principles on the Fight against Organised Crime
- Declaration on the Fight against International Terrorism (2001)
- Guidelines on Human Rights and the Fight against Terrorism (2002) and the Guidelines on the Protection of Victims of Terrorist Acts (2005)
- Declaration on freedom of expression and information in the media in the context of the fight against terrorism (2005)
- Recommendation Rec(2005)7 of the Committee of Ministers to member states concerning identity and travel documents and the fight against terrorism
- Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice
- Recommendation Rec(2005)10 of the Committee of Ministers to member states on “special investigation techniques” in relation to serious crimes including acts of terrorism
- Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims
- Recommendation Rec(2007)1 of the Committee of Ministers to member states regarding co-operation against terrorism between the Council of Europe and its member states, and the International Criminal Police Organization (ICPO – Interpol)
- Guidelines on protecting freedom of expression and information in times of crisis (2008)

Parliamentary Assembly

- Recommendations No. 684 (1972) and 703 (1973) on International Terrorism
- Recommendation No. 852 (1979) on Terrorism in Europe
- Recommendation No. 916 (1981) on the Conference on the Defence of Democracy against Terrorism in Europe – Tasks and Problems
- Recommendations No. 941 (1982) and 982 (1984) on the Defence of Democracy against Terrorism in Europe

- Recommendations No. 1024 (1986) and Resolution No. 863 (1986) on the European Response to International Terrorism
- Recommendation No. 1170 (1991) on strengthening the European Convention on the Suppression of Terrorism
- Recommendation No. 1199 (1992) on the Fight against International Terrorism in Europe
- Resolution No. 1132 (1997) on the Organisation of a Parliamentary Conference to reinforce Democratic Systems in Europe and Co-operation in the Fight against Terrorism
- Recommendation No. 1426 (1999) and Order 555 (1999) on European Democracies facing up to Terrorism
- Recommendation No. 1534 (2001) and Resolution No. 1258 (2001) on Democracies facing Terrorism
- Recommendation No. 1550 (2002) and Resolution No. 1271 (2002) on Combating Terrorism and Respect for Human Rights
- Recommendation No. 1549 (2002) on Air Transport and Terrorism: how to enhance security
- Recommendation No. 1584 (2002) on the Need for Intensified International Co-operation to Neutralise Funds for Terrorist Purposes
- Recommendation No. 1644 (2004) on Terrorism: a threat to democracies
- Resolution 1367 (2004) on Bioterrorism: a serious threat for citizens' health
- Resolution 1400 (2004) on the Challenge of terrorism in Council of Europe member states
- Recommendation 1677 (2004) on the Challenge of terrorism in Council of Europe member states
- Recommendation 1687 (2004) on Combating terrorism through culture
- Recommendation 1706 (2005) on Media and Terrorism
- Recommendation 1713 (2005) on the Democratic oversight of the security sector in member states
- Resolution 1507 (2006) and Recommendation 1754 (2006) on Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member States

Congress of Local and Regional Authorities

- Recommendation 134 (2003) and Resolution 159 (2003) on Tackling Terrorism - the role and responsibilities of Local Authorities

European Commission against Racism and Intolerance (ECRI)

- European Commission against Racism and Intolerance (ECRI) General Policy Recommendation N°8 on combating racism while fighting terrorism (2004)
- European Commission against Racism and Intolerance (ECRI) General Policy Recommendation N° 11 on combating racism and racial discrimination in policing (2007)

Consultative Council of European Judges (CCJE)

- Opinion no 8 prov. (2006) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on “the role of judges in the protection of the rule of law and human rights in the context of terrorism”

Selected judgments of the European Court of Human Rights

- *Amann v. Switzerland and Rotaru v. Romania*
Cases relating to intelligence accountability dealt with the “accordance with law” requirement. In several European States aspects of the legal basis have been found to be inadequate.
- *Klass and Others v. Germany and Weber and Saravia v. Germany*
Cases regarding the control systems for security intelligence and in relation to the specific issues of surveillance and records/screening.
- *Leander v. Sweden and Segerstedt-Wiberg v. Sweden*
Cases concerning remedies as regards security screening.
- *A. and others v. the United Kingdom.*
Case focusing on the statutory scheme under which non-British suspects of involvement in terrorism were detained indefinitely.
- *Kurt v. Turkey*
Case dealing with the issue of disappearance: reiteration of Court’s case-law on fundamental importance of Article 5 guarantees for protection of physical liberty and personal security of individuals. Unacknowledged detention of an individual must be considered a negation of these guarantees – assumption by authorities of control over individual requires them to account for individual’s whereabouts – Article 5 requires that authorities take effective measures to safeguard against risk of disappearance and to conduct prompt effective investigation into arguable claim that an individual has not been seen since being taken into custody.

- *N. v. Finland*
Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including their obligations under the Convention, to control the entry, residence and expulsion of aliens. However states cannot escape their duties under the ECHR by arguing that immigration control is a key attribute to their national sovereignty.
- *Soering v United Kingdom*
Leading case affirming that a contracting state is in violation of its obligations under the ECHR if it exposes a person to the likelihood of treatment contrary to Article 3 in a place outside its own jurisdiction.
- *Chahal v United Kingdom*
Case reiterating that the prohibition of deportation to face treatment contrary to Article 3 is absolute, irrespective of the victim's conduct.
- *Saadi v Italy*
Case noting that even if the terrorist threat has increased, the new circumstances would not call into question the conclusions of the Chahal judgment concerning the consequences of the absolute nature of Article 3.

The Commissioner for Human Rights

- Viewpoints
- “After the human rights breakdown during the “war on terror”, the damage must be assessed and corrective action taken”
- “Europe must open its doors to Guantanamo Bay detainees cleared for release”
- “Arbitrary procedures for terrorist black-listing must now be changed”
- “Fighting terrorism – learn the lessons from Northern Ireland”
- “Serious human rights violations during anti-terror campaign must be corrected - and never repeated”
- “The Guantánamo scandal is also our concern”

OTHER USEFUL LINKS AND DOCUMENTS

- National Human Rights Institutions Forum: countering terrorism
<http://www.nhri.net/default.asp?PID=284&AFD=0>
- Country profiles on counter-terrorist capacity
http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Fight_against_terrorism/4_Theme_Files/Country_Profiles/

- Uniting Against Terrorism: Recommendations for a global counter-terrorism strategy
Report of the UN Secretary-General
<http://www.un.org/unitingagainstterrorism>
- United Nations web site dedicated to the fight against terrorism
<http://www.un.org/terrorism/instruments.shtml>
- EU web site dedicated to the fight against terrorism
http://ec.europa.eu/justice_home/fsj/terrorism/fsj_terrorism_intro_en.htm
- OSCE web site dedicated to the fight against terrorism
<http://www.osce.org/activities/13032.html>
- Council of Europe's web site dedicated to the fight against terrorism
http://www.coe.int/t/e/legal_affairs/legal_co-operation/Fight_against_terrorism
- "Assessing damage, urging action" report published by the International Commission of Jurists on terrorism, counter terrorism and human rights
<http://ejp.icj.org/IMG/EJP-Report.pdf>

Workshop programme

TUESDAY, 9 JUNE 2009

Arrival of participants

18.30 – 19.00 Welcome reception

19.00 – 20.15 **Opening session**

Words of welcome and presentation of issues addressed by the workshop

by STEFANO VALENTI, P2P Project manager, Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua

Counter-terrorist measures and protection of human rights: issues at stake

by Professor PAOLO DE STEFANI, Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua

20.30 Dinner

WEDNESDAY, 10 JUNE 2009

9.30 – 11.00 **Working session 1 – Counter-terrorist measures and the rights of members of the public at large:**

- Arbitrary procedures for terrorist black-listing and violation of the right to privacy, the right to property, the right of association, the right to travel or freedom of movement;
- Correlation between counter-terrorist measures and the protection of the freedom of the media;
- Correlation between counter terrorist measures and freedom of expression: the crime of apology of terrorism and incitement to terrorism.

Introductory presentation: the protection of the rights of the public at large and the Council of Europe's activities in the field of the fight against terrorism

by ALEXANDRE GUESSEL, Council of Europe's Anti-Terrorism Co-ordinator

Overview of the pertinent case law of the European Court of Human Rights

by SILVIA DI MARTINO, Head of Division, Registry of the European Court of Human Rights

11.00 – 11.30 Coffee break

11.30 – 13.00 Discussion and exchange of experiences with contributions namely from the NHRs of France and Estonia

13.00 – 15.00 Lunch break

15.00 – 16.15 Working session 2 – The protection of the rights of victims of terrorism:

- Protection and compensation of victims of terrorism;
- Protection of witnesses and collaborators of justice;
- Effectiveness of national judicial system in their responses to terrorism.

Introductory presentation

by ALBINA OVCEARENCO, Co-Secretary of the Council of Europe’s Committee of Experts on Terrorism (CODEXTER)

Overview of the pertinent case law of the European Court of Human Rights

by SILVIA DI MARTINO,

Discussion and exchange of experiences with contributions namely from the NHRs of Dagestan Republic (Russian Federation)

16.15 – 16.45 Coffee break

16.45 – 18.00 Discussion continued

20.30 Dinner

THURSDAY, 11 JUNE 2009

9.00 – 10.30 Working session 3 – The protection of the rights of suspected or convicted terrorists:

- Absolute prohibition of torture also in connection with extradition and expulsion
- Arrest and detention
- Right to a fair hearing
- Penalties

Introductory presentation

by Professor PAOLO DE STEFANI

Overview of the pertinent case law of the European Court of Human Rights

by SILVIA DI MARTINO

Discussion and exchange of experiences with the contributions namely from the NHRs of Ireland and Montenegro

10.30 – 11.00 Coffee break

11.00 – 13.00 Discussion continued

13.00 – 13.45 Winding-up of the workshop

by STEFANO VALENTI

13.45 Close of the workshop

14.00 – 15.00 Lunch

15.00 – 19.00 Guided tour of the city of Padua or transfer to Venice

20.30 Dinner

FRIDAY, 12 JUNE 2009

Departure

List of participants

I. HUMAN RIGHTS STRUCTURES FROM COUNCIL OF EUROPE MEMBER STATES

ALBANIA

People's Advocate

TIRANA (AL) - Blv. "Deshmoret e Kombit" 3

Tel.: +355 4 232 462 - Fax : +355 4 226 095

E-mail: ap@avokatipopullit.gov.al

Web site: www.avokatipopullit.gov.al/English/index.htm

MR. ARTUR LAZEBEU, Director of Cabinet

ARMENIA

Human Rights Defender

375019 YEREVAN (AM) - 56a Pushkin Street

Tel.: +374 10 53 88 42 - Fax: +374 10 53 88 42

E-mail: ombuds@ombuds.am - Web site: www.ombuds.am/main/en

MS. SONA MANUSYAN, Specialist, Department of International Affairs

AZERBAIJAN

Commissioner for Human Rights

1000 BAKU (AZ) - 40, Uzeyir Hajibeyov St. (Dom Pravitelstva)

Tel.: +99 412 498 23 65/8721/8506 - Fax: +99 412 498 23 65

E-mail: ombudsman@ombudsman.gov.az - Web site: www.ombudsman.gov.az

MR. VUGAR HEYDAROV, Chief advisor in the Unit of Information and Public Relations

MR. VUGAR HUMMATOV, Head of the Quba Regional Centre

BOSNIA AND HERZEGOVINA

Institution of the Human Rights Ombudsman of Bosnia and Herzegovina

Field office Sarajevo

71 000 SARAJEVO (BA) - Ulica Grbavička broj 4

Tel.: +387 33 666 005 / 006 - Fax: +387 33 666 004 / 007

E-mail: info@ombudsmen.gov.ba, njosipovic@ombudsmen.gov.ba

Web site: www.ombudsmen.gov.ba

MR. LJUBOMIR SANDIC, Ombudsman

MS. EMINA HALILOVIC, Office of the Ombudsman of Bosnia and Herzegovina

ESTONIA

Chancellor of Justice

15193 TALLIN (EE) - 8 Kohtu Street

Tel. + 372 693 8445 - Fax: + 372 693 8401

E-mail: info@oiguskantsler.ee

MR. JAANUS KONSA, Adviser

FRANCE

French Human Rights Commission

75007 PARIS (FR) - 35, rue Saint Dominique

Tel. +33 142758712 - Fax +33 142757714

Web site: www.cncdh.fr

MS. NOÉMIE BIENVENU, Chargée de Mission

GEORGIA

Office of the Public Defender

0105 TBILISI (GE) - 11 Machabeli Str.

Tel: +995 32 922 479/477/480 - Fax: +995 32 92 24 70

E-mail: info@ombudsman.ge - Web site: www.ombudsman.ge/eng

MS. NANA SHEROZIA, Specialist, Division of Justice

MS. TAMAR KEMULARIA, Adviser to the Public Defender

IRELAND

Irish Human Rights Commission

DUBLIN 1 (IRL) - Fourth Floor, Jervis House, Jervis Street

Tel.: + 353 (0)1 858 9601 - Fax : + 353 (0)1 858 9609

E-mail: info@ihrc.ie, eurochair@ihrc.ie - Web site: www.ihrc.ie

Ms. ROISIN HENNESSY, Senior Research and Policy Officer

MOLDOVA

Centre for Human Rights of Moldova

2012 CHISINAU (MD) - 16 Sfatul Taril Str.

Tel: +373 22 23 48 00 - Fax: +373 22 22 54 42

E-mail: cpdom@mdl.net - Web site: www.ombudsman.md/en.html

MR. ALEXANDRU POPA, Lawyer

MONTENEGRO

Office of the Ombudsman

81000 PODGORICA (ME) - Atinska ulica 42, Gorica C

Tel. +382 (0)81 655 515; 655 517 - Fax: +382 (0)81 655 517

E-mail: ombudsman@cg.yu , ombudsman.pr@cg.yu

Web site: www.ombudsman.cg.yu/eng/index.htm

Ms. MARIJANA LAKOVIC, Deputy Ombudsman

Ms. MARINA PERISIC, Adviser

POLAND

Commissioner for Civil Rights Protection of the Republic of Poland (Ombudsman)

00 - 090 Warsaw (Poland) - Aleja Solidarności 77

Tel. (+ 48 22) 5517700 - 5517937 - Fax: (+ 48 22) 827 64 53

E-mail: rzecznik@brpo.gov.pl

MR. MIROSLAW WROBLEWSKI , Director of the Department for Constitutional
and International Law

RUSSIAN FEDERATION

Office of the Commissioner for Human Rights in the Republic of Dagestan

367005 REPUBLIC OF DAGESTAN, Makhachkala (RUS)

Lenin Square, 2 Building of State Office “President-Complex”

Tel./Fax: 007 8722 678799

E-mail: dag.ombudsman@mail.ru

MS. UMMUPAZIL AVADZIEVNA OMAROVA, Commissioner for Human Rights

Ombudsman Office of Karachaevo-Cherkesskaya Republic

CHERKESSK (RUS) - St. Krasnoarmeiskaya 59/80

Tel. +78782254-444, 5-1763 - Fax: +7 87822 5-5405, 54344

E-mail: nskchr@mail.svkchr.ru

MR. VLADIMIR TITARENKO, Ombudsman

Ombudsman Office of Rostovskaya Oblast

Rostov na Donu (RUS)

Tel./Fax: +7 8632 800601, 800604, 800611

E-mail: ombudsman@donland.ru

MR. ANATOLIY KHARKOVSKIY, Ombudsman

SERBIA

Office of the Protector of Citizens

11000 BELGRADE (RS) - Bulevar Mihajla Pupina No.2

Tel: +381 11 301 45 17 - Fax: +381 11 311 28 74

Web site: www.zastitnik.gov.rs

MS. JELENA UNIJAT, Counselor in the Department for human rights and freedoms and rights of persons deprived of liberty

Office of the Provincial Ombudsman of Autonomous Province of Vojvodina
21000 NOVI SAD (RS) - Bulevar Mihajla Pupina 25
Tel. +381 214874144
E-mail: office@ombudsmanapv.org; ombudsmanapv@gmail.com
Web site: www.ombudsmanapv.org

MR. STEVAN ARAMBASIC, Deputy Ombudsman for General Human Rights Issues

UKRAINE

Office of the Parliamentary Commissioner for Human Rights
01008 KIEV (UA) - 21/8, Instytutska Boul.
Tel: +380 44 253 34 37, 253 61 71 - Fax: +380 44 226 24 19
E-mail: foreign@ombudsman.gov.ua - Web site: www.ombudsman.kiev.ua

MR. VALERII ABLAZOV, Advisor

II. OTHER PARTICIPANTS

COUNCIL OF EUROPE

67075 STRASBOURG Cedex (FR)

MS. SILVIA DI MARTINO, Head of Division, Registry of the European Court of Human Rights

MR. ALEXANDRE GUESSEL, Council of Europe's Anti-Terrorism Co-ordinator

MS. ALBINA OVCEARENCO, Co-Secretary of the Council of Europe's Committee of Experts on Terrorism (CODEXTER)

INTERNATIONAL OMBUDSMAN INSTITUTE

08003 BARCELONA (ES) - Passeig de Lluís Companys, 7
Web-site: www.sindic.cat

MR. JORDI REIXACH RAMOS, Consultant of the Social Affairs and Public Security Department of the Office of the Catalan Ombudsman

THE OMBUDSPERSON INSTITUTION IN KOSOVO³⁷

PRISTINA - Agim Ramadani St, nn. (formerly "Kosovodrvo" building, nn)

Tel. +381 38 501 401, 545 303 - Fax: +381 38 545 302

E-mail: ombudsperson@ombudspersonkosovo.org

Web-site: www.ombudspersonkosovo.org

MR. ISUF SADIKU, Senior Lawyer

MS. DRAGANA RODIC, Senior Lawyer

ST PETERSBURG STRATEGY CENTRE OF HUMANITIES AND POLITICAL SCIENCE

190005 ST PETERSBURG (RUS) - 25/14 7th Krasnoarmeyskaya Street

Tel. +7 812 712 66 12

Web-site: <http://strategy-spb.ru/en>

MR. ALEXANDER NEZDYROV

III. EXPERTS

MR. PAOLO DE STEFANI

Interdepartmental Centre on human rights and the rights of peoples

University of Padua

35137 PADOVA (I) - Via Martiri della Libertà, 2

MS. ORSOLYA JENEY, Independent Expert

1093 BUDAPEST (HU) - Bakats u. 1-3

³⁷ *All reference to Kosovo, whether to the territory, institutions or population, in this document shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.*

IV. ORGANISERS

Interdepartmental Centre on Human Rights and the Rights of Peoples

University of Padua

35137 PADOVA (I) - Via Martiri della Libertà, 2

Tel: +39 049 827 1817 - Fax: +39 049 827 1816

Web site: www.centrodirittiumani.unipd.it

MR. STEFANO VALENTI, P2P Project Manager

MS. CINZIA CLEMENTE, P2P Project Assistant

V. INTERPRETERS

MR. ANDREI BOURTZEV

MR. ERIC HARLEY

ISKRA KURTALIC

MR. ANDREJA MONTANI

MS. BILJANA OBRADOVIC

MS. LUDMILA VALKOVA

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This project aims at setting up an active network of independent non-judicial human rights structures in Council of Europe member States.
