



DANGEROUSLY

DISPROPORTIONATE

THE EVER-EXPANDING NATIONAL SECURITY STATE IN EUROPE

AMNESTY
INTERNATIONAL



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Cover photo: Belgian police in riot gear march as they take position in the Brussels district of Molenbeek, Belgium, 2 April 2016. © REUTERS/Yves Herman

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EXECUTIVE SUMMARY

Hundreds of people were killed and wounded in a spate of violent attacks in European Union (EU) states between January 2015 and December 2016. They were shot by armed men, blown up in suicide bomb attacks and deliberately run over as they walked in the street. These callous crimes did not just target individuals; they were also attacks on societies, on how people live and what people think. The need to protect people from such wanton violence is obvious and urgent. Upholding the right to life, enabling people to live freely, to move freely, to think freely: these are essential tasks for any government. But they are not tasks that can be achieved by any means. Crucially, they are not tasks that should, or can, be achieved by riding roughshod over the very rights that governments are purporting to uphold.

The last two years, however, have witnessed a profound shift in paradigm across Europe: a move from the view that it is the role of governments to provide security so that people can enjoy their rights, to the view that governments must restrict people's rights in order to provide security. The result has been an insidious redrawing of the boundaries between the powers of the state and the rights of individuals.

Individual EU states and regional bodies have responded to the attacks by proposing, adopting and implementing wave after wave of counter-terrorism measures that have eroded the rule of law, enhanced executive powers, peeled away judicial controls, restricted freedom of expression and exposed everyone to government surveillance. Brick by brick, the edifice of rights protection that was so carefully constructed after the Second World War, is being dismantled.

This report aims to give a bird's eye view of the national security landscape in Europe. It shows just how widespread and deep the "securitization" of Europe has become since 2014. The report reflects a world in which fear, alienation and prejudice are steadily chipping away at the cornerstones of the EU: fairness, equality and non-discrimination.

The report focuses on eight themes:

- states of emergency/emergency laws
- principle of legality
- right to privacy/surveillance
- freedom of expression
- right to liberty
- freedom of movement
- stripping of nationality
- principle of *non-refoulement* (prohibition of the return of people to a place where they face a real risk of torture or other ill-treatment)

Illustrative examples of human rights violations or concerns that appear throughout the report have been drawn from 14 EU member states and from counter-terrorism initiatives at the UN, Council of Europe and EU levels. The countries profiled in various sections of the report are Austria, Belgium, Bulgaria, Denmark, France, Germany, Hungary, Ireland, Luxembourg, Netherlands, Poland, Slovakia, Spain, and the United Kingdom (UK).

UN Security Council Resolution 2178, which was adopted at rocket speed in September 2014, required states to pass laws to counter the threat of "foreign terrorist fighters". Since then, a large number of counter-

terrorism measures have been proposed or implemented in most European states. Instead of strengthening the European human rights system, these measures have been steadily dismantling it, putting hard won rights at risk.

Key common features of these counter-terrorism initiatives include:

- expedited processes where legislation is fast-tracked to adoption with little or no consultation with parliaments, experts and others in civil society;
- derogation from human rights commitments in law or practice with often detrimental effects on people's lives;
- consolidation of power in the hands of the executive, its agencies and the security and intelligence apparatus, often with little or no role for the judiciary in authorizing measures or providing effective scrutiny;
- ineffective or lack of independent oversight mechanisms to monitor implementation of counter-terrorism measures and operations, identify abuses and hold people accountable for human rights violations;
- imprecise and overly broad definitions of "terrorism" in laws, in violation of the principle of legality and leading to numerous abuses;
- standards of proof reduced from the traditional criminal standard of "reasonable suspicion" to mere "suspicion," and in some states to no formal requirement of suspicion at all;
- tenuous, and sometimes no, link between so-called preparatory acts or inchoate offences and the actual criminal offence;
- use of administrative control measures to restrict people's freedom of movement and association as a proxy for criminal sanctions, which would offer the people in question better safeguards against abuse;
- criminalization of various forms of expression that fall short of incitement to violence and threaten legitimate protest, freedom of expression, and artistic freedom;
- fewer possibilities to challenge counter-terrorism measures and operations, in particular due to the state's use of secret evidence typically not disclosed to a person affected by the measures or their lawyer;
- states invoking national security concerns and the "threat of terrorism" to arbitrarily target migrants and refugees, human rights defenders, activists, political opponents, journalists, minority groups, and people lawfully exercising their rights to freedom of expression, association and assembly; and
- lack of attention to the needs and protection rights of particular groups, including women and children.

The recent wave of counter-terrorism measures also breaches one of the foundational principles of the EU, that of non-discrimination. Often, the measures have proved to be discriminatory on paper and in practice, and have had a disproportionate and profoundly negative impact, particularly on Muslims, foreign nationals or people perceived to be Muslim or foreign.

Men, women and children have been verbally and physically abused. Passengers have been removed from planes because they "looked like a terrorist". Women have been banned from wearing a full body swimsuit on the beach in France. Refugee children in Greece have been arrested for playing with plastic guns. Instances of discrimination appear in every section of this report, highlighting that certain forms of discriminatory action by the state and its agents are increasingly seen as "acceptable" in the national security context. They are not.

One of the most alarming developments across the EU is the effort by states to make it easier to invoke and prolong a "state of emergency" as a response to terrorism or the threat of violent attacks. In a number of states, emergency measures that are supposed to be temporary have become embedded in ordinary criminal law. Powers intended to be exceptional are appearing more and more as *permanent* features of national law.

Given the febrile state of European politics, electorates should be extremely wary of the range of powers and extent of control over their lives that they are prepared to hand over to their governments. The rise of far right nationalist parties, anti-refugee sentiment, stereotyping and discrimination against Muslims and Muslim

communities, intolerance for speech or other forms of expression – risk that these emergency powers will target certain people for reasons that have nothing at all to do with a genuine threat to national security or from terrorism-related acts. Indeed, this is happening in Europe already.

The threshold for the triggering and extension of emergency measures has been lowered – and runs the risk of being reduced even further in coming years. While international human rights law is clear that exceptional measures should only be applied in genuinely exceptional circumstances - namely “in time of war or other public emergency threatening *the life of the nation*” - the disturbing idea that Europe faces a perpetual emergency is beginning to take hold.

There are many countries in Europe, particularly those with little history of terrorism, in which hard-line governments of whatever political persuasion will be tempted and increasingly able to impose states of emergency in response to the first serious terrorist attack they face. These governments will enjoy a range of sweeping powers whose use is unlikely to be restricted to those involved in the commission of terrorist acts. This has already proven to be case in France, where the extension – by a mainstream political party - of emergency powers well beyond the period of uncertainty that followed the Paris attacks has contributed significantly to the normalizing of the notion that a general threat of terrorist attacks threatens the very life of the nation.

Ultimately, however, the threat to the life of a nation – to social cohesion, to the functioning of democratic institutions, to respect for human rights and the rule of law – does not come from the isolated acts of a violent criminal fringe, however much they may wish to destroy these institutions and undermine these principles - but from governments and societies that are prepared to abandon their own values in confronting them.

Amnesty International is calling on all states, including EU member states, to renew their commitment in law and in practice to upholding their international human rights obligations in the context of countering terrorism. The steady regression in many aspects of rights protection in the EU must end.

METHODOLOGY

In light of UN Security Council Resolution 2178, adopted in late 2014, and a series of violent attacks in a number of EU member states in 2015-2016, Amnesty International continued tracking the roll-out of new legislation and policies intended to address the threat of terrorism. The attacks that prompted some of the government responses dealt with in this report include:

- Between 7 and 9 January 2015, attacks in Paris on the office of the satirical magazine *Charlie Hebdo*, at a kosher grocery store, and in the Paris suburb of Montrouge left 17 people dead.
- On 14-15 February 2015 in Copenhagen, Denmark, as an event was staged in solidarity with the victims of the Paris attacks, a gunman killed two people and injured five police officers.
- On 18 September 2015, a man with alleged links to a terrorist organization stabbed and injured a policewoman in Berlin, Germany.
- On 13 November 2015, coordinated attacks killed 130 people in Paris, including 89 at the Bataclan theatre, and injured hundreds of others.
- On 22 March 2016, coordinated suicide attacks killed 32 people and injured over 300 at Brussels airport and a metro station in central Brussels, Belgium.
- On 13 June 2016, a man stabbed to death two police officers in Île-de-France.
- On 14 July 2016, a man driving a truck deliberately ran over pedestrians in Nice, France, killing 86 people and injuring over 400.
- On 26 July 2016, two men with alleged links to a terrorist organization killed a priest and injured another person in a church in Normandy, France
- On 19 December 2016, a man drove a truck through a Christmas market in Berlin, killing 12 people and injuring over 50.

The research for this report was limited to the EU because:

- the EU offered a distinct regional entity in which the series of violent attacks noted above had taken place;
- initiatives were being taken at the EU level to address aspects of counter-terrorism policy, such as a draft directive on “foreign terrorist fighters”; and
- there is a clear pattern of EU member states drawing inspiration from each other’s regressive counter-terrorism measures.

The eight thematic areas of the report rose to the top time and again during the course of the research in each country and at regional level.

In some cases, primary research was conducted via interviews with victims of counter-terrorism measures that violated their human rights, and with their lawyers and family members (for example, in France and Hungary). In some cases, interviews were conducted with legislators, policymakers, members of the judiciary and independent experts (for example, in the Netherlands, Poland and the UK, among others).

Researchers in Amnesty International’s national offices in EU member states and at the International Secretariat in the UK gathered information on legislative developments, often adopted in fast-track procedures, in 14 countries: Austria, Belgium, Bulgaria, Denmark, France, Germany, Hungary, Ireland,

Luxembourg, Netherlands, Poland, Slovakia, Spain and the UK. Some countries feature in several sections of the report; some in only one or two.

Staff at Amnesty International's European Institutions Office have long monitored and reported on counter-terrorism-related legislative and treaty developments at EU and Council of Europe levels. The information from this work that is included in the report aims to illustrate the regional trend towards deep and permanent securitization.

The report focuses on measures in this securitization process that:

- carry a criminal penalty;
- effectively carry a criminal penalty and should therefore include safeguards attendant to criminal sanctions; and
- limit a human right in a manner that disproportionately restricts or essentially extinguishes it (for example, a blanket ban on public protests).

The report does not document or analyze other types of initiatives. For example, it does not cover “soft” measures intended to identify “radicalized” individuals or those vulnerable to that label. Nor does it look at projects often characterized as aimed at “preventing violent extremism” or “countering violent extremism”. Detailed analysis of such programmes has been undertaken by other human rights and advocacy organizations.¹ This report acknowledges such programmes and signals, where relevant, inextricable links between them and the repressive measures featured.

Not every EU member state is mentioned in this report, but almost all have promulgated bills, adopted laws and carried out security operations similar to many of those described. With respect to the criminalization of travel and other acts associated with the phenomenon characterized by many as “foreign terrorist fighters”, every UN member state, including EU member states, is required by UN Security Council Resolution 2178 to promulgate laws to criminalize such activities. If an EU member state is not cited in this report it is largely due to lack of access to adequate information in that state; it is not an indication that the state has bucked the securitization trend.

The research in this report was current as of 19 December 2016.

¹ See, for example, the work of the International Centre for Counter-Terrorism at The Hague on radicalization/de-radicalization and countering violent extremism, <https://icct.nl/topic/countering-violent-extremism/>. See also Open Society Justice Initiative, *Eroding Trust: The UK's Prevent Counter-Extremism Strategy in Health and Education*, October 2016, <https://www.opensocietyfoundations.org/reports/eroding-trust-uk-s-prevent-counter-extremism-strategy-health-and-education>; and Article 19, Amnesty International and 56 organizations, joint statement, *Initiatives to 'counter and prevent violent extremism' raise serious human rights concerns*, 4 February 2016, (Index: IOR 40/3417/2016), <https://www.amnesty.org/en/documents/ior40/3417/2016/en/>.

1. STATES OF EMERGENCY/ EMERGENCY LAWS

“We can't prolong the state of emergency forever. That would make no sense, it would mean that we were no longer a republic with laws which can apply in all circumstances.”

François Hollande, President of France, 14 July 2016, a few hours before the Nice attack, which immediately triggered an extension of the state of emergency for a further six months.²

One of the most alarming developments across the EU is the effort by states to make it easier to invoke and prolong a “state of emergency” as a response to terrorism or the threat of violent attacks. In a number of states, emergency measures that are supposed to be temporary have become embedded in ordinary criminal law. Powers intended to be exceptional are appearing more and more as *permanent* features of national law. And parliaments across the region are adopting such measures in fast-track processes, leaving little time for consideration of their impact on people’s human rights, let alone broader reflection on how Europe is sinking ever deeper into a state of heavy and permanent securitization.

The consequences of this shift are deeply disturbing: they are defined by the extension of sweeping new powers concentrated in the hands of the executive - and implemented by the security and intelligence apparatus, with little or no role for the judiciary or other independent oversight. Such a consolidation of power is a recipe for abuse at the best of times. Given the febrile state of European politics, electorates should be extremely wary of the range of powers and extent of control over their lives that they are prepared to hand over to their governments. The rise of far right nationalist parties, anti-refugee sentiment, stereotyping and discrimination against Muslims and Muslim communities, intolerance for speech or other forms of expression – risk that these emergency powers will target certain people for reasons that have nothing at all to do with a genuine threat to national security or from terrorism-related acts. Indeed, that is happening in Europe already.

As the examples below amply illustrate, the threshold for the triggering and extension of emergency measures has been lowered – and runs the risk of being reduced even further in coming years. While international human rights law is clear that exceptional measures should only be applied in genuinely

² Agence Press France, “French state of emergency to be lifted on July 26, Hollande confirms”, *FranceTV24*, 14 July 2016, <http://www.france24.com/en/20160714-france-state-emergency-will-be-lifted-july-26-says-hollande>.

exceptional circumstances - namely “in time of war or other public emergency threatening *the life of the nation*”³ - the disturbing idea that Europe faces a perpetual emergency is beginning to take hold.

There are many countries in Europe, particularly those with little history of terrorism, in which hard-line governments of whatever political persuasion will be tempted to impose states of emergency in response to the first serious terrorist attack they face. These governments will enjoy a range of sweeping powers whose use is unlikely to be restricted to those involved in the commission of terrorist acts. This has already proven to be case in France, where the extension – by a mainstream political party - of emergency powers well beyond the period of uncertainty that followed the Paris attacks has contributed significantly to the normalizing of the notion that a general threat of terrorist attacks threatens the very life of the nation.

Ultimately, however, the threat to the life of a nation – to social cohesion, to the functioning of democratic institutions, to respect for human rights and the rule of law – does not come from the isolated acts of a violent criminal fringe, however much they may wish to destroy these institutions and undermine these principles - but from governments and societies that are prepared to abandon their own values in confronting them.

In order to ensure that emergency measures are not abused, international and European human rights law require that a state may *only* derogate, up to a certain extent, from a limited range of human rights obligations:

- in very specific situations of acute emergency; and
- after officially proclaiming and formally notifying relevant international bodies of an emergency that “threatens the life of the nation.”⁴

The derogation must be exceptional and temporary, and the state’s *predominant* objective must be a return to a state of normalcy.⁵

In addition, any derogation from a specific right and each specific emergency measure taken under that derogation must be limited to what is strictly required by the exigencies of the exceptional situation. The derogation must therefore be absolutely necessary and proportionate in relation to the threat that justified the proclamation of the state of emergency.⁶ A state that is derogating must notify the other states parties to the relevant treaties of the provisions from which it is derogating and explain the reasons.⁷

Some human rights obligations can never be derogated from, even in a state of emergency. They include:

- the right to life;
- the prohibition of torture and other cruel, inhuman or degrading treatment or punishment;
- the fundamental guarantees of a fair trial; and
- the principle of non-discrimination.⁸

These rights must be fully protected in any and all circumstances. At an individual level, they apply to everyone at all times, irrespective of what a person is suspected or accused.

France is the only EU member state to have formally declared a state of emergency on national security grounds for terrorism-related acts in the last couple of years. Its actions have raised serious concerns about disproportionate emergency measures and how “exceptional measures” can become permanently embedded in law and policy.

Amnesty International has documented the impact of France’s emergency measures, including house searches without warrant, assigned residence orders and the closure of mosques and businesses, and has

³ European Convention on Human Rights (ECHR), Article 15

⁴ Article 4 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the ECHR. See also, *A and others v UK*, (3455/05), European Court of Human Rights, 19 February 2009, para. 176, [http://hudoc.echr.coe.int/eng?i=001-91403#{"itemid":\["001-91403"\]}](http://hudoc.echr.coe.int/eng?i=001-91403#{). The Court highlighted that a public emergency threatening the life of the nation is “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.

⁵ UN Human Rights Committee General Comment 29 (2001), UN Doc. CCPR/C/21/Rev.1/Add.11, paras 1, 2.

⁶ UN Human Rights Committee General Comment 29, para. 4.

⁷ In the case of the ICCPR, this requires notification via the UN Secretary-General; in the case of the ECHR it is via the Secretary General of the Council of Europe.

⁸ Article 4.1 of the ICCPR, UN Human Rights Committee General Comment 29, para. 8. Measures derogating from provisions of the Covenant must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin; this prohibition is absolute. Moreover, measures taken under a state of emergency must not involve direct or indirect discrimination on any other prohibited ground; any distinction on these grounds is permissible only if it demonstrably has a reasonable and objective justification.

expressed concern that France could be in a perpetual state of emergency.⁹ Others have expressed fear that France will carry on in a permanent state of emergency;¹⁰ that is, the emergency regime will become the “new normal”.¹¹

Some European states appear to have taken a cue from France and proposed or adopted constitutional amendments or new legislation to make it easier to declare a formal state of emergency in response to alleged terrorism-related threats.

Other states have passed laws in expedited processes and engaged in operations in response to real or perceived security threats that mirror measures that would typically only be envisaged in a formally declared state of emergency. This includes granting the executive, its agencies and the state’s security and intelligence apparatus special powers that would otherwise be permitted only in the context of a formally declared state of emergency.

Yet other states already had “reserve” powers in their legislation: counter-terrorism laws that provide for exceptional measures when the government deems them necessary without resorting to a formal declaration of a state of emergency.

In a number of EU member states, authorities have invoked the threat of terrorism in the context of the refugee crisis, casting those fleeing war and violence -- and seeking safe haven in Europe -- as potential threats to national security. This has contributed to emergency measures for an “influx” of refugees, among which their authorities say, could be criminals and terrorists. As the examples from Austria and Hungary below well illustrate, such emergency measures can and will continue to have a profoundly negative effect on the right to seek and enjoy asylum in Europe, leaving some of the world’s most vulnerable people unprotected.

Amnesty International calls on all states, including EU member states, to:

- Ensure that a declaration of a formal state of emergency strictly conforms to the requirements of international law.
- Guarantee that a declaration is duly reasoned and notified according to the relevant state’s treaty obligations.
- Ensure that the declared emergency is of an intensity that amounts to a “threat to the life of the nation”.
- Ensure that the declared state of emergency is treated as exceptional, that is, temporary and limited to what is absolutely required by the exigencies of the situation.
- Guarantee that all measures taken pursuant to the declared state of emergency are:
 - provided by a clear and publicly accessible law;
 - necessary to address the emergency and proportionate in each circumstance; and
 - consistent with the state’s other obligations under international law.
- Guarantee that no measure taken under a state of emergency has a direct or indirect adverse impact on non-derogable rights.
- Uphold the principle of non-discrimination in the operation of all emergency measures.

⁹ Amnesty International, *France: Upturned Lives: The Disproportionate Impact of France’s State of Emergency*, 4 February 2016, (Index: EUR 21/3364/2016), <https://www.amnesty.org/en/documents/eur21/3364/2016/en/> and Camille Blanc, President of Amnesty International France, “Prolonger l’état d’urgence, c’est donner droit de cité à l’arbitraire,” *Le Monde Idée*, 22 July 2016, http://www.lemonde.fr/idees/article/2016/07/22/prolonger-l-etat-d-urgence-c-est-donner-droit-de-cite-a-l-arbitraire_4973414_3232.html#mpg7HGmx18u4K2QF.99; See also, Robert Zaretsky, “France’s perpetual state of emergency: The country’s extraordinary anti-terrorism measures are on the way to becoming entirely ordinary,” *Foreign Policy*, 16 July 2016, <http://foreignpolicy.com/2016/07/16/frances-perpetual-state-of-emergency/>.

¹⁰ New York Times Editorial Board, “France’s permanent emergency state,” *New York Times*, 25 July 2016, <http://www.nytimes.com/2016/07/25/opinion/frances-permanent-emergency-state.html>.

¹¹ Letta Tayler, Human Rights Watch, “France’s emergency powers: The new normal,” *Just Security*, 2 August 2016, <https://www.justsecurity.org/32236/frances-emergency-powers-normal/>.

1.1 BULGARIA

In July 2016, the Bulgarian parliament overwhelmingly passed on first reading a new counter-terrorism bill. This empowers the President, with approval of the National Assembly, to declare a “state of emergency” in the aftermath of an act of “terrorism” against the territory.¹² No date had been set, at the time of writing, for a second reading of the bill.

Although the bill reaffirmed Bulgaria’s commitment to respect human rights and fundamental freedoms in general terms, it failed to provide key safeguards that would make this a reality.¹³ The bill states that it gives precedence to “saving lives and health over all other activities”,¹⁴ strongly implying that Bulgaria could dispense with other human rights in a state of emergency, possibly including rights that are non-derogable in all circumstances.

Under a “state of emergency” as defined in the legislation, the bill would grant the authorities sweeping powers to impose blanket bans on public rallies, meetings and demonstrations, very likely in violation of the rights to freedom of expression and peaceful assembly. Prohibitions on protests could be applied to circumstances that are unrelated to the purported reasons for the state of emergency. Political opponents, human rights defenders and others who disagree with the government risk becoming victims of a crackdown on such freedoms.

The bill would permit “preventive measures” to be applied to people suspected of terrorism-related activity, instead of laying criminal charges and prosecuting them in a fair trial (see Chapter 6). These measures would include travel bans and controls on individuals’ freedom of movement and association.¹⁵ The bill also authorizes the disruption of electronic communications in a state of emergency in a way that could potentially violate the right to privacy.

1.2 FRANCE

The day after the coordinated attacks across Paris on 13 November 2015, the French government declared a formal “state of emergency”. The emergency regime devolved to the police and other authorities, including the Ministry of Interior and Prefects (who represent the state at the local level), a broad array of powers, including to search houses day or night and issue assigned residence orders without prior judicial authorization.

The state of emergency was extended on 26 November 2015 for three months, on 26 February 2016 for three months, and on 26 May 2016 for two months. In July 2016, following the attack in Nice, the state of emergency was extended for six months.¹⁶ In November 2016, Prime Minister Manuel Valls said that it would probably be extended again to cover the period of national elections in April-May 2017.¹⁷ A new bill providing for the fifth extension of the state of emergency was expected to be tabled in the National Assembly in December 2016.

With the July 2016 extension, authorization for house searches without prior judicial approval was reintroduced (this power had been excluded in the third extension). The power to seize personal data was

¹² Draft Law on Countering Terrorism, no. 602-01-42, adopted by the Council of Ministers on 7 July 2016, http://www.parliament.bg/bills/43/602-01-42_PZ%20protivodeistvie%20na%20terorizma.PDF

¹³ Amnesty International, *Bulgaria: Proposed counter-terrorism bill would be a step back for human rights*, 29 July 2016, (Index: EUR 15/4545/2016), <https://www.amnesty.org/en/documents/eur15/4545/2016/en/>; See also, “Bulgaria approves anti-terrorism law amid growing concern over attacks”, *Reuters*, 28 July 2016, <http://news.trust.org/item/20160728125916-9jndg/>.

¹⁴ Draft Law on Countering Terrorism, no. 602-01-42, Article 2, para. 3.

¹⁵ Mariya Cheresheva, “Bulgaria adopts controversial anti-terror bill,” *Balkan Insight*, 29 July 2016, <http://www.balkaninsight.com/en/article/bulgarian-mps-strongly-back-a-controversial-anti-terror-bill-07-28-2016>.

¹⁶ Following the attacks in Paris on 13 November 2015, the French government decided by Decree No. 2015-1475 of 14 November 2015, to apply Law No. 55 -385 of 3 April 1955 relative to the state of emergency. The state of emergency was initially extended for a period of three months starting on 26 November 2015, by Law No. 2015-1501 of 20 November 2015; it was then extended for a period of three months starting on 26 February 2016 by Law No. 2016-162 of 19 February 2016; and then further extended for a period of two months (on the basis of security needs around major sporting events in France in June and July) starting 26 May 2016 by Law No. 2016-629 of 20 May 2016. Following the murders of two police officers on 13 June 2016 in Île-de-France and the attack in Nice on 14 July 2016, the state of emergency was extended by Act No. 2016 – 987 of 21 July 2016 for a further period of six months. This last act also amended certain measures in the Law of 3 April 1955 to allow greater latitude for carrying out administrative searches. See the French government’s official notification to the Council of Europe regarding the state of emergency and attendant extensions, 21 July 2016, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2930092&SecMode=1&DocId=2380820&Usage=2>.

¹⁷ Lucy Pasha-Robinson, “France to extend state of emergency, says Prime Minister Manuel Valls”, *The Independent*, 13 November 2016, <http://www.independent.co.uk/news/world/europe/manuel-valls-prime-minister-france-extend-state-of-emergency-paris-attacks-french-elections-a7415106.html>.

also formally reintroduced,¹⁸ although on 19 February 2016 the Constitutional Court had declared unconstitutional the copying of data from an electronic device during house searches without prior judicial authorization.¹⁹

Restrictions on freedom of expression and assembly were also expanded with the July 2016 extension. The authorities are expressly permitted to ban public demonstrations by asserting that they are not in a position to ensure public order and security.²⁰ In the past, administrative authorities had justified the existing power to ban demonstrations on the basis of lack of resources. In addition, the police are now allowed to search luggage and vehicles without a judicial warrant.²¹

In a law adopted on 3 June 2016,²² the government amended criminal laws to strengthen existing, permanent counter-terrorism powers and expanded administrative measures, even though the Consultative Commission on Human Rights had severely criticized such amendments in March 2016.²³ The measures included:

- The possibility to subject to an administrative control measure individuals who returned from areas where “terrorist groups” operated and where they had travelled to with the purpose of joining them.²⁴
- Stronger police powers, with prior authorization by prosecutorial authorities, to conduct identity checks and searches in the context of investigating terrorism-related offences under French law.²⁵
- The possibility for judicial authorities to authorize house searches at any time, including at night, with the purpose of investigating terrorism-related offences.²⁶

Parliament also took the opportunity in July 2016 to amend and extend the 2015 Intelligence Act to allow not only individuals “identified as a threat” but a person or anyone in the entourage of a person “likely to be related to a threat” to have his or her electronic metadata analyzed in real time by the intelligence services.²⁷

Moreover, the parliament amended criminal and administrative laws to further strengthen existing permanent counter-terror powers and measures. They included, for example, the extension of the maximum period a person can be subjected to an administrative regime restricting freedom of movement,²⁸ the ban from French territory of foreigners convicted for a terrorism-related offence under French law²⁹ and the increase of the maximum period of pre-trial detention for children aged 16 and older to up to three years, depending on the offence.³⁰

The frenzied rush in June and July 2016 to pass such legislation was indicative of the government’s desire to embed permanently in law some key powers that would typically be employed in a formal state of emergency.

Figures released by the government on 6 December 2016 indicated that since November 2015, 4,292 house searches had been conducted and 612 people had been assigned to forced residency (with 434 people affected).³¹ Also as of December 2016, 95 people remained subjected to assigned residence orders.³² In February 2016, Amnesty International reported that less than one percent of the house searches between November 2015 and February 2016 (over 3000 at that time) had resulted in a terrorism-related

¹⁸ Law 2016-987 amending Article 11 of Law No. 55-385.

¹⁹ Decision No. 2016-536 of Constitutional Court, 19 February 2016: www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-536-qpc/communiqu-e-de-presse-146992.html.

²⁰ Law 2016-987, amending Article 8-2 of Law No. 55-385.

²¹ Law 2016-987, amending Article 8-1 of Law No. 55-385.

²² Law 2016-731 of 3 June 2016, *Renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale*.

²³ Commission Consultative des droits de l'Homme (CCDH),

www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032628821&dateTexte=&categorieLien=id.

²⁴ Law 2016-731, Article 52.

²⁵ Law 2016-731, Article 47.

²⁶ Law 2016-731, Article 1.

²⁷ Law 2016-987, amending Article L 851-2.-I. of the Code of National Security.

²⁸ Law 2016-987, Article 10.

²⁹ Law 2016-987, Article 14.

³⁰ Law 2016-987, Article 12.

³¹ Dominique Raimbourg and Jean-Frédéric Poisson, “Report tabled [in the National Assembly] in accordance with article 145 of the Regulation on behalf of the Legal Committee regarding parliamentary control on the state of emergency (*Rapport d'information déposé en application de l'article 145 du Règlement, par la commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur le contrôle parlementaire de l'état d'urgence*)”, 6 December 2016 <http://www.assemblee-nationale.fr/14/rap-info/i4281.asp> House searches were not included in the third phase of the state of emergency but were reintroduced in the July 2016 renewal.

³² Dominique Raimbourg and Jean-Frédéric Poisson, “Report tabled [in the National Assembly] in accordance with article 145 of the Regulation on behalf of the Legal Committee regarding parliamentary control on the state of emergency”.

charge under French law (apart from offences for “apology of terrorism”) raising serious concerns that the measure was disproportionate.³³

Night searches, often violent and humiliating, and assigned residence, which hampers people’s ability to work and go to school, among other things, have traumatized hundreds of people. Their rights to privacy, movement, expression, association and liberty have been trampled in the name of security. The February 2016 Amnesty International report concluded that France’s search powers and application of administrative control measures such as assigned residence were not only disproportionate, but also discriminatory and had a profound and lasting impact on many people, including children.³⁴

In its concluding observations in May 2016, the UN Committee against Torture raised concerns about “reports of excessive use of force by the police during some search operations, which has in some cases led to psychological sequelae [consequences] for the persons in question” which “could constitute an infringement of rights ensured under the Convention.”³⁵ Many organizations and experts have urged the French authorities to end the state of emergency and to provide victims of the emergency measures with a remedy.³⁶

Another key indicator that the emergency measures have been disproportionate involved the government’s application – or attempted application – of emergency measures to people who were not even suspected of conduct related to the security threat. Among them were people planning to protest against the proposed reform of the Labour Law,³⁷ and environmental activists at the UN Climate Conference (COP21) in Paris in December 2015, who were suspected on dubious evidence of having engaged previously in acts of violence at protests.³⁸ By applying the derogatory measures to people on grounds not related to the emergency situation in question, the government exposed its lack of commitment to adhere to the stated rationale behind the declared state of emergency.

In an unprecedented move, five UN special rapporteurs concluded in January 2016 that France’s state of emergency and associated laws imposed excessive and disproportionate restrictions on human rights and fundamental freedoms, and emphasized the lack of clarity and precision of some provisions. They recommended that “in order to guarantee the rule of law and prevent arbitrary procedures”, the authorities should ensure that there are “prior judicial controls” over all anti-terrorism measures.³⁹

In a similar vein, France’s Defender of Rights (Ombudsman), an independent administrative authority in charge of protecting rights and freedoms, promoting equality and ensuring greater access to rights, had condemned the renewal of the state of emergency and issued specific recommendations relating to house searches, particularly when minors are present.⁴⁰ In November 2016, the Defender of Rights stated that all house searches should comply with the European Convention on Human Rights, and that people who suffered abuse or damage to their homes should be able to seek compensation.

³³ Amnesty International, *France: Upturned Lives: The Disproportionate Impact of France’s State of Emergency*, 4 February 2016, (Index: EUR 21/3364/2016) <https://www.amnesty.org/en/documents/eur21/3364/2016/en/>, p. 33; See also Human Rights Watch, “France: Abuses under state of emergency: Halt warrantless search and house arrest”, 3 February 2016, www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency.

³⁴ Amnesty International, *Upturned lives*, 4 February 2016.

³⁵ UN Committee against Torture, Concluding observations on the seventh periodic report of France, CAT/C/FRA/CO/7, 10 June 2016, paras 12-13. The Committee also recommended that “that the State party take steps to ensure that, in practice, counter-terrorism measures do not infringe on the exercise of rights protected under the Convention. In particular, the State party should ensure that all search operations are conducted in strict respect of the Convention. The Committee further recommends that the State party should ensure that any victim of excessive use of force during such search operations is able to file a complaint, that an inquiry is conducted, that prosecution, as applicable, is pursued and that perpetrators are punished.”

³⁶ Nils Muižnieks, Council of Europe Commissioner for Human Rights, “Lutons contre le terrorisme dans le respect du droit,” *Le Monde*, 5 February 2016, www.lemonde.fr/idees/article/2016/02/03/lutons-contre-le-terrorisme-dans-le-respect-du-droit_4858281_3232.html; International Federation for Human Rights (FIDH) “Counter-terrorism measures & human rights: When the exception becomes the norm”, 9 June 2016, https://www.fidh.org/IMG/pdf/report_counter_terrorism_measures_human_rights.pdf; See also, Bérénice Boutin and Christophe Paulussen, “From the Bataclan to Nice: A Critique of France’s State of Emergency Regime”, *TMC Asser Institute*, 21 July 2016, <http://www.asser.nl/about-the-institute/news/policy-brief-from-the-bataclan-to-nice-a-critique-of-frances-state-of-emergency-regime/>.

³⁷ Tony Cross, “France’s state of emergency used to ban activists from labor law protests,” *RFI*, 16 May 2016, <http://en.rfi.fr/france/20160516-frances-state-emergency-used-ban-activists-labor-law-protests>; “Protesters in Paris march against French labor reforms amid tight security,” *Deutsche Welle*, 23 June 2016, <http://www.dw.com/en/protesters-in-paris-march-against-french-labor-reforms-amid-tight-security/a-1935084>; “The French government had attempted to ban the protest from going forward under the current state of emergency regime... However, Paris authorized the rally following bitter negotiations between participating unions and the government”.

³⁸ Amnesty International France, “COP21 : Les Militants Écologistes Pris Pour Cible”, 16 December 2015, <https://www.amnesty.fr/liberte-d-expression/actualites/cop21-les-militants-ecologistes-pris-pour-cible>

³⁹ Office of the High Commissioner for Human Rights, “UN rights experts urge France to protect fundamental freedoms while countering terrorism,” 19 January 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=16966>.

⁴⁰ The full list of reports and recommendations on the state of emergency by the Defender of Rights can be found here: www.defenseurdesdroits.fr/fr/mots-cles/etat-durgence.

1.3 HUNGARY

In June 2016, Hungary's President János Áder signed into law a package of sweeping and draconian counter-terrorism measures, including a "sixth amendment" to the Constitution⁴¹ and amendments to laws governing the police, national security services and defence forces.⁴² The stated aim was to streamline the process to declare a state of emergency. The package of measures entered into force on 1 July 2016.

The "sixth amendment" and other measures rely on an extremely vague concept – a "terror threat situation" – which is not defined.⁴³ If declared, however, a "terror threat situation" gives the executive wide-ranging powers that threaten to violate Hungary's international human rights obligations.⁴⁴ The "terror threat situation" violates the principle of legality, which requires that the law be formulated in clear and unambiguous terms.

Under the "sixth amendment", within 15 days of the government proclaiming a "terror threat situation", parliament must vote by two-thirds majority to declare such a situation in force. In those 15 days, the executive has the power to enact exceptional measures normally only permitted under a "terror threat situation" declared by parliament, providing that the executive informs the President and any relevant parliamentary committees. Such exceptional measures can include:

- suspending laws and fast-tracking new ones to adoption;
- deployment of the army and permitting the use of firearms to quell disturbances;
- restrictions on freedom of movement within Hungary;
- assertion of military control over all air traffic;
- freezing the assets and restricting the property rights of other states, individuals, organizations and legal entities deemed a threat to international peace or national security;
- banning or restricting events and assemblies on public premises; and
- giving the government wide latitude to apply any special measures (still to be defined) in order to prevent terrorism as defined under national law.

The police, other law enforcement officers and the military are permitted to use lethal force in a "terror threat situation". Any powers assumed or measures implemented in the first 15 days could be extended if parliament approves the declaration of a "terror threat situation".

In essence, the invocation of a "terror threat situation" would amount to Hungary establishing an emergency regime and implementing exceptional measures in breach of its human rights obligations, rather than officially declaring a formal state of emergency and strictly complying with the requirements foreseen for such situations under international human rights law.

The "sixth amendment" provides wide scope for sweeping restrictions on the rights to freedom of association and peaceful assembly, privacy and freedom of movement. In a political landscape where refugees and others are regularly portrayed as a threat to security, the government could apply the measures arbitrarily for political rather than security reasons (see "migration and counter-terrorism" section below).

1.4 LUXEMBOURG

In the aftermath of the November 2015 attacks in Paris, the government of Luxembourg asked the country's Commission on Institutions and Constitutional Revision to prepare a revision of Article 32 of the Constitution, which governs the declaration of a state of emergency. The National Consultative Commission on Human

⁴¹ Sixth amendment to the Fundamental Law of Hungary (*Magyarország Alaptörvényének hatodik módosítása*), 14 June 2016, http://njt.hu/cgi_bin/njt_doc.cgi?docid=195912.322970.

⁴² Law LVII on amendments to certain laws related to a terror threat situation (2016. évi LVII. törvény egyes törvényeknek a terrorveszélyhelyzettel kapcsolatos módosításáról), 14 June 2016, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600057.TV×hift=ffffff4&xtreferer=00000001.TXT; and Law LXIX on amendments to certain laws related to countering terrorism (2016. évi LXIX. törvény a terrorizmus elleni fellépéssel összefüggő egyes törvények módosításáról), 14 June 2016, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600069.TV×hift=ffffff4&xtreferer=00000001.TXT.

⁴³ "terrorveszélyhelyzet" (Hungarian)

⁴⁴ Amnesty International, "Hungary: Constitutional changes would grant the executive sweeping counter-terrorism powers," 10 May 2016 (Index: EUR 27/4011/2016), <https://www.amnesty.org/en/documents/eur27/4011/2016/en/> and Amnesty International, "Hungary: Proposed 'sixth amendment' to the Constitution would be a frontal attack on human rights," 1 February 2016 (Index: EUR 27/3359/2016), <https://www.amnesty.org/en/documents/eur27/3359/2016/en/>.

Rights reminded the government in a January 2016 report that a state of emergency must always be exceptional and that its implementation must always include a review of its necessity and proportionality.⁴⁵ The Commission on Institutions and Constitutional Revision's work on the revision of Article 32 was ongoing at the time of writing.⁴⁶

In December 2016 a bill on a vaguely defined "terrorist threat" was adopted. The law expands law enforcement's investigative and arrest powers, and extends considerably their power to collect and use private data, with some measures justified by an otherwise undefined "emergency" or "extreme emergency."⁴⁷ These are permanent powers that will not require the state to invoke a formal state of emergency, with all its attendant requirements and safeguards. The National Consultative Commission on Human Rights had criticized the bill for a range of human rights deficiencies.⁴⁸

The law does not define what would constitute an "emergency" or "extreme emergency". The National Consultative Commission on Human Rights had warned that clear and precise definitions of such situations must be delineated in the law.⁴⁹ Luxembourg's laws already contain a definition of "terrorism" that is vague and overly broad.⁵⁰ Compounding that with a vague notion of what constitutes an "emergency" or "extreme emergency" would open the way for potential abuse.

Under the new law, the authorities can:

- limit access to counsel for some detainees to 30 minutes;
- wiretap places and vehicles;
- engage in expanded forms of surveillance, including of telecommunications, and seize such information relating to both a suspect and anyone communicating with the suspect; and
- decline to notify a person who has been under surveillance in a terrorism investigation that he or she has been subjected to such scrutiny.

1.5 POLAND

Poland enacted a draconian counter-terrorism law in June 2016 that embeds powers in permanent law that would typically be invoked during an exceptional state of emergency.⁵¹ The law, which was rushed to adoption in a fast-track process, consolidates sweeping powers, including enhanced surveillance capacity, in the hands of the Internal Security Agency, with no independent oversight mechanism to prevent abuse and ensure accountability. Combined with other 2016 legislative amendments, such as those to the Police Act⁵² and the Criminal Procedure Code,⁵³ the new law creates conditions for violations of the rights to liberty, privacy, fair trial, expression, peaceful assembly and non-discrimination.⁵⁴

⁴⁵ Commission Consultative des droits de l'Homme (CCDH), "Opinion on Bill 6921", January 2016, <https://ccdh.public.lu/fr/avis/2016/avis1-PL-6921-menace-terroriste-final.pdf>.

⁴⁶ The Commission on Institutions and Constitutional Review's progress on the revision on Article 32 can be found here: <http://bit.ly/2b32gUT>.

⁴⁷ Document no. 6921/05 relating to bill 6921 entitled "Projet de loi portant 1) modification du Code d'instruction criminelle, 2) modification de la loi modifiée du 30 mai 2005 concernant la protection de la vie privée dans le secteur des communications électroniques, 3) modification de la loi du 27 février 2011 sur les réseaux et les services de communications électroniques, 4) adaptation de la procédure pénale face aux besoins liés à la menace terroriste"

http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl?path=/export/exped/sexdpata/Mag/165/629/166248.pdf

⁴⁸ CCDH, "Opinion on Bill 6921", January 2016. The CCDH recommended that the right to access to counsel be in compliance with the jurisprudence of the European Court of Human Rights; clear limits be set to protect the personal details of third-parties indirectly linked to terrorism investigations; a clear limitation of data that can be seized is necessary; that the integrity of the collected data be guaranteed; that the right to privacy be observed in all surveillance and monitoring operations; and that persons subject to surveillance be guaranteed their right to information by introducing a clear deadline for notification.

⁴⁹ CCDH, "Opinion on Bill 6921", January 2016, pp 2-3.

⁵⁰ Penal Code, Chapter 3 "Terrorism", Section 1 "Offences with terrorist aim", Article 135-1, p. 25.

⁵¹ Law on Counterterrorism of 10 June 2016 (*Ustawa z dnia 10 czerwca 2016 r. o działaniach antyterrorystycznych*), Journal of Laws 2016, item 904.

⁵² Act of 15 January 2016 amending the Police Act and certain other acts (*Ustawa z dnia 15 stycznia 2016 r. o zmianie ustawy o Policji oraz niektórych innych ustaw*), Journal of Laws 2016, item 147.

⁵³ Act of 11 March 2016 amending the Criminal Procedure Code and certain other Acts (*Ustawa z dnia 11 marca 2016 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw*), Journal of Laws 2016, item 437.

⁵⁴ See Amnesty International, *Poland: Dismantling Rule of Law? Submission for the UN Universal Periodic Review – 27th Session of the UPR Working Group*, April/May 2017, 31 October 2016 (Index: EUR 37/5069/2016), <https://www.amnesty.org/en/documents/eur37/5069/2016/en/>; and Amnesty International, *Submission to the UN Human Rights Committee, 118th Session, 17 Oct-4 Nov 2017*, 27 October 2016 (Index: EUR 37/4849/2016), <https://www.amnesty.org/en/documents/eur37/4849/2016/en/>.

The law's vague and overly broad definition of "terrorism" underpins, among other things:

- indiscriminate, mass surveillance powers;
- the targeting of foreign nationals; and
- the extension of pre-charge detention.

The UN Human Rights Committee, the Council of Europe's Venice Commission, the Council of Europe Commissioner for Human Rights and others have criticized the new law (see Chapters 2, 3, 4 and 5 below). In July 2016, the Polish Commissioner for Human Rights brought a challenge to the law to the Constitutional Tribunal.⁵⁵ A respected member of the Polish judiciary told Amnesty International:

*"Undoubtedly, the Counter-terrorism Law... is more than just taking a sledgehammer to crack a nut. It appears to be an intentional, deliberate act, arming the executive with powerful tools to fight, for instance, those who hold differing views."*⁵⁶

1.6 UNITED KINGDOM

In the UK, longstanding laws and measures akin to an emergency regime, albeit adopted outside of a formally declared state of emergency, contain vague and overly broad formulations. Taken together with special counter-terrorism legislation, these provisions are open to abuse.

The Civil Contingencies Act 2004 was drafted to modernize emergency powers set out in post-World War II legislation, including by the addition of the threat posed by terrorism as a type of emergency. It defines an emergency as:

- (a) an event or situation which threatens serious damage to human welfare in a place in the United Kingdom,
- (b) an event or situation which threatens serious damage to the environment of a place in the United Kingdom, or
- (c) war, or terrorism, which threatens serious damage to the security of the United Kingdom.⁵⁷

In this legislation, terrorism is just one form of emergency where special powers may be invoked. Unlike another phenomenon such as flooding, earthquake or invasion by another state, the counter-terrorism legislation provides the executive with "enhanced" emergency powers to be held in reserve.

The Terrorism Prevention and Investigation Measures (TPIM) Act 2011 provides the statutory framework for administrative restrictions on people suspected to pose a threat to national security. It contains "enhanced powers" for the Home Secretary (equivalent to the Interior Minister) to assign such a person to a particular residence, restrict with whom they may live, impose geographic and curfew restrictions, and limit association and communication with others.⁵⁸

Many of these enhanced TPIM measures had existed in relation to the "control orders" of the Prevention of Terrorism Act 2005,⁵⁹ (see Chapter 6 below) but were removed when UK courts deemed aspects of the control order regime too restrictive. Rather than abandoning the most restrictive aspects, parliament legislated to hold them in reserve for an unspecified situation in which the Home Secretary "considers that it is necessary to do so [use such power] by reason of urgency."⁶⁰ In addition, the control order regime was introduced as a temporary measure which required annual renewal by parliament. The TPIM regime has retained many of its features on a permanent basis.

⁵⁵ Commissioner for Human Rights, "The Commissioner for Human Rights Challenges the Anti-Terrorism Act before the Constitutional Tribunal", 11 July 2016, <https://www.rpo.gov.pl/en/content/commissioner-human-rights-challenges-anti-terrorism-act-constitutional-tribunal>.

⁵⁶ Member of Polish judiciary in an email to Amnesty International, 25 July 2016.

⁵⁷ Civil Contingencies Act 2004, s. 1 & 19: <http://www.legislation.gov.uk/ukpga/2004/36/section/1> and <http://www.legislation.gov.uk/ukpga/2004/36/section/19>.

⁵⁸ Terrorism Prevention and Investigation Measures Act 2011, s. 26. http://www.legislation.gov.uk/ukpga/2011/23/pdfs/ukpga_20110023_en.pdf. For criticism of the TPIM regime during the legislative process, see: Amnesty International, *The Terrorism Prevention and Investigation Measures Bill 2011: control orders redux*, June 2011 (Index: EUR 45/007/2011), <https://www.amnesty.org/en/documents/eur45/007/2011/en/>.

⁵⁹ For Amnesty International's criticism of the control orders regime, see *United Kingdom: Five years on: Time to end the control orders regime*, (Index: EUR 45/012/2010), August 2010; and *United Kingdom: Submission for the review of counter-terrorism and security powers*, (Index: EUR 45/015/2010), September 2010.

⁶⁰ Terrorism Prevention and Investigation Measures Act 2011, s. 26(1). The Home Secretary has this power available at their disposal when parliament is not available.

Similarly, the legislation governing the maximum length of pre-charge detention of terrorism suspects is open to “enhancement” by the executive in poorly defined situations of urgency. In January 2011, the maximum period of pre-charge detention in counter-terrorism cases was reduced from 28 to 14 days following a Home Office review of counter-terrorism and security powers. The Protection of Freedoms Act, which came into force in May 2012, not only retains the 14-day limit (already the longest available to a state in the region), but it also allows the maximum period to be increased to 28 days in response to an unspecified “urgent” situation that could arise in the future.⁶¹ Such undefined situations of “urgency” undermine notions of legal certainty and give the government wide powers to define an “urgent” situation as it sees fit.

1.7 MIGRATION AND COUNTER-TERRORISM

“In Europe today it is forbidden to speak the truth...It is forbidden to say that today we are not witnessing the arrival of refugees, but a Europe being threatened by mass migration...It is forbidden to say that immigration brings crime and terrorism to our countries.”

Hungarian Prime Minister Viktor Orbán in a speech on 15 March 2016⁶²

1.7.1 AUSTRIA

Amendments to Austria’s Asylum Act and associated laws were fast-tracked to adoption in April 2016.⁶³ They reflect the growing link being made by many EU member states, between the refugee crisis and the threat of terrorism. The law amending the Asylum Act, which came into force in June 2016, allows the Austrian authorities to employ special, temporary measures if a high “influx” of refugees at the country’s borders is deemed to threaten public order and internal security. Among the numerous threats the law is purported to address are “concerns of increasing levels of organized crimes and risk of individuals associated with terrorist groups entering the state” and “increased risk of social and ethnic tensions”.⁶⁴

The law provides no definition of the criteria that should be applied in determining that a situation has reached such a threshold – in effect an emergency – such that the special measures, which clearly deviate from Austria’s general human rights obligations, may be employed. This gives the authorities wide discretion to decide that emergency measures are needed.

The amendments introduced an additional section to Part 4 of the Asylum Act dealing with “asylum procedural law” entitled “Special measures for the maintenance of public order and the safeguarding of internal security while controls at internal borders are conducted.”⁶⁵ Two prerequisites must be met for the introduction of these special measures, which permit the authorities to deviate from human rights protections. First, the federal government must adopt a decree, in agreement with the Main Committee of

⁶¹ Protection of Freedoms Act 2012, Part 4, s. 58 <http://www.legislation.gov.uk/ukpga/2012/9/part/4/enacted>.

⁶² Office of the Prime Minister, 15 March 2016, <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/speech-by-prime-minister-viktor-orban-on-15-march>.

⁶³ Amendments to the Asylum Act (*Asylgesetz 2005*), Aliens Police Act (*Fremdenpolizeigesetz 2005*) and the Federal Office for Immigration an Asylum - Procedural Law (*BFA-Verfahrensgesetz 2012*), all amended by Federal Law Gazette I No. 24/2016. The government initially provided no public review process, but relented amid protest and provided a one-week window for ministries, social partnership organizations (chambers) and the civil society to evaluate the proposals. The typical review period for proposed legislation is between four and six weeks.

⁶⁴ Federal Act Concerning the Granting of Asylum (Asylum Act 2005) [*Bundesgesetz über die Gewährung von Asyl (Asylgesetz 2005)*], <https://www.ris.bka.gv.at/Ergebnis.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004240%20&VonParagraf=0&FassungVom=02.02.2222&Titel=&Kundmachungsorgan=BGBL.%20I.%20Nr.&Kundmachungsnummer=100/2005>; for the English version see: https://www.ris.bka.gv.at/Dokumente/ErV/ERV_2005_1_100/ERV_2005_1_100.html.

⁶⁵ *BFA-Verfahrensrecht* s. 16-42, *Sonderbestimmungen zur Aufrechterhaltung der öffentlichen Ordnung und des Schutzes der inneren Sicherheit während der Durchführung von Grenzkontrollen*.

parliament,⁶⁶ declaring that public order and internal security are endangered. Second, the proposed special measures will only apply so long as border controls at the internal Schengen borders are maintained.⁶⁷

The special measures would fast-track asylum procedures in a manner that would significantly undermine the rights of asylum-seekers in Austria. If a decree was issued declaring a threat to public order and internal security, the police would be empowered to take an immediate decision at the Austrian border regarding whether a person's claim to asylum can be rejected and the person barred from entering the country. If a person in Austria had their asylum claim rejected, police would be empowered to force him or her to leave Austria immediately, regardless of the state's *non-refoulement* obligation.

Amnesty International and others have raised concern that the police are not trained to make determinations on international protection, which is a complex area of international law. They have also noted that the law does not provide for an effective and meaningful appeal and/or remedy against a negative decision.⁶⁸ Indeed, the police are not even required to issue a decision in writing. Any appeal against a negative decision must be filed in an Austrian court from abroad and does not have "suspensive" effect, that is, a person cannot enter Austria to file the appeal with protection against return in the meantime. Given the often abject circumstances of refugees fleeing persecution and war or other violence, this appeals process acts as an obstacle to enjoying international protection in Austria.

A report of the Austrian parliamentary Committee on Internal Affairs concluded that emergency measures must be employed only in exceptional circumstances, must be both necessary and proportionate, and must not infringe on non-derogable rights.⁶⁹ However, as it stands, the law paves the way for a significant roll-back in rights for people seeking international protection in Austria.

1.7.2 HUNGARY

Hungarian authorities have been particularly aggressive in their attempts to draw a link between refugees and the threat of terrorism. In December 2016, in response to criticism of Hungarian refugee policy, Minister of Justice László Trócsányi, stated that the integration of immigrants "cannot always be regarded as successful..." and noted that "[a]cts of terrorism were committed in both Paris and Brussels last year."⁷⁰

Hungary has also taken concrete steps toward keeping refugees out of the country and making it extremely difficult for them in-country. Since 2015, the government has invoked a "crisis situation due to mass immigration", a distinct state of emergency empowering the police and military to "assist" the asylum authority; instituting expedited border procedures in "transit zones"; and limiting judicial review of asylum decisions, issued by the Office of Immigration and Nationality.

The "crisis situation" was introduced into the Law on Asylum in September 2015⁷¹ and initially applied in two counties by government decree.⁷² It was extended to six counties within a few days⁷³, and in March 2016 to the whole territory of Hungary.⁷⁴ It is set to be in force until March 2017⁷⁵, despite plummeting numbers of refugee and migrant arrivals to the country, and thus the absence of the threatening "mass" migration upon which the "crisis situation" has been justified.

⁶⁶ The Main Committee advises the executive, including on European policy.

⁶⁷ The Schengen area comprises 26 European states that have abolished passport and any other type of border control at their mutual borders.

⁶⁸ Amnesty International Austria, *Statement on the amendment of the Austrian Asylum Act (2005), the Aliens Police Act (2005) and the Federal Office for Immigration and Asylum - Procedural Law (2012)*, 21 April 2016, https://www.amnesty.at/de/view/files/download/showDownload/?tool=12&feld=download&sprach_connect=417.

⁶⁹ Accompanying report from the Committee on Internal Affairs, 25 April 2016, https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_01097/fname_528037.pdf.

⁷⁰ Ministry of Justice, "Minister of Justice speaks out in Dutch paper about criticism of Hungarian refugee policy", 8 December 2016, <http://www.kormany.hu/en/ministry-of-justice/news/minister-of-justice-speaks-out-in-dutch-paper-about-criticism-of-hungarian-refugee-policy>.

⁷¹ Law CXL of 2015 on amendments to certain laws in connection to the management of mass immigration, promulgated on 7 September 2015, (2015. évi CXL. törvény egyes törvényeknek a tömeges bevándorlás kezelésével összefüggő módosításáról), <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK15124.pdf>.

⁷² Government decree 269/2015. (IX. 15.), http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1500269.KOR×hift=ffffff4&xtreferer=00000001.TXT

⁷³ Government decree 270/2015. (IX. 18.), <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK15131.pdf>

⁷⁴ Government decree 41/2016. (III. 9.), http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600041.KOR×hift=ffffff4&xtreferer=00000001.TXT

⁷⁵ Government decree 272/2016. (IX. 5.), <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK16135.pdf>

At the same time, amendments in 2015 to the Criminal Code led to the criminalization of refugees and migrants who enter Hungary irregularly through its southern border fence, instituting a wide range of penalties, including prison sentences and mandatory expulsion.⁷⁶

Eleven people have been convicted for illegal crossing of the border fence aggravated by alleged participation in a mass riot. They were part of a large group of refugees and migrants stranded at the border between Serbia and Hungary on 16 September 2015, the day after Hungary moved to completely close its southern border. All of them, including a blind elderly Syrian woman and a wheelchair-bound Syrian man living with a disability, were alleged to have participated in a mass riot in their attempts to enter the country unlawfully, a crime carrying a prison sentence of one to five years and mandatory expulsion.

In November 2016 one of the eleven, Syrian national Ahmed H., was convicted by a first instance court in Szeged for committing “acts of terror” as defined by the Criminal Code⁷⁷ and was sentenced to ten years in prison and final expulsion from Hungary. Prosecutors alleged that Ahmed H. committed “acts of terror” by using a megaphone to request that the police communicate with the refugees and migrants at the border and by throwing objects at them, which the prosecution argued had constituted an attempt to force state authorities to allow the irregular entry of refugees and migrants into Hungary.⁷⁸ News footage taken at the time captured Ahmed H. using a megaphone to call on both the refugees and the police to remain calm, but as the clashes intensified Ahmed H. admitted in court that he was involved in stone throwing.⁷⁹ Amnesty International observers on the scene at the time registered the use of excessive force by Hungarian police while quashing the unrest.⁸⁰

Amnesty International has called the conviction of Ahmed H. a blatant and shameful misuse of terrorism provisions in the Criminal Code, noting that using a megaphone and throwing stones cannot credibly be considered acts of terrorism.⁸¹ Ahmed H. appealed the conviction and the prosecution had also announced that it intended to appeal what it considered a “lenient” sentence.

⁷⁶ Law CXL of 2015 on amendments to certain laws in connection to the management of mass immigration, promulgated on 7 September 2015, <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK15124.pdf>.

⁷⁷ Section 314. Para. (1) a, Law C of 2012 on the Criminal Code (2012. évi C. törvény a Büntető Törvénykönyvről), http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200100.TV

⁷⁸ Notes from the trial hearing, 30 November 2016, on file with Amnesty International.

⁷⁹ CNN, “Syrian man jailed over Hungary border riot despite pleading for calm”, 2 December 2016, <http://edition.cnn.com/2016/12/02/europe/syrian-man-border-riot-terror/index.html>

⁸⁰ Amnesty International, *Fenced Out: Hungary's Violations of the Rights of Refugees and Migrants*, 8 October 2015, (Index: EUR 27/2614/2015), <https://www.amnesty.org/en/documents/eur27/2614/2015/en/>.

⁸¹ Amnesty International, *Hungary: Shameful misuse of terrorism provisions as man involved in border clash jailed for 10 years*, 30 November 2016, <https://www.amnesty.org/en/latest/news/2016/11/hungary-shameful-misuse-of-terrorism-provisions-as-man-involved-in-border-clash-jailed-for-10-years/>. See also, Kartik Raj, “How a family man in Cyprus ended up in a Hungarian jail cell accused of ‘terrorism’”, 29 November 2016, <https://www.amnesty.org/en/latest/news/2016/11/how-a-family-man-in-cyprus-ended-up-in-a-hungarian-jail-cell-accused-of-terrorism/>.

2. PRINCIPLE OF LEGALITY

“Calls by the international community to combat terrorism, without defining the term, might be understood as leaving it to individual States to define what is meant by it. This carries the potential for unintended human rights abuses and even the deliberate misuse of the term.”

Office of the High Commissioner for Human Rights ⁸²

Because there is no universally agreed definition of “terrorism” under international law, states and international bodies have created their own. In that process, over the years, definitions of terrorism have become ever more vague and overly broad. This lack of clarity in many counter-terrorism laws has led, in turn, to a lack of *certainty* regarding what precisely constitutes an act of terrorism. If people can’t tell whether their conduct would amount to a crime, they cannot adjust their behaviour to avoid criminality. The consequences can be significant, ranging from the profiling of members of certain groups thought to be more inclined toward “radicalization”, “extremism”, or criminality based on stereotypes – i.e. guilt by association – to the outright misuse by states of laws that define terrorism loosely to deliberately target political opponents, human rights defenders, journalists, environmental activists, artists, and labour leaders.

Such targeting under a broad banner of what constitutes “terrorism” can mean that people not associated in any way with criminal acts may be subjected to unwarranted surveillance of their electronic communications, controls on their ability to live in certain areas or meet with certain people, intrusive searches of their homes and cars, and monitoring – or outright closure -- of their places of worship. Overly broad definitions of terrorism have real world consequences.

The “principle of legality” under international law requires that criminal laws are sufficiently precise so it is clear what constitutes a criminal offence and what the consequences of committing the offence would be.⁸³ This recognizes that ill-defined and overly broad laws are open to arbitrary application and abuse.

⁸² OHCHR, “Human Rights, Terrorism and Counter-terrorism”, July 2008, p. 39, <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

⁸³ See Martin Scheinin, (former) UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report to the Commission on Human Rights, E/CN.4/2006/98, para. 46: “The first requirement of article 15, paragraph 1, [ICCPR] is that the prohibition of terrorist conduct must be undertaken by national or international prescriptions of law. To be ‘prescribed by law’ the prohibition must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct”.

For instance, causing a "disturbance" is part of the definition of terrorism in some laws, sometimes with the intent to compel the authorities to take a specific action. But disturbances come in many forms and at varying levels of severity.

Often, causing "fear" or "threat" in the general population is a key element in the definitions of terrorism. This means, for example, that peacefully advocating for the rights of lesbian, gay, bisexual, transgender and intersex people in the face of stiff public opposition could be deemed as intended to cause fear, and acts of peaceful civil disobedience could be considered a "threat" to the established order. In both cases, peaceful activists could fall foul of anti-terrorism laws.

Human rights bodies have repeatedly criticized states for adopting imprecise and overly broad definitions of terrorism in domestic legislation.

Amnesty International calls on all states, including EU member states, to:

- Refrain from adopting or maintaining vague and overly broad definitions of "terrorism".
- Ensure that each constituent element of terrorism-related offences under national law is precisely and sufficiently circumscribed to uphold the principle of legality.

2.1 BULGARIA

One of the broadest definitions of terrorism in the EU can be found in Bulgaria. Under the Criminal Code, "anyone who, in view of causing disturbance or fear among the population or of threatening or forcing a competent authority, a representative of a public institution or of a foreign state or international organization to perform or omit part of his/her duties commits a crime... [and] shall be punished for terrorism by deprivation of liberty from five to fifteen years..."⁸⁴

The 2016 counter-terrorism bill (see Chapter 1) further defines a "terrorist act" as carrying out an explosion, arson, pollution or otherwise endangering the population or threatening the life or health of a person; causing substantial property damage; hostage-taking; and the threat to take such actions with the intent to cause such a disturbance or fear, or threaten or force a state actor to take a particular action.⁸⁵

Against a backdrop of high levels of racism and intolerance towards marginalized groups in Bulgaria, including migrants, refugees, Roma, Muslims and people perceived to be members of these groups, it is self-evident that the vague and overly broad definitions of "terrorism" and "terrorist acts" could be used to arbitrarily target for monitoring, surveillance, investigation, and prosecution individuals from such marginalized groups against whom the state has neither credible nor sufficient evidence of criminality.⁸⁶

2.2 DENMARK

In July 2016, the UN Human Rights Committee expressed concern about the "vague terms criminalizing and defining actions constituting acts of terrorism" in article 114 of Denmark's Criminal Code (2005).⁸⁷ It recommended that Denmark "clearly define the acts that constitute terrorism in order to avoid abuses".⁸⁸

2.3 FRANCE

In August 2015, the UN Human Rights Committee expressed particular concern about "the introduction of bans on leaving the country and of the offence of 'individual terrorist undertaking', along with the use of vague and inaccurate terms criminalizing and defining actions constituting acts of terrorism, provocation and

⁸⁴ Criminal Code of the Republic of Bulgaria, Article 108a, <http://www.legislationline.org/documents/section/criminal-codes/country/39>.

⁸⁵ Draft Law on Countering Terrorism, no. 602-01-42, adopted by the Council of Ministers on 7 July 2016.

⁸⁶ Amnesty International, *Bulgaria: Proposed counter-terrorism bill would be a step back for human rights*, 29 July 2016, (Index: EUR 15/4545/2016), <https://www.amnesty.org/en/documents/eur15/4545/2016/en/>

⁸⁷ Criminal Code of Denmark (2005), Article 114, https://www.unodc.org/tldb/pdf/Denmark_Criminal_Code_2005.pdf

⁸⁸ UN Human Rights Committee, Concluding Observations on the sixth periodic report of Denmark, CCPR/C/DNK/CO/6, 7 July 2016, paras 27-28.

vindication of terrorism”.⁸⁹ It called on France to ensure that laws that strengthen anti-terrorism provisions, such as the November 2014 law that included the offending vague and inaccurate terms, “observe the principles of the presumption of innocence and of legality, and are consequently clearly and precisely set out”.⁹⁰

2.4 POLAND

The 2016 Counter-terrorism Law⁹¹ is based on a broad set of “terrorist crimes” as defined in Polish law.⁹² In 2010, the UN Human Rights Committee had found the definition of the nature and consequences of “terrorist crimes” in Polish law overly broad and inadequate. It urged Poland to ensure that the law defines such crimes narrowly and in terms of their purpose; Poland has yet to do so.⁹³

In 2016 the government listed incidents that could be of a “terrorist” nature in the regulation that accompanied the new Counter-terrorism Law. The list enumerated activities that, taken alone, could hardly be thought of as credible and sufficient evidence that a person was involved in terrorist activity, including a Polish citizen “coming into contact” with a person “feared” to be involved in terrorism-related activity, and a Polish citizen losing their ID documents abroad.⁹⁴ In October 2016, the UN Human Rights Committee concluded that the definitions of “terrorist incidents” were broad and imprecise, and recommended that a definition be adopted that “does not give the authorities excessive discretion or obstruct the exercise of... rights.”⁹⁵

2.5 SPAIN

The Penal Code in Spain does not explicitly define “terrorism” as a crime, but one legislative reform after another has expanded and created overlap between different offences of varying gravity that are deemed to constitute acts of terrorism.

In February 2015, four UN special rapporteurs issued a joint statement expressing serious concerns about definitions in the context of a move to reform the penal code regarding crimes of terrorism. The UN experts concluded that “the text of the reform project included broad or ambiguous definitions that pave the way for a disproportionate or discretionary enforcement of the law by authorities” and threatened “to violate individuals’ fundamental rights and freedoms”.⁹⁶

They noted that the definition of terrorist offences and provisions relating to the criminalization of “incitement and glorification” and “justification” of terrorism were too broad and vague. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression said that “the anti-terror law could criminalize behaviours that would not otherwise constitute terrorism and could result in disproportionate restrictions on the exercise of freedom of expression.”⁹⁷

The UN experts also raised concerns that the reforms included as “aggravating factors” a range of conduct committed in the context of a large gathering, in order to increase penalties in cases of public protest. The

⁸⁹ UN Human Rights Committee, Concluding Observations on the fifth periodic report of France, CCPR/C/FRA/CO/5, 17 August 2015, para. 10.

⁹⁰ UN Human Rights Committee, Concluding Observations on the fifth periodic report of France, 17 August 2015, para. 10.

⁹¹ Law on Counterterrorism of 10 June 2016 (Ustawa z dnia 10 czerwca 2016 r. o działaniach antyterrorystycznych), Journal of Laws 2016.

⁹² Penal Code of 6 June 1997 (Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego) Journal of Laws 1997 no. 89 item 555 as amended. Article 115 s. 20: “A terrorist offence is a prohibited act subject to the penalty of deprivation of liberty with the upper limit of at least five years, committed in order to: 1) seriously intimidate many persons; 2) to compel public authority of the Republic of Poland or of the other State or of international organization agency to undertake or abandon specific actions; 3) cause serious disturbance to the constitutional system or to the economy of the Republic of Poland, of the other State or international organization - and a threat to commit such an act”. See English version of Polish Penal Code: [https://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/PL4-ADDMONEYVAL\(2013\)2ANN_en.pdf](https://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/PL4-ADDMONEYVAL(2013)2ANN_en.pdf).

⁹³ UN Human Rights Committee, Concluding observations on the sixth periodic report of Poland, CCPR/C/POL/CO/6, 15 November 2010, para. 4.

⁹⁴ Regulation of the Minister of the Interior and Administration of 22 July 2016 on the Catalogue of Terrorist Incidents (*Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 22 lipca 2016 r. w sprawie katalogu incydentów o charakterze terrorystycznym*) Journal of Laws 2016 item 1092, 1.4.

⁹⁵ UN Human Rights Committee, Concluding observations on the seventh periodic report of Poland, CCPR/C/POL/CO/7, 23 November 2016, paras 9-10.

⁹⁶ OHCHR, “Two legal reform projects undermine the rights of assembly and expression in Spain - UN experts,” 23 February 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597>.

⁹⁷ OHCHR, “Two legal reform projects,” 23 February 2015.

Special Rapporteur on the rights to peaceful assembly and association stated that this could have a “chilling effect” on the freedom of peaceful assembly.⁹⁸

Spain’s Public Security Act has also come under scrutiny by the UN Human Rights Committee. In August 2015, the Committee criticized the Act for “the use of vague and ambiguous terms in some provisions, which could give rise to wide variations in the implementation of the Act”.⁹⁹

2.6 UNITED KINGDOM

The UN Human Rights Committee has raised concerns about the definition of terrorism in UK legislation, which is also an example of incremental legislative expansion of the types of actions and behaviours that can constitute terrorism.¹⁰⁰ The Terrorism Act 2000 definition has been expanded through subsequent legislation that has added new offences, leading to a vast arsenal of what constitutes “terrorism-related activity”.¹⁰¹

In August 2015, the Committee expressed concern that the UK had maintained the broadly formulated definition of terrorism in section 1 of the Terrorism Act 2000 “that can include a politically motivated action which is designed to influence a government or international organization, despite significant concern... that the definition is ‘unduly restrictive of political expression’.”¹⁰²

Amnesty International and many others have outstanding concerns, in particular with the still vague notions of what constitutes “facilitation”, “encouragement” or “instigation” in the commission of an “act of terrorism”, as provided in the 2015 CTSA amended definition.¹⁰³

The UK’s Independent Reviewer of Terrorism Legislation reiterated his own concerns about the broad definition of terrorism under UK law in a December 2016 report.¹⁰⁴ He noted that the definition had been narrowed somewhat by the January 2016 Court of Appeal decision in the case of David Miranda, a Brazilian national who was stopped at Heathrow Airport while in possession of documents supplied by Edward Snowden. Miranda was questioned under Schedule 7 Terrorism Act 2000. The Court of Appeal concluded that while the stop was lawful under the existing law, paragraph 2(1) of Schedule 7 of the Act was “incompatible with article 10 of the [European] Convention in relation to journalistic material in that it is not subject to adequate safeguards against its arbitrary exercise.”¹⁰⁵ The judgment was widely perceived as a victory for press freedom,¹⁰⁶ but the Home Secretary stated in October 2016 that the government would decline to change the statutory definition of terrorism in line with the Court of Appeal’s judgment.¹⁰⁷

⁹⁸ OHCHR, “Two legal reform projects,” 23 February 2015.

⁹⁹ UN Human Rights Committee, Concluding observations on the sixth periodic report of Spain, CCPR/C/ESP/CO/6, 1 August 2015, para. 25.

¹⁰⁰ Terrorism Act 2000 s1 (1) as amended by Terrorism Act 2006 (c. 11), s. 34; S.I. 2006/1013, art. 2 and Counter-Terrorism Act 2008 (c. 28), ss. 75(1)(2)(a), 100(5) (with s. 101(2)); S.I. 2009/58, art. 2(a). Available here: <http://www.legislation.gov.uk/ukpga/2000/11/section/1#commentary-c16756551>.

¹⁰¹ Amnesty International has had longstanding serious concerns about the definition of terrorism in UK law, and has expressed concern about the definition of “terrorism” in the Terrorism Act 2000 since that Act was first introduced in Parliament; see, for instance, Amnesty International, *UK: Briefing on the Terrorism Bill*, (Index: EUR 45/043/2000), published in April 2000 and Amnesty International, “UK: High court decision to uphold use of terrorism legislation against David Miranda ‘chilling,’” 19 February 2014, <https://www.amnesty.org.uk/press-releases/uk-high-court-decision-uphold-use-terrorism-legislation-against-david-miranda>. For examples from other organisations see: Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression*, Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights, London, April 2006; and Human Rights Watch, *Universal Periodic Review of the United Kingdom: Human Rights Watch’s Submission to the Human Rights Council*, 7 April 2008.

¹⁰² UN Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7, 17 August 2015, para. 14.

¹⁰³ Counter-Terrorism and Security Act 2015 s 14(4) [amended 2015]: “Involvement in terrorism-related activity is any one or more of the following:

- (a) the commission, preparation or *instigation* of acts of terrorism;
- (b) conduct that *facilitates* the commission, preparation or instigation of such acts, or is intended to do so;
- (c) conduct that gives *encouragement* to the commission, preparation or instigation of such acts, or is intended to do so;
- (d) conduct that gives support or *assistance* to individuals who are known or believed by the individual concerned to be involved in conduct falling within paragraph (a).

It is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism in general.”

http://www.legislation.gov.uk/ukpga/2015/6/pdfs/ukpga_20150006_en.pdf.

¹⁰⁴ David Anderson QC, “Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part I of the Terrorism Act 2006”, 1 December 2016, pp 24-26,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/573677/THE_TERRORISM_ACTS_IN_2015_web.pdf.

¹⁰⁵ *Miranda v Secretary of State for the Home Department and Commissioner for the Metropolitan Police* [2016] EWCA 6; [2016] 1 WLR 1505, para. 119, <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/miranda-v-home-sec-judgment.pdf>

¹⁰⁶ Article 19, “UK: Free speech groups welcome win for press freedom in Miranda case”, 19 January 2016, <https://www.article19.org/resources.php/resource/38236/en/uk-free-speech-groups-welcome-win-for-press-freedom-in-miranda-case>

¹⁰⁷ David Anderson QC, “Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part I of the Terrorism Act 2006”, 2 December 2016, p. 26.

3. RIGHT TO PRIVACY

“I grew up with the understanding that the world I lived in was one where people enjoyed a sort of freedom to communicate with each other in privacy without it being monitored. Without it being measured or analyzed or sort of judged by these shadowy figures or systems...”

Edward Snowden, the former CIA employee turned whistleblower who leaked classified information about unlawful global surveillance programmes¹⁰⁸

Privacy rights and surveillance practices in Europe – and globally – have been at odds in recent years.¹⁰⁹ On the one hand, states have vastly expanded executive power and largely neutralized the ability of the judiciary to serve as a prior check, thus granting the executive a virtual monopoly of power over mass surveillance practices. On the other hand, courts in EU member states, as well as international bodies and experts, have met this challenge and made clear in judgments and expert opinions that indiscriminate mass surveillance violates the right to privacy, freedom of expression and other human rights. So far, the reach for greater executive powers in the surveillance arena is winning, with a number of EU member states having already joined the ranks of “surveillance” states.

As the examples below illustrate, many European governments cite security threats to justify enhancing their surveillance powers. While specific security threats need to be addressed by states, any response to them must comply with the rule of law, including international human rights law. Indiscriminate mass surveillance cannot meet that test.

Like all measures taken in the counter-terrorism context, communications surveillance has to be conducted in a way that preserves people’s human rights. States may have a legitimate goal to pursue by means of surveillance measures, but that is not the end of the story. Any communications surveillance measure used must be strictly necessary and, to the extent that it interferes with people’s rights, must be proportionate in the particular circumstances of each case. The cornerstone of lawful communications surveillance is that it is individualized and based on reasonable suspicion of wrongdoing.

Indiscriminate mass surveillance, in effect a fishing expedition and “just-in-case” retention of people’s communications and data, is the antithesis of this. States may refer to indiscriminate mass surveillance practices by other names – “bulk” rather than “mass”, “collection” or “interception” rather than “surveillance” – but linguistic gymnastics do not make the practices conform to human rights standards.

¹⁰⁸ Larry Abramson, “Privacy board to scrutinize surveillance programs,” *National Public Radio (NPR)*, 9 July 2013, <http://www.npr.org/2013/07/09/200285740/privacy-board-to-hold-first-meeting>. See also, Kenneth Roth and Salil Shetty, “Pardon Edward Snowden,” *New York Times*, 15 September 2016, http://www.nytimes.com/2016/09/15/opinion/pardon-edward-snowden.html?_r=0.

¹⁰⁹ Celestine Bohlen, “Discord over snooping muted by security fears,” *New York Times*, 22 September 2016, http://www.nytimes.com/2016/09/23/world/europe/discord-over-snooping-muted-by-security-fears.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&_r=0.

In addition to surveillance measures, some European states have pushed for greater mandatory data retention, including communications data, by private telecommunications providers. Communications data is information about the communication itself, essentially the “who”, “how”, “when” and “where”. Such data, especially when aggregated over a period of time, can provide a detailed profile of a person’s private life, including their politics, sexual orientation, medical conditions and financial status.

Retention of such data, whether by the state or private companies, poses three particularly serious problems in terms of human rights protection:

- it is not based on individualized, reasonable suspicion of wrongdoing;
- it results in massive databases that may be hacked;
- it allows the build-up of an enormous store of information covering many years for the state authorities to trawl through.

Proposals to limit encryption have also raised concerns.¹¹⁰ Encryption is used in a broad range of applications to secure data, from protecting banking and financial data from criminals to keeping emails confidential. Encryption allows victims of human rights violations to securely speak out and permits human rights defenders to do their work, within and beyond the realm of repressive governments. Encryption should only be subject to restrictions that are demonstrably necessary and proportionate, and otherwise comply with international human rights law. Proposals to prohibit or “backdoor”¹¹¹ encrypted communications are an affront to people’s human rights as they indiscriminately undermine the privacy and security of all users.

The UN High Commissioner for Human Rights,¹¹² the Special Rapporteur on the protection of human rights while countering terrorism¹¹³ and the Special Rapporteur on freedom of expression¹¹⁴ have all denounced indiscriminate mass surveillance. In October 2015, the Court of Justice of the EU concluded that legislation that gives the authorities general access to the content of electronic communications compromises the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the [EU] Charter.¹¹⁵

The European Court of Human Rights has issued two important judgments in this regard. In December 2015, in *Roman Zakharov v Russia*, the Grand Chamber held that the regime in Russia for the surveillance of telecommunications violated convention rights as it did not require prior judicial authorization based on individualized reasonable suspicion of wrongdoing.¹¹⁶ In *Szabo and Vissy v Hungary*, the Court condemned the unlawful surveillance practices in Hungary.¹¹⁷

Amnesty International, jointly with nine other human rights organizations across four continents, is challenging indiscriminate mass surveillance laws and practices in a case pending at the European Court of Human Rights.¹¹⁸

Amnesty International calls on all states, including EU member states, to:

- **Reject laws and policies governing secret surveillance and encryption that violate international human rights standards.**
- **Abandon indiscriminate mass surveillance laws and practices.**

¹¹⁰ Amnesty International, *For Your Eyes Only? Ranking 11 Technology Companies on Encryption and Human Rights* (Index: POL 40/4985/2016), 21 October 2016, <https://www.amnesty.org/en/documents/pol40/4985/2016/en/>; and Amnesty International, *Encryption: A Matter of Human Rights* (Index: POL 40/3682/2016), 21 March 2016, <https://www.amnesty.org/en/documents/pol40/3682/2016/en/>.

¹¹¹ An informal term used to refer to technical measures that weaken or undermine encryption tools, devices and services in order to facilitate access to information and communications by actors other than the service provider, and parties to, the information or communications.

¹¹² OHCHR, “The Right to Privacy in the Digital Age”, A/HRC/27/37, 30 June 2014, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/088/54/PDF/G1408854.pdf?OpenElement>.

¹¹³ Ben Emmerson QC, “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism”, A/69/397, 23 September 2014, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/545/19/PDF/N1454519.pdf?OpenElement>.

¹¹⁴ Frank La Rue, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression”, A/HRC/23/40, 17 April 2013, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf.

¹¹⁵ *Maximilian Schrems v the Data Protection Commissioner of the Republic of Ireland*, Case C-362/14, Court of Justice of the European Union, Judgment of 6 October 2015, para. 94.

¹¹⁶ *Roman Zakharov v Russia*, (47143/06), European Court of Human Rights, 4 December 2015.

¹¹⁷ *Szabo and Vissy v Hungary*, (37138/14), European Court of Human Rights, 12 January 2016.

¹¹⁸ Amnesty International, *The European Court of Human Rights Application: 10 Human Rights Organisations v United Kingdom: Additional submissions on the facts and complaints*, 9 April 2015 (Index: IOR 60/1415/2015), <https://www.amnesty.org/en/documents/ior60/1415/2015/en/> and *The European Court of Human Rights Application: 10 Human Rights Organisations v United Kingdom: Submissions made in light of the third IPT judgment of 22 June 2015*, 1 September 2015 (Index: IOR 60/3222/2015), <https://www.amnesty.org/en/documents/ior60/3222/2015/en/>.

- Only undertake surveillance after prior, independent judicial authorization, and subject it to ongoing judicial scrutiny and independent oversight, on the basis of individualized reasonable suspicion of wrongdoing and the requirements of strict necessity and proportionality.
- Strictly circumscribe the aim of communications surveillance measures to a narrow set of genuinely legitimate grounds, such as combating serious crime or acts amounting to a specific threat to national security; and never use it against people for the lawful exercise of their human rights, such as organizing peaceful protests.
- Increase transparency about when surveillance is authorized and undertaken.
- Notify people whose communications have been subjected to surveillance as soon as such notification does not or no longer jeopardizes legitimate investigations, and provide them with effective access to proper remedies against alleged human rights violations constituted by and/or resulting from the surveillance.

3.1 AUSTRIA

On 1 July 2016, the Police State Protection Act¹¹⁹ entered into force, granting far-reaching powers to the Federal Office for the Protection of the Constitution and the Fight against Terrorism (BVT).¹²⁰ Such powers included permission to collect data from other state institutions and agencies, and to engage in secret surveillance, undercover investigation, and video and audio recording if there is a reasonable suspicion of an attack that would compromise the constitutional order.¹²¹ No prior judicial authorization is required nor is there provision for judicial supervision or independent oversight to ensure the lawfulness and proportionality of BVT operations. Under the Act, the BVT has access to sensitive data from all Austrian authorities and enterprises.¹²² Any information collected can be stored for up to six years.

The BVT reports to a confidential sub-committee of parliament. A commissioner for special legal protection is responsible for safeguarding the rights of people affected by BVT operations and is tasked with approving some (but not all) BVT investigative measures.¹²³ The commissioner can bring legal complaints to the Austrian Data Protection Authority on behalf of people who have been investigated by the BVT if legal circumstances do not permit the commissioner to inform the people of the nature and extent of the BVT operations. The BVT can invoke national security or witness protection to deny the commissioner access to parts of the files.

These constraints raise serious concerns about the ability of the commissioner's office to be an effective independent oversight mechanism and the ability of the commissioner to provide an effective remedy to people who suffer rights violations at the hands of the BVT.

3.2 BELGIUM

Recent surveillance initiatives in Belgium focus primarily on people characterized as potential, suspected, or returned “foreign terrorist fighters”, who appear on the Coordinating Body for Threat Analysis list.¹²⁴ In July 2016, newspapers reported on the basis of government data that 457 individuals were on the list at the beginning of 2016.¹²⁵ The government has acknowledged that a confidential circular sent to various agencies sets out surveillance measures and policies targeting listed individuals.

¹¹⁹ *Bundesgesetz über die Organisation, Aufgaben und Befugnisse des polizeilichen Staatsschutzes (Polizeiliches Staatsschutzgesetz – PSTSG)*, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009486>. The bill passed the National Council of parliament on 27 January 2016.

¹²⁰ *Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (BVT)*. The BVT is a domestic police and intelligence agency responsible for monitoring and investigating persons suspected of terrorism-related acts in Austria.

¹²¹ Section 6 of the Act refers to offences in the Austrian criminal code that would constitute such an attack.

¹²² According to the Act, “data deserving special protection” includes information relating to natural persons concerning their racial or ethnic origin, political opinion, trade-union membership, religious or philosophical beliefs, and data concerning health or sex life.

¹²³ If domestic authorities or foreign security services, organs of the EU or the UN provide information on persons who are suspected of having committed an attack abroad equal to an attack that would compromise the Constitution the BVT can take action without the approval of the commissioner.

¹²⁴ The OCAD/OCAM list. The Law on Threat Analysis:

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2006071032&table_name=loi; The Royal Decree implementing the Law on Threat Analysis: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2006112833&table_name=loi.

¹²⁵ See, for example, “1 op de 3 Belgische Syriëstrijders is vrouw of kind”, *DeMorgen*, 12 July 2016, <http://www.demorgen.be/buitenland/1-op-de-3-belgische-syriestrijders-is-vrouw-of-kind-b4ec3db5/>; and http://www.standaard.be/cnt/dmf20160712_02382220.

In September 2016 a new, dynamic database was established. This database allegedly will allow for better exchange, updating and cross-checking of information relating to “foreign terrorist fighters” between different public services involved in addressing terrorism and what is deemed as constituting “violent extremism”.¹²⁶

Both the Coordinating Body for Threat Analysis list and the dynamic database are exempt from general privacy and data protection safeguards.¹²⁷ As a consequence, it is not possible for individuals to verify directly whether they are listed, nor can they request access to their information or ask for it to be corrected or removed. On the basis of Article 13 of the Data Protection Law, they can only indirectly request verification and correction of their personal data via the Privacy Commission. The Privacy Commission can only communicate to the person that the necessary verifications have been carried out.¹²⁸

The law introducing the dynamic database was rushed through parliament in a couple of weeks, even though it touches on complex issues. Moreover, both the Privacy Commission and the Council of State had raised fundamental issues relating to the legal instrument used to create the new database, who has access to it, and what information is to be included.¹²⁹

Local administrations are required to set up Local Integrated Security Cells.¹³⁰ These cells are the vehicles for police, the mayor, municipal social services and other relevant services and institutions to exchange information. There is uncertainty about the role of confidentiality and professional secrecy within the cells, and there are several worrying legislative proposals pending that would lift professional confidentiality in cases where there is a risk of terrorism-related offences being committed.¹³¹

On 29 May 2016, the Data Retention Act was adopted.¹³² This obliges telecommunications companies in Belgium to retain all metadata concerning their customers' communications for 12 months, and to provide the data to certain public officials, most typically law enforcement agencies conducting criminal investigations. Notwithstanding the fact that the indiscriminate nature of the data retention had been deemed problematic by the Constitutional Court and the Court of Justice of the EU,¹³³ the government stated it was technically not possible to distinguish between different types of users of telecommunications services. As a consequence, even the metadata of doctors, lawyers, journalists and other professionals subject to professional privilege or other confidentiality obligations will be retained, although access to such data is subject to stricter safeguards.

3.3 FRANCE

In July 2015, a surveillance law came into force in France that granted the Prime Minister the power to authorize the use of surveillance measures for a wide range of goals, including the protection of economic or overarching foreign policy interests, and the prevention of “collective violence constituting a serious threat to

¹²⁶ Established by Royal Decree of 21 July 2016 establishing a shared database on foreign fighters, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2016072138&table_name=loi and the law of 27 April 2016 on additional measures in the fight against terrorism

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2016042707&table_name=loi. See also, Jeff Stein, “Belgian federal police chief braces for new ISIS terror attacks”, *Newsweek*, 29 November 2016, <http://www.newsweek.com/belgium-police-chief-braces-isis-terror-attacks-526192>.

¹²⁷ Data Protection Law, Article 4, s. 4.

¹²⁸ Data Protection Law, Article 13; Articles 36-46 of the Royal Decree implementing the Data Protection Law, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2001021332&table_name=loi.

¹²⁹ The legal basis for the dynamic database has been included in the Law on the Police Service rather than the Law on Threat Analysis.

¹³⁰ This concept originates in a confidential circular on the treatment of “foreign terrorist fighters”. The Royal Decree on the impulse policy for pilot projects for containing “violent radicalism” and combating “radicalisation” makes financial support conditional on the establishment of a Local Integrated Security Cell.

¹³¹ For example,

<http://www.dekamer.be/kvcr/showpage.cfm?section=flwb&language=nl&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=N&legislat=54&dossierID=1910>; and <http://www.dekamer.be/FLWB/PDF/54/1687/54K1687001.pdf>.

¹³² Law of 29 May 2016 on the collection and retention of data in the electronic communications sector,

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2016052903&table_name=loi.

¹³³ On 11 June 2015, the Belgian Constitutional Court had declared invalid the Data Retention Act of 30 July 2013 for having disproportionately interfered with the right to privacy and data protection, enshrined in articles 7 and 8 of the EU Charter of Fundamental Rights, of persons present under Belgian jurisdiction. The legislation attempted to salvage the content of the EU Data Retention Directive, previously declared invalid by the Court of Justice of the European Union. The Belgian Constitutional Court ruled that the law had not sufficiently met the requirements imposed by the EU judges, as it still referred to an imprecise list of “serious” criminal offences; did not provide a due process for access to information; allowed for the targeting of people not constituting a genuine threat to security; and provided for excessively long times of storage of intercepted information.

public order” and “organized criminality.”¹³⁴ The measures included the power to employ indiscriminate mass surveillance techniques for the purpose of preventing terrorism.

The 2015 law permits the use of mass surveillance tools that capture mobile phone calls and of black boxes in internet service providers that collect and analyze the personal data of millions of internet users (for the automatic detection of electronic communications that could indicate a “terrorist threat”).

The Prime Minister has been empowered to authorize such surveillance without any judicial authorization prior to the surveillance or ongoing independent judicial oversight of the operation, for the purpose of achieving vaguely defined goals, including preventing terrorism. Amnesty International warned before its adoption that the law was “so broad it essentially provides the Executive and intelligence agencies carte blanche for mass data interception”.¹³⁵

The Prime Minister is only required to seek the views of a new body, the National Committee of Intelligence Techniques Control,¹³⁶ but without any requirement to abide by the Committee’s advice or recommendations. There is no notification mechanism foreseen in the law, nor any other effective way for a person to find out whether his or her communications are being subjected to unlawful surveillance measures.

In July 2015, France’s Constitutional Court struck down part of the draft law regarding surveillance of international communications.¹³⁷ In November 2015, a second law was passed that paves the way for indiscriminate, mass surveillance of all electronic communications - both content and associated metadata - sent to, or received from, abroad, including therefore communications sent from one French resident to another via a server located abroad.¹³⁸

In July 2016, the law renewing the state of emergency amended the Law on National Security. This again extended the surveillance powers over electronic communications of the Prime Minister to collect information, without prior judicial authorization, regarding individuals suspected of constituting a threat or of “being associated” with someone who may constitute a threat with the aim of “preventing terrorism”.¹³⁹

3.4 GERMANY

After expanding the surveillance powers of the federal intelligence service¹⁴⁰ in 2015 in response to “cyber threats”,¹⁴¹ parliament adopted in October 2016 a law on the service’s surveillance of foreign-to-foreign communications.¹⁴² In response, the UN Special Rapporteur on the right to privacy expressed deep concern that a “stable and progressive liberal democrac[y]” like Germany had voted for a new surveillance law that legalized practices “that seem unnecessary and/or disproportionate”, and that discriminated against foreigners.¹⁴³

The law grants the federal intelligence service the power to intercept, collect and process the communications of non-EU citizens outside Germany when the interception point is in Germany (bulk and targeted surveillance) and when deemed necessary to “identify and prevent threats against internal or

¹³⁴ Law No. 2015-912, amending the Law on National Security (*Code de la Sécurité Intérieure*):

www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030931899&categorieLien=id

¹³⁵ Amnesty International France, “Observations sur le projet de loi renseignement”, April 2015, SF15 PA 21,

https://amnestyfr.cdn.prismic.io/amnestyfr%2Fa3e7c7d5-5b64-4bdf-be69-e556592d8b2b_aif_observations_sur_projet_de_loi_renseignement_13_avril_2015.pdf; Amnesty International, “France: Parliament must reject law that gives carte blanche to mass surveillance globally,” 30 September 2015, www.amnesty.org/en/latest/news/2015/09/france-must-reject-law-that-gives-carte-blanche-to-mass-surveillance-globally/ and Amnesty International, “France: New surveillance law a major blow to human rights,” 24 July 2015, <https://www.amnesty.org/en/latest/news/2015/07/france-new-surveillance-law-a-major-blow-to-human-rights/>. See also the July 2015 submission of Amnesty International and other NGOs before the Constitutional Court, https://amnestyfr.cdn.prismic.io/amnestyfr%2Ffc34fa43-817b-408a-9b08-f39d1c232bcc_observations_cc_-_9_juillet_2015.pdf.

¹³⁶ Commission National de Contrôle des Techniques de Renseignement (French)

¹³⁷ Decision No. 2015-713 of 23 July 2015, www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-713-dc/decision-n-2015-713-dc-du-23-juillet-2015.144138.html.

¹³⁸ Law No. 2015-1556: <https://www.legifrance.gouv.fr/eli/loi/2015/11/30/DEFX1521757L/jo/texte>, Amnesty International France, “Préoccupations sur la proposition de loi relative aux mesures de surveillance des communications électroniques internationales”, September 2015, SF15 C4 23, https://amnestyfr.cdn.prismic.io/amnestyfr%2Fcd1ec695-dacf-403b-a061-789fed6b90bf_aif_observations_pjlsurveillance_sept2015.pdf

¹³⁹ Law No. 2016-987, Article 15, amending article 851-2 of the Law on National Security, www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032921910&dateTexte=&categorieLien=id.

¹⁴⁰ Bundesnachrichtendienst (BND).

¹⁴¹ Gesetz zur Verbesserung der Zusammenarbeit im Bereich des Verfassungsschutzes.

¹⁴² Gesetz zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes, amending Gesetz über den Bundesnachrichtendienst.

¹⁴³ Joseph A. Cannataci, “The fundamental right to privacy does not depend on the passport in your pocket,” 24 October 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20747&LangID=E>.

external security", maintain Germany's "capacity to act" or "gain other insights of importance with regard to foreign affairs and security politics".¹⁴⁴ These provisions are vague and overly broad, and bulk surveillance for the purpose of informing foreign affairs fails to satisfy the requirement of proportionality.¹⁴⁵ The law contains no provision for independent judicial oversight.

In August 2016, three UN special rapporteurs wrote to the German government expressing concerns that the draft law:¹⁴⁶

- articulated vague and overly broad conditions for the interception and processing of data;
- only regulated data collection on German territory while data collection abroad would remain largely unregulated;
- unduly restricted the right to freedom of expression of foreign journalists and lawyers,¹⁴⁷ including the privileged nature of communications between lawyer and client;
- discriminated against non-German citizens in violation of their right to freedom of expression, which is guaranteed to everyone, regardless of frontiers;¹⁴⁸
- lacked a requirement for prior judicial authorization; and
- lacked the provision of an effective independent oversight mechanism.

None of the special rapporteurs' concerns was taken into account when the bill was finally adopted in October 2016.

German courts have also ruled on the federal criminal police's covert surveillance powers. In April 2016, the German Constitutional Court concluded that some provisions of the 2009 Federal Criminal Police Act, which extended the powers of the federal criminal police to use covert surveillance measures – for example, inside people's homes, including remotely searching computers, and expanding the scope of transferring data to authorities in third countries – were disproportionate.¹⁴⁹ Although the Court held that the powers were not *per se* unconstitutional, it did rule that some provisions were too broad or vague and, as such, were disproportionate because they did not strike the correct balance between the right to privacy and the interests of the state to investigate crimes, including terrorism-related offences. The Court also said that increased transparency was needed in the way data was shared with third parties.

Since the law itself was not ruled unconstitutional, the provisions will remain in force subject to restrictions until 30 June 2018 and then will need to be revised.

3.5 HUNGARY

In *Szabo and Vissy v Hungary*, the European Court of Human Rights found in January 2016 that the Hungarian system of surveillance employed by the Anti-Terrorism Taskforce was contrary to European human rights law.¹⁵⁰ The taskforce had been given broad surveillance powers, including opening correspondence and reading electronic communications. The Minister of Justice can order such surveillance on any individual on the basis of national security, without prior judicial authorization and without requiring that the taskforce produce any evidence to support its request.

¹⁴⁴ Gesetz über den Bundesnachrichtendienst, section 6 (1)

¹⁴⁵ Amnesty International Germany, "Privatsphäre ist ein Menschenrecht", 2 September 2016, <http://www.amnesty.de/2016/9/2/privatsphaere-ist-ein-menschenrecht>. See also Statement by Prof. Matthias Bäcker at an expert hearing on the bill Öffentliche Anhörung am Montag, dem 26. September 2016 zum Gesetzentwurf der Fraktionen der CDU/CSU und SPD.

¹⁴⁶ Letter to Ambassador Hans Joachim-Daerr, Permanent Mission of the Federal Republic of Germany to the United Nations (Geneva), from the UN Special Rapporteur on the right to promotion and protection of the right to freedom of opinion and expression; UN Special Rapporteur on the situation of human rights defenders; and UN Special Rapporteur on the independence of judges and lawyers, 29 August 2016, https://www.reporter-ohne-grenzen.de/fileadmin/Redaktion/Presse/Downloads/Berichte_und_Dokumente/2016/20160902_Kritik_UN_am_BND-Gesetzentwurf.pdf

¹⁴⁷ See also, Martha Otwinowski, "Tailor-made laws: The state of surveillance in Germany Would more power for spy agencies put investigative journalism at risk?" Index on Censorship, 7 November 2016, <https://www.indexoncensorship.org/2016/11/tailor-made-laws-the-state-of-surveillance-in-germany/>.

¹⁴⁸ ICCPR, Article 19.

¹⁴⁹ German Federal Constitutional Court, 20 April 2016, 1 BvR 966/09, 1 BvR 1140/09, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/04/rs20160420_1bvr096609.html (judgment in German) and <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-019.html> (Court press release in English).

¹⁵⁰ *Szabo and Vissy v Hungary*, (37138/14), European Court of Human Rights, 12 January 2016, <http://hudoc.echr.coe.int/eng?i=003-5268616-6546444>.

The applicants in the case were employees of an NGO critical of the Hungarian government. They argued that they could be subjected to unjustified and disproportionately intrusive measures under Hungary's surveillance legislation. The Court held that the Hungarian law endowing the Anti-Terrorism Taskforce with these surveillance powers violated the right to privacy as there were insufficient legal safeguards to ensure against abuse. It noted that:

- the taskforce could subject almost anyone to surveillance since the law lacked specificity as to who could be targeted for surveillance;
- there was a lack of judicial supervision and no provision for parliamentary oversight;
- it was not clear whether the initial 90-day warrant was renewable once or many times; and
- the “eminently political” system of ministerial supervision of the taskforce surveillance was “inherently incapable of ensuring the requisite assessment of strict necessity with regard to the aims and the means at stake”.¹⁵¹

3.6 NETHERLANDS

On 2 July 2015, the Dutch government introduced a bill for public consultation that proposed an overhaul of the Dutch Intelligence and Security Act of 2002.¹⁵² The July 2015 draft Law on the Intelligence and Security Services,¹⁵³ if enacted, would legitimize sweeping surveillance and interception powers for the General Intelligence and Security Service and the Military Intelligence and Security Service. An amended version of the bill, which was widely debated, was sent to the Dutch House of Representatives in October 2016.¹⁵⁴

The proposed law would grant the security services the power to intercept the electronic communications of unspecified groups of individuals as long as the interception is “case-specific”. This limitation is not defined in the draft law or in the explanatory memorandum that accompanies it, raising concerns that such interception will occur outside the bounds of a formal criminal investigation where surveillance measures should be trained on specific individuals for whom the state has a reasonable suspicion of criminal activity. This broadly drawn provision --combined with the absence of an express requirement for prior individual reasonable suspicion -- risks arbitrary interpretation and application, signalling a disproportionate interference with private communications.

The draft law also lacks sufficient safeguards against abuse. It proposes the establishment of a Review Board,¹⁵⁵ tasked with reviewing the lawfulness of the relevant Minister's¹⁵⁶ decision to approve the use of these surveillance powers; however, it does not include adequate guarantees to ensure the Board's independence. In addition, the recommendations of the currently sitting Oversight Board for the Intelligence and Security Services,¹⁵⁷ about the lawfulness of the activities of the security services, are not binding and can be overruled by the relevant Minister. The Oversight Board cannot end surveillance operations, nor provide for redress.

The draft law does not provide sufficient guarantees that cooperation with foreign intelligence and security agencies will not involve the sharing of information resulting from or leading to serious human rights violations. Amnesty International has expressed concern that the government would be able to share private communications with the authorities of other states engaged in human rights violations.¹⁵⁸ Moreover, the provisions of the draft law relating to human rights safeguards on the use, retention and destruction of communications data are also not sufficient.¹⁵⁹

¹⁵¹ Szabo and Vissy v Hungary, para. 75.

¹⁵² The Intelligence and Security Act of 2002 regulates special powers, including the interception powers of the intelligence and security services (which historically focused on internal security) and the military intelligence and security services.

¹⁵³ Bill containing rules concerning the intelligence and security services and amending certain acts (Intelligence and Security Services Act 20..), 2016/188/NL (Netherlands), 21/04/2016 <http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2016&num=188>

¹⁵⁴ Bill containing rules concerning the intelligence and security services and amending certain acts (Intelligence and Security Services Act 20..), <https://www.rijksoverheid.nl/documenten/kamerstukken/2016/10/28/voorstel-van-wet-inzake-wijziging-wet-op-de-inlichtingen-en-veiligheidsdiensten>.

¹⁵⁵ *Toetsingscommissie Inzet Bevoegdheden* (Dutch).

¹⁵⁶ For the AIVD – the general intelligence and security services – it is the Minister for the Interior and Kingdom Relations. For the MIVD – the military intelligence and security services – it is the Minister for Defence.

¹⁵⁷ *Commissie van Toezicht op de inlichtingen- en veiligheidsdiensten*, CTIVD (Dutch).

¹⁵⁸ Amnesty International, *The Netherlands: Submission for the UN Universal Periodic Review in April/May 2017*, September 2016.

¹⁵⁹ For example, the draft law (in article 67) prohibits disclosure of personal data whose correctness cannot be reasonably determined or which were processed over 10 years ago if no new data have been processed with respect to the person in question since that time; *exceptionally* disclosures to eligible foreign intelligence and security services regarding personal data can be permitted.

3.7 POLAND

Poland's controversial June 2016 Counter-terrorism Law vastly enhances the surveillance powers of the Internal Security Agency and includes some of the most draconian surveillance powers in the EU.¹⁶⁰ Coupled with a range of expanded surveillance powers enshrined in the February 2016 Police Act,¹⁶¹ the Counter-terrorism Law helps set the stage for virtually unimpeded access by state authorities to the personal data and other information of Polish citizens and others present or residing on Polish territory. In October 2016, the UN Human Rights Committee expressed particular concern that the law interfered with the right to privacy and discriminated against foreigners.¹⁶²

Under the Counter-terrorism Law, the ISA will maintain a list of persons allegedly involved in terrorism-related activities and those reasonably suspected of being involved, and can access data on terrorism-related threats from several government agencies (e.g. the police, the Border Guard, the Social Insurance Institution, local authorities), as well as private property owners. The ISA can also share this data and its list with other agencies, and access and carry out closed-circuit television recordings of public locations. The law has no provision for notifying people at a relevant point that they are on the list, which would allow them to challenge their inclusion on it, nor is there any process to allow anyone to get their name removed from the list.

On 13 June 2016, the Council of Europe's Venice Commission said that the "procedural safeguards and material conditions set in the Police Act for implementing secret surveillance are still insufficient to prevent its excessive use and unjustified interference with the privacy of individuals".¹⁶³ Under the Police Act, courts are allowed to authorize surveillance of the content of people's communications on the basis of a list of crimes that the Venice Commission considered overly broad, and without a requirement to consider proportionality. Communications data, which can be as or more revealing of personal information than content, can be accessed directly by police without a court order.

In June 2016, the Council of Europe Commissioner for Human Rights, commenting generally on the basket of surveillance powers contained in various laws, called on the Polish authorities "to remedy the lack of a democratic, independent and efficient system of control of surveillance activities".¹⁶⁴

Foreign nationals in Poland are particular targets of the 2016 Counter-terrorism Law as they can be subjected to a range of covert surveillance measures, including wire-tapping, monitoring of electronic communications, and surveillance of telecommunications networks and devices without any judicial oversight for the first three months (after which surveillance can be extended via a court order). Such surveillance is permitted if there is a "fear", not even a reasonable suspicion, that a foreign national may be involved in terrorism-related activities. Singling out foreign nationals in such a manner is discriminatory. Given the secret nature of surveillance, it could also lead to racial and ethnic profiling. The Law does not provide procedural safeguards to ensure that anyone made aware of surveillance can challenge it and have access to an effective remedy against unlawful surveillance. It also potentially impacts Polish citizens communicating or living with foreigners under investigation.

¹⁶⁰ Amnesty International, *Poland: Counter-terrorism bill would give security service unchecked power*, 15 June 2016, (Index: EUR 37/4263/2016), <https://www.amnesty.org/en/documents/eur37/4263/2016/en/>; see also, Amnesty International, *Poland: Dismantling Rule of Law? Submission for the UN Universal Periodic Review – 27th Session of the UPR Working Group, April/May 2017*, 31 October 2016, (Index: EUR 37/5069/2016), <https://www.amnesty.org/en/documents/eur37/5069/2016/en/> and Amnesty International, *Submission to the UN Human Rights Committee, 118th Session, 17 Oct-4 Nov 2017*, 27 October 2016 (Index: EUR 37/4849/2016), <https://amnesty.org.pl/wp-content/uploads/2016/10/HRC-submission-Amnesty-International.pdf>

¹⁶¹ Amnesty International, *Poland: New surveillance law a major blow to human rights*, 29 January 2016, (Index: EUR 37/3357/2016), <https://www.amnesty.org/en/documents/eur37/3357/2016/en/>. The Act significantly affects the right to privacy, allowing security services and police broad access to telecommunications data, including internet and metadata. Confidentiality of information covered by professional privilege (e.g. available to defence solicitors) is also significantly compromised as secret surveillance of lawyers' communications is not prohibited. The Act has been challenged before the Constitutional Tribunal by the National Bar Council and the Human Rights Commissioner, which has had little real effect given the current Constitutional Tribunal crisis, and the Law remains in force.

¹⁶² Concluding observations on the seventh periodic report of Poland, paras 39-40.

¹⁶³ European Commission for Democracy through Law (Venice Commission), Opinion No. 839/2016 (2016), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)012-e), para. 132.

¹⁶⁴ Nils Muiznieks, "Erosion of rule of law threatens human rights protection in Poland," 15 June 2016, <http://www.humanrightseurope.org/2016/06/nils-muiznieks-erosion-of-rule-of-law-threatens-human-rights-protection-in-poland/>.

3.8 UNITED KINGDOM

In November 2016, the UK parliament passed the Investigatory Powers Bill, which received Royal Assent on 29 November 2016.¹⁶⁵ The Investigatory Powers Act contains some of the most sweeping surveillance powers in the EU – indeed, in the world – and when it comes into force, threatens to have devastating consequences for privacy and other human rights in the UK and beyond.¹⁶⁶

Commonly referred to as the “Snoopers Charter”, the Act institutionalizes highly intrusive bulk surveillance powers, mandating broad powers for bulk interception, bulk acquisition, access to bulk personal datasets and bulk equipment interference (hacking).¹⁶⁷ Such provisions, lacking any requirement for individualized, reasonable suspicion, are contrary to human rights law. Even the allegedly targeted “thematic” warrants are so broad that they will undermine privacy rights well beyond what human rights law allows.¹⁶⁸ Such warrants can be applied to large numbers of individuals who “share a common purpose” or who “carry on, or may carry on, a particular activity.”¹⁶⁹ These warrants fail to target specific individuals based on a reasonable suspicion of criminal activity and fall foul of the UK’s human rights obligations.

All powers under the new law – both targeted and mass – will generally be authorized by a government minister after review by a quasi-judicial body composed of members appointed by the Prime Minister. This raises serious concern that the Act lacks provision for an independent authorization and oversight mechanism.¹⁷⁰ Warrants would generally be issued by the Secretary of State (i.e. the Minister responsible for the security services), on a range of vague grounds such as the “interests of national security” or the “economic well-being of the United Kingdom”.¹⁷¹ The power of “judicial commissioners” will be limited to the principles of judicial review, rather than a full assessment of the merits of applications for warrants. Even this limited review will not be required for cases deemed urgent by the issuer of the warrant, which may delay review for three days. Similarly, major modifications of warrants, which can include adding the names of people, places or organizations, would not involve judicial commissioners.

Despite the sweeping powers in the Investigatory Powers Act that threaten to violate the human rights of people inside and outside the UK, the bill was pushed through parliament by the government, which ignored criticism from parliamentary committees, the telecommunications industry and civil society, including the UN’s privacy chief, who had warned that the bill violated the right to privacy and ran contrary to recent Europe Court of Human Rights jurisprudence.¹⁷² Three separate parliamentary committees made extensive recommendations on the bill in 2014, urging redrafting, further safeguards and greater consultation. Few of these proposals were endorsed by the government.

Amnesty International itself had been the target of the UK’s surveillance powers. As part of the legal challenge brought by Amnesty International noted above, on 1 July 2015 the Investigatory Powers Tribunal notified Amnesty International that UK government agencies had unlawfully spied on its communications.¹⁷³ The Tribunal did not tell Amnesty International when or why it was spied on and what was done with the information obtained. The Tribunal ruled that one of the other organizations that is part of the legal challenge, the South Africa-based Legal Resources Centre, had also been subjected to unlawful surveillance.

¹⁶⁵ The full text of the Investigatory Powers Bill through its stages of passage through parliament can be found here:

<http://services.parliament.uk/bills/2015-16/investigatorypowers.html>.

¹⁶⁶ Amnesty International UK, “Investigatory Powers Act legalises sweeping surveillance powers for UK government,” 29 November 2016, https://www.amnesty.org.uk/press-releases/investigatory-powers-act-legalises-sweeping-surveillance-powers-uk?utm_source=TWITTER&utm_medium=Social&utm_content=20161129175000&utm_campaign=Freedom_of_expression. See also, Ewen MacAskill, “‘Extreme surveillance’ becomes UK law with barely a whimper”, The Guardian, 19 November 2016, <https://www.theguardian.com/world/2016/nov/19/extreme-surveillance-becomes-uk-law-with-barely-a-whimper> and Andrew Griffin, “Tens of thousands sign petition urging Parliament to recall ‘most extreme spying powers ever’: The bill forces internet companies to keep records of every website all of their customers go to, among other things”, The Independent, 25 November 2016, <http://www.independent.co.uk/life-style/gadgets-and-tech/news/investigatory-powers-bill-act-petition-snoopers-charter-spying-surveillance-privacy-a7438791.html>.

¹⁶⁷ Matt Burgess, “Snooper’s Charter is set to become law: how the Investigatory Powers Bill will affect you”, *Wired*, 25 November 2016, <http://www.wired.co.uk/article/ip-bill-law-details-passed>.

¹⁶⁸ Investigatory Powers Bill, Section 17 (2), HL Bill 62, 12 September 2016, <http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0062/17062.pdf>.

¹⁶⁹ Home Office, “Interception of communications pursuant to Schedule 7 of the Investigatory Powers Act: Draft code of practice”, Autumn 2016, pp. 20-23, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/561091/16-10-18_Interception_code_of_practice_draft.pdf.

¹⁷⁰ The Investigatory Powers Bill designates the Investigatory Powers Commissioner and an unspecified number of “judicial commissioners” to be appointed by the Prime Minister, to three year terms, to exercise oversight and error reporting functions over the working of the investigatory powers. See Investigatory Powers Bill, Section 205, HL Bill 62, 12 September 2016.

¹⁷¹ See, among other things, Investigatory Powers Bill Articles 2(4), 20(2), 58(7), 97(5), 130(2), 147(2) and 165(2), HL Bill 62, 12 September 2016. Similar wording on “economic well-being” also applies to the parts of the legislation setting out the oversight roles of the Commissioners.

¹⁷² Joseph A. Cannataci, “Report of the special rapporteur on the right to privacy”, A/HRC/31/64, 8 March 2016, pp. 14-15.

¹⁷³ Amnesty International, “UK surveillance tribunal reveals the government spied on Amnesty International,” 1 July 2015, <https://www.amnesty.org/en/latest/news/2015/07/uk-surveillance-tribunal-reveals-the-government-spied-on-amnesty-international/>.

Earlier in the same case, on 6 February 2015, the Investigatory Powers Tribunal ruled that the UK government's procedures for "soliciting, receiving, storing and transmitting by UK authorities of private communications of individuals located in the UK, which have been obtained by US authorities" pursuant to PRISM and Upstream (the US National Security Agency's mass surveillance programmes), violated the European Convention on Human Rights.¹⁷⁴

¹⁷⁴ Amnesty International, "UK: 'Historic' surveillance ruling finds intelligence-sharing illegal," 6 February 2015, <https://www.amnesty.org/en/latest/news/2015/02/uk-historic-surveillance-ruling-finds-intelligence-sharing-illegal/>.

4. FREEDOM OF EXPRESSION

“Limiting the space for freedom of expression and restricting civic space advances the goals of those promoting, threatening and using terrorism and violence.”

David Kaye, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression¹⁷⁵

The right to freedom of expression has been under direct and sustained assault across Europe in recent years. Measures that seek to curb speech and other forms of expression, taken cumulatively, reflect a landscape where freedom to access information, offer opinions, exchange ideas, and engage in robust and challenging debate – publicly or online – is in rapid decline. The risk that a person could be labelled a security threat or “extremist” has had very real consequences for some people as the examples below illustrate, while the “chilling effect” that such measures creates has left the public space for free expression smaller and more impoverished than it has been in decades.

Many governments have sought to criminalize expression perceived to support the aims of armed groups or organizations labelled as “terrorist”. As they have done so, artists, human rights defenders and many others, including children, have been negatively affected by a narrowing of what speech and other forms of expression are deemed “acceptable” in Europe’s security-heavy environment.

Governments have not only criminalized expression that directly incites a person to commit a terrorism-related act. Some have criminalized any expression that is deemed to praise, glorify, support, defend, apologize for, or seeks to justify acts defined as “terrorism” under domestic law (see also Chapter 2). Terms such as “glorify” or “apology” are ill-defined and vague, leaving room for broad interpretation. In **France**, hundreds of people, including children, have been charged in the past two years for “apology of terrorism”, including for comments they have posted on Facebook.¹⁷⁶ In **Spain**, “glorification of terrorism” laws have been aimed at artists and musicians.¹⁷⁷

Under international human rights law, everyone has the right to hold opinions without interference and to peacefully exercise their freedom of expression, including by way of seeking, receiving and imparting information and ideas of all kinds.¹⁷⁸ States may place certain restrictions on the exercise of freedom of expression. However, any limitations must be enshrined in a clear and publicly available law, and be necessary and proportionate to achieve a legitimate goal. While such a goal may be the protection of national

¹⁷⁵ “UN expert warns combat against violent extremism could be used as ‘excuse’ to curb free speech,” UN News Centre, 3 May 2016, <http://www.un.org/apps/news/story.asp?NewsID=53841#V-0mSzuevQc>.

¹⁷⁶ See for example, Christophe Turgis, “Charlie Hebdo : à Nantes, un adolescent de 16 ans poursuivi pour ‘apologie du terrorisme’ sur Facebook,” *France 3*, 17 January 2015, <http://france3-regions.francetvinfo.fr/pays-de-la-loire/2015/01/17/charlie-hebdo-nantes-un-adolescent-de-16-ans-poursuivi-pour-apologie-du-terrorisme-sur-facebook-634720.html>.

¹⁷⁷ Raphael Minder, “Crackdowns on free speech rise across a Europe wary of terror,” *New York Times*, 24 February 2016, http://www.nytimes.com/2016/02/25/world/europe/spain-europe-protest-free-speech.html?_r=0.

¹⁷⁸ ICCPR, Article 19(1 and 2).

security or public order,¹⁷⁹ each limiting measure must pass the test of legality, necessity and proportionality for it to be lawful under international human rights law.

While states may prohibit “incitement” to criminal acts, the line between this and criminalization of other forms of expression is crossed all too often. When it comes to criminalizing expression, a set of particularly strict conditions must apply to ensure that such sanctions do not run foul of the right to freedom of expression.

In this regard, UN Secretary-General Ban Ki-Moon considered that “laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action”.¹⁸⁰

On UNESCO World Press Freedom Day in May 2015, four UN experts on freedom of expression stated that “...[c]riminal responsibility for expressions relating to terrorism should be limited to those who incite others to terrorism; vague concepts such as ‘glorifying’, ‘justifying’ or ‘encouraging’ terrorism should not be used.”¹⁸¹ Exactly such vague terms have been made criminal offences in several countries in Europe.

Amnesty International is concerned that arrests and prosecutions – and pending proposals for such criminalization – on the basis of such vaguely defined offences as “apology of terrorism” (in **France**), “glorification of terrorism” (in **Spain** and the **United Kingdom**), or “promoting terrorism” (proposed in **Germany**)¹⁸² risk violating people’s right to freedom of expression. Although international treaties on the prevention of terrorism may require states to criminalize incitement to commit a terrorism-related offence, vaguely defined offences such as “apology of terrorism” risk criminalizing statements or other forms of expression which, even if deeply offensive to many, fall well short of incitement.¹⁸³

The following country examples reflect the shrinking space in civil society for communication of and debate on a range of timely and relevant – and sometimes offensive – ideas. Criminalization of expression has a chilling effect and, as some of the examples reflect, may facilitate the creation of an environment of fear.

Amnesty International calls on all states, including EU member states, to:

- Promote and protect the right to freedom of expression.
- Only restrict forms of expression if absolutely necessary and proportionate to the achievement of a legitimate objective, and on the basis of a clear and precise legal provision.
- Only subject forms of expression to criminal prosecution where it genuinely amounts to *incitement*, that is *encouraging others* to commit recognizable criminal acts with the *intent* to incite them to commit such acts and with a *reasonable likelihood* that they would commit such acts, with a *clear and direct causative link* between the statement/expression and the criminal act; vague offences such as “glorification” or “apology” of terrorism should be repealed.

¹⁷⁹ ICCPR, Article 19(3b).

¹⁸⁰ Report of the Secretary-General, “The protection of human rights and fundamental freedoms while countering terrorism”, A/63/337, 28 August 2008, para. 62.

¹⁸¹ Article 19, “Special Rapporteurs warn against restrictions on freedom of speech in conflicts,” 4 May 2015, <https://www.article19.org/resources.php/resource/37952/en/special-rapporteurs-warn-against-restrictions-on-freedom-of-speech-in-conflicts>.

¹⁸² Jörg Diehl und Annett Meiritz, “Anti-Terror-Konzept De Maizières Überwachungsoffensive”, *Spiegel Online*, 11 August 2016, <http://www.spiegel.de/politik/deutschland/thomas-de-maiziere-plant-ueberwachungsoffensive-a-1107223.html>; also BBC News, “Germany in new anti-terror plan to thwart Islamist militants,” 11 August 2016, <http://www.bbc.com/news/world-europe-37044519>.

¹⁸³ The former UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, laid out a set of criteria for the criminalization of expression to comport with international human rights law. Prohibited expression *must* be limited to the incitement to conduct that is truly terrorism-related in nature; restrict freedom of expression no more than is necessary for the protection of national security, public order and safety or public health or morals; be prescribed by law in precise language, and avoid vague terms such as “glorifying” or “promoting” terrorism; include an actual (objective) risk that the act incited will be committed; expressly refer to intent to communicate a message and intent that this message incite the commission of a terrorism-related act; and preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to “unlawful” incitement to terrorism. See UN Human Rights Council, “Report of the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism”, A/HRC/31/65, 22 February 2016, http://webcache.googleusercontent.com/search?q=cache:BZX_IKEIJgJ:www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.65_AUV.docx+&cd=1&hl=en&ct=clnk&gl=us

4.1 BELGIUM

Just before its 2016 summer recess, parliament passed a bill extending the scope of the provision on incitement to commit a terrorism-related offence.¹⁸⁴ As a result, there is no longer a requirement in Belgian law to prove that the incitement entails any risk of a terrorism-related offence actually being committed. By omitting this condition, the government sought to lower the evidentiary burden imposed on a prosecutor.

The bill was rushed through parliament under an expedited (“urgent”) procedure, leaving insufficient time to properly review and debate the bill’s possible negative effect on freedom of expression. The same law now also criminalizes incitement to travel with the purpose of committing a terrorism-related offence (see Chapter 6).

There are also two bills pending in parliament that would specifically criminalize “apology of terrorism”. The first, proposed by members of parliament in the rightwing Flemish nationalist Vlaams Belang party, would criminalize expression that grossly minimizes, justifies, approves or makes an apology for terrorism committed in Belgium or abroad, or celebrates a terrorism-related act.¹⁸⁵ The second, proposed by members of the current majority party, the centrist French-speaking Reformist Movement, would enshrine in the Criminal Code “apology of terrorism”, defined as when someone deliberately approves, seeks to justify or grossly minimizes terrorism-related acts.¹⁸⁶

In September 2016, the centre-right Flemish nationalist party, New Flemish Alliance (N-VA) published its security plan,¹⁸⁷ setting out five policy proposals. These would make it possible to explicitly criminalize “apology of terrorism” through an interpretative law that could be applied to the amended provision on incitement. This would mean that no legislative change would be required to criminalize “apology of terrorism”. No legislative proposal to enact this policy has yet been submitted to parliament.

All of these proposals would threaten the right to freedom of expression in Belgium.

4.2 FRANCE

An amendment of the French Criminal Code adopted in November 2014 provides, among other things, for the offence of “apology of terrorism”. The offence is punishable with five years in prison and a fine of up to 75,000 euros, or seven years in prison and a fine of up to 100,000 euros when the communication was made online. The authorities said the amendment was needed to strengthen criminal and administrative measures to address terrorism-related acts.¹⁸⁸

During the fortnight following the attacks in Paris on 7 January 2015, there were 298 judicial procedures for “apology for terrorism”, including 96 cases involving minors, according to the Ministry of Justice.¹⁸⁹ The number of cases spiked again following the 13 November 2015 attacks in Paris and the introduction of the

¹⁸⁴ Bill Containing Various Provisions in the Fight against Terrorism (III) (*Projet de loi portant des dispositions diverses en matière de lutte contre le terrorisme*), July 2016, <http://www.lachambre.be/kvvcr/showpage.cfm?section=flwb&language=fr&cfm=flwb.cfm?lang=N&dossierID=1951&legislat=54>; See also, Peter Buysrogge, “Projet de Loi: portant des dispositions diverses en matière de lutte contre le terrorisme (III) - Rapport: Fait au Nom de la Commission Temporaire ‘Lutte contre le terrorisme’”, 18 July 2016, <http://www.lachambre.be/FLWB/PDF/54/1951/54K1951003.pdf>, Belgian Penal Code (*Code Pénal*), No. 1867-06-08/01, Article 14, http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&caller=list&cn=1867060801&la=f&fromtab=loi&tri=dd+as+rank, as modified by the Law of August 3, 2016 Containing Various Provisions in the Fight against Terrorism (III), Article 2.

¹⁸⁵ Belgian Chamber of Representatives, Bill criminalizing grossly minimizing, justifying, approving, making an apology for or celebrating a terrorist offence (*Proposition de loi punissant le fait de minimiser grossièrement, de chercher à justifier, d'approuver, ou de faire l'apologie d'une infraction terroriste ou de s'en réjouir*), 27 November 2015, <http://www.lachambre.be/kvvcr/showpage.cfm?section=flwb&language=fr&cfm=/site/wwwcfm/flwb/flwb.cfm?dossierID=1483&legislat=54&inst=K>.

¹⁸⁶ Belgian Chamber of Representatives, Bill to punish apology for terrorism in public and on the internet (*Proposition de loi visant à réprimer l'apologie du terrorisme en public et sur internet*), 20 November 2015, <http://www.lachambre.be/kvvcr/showpage.cfm?section=flwb&language=fr&cfm=/site/wwwcfm/flwb/flwb.cfm?dossierID=1467&legislat=54&inst=K>.

¹⁸⁷ NVA Nieuws, “Niveau V: 5 voorstellen voor meer veiligheid”, 10 September 2016, <http://www.n-va.be/nieuws/niveau-v-5-voorstellen-voor-meer-veiligheid>

¹⁸⁸ Louis Imbert, “Apologie d'actes terroristes: des condamnations pour l'exemple”, *Le Monde*, 13 January 2015, http://www.lemonde.fr/societe/article/2015/01/13/apologie-d-actes-terroristes-des-condamnations-pour-l-exemple_4555102_3224.html.

¹⁸⁹ Lucie Soullier, “Apologie du terrorisme : la justice face à l'urgence”, 22 January 2015, *Le Monde* http://www.lemonde.fr/societe/article/2015/01/22/apologie-du-terrorisme-la-justice-face-a-l-urgence_4560603_3224.html#dS9S0o3CQ02xgiS.99.

state of emergency. Some 255 cases were brought in November after the attacks¹⁹⁰ and up to 570 by 10 December.¹⁹¹

Criminal proceedings against people charged with “apology of terrorism” move very quickly, requiring a person’s “immediate appearance” before a judge, sometimes on the day of arrest.¹⁹² In 2015 alone, courts handed down 385 sentences for “apology of terrorism”.¹⁹³

A large proportion of these cases involve young people, a third of them minors.¹⁹⁴ In December 2015, for example, a 16-year-old boy and two sisters aged 15 and 16 were arrested in Toulouse for “apology for terrorism”.¹⁹⁵ On 2 May 2016, a 25-year-old man who wrote “Vive Daesh” in a toilet was convicted of and given a suspended sentence for “apology for terrorism”.¹⁹⁶

On 3 June 2016 parliament passed a law that made “regular” accessing of a website containing messages, images or representations deemed to “incite” or “glorify” terrorism an offence.¹⁹⁷ What constitutes “regular” access is not clear in the law. The law came into force in July, even though the Constitutional Court stated in 2012 that criminalizing such online activity was an unnecessary, disproportionate restriction to freedom of expression.¹⁹⁸

One of the first convictions for such online activity was in August 2016, when a 19-year-old man was jailed for three years for, among other things, “apology of terrorism” and for regularly accessing “jihadist” websites.¹⁹⁹

Government statistics released on 7 November 2016 indicated that since the beginning of 2015, 54 websites had been blocked for apology for and incitement to terrorism.²⁰⁰

4.3 NETHERLANDS

The Christian Democratic Party²⁰¹ proposed a bill in May 2016 to criminalize “glorification of terrorism”. The proposal was received with much public criticism.²⁰²

In 2014, the Minister of Security and Justice had advised against a similar proposal, arguing that such criminalization threatened to violate the right to freedom of expression.²⁰³ In 2016 the Cabinet affirmed that existing legal instruments were available to combat incitement to criminal offences such as terrorism-related acts or incitement to hatred, and that it considered it unnecessary to create separate “glorification” legislation.²⁰⁴

¹⁹⁰ Lucie Soullier and Damien Leloup, “Dans le grand fourre-tout de l’apologie du terrorisme”, *Le Monde*, 18 December 2015, http://www.lemonde.fr/attaques-a-paris/article/2015/12/18/dans-le-grand-fourre-tout-de-l-apologie-du-terrorisme_4834349_4809495.html.

¹⁹¹ Minister of Justice, “SG/SDSE, exploitation statistique du système d’information décisionnel” quoted in www.lemonde.fr/police-justice/article/2015/12/16/apres-les-attentats-une-justice-rapide-et-severe-contre-l-apologie-du-terrorisme_4833298_1653578.html.

¹⁹² Although a person can argue that they are not ready to defend against the charge and require more time to prepare.

¹⁹³ Minister of Justice, “SG/SDSE, exploitation statistique du système d’information décisionnel”

¹⁹⁴ Lucie Soullier and Damien Leloup, “Dans le grand fourre-tout de l’apologie du terrorisme”, *Le Monde*, 18 December 2015.

¹⁹⁵ La Depeche, “Apologie du terrorisme : 3 ados arrêtés rue d’Alsace-Lorraine”, 22 December 2015, <http://www.ladepeche.fr/article/2015/12/22/2243107-apologie-du-terrorisme-3-ados-arretes-rue-d-alsace-lorraine.html>.

¹⁹⁶ Stéphanie Forestier, “Venette : condamné pour apologie du terrorisme après avoir tagué « Vive Daesh »”, *Le Parisien*, 3 May 2016, <http://www.leparisien.fr/compiègne-60200/venette-condamne-pour-apologie-du-terrorisme-apres-avoir-tague-vive-daesh-03-05-2016-5764869.php>.

¹⁹⁷ Law No. 2016-731 “which reinforces the fight against organized crime, terrorism and their financing and which improves efficiency and guarantees of criminal procedure” amending article 421-2-5-2 of the criminal code, 4 June 2016 (*Law No. 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l’efficacité et les garanties de la procédure pénale*) <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032627231&categorieLien=id>

¹⁹⁸ Conseil d’État, “Rapport d’activité 2013”, http://arianeinternet.conseil-etat.fr/consiliaweb/avisadm/386618_20120405.pdf.

¹⁹⁹ Leparisien.fr with AFP, “Un Niçois de 19 ans condamné à 3 ans de prison pour apologie du terrorisme”, *Le Parisien*, 23 August 2016, <http://www.leparisien.fr/faits-divers/nice-un-homme-de-19-ans-condamne-a-3-ans-de-prison-pour-apologie-du-terrorisme-23-08-2016-6063109.php>.

²⁰⁰ Ministry of Interior, “Lutte contre le terrorisme et prévention de la radicalisation: réunion des préfets et des procureurs”, 7 November 2016, <http://mobile.interieur.gouv.fr/Le-ministre/Interventions-du-ministre/Lutte-contre-le-terrorisme-et-prevention-de-la-radicalisation-reunion-des-prefets-et-des-procureurs>.

²⁰¹ Christen Democratisch Appel (CDA)

²⁰² Law proposal of MP Keijzer to amend the criminal Code to criminalize the glorification of terrorism, No. 34.466, No. 2 (2 May 2016).

²⁰³ Motion of MPs Haersma Buma /Van der Staaij concerning the criminalization of glorifying terrorist violence (Parliamentary Paper 29 754, no. 255), and “Letter of the Minister of Security and Justice about the approach to Jihad fighters and the Cabinet Response to submitted Motions”, 9 September 2014, No. 29754-266.

²⁰⁴ Letter of the Ministers of Social Affairs and Employment and of Security and Justice, “Constitutional rights in a pluriform society”, 25 February 2016, Parliamentary Papers 29 614, No. 39, pp. 3-4.

Article 131 of the Dutch criminal code already criminalizes public incitement –verbally or through writing or images – to violence against public authorities.²⁰⁵ The maximum punishment is five years in prison. However, when the incitement is to commit acts related to terrorism or in preparation for or furtherance of a terrorism-related offence, the maximum punishment is increased by a third. Article 132 makes it an offence to disseminate any material that would incite others to commit crimes. The maximum punishment is three years, increased by a third when the incitement is to commit a terrorism-related offence.²⁰⁶

4.4 POLAND

The Counter-terrorism Law passed in June 2016 includes provision for the Director of the Internal Security Agency to order the immediate blocking of specific websites with no prior judicial authorization if he or she considers that a delay could result in an undefined “terrorist incident”.²⁰⁷ After five days a court must confirm that the Internal Security Agency’s order was justified under Polish law. The Internal Security Agency and Prosecutor General can appeal if the court rules that the order was not justified. The appeal can be based on vague national security grounds. It remains unclear what evidence the Internal Security Agency and Prosecutor General would need to disclose to win the appeal.²⁰⁸ The law is silent on whether any other person or organization can appeal the blocking of a website.

While the blocking of the entire content of a website in itself raises significant freedom of expression-related concerns, in any event such blocking should not happen without prior judicial authorization. Judicial scrutiny after the fact is not enough. Moreover, the five-day lapse between the blocking and judicial scrutiny means website content would be unavailable without any prior judicial determination on whether the blocking was necessary and proportionate.

4.5 SPAIN

The definition in the Spanish Penal Code for the offence of “glorification” or “encouragement” of terrorism is so broad that it threatens to criminalize lawful forms of expression.²⁰⁹

In 2015, a reform of the Penal Code broadened the definition of the “glorification” offence to include “the distribution or public dissemination of messages or slogans”, including electronically. The penalty for “glorification” is one to three years in prison. A judge can additionally impose a fine.²¹⁰ In February 2015, four UN experts expressed deep concern that provisions adopted in the reform process violated freedom of expression and peaceful assembly.²¹¹

In 2015, the National Court²¹² (a specialized tribunal tasked with the prosecution of crimes, including those related to terrorism) handed down 19 convictions for “glorifying terrorism”. In 2016, as of 19 July, there had been 17 such convictions. Several of those arose from a police operation dubbed Operation Spider,²¹³ which searched for messages on social networks that could be construed to fall within the legal definition of “glorifying terrorism”.

²⁰⁵ Criminal Code (2012), <http://www.legislationline.org/documents/section/criminal-codes/country/12>.

To fall within this provision, a direct connection must exist between the incitement and the crime incited, but the incitement itself can be direct or indirect. Moreover, the act of incitement is complete once it is communicated—whether the incited act is actually committed is irrelevant. Incitement must also be done publicly.

²⁰⁶ On 10 December 2015, the District Court of The Hague convicted eight men and one woman for a range of terrorism-related offenses in a trial known as the “Context” case. Nine individuals were found guilty of various terrorism offences, including for online incitement to terrorism (Art. 131) and the dissemination of terrorism-related inciting content (Art. 132). See District Court of The Hague, 10 December 2015, ECLI:RBDHA:2015:16102, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:16102> (Unofficial English translation).

²⁰⁷ Law on Counterterrorism of 10 June 2016 (*Ustawa z dnia 10 czerwca 2016 r. o działaniach antyterrorystycznych*), Journal of Laws 2016, Article 32c s 4.

²⁰⁸ Jan Rydzak, “Now Poland’s government is coming after the Internet:

Warsaw is tightening control over the Web in the name of national security — and setting an ominous precedent for other democracies”, *Foreign Policy*, 10 June 2016, <http://foreignpolicy.com/2016/06/10/how-polands-government-is-coming-after-the-internet/>.

²⁰⁹ See, for example, Amnesty International, “Spain: New counter-terrorism proposals would infringe basic human rights,” 10 February 2015, <https://www.amnesty.org/en/latest/news/2015/02/spain-new-counter-terrorism-proposals-would-infringe-basic-human-rights/>.

²¹⁰ Article s 50 (fines) and 578 of the Spanish Penal Code (revised 2015).

²¹¹ OHCHR, “Two legal reform projects undermine the rights of assembly and expression in Spain - UN experts,” 23 February 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597>.

²¹² *Audiencia Nacional* (Spanish)

²¹³ *Operación Araña* (Spanish)

Cesar Montana Lehman, also known as Cesar Strawberry and lead vocalist of Madrid rap-rock band Def con Dos, was apprehended in May 2015 and subsequently detained incommunicado in the course of Operation Spider. He was prosecuted for “glorification of terrorism” and humiliating victims of terrorism for a series of tweets he posted in 2013-14. In December 2013, Lehman tweeted “how many more should follow the flight of Carrero Blanco?” referring to Admiral Luis Carrero Blanco, a Franco-era prime minister killed in 1973 in an ETA²¹⁴ car bomb attack in Madrid. ²¹⁵ In another tweet from January 2014 Lehman joked about offering former King Juan Carlos a bomb as a birthday gift. ²¹⁶

Prosecutors alleged that in the tweets he defended the armed groups ETA and GRAPO.²¹⁷ In July 2016, the criminal chamber of the National Court acquitted him of all charges. The case is on appeal at the Supreme Court.

In February 2016, puppeteers Alfonso Lázaro de la Fuente and Raúl García Pérez were arrested after a performance organized by the city council for Madrid’s carnival celebrations.²¹⁸ A large audience, including children, attended their puppet show, during which a puppet held a banner with a slogan similar to one used by the ETA. Some of the audience took offence and called the police.

The puppeteers appeared before the Second Chamber of the Central Investigative Court of the National Court in Madrid on 6 February, accused of “glorification of terrorism” and incitement to hatred or violence. They were remanded in custody pending trial.²¹⁹ On 10 February, the prosecutor in charge of overseeing the investigation requested their release. Two days later Amnesty International issued an Urgent Action calling for the charge related to “glorification” to be dropped.²²⁰ On 13 April, Amnesty International and six other organizations wrote to the Working Group on Arbitrary Detention to inform it of the case.²²¹

On 9 September, Spain’s National Court ruled that the “glorification”-related charge should be dropped, but upheld an earlier ruling to remit the “incitement”-related charge to a competent court of investigation in Madrid.

4.6 UNITED KINGDOM

For a decade under the Terrorism Act 2006, UK counter-terrorism legislation has provided for controversial criminal offences related to direct and indirect forms of “encouragement”, including the “glorification” of terrorism. In the same decade, provisions in the Terrorism Act 2000 permitting the proscription of organizations “concerned in terrorism” were amended to include conduct that “encourages” or “glorifies” terrorism.²²² This legislation was passed in the context of the July 2005 bombings in London, with the then-Prime Minister proposing a 12-point plan to combat what was characterized as “extremism” and “radicalization”.²²³

²¹⁴ *Euskadi Ta Askatasuna* (Basque)

²¹⁵ Agence France Press, “Spanish court clears rapper who joked about ETA attacks,” 20 July 2016, <https://www.thelocal.es/20160720/spanish-court-clears-rapper-of-charge-of-glorifying-terrorism>

²¹⁶ Agence France Press, “Spanish court clears rapper who joked about ETA attacks,” 20 July 2016.

²¹⁷ *Grupos de Resistencia Antifascista Primero de Octubre* (Spanish)

²¹⁸ Amnesty International, “Spain: Puppeteers accused of glorifying terrorism: Alfonso Lázaro de la Fuente and Raúl García Pérez,” 12 February 2016, <https://www.amnesty.org/en/documents/eur41/3428/2016/en/>.

²¹⁹ Articles 578 and 510 of the Penal Code, respectively.

²²⁰ Amnesty International Urgent Action, “Spain: Puppeteers accused of glorifying terrorism,” UA 35/16 (Index: EUR/41/3428/2016) <https://www.amnesty.org/download/Documents/EUR4134282016ENGLISH.pdf>

²²¹ Amnesty International, “Naciones Unidas debe investigar la “detención arbitraria” de los titiriteros”, 19 April 2016, <https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/varias-organizaciones-de-derechos-humanos-piden-a-naciones-unidas-que-investigue-la-detencion-arbi/>

²²² Terrorism Act 2000, s3 <http://www.legislation.gov.uk/ukpga/2000/11/section/3> (see amendments at 3(5)A-C in particular: <http://www.legislation.gov.uk/ukpga/2000/11/section/3#reference-c16757481>). The case of *R v Faraz* itself highlights the extremely complex considerations required in terms of intent and directness in order for criminal proceedings to correctly consider whether a publication or the expression of a view was in fact intended to “encourage” terrorism. See *Faraz v R*. [2012] EWCA Crim 2820 (21 December 2012), <http://www.bailii.org/ew/cases/EWCA/Crim/2012/2820.html> and discussion by Edward Craven, “Case comment: *R v Faraz* – Terrorist publications and free speech in the Court of Appeal,” 10 January 2013, <https://inform.wordpress.com/2013/01/10/case-comment-r-v-faraz-terrorist-publications-and-free-speech-in-the-court-of-appeal-edward-craven/>.

²²³ “The prime minister’s 12-point plan,” *The Guardian*, 5 August 2005, <https://www.theguardian.com/politics/2005/aug/05/uksecurity.terrorism2> and “Speech: The prime minister’s statement on anti-terror measures”, 5 August 2005, (Reprinted in *The Guardian*: <https://www.theguardian.com/politics/2005/aug/05/uksecurity.terrorism1>). The government at the time’s initial proposals also included a proposal that criminalized “condoning” terrorism, which fell away during the legislative process.

In practice, the use of the power to proscribe entire groups on “glorification” grounds has been limited; proscription on wider grounds has been quite extensive.²²⁴ The notion of “glorification” in the Terrorism Act 2006 is extremely vague, and includes “praise or celebration”. During its parliamentary passage, however, a clause was added to ensure that it can only be applied when the “public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances”.²²⁵ There is also insufficient clarity between the definitions of “indirect incitement” and “glorification”. Indeed, as one legal commentator noted, “the overall impact is to criminalize generalized and public encouragements that terrorism would be a good thing, without stating where or when or against whom,” and in this regard differs significantly from ‘encouragement’ in ‘normal’ criminal law.”²²⁶

4.7 EUROPEAN UNION

Initiatives have been taken at the EU level to limit freedom of expression in a manner that raises serious human rights concerns.

In December 2015, the European Commission rolled out a proposal for a Directive on Combating Terrorism (“the proposed Directive”).²²⁷ The proposed Directive – intended to address rising concern about “foreign terrorist fighters” travelling from EU member states with the intention of joining armed groups in conflict zones such as Syria and Iraq – remained pending adoption as of 6 December 2016.

Amnesty International and non-governmental partners submitted a detailed critique of the proposed Directive, including key concerns about how certain provisions threatened the right to freedom of expression.²²⁸

Article 5 of the original draft Directive, for example, created the offence of “public provocation to commit a terrorist offence” and was of particular concern.²²⁹ The article sought to criminalize incitement “*whether or not* (it is) directly advocating terrorist offences”, provided that it merely “*causes a danger*” that such offences “*may*” be committed. This established a very low threshold for the proximity of the criminalized conduct to the principal offence. Its vagueness made it difficult to see how it would have been applied in practice, contrary to the principle of legality. Crucially, the potential breadth and uncertainty of its scope carried risks of arbitrary or discriminatory interference with freedom of expression.

The revised and consolidated text of the proposed Directive, made public in November 2016, indicated that the offence of “glorification” had been added to Article 5 as an example of indirect public provocation.²³⁰ As noted above, the criminalization of conduct deemed to “glorify” terrorism raises significant concerns in terms of freedom of expression. On 5 December 2016, the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) approved the revised and consolidated text of the directive. Final adoption was expected by the end of 2016 or beginning of 2017.

It is essential that the proposed Directive expressly confirms and effectively guarantees people’s freedom of expression, which may only be limited where the authorities can justify restrictions as prescribed by law and

²²⁴ An updated list is published regularly by the Home Office: <https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2>. As of July 2016, 70 international organizations and 14 Northern Ireland-related ones had been proscribed; a detailed breakdown of how many of these are proscribed on grounds of promoting or encouraging (including glorifying) terrorism was not available.

²²⁵ David Anderson QC, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228552/9780108511769.pdf, paragraph 10.6.

²²⁶ See Clive Walker, *The Anti-terrorism legislation*, 2nd Ed, Oxford: OUP. Para 2.63 (but see 2.60-63 more generally).

²²⁷ Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM (2015) 625 Final, 2015/0281 (COD), 2 December 2015, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-security/legislative-documents/docs/20151202_directive_on_combatting_terrorism_en.pdf.

²²⁸ Amnesty International, International Commission of Jurists, Open Society Justice Initiative, and Open Society European Policy Institute, *Joint Submission regarding the European Commission’s Proposed Draft Combating Terrorism Directive*, 19 February 2016, <https://www.amnesty.org/en/documents/ior60/3470/2016/en/>.

²²⁹ Article 5: “Member States shall take the necessary measures to ensure that the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (h) of Article 3(2), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally.”

²³⁰ Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, consolidated text following sixth trilogue of 10 November 2016, 11 November 2016, <http://statewatch.org/news/2016/nov/eu-council-c-t-directive-consolidated-text-14238-16.pdf>. The revised Article 5 (*Public Provocation to Commit a Terrorist Offence*): “Member States shall take the necessary measures to ensure that the distribution, or otherwise making available **by any means, whether on- or offline**, of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (i) of **Article 3(1)**, where such conduct, directly or indirectly, such as by the **glorification of terrorist acts**, advocates the commission of terrorist offences, **thereby causing** a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally.”

as absolutely necessary and proportionate to a legitimate purpose.²³¹ Such a provision was included in the 2008 Framework Decision on Combating Terrorism, which first introduced the offence of “public provocation to commit a terrorist offence” in EU law.²³² It is not clear what justification there could be for omitting a similar clause from the proposed Directive.

²³¹ Amnesty International, European Network Against Racism, European Digital Rights, Fundamental Rights European Experts Group, Human Rights Watch, International Commission of Jurists and Open Society Foundations, “European Union directive on counterterrorism is seriously flawed”, 30 November 2016, <http://www.amnesty.eu/en/news/press-releases/all/european-union-directive-on-counterterrorism-is-seriously-flawed-1010/#.WErAnneZMkg>.

²³² Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0919>.

5. RIGHT TO LIBERTY

“Everyone has the right to liberty and security of person.”

International Covenant on Civil and Political Rights, Article 9

Many EU member states have implemented laws that allow them to detain individuals suspected of terrorism-related offences for an extended period before bringing charges – and in many cases, charges are never laid. These suspects typically do not have access to the secret information on which the detention is often based and consequently cannot effectively challenge its legality. Prolonged detention without charge or trial violates the right to be free from arbitrary detention and other fair trial rights such as the presumption of innocence.

In order to avoid arbitrariness, states must ensure that deprivation of liberty is in accordance with law, is proportionate and includes procedural safeguards. These safeguards include the rights to:

- be promptly informed of any charges;
- be brought promptly before a judge;
- access counsel of choice from the outset of detention;
- challenge effectively the legality of the detention before a court; and
- be afforded an effective remedy in a case of unlawful deprivation of liberty.²³³

Amnesty International calls on all states, including EU member states, to ensure that no person is subjected to arbitrary detention in the context of counter-terrorism operations.

5.1 BELGIUM

The Parliamentary Committee on Counter-terrorism in Belgium is currently considering a proposal to amend the Constitution to extend the maximum duration of pre-charge detention from 24 hours for up to 72 hours.²³⁴ Initially, this reform was announced as a counter-terrorism measure, but it is likely to apply to all suspects.

²³³ ICCPR, Article 9; ECHR, Article 5.

²³⁴ The exact scope of the amendment is still under debate. The following proposals have been submitted to Parliament:
<http://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&cfm=flwbn.cfm?lang=N&legislat=54&dossierID=1741> ;
<http://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&cfm=flwbn.cfm?lang=N&legislat=54&dossierID=1713> ;
<http://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&cfm=flwbn.cfm?lang=N&legislat=54&dossierID=1712> ;
<http://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&cfm=flwbn.cfm?lang=N&legislat=54&dossierID=1529> ;

Under Belgian law, a lawyer should be present from the start of the first interrogation.²³⁵ But if that interrogation does not take place until late into the 72-hour period of pre-charge detention, a person could go nearly three days without access to counsel.

The change would lead to a substantial weakening of a Constitutional safeguard for all suspects, regardless of the seriousness or nature of the offence. The Belgian authorities must ensure effective access to counsel from the outset for all persons in pre-charge detention.²³⁶

5.2 FRANCE

In the immediate aftermath of the November 2015 attacks in Paris and after the 26 July 2016 attack on a church in Normandy, proposals to detain people without charge or trial were raised in France.²³⁷ The proposals would target people with a security file (Fiche “S”) that allegedly indicates that a person has been or is at risk of being “radicalized”. To date, these proposals have gained little support and the government has indicated that such detention would be unconstitutional.²³⁸

5.3 POLAND

Poland’s new Counter-terrorism Law provides for 14 days’ detention without charge of people suspected of “terrorist crimes” based on the broad definition noted in Chapter 2.²³⁹ Since such arrests can be made on the basis of information obtained via the broad surveillance powers also contained in the new law, the suspect and their lawyer may be denied access to the evidence upon which the pre-charge detention is based. This severely undermines the right to contest the legality of detention and seek release and remedy. Because these new surveillance powers primarily target foreigners in Poland, it is likely that the 14-day pre-charge detention regime will discriminate against non-nationals and have a disproportionate impact on foreign individuals, their families and communities.

5.4 SLOVAKIA

Constitutional and legislative changes that came into force in January 2016 in Slovakia newly provided for a 96-hour pre-charge detention period for terrorism suspects.²⁴⁰ That extends the possible pre-charge detention period in Slovakia from the routine 48 hours to four days for terrorism suspects.

5.5 SPAIN

In May 2015, the UN Committee against Torture called on Spain to “put an end” to incommunicado detention that empowers the authorities to detain terrorism suspects without charge for up to 13 days and “to guarantee the rights of all detainees to medical services and to freely choose a lawyer whom they can consult in complete confidentiality and who can be present at interrogations”.²⁴¹ Members or perceived

²³⁵ Code of Criminal Procedure, Article 47bis s2, para. 4; and Law on Preventive Detention, Article 16, s 2, para. 2, as amended by the Salduz Law.

²³⁶ See also, Human Rights Watch, *Grounds for Concern: Belgium’s Counter-terror Responses to the Paris and Brussels Attacks*, 3 November 2016, <https://www.hrw.org/report/2016/11/03/grounds-concern/belgiums-counterterror-responses-paris-and-brussels-attacks>.

²³⁷ “Sarkozy propose d’assigner à résidence les individus ayant une fiche S”, *Libération*, 15 November 2015, http://www.liberation.fr/direct/element/sarkozy-propose-dassigner-a-residence-les-individus-ayant-une-fiche-s_23259/. See also Cécile Barbière, “French right calls for detention without trial for potential terrorists,” *Euractiv.fr*, 29 July 2016, <https://www.euractiv.com/section/justice-home-affairs/news/french-right-adopts-tougher-stance-on-potential-jihadists/>.

²³⁸ Cécile Barbière, “French right calls for detention without trial for potential terrorists,” *Euractiv.fr*, 29 July 2016. Note, however, that the Australian government has proposed indefinite detention for persons who have completed a prison sentence but are still viewed as a threat, so-called post-sentence indefinite detention. See A. Odysseus Patrick, “Terrified of terror, Australia plans indefinite detention even after sentences are served,” *Washington Post*, 8 October 2016, <https://www.washingtonpost.com/news/worldviews/wp/2016/10/08/terrified-of-terror-australia-plans-indefinite-detention-even-after-sentences-served/>.

²³⁹ Law on Counterterrorism of 10 June 2016 (Ustawa z dnia 10 czerwca 2016 r. o działaniach antyterrorystycznych), *Journal of Laws* 2016.

²⁴⁰ Amnesty International, *Annual Report 2015: Slovakia*, <https://www.amnesty.org/en/countries/europe-and-central-asia/slovakia/report-slovakia/>.

²⁴¹ UN Committee against Torture, Concluding observations on the sixth periodic report of Spain, 20 July 2015, (CCPR/C/ESP/CO/5), para. 14.

members of the armed group ETA have been the primary subjects of the incommunicado detention regime. Spain has been criticized repeatedly for the torture and ill-treatment of suspects held incommunicado, and the failure to effectively investigate allegations of such abuse.

5.6 UNITED KINGDOM

In the UK, from December 2001 to December 2004, the Home Secretary was empowered to *indefinitely* detain, without charge or trial, foreign nationals suspected of terrorism.²⁴² The Appellate Committee of the House of Lords, the UK's then highest appellate court, ruled in 2004 that this extraordinary power violated the right to liberty under Article 5 of the European Convention on Human Rights.²⁴³

Proposals for terrorism-related pre-charge detention periods in the UK – separate from the indefinite detention regime for foreigners noted above -- have ranged from a 90-day period to 56 and 42 days. Pre-charge detention of 28 days was in effect from 2006 to 2011.²⁴⁴ The current pre-charge detention period is 14 days, one of the longest in the EU, with the caveat that the Home Secretary can extend that to 28 days in case of an unspecified emergency.²⁴⁵

²⁴² Anti-Terrorism, Crime and Security Act 2001, Part IV.

²⁴³ *A and Others v Secretary of State for the Home Department*, [2004] UKHL 56, 16 December 2004, <http://www.bailii.org/uk/cases/UKHL/2004/56.html>.

²⁴⁴ Amnesty International, *United Kingdom: Submission for the Review of Counter-Terrorism and Security Powers* (Index: EUR 45/015/2010), September 2010, <https://www.amnesty.org/en/documents/eur45/015/2010/en/>; *United Kingdom: Submission to the UN Human Rights Committee*, (Index: EUR 45/1793/2015) 29 June 2015, <https://www.amnesty.org/en/documents/eur45/1793/2015/en/>; "UK: Extension of pre-charge detention amounts to internment," (Index: EUR 45/012/2007), 25 July 2007; Amnesty International UK, "Ten good reasons why extending pre-charge detention is a bad idea," 13 December 2007, <https://www.amnesty.org.uk/press-releases/uk-amnesty-releases-ten-good-reasons-why-extending-pre-charge-detention-bad-idea-0>. See also, Liberty, "Extended pre-charge detention," <https://www.liberty-human-rights.org.uk/human-rights/countering-terrorism/extended-pre-charge-detention>.

²⁴⁵ Protection of Freedoms Act 2012, Part 4, <http://www.legislation.gov.uk/ukpga/2012/9/part/4/crossheading/precharge-detention-of-terrorist-suspects/enacted>.

6. FREEDOM OF MOVEMENT

In the context of counter-terrorism, two aspects of the right to freedom to movement and associated rights (association, expression, privacy) have come under particular threat in EU member states:

- the application of *administrative* measures to control a person's movement; and
- the *criminalization* of travel and acts preparatory to travel enshrined in new instruments and laws in response to the phenomenon of "foreign terrorist fighters."

6.1 ADMINISTRATIVE CONTROL MEASURES

"You are punished without a real proceeding, without any real possibility to defend yourself."

Lawyer representing a man subjected to assigned residence order in France²⁴⁶

Many EU member states are increasingly relying on administrative control measures to restrict people's freedom of movement (and other rights) in order to monitor those with alleged "extremist" views or suspected of terrorism-related activity. The regional trend of using such measures instead of charging and prosecuting people in the criminal justice system is deeply problematic.

The control measures mean:

- people are punished before any crime has been committed; or
- controls are applied to people who the authorities suspect but do not charge and thus do not provide them with the safeguards normally available in the criminal justice process.

This approach raises the issue of governments investing in "pre-crime" initiatives that undermine the presumption of innocence and leave people with fewer and weaker safeguards to challenge restrictions on their liberty than they would enjoy in the criminal justice system.

Such efforts at "pre-emptive justice" typically involve a range of controls on individuals who the authorities believe might commit crimes. People subjected to administrative controls are not charged, however, and, in the vast majority of cases, the state has no plan to prosecute them. In most cases, the people subject to control measures receive little or no information to explain why the controls have been applied. Evidence is often kept secret, which puts a person at a distinct disadvantage in terms of challenging a control measure. It also raises concerns about the principle of "equality of arms", that is, the notion that both parties have equal access to the evidence and arguments in the case.

²⁴⁶ Amnesty International, *France: Upturned Lives*, p. 16.

People subjected to such restrictions have reported that their lives have been profoundly disrupted. Many cannot go to work or school, run a business, access necessary medical care, visit family and friends, or receive visitors. For people living with others, control measures can impact the entire household, often infringing the rights of people under no suspicion whatsoever.

Generally, control orders mainly affect a person's freedom of movement. The measures can include:

- reporting daily or weekly to a police station;
- forced/assigned residency in a particular home, neighbourhood or region of a country;
- curfews during which the person cannot leave the home;
- restrictions on who may enter the person's home or other residence, often coupled with a requirement that visitors have security clearance;
- prohibitions on visiting certain places, such as community centres and places of worship;
- limitations on access to electronic means of communication, including internet and mobile phones;
- confiscation of travel documents, such as a passport;
- bans on travelling outside the country or a particular area;
- exclusion orders prohibiting the person from entering or re-entering the country;
- tagging with an ankle bracelet or other means of electronic tracking.

Amnesty International calls on all states, including EU member states, to:

- Ensure that any measure to control a person's freedom of movement and associated rights adversely affected by the application of administrative control measures is both necessary and proportionate to achieve a legitimate governmental aim.²⁴⁷
- Ensure that any control measure has prior judicial authorization and ongoing judicial or other independent supervision.²⁴⁸
- Ensure that people are told why they have been subjected to control measures and can access the information that is the basis for the measures so that they can effectively mount a challenge.
- Guarantee that if control measures, singularly or taken together, amount to a deprivation of liberty, an affected person has the full range of fair trial safeguards to challenge such a deprivation of liberty.²⁴⁹
- Ensure that if a person is reasonably suspected of having committed a terrorism-related act, he or she should be charged and prosecuted in a fair trial.

6.1.1 BULGARIA

The July 2016 draft Law on Counter-terrorism, pending in the Bulgarian parliament at time of writing, would provide a range of new powers, including the application of administrative control measures to those "for whom there exists a reasonable suspicion that they are planning or preparing a terrorist act". Such preventive measures would include:

- forced/assigned residency;

²⁴⁷ ICCPR Article 12:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country."

See also, ECHR Protocol 4, Article 2.

²⁴⁸ On a number of occasions, the European Court of Human Rights has criticized the executive's power to restrict individual rights without judicial oversight. See *Klass and others v Germany*, (5029/71), European Court of Human Rights, 6 September 1978, para 55; and *Szabo and Vissy v Hungary*, (37138/14), European Court of Human Rights, 12 January 2016, para 75.

²⁴⁹ ECHR, Article 6; ICCPR, Article 9.

- bans on visiting certain neighbourhoods, locations or regions;
- a ban on leaving the country;
- a ban on maintaining contact with specified people;
- periodic reporting to a police station;
- the withdrawal of a passport or other travel documents; and
- a prohibition on applying for and being granted a new passport or other travel document.²⁵⁰

Administrative control measures would be ordered by the President of Bulgaria's National Security Agency or the General Secretary of the Ministry of Interior, with no requirement of prior judicial authorization. An appeal process, which would not suspend the measures, would involve the Supreme Administrative Court under the Administrative Procedure Code.

If a person is suspected of planning or preparing a terrorism-related act in Bulgaria, they should be charged and prosecuted in a fair trial, not subjected to executive control measures, which offer fewer and weaker safeguards than those in the criminal justice system.²⁵¹

6.1.2 FRANCE

The state of emergency and associated laws in France have made it easier to apply administrative controls to persons suspected of, but not charged with, terrorism-related acts. Between January 2015 and 7 November 2016, 430 people were subjected to an administrative ban against leaving the country and 201 people had been banned by an administrative order from entering France (exclusion order).²⁵² From November to date of writing, hundreds of people had been subjected to forced assigned residency, and as of 6 December 2016, 95 people remained under an administrative order requiring assigned residency.²⁵³

An assigned residence administrative order typically includes:

- a night curfew of up to 12 hours in a house (in practice it is usually 9-10 hours), which is either the person's residence or a residence in a specific area;
- a ban on travel outside a specific municipal area; and
- the requirement to report to a police station, typically twice daily.

In the cases examined by Amnesty International, the authorities often justified assigned residence orders by alleging that those targeted were either a threat because of their religious practice or supposed "radicalization", or had connections with Muslims who were allegedly "radicalized". Controls were applied without giving the affected person any specific information, let alone formal evidence, indicating why they were considered a threat to national security or public order, or were suspected of involvement in criminal activity.²⁵⁴

People subjected to control measures do have a right to appeal them through the administrative court system and then before the Council of State. Lawyers have told Amnesty International, however, that the courts tended to show strong deference to the arguments for assigned residence orders put forward by the Ministry of Interior on the basis of information collected by the intelligence services, without inquiring sufficiently about the provenance of the information and without requiring authorities to share detailed information regarding the allegations against those subjected to the orders.²⁵⁵

²⁵⁰ Draft Law on Countering Terrorism, no. 602-01-42, adopted by the Council of Ministers on 7 July 2016, http://www.parliament.bg/bills/43/602-01-42_PZ%20protivodeistvie%20na%20terorizma.PDF (in Bulgarian)

²⁵¹ Amnesty International, *Bulgaria: Proposed counter-terrorism bill a step back for human rights*, 29 July 2016 (Index: EUR 15/4545/2016), <https://www.amnesty.org/en/documents/eur15/4545/2016/en/>

²⁵² Ministry of Interior, "Lutte contre le terrorisme et prévention de la radicalisation: réunion des préfets et des procureurs", 7 November 2016, <http://mobile.interieur.gouv.fr/Le-ministre/Interventions-du-ministre/Lutte-contre-le-terrorisme-et-prevention-de-la-radicalisation-reunion-des-prefets-et-des-procureurs>

²⁵³ Dominique Raimbourg and Jean-Frédéric Poisson, "Report tabled [in the National Assembly] in accordance with article 145 of the Regulation on behalf of the Legal Committee regarding parliamentary control on the state of emergency"

²⁵⁴ Amnesty International, *France: Upturned Lives*, p. 17.

²⁵⁵ Amnesty International, *France: Upturned Lives*, pp 28-30.

6.1.3 GERMANY

Administrative control measures can be applied in Germany to non-German individuals who the government seeks to deport on national security grounds but cannot because they would be at risk of torture or other ill-treatment following deportation.

Outlined in Section 56 of the Residence Act,²⁵⁶ these controls can include:

- an obligation to register on a regular, at least weekly basis with a local police station;
- bans on using certain means of communications; and
- bans on communicating with and meeting certain groups of people.

The Act for the Reclassification of the Right to Stay and the Termination of Residence, in force since 1 August 2015, was a major revision of the Residence Act that intensified and expanded the control order powers for the surveillance of foreign nationals.²⁵⁷ The amendments expanded grounds for revocation of asylum or residence permits and strengthened controls that could be used to further restrict freedom of movement.²⁵⁸

6.1.4 NETHERLANDS

A draft bill, the Temporary Administrative Powers Counter-Terrorism Act (Temporary Powers bill), was pending in the Senate at time of writing.²⁵⁹ The government had said that the bill seeks to limit the risk to national security posed by certain individuals who “can be associated with” terrorism-related activities or the support of them. The bill had been proposed in the context of the Dutch government’s 2014 “Comprehensive Action Programme to Combat Jihadism.”²⁶⁰

The bill would impose administrative control measures on such people that would:

- restrict their access to certain places and areas;
- restrict their contact with specific people;
- restrict their ability to travel;
- impose a duty to report regularly to the police; and/or
- provide for the use of ankle tags to ensure compliance.²⁶¹

Under the Temporary Powers Act, the government would also be empowered to decline to respond to requests for certain government subsidies or discontinue them, and decline to grant licences or permits (e.g. for public gatherings) to groups or people deemed at risk of committing or supporting terrorism-related activities. The bill does not define or list what actions might bring a person under consideration for a control measure. The bill signals a disturbing shift in the Netherlands away from traditional criminal law principles and the criminal justice system’s safeguards.

An administrative order banning travel outside the Schengen area is also a key feature of the Temporary Powers Act. If the government has a “grounded suspicion” that a person plans to leave the Schengen area to join a group deemed to be engaged in acts threatening national security,²⁶² a travel ban could be imposed

²⁵⁶ *Aufenthaltsgesetz* (German)

²⁵⁷ *Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung* <http://dipbt.bundestag.de/extrakt/ba/WP18/643/64395.html>; see also Eric Töpfer, “Kontaktsperren für “ausländische Gefährder” geplant”, *Bürgerrechte & Polizei/CILIP*, No. 108, June 2015, p. 85.

²⁵⁸ *Ibid.*

²⁵⁹ “Temporary Rules Relating to Restricting the Freedom of People who From a National Security Perspective Pose a Danger or Who are Considering to Join a Terrorist Group and Refusing or Suspending Orders When There is a Serious Threat of Them Being Used for Terrorist Activities” (Temporary Administrative Powers Counter-Terrorism Act), Parliamentary Papers I 2015-2016, 34359, A, 17 May 2016. It passed the House of Representative of the States General on 17 May 2016.

²⁶⁰ Ministry of Security and Justice, National Coordinator for Security and Counterterrorism and Ministry of Social Affairs and Employment, “The Netherlands comprehensive action programme to combat jihadism,” 29 August 2014, p. 7, https://english.nctv.nl/binaries/def-a5-nctvjihadismuk-03-lr_tcm32-83910.pdf.

²⁶¹ Temporary Administrative Powers Counter-Terrorism Act, 34359, A, 17 May 2016.

²⁶² According to the bill, if a person plans to leave the Schengen Area “with the purpose of joining an organization that, in agreement with the feelings of the Cabinet, has been placed on a list of organizations that participate in a national or an international armed conflict and that pose a threat to national security”. The list will be made public but a group cannot appeal a listing. The Minister has explained that it includes Al Qaeda and Islamic State, but not the FARC (a Colombian armed group) because the latter does not pose a threat to the national security of the Netherlands.

and would automatically lead to the confiscation and revocation of the person's passport.²⁶³ The government has stated that the bill forms part of the state's plan to implement UN Security Council Resolution 2178.²⁶⁴

An administrative order mandating the application of a control measure – which would initially last for six months but could be extended *indefinitely* – would be issued by the Minister of Security and Justice at the national level or, in the case of ending a subsidy, for example, a local administrative authority.²⁶⁵

The bill contains no requirement for prior judicial authorization or continuing supervision, consolidating power to issue an order solely in the executive.

The ministerial decision to issue a control order could be based on secret information from the Dutch intelligence and security services, which would not be subject to disclosure to the person affected by the order or the person's lawyer. This was precisely the provision struck down by the Appellate Committee of the UK House of Lords in June 2009.²⁶⁶ A person must be able to access enough information effectively to challenge the application of a control measure.

Under the Temporary Powers Act, if a person failed to comply with a control measure, the non-compliance would itself be a criminal offence punishable by up to one year in prison or a fine of up to 8,200 euros. Such penalties raise concerns that sanctions for non-compliance would be disproportionate.

If a person's rights are restricted under the Temporary Powers Act, they would be able to appeal the ministerial order directly to an administrative court, and an administrative judge could consider any facts and circumstances that had become relevant since the order was issued. However, the judicial review would be available only on procedural grounds, not on substance, and only after the control order had been imposed. The restrictions would remain in force until the appeal was concluded.

Amnesty International has called on the Dutch Senate to reject the bill,²⁶⁷ and a range of other actors, including the Council of Europe Commissioner for Human Rights, has criticized the bill based on human rights concerns.²⁶⁸

6.1.5 UNITED KINGDOM

The UK has been at the forefront of developing and employing administrative control measures, first in the form of "control orders" and, since December 2011, in the form of "terrorism prevention and investigation measures" (TPIMs).²⁶⁹ The Appellate Committee of the House of Lords ruled in June 2009 that control

²⁶³ The Dutch Senate will vote on an amendment to Article 23 of the Passport Act at the same time it will vote on the Temporary Powers bill. That amendment would empower the Ministry of Security and Justice to order the immediate confiscation and revocation of a person's passport and identification card if a travel ban is imposed.

²⁶⁴ With respect to the travel ban in the proposed law, the government has justified it based on its international legal obligations, including UN Security Council Resolution 2178, para. 8.2, <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/03/17/wetsvoorstel-tijdelijke-wet-bestuurlijke-maatregelen-terrorismebestrijding/getcontent.pdf>. "One of the obligations that follows from this resolution (2178) is to prevent the travelling of 'foreign terrorist fighters' outside Schengen, who prepare, facilitate, contribute to, train for, or participate in terrorist activities (and thereby pose a threat to regional and national security), including through strict border controls and ID paper checks."

²⁶⁵ Subsidies for local youth associations, for example, could be temporarily withheld and stopped altogether if there were a suspicion that the association's directors could be linked to groups engaged in terrorism related activity and if subsequently there were a risk that the association might use government subsidies to organize or support such activities. Also, government subsidies for education or research could be withheld from groups and organizations for the same reason.

²⁶⁶ Amnesty International, "UK Law Lords rule control orders based on secret information violate right to fair trial," 10 June 2009, <https://www.amnesty.org/en/latest/news/2009/06/uk-law-lords-rule-control-orders-based-secret-information-violate-right-fair-tri/>. The Law Lords were undoubtedly influenced by the European Court of Human Rights February 2009 judgment in the case of *A and Others v United Kingdom*, which had concluded, among other things, that the use of secret evidence in internment cases was in violation of fair trial rights enshrined in the ECHR. See *A and Others v United Kingdom*, (3455/05), European Court of Human Rights, 19 February 2009.

²⁶⁷ Amnesty International, Letter to the Dutch Senate, 2016, POL-2016-6EK voorbereidend onderzoek Tijdelijke wet bestuurlijke maatregelen (Dutch)

²⁶⁸ Nils Muižnieks, Council of Europe Commissioner for Human Rights, "Letter: The Netherlands urged to strengthen human rights safeguards in its response to terrorism", 29 November 2016, <http://www.coe.int/en/web/commissioner/-/the-netherlands-urged-to-strengthen-human-rights-safeguards-in-its-response-to-terrorism?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fcounter-terrorism>. See also, Netherlands Institute for Human Rights, "Aanpak terrorisme vooral symptoombestrijding", 30 April 2015, <https://www.mensenrechten.nl/berichten/aanpak-terrorisme-vooral-symptoombestrijding>, and the NIHR response to the Temporary Powers Act, in particular: <https://mensenrechten.nl/publicaties/detail/35614>. For a response to this bill by the Dutch section of International Commission of Jurists, see: <http://www.njcm.nl/site/newsposts/show/350> and the Bar Association, see: <https://www.rijksoverheid.nl/documenten/rapporten/2015/12/01/tk-advies-nova-inz-tijdelijke-wet-bestuurlijke-maatregelen-terrorismebestrijding>

²⁶⁹ Amnesty International, *Left in the Dark: The Use of Secret Evidence in the United Kingdom*, 15 October 2012 (Index: EUR 45/014/2012), <https://www.amnesty.org/en/documents/EUR45/014/2012/en/> and *United Kingdom: Terrorism Prevention and Investigation Measures Bill 2011: Control Orders Redux*, 30 June 2011 (Index: EUR 45/007/2011), <https://www.amnesty.org/en/documents/eur45/007/2011/en/>.

orders based on secret information violated the right to a fair trial and essentially struck down the UK's control order regime.²⁷⁰

TPIMs, which can be applied to UK nationals and foreigners, are limited to two years,²⁷¹ allow among other things:

- assigned overnight residence;
- a ban on travel outside the country or outside a specified area within the UK;
- exclusion orders prohibiting a person from entering an area or specific types of places (such as internet cafes);
- restrictions on access to financial services and the use of mobile phones; and
- restrictions on association with other people.

On 12 February 2015, the Counter-Terrorism and Security Act became law and amended the TPIM Act by re-introducing several of the more stringent administrative restrictions found under the previous control order regime, including the forced relocation of individuals subject to a TPIM.²⁷² In addition, the threshold for imposing a TPIM was lowered from “a reasonable belief” to a “balance of probabilities” that a person has been involved in terrorism-related activities.²⁷³

The 2015 Counter-Terrorism and Security Act also introduced “temporary exclusion orders”, which prevent a British citizen, or others with a right to live in the UK, from returning to the UK unless their return is either in accordance with a “permit to return” or they are deported to the UK by another state.²⁷⁴ A temporary exclusion order is an administrative, executive order that can be imposed if the Secretary of State reasonably suspects that the individual in question is or has been involved in terrorism-related activity, and reasonably considers that it is necessary to impose an order to protect people in the UK from a risk of terrorism.

The imposition of a temporary exclusion order invalidates the subject's British passport, with no option for re-issue. The temporary exclusion order lasts for two years, and can be renewed for as long as the government claims that the conditions remain satisfied. The individual can apply to the Secretary of State for a “permit to return” to allow them to re-enter the UK. The permit states when, where and how the person is permitted to return, but it may also be subject to special conditions set by the Secretary of State, such as compulsory reporting and interviews. Return to the UK in contravention of those restrictions without reasonable excuse is a criminal offence, punishable by up to five years in prison. There is limited judicial oversight of the process, apart from the possibility of ex-post facto judicial review, which would have to be pursued from abroad.

In practice, a temporary exclusion order does more than manage and control the return of individuals to the UK. It temporarily excludes from their home those who have a right to live in the UK, in contravention of the right to freedom of movement and the right to return to one's own country.²⁷⁵ Furthermore, Amnesty International considers temporary exclusion orders to be neither necessary nor proportionate.²⁷⁶

²⁷⁰ Amnesty International, “UK Law Lords rule control orders based on secret information violate right to fair trial,” 10 June 2009.

²⁷¹ Terrorism Prevention and Investigation Measures Act 2011, http://www.legislation.gov.uk/ukpga/2011/23/pdfs/ukpga_20110023_en.pdf

²⁷² Counter-Terrorism and Security Act (CTSA) 2015, http://www.legislation.gov.uk/ukpga/2015/6/pdfs/ukpga_20150006_en.pdf

²⁷³ CTSA, Part 3 [20], miscellaneous amendments.

²⁷⁴ CTSA, Part 1, Chapter 2.

²⁷⁵ ICCPR Articles 12 and 15. In evidence to the Joint Committee of Human Rights the Minister for Immigration and Security at the Home Office confirmed the provisions in the Bill still have the effect of invalidating a UK national's passport while they are abroad, and of preventing their return unless they comply with conditions imposed by the Secretary of State. See the Joint Committee of Human Rights report, *Legislative Scrutiny: the Counter-terrorism and Security Bill*, HL paper 86/HC 859, 7 January 2015, p. 15, <http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/86/86.pdf>.

²⁷⁶ Amnesty International, *United Kingdom: Submission to the Human Rights Committee*, 29 June 2015 (Index: EUR 45/1793/2015), <https://www.amnesty.org/en/documents/eur45/1793/2015/en/>

6.2 CRIMINALIZATION OF TRAVEL

“Some preparatory offences require only that the prosecution prove that the suspect intended to commit a future criminal act. The presumed intention provides the basis for criminalizing otherwise lawful activity, such as travelling to an airport.”

McCulloch and Wilson, 2016²⁷⁷

The issue of people travelling to conflict zones in foreign countries to participate in armed operations has received much attention in the EU in recent years. Characterized as the “foreign terrorist fighters” phenomenon, it has focused primarily on Muslim men, women and children who are citizens or residents of EU member states or other countries and travel to Syria and Iraq allegedly to join and advance the aims of armed groups. This section is not intended as a survey of the “foreign terrorist fighters” phenomenon in the EU, which has been expertly done by others.²⁷⁸ Instead, it addresses some of the key problems with respect to global and regional initiatives to criminalize preparation to travel.²⁷⁹

Initiatives to criminalize travel and acts preparatory to travel are deeply problematic as they can have an adverse effect on freedom of movement.²⁸⁰ They can also undermine the principle of legality, which can lead to their arbitrary and/or discriminatory application.

In some countries mere “intent to travel” or “incitement to travel” are criminal offences. Moreover, notions of what constitutes a “fighter,” what it means to travel to “join” a group or “participate” in such activities are not clearly articulated and leave room for abuse by the authorities, paving the way for the deprivation of liberty on the flimsiest of grounds.

The criminalization of so-called preparatory acts to travel abroad for the purposes of committing a terrorist offence means that actions far removed from the commission of a principal terrorism-related offence – that is, the commission of a recognizably criminal terrorist offence, such as planting a bomb, or beheading a captive – are now being criminalized.

Indeed the extent of the remove can be seen from the fact that states are criminalizing not just the preparatory act of travelling abroad with the purpose of committing a terrorist offence, but also acts preparatory to the preparatory act of travelling abroad with this purpose. The problem here is that acts such as browsing “extremist” websites and looking up the price of flights to Istanbul can all render people liable to prosecution, long before individuals may have made up their minds to commit a terrorist offence, or without their ever even having contemplated it in the first place.

²⁷⁷ Jude McCulloch and Dean Wilson, *Pre-Crime: Pre-emption, Precaution, and the Future*, Routledge, 2016, p. 19.

²⁷⁸ Christophe Paulussen, *Repressing the Foreign Fighters Phenomenon in Western Europe: Towards an Effective Response Based on Human Rights*, ICCT Research Paper, November 2016, <https://icct.nl/wp-content/uploads/2016/11/ICCT-Paulussen-Rule-of-Law-Nov2016-1.pdf>; Andrea de Guttry, Francesca Capone, Christophe Paulussen, Eds., *Foreign Fighters under International Law and Beyond*, Asser Institute/TMC Asser Press, February 2016, <http://www.asser.nl/asserpress/books/?rld=12841>; International Center for Counter-Terrorism – The Hague, *The Foreign Fighters Phenomenon in the European Union: Profiles, Threats, and Policies*, April 2016, http://icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf. See also, Working Group on the Use of Mercenaries, “Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to Belgium”, A/HRC/33/43/Add.2, 8 July 2016, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/147/71/PDF/G1614771.pdf>. There is an ongoing discussion regarding the status of “foreign terrorist fighters” under international humanitarian law; see Sandra Kraehenmann, *Foreign Fighters under International Law*, Geneva Academy of International Humanitarian Law and Human Rights, October 2014.

²⁷⁹ The status of “foreign terrorist fighters” has been considered by many commentators and international bodies. See, above footnote.

²⁸⁰ ICCPR Article 12:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.”

See also, ECHR Protocol 4, Article 2.

The concern is exacerbated by the broader lack of clarity, variously documented above, as to what kind of act or support to a terrorist group would constitute an offence once actually abroad. How, for instance, will women and children who have planned to travel or have travelled to places such as Turkey, considered a major transit route to Syria, or Syria or Iraq be treated under such laws?²⁸¹ Are girls and women who take preparatory steps or actually travel with the intent to marry fighters – as opposed to joining an armed group – to be labelled as “foreign terrorist fighters” and subjected to criminal penalties? When children are involved, questions arise about their ability to consent and even whether they should be treated as child soldiers as opposed to voluntary and willing combatants. Dozens of such cases involving women and children have been documented across the region.²⁸²

Amnesty International calls on all states, including EU member states, to:

- Ensure that measures to criminalize preparatory acts such as travel and/or acts preparatory to travel are both necessary and proportionate to achieve a genuinely legitimate governmental aim in conformity with an individual’s right to freedom of movement.
- Comply with the principle of legality and avoid arbitrary and discriminatory application in practice, by ensuring that any preparatory act that is to be criminalized has a sufficiently close and direct connection to the commission of a principle criminal act, with a real and foreseeable risk that the act would in fact take place.
- Establish, before travel-related measures are imposed, a clear and unequivocal intent on the part of an individual to commit or otherwise participate in the principal criminal act.
- Inform people prosecuted for travel or preparing to travel of the grounds for prosecution and give them access to the information that forms the basis for the prosecution so that they can mount an effective challenge.

6.2.1 REGIONAL INITIATIVES

UN Security Council Resolution 2178, adopted in September 2014, required every member state to “prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities.”²⁸³

Following this, in January 2015 the **Council of Europe** established the Committee on Foreign Terrorist Fighters and Related Issues to prepare a draft Additional Protocol to the European Convention on the Prevention of Terrorism. That protocol was adopted in May 2015 and opened for signature in October 2015. It also includes sanctions for travel and for acts in preparation to travel.²⁸⁴

The **European Union** has addressed the “foreign terrorist fighters” phenomenon by updating the 2002 EU Framework Decision on combating terrorism, already updated in 2008.²⁸⁵ The draft Directive seeks, among other things, to criminalize travel and acts preparatory to travel for the purposes of engaging in acts of terrorism, and was pending final adoption at the time of writing.

²⁸¹ Edwin Bakker and Seran de Leede, *European Female Jihadists in Syria: Exploring an Under-Researched Topic*, April 2015, [https://www.icct.nl/download/file/ICCT-Bakker-de-Leede-European-Female-Jihadists-In-Syria-Exploring-An-Under-Researched-Topic-April2015\(1\).pdf](https://www.icct.nl/download/file/ICCT-Bakker-de-Leede-European-Female-Jihadists-In-Syria-Exploring-An-Under-Researched-Topic-April2015(1).pdf).

²⁸² Harriet Sherwood, et al., “Schoolgirl jihadis: the female Islamists leaving home to join Isis fighters; Hundreds of girls and women are going missing in the west, reappearing in Iraq and Syria to bear children for the caliphate,” *The Guardian*, 29 September 2014, <http://www.theguardian.com/world/2014/sep/29/schoolgirl-jihadis-female-islamists-leaving-home-join-isis-iraq-syria>.

²⁸³ UN Security Council Resolution 2178, adopted on 24 September 2014, para. 5, http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf

²⁸⁴ Council of Europe, Additional Protocol to the European Convention on the Prevention of Terrorism, Riga, 2015, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168047c5ea>.

²⁸⁵ Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, consolidated text following sixth trilogue of 10 November 2016, 11 November 2016, <http://statewatch.org/news/2016/nov/eu-council-c-t-directive-consolidated-text-14238-16.pdf>. Original proposal: Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM (2015) 625 Final, 2015/0281 (COD), 2 December 2015, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-security/legislative-documents/docs/20151202_directive_on_combatting_terrorism_en.pdf.

6.2.1.1 COUNCIL OF EUROPE

Amnesty International expressed serious concerns regarding the Additional Protocol to the European Convention on the Prevention of Terrorism in submissions in March and April 2015 to the relevant Council of Europe bodies.²⁸⁶ With respect to Article 4, which required states to criminalize “travelling abroad for the purpose of terrorism,”²⁸⁷ concerns were raised about how the offence would impact the right to freedom of movement, including the freedom to leave any country, including one’s own, which under international human rights law is subject only to limitations that are strictly necessary and proportionate.²⁸⁸ The language undermines the principle of legality because it fails to ensure that any preparatory act which is to be criminalized – here, preparation to travel or travel -- must have a direct and sufficiently close connection to the commission of the principal offence (a terrorism-related act), with a real and foreseeable risk that such a criminal act would in fact take place.

Article 4 thus requires states to criminalize conduct several stages removed from, and therefore lacking a proximate causal link to, any principal offence that may take place. It also fails to clarify that, in keeping with the principle of presumption of innocence, the burden of proof lies solely with the prosecution. This is crucial in respect of offences where actual and not just presumed intentions are central yet difficult to prove. The prosecution must establish beyond reasonable doubt not only that an accused had definitely decided to travel abroad, but also that the purpose of this travel was the commission of an actual criminal offence. The defendant should never bear the burden of proof in establishing that their travel would be for a legitimate purpose.²⁸⁹

6.2.1.2 EUROPEAN UNION

Similar concerns arise from the EU draft Directive noted above.²⁹⁰ Article 9 requires states to criminalize “travelling for the purpose of terrorism” and suffers the same deficiencies as those noted above regarding the Additional Protocol.²⁹¹ It is notable that Article 9 criminalizes a wider range of conduct than the equivalent offence under the Additional Protocol, as it would also criminalize acts in preparation to travel for the purposes of “participation in the activities of a terrorist group referred to in Article 4 [of the proposed Directive]”.²⁹²

²⁸⁶ Amnesty International and the International Commission of Jurists, *Preliminary public observations on the terms of reference to draft an Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism*, 6 March 2015, <https://www.amnesty.org/download/Documents/IO6011722015ENGLISH.pdf>; Amnesty International and the International Commission of Jurists, *Submission to the Committee on Foreign Fighters and Related Issues (COT-CTE) on the Draft Additional Protocol to the Convention on the Prevention of Terrorism*, 19 March 2015, <https://www.amnesty.org/download/Documents/IO6012812015ENGLISH.pdf>; Amnesty International and the International Commission of Jurists, *Submission to the Council of Europe Committee of Experts on Terrorism (DODEXTER) on the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*, 7 April 2015, <https://www.amnesty.org/download/Documents/IO6013932015ENGLISH.pdf>. See also Open Society Justice Initiative, *Comments on the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*, 24 March 2015, <https://www.opensocietyfoundations.org/publications/comments-draft-additional-protocol-council-europe-convention-prevention-terrorism>.

²⁸⁷ Article 4 – Travelling abroad for the purpose of terrorism: “1) For the purpose of this Protocol, “travelling abroad for the purpose of terrorism” means travelling to a State, which is not that of the traveller’s nationality or residence, for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism. 2) Each Party shall adopt such measures as may be necessary to establish “travelling abroad for the purpose of terrorism”, as defined in paragraph 1, from its territory or by its nationals, when committed unlawfully and intentionally, as a criminal offence under its domestic law. In doing so, each Party may establish conditions required by and in line with its constitutional principles. 3) Each Party shall also adopt such measures as may be necessary to establish as a criminal offence under, and in accordance with, its domestic law the attempt to commit an offence as set forth in this article.”

²⁸⁸ ECHR Article 2 Protocol 4; ICCPR Article 12.

²⁸⁹ The same concerns apply to an even greater degree with regard to Article 4.3, which criminalizes the attempt to carry out such acts.

²⁹⁰ Amnesty International, International Commission of Jurists, Open Society Justice Initiative, and Open Society European Policy Institute, *Joint Submission regarding the European Commission’s Proposed Draft Combating Terrorism Directive*, 19 February 2016, <https://www.amnesty.org/en/documents/ior60/3470/2016/en/>.

²⁹¹ Article 9: Travelling (...) for the purpose of terrorism (consolidated and revised text as of 11 November 2016):

“1. Each Member State shall take the necessary measures to ensure that travelling to a country other than that Member State (...) for the purpose of the commission of or contribution to a terrorist offence referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving of training for terrorism referred to in Articles 7 and 8 is punishable as a criminal offence when committed intentionally. 2. Each Member State shall take the necessary measures to ensure that one of the following conducts is punishable as a criminal offence when committed intentionally: a) travelling to that Member State for the purpose of the commission or contribution to a terrorist offence, as referred to Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving of training for terrorism referred to in Articles 7 and 8; or b) preparatory acts undertaken by a person entering that Member State with the intention to commit or contribute to a terrorist offence, as referred to in Article 3.”

²⁹² Article 4: Offences relating to a terrorist group:

“Each Member State shall take the necessary measures to ensure that the following acts, when committed intentionally, are punishable as a criminal offence: (a) directing a terrorist group; (b) participating in the activities of a terrorist group, including by supplying information or

This element of the offence has a particularly unclear scope, given the uncertainty of the meaning of “participation in the activities of a terrorist group” under Article 4. Article 4 clearly envisages that relatively minor involvement, such as supplying information or resources, involves participation, and that it does not require that such participation be willful or voluntary. Taken together with the wide definition of terrorism, this is likely to mean, among other things, that anyone travelling to a zone controlled by a party to an armed conflict for any purpose – where provision of some information, funds or services to the group may be unavoidable – would be at high risk of facing criminal sanctions.²⁹³

material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.”

²⁹³ Amnesty International, European Network Against Racism, European Digital Rights, Fundamental Rights European Experts Group, Human Rights Watch, International Commission of Jurists and Open Society Foundations, “European Union directive on counterterrorism is seriously flawed”, 30 November 2016, <http://www.amnesty.eu/en/news/press-releases/all/european-union-directive-on-counterterrorism-is-seriously-flawed-1010/#.WErAnneZMkg>.

7. STRIPPING OF NATIONALITY

“Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality...”

Universal Declaration of Human Rights, Article 15

The stripping of nationality is one of the most severe non-criminal sanctions used in the EU against people perceived as “extremists” or suspected of having engaged in terrorism-related acts. In some extreme instances, the measure is applied to people who have no other nationality, but generally it is applied to dual nationals.

The alleged activities giving rise to the possibility of such a sanction run the gamut of those associated with “extremism” or “terrorism” as defined, typically very broadly, under domestic law. These can include the commission of a terrorism-related crime for which a person is convicted and, as part of the formal sentencing or after serving a sentence, nationality is stripped on the basis of the conviction. Increasingly, however, states are adopting laws that do not require the commission of a terrorism-related crime, but a mere suspicion that someone may be engaging in conduct that is “prejudicial” to the interests of the state. Such conduct includes:

- various forms of expression interpreted as incitement to, or “apology for” or “glorification of” terrorism (online or in public), with or without an actual conviction for such offence;
- suspected association with certain groups (banned or otherwise);
- suspected or actual travel to conflict zones; and
- suspicion that a person does not hold the same “values” as those allegedly espoused by the majority population of a state.

Some of these activities are already criminalized under domestic law, leaving the impression that nationality-stripping is a punitive proxy for the formal laying of charges in the context of the criminal justice system with all its attendant safeguards.

Nationality-stripping in the context of counter-terrorism initiatives can be extremely divisive. It can:

- strengthen false and xenophobic narratives about “true” citizens as opposed to a second tier of people perceived to have divided loyalties due to their dual nationality;
- lead to a perception that foreignness is associated with terrorism;
- adversely impact on the environment in which nationals of foreign origin or certain racial/ethnic/religious groups are able to enjoy their human rights on the basis of equality.

In fuelling stereotypes of who is a “terrorist”, nationality-stripping helps create a climate in which some groups of immigrants and others of certain national origins may find themselves victims of discrimination, regardless of their beliefs or behaviour, or whether or not they have dual nationality.

Other problems linked to this measure include:

- the absence of procedural safeguards to effectively challenge nationality-stripping, including stripping processes that occur *in absentia*; and
- lack of access to all the information/evidence upon which a nationality-stripping decision is made at both the initial consideration stage and upon appeal.

All these issues give rise to deep concerns that EU member states may be applying this measure in an arbitrary manner.

States can, in exceptional and narrowly defined circumstances, lawfully strip a person of nationality.²⁹⁴ International human rights law, however, puts clear limits on this:

- No person should be rendered stateless; nationality enables a person to enjoy not only citizenship, but all the other attendant privileges that flow from it.²⁹⁵
- No distinction should be made between people who obtained citizenship by birth and those who obtained it by naturalization, in conformity with the principle of non-discrimination.²⁹⁶
- States must ensure that the stripping of nationality is not undertaken if it would be a disproportionate measure in the particular case: the proportionality assessment should take into consideration all relevant factors, including age, physical and mental health, right to family life, and a person’s links to both countries of nationality (for example, family ties, employment history, and ability to speak the language and navigate socially and culturally); it should also consider the strength and credibility of the evidence that an individual has committed or intends to commit a serious criminal act that would trigger as severe a penalty as stripping a person of nationality.
- The “best interests of the child” standard should govern any consideration of stripping a person aged under 18 of their nationality.
- Stringent procedural safeguards must attach to any deprivation of nationality. Such guarantees would include a person having access to due process and the evidence that forms the basis for any decision to withdraw nationality. The decision should be appealable to a court that should have full jurisdiction, including on the merits. A person stripped of nationality *in absentia* must be permitted, if they appeal the decision, to return to the state that has effected the stripping.
- No one should be stripped of nationality and sent to any place where they would be at risk of torture and other ill-treatment.

Amnesty International calls on all states, including EU member states, to ensure that any nationality-stripping measure fully conforms with international human rights law by:

- including a rigorous proportionality assessment taking into account the impact on the human rights of the individual(s) concerned;
- respecting the right of everyone to a nationality and therefore avoid the consequence of statelessness;

²⁹⁴ 1997 European Convention on Nationality, Article 7, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007f2c8>

²⁹⁵ 1961 Convention on the Reduction of Statelessness; 1997 European Convention on Nationality. The avoidance of statelessness is a fundamental principle of international law. UN Human Rights Council, “Human rights and arbitrary deprivation of nationality. Report of the Secretary-General”, 19 December 2013, A/HRC/25/28, para. 6. See also Explanatory Report to the European Convention on Nationality, para. 33: “The obligation to avoid statelessness has become part of customary international law”.

²⁹⁶ 1997 European Convention on Nationality, Article 5 – Nondiscrimination: “1 The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin. 2 Each State Party shall be guided by the principle of non-discrimination between its nationals, *whether they are nationals by birth or have acquired its nationality subsequently*.” See also UN Human Rights Council, “Human rights and arbitrary deprivation of nationality. Report of the Secretary-General”, 19 December 2013, A/HRC/25/28, para. 6: “Another trend that can be observed in domestic laws is the differentiation between nationals by birth and nationals by naturalization. A nationality acquired by naturalization is often less secure than one acquired by birth or otherwise. For example, fraud, absence or ordinary crime are often only recognized as grounds for the loss or deprivation of nationality conferred by naturalization. This form of inequality between nationals may raise concerns under international law. However, the increased vulnerability of naturalized nationals to loss or deprivation of nationality is mitigated in many countries by the establishment of temporal limitations for the subjection of a nationality acquired by naturalization to loss or deprivation.”

- respecting the principle of non-discrimination and the absolute ban on *refoulement*;
- giving a person subjected to such a measure a meaningful right to appeal the stripping and the right to a full and effective remedy.

7.1 BELGIUM

Belgian law has provided since 1919 for the possibility to strip a person of Belgian nationality for “breach of his obligations as a Belgian citizen”.²⁹⁷ This old provision has been applied in a number of terrorism-related cases involving dual nationals.²⁹⁸

In 2013, a new article was introduced, specifically listing the crimes that can lead to stripping of nationality, including certain terrorism-related crimes.²⁹⁹ However, to avoid statelessness, such stripping can only be applied to people with dual nationality, and requires prior judicial authorization. Loss of nationality is never automatic.

In July 2015, an amendment to the Code of Belgian Nationality introduced Article 23/2. This provides for the possibility to strip Belgian nationality from people with dual nationality who obtained Belgian nationality in the course of their life if they are convicted of a terrorism-related act and sentenced to five or more years in prison.³⁰⁰

Since 2009, there have been four known cases of nationality-stripping in terrorism-related cases, all applying the old provision. In November 2016, Human Rights Watch reported that there were three pending cases of nationality-stripping;³⁰¹ in at least two of these, the old provision was being applied.

There is no public information indicating that the 2015 provision has yet been applied. Its adoption, however, caused significant concern that Belgium had established a two-tier citizenship system, with Belgians of North African heritage – many of whom hold dual nationality – assigned to “second class”, or “conditional” citizenship status.

Another key concern regards the simultaneous applicability of the old and new provisions when they do not offer the same safeguards and have differing scopes. The differences could lead to discriminatory practices.

7.2 FRANCE

In January 2016, President François Hollande outlined plans to change the Constitution to allow deprivation of French nationality for dual nationals who had acquired French citizenship at birth.³⁰² These plans were dropped in March as the Senate and the Assembly could not agree on the reforms.³⁰³

At present, French citizens who acquired nationality at birth cannot be deprived of their nationality. Article 25 of the Civil Code allows a naturalized French citizen to be deprived of citizenship, unless it would render them stateless, if they are convicted of certain offences, including terrorism-related crimes.³⁰⁴

A recent high-profile case involved four dual French-Moroccan nationals convicted of terrorism-related offences in 2007. They were stripped of their French citizenship in 2015 and have lost all appeals regarding

²⁹⁷ Code of Belgian Nationality, Article 23.

²⁹⁸ The Belgian Chamber of Representatives, “Bulletin n° B036 – Question et réponse écrite n° 0405 – Législature 54”, <https://www.lachambre.be/kvvcr/showpage.cfm?section=qv&language=fr&cfm=qv&Xml.cfm?legislat=54&dossierID=54-b036-866-0405-2014201503702.xml>, 27 July 2015

²⁹⁹ Code of Belgian Nationality, Article 23/1.

³⁰⁰ Code of Belgian Nationality, Article 23/2, as introduced by the Law of 20 July 2015, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2015072008.

³⁰¹ Human Rights Watch, *Grounds for Concern: Belgium's Counterterrorism Responses to the Paris and Brussels Attacks*, 3 November 2016, <https://www.hrw.org/report/2016/11/03/grounds-concern/belgiums-counterterrorism-responses-paris-and-brussels-attacks>.

³⁰² Lucie Soullier, “Déchéance de nationalité : qui serait concerné par le projet de loi constitutionnelle?”, *Le Monde*, 4 January 2016, http://www.lemonde.fr/societe/article/2016/01/04/decheance-de-nationalite-qui-serait-concerne-par-le-projet-de-loi-constitutionnelle_4841434_3224.html; Aisha Maniar, “Citizenship Deprivation: 21st Century Banishment”, *One Small Window*, 4 May 2016, <https://onesmallwindow.wordpress.com/2016/05/04/citizenship-deprivation-21st-century-banishment/>.

³⁰³ “François Hollande renonce à la déchéance de nationalité et au Congrès”, *Le Monde*, 30 March 2016, http://www.lemonde.fr/attaques-a-paris/article/2016/03/30/francois-hollande-renonce-a-la-decheance-de-nationalite-et-au-congres_4892426_4809495.html.

³⁰⁴ Civil Code Section 3 (*De la déchéance de la nationalité française*), https://www.legifrance.gouv.fr/affichCode.do;jsessionid=94686E6B6F67326C733FDC410FD668B7.tpdila12v_2?idSectionTA=LEGISCTA00006150513&cidTexte=LEGITEXT000006070721&dateTexte=20151229.

this and against return to Morocco.³⁰⁵ In September 2016, the men decided to lodge applications with the European Court of Human Rights, arguing that they would be at risk of torture and other ill-treatment if returned to Morocco and requesting interim measures to halt their transfer pending the court's consideration of their cases.³⁰⁶

7.3 NETHERLANDS

In April 2016, amendments to the Nationality Act expanded the grounds to revoke a person's Dutch nationality if they had been convicted of terrorism-related crimes.³⁰⁷ Such crimes now also include preparatory acts such as "training for violent *jihād*" in the Netherlands and/or abroad.³⁰⁸ It remains unclear whether and how the nationality of the children of Dutch dual nationals who have moved abroad will be affected. Dutch law does not allow a person's nationality to be stripped in any circumstances if that would leave them stateless.

A bill to further amend the Nationality Act was introduced in May 2016 and was pending in the Senate at time of writing.³⁰⁹ These amendments would only affect people already outside the country and thus would revoke *in absentia* their Dutch nationality. Such people would have been deemed a threat to national security on the basis of government claims that they had left the country to voluntarily "join" a foreign state's military service³¹⁰ or a "terrorist organization".³¹¹ The Cabinet would maintain a list of such organizations.³¹² People subject to this deprivation of nationality could include minors (people 16 years and older) and they would not need to have been charged or previously convicted of terrorism-related crimes.³¹³ No prior judicial authorization would be required. Upon the stripping of nationality, the affected individual would automatically be declared an "unwanted alien" and be prohibited from re-entering the country, voting or reuniting with family members.

A person would be able to appeal a nationality-stripping order, but the bill fails to expressly provide for suspensive effect of the order while an appeal is pending. If individuals have been effectively notified – which could be difficult given that they would be abroad and/or in a conflict zone – and have lodged an appeal, they can appoint a person of choice (such as a lawyer or family member) to engage in the appeals process. If the affected person does not personally lodge an appeal within the required timeframe, an automatic appeal at the District Court of The Hague would begin, with legal counsel appointed by the court to represent the person. An appeal of the District Court ruling could then be lodged at the Council of State (Administrative Jurisdiction Division, the highest general administrative court).

Ministerial decisions to strip a person of Dutch nationality are often based on secret information from the intelligence and security services. Such information is generally not accessible to the affected person or their

³⁰⁵ "French court upholds stripping of nationality for terrorism", *RFI*, 8 June 2016, <http://en.rfi.fr/france/20160608-french-court-upholds-stripping-nationality-terrorism>.

³⁰⁶ Jean-Baptiste Jacquin, "La Cour européenne des droits de l'homme saisie de la déchéance de nationalité", *Le Monde*, 5 September 2016, http://www.lemonde.fr/police-justice/article/2016/09/05/la-cour-europeenne-des-droits-de-l-homme-saisie-de-la-decheance-de-nationalite_4992603_1653578.html.

³⁰⁷ The act, amending the Dutch Nationality Act, "Broadening the Grounds to Revoke Dutch Citizenship when Convicted for Terrorist Crimes" was implemented in April 2016. See Dutch Nationality Act, Stb.1984, 628, entered into force 19 December 1984 (amended 1 April 2016).

³⁰⁸ Section 134a Criminal Code and Article 14, para 2(b) of Dutch Nationality Act: "Any person who intentionally obtains or attempts to obtain for himself or another person means or information for the commission of a terrorist offence or a serious offence for the preparation or facilitation of a terrorist offence, or gains knowledge or skills for that purpose or imparts this knowledge or these skills to another person, shall be liable to a term of imprisonment not exceeding eight years or a fine of the fifth category." Section 134a was added to the Criminal Code in 2010, and was included as an additional deprivation ground under Article 14, para. 2(b) of the Dutch Nationality Act in April 2016.

³⁰⁹ The bill, Revoking Dutch Citizenship in the Interest of National Security, which will amend the Dutch Nationality Act, Parliamentary Papers I 2015-2016, 34356 (R2064), A, 24 May 2016.

³¹⁰ It has been possible since 2003 to deprive an adult of his or her Dutch nationality for voluntarily joining a foreign military service that has participated in an armed conflict against the Dutch state or one of its coalition partners (section 101 Criminal Code and Article 15, para. 1(e) Nationality Act). The current proposed amendment to the Nationality Act, if adopted, would move Article 15, para. 1(e) to Article 14, para. 3, and the deprivation of nationality would no longer be automatic but a result of a Ministerial decision.

³¹¹ In conformity with the "Netherlands comprehensive action programme to combat jihadism", "the [Netherlands Nationality] Act will be further amended to allow Dutch nationality to be stripped without prior criminal conviction when Dutch nationals voluntarily enlist in the armed forces of a terrorist militia" (p. 6, under 4b). The bill aims to include this new deprivation ground in Article 14 of the Nationality Act, notably in case "the person in question has joined an organisation which is taking part in a national or international armed conflict and which has been placed by the Minister of Security and Justice on a list of organisations that constitute a threat to national security." It remains unclear what precise actions would constitute "joining" such a group (such as marrying a member).

³¹² In the proposal's explanatory memorandum, the Minister focuses in particular on "jihadist" groups because groups so labelled are perceived by the government as having the objective of disrupting Western societies and can thus constitute a threat to the national security of the Netherlands, see Proposal 2 and explanatory memorandum 2014, pp. 5 and 7. An individual cannot appeal the listing of an organization.

³¹³ The Minister has stated that age can be a mitigating factor in the proportionality assessment regarding stripping of Dutch nationality.

representative, raising concerns about “equality of arms” during the appeal. An affected person should have access to enough information to effectively challenge the stripping of his or her Dutch Nationality.

The proposed amendment to strip nationality raises a number of pressing human rights concerns. Not least of these is the problematic nature of a ministerial order issued *in absentia*, based on secret information and with no provision for the affected person to be heard or represented in the course of ministerial deliberations. While an automatic appeal provides a safeguard, it is deeply problematic for similar reasons, including obvious obstacles to timely and effective notification and the consequent potential lack of full and effective access and representation.

The nationality stripping measure has been proposed in the context of the Netherlands “comprehensive action programme to combat jihadism” and as such would primarily affect Muslims.³¹⁴ In general, nationality stripping measures in the context of counter-terrorism initiatives can be divisive, and buy into and promote false and xenophobic narratives about “true” citizens, for example those whose sole nationality is Dutch, and citizens of a second tier, possibly perceived to have divided loyalties due to their dual nationality. Nationality stripping can thus have a detrimental impact on the environment in which Dutch nationals of foreign origin/descent or certain racial/ethnic/religious groups are able to enjoy their human rights on the basis of equality. The ultimate risk is that in fueling stereotypes of who is a “terrorist” the stripping measure threatens to create a climate in which certain groups of immigrants and others of certain national origins may find themselves victims of discrimination, regardless of whether or not they come within the remit of the stripping provisions or whether they have dual nationality.

Amnesty International has called on the Dutch Senate to refrain from adopting the bill, which runs counter to the Netherlands’ human rights obligations³¹⁵ and others experts have raised human rights concerns about the stripping measure.³¹⁶

7.4 UNITED KINGDOM

At the extreme end of the spectrum in the EU, under a July 2014 amendment to the Immigration Act, the UK Home Secretary can deprive a foreign-born, naturalized British citizen of their sole nationality even if it renders them stateless.³¹⁷

David Anderson QC, a senior lawyer and independent reviewer of terrorism legislation, reviewed the power to deprive someone of nationality and render them stateless.³¹⁸ His April 2016 report noted that between July 2014 and April 2016, the power had not been exercised.³¹⁹ However, it highlighted as “striking” the wide discretion given to the Home Secretary, including to invoke the power if they believe that a person “has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom” and has “reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such country or territory”.³²⁰ The government has stated that the term “vital interests” could include the “interests of the economic well-being of the country”.³²¹

The report noted that a second striking feature of the power is the absence of any requirement for judicial authorization prior to deprivation of nationality.³²²

³¹⁴Ministry of Security and Justice, National Coordinator for Security and Counterterrorism and Ministry of Social Affairs and Employment, “The Netherlands comprehensive action programme to combat jihadism,” 29 August 2014, p. 6, https://english.nctv.nl/binaries/def-a5-nctvjihadismuk-03-lr_tcm32-83910.pdf.

³¹⁵ Amnesty International, Letter to the Dutch Senate, 2016, *POL-2016-EK-Wijziging Rijkswet op Nederlandschap in belang van nationale veiligheid*.

³¹⁶ Nils Muižnieks, Council of Europe Commissioner for Human Rights, “Letter: The Netherlands urged to strengthen human rights safeguards in its response to terrorism”, 29 November 2016.

³¹⁷ Section 66 of the Immigration Act 2014, which inserts the new section 40(4A) into the British Nationality Act 1981. The UK has ratified the 1961 Convention on the Reduction of Statelessness, but retained in a reservation the power to strip naturalized citizens of British nationality if they conducted themselves “a manner seriously prejudicial to the vital interests of Her Britannic Majesty.” See <http://www.refworld.org/docid/3ae6b39620.html>. The UK has not ratified the 1997 European Convention on Nationality, <http://www.refworld.org/pdfid/3ae6b36618.pdf>.

³¹⁸ David Anderson QC, *Citizenship Removal Resulting from Statelessness*, Independent Reviewer of Terrorism, 21 April 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518120/David_Anderson_QC_-_CITIZENSHIP_REMOVAL_web_.pdf.

³¹⁹ David Anderson QC report, p. 4, para.1.9.

³²⁰ David Anderson QC report, p. 3, para. 1.2.

³²¹ Joint Committee on Human Rights: Twelfth Report, Legislative Scrutiny: Immigration Bill (Second Report), Deprivation of UK Citizenship, 26 February 2014, para. 62, <http://www.publications.parliament.uk/pa/lt201314/jtselect/jtrights/142/14205.htm#a4>

³²² David Anderson QC report, pp. 15-16, para. 3.18.

The Home Office stripped 70 people – all dual nationals – of their British nationality between 2010 and 2016. Of these, 33 – most of whom were abroad at the time – were deprived of nationality because it was deemed to be “conducive to the public good”, widely believed to be code for suspicion of terrorism-related activities.³²³

Appeals against such a decision are heard by the Special Immigration Appeals Commission. The Commission conducts hearings in both open sessions and in “closed material procedures” that allow the government to rely on secret evidence in closed sessions based on the government’s claim that it would be damaging to national security or otherwise harmful to the public interest if such evidence were disclosed. This material is withheld for the entire case from the individual(s) facing the deprivation of citizenship, their lawyer of choice and the public, none of whom has access to the closed hearing.

The individual's interests are represented by a court-appointed special advocate whose ability to communicate with the individual and their lawyer of choice is limited. In practice, in some cases, the overwhelming majority of the hearing takes place in closed sessions. As a result, the individual may never know the content of the material leading to deprivation of nationality, even though the court can rely on it to determine the facts and outcome of the case.³²⁴

The UK’s nationality-stripping provisions for people with only British nationality undermine the international legal imperative to avoid statelessness. For dual nationals, there are pressing human rights concerns, including:

- the broad basis on which such a decision can be taken;
- the lack of access to the information and evidence on which a stripping order is made; and
- the fact that many stripping orders can be and are issued *in absentia*, creating obstacles to challenging them.

³²³ Victoria Parsons, “Counter-terrorism: Citizenship stripping: new figures reveal Theresa May has deprived 33 individuals of British citizenship,” *Bureau of Investigative Journalism*, 21 June 2016, <https://www.thebureauinvestigates.com/2016/06/21/citizenship-stripping-new-figures-reveal-theresa-may-deprived-33-individuals-british-citizenship/>.

³²⁴ For further information setting out Amnesty International's concerns around the use of closed material procedures, see *Left in the Dark: The Use of Secret Evidence in the United Kingdom* (Index: EUR 45/014/2012), October 2012, <https://www.amnesty.org/en/documents/EUR45/014/2012/en/>.

8. PRINCIPLE OF *NON-REFOULEMENT*

“The *non-refoulement* obligation is a specific manifestation of a more general principle that States must ensure that their actions do not lead to a risk of torture anywhere in the world.”

Juan Méndez, UN Special Rapporteur on Torture, October 2015³²⁵

A number of EU member states were complicit in unlawful rendition, torture and enforced disappearance during US-led rendition and secret detention programmes between 2001 and 2006.³²⁶ Yet not one has conducted a timely and effective investigation into its involvement in these illegal operations.³²⁷ Nevertheless, the EU and key member states have reasserted their commitment to the absolute ban on torture and other cruel, inhuman or degrading treatment or punishment in a seeming attempt to return to the rule of law after a long period of shocking disregard for human rights.³²⁸

Such assertions, however, ring a little hollow in light of the ongoing practice in many EU member states of expelling, deporting or extraditing alleged national security and terrorism-related suspects to places where they are at a real risk of torture and other ill-treatment, thereby violating the principle of *non-refoulement*.³²⁹ Indeed, governments have been more than willing to ignore the fact that the absolute ban on torture and other ill-treatment *includes* a prohibition on sending anyone to a place where they would be at risk of such abuse, regardless of their alleged offence.

Many states have invoked an individual's status or actions as an alleged threat to national security or as a terrorism suspect in efforts to remove that person from their territory. They brush aside the jurisprudence of the European Court of Human Rights, which has repeatedly and categorically concluded that balancing the risk of harm to the person if removed from the country against the danger a person presents to the community if not sent back is “misconceived”:

“The concepts of ‘risk’ and ‘dangerousness’ in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence

³²⁵ “The case against backsliding on the torture ban,” Keynote Address, 2 October 2015,

https://www.freedomfromtorture.org/sites/default/files/documents/juan_mendez_proving_torture_eveningaddress_final.pdf.

³²⁶ See for example, Amnesty International, *Breaking the Conspiracy of Silence: USA's ‘Partners in Crime’ Must Act in Wake of Senate Torture Report*, 20 January 2015 (Index: EUR 01/002/2015), <https://www.amnesty.org/en/documents/EUR01/002/2015/en/>

³²⁷ European Parliament Committee on Civil Liberties, Justice and Home Affairs, *Study: A Quest for accountability? EU and Member State inquiries into the CIA Rendition and Secret Detention Programme*, 2015, [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536449/IPOL_STU\(2015\)536449_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536449/IPOL_STU(2015)536449_EN.pdf)

³²⁸ “EU says CIA torture report a positive step,” *EUBusiness.com*, 10 December 2014, <http://www.eubusiness.com/news-eu/us-torture-politics.z2z>.

³²⁹ ECHR, Article 3; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Article 3; ICCPR, Article 7.

adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill-treatment that the person may be subject to on return.”³³⁰

In 2015, the Court issued two illustrative judgments – one against **Belgium** and the other against **France**. These reiterated that no matter what a person has been accused of, the absolute ban on returning a person to a risk of torture or other ill-treatment trumps any other consideration.³³¹

The following country examples illustrate how some governments have simply ignored the Court’s rulings. Others have resorted to “diplomatic assurances”, whereby, to justify a transfer, they reach agreement with a government with a poor record on torture. That government allegedly promises not to do what it otherwise does, namely torture or ill-treat people in custody, to the specific person being transferred. Amnesty International opposes the use of “diplomatic assurances” as such hollow promises are inherently unreliable.³³²

The practice of returning people to risk of torture or other ill-treatment is one more indication of how governments across the region have shunned their obligations under the European Convention on Human Rights in the name of security.

Amnesty International calls on all states, including EU member states, to:

- Comply with their international obligations and decline to extradite, deport, expel or otherwise transfer any person to a place where they would be at real risk of torture or other ill-treatment.
- Refrain from seeking or otherwise relying on “diplomatic assurances” against torture and other ill-treatment as they are inherently unreliable and cannot provide an effective safeguard against the risk of exposure to such abuse.

8.1 BULGARIA

A 2016 case in Bulgaria did indeed have all the hallmarks of an unlawful rendition to risk of torture. On 10 August 2016, the Bulgarian authorities in Sofia apprehended Abdullah Büyük, a Turkish national and businessman who had been living in Bulgaria since late 2015. The arrest was based on an Interpol warrant issued at the request of the Turkish government that sought Abdullah Büyük’s extradition on charges of money-laundering and terrorism linked to his alleged association with what the Turkish state has deemed the “Fethullah Gülen Terror Organisation”. Almost immediately, Abdullah Büyük was secretly handed over to the Turkish authorities and transferred to Turkey, apparently without further process, including the opportunity to consult legal counsel or his family, or otherwise initiate an appeal against the transfer.³³³

Before these events, courts had twice ruled against Abdullah Büyük’s extradition because, in the absence of any relevant evidence from the Turkish government, the charges appeared to be politically motivated, and Turkey could not guarantee him a fair trial.³³⁴

In the aftermath of a failed coup on 15 July 2016, the Turkish government declared a state of emergency and rounded up and detained anyone – including military officers, teachers, university professors, businesspeople, and journalists – suspected in relation to the coup or accused of links with Fethullah Gülen.

³³⁰ *Saadi v Italy*, (37201/06), European Court of Human Rights, 28 February 2008, para. 139, <http://hudoc.echr.coe.int/eng?i=001-85276>.

³³¹ *Quabour v Belgium*, (26417/10), European Court of Human Rights, 2 June 2015, <http://hudoc.echr.coe.int/eng-press?i=003-5095935-6279464> (Article 3 violation if person convicted of terrorism-related offences in Belgium and wanted on similar charges in Morocco were to be extradited to Morocco); *RK v France*, (61264/11), European Court of Human Rights 9 July 2015, <http://hudoc.echr.coe.int/eng-press?i=003-5129465-6330836> (removal of Chechen man wanted in Russia on terrorism-related charges would expose him to real risk of torture in violation of Article 3).

³³² Amnesty International, *Dangerous Deals: Europe’s Reliance on ‘Diplomatic Assurances’ against Torture*, 12 April 2010, (Index: EUR 01/012/2010), <https://www.amnesty.org/en/documents/EUR01/012/2010/en/>.

³³³ On 29 July 2016, the Office of the Vice-President of Bulgaria rejected Büyük’s request for political asylum, failing to disclose the grounds for the refusal. The Bulgarian Migration Directorate issued an order on 9 August for Büyük’s forcible removal from the country. According to the Ministry of Interior and media reports, Büyük was stopped in a “random check” in Sofia on 10 August and apprehended after it was determined that he did not possess a valid residency permit. That same day, he was handed over to the Turkish authorities at the border. According to the Bulgarian Foreigners’ Law, the Ministry of Interior should have been notified of the transfer and the Bulgarian National Ombudsman or an independent NGO should have been present during the transfer to guarantee that it was carried out in accordance with the rule of law. No such protocol was followed with respect to Büyük’s secret transfer.

³³⁴ In March 2016, both the Sofia City Court and the Bulgarian Court of Appeal in Sofia ruled against Büyük’s extradition. See Asya Mandzhukova, “Guest post: Outrage in Bulgaria over secretive transfer of Turkish citizen to Ankara,” *Fair Trials International*, 19 August 2016, <https://www.fairtrials.org/guest-post-outrage-in-bulgaria-over-secretive-transfer-of-turkish-citizen-to-ankara/>.

Amnesty International and many other human rights organizations and bodies had documented a range of human rights violations by the Turkish authorities at that time, including torture and other ill-treatment.³³⁵ Despite this, Abdullah Büyük was returned to Turkey. On 12 August, Bulgaria's National Ombudsman stated that the return had contravened the Constitution, domestic law and the country's international legal obligations.³³⁶

8.2 IRELAND

On 6 July 2016, Ireland deported a Jordanian national of Palestinian descent to Jordan on the basis of allegations that he was a recruiter for the armed group calling itself Islamic State and as such posed a threat to Ireland's national security. Amnesty International opposed the deportation on the basis that he would be at real risk of torture and other ill-treatment upon return.³³⁷ The Irish government successfully argued in court that the man was not at such a risk because he was so low-profile that the Jordanian authorities would not even notice his return. This was despite an Irish government expert's affidavit noting the utmost urgency of the deportation because the man was both a domestic and an international security threat.

In an 11 July letter to Amnesty International, however, the Irish government openly acknowledged that its assessment of the man's risk on return was governed by the balancing test expressly prohibited by the European Court of Human Rights: "All such applications were fully considered and the rights of the individual concerned were weighed and balanced against the rights of the State to ensure the security and safety of the State."³³⁸

Amnesty International and the man's lawyers remain concerned for his safety in Jordan.³³⁹

In another case, lawyers currently are challenging before the High Court a deportation order against a man on alleged national security grounds. The order was made even though Ireland's own protection appeal body had previously determined that the man faced a risk of torture in his country of origin if returned there.³⁴⁰

The man had been granted refugee status in Ireland in 2000. He was subsequently convicted of offences in another European state³⁴¹ for activities considered to have provided support to a political grouping in his country of origin deemed to be a terrorist organization. After his release from prison in 2009 he returned to Ireland, where his refugee status was revoked. His 2012 application for "subsidiary protection" in Ireland was rejected in 2015. In February 2016, the Refugee Appeal Tribunal rejected his appeal against that decision on the basis that he was excluded from such protection due to the offences he had committed and because he was considered a threat to Ireland's national security. Significantly, the Refugee Appeal Tribunal decided that there was "a personal, present, foreseeable and substantial risk of serious harm by the [country of origin's] authorities" if he were deported there. It added: "That is not to say that it is probable that he will be tortured... simply that there are substantial grounds for believing so."

The man applied to the Minister for Justice and Equality for discretionary "temporary leave to remain", the final recourse before deportation, which includes an assessment of the state's obligations under Article 3 of the UN Convention against Torture. The application was rejected; the Minister's decision did not acknowledge any risk of torture and found that no Article 3 obligation to avoid deportation existed. In December 2016, after the man's lawyers had made another appeal to the Minister to halt the man's

³³⁵ Amnesty International, "Turkey crackdown by the numbers: Statistics on brutal backlash after failed coup," 28 July 2016, <https://www.amnesty.org/en/latest/news/2016/07/turkey-crackdown-by-the-numbers-statistics-on-brutal-backlash-after-failed-coup/>; also, "Turkey: Independent monitors must be allowed to access detainees amid torture allegations," 24 July 2016, <https://www.amnesty.org/en/latest/news/2016/07/turkey-independent-monitors-must-be-allowed-to-access-detainees-amid-torture-allegations/>; and "Turkey: State of emergency must not rollback rights," 21 July 2016, <https://www.amnesty.org/en/latest/news/2016/07/turkey-state-of-emergency-must-not-roll-back-human-rights/>.

³³⁶ Sofia News Agency, "Bulgaria's Ombudsman calls 'unconstitutional' expulsion of Gülen supporter to Turkey," 12 August 2016, <http://www.novinite.com/articles/175869/Bulgaria's+Ombudsman+Calls+'Unconstitutional'+Expulsion+of+G%C3%BClen+Supporter+to+Tu+rkey#sthash.V7T2yxKV.dpuf>.

³³⁷ Amnesty International, "Ireland: Deportation would risk backsliding on absolute ban on torture," 6 July 2016, <https://www.amnesty.org/en/latest/news/2016/07/ireland-deportation-to-jordan-would-risk-backsliding-on-absolute-ban-on-torture/>. The man claimed previous torture in Jordan, which was supported by an independent medical examination. His sons had also been apprehended and mistreated in Jordan based on their father's alleged activities. Lawyers representing the man submitted detailed NGO and government reports (US Department of State, for example) noting the escalation in torture and other ill-treatment of suspected "Islamists" and those alleged to be associated with Islamic State by the Jordanian intelligence services.

³³⁸ Letter from Michael Kirrane, Acting Director General, Irish Naturalisation and Immigration Service (INIS), 11 July 2016, on file with Amnesty International.

³³⁹ Amnesty International, *Annual Report 2015: Jordan*, <https://www.amnesty.org/en/countries/middle-east-and-north-africa/jordan/report-jordan/>; see also, Jillian Schwedler, "Jordan drops the pretense of democratic reform," *Middle East Research and Information Project (MERIP)*, 28 April 2016, <http://www.merip.org/jordan-drops-pretense-democratic-reform>.

³⁴⁰ Reporting restrictions imposed by the Irish Court are still in place at the time of writing so his country of origin remains confidential.

³⁴¹ At the time of writing the name of that state is also subject to the High Court restriction on reporting.

deportation on Article 3 grounds, the Minister declined and ordered the man deported. At time of writing, the deportation order had not been executed.

8.3 SPAIN/BELGIUM

The Spanish government extradited Ali Aarrass, a dual Belgian-Moroccan national, from Spain to Morocco in 2010. Ali Aarrass was wanted in Morocco for suspected involvement in arms trafficking to a group allegedly engaged in terrorism-related activity. He had argued against the extradition, saying that he would be at real risk of torture and other human rights violations if sent to Morocco. In September 2014, the UN Human Rights Committee concluded that his extradition had violated Article 7 (the ban on torture and other ill-treatment) of the International Covenant on Civil and Political Rights.³⁴²

The UN Working Group on Arbitrary Detention stated in 2013 that on return to Morocco Ali Aarrass had been held incommunicado, tortured, and forced to confess under duress, and as a result should be immediately released.³⁴³ In May 2014, the UN Committee against Torture concluded that Morocco had violated the UN Convention against Torture by failing to protect Ali Aarrass from just such abuse upon his return to Morocco.³⁴⁴

With respect to Spain, the UN Human Rights Committee held that despite information regarding the use of torture by prison guards and security forces in Morocco, Spain's National Court had not properly assessed the risk to Ali Aarrass when considering his extradition to Morocco. The Committee ordered Spain to compensate him adequately³⁴⁵ and cooperate with the Moroccan authorities to ensure effective oversight of his treatment in Morocco.

In 2015, Aarrass went on a 72-day hunger strike to protest against his conviction and the delay in the judgment from Morocco's Court of Cassation on his final appeal.³⁴⁶ To date, the Spanish authorities have not provided Ali Aarrass with an effective remedy in relation to the UN Human Rights Committee's 2014 decision.

Because Ali Aarrass also holds Belgian nationality, his lawyers repeatedly requested consular assistance from Belgian diplomatic representatives, first in Spain and subsequently in Morocco. The Belgian authorities consistently refused to provide such assistance until instructed to do so in September 2014 by the Brussels Court of Appeals. The Court ruled that Belgium was obliged to try to stop serious human rights violations, in particular treatment that contravenes the absolute prohibition of torture, by the means at its disposal, including by offering consular assistance.³⁴⁷ The Belgian authorities have since reported that they have asked to meet Ali Aarrass, but that the Moroccan authorities declined the request.

Nonetheless, Belgian authorities continue to ignore or downplay Ali Aarrass's highly credible allegations of torture and have not voiced any support for the recommendation of the Working Group on Arbitrary Detention that Ali Aarrass be released immediately. Simultaneously, the Belgian authorities have appealed the Court of Appeal's decision.

Amnesty International has issued Urgent Actions on behalf of Ali Aarrass.³⁴⁸

³⁴² UN Human Rights Committee, *Ali Aarrass v Spain*, Communication no. 2008/2010, U.N. Doc. CCPR/C/111/D/2008/2010 (2014), <http://hrlibrary.umn.edu/undocs/2008-2010.html>.

³⁴³ Working Group on Arbitrary Detention, *Ali Aarrass v Morocco*, Opinion No. 25/2013, U.N. Doc. A/HRC/WGAD/2013/25 (2014), <http://hrlibrary.umn.edu/wgad/25-2013.html>.

³⁴⁴ UN Committee against Torture, *Ali Aarrass v Morocco*, CAT/C/52/D/477/2011, 24 June 2014.

³⁴⁵ UN Human Rights Committee, *Ali Aarrass v Spain*, para. 12.

³⁴⁶ Amnesty International, "Ali Aarrass: Letter from prison: The days are endless," 14 December 2015, <https://www.amnesty.org/en/latest/news/2015/12/ali-aarrass-letter-from-prison-the-days-are-endless-but-i-try-to-stay-positive/>.

³⁴⁷ International State Crime Initiative, "Belgian court victory for Ali Aarrass", 2014, <http://statecrime.org/state-crime-research/belgian-court-victory-for-ali-aarrass/>.

³⁴⁸ Amnesty International, Urgent Actions: *Spain: Risk of Torture if Man Returned to Morocco*, 23 November 2010 (Index: EUR 41/004/2010); and *Spain: Man Returned to Morocco from Spain*, 16 December 2010 (Index: EUR 41/005/2010). See also, Amnesty International Public Statement, "Morocco: Torture survivor still detained despite UN calls for his immediate release," (Index: MDE 29/4119/2016), <https://www.amnesty.org/en/documents/mde29/4119/2016/en/>.

8.4 UNITED KINGDOM

The UK is seeking to return to his home country a man referred to as “N2” who is deemed to be a threat to national security. N2 challenged the deportation on the ground that he would be at risk of torture and other ill-treatment if returned. The UK government has acknowledged that he is terrified of being deported.³⁴⁹

The government has sought “diplomatic assurances” from the man’s home country that he will not be tortured or given an unfair trial; the assurances have not yet been agreed.

The UK government has been particularly aggressive about seeking, securing and relying on diplomatic assurances to deport people it alleges are threats to national security. A series of “memorandums of understanding” with governments (including those in Ethiopia, Jordan, Lebanon and Morocco) sets out the broad framework under which a person can be returned to those countries with assurances of treatment that allegedly complies with the international human rights obligations of the UK and the other country involved. However, Amnesty International and other human rights organizations have documented violations of “diplomatic assurances” over the years³⁵⁰ and consider such agreements empty promises.

Moreover, the UK’s Special Immigration Appeals Commission ruled in April 2016 that the UK could not deport a group of Algerian nationals because the assurances provided by Algeria did not mitigate the risk of harm the men could face on return.³⁵¹ The Commission concluded that the system for verifying assurances was not “robust”. Notes from the British Embassy in Algiers acknowledged that there was “never a realistic prospect of being able to monitor the whereabouts and well-being of... deportees.”³⁵² This was a major setback for the UK authorities. It was also a nod to the stark reality that promises of humane treatment from governments that routinely torture and otherwise abuse national security suspects cannot be relied on.

³⁴⁹ Victoria Parsons, “Another ‘Abu Qatada’ saga? Theresa May thwarted as judge bails convicted extremist in new deportation hearing,” Bureau of Investigative Journalism, 24 July 2015, <https://www.thebureauinvestigates.com/2015/07/24/another-abu-qatada-saga-theresa-may-defeated-judge-bails-n2-extremist-siac-deportation/>.

³⁵⁰ Ibid. See also, Adam Coogle, “Abu Qatada case is no victory for London,” *The World Post*, 27 October 2014 (updated 27 December 2014), http://www.huffingtonpost.com/adam-coogle/-/abu-qatada-case-is-no-vic_b_6054974.html (Jordan violated assurances of a fair trial by admitting torture-tainted evidence into proceedings against defendant).

³⁵¹ Special Immigration Appeals Commission, *BB and others v Secretary of State for the Home Department*, 18 April 2016, <http://statewatch.org/news/2016/may/uk-siac-judgment-w-others-deportation-with-assurances-18-4-16.pdf>

³⁵² Aisha Maniar, “A significant blow to deportation with assurances,” *One Small Window Press*, 6 May 2016, <https://onesmallwindow.wordpress.com/2016/05/06/a-significant-blow-to-deportation-with-assurances/>.

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DANGEROUSLY DISPROPORTIONATE

THE EVER-EXPANDING NATIONAL SECURITY STATE IN EUROPE

Hundreds of people were killed and wounded in violent attacks in the European Union in 2015 and 2016. The need to protect people from such wanton violence is obvious and urgent.

In response, states and regional bodies have proposed and adopted wave after wave of counter-terrorism measures that have enhanced executive powers, limited judicial controls, restricted freedoms and exposed everyone to government surveillance. Brick by brick, the edifice of rights protection that was constructed after the Second World War, is being dismantled.

This report gives a bird's eye view of the national security landscape and shows just how widespread and deep the "securitization" of Europe has become. It focuses on eight themes: states of emergency, principle of legality, right to privacy, freedom of expression, right to liberty, freedom of movement, stripping of nationality, and the prohibition on sending people to places where they risk torture. The report covers developments at regional level and in 14 EU member states, including Austria, Belgium, Bulgaria, Denmark, France, Germany, Hungary, Ireland, Luxembourg, Netherlands, Poland, Slovakia, Spain, and United Kingdom.

Amnesty International calls on all EU member states to renew their commitment in law and in practice to protecting human rights while countering terrorism. The steady regression in rights protection in Europe must end.