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NATIONAL SECURITY COURTS: A EUROPEAN PERSPECTIVE

Mindia Vashakmadze*

I. INTRODUCTION

The current United States ("U.S.") administration faces an unresolved legal problem in the so-called war on terrorism. The problem is what to do with Guantanamo detainees: whether to try some of them in federal courts; create a national security court to deal with cases involving the sensitive intelligence information; or release others.[1] Meanwhile, some of the key architects of the September 11 attacks, including Khalid Shaikh Mohammed, are scheduled to appear before a civilian court in New York.[2] This move of the Obama administration has been lauded by

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* Senior Research Associate, Institute of State and Law, Georgian Academy of Sciences. This contribution is based on a presentation given at the symposium "Comparative Constitutional Law: National Security Across the Globe," which took place at Pace Law School on November 13, 2009. The presentation form is essentially maintained. The author would like to thank Dr. Helmut Aust for his comments on an earlier draft of this paper. Any errors are mine.

[1] Kelli Arena, *Obama Team Ponders What to Do with Guantanamo Inmates*, CNN NEWS, Nov. 10, 2008, http://edition.cnn.com/2008/POLITICS/11/10/obama.transition.guantanamo/index.html.

[2] Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at 1.

many observers[3] while criticized by others.[4] While the initial plan to try alleged terrorists in ordinary criminal courts is still under review at the time of writing,[5] the future prospects of a fair civilian trial remain uncertain at best for hundreds of detained terror suspects.

What is a proper venue for trying terrorism detainees? Policymakers and academia alike have been discussing the creation of a distinct system of special courts as adjudicatory instances[6] or courts supervising a new preventive detention system.[7] Legal scholars have considered extending the military detention paradigm to new special courts or creating a hybrid system of national security courts, which would combine elements of ordinary criminal justice applicable within a "peacetime" legal order with attributes of military justice as applied in wartime.[8]

One justification for the establishment of specialized courts trying alleged terrorists is the failure of the criminal justice system to deal with

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[3] Editorial, *A Return to American* Justice, N.Y. TIMES, Nov. 14, at 22; Editorial, *Terrorism on Trial; There are Good Reasons to Try Khalid Sheik Mohammed in New York*, WASH. POST, Nov. 15, 2009, at A20; Chris Smith, *Trying Question: Why Putting Khalid Sheik Mohamed on Trial Downtown is the Right Thing for the U.S. – and the City. (And if Rudy Were Still U.S. Prosecutor, He'd Agree.)*, Nov. 20, 2009, N.Y. MAG., *available at* http://nymag.com/news/politics/citypolitic/62255/.

[4] Editorial, *KSM Hits Manhattan – Again: Eric Holder's Decision to Move a Trial on War Crimes to American Soil is Morally Confused, Dangerous and Political a Fault*, WALL ST. J., Nov. 14, 2009, at 14; *Giuliani Criticizes Terror Trials in New York*, N.Y. TIMES, Nov. 15, 2009, *available at* http://www.nytimes.com/2009/11/16/us/politics/16giuliani.html; *Bloomberg: Try 9/11 Mastermind Somewhere Else,* N.Y. POST, Jan. 28, 2010, *available at* http://www.nypost.com/p/news/local/manhattan/mike_try_1w1hLYpkm0FihEHooEqUdN; Peter Beaumont, *Khalid Sheikh Mohammed Trial Poses Huge Challenges for US Judiciary*, GUARDIAN, Nov. 13, 2009, http://www.guard-ian.co.uk/world/2009/nov/13/911-mastermind-trial-challenges-analysis.

[5] *US to Decide on Where to Try Alleged 9/11 Plotters "In Weeks", Holder Says,* N.Y. POST, Apr. 8, 2010.

[6] GLENN SULMASY, NATIONAL SECURITY COURT SYSTEM – A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR (2009).

[7] Jack L. Goldsmith & Neal Katyal, *The Terrorist Court*, N.Y. TIMES, July 11, 2007, at 19; *see also* BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008). For possible obstacles for a transition to national security courts, *see* Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options*, 103 NW. U. L. REV. 29 (2008),

[8] Amos N. Guiora, *Quirin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 FLA. J. INT'L L. 511-30 (2007) [hereinafter Guiora, *Quirin to Hamdan*]. For security-based detention in armed conflict *see* Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 85 INT'L REV. OF THE RED CROSS, 375-91 (2005).

terrorism suspects. The exigencies of an emergency situation, which may be triggered by terrorist attacks, can indeed create difficulties for ordinary courts in dealing with terrorism, but such is highly circumstance-dependent. Further, any general assumption that criminal courts are unable to deal with terrorism offences presupposes that the alleged terrorists, as a matter of principle, do not qualify as ordinary criminals. This presupposition is tied to two fundamental issues: who are the terrorists; and what is the distinction to be made between criminals and terrorists? The proponents of special terrorism courts do not seem to have compelling answers to these questions and are often focused on the strand of issues relating to the procedural difficulties of the criminal justice system in terrorism trials. According to this view, ordinary civilian courts are not a proper venue for prosecuting terrorism suspects because of their incapability to deal with sensitive information[9] and because of the need to protect witnesses. From this perspective, it could be argued that another ("hybrid"[10]) legal paradigm is needed.[11] However, these arguments are not persuasive; their proponents have not shown so far that the criminal justice definitely failed[12] or that the same goal of providing procedural "comfort" in terrorism trials cannot be achieved through adjustments to existing criminal justice systems.

I would like to offer the reader a European perspective on this issue. Accordingly, my paper will address the question as to whether and to

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[9] On the secrecy issue *see* Serrin Turner & Stephen J. Schulhofer, THE SECRECY PROBLEM IN TERRORISM TRIALS, BRENNAN CENTER FOR JUSTICE, N.Y. UNIV. SCHOOL OF LAW, *available at* http://brennan.3cdn.net/2941d4bea-7c3c450d2_4sm6iy66c.pdf.

[10] Guiora, *Quirin to Hamdan*, *supra* note 8.

[11] *See, e.g.*, Amos N. Guiora, *Military Commissions and National Security Courts after Guantanamo*, 103 NW. U. L. REV. 201 (2008) [hereinafter Guiora, *Military Commissions*]. "Precisely because the individuals I refer as "post 9/11 detainees" are neither criminals under the traditional criminal law paradigm nor prisoners of war according to international law, we must establish a legal definition of "detainee" so that we may determine the rights and privileges to accord them."

[12] *Contra* Richard B. Zabel & James J. Benjamin, Jr., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS: 2009 UPDATE AND RECENT DEVELOPMENT, HUMAN RIGHTS FIRST, July 2009, *available at* http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf; THE CASE AGAINST A SPECIAL TERRORISM COURT: POLICY PAPER, HUMAN RIGHTS FIRST, March 2009, *available at* http://www.humanrights-first.org/pdf/090323-LS-nsc-policy-paper.pdf. *See also* Andrew Cohen, *A Terrorism Trial's Myths*, WASH. POST, Nov. 14, 2009, at A15.

what extent the creation and operation of a distinct system of security courts supervising preventive detention of terror suspects would be compatible with the European Convention of Human Rights ("ECHR"). The procedural and institutional guarantees for independent and impartial justice systems created by the ECHR may impose considerable legal constraints on creating a distinct system of security courts in Europe. Moreover, problems may also arise with regard to certain procedural aspects of the operation of such courts when seen in the light of the ECHR. In addition, the ECHR does not fully recognize one of the rationales for the creation and operation of a system of special terrorism courts, namely preventive detention for security purposes. Although such detention is not forbidden by the ECHR in absolute terms and can be permissible in emergency situations, nevertheless the general requirement of overall fairness in proceedings under the ECHR, even in times of emergency, limits the application of preventive security-based detention.

I argue in this paper that terrorist suspects should not be seen as non-prosecutable detainees because such a view undercuts general procedural fairness and compromises individual liberty. The ECHR allows Contracting States to keep their flexibility in their fight against terrorism through the means of the traditional criminal justice. Therefore, the reasonableness of the creation of a special court system dealing with terrorism cases and the application of relaxed procedures in terrorism trials should be considered carefully not only in peacetime, but also in emergencies.

II. GENERAL LEGAL FRAMEWORK

Article 5(1) of the ECHR determines that "[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law . . . ." There are six grounds for detention in Article 5(1),[13] and preventive security detention is not among them.[14] Under the

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[13] The European Convention of Human Rights art. 5 (Nov. 4, 1950), *available at* http://www.hri.org/docs/ECHR50.html#C.Art5 (last visited Mar. 12, 2010) [hereinafter ECHR]. Article 5(1) allows a deprivation of liberty to be justified in the following cases:

> "a. the lawful detention of a person after conviction by a competent court;
>
> b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

ECHR, detention is only permissible after conviction by a competent court or while awaiting trial.[15] Although Article 5(1)(c) authorizes detention "when it is reasonably considered necessary to prevent committing an offence," this provision is only applicable in detention for criminal law purposes. Terrorism suspects may also be detained under the same Article 5(1)(c) on reasonable suspicion of having committed an offense.[16] The ECHR, however, does not permit detention for general crime prevention or gathering information; there must always be a link to criminal proceedings.[17] Even the very serious public concerns regarding terrorism would not justify an indefinite deprivation of liberty without prospect of a fair trial. In *A. and Others v. United Kingdom*,[18] the Court reaffirmed that "paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5 [of the ECHR]."[19] Thus, a purely security-based detention of terrorism suspects would not be permissible

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> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
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> d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; [and]
>
> f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

[14] For an overview, *see* Helena Cook, *Preventive Detention – International Standards and the Protection of the Individual*, in PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE 1-52 (Stansilaw Frankowski & Dinah Shelton eds., 1992); Despina Chatzivassiliou, *The Guarantees of Judicial Control with Respect to Deprivation of Liberty under Article 5 of the European Convention of Human Rights: An Overview of the Strasbourg Case-Law*, 5 ERA-FORUM 4, 499-519 (Dec. 2004), http://www.spr-ingerlink.com/content/y5pl46u146223q70/fulltext.pdf.

[15] *Supra* note 13.

[16] *Id.* lit. c.

[17] *See* Ciulla v. Italy, 148 Eur. Ct. H.R. (ser. A), ¶ 38 (1989); *see also* Brogan & Others v. United Kingdom, 145-B Eur. Ct. H.R. (ser. A), ¶ 53 (1988).

[18] A. & Others v. United Kingdom, 2009 Eur. Ct. H.R.

[19] *Id.* ¶ 171. *See* Sangeeta Shah, *From Westminster to Strasbourg: A. and Others v. United Kingdom*, 9 HUM. RTS. L. REV. 473 (2009).

under the Convention's "peacetime" legal regime.

Is preventive detention lawful in times of emergency? According to Article 15 (1)[20]:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

First, it must be emphasized that recourse to the emergency derogation provision in Article 15 is seldom made. Although the terrorism threat may amount to a public emergency under the Convention,[21] there is no need to rely on an emergency legal regime in the majority of cases involving terrorist threats. Contracting States possess enough flexibility under the ECHR to adjust their criminal law to the contemporary challenges of terrorism through, for example, extending pre-charge detention powers. The European Court of Human Rights ("ECtHR"), however, sets limits to such adjustments based on Articles 5 and 6, which indicate that pre-trial detention of terrorism suspects must not exceed certain limits, namely the appropriate time limit for pre-charge detention,[22] and the principle of overall fairness in proceedings must be upheld.

A government's valid derogation under Article 15 may preclude the unlawfulness of a preventive detention, which is tied to the primary issue of what circumstances justify the proclamation of a public emergency. The existence of a public emergency falls under the ECtHR's margin of appreciation doctrine, which indicates that states have considerable lee-

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[20] *See* DAVID J. HARRIS, MICHAEL O'BOYLE & COLIN WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 617 (2d ed. 2009).

[21] In *A. & Others v. United Kingdom*, the Court agreed with the House of Lords that there was "an emergency threatening the life of the nation" for the purposes of Article 15. *A. & Others*, 2009 Eur. Ct. H.R., ¶ 181. While doing so, the Court interpreted the criteria already elaborated in the *Greek Case* for an emergency threatening the life of the nation and arrived at the conclusion that the margin of appreciation of state authorities shall not be significantly restricted and terrorism may well constitute a threat to the life of the nation within the meaning of Article 15. *See id*. ¶¶ 173, 176, 179-181.

[22] The Court ruled in the *Brogan & Others* judgment that, unless there is a valid derogation under Article 15 ECHR, any excess of four days of police custody, even in the most exceptional circumstances, including the fights against terrorism, constitutes a violation of Article 5(3). *See* Brogan & Others v. United Kingdom, 1988 Eur. Ct. H.R., ¶ 62.

way as to the preconditions of the situation,[23] but any derogation from individual liberty must be strictly required by the exigencies of the emergency.[24] Although the ECtHR has been criticized for its deferential approach to the admissibility of emergency derogations from Convention rights, the Strasbourg Court has not been leaving Contracting States an unlimited discretion with regard to measures that are acceptable in cases of terrorist threats.[25] A relatively recent confirmation of the ECtHR's deferential approach is that the Court (once again) lowered the threshold for the proclamation of a public emergency in *A. and Others v United Kingdom* when it disagreed with Lord Hoffman in the *Belmarsh* case.[26] Lord Hoffman argued that a terrorism threat does not necessarily put the life of the nation into question and therefore, it does not deserve to be seen as an emergency within the meaning of Article 15 of the ECHR.[27] Contrary to this view, the Court, however, emphasized that "[t]he requirement of imminence [of future terrorist attacks] cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it."[28] This means that the Contracting States are allowed to take comprehensive measures with a view to preventing future terrorist threats from materializing. In any case, the Court continues to require that the nature of the particular threat be demonstrated and the proportionality of the response be established.

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[23] *See* Ireland v. U.K., 25 Eur. Ct. H.R. (ser. A), 207 (1978); Brannigan & McBride v. United Kingdom, 258-B Eur. Ct. H.R. (ser. A), 43 (1993).

[24] *See Ireland*, 25 Eur. Ct. H.R., ¶ 207; *see also Aksoy*, 1996-VI Eur. Ct. H.R., ¶ 68.

[25] In *Klass & Others v. Germany*, the Court stated that "[i]t is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion . . . . The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate." 28 Eur. Ct. H.R. (ser. A), ¶ 49 (1979) (internal citation omitted); *see also Brannigan & McBride*, 258-B Eur. Ct. H.R., ¶ 43.

[26] *See A. & Others*, 2009 Eur. Ct. H.R., ¶ 177.

[27] *See* A. & Others v. Sec'y of State for the Home Dep't [2004] UKHL 56, ¶ 97 (appeal taken from Eng.) (U.K.). In 2004 the House of Lords ruled that § 23 of the Anti-terrorism, Crime and Security Act of 2001 was not compatible with the ECHR because denying people their liberty indefinitely was disproportionate to the existing threat and limiting indefinite detention to non-British people was racially discriminatory. *See id.* ¶¶ 68, 90, 95.

[28] *A. & Others*, 2009 Eur. Ct. H.R., ¶ 177.

The ECtHR has dealt with the issue of detention for security purposes on several occasions and has determined preconditions for such detentions. In *Lawless v. Ireland*, the Court concluded that the administrative detention of individuals suspected of intending to take part in terrorist activities appeared to be a measure required by the circumstances of the emergency, which was proclaimed by the Irish Government in July 1957. The Court concluded that the "military, secret and terrorist character" of the IRA, "the fear they created among the population," and "the fact that these groups operated mainly in Northern Ireland, [with] their activities in the Republic of Ireland being virtually limited to the preparation of armed raids across the border," caused "great difficulties" in "amassing . . . the evidence [required] to convict persons involved in activities of the IRA and its splinter groups."[29] At the same time, the Court found that other less restrictive means could not achieve the same goal of preventing terrorist acts.[30] In addition, the Court noted that the Offences against the State (Amendment) Act of 1940, which instituted administrative detention for counter-terrorism purposes, provided safeguards designed to prevent abuses in the operation of the administrative detention system.[31] Such safeguards included a constant supervision by Parliament, the establishment of a Detention Commission including an officer of the Defence Forces and two judges, and the power of ordinary courts to "compel the Detention Commission to carry out its functions."[32] In *Brannigan & McBride v. United Kingdom,*[33] the Court upheld British detentions of terrorists in Northern Ireland for periods of up to seven days without judicial control.[34] The Court emphasized the availability of safeguards, especially the detainee's access to *habeas corpus*.[35] In *Aksoy v. Turkey*, however, the Court found that a detention of fourteen days without judicial supervision was "exceptionally long, and left the appli-

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[29] Lawless v. Ireland (No. 3), 1961 Eur. Ct. H.R., ¶ 36.

[30] Sealing the border would have imposed "extremely serious repercussions on the population as a whole." *Id.*

[31] In this context, it has been emphasized that a "detention commission" had been set up, which could hear complaints from detainees and, if necessary, release them. Moreover, the ordinary courts supervised over the Detention Commission. *See id.* ¶ 37.

[32] *Id.*

[33] *Brannigan & McBride*, 258-B Eur. Ct. H.R.

[34] *See* Susan Marks, *Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights,* 15 OXFORD J. OF LEGAL STUD. 69 (1995).

[35] *Brannigan & McBride*, 258-B Eur. Ct. H.R., ¶¶ 26-28.

cant vulnerable not only to arbitrary interference with his right to liberty but also to torture."[36] In addition, the Court emphasized that "the Government have [sic] not adduced any detailed reasons . . . as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable."[37] Moreover, the Court considered that "in this case insufficient safeguards were available to the applicant . . . . In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him."[38] Thus, any restrictive measure taken must constitute a genuine response to the emergency situation, which may imply the inability of the ordinary criminal justice system to deal with terrorism under the given circumstances. In any case, it must be determined whether safeguards have been put in place to protect individuals against abuses of emergency powers.

III. PROCEDURAL GUARANTEES IN ARTICLES 5 AND 6 OF THE ECHR

Once preventive detention is considered to be a measure strictly required by the exigencies of the case, the institutional and procedural underpinnings required to protect the individual's right to a fair trial to the greatest extent possible should be put in place. There must be an opportunity for terrorism suspects to challenge their detention in court pursuant to Article 5(4) of the ECHR: "[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."[39]

1. Judicial Independence as a Requirement for Procedural Fairness

The use of preventive detention as a counter-terrorist measure or ad-

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[36] *Aksoy*, 1996 Eur. Ct. H.R., ¶ 78.

[37] *Id.* In *Demir & Others v. Turkey*, the Court regarded sixteen to twenty-three days incommunicado detention without judicial supervision as not justified under derogation from Article 5. 1998 Eur. Ct. H.R., ¶¶ 56-58. Similarly, in *Nuray Sen v. Turkey* eleven days detention without judicial supervision was seen as not justified under derogation from Article 5, 2003 Eur. Ct. H.R., ¶¶ 22-29.

[38] *Aksoy*, 1996 Eur. Ct. H.R., ¶ 83.

[39] ECHR, *supra* note 13, art. 5(4).

justments to criminal justice systems in Europe have seldom resulted in the creation of a distinct system of terrorism courts.[40] When a state decides to establish a special terrorism tribunal supervising preventive security detentions, what form should the court take? The ECtHR does not specify the type of court in which a detainee can contest the lawfulness of his/her detention. The special tribunal does not have to be a court constituting part of the judicial system. The term refers to bodies which exhibit not only common fundamental features, of which most important is independence of the executive and the parties to the case, but also the guarantees of a judicial procedure appropriate to the kind of deprivation of liberty in question.[41]

The ECtHR must ascertain whether the *manner* in which courts function can infringe on the detainee's right to the overall fairness of proceedings. Specialized courts may be susceptible to executive influence in a way that ordinary judges are not. Such concerns may be raised especially with regard to the participation of military personnel in special courts. When dealing with the operation of the State Security Courts in Turkey, which until 1999 included military officers, the ECtHR emphasized that the defendant was justified in fearing that the court would allow itself to be unduly influenced by considerations unrelated to the nature of the case.[42]

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[40] France created a magistrate system dealing with terrorism, as part of its 1986 counterterrorist legislation. Judges acquired the competence to order preventive detention for up to six days. The Diplock courts in the U. K. that tried members of the IRA were instituted by the Northern Ireland emergency legislation. These courts have been criticized as arbitrary. They were abolished in 2007 following the success of the peace process. State Security Courts in Turkey based on 1982 Constitution dealt with crimes against the state security including terrorism. The military involvement in court proceedings has been regarded by the ECtHR as a violation of the fair trial standards of Article 6 ECHR. In 1999, the Government made the court civilian-run. The SSC were abolished in 2004 as part of Turkey's efforts to join the EU. For an overview, see GLEN SULMASY, THE NATIONAL SECURITY COURT SYSTEM 158 (2009).

[41] Hutchison Reid v. U.K, 2003 IV-VI Eur. Ct. H.R., ¶ 64.

[42] *Altay*, 1996 Eur. Ct. H.R., ¶¶ 72-75. It should be noted in this context that some European States have expressed reluctance to extradite persons to the U.S. if they are to be tried before a military tribunal – the decisions of the Federal Constitutional Court of Germany concerning the extradition of two Yemenites to the USA is worth mentioning. The U.S. agreement that neither suspect would be detained at Guantanamo played a central role in the final outcome of proceedings. Bundesverfassungsgericht [BVerfG] [federal constitutional court] Nov. 5, 2003, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1243/03 (F.R.G.), *available at* http://www.bundesverfass-

A specialized court, consisting of civilian judges and based on appropriate institutional underpinnings, may satisfy the requirements of judicial independence and constitute a competent court within the meaning of the ECHR. The most problematic issue in this context would be the extent of limitations imposed on the guarantees of procedural fairness in such courts in the name of public security, which may undermine the existing (properly functioning) system of ordinary criminal justice – under certain circumstances and especially in times of stress, the government may be induced to rely heavily upon special courts. In such situations the extent to which an individual is protected within an ordinary criminal justice system can be significantly modified in a special court.

2. Setting Standards for the Extent and Quality of Evidence

One of the main concerns raised by the proponents of national security courts is a possible improper disclosure of information during terrorism trials that may compromise national security. Proponents argue that burdens are imposed on criminal courts by certain evidentiary and procedural rules, and a specialized court would allow "matters of national security [to be kept] confidential as well as to guarantee the defendants[']rights to a fair trial."[43] A central question in this context is how intelligence is gathered, evaluated, and used in court proceedings. A State may claim that it is necessary, in light of public interest, to interfere with individual rights by relying on information that cannot be fully revealed. The entitlement to disclosure of relevant evidence for criminal law purposes can be weighed against the State's national security interests or the interests of witnesses.[44] Nonetheless, certain criteria must be observed. In *A. and Others v. the United Kingdom*, the ECtHR heard a claim under Article 5(4), which provides for the right of every detainee to challenge the legality of detention in immigration cases. The applicant argued that the proceedings before the Special Immigration Appeals Commission

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ungsgericht.de/entscheidungen/rs20031105_2bvr124303.html?Suchbeg-riff=jemen (in German) (last visited Jan. 11, 2009). T. R. Reid, *Europeans Reluctant to Send Terror Suspects to U.S.; Allies Oppose Death Penalty and Bush's Plan for Secret Military Tribunals*, WASH. POST, Nov. 29, 2001, at A23.

[43] Guiora, *Military Commissions and National Security Courts after Guantanamo*, 103 NW. U. L. REV. 199 (2008).

Doorson v. the Netherlands, 1996-II Eur. Ct. H.R., 70.

(SIAC)[45] did not satisfy due process requirements because some of the evidence in the proceedings was not disclosed to the applicants, and the SIAC used special advocates with security clearances[46] who could not communicate with their clients during proceedings pursuant to the UK Prevention of Terrorism Act 2005. The ECtHR assessed each of the complaints on a case-by-case basis. In doing so, the Court referred to the SIAC as a "fully independent court" [47] and did not put into question its impartiality.

Standards, nevertheless, are necessary for evidence in terrorism cases where classified information may play a crucial role.[48] There are questions as to whether such standards can be established, whether they could fully comply with the ECHR's guarantees to a fair trial, and to what extent the standards should deviate from ordinary criminal proceedings. The ECtHR attempted in the *A and Others v the UK* to develop certain criteria on the extent and quality of evidence needed to justify a preventive detention in immigration cases. One of the problematic issues related to the overall fairness of proceedings was the fact that neither the applicants nor their legal advisers could see the classified material relevant to court proceedings. Instead, the classified material was disclosed to one or more special advocates, appointed by the Solicitor General to act on behalf of each applicant. From the point at which the special advocate first had access to the closed material, he/she was not permitted to have any further contact with the applicant and his representatives, save for with the permission of the SIAC. The ECtHR stated that where full disclosure was not possible, Article 5(4) required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility of effectively challenging the allegations against him be-

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[45] The Special Immigration Appeals Commission (SIAC) was set up in response to Chahal v. United Kingdom, 1996-V Eur. Ct. H.R., by the Special Immigration Appeals Commission Act 1997 in order to provide a judicial process where the Government raised national security considerations about the presentation of evidence in immigration cases. It is a tribunal composed of independent judges, with a right of appeal against its decisions on a point of law to the Court of Appeal and the House of Lords.

[46] CONSTITUTIONAL AFFAIRS COMMITTEE, THE OPERATION OF THE SPECIAL IMMIGRATION APPEALS COMMISSION (SIAC) AND THE USE OF SPECIAL ADVOCATES, 2004-5, H.C. 323-I.

[47] A. v. United Kingdom, 2009 Eur. Ct. H.R., ¶ 19.

[48] Doug Cassel, *International Human Rights Law and Security Detention* (Notre Dame Law Sch. Legal Research, Paper No. 08-32, 2008) *available at* http://ssrn.com/abstract=1281041.

fore an independent judiciary.[49]

Further, the Court dealt with the *extent* to which the evidence is disclosed in the Court. According to the Court, "[w]here the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him."[50] In other cases, even where all or most of the evidence remained undisclosed, if the allegations contained in the open material were *sufficiently specific*, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute the allegations without his having to know the detail or sources of the evidence which formed the basis of the allegations.[51] The Court here recognized the wide discretion of Contracting States' authorities to not disclose evidence derived from classified information. Where, however, the open material consisted purely of general assertions and the authority's (here, SIAC's) decision to maintain the detention was based solely, or to a decisive degree, on closed material, the procedural requirements of Article 5(4) would not be satisfied.[52] Thus, a judge has to take into account the extent to which the relevant material is disclosed and the specificity of the open information available to the detainees. However, this standard can only be applied on a case-by-case basis.[53]

3. Limiting the rights of defense?

The ECHR does not require that the proceedings against individuals suspected of involvement in terrorism fully reflect all guarantees of a fair trial, but it does require that the proceedings as a whole should be fair. The ECtHR has decided in the abovementioned *A and Others* case that Article 5(4) proceedings with regard to terrorism immigration cases must

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[49] *A.*, 2009 Eur. Ct. H.R., ¶ 218.
[50] *Id.* ¶ 220.
[51] *Id.*
[52] *Id.*
[53] The Court found that there was a violation of Article 5(4) in respect of four of the applicants who were not able to effectively challenge their detention. The rights of five other applicants have not been violated. *Id.* 212-24.

be conducted in accordance with the principles of procedural fairness.[54] While doing so, the Court emphasized that "[a]lthough it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6… it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question."[55] Owing to the "dramatic impact of the lengthy—and what appeared at that time to be indefinite—deprivation of liberty," the ECtHR held that the full level of protections accorded by Article 6(1) to criminal proceedings should have been guaranteed to the applicants.[56] This holding can be interpreted in such a way that criminal procedural safeguards shall adhere to special court proceedings dealing with preventive security detentions under the ECHR, especially in cases of so-called "indefinite detention" of suspected terrorists.

It has been argued that one of the effective ways to protect the interests and rights of alleged terrorists is to employ special advocates who have security clearance to access all information related to a given proceeding. According to the ECtHR, "[t]he special advocate could provide an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure."[57] Nevertheless, the communication between the special advocates and the alleged terrorists must also be in line with procedural fairness:

> The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.[58]

Furthermore, the principle of the equality of arms cannot be fully implemented when the judges and special advocates have access to closed information, but the detainees and their legal representatives do

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[54] *Id.* ¶¶ 203, 217.
[55] *Id.* ¶ 203.
[56] *Id.* ¶ 217.
[57] *Id.* ¶ 219.
[58] *Id.* ¶ 220.

not enjoy such a privilege.[59]

The Court examined the lawfulness of the extent to which the rights of defense may be limited in cases involving the threats of terrorism.[60] Any difficulties caused to the defense by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[61] The ECtHR, however, does not decide whether a non-disclosure of evidence was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them.[62] The ECtHR's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the accused's rights.[63] Generally, the accused's rights must be upheld, and the manner in which the trial is conducted must not undermine these rights.

Thus, it can be concluded that the far-reaching deviations from the ordinary guarantees of a fair trial cannot be justified by the threat of terrorism; there must be compelling reasons that incapacitate the state to fully guarantee all relevant safeguards of criminal justice. Taking into account the European States' overall reluctance to rely on emergency legal regime and the actual circumstances on the ground that do not create a need for such reliance, the fight against terrorism in Europe will rather remain within the bounds of the ordinary criminal justice, especially when there are no real incentives to make a dangerous move into a different legal order where a preventive detention of suspected terrorists constitutes a rule while their criminal trial is rather an exception.

IV. THE ROLE OF THE DOMESTIC JUDICIARY: COMPROMISING NATIONAL SECURITY IN THE NAME OF THE RULE OF LAW?

The recent practice of domestic civilian courts demonstrates that ordinary judiciary is not powerless in the face of terrorism threats. On the

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[59] ECHR, *supra* note 13 (noting that Article 5(2) requires that there is sufficient information for an individual to be able to challenge the reasonableness of the suspicion against him/her).

[60] Hulki Günes v Turkey, 2003-VII Eur. Ct. H.R. ¶ 96.

[61] Van Mechelen and Other v. the Netherlands 1997-III Eur. Ct. H.R., ¶ 58 (1997).

[62] Edwards & Lewis v. United Kingdom, 2004-X Eur. Ct. H.R. ¶ 46.

[63] Rowe & Davis v. United Kingdom, 2000-II Eur. Ct. H.R. ¶¶ 60-62.

other hand, it illustrates the limits imposed by human rights that special courts would face in similar situations.[64] These problems concern the detainee's access to witnesses, standards of proof, admissibility of evidence, and the use of intelligence information. All these evidentiary questions are related to the central issues of how to gather and utilize sensitive information that may play a significant role in terrorism trials, what the burden of proof should be in the admissibility of certain intelligence-gathering techniques, and with which party the burden of proof lies.

Ordinary criminal courts have been struggling with procedural problems in terrorism trials where the intelligence information and sources played a decisive role in upholding the standards of a fair trial. In 2004, the German High Court reconsidered the conviction of Mounir al-Motassadeq, who was held responsible for the events of September 11, because of doubts about fairness of the proceedings against him.[65] A central issue was the question of how a court should deal with a situation where persons, who may possess important information pertaining to the case in question, are not allowed to appear as witnesses.[66] The court held that the right to a fair trial can be violated when executive authorities are withholding exculpatory evidence.

The disclosure of sensitive information can be decisive in criminal proceedings. It is worth mentioning in this context that the testimony given by the President of the German Secret Service during the Mzoudi trial played a crucial role in the court's decision to drop the terrorism charges against Mzoudi. In particular, he reported secret service information that the September 11 attacks were not planned by the Muslim students in Hamburg but by the leadership of the Al-Qaida terrorist network in Afghanistan.[67]

Security courts may face difficulties in determining the proper burden of proof in similar situations, leaning towards deciding them on the

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[64] National state secrecy rules may impose limits on ordinary courts.

[65] *See* Christoph Safferling, *Terror and Law – Is the German Legal System Able to Deal with Terrorism? The Bundsgerichtshof (Federal Court of Justice) decision in the case against Motassadeq*, 5 GERMAN L.J. 516 (2004).

[66] ECHR, *supra* note 13 (noting that the right to confront a witness is stipulated by Article 6(3)(d)).

[67] Loami Blaauw-Wolf, *The Hamburg Terror Trials – American Political Poker and German Legal Procedure: An Unlikely Combination to Fight International Terr*orism, 5 GERMAN L. J. 791, 801 (2004).

basis of mere suspicion refuted by the government's evidence, the reliability and accuracy of which cannot be sufficiently proven.

The fight against terrorism through means which lie outside ordinary criminal justice may lead to detentions on a low burden of suspicion and highly unreliable (secret) evidence.[68] For example, part 4 of the UK Terrorism Act of 2001 has been criticized as authorizing detention of suspected international terrorists on executive order and on a low burden of suspicion.[69]

The ECtHR is not in a position to examine the national authorities' determination that someone poses a serious security threat to the state. International law does not establish standards for identifying when a terrorism suspect poses a sufficiently serious security threat to render an individual's (preventive) detention non-arbitrary, and the domestic legal rules on the determination of dangerousness may also be vague. This does not mean, however, that mere suspicion should become an effective yardstick for security-based detentions. Generally, any suspicion which constitutes a basis for detention shall be reasonable,[70] and the detainee shall have the right to contest it in a competent court. Having reasonable suspicion presupposes the "existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offense."[71] The ECtHR has slightly modified these standards for terrorism suspects. According to the Court, the Government has to furnish "at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence. This is all the more necessary where . . . the domestic law does not require reasonable suspicion, but sets a lower threshold by merely requiring honest suspicion."[72]

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[68] *See, e.g.*, Audrey Gillan, *Judges Accuse Blankett Over Terror Suspect*, GUARDIAN, Mar. 9, 2004, http://www.guardian.co.uk/politics/2004/mar/09/al-qaida.september11.

[69] Colin Warbrick, *The European Response to Terrorism in an Age of Human Rights*, 15 EUR J. INT'L. L. 989, 995, 1013 (2004). *See also Opinion of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, On Certain Aspects of the United Kingdom Derogation From Article 5 Par. 1 of the European Convention on Human Rights*, Aug. 28, 2002, CommDH(2002)7, *available at* https://wcd.coe.int/ViewDoc.jsp?id=980187&Site=COE.

[70] ECHR, *supra* note 13, lit. c.

[71] *See* Fox v. United Kingdom, 182 Eur. Ct. H.R. (ser. A) ¶32; O'Hara v. United Kingdom, 2001-X Eur. Ct. H.R. ¶ 34.

[72] *Fox*, 182 Eur. Ct. H.R., ¶32; *O'Hara*, 2001-X Eur. Ct. H.R., ¶ 35.

International counter-terrorist cooperation may cause additional difficulties regarding access to relevant information in terrorism trials. The disclosure may be most problematic when states are aware that the interrogation methods used against suspected terrorists cannot produce admissible evidence. For example, not all intelligence information for which the practice of torture is certified is disclosed in a court. One may argue that the disclosure of sensitive information stemming from international intelligence cooperation may damage not only the national security of the respective (disclosing) state but also the international effort to combat terrorism, and therefore such information should only be disclosed in a specialized security court.

A recent U.K. case related to the illegal treatment of Binyam Mohamed clearly demonstrated that there may be a conflict between the interests of inter-state counterterrorist intelligence cooperation and human rights,[73] and raised the question of what the proper balance should be. In *Mohamed*,[74] the U.K. court dismissed the Foreign Secretary's claims that disclosing the evidence would harm national security and threaten the U.K.'s intelligence-sharing arrangements with the U.S.,[75] and stated the following:

> In our view, as a court in the United Kingdom, a vital public interest requires, for reasons of democratic accountability and the rule of law in the United Kingdom, that a summary of the most important evidence relating

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[73] HOUSE OF LORDS/HOUSE OF COMMONS, ALLEGATIONS OF UK COMPLICITY IN TORTURE, 2008-2009, *available at* http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/15202.htm. For broader discussion on complicit states, *see* George Nolte & Helmut Philipp Aust, *Equivocal Helpers, Complicit States, Mixed Messages and International Law*, 58 INT'L & COMP. L.Q. 1 (2009).

[74] *See generally, Binyam Mohamed Torture Appeal Lost by UK Government,* BBC NEWS, Feb. 10, 2010 [hereinafter Binyam Mohamed], http://news.bbc.co.uk/2/hi/uk_news/8507852.stm; David Miliband, *Remarks on the Binyam Mohamed Case*, FOREIGN & COMMONWEALTH OFF., Feb. 10, 2010, http://www.fco.gov.uk/en/news/latest-news/?view=News&id=21722320; John F. Burns, *Britain Discloses Data on Ex-Detainee*, NY TIMES, Feb. 10, 2010, http://www.nytimes.com/2010/02/11/world/europe/11brit-ain.html?ref=europe (last visited Feb. 15, 2010). *See also US Disappointed at UK Appeal Court Torture Ruling*, BBC NEWS, Feb. 11, 2010, http://ne-ws.bbc.co.uk/2/hi/uk_news/8509787.stm (last visited Feb. 15, 2010).

[75] Richard Norton-Taylor, *Binyam Mohamed: Judge Overrules Attempt to Suppress Torture Evidence*, GUARDIAN, Oct. 16, 2009, *available at* http://www.guardian.co.uk/world/2009/oct/16/binyam-mohamed-torture-evid-ence-miliband.

> to the involvement of the British security services in wrongdoing be placed in the public domain in the United Kingdom.[76]

The Court further noted that "the suppression of reports of wrongdoing by officials (in circumstances which cannot in any way affect national security) would be inimical to the rule of law."[77] The U.K. Government's efforts to enforce a non-disclosure obligation in an Appeals Court failed.[78]

A court in Milan, by recently convicting 23 US and Italian security officials who had abducted Muslim cleric Abu Omar on suspicion of terrorism from an open street in Milan, has shown that the barriers erected by the domestic law concepts of state secrecy may cause difficulties to terrorism trials in civilian courts but do not always prevent them from undertaking their judicial function.[79] The Italian Constitutional Court, while determining competencies of the branches of government in the area of state secrets, recognized the wide discretion of the executive by ruling on March 11, 2009 that any evidence of coordination between the Italian secret services and the C.I.A. violated state secrecy rules and was therefore inadmissible.[80] At the same time, the Court indicated that the Milan trial of U.S. intelligence officers involved in Omar's abduction may continue proceedings if all classified information is withdrawn and only open sources of information are presented before the court.[81] The

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[76] The Queen on the Application of Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs, (2009) CO/4241/2008 (Royal Court of Justice), ¶ 105, *available at* http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_10_09_mohamed_judgement.pdf.

[77] *Id.*, ¶ 73(i)(e).

[78] John F. Burns, *Britain Discloses Data on Ex-Detainee,* NY TIMES, Feb. 10, 2010, *available at* http://www.nytimes.com/2010/02/11/world/europe/11britain.html?ref=europe (last visited Feb. 15, 2010).

[79] *Italy Convicts 23 Americans for CIA Renditions, Most Working for the CIA of Abducting Muslim Cleric*, N.Y.TIMES, Nov. 5, 2009, at 15. For a detailed discussing concerning this case, see Francesco Messineo, *Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy*, 7 J. INT'L CRIM. JUST. 1023-44 (2009).

[80] Conflitto di attribuzione tra potteri dello Stato (processo Abu Omar e segreto di stato), n.106/2009, Gazz. Uff. 1 Serie Sp. published on 8 April 2009 (decided 11 March 2009) at 9.1.

[81] *Id.* at 12.3. The Court emphasized that state secrets never covered the kidnapping of Abu Omar which could be investigated by the competent courts according to standard procedures. *Id.*

Milan court indeed ruled that there was enough evidence to proceed with the case (As a result, not all suspects have been charged. Charges were dropped against five Italians because evidence against them violated state secrecy rules and against three Americans because of diplomatic immunity).[82]

The domestic civilian courts may prevent the lowering of standards regarding the conduct of intelligence gathering and the use of sensitive information in terrorism trials while maintaining a proper balance between national security interests and fundamental rights. At the same time, they cannot do away with state secrecy rules altogether. Notwithstanding the national authorities' margin of appreciation in adjusting their criminal justice systems to contemporary security challenges, the jurisprudence of the ECtHR can play a guiding role and shed light on some of the procedural difficulties with which the domestic judiciary may be confronted in terrorism cases. This especially concerns the need for an effective protection of important procedural rights even in times of serious security threats.

V. CONCLUSION

It is unlikely that criminal justice will be substituted by a new procedural paradigm of national security courts in Europe not least because of the strict requirements of the legal regime of the European Convention on Human Rights and also as a matter of legal policy. It is certainly true that global terrorism is a serious threat to the national security of many European states. However, the threat of terrorism cannot be used as a justification for introducing new terrorism courts with more flexible procedural underpinnings. The use of security detention for suspected terrorists is not a general practice under the Convention regime – it always depends on the circumstances of the case if such "pure" security based detentions can be justified in times of national emergency. As a matter of principle, terrorist activities can amount to an emergency that allow a

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[82] *Abu Omar, Pollari e Manicini non giudicabili. Condanne per la Cia, e gli Usa protestano*, La Republicca, Nov. 4 2009, *available at* http://www.repubblica.it/2009/09/sezioni/cronaca/processo-abu-omar/-sentenza-abu-omar/sentenza-abu-omar.html. *Rapimento Abu Omar, Pollari e Mancini non giudicabili per il segreto di Stato*, Corriere Della Sera, Nov. 4, 2009, *available at* http://www.corriere.it/cronache/09_novembre_04/processo-abu-omar_a6179aba-c95c-11de-a52f-00144f02aabc.shtml.

state to derogate from its obligations under Article 15. However, there is only one Council of Europe State which had made use of this clause so far since 9/11[83], the U.K. The effect of the House of Lord's ruling of December 16, 2004 in the *Belmarsh Prison Case*[84], however, is that derogation from Article 15 requirements is invalidated.[85] Thus, the threshold for allowing detention in light of an emergency is not to be taken lightly.

The ECtHR does not universally specify to what extent special procedural rules can deviate from the standards of criminal justice.[86] Any such specification would be dependent on the circumstances of the case and on the importance of rights that are at stake. The consistency in the application of procedural standards is especially important because of the multitude of counter-terrorist modifications to national criminal justice systems. Such consistency must preclude abuse and arbitrariness in national detention policies. The role of external accountability pursuant to the ECHR is crucial in this respect.

The elaboration of national detention strategies remains largely in the discretion of the respective Contracting State. Meaningful modifications to the existing criminal justice systems, if necessary, would prevent a Contracting State's move into a different legal order and would not accord the terrorists the privilege of being a "special" target of the State's

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[83] Turkey's derogation from Article 5(3) of the ECHR, which was first made in the late 1980s, aimed at taking certain counter-terrorist measures in the southeastern part of the country; the latest Turkish derogation made in the early 2000s had been revoked by the end of 2002; Albania made a brief derogation that lasted from 10 March 1997 until 24 July 1997.

[84] A. & Others v. Sec'y of State for the Home Dep't [2004] UKHL 56, ¶ 97 (appeal taken from Eng.) (U.K.).

[85] The UK derogation concerned detention provisions in the Anti-terrorism, Crime and Security Act 2001 which were repealed with effect from 14th March 2005 by section 16(2)a of the Prevention of Terrorism Act 2005. Concerning the UK derogation and the "A" Case, *see* Ed Bates, *A "Public Emergency Threatening the Life of the Nation"? The United Kingdom's Derogation from the European Convention on Human Rights of 18 December 2001 and the "A" Case*, BRITISH YEARBOOK OF INTERNATIONAL LAW 76 (2005), at 245-335.

[86] According to Hakimi, "the legal process afforded to administrative detainees might reasonably deviate from a state's own rules of criminal procedure while still being fundamentally fair and consistent with international law." Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond Armed Conflict-Criminal Device*, 40 CASE W. RES. J. INT'L L. 593, 642 (2009).

repressive machine. Criminal justice allows enough flexibility in dealing with alleged terrorists.[87] Preventive detention for security purposes may appear meaningful in some situations, but it is fraught with uncertainties as to the basics of procedural fairness and to the rule of law. The principles at stake in cases of preventive security detention are too valuable to be left to special security courts sitting *in camera* and applying dubious standards of procedural fairness.

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[87] Colin Warbrick, *The European Response to Terrorism in an Age of Human Rights*, 15 EUR J. OF INT'L. L. 989, 995 (2004); Frederic Megret, *Justice in Times of Violence,* 14 EUR. J. OF INT'L. L. 327, 344 (2003) (stating that "if one does not want to judge terrorists before ordinary courts, because of fear of one's own judicial system, the solution should be to try and fix that system rather than create a largely derogatory one from scratch."). *See also* Committee of Ministers, Council of Europe, July 11, 2002, *Guidelines on Human Rights and the Fight Against Terrorism, available at* http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf.