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

21 January 2022

Submission by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in the case of Daoudi v. France (Application no. 48638/18) before the European Court of Human Rights

INTRODUCTION

1. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism established pursuant to Human Rights Council resolution 40/16 (hereafter, the **Special Rapporteur**) was granted leave to make written submissions in this application under Rule 44(3).

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

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

4. The Special Rapporteur is cognizant that the purpose of this written submission is not to address the specific case at issue. Rather, she draws here on her broader engagement with multiple governments and expert bodies concerning the use and human rights compatibility of administrative detention and related measures. The Special Rapporteur wishes to reaffirm the Mandate's extensive and continuous positive dialogue and constructive engagement with the French authorities in particular in the context of her 2018 country visit to France.[1] She notes ongoing constructive engagement with the

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

Government on legislative enactments since 2018 and with civil society in respect of the protection of fundamental rights and the rights of victims of terrorism.[2]

5. The Special Rapporteur recognizes the significant challenges many that governments, including France, face in addressing the challenges of terrorism. Ensuring that responses to terrorism are consistent with the international and human rights law obligations of States is essential for all States.

ASSIGNED RESIDENCE AS A PRE-EMPTIVE ADMINISTRATIVE MEASURES IN THE CONTEXT OF COUNTER-TERRORISM

6. The Special Rapporteur has observed that in many countries States activate wide-ranging and exceptional national security powers premised on elevated public security risks, operated and reviewed through the administrative law system.[3] Such administrative control measures, which engage significant limitations and restrictions to a number of rights, are implemented directly by the executive power without any or with limited judicial oversight.

7. France has developed several administrative practices involving the assigned residence and/or confinement of individuals (including foreign individuals) prior to and in the absence of criminal charge. The assigned residence of foreigners who cannot be expelled to their countries of origin has existed in various forms since 1945. The precise legal foundation for these measures has changed over time, notably for individuals banned or expelled from French territory further to a conviction for terrorism-related offences. Administrative practices, including territorial bans, expulsion orders and assigned residence, are frequently connected to the exercise of the ordinary criminal law as applied to the prosecution of crimes of terrorism, and often based on secret intelligence information which forms the basis for the executive decision.

8. Deferring to the Court's role in assessing the human rights compliance of any specific measure applied in a given case, this submission addresses administrative practices generally, their relationship to other counter-terrorism measures and with reference to their overarching effects.

Key principles relating assigned residence

9. The Special Rapporteur holds that the impact of assigned residence measures on an array of human rights protections—economic, social, political, civil, cultural and familial—are extensive and interdependent. In respect of the Convention, the specific impact of these measures has undulating effects on the enjoyment of freedom of movement, liberty rights, the right to a fair trial, the right to a private and family life, the right to work and to an education. The longer a person is confined to assigned residence, the more harmful the measure to the exercise of fundamental rights and the dignity of the person.

10. Assigned residence is a measure that involves a limitation of freedom of movement. According to the Special Rapporteur this implies at a minimum that any assigned residence measure must always conform with the principles of legality and foreseeability, which affords a measure of protection against arbitrariness, legitimacy, necessity, proportionality, and non-discrimination.[4] The Special Rapporteur recalls the centrality of

[2] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on her visit to France, A/HRC/40/52/Add.4, 8 May 2019.
[3] A/HRC/37/52, 1 March 2018.
[4] *De Tommaso v. Italy* [GC], 2017, § 109; *Khlyustov v. Russia*, 2013, § 70; *Rotaru v. the Republic of Moldova*, 2020, § 124; *De Tommaso v. Italy* [GC], 2017, § 125; *Timofeyev and Postupkin v. Russia*, 2021, § 129; *Sissanis v. Romania*, 2007, §§ 68-69; *De Tommaso v. Italy* [GC], 2017, § 104; *Battista v. Italy*, 2014, § 37; *Khlyustov v. Russia*, 2013, § 64; *Labita v. Italy* [GC], 2000, §§ 194-195.

these principles in international human rights law, highlighting that the tests of proportionality and necessity have become, both globally and in the case law of this Court, the main way of analysing whether the restriction of a fundamental right is justified in the light of a competing right or the public interest.[5]

11. In all circumstances, given the cross-cutting nature of the rights implicated by the assignment of residence, such impositions must **at all times** be the **least restrictive measure** available.[6] This ensures that the measure, or the sum of measures, is not unacceptably broad in its impact on the protected rights of specific individuals despite being effective in satisfying a public interest, such as the protection of national security. This is particularly important when a government advances policy objectives that have a proven record of being abused. In cases of assigned residence that extend to years of confinement (even over decades), the extended and cumulative the core human rights restriction must be **presumptively** considered as a measure which deprives liberty and subject to stricter test of compatibility with Convention requirements.[7]

12. These questions are to be assessed according to the specifics of each case.[8] These requirements cannot be understood abstractly but must be assessed relative to the actual experiences and day-to-day situation of the assigned individual. The precise elements of the assigned residence regime, including distance from home, the location of assigned residence, number of times per day an individual must report to the police, age of family members, etc., are to be taken into consideration when examining the compliance of the measures with these principles. To be compatible with the rule of law and provide protection against arbitrariness, the law must provide minimum procedural safeguards commensurate with the importance of the principle at stake and the authorities must provide sufficient justification for the existence, and continued existence, of the measure.[9]

13. Assignment to residence should never follow criminal conviction as a matter of course, nor should it function as a form of extended punishment when the tariff for criminal conviction has been completed. The Special Rapporteur believes that close examination of any monitoring requirements tied to assigned residence is critical to assess whether a clear distinction is being drawn between assigned residence and punishment for a criminal offence, and to ensure that assigned residence does not function as an extension of a completed tariff.[10]

14. Best human rights practice demands that the protection of economic rights (right to work), education (right to seek further education), right to health (access to adequate medical care) freedom of movement and family life are fully accounted for in assessing what is a necessary and proportionate restriction. The Special Rapporteur places particular weight on the right to family life protected by the Convention (article 8), as it constitutes one of the most intimate and significant rights to human personhood. Limitations on family life not only affect the assigned individual but all members of their family and can fall particularly harshly on children.[11] Where residence is assigned at a significant distance

[5] ECtHR [GC], 27 May 2008, *N. v. the United Kingdom*, § 44.
[6] "*The Court has previously found that, for a measures to be regarded as proportionate and as necessary in a democratic society, the possibility of recourse to an alternative measure that would cause less damage to the fundamental right at issue whilst fulfilling the same aim must be rules out*". ECtHR [GC], *Nada v. Switzerland*, 12 September 2012, para. 183.
[7] A deprivation of liberty is not confined to classic detention following arrest or conviction but may take numerous other forms (*Guzzardi v. Italy*, § 95).
[8] *Hajibeyli v. Azerbaijan*, 2008, § 63
[9] *Rotaru v. the Republic of Moldova*, 2020, § 24; *Căşuneanu v. Romania*, 2011.
[10] *Stafford v. the United Kingdom,* [GC], 2002 § 94; *Wynne v. the United Kingdom* (no. 2), 2003 § 14, 15 and 25; *Hill v. the United Kingdom*, 2004 § 22, and *Kafkaris v. Chypre* [GC], 2008 (opinion concordante du juge Bratza).
[11] A/HRC/46/36, Article 16(3) of the 1948 UDHR, Article 23(1) ICCPR, and Article 10(1) ICESCR. Note also that the Court has applied the least restrictive measure test in relation to the contact with and care of children. See ECtHR, *K. and T. v. Finland* [GC], 2001; *T.P. and K.M. v. United Kingdom*, 2001 §168; *Kutzner v. Germany*, 2002, § 75; *P, C*

from one's family, this raises serious concerns about a state's compliance with article 8. Distance which is prohibitive to maintain the consistency and intimacy of family life, including the responsibilities of parenting, coupled with onerous monitoring requirements (e.g. the requirement to "check in" with police regularly) may, in serious cases, have the effect of forcibly separating an individual from his or her family, and prohibiting that individual from engaging in work, religious activities, or other activities central to maintaining a private life. Any such impact must be carefully calibrated against the level of risk posed by the individual and the necessity and proportionality of all the measures imposed, including an assessment of their cumulative effect. The Court has affirmed that that interferences in individuals' private sphere should be limited as much as possible and has focussed on modalities and safeguards that could limit the restrictive impact of the measures.[12]

Regimes of enhanced and robust assigned residence

15. The Special Rapporteur notes the close proximity between the right to freedom of movement and the right to liberty. She notes that assigned residence is a measure involving a limitation of liberty that may in certain circumstances amount to a deprivation of liberty and engage Article 5 of the Convention. The Court has extensively opined on the criteria to determine detention and has an autonomous view on determining what constitutes a deprivation of liberty under Article 5.[13] The difference between restrictions on movement serious enough to fall within the ambit of a deprivation of liberty under Article 5 § 1 and mere restrictions of liberty which are subject only to Article 2 of Protocol No. 4 is one of degree or intensity, and not one of nature or substance.[14]

16. In line with this Court's jurisprudence considering the "autonomous meaning," the Court does not consider itself bound by the legal conclusions of the domestic authorities as to whether or not there has been a deprivation of liberty and undertakes an autonomous assessment of the situation.[15] The key considerations for this Court are the type, duration, effects, and manner of implementation of the measure in question.

17. The Special Rapporteur notes in particular that in specific cases of highly enhanced assignation of residence regimes, the restrictive nature of the impact of an assigned residence order may prompt the Court to consider whether the constraints constitute measures that are tantamount to imprisonment and/or deprivation of liberty.

18. The Special rapporteur highlights the importance of the concept of arbitrariness. She recalls that for the UN Human Rights Committee, the notion of "arbitrariness" is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[16] Similarly, according to the Court, arbitrariness extends beyond lack of conformity with national law.[17]

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and S v. UK, 2002, § 116; *Venema v Netherlands*, 2002 § 93; *Haase v. Germany*, 2004 §§ 90 and 95; *Moser v. Austria*, 2006 §§ 68-73; *A.D. and O.D. v. UK*, 2010 § 89; *Kurochkin v. Ukraine*, 2010 § 52 and 57; *Šneersone and Kampanella v. Italy*, 2011 § 97; *Pontes v. Portugal*, 2012 § 98.

[12] ECtHR, *Keegan v. UK*, 2006 § 34; *Foxley v. UK*, 2000 § 43; *Peck v. UK*, 2003 § 85.

[13] Per the terms of Article 5. For an exploration of the question of deprivation of liberty in the context of house arrest, see *Buzadji v the Republic of Moldova*, 2016; *Mancini v Italy*, 2001; *Lavents v Latvia*, 2003; *Nikolova v Bulgaria (No 2)*, 2004. See further HRC General Comment No.9 on Deprivation of Liberty at [1], which affirms that the right to liberty is concerned with *all* relevant deprivations of liberty. On autonomous meaning of deprivation of liberty *Khlaifia and Others v. Italy* [GC], 2016 § 71; *H.L. v. the United Kingdom*, 2005 § 90

[14] As between the application of Article 5, versus Article 2 of Protocol No.4. See ECtHR *De Tommaso v. Italy*, 2017; *Guzzardi v. Italy*, 1980 § 93; *Rantsev v. Cyprus and Russia*, 2010 § 314; *Stanev v. Bulgaria* [GC], 2012 § 115.

[15] See *Khlaifia and Others v. Italy* [GC], 2016 § 71; *H.L. v. the United Kingdom*, 2005 § 90; *H.M. v. Switzerland*, 2002 §§ 30 and 48; *Creangă v. Romania* [GC], 2012 § 92, *Welch v. the United Kingdom*, 1995 § 27, Series A no. 307-A; *Jamil v. France*, 1995, § 30, Series A no. 317-B.

[16] UN Human Rights Committee, General Comment 35, CCPR/C/CG/35. para. 12.

[17] *A. and Others v. the United Kingdom* [GC], 2009 § 164).

19. The Special Rapporteur particularly stresses the necessity of examining the length, precise location(s), and conditions attached to assigned residence indicative of the degree and intensity of restrictions. Relevant objective factors to be considered include the size and characteristics of a restricted area to which a person's movement is confined, the possibility to leave this area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts.[18] The Special Rapporteur notes that the Court has taken into consideration the combination of factors such as the level of police supervision, including the frequency of reporting to the authorities, the existence of a compulsory residence order, the obligation to live a restricted area, the duration of the order, the possibility of social contacts, and the possibility of contacts with their family.[19] This, coupled with consequential restrictions on maintaining an occupation are further relevant considerations.

20. The risk of significant human rights violations incurred by assigned residence heightens with the length of time in which the measure is in force and the intensity of the relevant restrictions. The absence of temporal limits on the imposition of measures such as assigned residence, or in-built statutory requirements for review of the measures (whether mandatory of voluntary) exacerbate this risk that extremely restrictive measures can be imposed arbitrarily,[20] disproportionately, without a sufficiently strong foundation, or for an unduly long period of time.[21] She highlights her concerns at extremely tight regimes which have the effect of placing the individuals subject to assignation of residence in situations where – in effect – the impact of the regime and the need to respect numerous condition leave no room for any other activity.

21. The Special Rapporteur considers that the penalties attached to any violation of the assigned residence regime must also be a key factor in the determination of lawfulness of the measure. She raises concern that even minor violations of particularly lengthy and robust assigned residence measures can lead to judicial sanctions and even imprisonment may place individuals who have already served their sentence for terrorism related offences in an unending revolving door situation moving from tight administrative restrictions to criminal sanctions and vice versa. In the Special Rapporteur's view, such measures — particularly where the conditions for the termination of assigned residence are unlikely to be met in the near future and where the regime is particularly harsh — can very rarely be reconciled with the principles of necessity and proportionality and absence of arbitrariness.

22. The Special Rapporteur is particularly concerned at particularly severe assigned residence measures that are premised on intractable situations with no realistic prospect of the situation evolving in a way that would enable termination, thus keeping individuals in a ruthless circle from which there is no escape. This includes assigned residence measures functioning within the fulcrum of immigration law and counter-terrorism, typically where individuals have been stripped of their right to remain within a specific country following a conviction for an act of terrorism but are unable to return to their country of nationality or be deported to any other State. The Special Rapporteur warns against using immigration status as a subsidiary and additional counter-terrorism sanction, noting the risks of discrimination inherent to such measures that only apply to foreigners or to nationals stripped of their citizenship.[22]

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[18] *Guzzardi v. Italy*, 1980, § 95; *De Tommaso v. Italy* [GC], 2017, §§ 83-88; *Nada v. Switzerland* [GC], 2012, §§ 229-232.
[19] *Ibid*. See also *Timofeyev and Postupkin v. Russia*, 2021 on the frequency of reporting.
[20] *Căşuneanu v. Romania* (dec.), 2011.
[21] *Manannikov v. Russia*, 2018, § 62.
[22] The Court has also applied the principle of the least restrictive measure to expulsion decisions. See ECtHR, *Radovanovic v. Austria*, 2004 § 37.

PROCEDURAL CONCERNS OF ENHANCED ASSIGNATION OF RESIDENCE REGIMES

Use of Intelligence and Secret Evidence

23. The Special Rapporteur notes that procedural safeguards commensurate with the importance of the principle at stake are critical to the preservation of the rule of law, the protection against arbitrariness,[23] respect for the principles of legality, lawfulness, necessity, proportionality and non-discrimination. The greater the interference by the executive authorities with an individual's rights, the greater and more frequent the judicial control must be. The Special Rapporteur highlights that for any imposition of assigned residence following from criminal conviction, or otherwise, to function fairly, an entirely separate and independent judicial assessment of the necessity and legal basis for the measure is necessary, with the individual given adequate time and means to engage in such legal proceedings, including sufficient access to evidence for legal representatives to contest the factual basis for assignment.

24. According to the Special Rapporteur, administrative measures based on suspicion, or secret intelligence, raise extremely serious concerns about the right to the presumption of innocence, due process and fair trial, by weakening the principle of equality of arms and the rights of defense.[24] Indeed, the human rights compliant use of intelligence material in administrative and pre-judicial proceedings are key to the effectiveness of fair trial rights. The Special Rapporteur notes her concern about the use of such material in the form of "Notes Blanches" as the basis for pre-emptive administrative measures which limit or deprive of liberty in the context of counter-terrorism, such as extensive regimes of assigned residence.

25. The Special Rapporteur notes that the so-called "white notes" are generally succinct, unsigned and undated documents drafted by the intelligence services, attesting —without fully disclosing why—that an individual poses a threat to public order and security. She has found that defense lawyers have struggled to advance contradictory proof as to why their clients were considered a threat to national security or public order or were suspected of involvement in criminal activity because of the opaqueness of these notes.[25]

26. While the Special Rapporteur acknowledges that the withholding of evidence from the defendant and his/her legal representatives may, in some cases, be consistent with the guarantees in Article 6, such measures are, in the Court's analysis, only permissible where they are strictly necessary.[26] Further, any alleged "withholding" may in fact obliterate the a lack of sufficient evidence. Whether the withholding of evidence is necessary must be balanced against the judicial procedures in place to vindicate the defendant's right to a fair trial. Where a Court cannot review the evidence that has not been disclosed, then the weight of the public interest cannot be assessed, and it falls to the Court instead to scrutinize the decision-making procedures involved to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of accused.[27] In this case, the Special Rapporteur reiterates that the presumption of veracity attached to *notes blanches*, the withholding of their content from judicial oversight, and the absence of *ex ante* or *ex post* scrutiny in the decision to impose the measures all point significant against the adequacy of safeguards.

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[23] *Rotaru v. the Republic of Moldova*, 2020, § 24, *Sissanis v. Romania*, 2007, § 70; *Khlyustov v. Russia*, 2013, § 74

[24] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 29 April 2016, A/HRC/31/65. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Visit to France, A/HRC/40/52/Add.4, 8 May 2019.

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

[26] ECtHR *Van Mechelen v the Netherlands*, 1997 § 58; and *Paci v Belgium*, 2018 § 85.

[27] ECtHR *Dowsett v UK*, 2003 §§ 42 and 43; and *Leas v Estonia*, 2012 § 78.

27. The Special Rapporteur has continuously stressed that the use of such documents can render the assessment of the continuing necessity and proportionality requirements meaningless in practice. It also seriously impacts on the ability of the courts to examine the manner in which the authorities had exercised their discretionary power to assess the need for the restriction. She contends that un-tested and un-corroborated intelligence "evidence" does not provide a legitimate basis for the authorization of coercive and rights-limiting counter-terrorism (administrative) measures. When the measures adopted on this basis includes a punitive aspect, such evidence and the chain of custody attached to it must be subject to review by the defendant before an independent court and before any measure is adopted.

Fair trial and due process rights

28. The Special Rapporteur identifies a very clear trend in counter-terrorism legislation and policy of measures being adopted in the "pre-criminal" and "post-criminal" space, which includes a shift away from criminal proceedings towards administrative action on security grounds. She is clear that the clear aim of the increased use of these administrative measures is to bypass the *"constraints of criminal procedure",* including by significantly reducing "*liberties which normally belong to the realm of criminal law*"[28] such as procedural fair trial rights, prior judicial review and appropriate standard of proof.

29. The question of the "privative" or "restrictive" nature of administrative pre-emptive house arrests or assignation of residence measures does not only constitute a doctrinal theoretical debate, as it is precisely the nature of these measures that will later determine the applicable legal regime under the Convention. Indeed, one of the consequences of classifying measures such as house arrests as an administrative pre-emptive measure is to deprive the person concerned of the guarantees of criminal procedure. While the administrative judge has jurisdiction to review administrative measures it may only do so *ex post facto* either through the procedure for an excess of power or by way of *référé-liberté*.[29]

30. While administrative measures are usually classified by States as preventive and precautionary measures that "permit intervention against terrorist planning and preparations before they mature into action,"[30] when these measures include a coercive aspect, such as warrantless arrests, detention or restrictions to the right to liberty and security, deportation of suspects, restrictions to freedom of movement or the use electronic surveillance, it becomes difficult to draw a clear line between preventive and punitive measures.

31. The Special Rapporteur is clear that, using the European Court's own doctrine of "autonomous meaning,"[31] when preventive counter-terrorism administrative measures affect or impact the substantive right of the person affected, the protection of Article 6 of the Convention should apply, regardless of the State's own portrayal and qualification of the measures.

32. On the Court's own jurisprudence, it will look beyond the domestic characterization of a measure to assess its substance. Administrative measures such as assigned residence which entail significant coercive measures (including restrictions on the right to liberty), the compliance of which is closely surveilled, and the violation of which carries

[28] https://icct.nl/wp-content/uploads/2016/12/ICCT-Boutin-Administrative-Measures-December2016-1.pdf
[29] See Sharon Weill, « *Terrorisme et Etat d'Urgence : jurisprudence des hautes jurisdictions françaises* », Avril 2017 Loi n° 2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives, art. 5
[30] Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments, p.3.
[31] See ECtHR *Welch v. the United Kingdom*, 1995, § 27, Series A no. 307-A; *Jamil v. France*, 1995, § 30, Series A no. 317-B.

significant penalties (including a criminal offence) should, in the view of the Special Rapporteur, be treated as functionally the same as criminal measures. Moreover, where the preventive step is imposed to prevent conduct which is a crime, in the public interest, and by the use of coercive measures, the Court's reasoning has been clear that these amount to measures which should be subject to the protection afforded to criminal measures under Article 6.[32] Similarly, where the stated purpose of any administrative measures is prevention, "looking behind appearances at the reality of the situation whatever the characteristic of the measure",[33] some of these should be characterized as punitive or repressive because of the use of coercion, by depriving individuals based on a suspected and unproven "dangerosity" of some of their rights and freedoms to prevent the commission of terrorism-related offences.

33. The determination and subsequent applicability of protection regimes has been extensively discussed in the context of non-judicial disciplinary measures before the ECtHR, where a three-stage approach to determine whether an offence amounted to a criminal charge for the purposes of Article 6 of the ECHR relating to the right to a fair trial was developed: the legal classification of the offence in question in domestic law, the nature of the offence and the nature and degree of severity of the penalty to which the person concerned is liable. For example, in *Lauko v Slovakia,*[34] the classification by Slovakia of a minor offence as an "administrative" offence did not prevent the Court from concluding that the nature of the offence and the punitive character of the penalty meant that the proceeding was a criminal one, for the purpose of Article 6 of the ECHR.

Insufficient Judicial Control

34. As a restriction that fundamentally impinges on the exercise of fundamental rights, assigned residence must be *ab initio* judicially authorized and regularly reviewed. The Special Rapporteur has stressed that administrative pre-criminal counter-terrorism measures which inherently lack pre-judicial authorization represent a potentially serious challenge to the overall balance of security and rights and necessarily impacts the oversight role that the judicial branch is to play in order to determine the necessity, proportionality and legality of the measures. These concerns echo those of the Commission Nationale Consultative des Droits de l'Homme which has, since 2006 also regularly raised the concern of "the increasing power of administrative police to the detriment of judicial authority, which is normally "the sole guardian of liberty".[35]

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

36. The Special Rapporteur argues that if the Court determines that the measure has a punitive or repressive nature — even if officially classified as a preventive measure — such an assessment may have a consequence on the oversight regime that should apply according to international law and jurisprudence. Consequently, the person affected by preventive measures of an "excessively punitive nature" shall have the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by

[32] *Öztürk v Germany* 1984 § 49; *Engel v Netherlands* 1976 §§88 and 82; and *Gestur Jónsson and Ragnor Halldór Hall v Iceland*, 2018 [GC] §§ 86 and 77-78.
33 See ECtHR *M. v. Germany*, 2009 §120.
[34] See ECtHR *Lauko v. Slovakia*, 1998 §53.
[35] CNCDH, « *Note sur le projet de loi relatif à la lutte contre le terrorisme* » 14 December 2015.

law pursuant to Article 6 of the Convention which is a non-derogable right even in the context of a state of emergency.

37. The Special Rapporteur submits that administrative measures that are repressive and right-limiting should be considered as falling within the criminal arena with the applicable regime applicable thereto.[36] This is the case with measures that seriously impede on the freedom to come and go from the home by order of state authorities, usually on security grounds, without intent to prosecute them in a criminal trial, even for new elements where the individual had already been convicted. In her view, this amounts to administrative detention which prevents the fair trial safeguards of criminal proceedings.

38. The jurisprudence of the Court supports that claim clearly. In *Klass and others v Germany*[37] the Court emphasized that "the rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure". In December 2015, in *Roman Zakharov v Russia*, the Grand Chamber held that the regime in Russia for the surveillance of telecommunications violated the ECHR as it did not require prior judicial authorization based on individualized reasonable suspicion of wrongdoing.

39. By analogy, in the context of surveillance, the Venice Commission noted that "there is an obvious advantage of requiring prior judicial authorization for special investigative techniques, namely that the security agency has to go "outside of itself" and convince an independent person of the need for a particular measure. It subordinates security concerns to the law, and as such it serves to institutionalize respect for the law. If it works properly, judicial authorization will have a preventive effect, deterring unmeritorious applications and/or cutting down the duration of a special investigative measure. The Parliamentary Assembly has earlier expressed a clear preference for prior judicial authorization of special investigative measures".[38] At the European Union level, the Court of Justice of the European Union ruled that both a court or an administrative body could have authority to authorize a measure as long as that body was independent and that the review was an *a priori* authorization.[39]

40. Access to administrative oversight following the imposition of these measures does not lessen these burdens, nor does it vindicate the principle of fairness in many cases, because of the inherent challenges faced by judges to adjudicate the evidence and the perceived burdens of ignoring intelligence information.

CONCLUSION

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[36] See ECtHR *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), ECtHR, 12 January 2016, para 75.

[37] (5029/71), ECtHR, 6 September 1978, para 55.

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

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

41. In closing, the Special Rapporteur draws the attention of the Court to practices that rely predominantly on executive administrative powers to further regulate terrorism, as add-ons to other pieces of legislation that are far and remote from counter-terrorism regulation. Often, these added administrative measures strip several rights, including the right to liberty, to fair trial and due process, the right to a nationality – as an enabling right – of much of their content. The sheer number of such measures, their piling and overlapping on single individuals, create a diluted form of emergency practice and a minimization of rights that is justified simply by the necessity of the exceptional threat posed by terrorism, and an alleged perpetual risk posed by a perceived and often non-corroborated 'dangerosity' of individuals stamped by a terrorist mark. The use of such 'normalized' counter-terrorism powers amounts to the normalization of the exception in national law that the Court should view with concern. This concern is heightened by the fact that Law No. 2021-998 of 30 July 2021 "relative à la prevention d'actes terroristes et au renseignement" precisely provides for the use of such extensive measures ("mesures de sureté") in the direct context of counter-terrorism.[40] Such practices require substantive oversight by national and international human rights courts and bodies.

[40] FRA 4/2020 and FRA 2/2020.