SECILE Securing Europe through Counter-Terrorism: Impact, Legitimacy and Effectiveness

D3.3

Report on Legal Understandings of Impact, Legitimacy and Effectiveness in Counter-Terrorism

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1. Introduction

SECILE aims to create 'an empirically-informed view of the legitimacy and effectiveness of European security legislation, taking into account legal, societal, operational and democratic perspectives'.[1] This wording does not suggest that law is an island, which exists detached from a societal, operational or democratic reality, but merely acknowledges that different disciplines within the social sciences have different methods to conceptualise and measure the impact, legitimacy and effectiveness of security measures introduced in the name of countering terrorism.

To a certain extent law is the art of playing with words. Hence, in this discipline – perhaps even more compared to other perspectives – words and their meanings matter. According to the *Oxford Dictionary*, 'impact' means a 'marked effect or influence'; 'effectiveness' means 'the degree to which something is successful in producing a desired result'; and legitimacy is simply defined as 'conformity to the law or to rules'.[2] These definitions would suggest that a legal review of the impact of certain European counter-terrorism measures could focus on their negative, or unintended, consequences, which from a legal perspective could be seen as those that violate European human rights law. Consequently, a legal review of 'effectiveness' would focus on the intended consequences a countermeasure has, and 'legitimacy' would simply focus on analysing whether a national law has been implemented in line with the intentions of the legislator. While the first two definitions seem like a reasonable starting point for this deliverable, the definition of 'legitimacy' is somewhat unsatisfying for its lack of detail. If security legislation derives its legitimacy from its compliance with the basic tenets of the rule of law, then there would be little difference between analysing the 'impact' and the 'legitimacy' of security legislation. *Stanford's Encyclopaedia of Philosophy* distinguishes between descriptive and normative concepts of legitimacy. The first concept refers to 'people's beliefs about political authority and, sometimes, political obligations'. More importantly, the normative concept of political legitimacy refers to 'some benchmark of acceptability or justification of political power or authority and – possibly – obligation'.[3] The normative concept of legitimacy is a more interesting starting point for this deliverable as it distinguishes legitimacy more clearly from legality: a measure can be legal whilst not being legitimate.

1.1 Methodology

Both practical considerations and the interdisciplinary nature of the SECILE project have influenced the style and content of this deliverable. Given the fact that two other deliverables in this work package focus on how democratic theory and sociology approach the impact, effectiveness and legitimacy of European counter-terrorism measures,[4] we decided to focus primarily on laws, codes, and judicial interpretation of these counter-terrorism laws in order to distil a legal 'empirically informed view' of these concepts.[5] In the context of the SECILE-project, this means that we will analyze (a) how the European Court of Human Rights has assessed the compatibility of European counter-terrorism measures with the European Convention of Human Rights in order to determine the 'impact' of counter-terrorism measures, and (b) to which extent has this Court taken into account the perceived effectiveness of counter-terrorism measures in this assessment.

The choice to focus on the jurisprudence of the European Court of Human Rights deserves a further explanation. This choice was partly motivated on the basis of practical reasons: it is simply not possible – given the amount of time and linguistic capacity among the authors – to analyze what domestic courts in each of the 28 European member states have said about the legitimacy, effectiveness and impact of a country's counter-terrorism-measures. More importantly, our aim was to come to conclusions that apply to European security legislation in general. Such conclusions could - in our view - only be derived from the European Court of Human Rights, since its findings

[1] SECILE, Description of Work, p.5.
[2] Oxford Dictionary Online: http://oxforddictionaries.com
[3] *Stanford Encyclopaedia of Philosophy,* 'political legitimacy': http://plato.stanford.edu/entries/legitimacy/
[4] Please see D3.5 and D3.6, SECILE.
[5] A literature review on questions of 'balancing', the revival of the 'exception argument' and the nature of emergencies can be found in D3.5 on the societal perspective on counterterrorism.

potentially affect every member state.[6] Finally, a literature review suggested that no comprehensive paper had been written on how the European Court of Human Rights assesses the impact and effectiveness of European counter-terrorism measures. This deliverable aims to fill that gap.

A strict legal view on the legitimacy of counter-terrorism measures is difficult to maintain because of the inherently a-legal nature of this concept. de Londras has helpfully identified four factors that can determine the legitimacy of a counter-terrorism measure: the existence of a public justificatory deliberation, non-discrimination, meaningful review, and temporal limitation of a given measure.[7] In this deliverable we aimed to examine how counter-terrorism laws have tried to incorporate those factors within the law. The most important mechanism we found was the use of sunset clauses. Inserting a sunset-clause in counter-terrorism legislation allows, in theory, for a society to assess the impact and effectiveness of a given counter-terrorism measure, in order to decide whether it is still legitimate or not. These clauses put a temporal limitation on the use of (a number of) counter-terrorism measures: when the clause expires a broad public debate should determine the need to renew or revoke the measure(s) in question. Such a debate should include a meaningful review of the impact of the measures on civil liberties such as non-discrimination. A thorough review of counter-terrorism legislation in the UNODC database,[8] suggested that only one European country used sunset clauses in this context (the UK). In order to properly assess the sunset clauses of the UK, we compared these provisions with other common law countries that have adopted such sunset clauses.

2. The impact of European counter-terrorism legislation on human rights

In the immediate aftermath of 9/11, United Nations Resolution 1373 was adopted under Chapter VII of the UN Charter. [9] It established a wide variety of new international legal obligations on states to prevent and supress terrorist acts. These measures included, among others, (1) the criminalization of the collection of funds for terrorist acts, (2) freezing the assets of those that even attempt to commit terrorist acts, (3) adopting material support laws that ensure that any person who participates in the financing, planning or preparation of terrorist acts is brought to justice, and (4) preventing the movement of terrorists or terrorist groups by effective border controls. The Security Council further called upon states to (5) intensify and accelerate the exchange of operational information concerning 'terrorist persons and networks'; and (6) to ensure that terrorists would not abuse refugee status.[10] In this resolution, the only reference to human rights could be found in a paragraph that called upon states to take human rights law 'into account' when taking measures to ensure that an asylum seeker had not planned, facilitated or participated in the commission of a terrorist act, before giving him or her refugee status.[11] This scant attention to human rights would soon backfire. The United Nations High Commissioner for Human Rights warned that 'serious human rights concerns ... could arise from the misapplication of resolution 1373'.[12]

The EU swiftly followed suit, and in a Council Framework Decision to combat terrorism, called upon member states to criminalize inter alia, 'participat[ion] in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with

[6] The decisions of the European Court of Justice are considered in D2.3, SECILE.
[7] de Londras, F. (2011) 'Can counter-terrorist internment ever be legitimate ?', Human rights quarterly., 33 (3). pp. 593-619
[8] UNODC, Electronic legal resources on international terrorism, available at https://www.unodc.org/tldb/
[9] UN Security Council, Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts], 28 September 2001, S/RES/1373 (2001)
[10] Ibid.
[11] ibid, §3(f).
[12] UN Commission on Human Rights, Report of the High Commissioner submitted pursuant to General Assembly resolution 48/141.

knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group' [13] and inciting, aiding or abetting, and attempting to commit terrorist acts.[14] In 2008 the Decision was amended to clarify the terms 'public provocation to commit a terrorist offence', 'recruitment for terrorism' and 'training for terrorism'.[15] The EU seemed to be more aware of the potential impact of some of these criminalization measures, noting in the preamble that 'nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate'.[16] Article 1.2 of the Framework Decision also stressed that it would 'not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'.

States had to report to the newly established UN Counter-Terrorism Committee on their progress in implementing resolution 1373. After the Office of the United Nations High Commissioner for Human Rights reviewed a number of reports that states had sent to the UN's Counter-Terrorism Committee to assess their compliance with UN Resolution 1373, it noted in 2003 that these reports

> 'focus mainly on the legal framework to counter-terrorism, but do not address how these measures operate in practice. Some measures may appear benign but could have a negative impact on the enjoyment of human rights'.[17]

This was not exactly a surprise. In June 2001, a Special Rapporteur to the (then) UN Commission on Human Rights, Ms. Kalliopa Koufa, presented a preliminary report to the Commission on 'terrorism and human rights' in which she warned that,

> 'the rights to freedom of speech, association, belief, religion and movement, and the rights of refugees are particularly vulnerable to undue suspension in the guise of anti-terrorist measures. This may sometimes occur when individuals or groups in a State express support for a political position that is in opposition to the government's position but conforms with that espoused by a group labelled as terrorist'.[18]

Koufa described how states adopted anti-terrorism legislation that put groups on an official terrorist list,

> 'frequently with no analysis of the particulars of the situation or the nature of the group. Those groups and others espousing similar views but uninvolved with the groups concerned may face severe consequences. (...) judicial proceedings to challenge this false labelling or to defend a person charged with an offence under such anti-terrorism legislation may leave room for serious negation of a wide range of procedural rights'. [19]

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[13] European Council Framework Decision of 13 June 2002 on combating terrorism, 2002/475/JHA, Article 2(b)

[14] Idem, Article 4.

[15] European Council Framework Decision 2008/919/JHA of 28 November, Article 3.

[16] See also preamble 1, in which the EU stressed that it's founded on the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms. It is based on the principle of democracy and the principle of the rule of law, principles which are common to the member states.

[17] United Nations Office of the High Commissioner for Human Rights, *Digest of jurisprudence of the United Nations and regional organizations on the protection of human rights while countering terrorism,* 2002, p.6

[18] UN Sub-Commission on Human Rights, *Progress report prepared by Ms. Kalliopi K. Koufa,*

Special Rapporteur, E/CN.4/Sub.2/2001/31, p.110

[19] ibid p. 111

In effect, Koufa distinguished between the direct and indirect impact of counter-terrorism measures on human rights. The direct impact of counter-terrorism measures could be witnessed most clearly in the observance of the rights of terrorist suspects in the criminal justice system. Terrorist suspects could be detained for longer periods of time without having access to a lawyer, or before being promptly brought in front of a judge. In some countries secret evidence could be introduced against the defendant, which the defendant would find hard to challenge. The direct impact of counter-terrorism measures could not only be found in the criminal justice system, but also in the more flexible treatment of non-national terrorist suspects, who could be subject to extraordinary detention procedures (such as administrative detention or control orders) and looser expulsion or deportation measures, even to such an extent that some countries seemed to circumvent their *non-refoulement* obligations. The rapporteur also commented on the indirect impact of counter-terrorism measures, noting for instance that 'the orchestrated denouncing of certain groups' or undue 'fear campaigns' by state actors against certain groups leads to 'weakened resistance to overly harsh anti-terrorism measures'. As a result, this could lead to 'generalized racism and religious intolerance'.[20]

This section will focus on three (relatively) new counter-terrorism measures that have been adopted by European states since 9/11, the direct human rights impact of which have subsequently been reviewed by the European Court of Human Rights: the use of terrorist listings, public provocation laws, and the use of diplomatic assurances. The focus on these measures complements the future deliverables on counter-terrorism financing and increased border control measures in the other work packages of SECILE.[21] The distinction between a direct and indirect impact of counter-terrorism measures is useful for the purposes of this paper. Initially, we wanted to focus on those counter-terrorism measures where the European Court of Human Rights has made statements about the (societal) 'impact' of counter-terrorism measures, but an extensive analysis of case-law of the Court (and other subsidiary bodies) made it clear that these subsidiary bodies rarely make comments about the indirect impact of a given measure, but instead focus on the more narrow impact of a specific counter-terrorism measure on the (procedural) dimension of a specific human right.

2.1 Terrorist listings

Since the adoption of UN Resolution 1373, many individuals and organisations have been put on terrorist 'blacklists', which have been created by international and regional organisations, and on the national level. In July 2013, the UN's Al-Qaida Sanctions List consisted of 224 individuals and 64 entities;[22] the EU's own terrorist list consists of 11 persons and 26 entities.[23] The UK's consolidated list of financial sanctions targets consists of 33 names, and 28 entities as of July 2013.[24] The individuals and members of these organisations typically not only face restrictions on their financial transactions but also on their freedom of movement. From the outset, the listing practice and procedure has been controversial, and many organisations and academics have criticized the lack of due-process guarantees in the listing procedure, notably the lack of an effective complaint mechanism, the political nature of the listing decision and the open-ended nature of the listing decision. The Parliamentary Assembly of the Council of Europe found in 2007 that,

[20] ibid p.118.

[21] Work Package 4, SECILE.

[22] United Nations Security Council Committee, *The List established and maintained by the 1267 Committee with respect to individuals, groups, undertakings and other entities associated with Al-Qaida* available at: http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml

[23] EU Council Implementing Regulation (EU) No 714/2013 of 25 July 2013, *Implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and repealing Implementing Regulation (EU) No 1169/2012,*

[24] Consolidated list of financial sanctions targets in the UK, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207736/terrorism.pdf

> 'the procedural and substantive standards currently applied by the UN Security Council and by the Council of the European Union, despite some recent improvements, in no way fulfil the minimum standards (..) and violate the fundamental principles of human rights and the rule of law.
>
> Concerning procedure, it must be noted and strongly deplored that even the members of the committee deciding on the blacklisting of an individual are not fully informed of the reasons for a request put forward by one member. The person or group concerned is usually neither informed of the request, nor given the possibility to be heard, nor even necessarily informed about the decision taken – until he or she first attempts to cross a border or use a bank account. There are no procedures for an independent review of decisions taken or for compensation for infringements of rights. Such a procedure is totally arbitrary and has no credibility whatsoever. Similarly, substantive criteria for the imposition of targeted sanctions are at the same time wide and vague, and sanctions can be imposed on the basis of mere suspicions. This is a deplorable situation, and breaches human rights and fundamental freedoms.'[25]

The practice of terrorist listings has also been denounced for its broader impact on the rule of law. The European Center for Constitutional and Human Rights has pointed to the broader impact of the listings practice, which includes the 'externalisation and expansion of (unaccountable) executive powers'.[26] Essentially, it is claimed that states have deliberately circumvented the evidentiary and procedural requirements of the criminal justice system in exchange for 'easier' administrative law measures, which face less judicial and democratic control. This practice also allows states to easily criminalize and delegitimize popular resistance movements, which in turn has impacted the work of international development organisations and conflict resolution processes.[27] Norway withdrew its support for the EU's own terrorist list because its continued alignment with the list could 'cause difficulties for Norway in its role as neutral facilitator in certain peace processes. Norway's role could become difficult if one of the parties involved was included on the EU list, and the opportunities for contact were thus restricted'.[28]

Last, but not least, the lists also have a direct and indirect impact on the human rights of third parties, particularly female family members. According to the UN Special Rapporteur on the protection of human rights while countering terrorism in 2009, listings 'directly impact women, who, for example may have their bank accounts separately monitored and experience limits on their normal family life through conditions such as those that restrict who can enter the family home.'[29]

This last impact was indirectly addressed by the European Court of Human Rights in an important case lodged by Mr. Youssef Nada, who had been put on the United Nations Sanctions Committee's list in 2001. Switzerland implemented the sanctions regime, and applied an entry and transit ban to all individuals put on the list. Nada lived in Campione d'Italia, an Italian enclave of about 1.6 sq. km surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by Lake Lugano. Nada complained that the travel ban had breached his Article 8 right to 'respect for his private life, including his professional life, and his family life'. He contended that this ban had prevented him from seeing his doctors in Italy or Switzerland, and from visiting his friends and family, including for important events such as funerals or weddings. He further claimed that the

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[25] United Nations Security Council and European Union Blacklists, Resolution 1597 (2008)

[26] Hayes, B. and Sullivan, G. *BLACKLISTED: Targeted sanctions, preemptive security and fundamental rights* (December 2010) p.79, ECCHR, available at http://www.statewatch.org/news/2010/dec/eu-ecchr-blacklisted-report.pdf

[27] ibid, p.89

[28] ibid

[29] UN General Assembly, *Protection of human rights and fundamental freedoms while countering terrorism: note / by the Secretary-General*, 3 August 2009, A/64/211, para. 16

addition of his name to the list annexed to the Taliban Ordinance had impinged his honour and reputation.[30] In September 2009 Nada was delisted.

The Court found that Switzerland enjoyed some 'limited, but nevertheless real' latitude in implementing the Security Council resolution. [31] In assessing the necessity of the interference with Nada's right to private life, the Court was again 'prepared to take account of the fact that the threat of terrorism was particularly serious at the time of the adoption - between 1999 and 2002 - of the resolutions prescribing those sanctions. That is unequivocally shown by both the wording of the resolutions and the context in which they were adopted'.[32] While the Court did not go into whether the listing amounted to a criminal charge given the severity of the sanction, it did stress 'maintaining or even reinforcement of those measures over the years must be explained and justified convincingly'.[33]

After pointing out that investigations conducted by the Swiss and Italian authorities concluded in 2005 that suspicions about Nada's participation in terrorist activities were clearly unfounded, the Court was 'surprised' that the Swiss authorities only informed the Sanctions Committee in 2009 of this decision. The Court found that 'a more prompt communication of the investigative authorities' conclusions might have led to the deletion of the applicant's name from the United Nations list at an earlier stage, thereby considerably reducing the period of time in which he was subjected to the restrictions of his rights under Article 8'. The Court stressed that it was important in the present case to consider the measures that the national authorities actually took, or sought to take, in response to the applicant's very specific situation.

> 'In this connection, the Court considers in particular that the Swiss authorities did not sufficiently take into account the realities of the case, especially the unique geographical situation of Campione d'Italia, the considerable duration of the measures imposed or the applicant's nationality, age and health. It further finds that the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order should have allowed some alleviation of the sanctions regime applicable to the applicant, having regard to those realities, in order to avoid interference with his private and family life, without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein'.[34]

In the concurring opinion of Judges Bratza, Nicolaou And Yudkivska, the judges stressed that the impact of the listing was indisputably serious and Switzerland 'was required to take all such other steps as were reasonably open to them to bring about a change in the regime so as to reduce so far as possible its serious impact on the private and family life of the applicant'.[35]

The European Court of Human Rights did not denounce the listings practice as such, nor the long term impact of the use of the terrorist listing, but instead focused solely on the direct impact of the listing on Mr. Nada and his family.

2.2 Public provocation laws

European counter-terrorism legislation increasingly allows law enforcement agencies to take a more pre-emptive approach in order to counter terrorist threats. A crucial element to this has been the creation of inchoate offences such as incitement, provocation of terrorist activities or aiding and abetting terrorist suspects. Within the EU, the original 2002 Council Framework Decision on

[30] ECHR Case of *Nada v. Switzerland*, 10593/08 - HEJUD [2012] ECHR 1691, par. 146, (12 September 2012)

[31] ibid, para..180.
[32] ibid, para.186.
[33] ibid para..186.
[34] ibid para.195.
[35] ibid (Joint Concurring Opinion Of Judges Bratza, Nicolaou And Yudkivska) para.10.

combatting terrorism included a rather vague call for states to take necessary measures to ensure that incitement to terrorist acts was made punishable.[36] Similarly, the UN Security Council called upon states to 'prohibit by law incitement to commit a terrorist act or acts'.[37] The EU tried to clarify the need to criminalize incitement by including a more detailed 'public provocation' offence, in which it defined provocation as:

> The distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.[38]

Many organisations have criticized the wording of incitement provisions in general, and the EU definition in particular.[39] Some European countries adopted laws that criminalize the public expression of praise, support or justification of terrorism and/or terrorist acts.[40] Spain, for instance, has criminalized the 'praising or justification, through any means of public expression or broadcasting' of terrorist offences.[41] The UN Special Rapporteur on the protection of human rights while countering terrorism in criticising the definition concluded that

> 'Despite assurances from the judicial authorities that this provision must be narrowly interpreted and requires acts of a concrete, non-symbolic and public character, the Special Rapporteur takes the view that the vague term of 'glorification' must not be used to restrict expression, and that any criminalization relating to the incitement to terrorism should include the requirements of an intent to incite the commission of a terrorist offence, as well as the existence of an actual risk that such an offence will be committed as a consequence'.[42]

The UK's 2006 Terrorism Act provided for similar 'glorification' offences that 'intend members of the public to be 'directly or indirectly encouraged or otherwise induced (to terrorism)… or (ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced. The act then clarifies that this provision includes 'every statement which – (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences'.[43]

The International Commission of Jurists has correctly pointed out that such provisions weaken the causal link normally required in law between the original speech (or other forms of expression) and

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[36] Article 4.1, Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) (OJ L 164, 22.6.2002, p. 3)
[37] United Nations Security Council Resolution 1624 (2005) 1(a)
[38] Art 3(1)a, 2008 Council Framework Decision. This wording is identical to Article 5 of the Council of Europe Convention on the Prevention of Terrorism. While the UN never defined 'incitement' in a subsequent resolution, the Secretary General defined incitement to terrorism as 'a direct call to engage in terrorism, with the intention that this will promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring'. UN Doc. A/63/337 (28 August 2008) at 61. This definition has since then been adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression. Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (28 December 2005), available at http://www.osce.org/documents/rfm/2005/10/26809_en.pdf
[39] See for instance: Banisar, D. *Speaking of terror: A survey of the effects of counter-terrorism legislation on freedom of the media in Europe* Media and Information Society Division Directorate General of Human Rights and Legal Affairs, Council of Europe, November 2008, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/SpeakingOfTerror_en.pdf
[40] Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism, available at http://conventions.coe.int/Treaty/EN/Reports/Html/196.htm p. 12.
[41] Article 578 of the Spanish Penal Code.
[42] Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/10/3/Add.2, at par.11
[43] UK Terrorism Act 2006, section 1. For more information on the UK see I. Cram, *Terror and the War on Dissent: Freedom of Expression in the Age of Al-Qaeda*. Springer, Dordrecht, (2009)

the risk that criminal acts may be committed.[44] Such wide-ranging laws can have a substantial impact on legitimate political debate, 'particularly within immigrant or minority communities'.[45] The following statement of the Islamic Human Rights Commission at the ICJ's EJP hearing was telling:

> 'Certain statements made by Muslims will be regarded as 'glorification' due to its delivery to a Muslim audience; similar comments made by members of other communities will not be held to the same standard'.[46]

Incitement laws also have an impact on the ability of journalists to gather and disseminate information. Under the Council of Europe Convention on the Prevention of Terrorism, states are obliged to criminalize the distribution or otherwise making available of a message to the public advocating terrorist offence, and notes that 'whether this is done directly or indirectly is irrelevant for the application of this provision'.[47] It is easy to see how such laws could be abused. In Azerbaijan, for example, opposition editor Eynulla Fatullayev was convicted of incitement to terrorism in 2007 and sentenced to an 8½ year custodial sentence for an article opposing Azerbaijan's support of US policies relating to Iran. In particular, Fatullayev had noted that the country's continued close alliance with the US was likely to lead to Azerbaijan's involvement in a possible US-Iranian war. The author further proposed a hypothetical scenario of such a war, according to which Iran would respond by bombing a number of facilities on the territory of Azerbaijan, and he distributed a potential list of terrorist targets. A domestic court found that the publication of the article had pursued the aim of creating panic among the population and constituted a terrorist threat. Fatullayev spent four years in jail before being pardoned in May 2011.[48]

The UN Human Rights Committee has similarly expressed its concerns about 'the high number of cases in which human rights defenders, lawyers, journalists and even children are charged under the Anti-Terrorism Law for the free expression of their opinions and ideas, in particular in the context of non-violent discussions of the Kurdish issue'.[49] Article 7.2 of Turkey's anti-terrorism law is particularly broad, and allows jail sentences, for any person '*who makes propaganda in connection with' a terrorist organization.*[50] According to Turkey, these provisions were needed 'with a view to prevent gaining strength of terrorist organizations by way of propaganda'.[51]

The European Court of Human Rights has considered the impact of incitement provisions on freedom of speech in a number of cases, including the Fatullayev case above. The judgment of the Court is illustrative of its general, rather permissive, approach to incitement issues. Despite the wide application of the anti-terrorism legislation to demonstrable political speech, the Court stated that it was not its task 'to rule on the constituent elements of the offences under domestic law of terrorism and threat of terrorism, by reviewing whether the corpus delicti [i.e. the facts and circumstances constituting a crime] of 'threat of terrorism' actually arose from the applicant's

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[44] International Commission of Jurists (ICJ). 2009. *Assessing Damage, Urging Action.* Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights. (pg..129), available at: http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf
[45] ibid, pg. 130.
[46] ibid pg. 130.
[47] Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism (pg. 85) available at http://conventions.coe.int/Treaty/EN/Reports/Html/196.htm .
[48] Amnesty International (USA), 'Jailed Azerbaijani Journalist Pardoned', May 26 2011, available at: http://www.amnestyusa.org/our-work/latest-victories/jailed-azerbaijani-journalist-pardoned
[49] UN Human Rights Committee, Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session, 15 October to 2 November 2012, UN Doc. CCPR/C/TUR/CO/1, par.16
[50] Article 7.2 Turkish Counter-terrorism law no. 3713.
[51] UN Human Rights Committee, Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session, 15 October to 2 November 2012, UN Doc. CCPR/C/TUR/CO/1, at p.14

actions'.[52] Instead, the Court's task is 'merely to review under Article 10 the decisions they delivered pursuant to their power of appreciation'.[53]

The European Court of Human Rights has dealt with glorification-laws in two cases. In *Leroy v. France* (which will be dealt with more in detail in section 3.2 below), the Court agreed with a local court in Pau that a cartoon that portrayed the Twin Towers with a caption that parodied the advertising slogan of Sony, 'We have all dreamt of it... Hamas did it', amounted to 'the support and glorification of the violent destruction of the United States'.[54] The Court in Pau had held that:

> 'by making a direct allusion to the massive attacks on Manhattan, by attributing these attacks to a well-known terrorist organisation and by idealising this lethal project through the use of the verb 'to dream', [thus] unequivocally praising an act of death, the cartoonist justifies the use of terrorism, identifies himself through his use of the first person plural ('We') with this method of destruction, which is presented as the culmination of a dream and, finally, indirectly encourages the potential reader to evaluate positively the successful commission of a criminal act.'

Interestingly, the French government had asked the Court to dismiss the application because the glorification of terrorism would fall under Article 17 (prohibition of abuse of rights), and as such is an act aimed at the destruction of the rights and freedoms guaranteed by the European Convention.[55] One of the cases the French government referred to in this context was *Norwood v. the UK*. In this case an applicant of the British National Party came to Court to complain about the criminal proceedings against him for displaying in the window of his first-floor flat a large poster with a photograph of the Twin Towers in flame, the words 'Islam out of Britain – Protect the British People' and a symbol of a crescent and star in a prohibition sign. In this case the Court declared the application inadmissible on grounds of Article 17, because:

> 'the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14.'[56]

The Court did not go as far in Leroy, underlining that the message of the cartoon – a critique on 'US imperialism' – did not amount to a denial of the fundamental values of the Convention, in contrast with incitement to Islamophobia, for instance.[57] In the *Batasuna v. Spain* case, the Court referred to *Leroy* and the international 'concern to universally condemn justification for terrorism'[58], in order to come to the conclusion that the actions and speeches of the Basque political parties, 'taken together, give a clear picture of a model of society conceived and advocated (…) which is

[52] ECHR Case of *Fatullayev v. Azerbaijan*, 40984/07, Council of Europe: European Court of Human Rights, 22/04/2010, para. 121

[53] Ibid (para. 123-124). The court did find that the domestic courts' finding that the applicant threatened the state with terrorist acts was 'nothing but arbitrary' and that the domestic courts overstepped the margin of appreciation afforded to them for restrictions on debates on matters of public interest. ibid (par. 129):

[54] ECHR Case of *Leroy v. France*, 36109/03, Council of Europe: European Court of Human Rights, 02/10/2008 para. 43

[55] ibid at 23

[56] *Norwood v. the United Kingdom*, inadmissibility decision, 23131/03, 16/11/2004.

[57] ECHR Case of *Leroy v. France*, 36109/03, Council of Europe: European Court of Human Rights, 02/10/2008 para. 43

[58] The Court refers explicitly to 'the European Council framework decision on combating terrorism, Article 4 of which refers to incitement to terrorism, Council Common Position of 27 December 2001 on the fight against terrorism – adopted soon after the attacks of September 11, it obliges states to take measures to suppress 'active and passive support' to terrorist organisations and individuals – Resolution 1308 (2002) of the Parliamentary Assembly of the Council of Europe on restrictions concerning political parties in the member states of the Council of Europe, and the Council of Europe Convention for the Prevention of Terrorism, which came into force on 1 June 2007 and was signed and ratified by Spain. Article 5 of that Convention provides for 'public provocation to commit a terrorist offence' to be defined as an offence'. Herri Batasuna and *Batasuna v. Spain* 25803/04 25817/04, 30/06/2009, para. 90.

incompatible with the concept of a 'democratic society'.[59] The court noted that Batasuna's conduct[60]

> 'bears a strong resemblance to explicit support for violence and the commendation of people seemingly linked to terrorism. It can also be considered to be capable of provoking social conflict between supporters of the applicant parties and other political organisations, in particular those of the Basque country. In that connection, the Court reiterates that in the actions and speeches to which the Supreme Court referred, the members and leaders of the applicant parties had not ruled out the use of force with a view to achieving their aims. In those circumstances, the Court considers that the national courts sufficiently established that the climate of confrontation created by the applicant parties risked provoking intense reactions in society capable of disrupting public order, as has been the case in the past.'[61]

In neither case did the Court address the compatibility of the criminalization of glorification of terrorism *per se* with the European Convention on Human Rights; it instead reviewed only whether convictions on the grounds of the glorification of terrorism were compatible with freedom of expression.

2.3 Diplomatic assurances

In May 2007, the interior ministers of France, Germany, Italy, Poland, Spain and the United Kingdom[62] discussed the difficulties faced by states in seeking to implement an 'effective expulsion policy', which was defined as 'the need to protect national security and the human rights of those who pose a threat'.

> 'To that aim, they decided to analyse better the different mechanisms that exist, including a case by case approach, diplomatic contacts or assurances, that could be useful under certain circumstances for promoting, in repatriation states, pattern of conduct compliant with the international obligations as to the safeguard of human rights'.[63]

This practice of seeking 'diplomatic assurances' in order to be able to deport foreign terrorist suspects to countries with dubious human rights records, even where such a person might face a real risk of being subjected to treatment contrary to Article 3 of the European Convention, has been

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[59] ibid, para. 91

[60] The Spanish Supreme Court had stated in particular, that during a demonstration organised by Batasuna and led by the party leaders, 'not only had slogans in support of ETA prisoners been heard, but also threatening expressions such as 'borroka da bide bakarra' (struggle is the only way), 'zuek faxistak zarete terroristak' (you, the fascists, are the real terrorists) or 'gora ETA militarra' (long live ETA militar)'. The Court notes further that in an interview with the newspaper Egunkaria on 23 August 2002, a Batasuna representative in the Basque parliament had stated that 'ETA did not support armed struggle for the fun of it, but that [it was] an organisation conscious of the need to use every means possible to confront the state'. Lastly, the Court notes the attendance of a Batasuna councillor at a pro-ETA demonstration, the fact that ETA terrorists had been made honorary citizens of towns run by the applicant parties and that the anagram of the organisation 'Gestoras Pro-Amnistía', declared illegal by central investigating judge no. 5 at the Audiencia Nacional and included on the European list of terrorist organisations (Council Common Position 2001/931/PESC), had been posted on the website of the second applicant party. Ibid para. 85.

[61] ibid para. 86.

[62] The United Kingdom has been particularly active in promoting this practice, not only by concluding agreements that include the use of such diplomatic assurances with countries such as Algeria, Egypt, Ethiopia, India, Jordan, Lebanon, Libya, and Russia (Amnesty International, *Dangerous Deals: Europe's Reliance on Diplomatic Assurances Against Torture* (2010), available at: http://www.amnesty.org/en/library/asset/EUR01/012/2010/en/608f128b-9eac-4e2f-b73b-6d747a8cbaed/eur010122010en.pdf) but also at the European Court of Human Rights as a respondent state (in ECHR Case of *Chahal v. The United Kingdom,* Appl No. 22414/93, Council of Europe: European Court of Human Rights, 15 November 1996 and ECHR Case of *Othman (Abu Qatada) v. The United Kingdom,* Application No. 8139/09, Council of Europe: European Court of Human Rights, 17 January 2012) and as a third party intervener (in ECHR Case of *Saadi v. Italy*, Appl. No 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008)

); and in a number of intergovernmental forums such as the G6-meeting, mentioned above.

[63] Conclusion of G-6 Meetings in Venice 11-12 May 2007, Italian Interior Ministry (12/05/07) available at: http://www.statewatch.org/news/2007/may/05venice-g7-may-2007.htm

explicitly defended by the United Kingdom, Lithuania, Portugal, and Slovakia in the *Ramzy v. Netherlands* case at the European Court of Human Rights, and by Italy in the *Saadi v. Italy* case. The governments invited the Court in *Ramzy* to consider whether

> 'recognising the increased and major threat posed by international terrorism, it is appropriate or justified to maintain the principle that (...) there is only a single relevant issue, namely whether or not substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to treatment contrary to Article 3 in the receiving State. On that basis, it can never be appropriate even to take into account as relevant the fact, nature or degree of the national security threat posed by an individual'.[64]

The governments stated that there needed to be a new balance that afforded 'proper weight to the fundamental rights of the citizens of contracting states who are threatened by terrorism'.[65] The Danish government did not join this initiative, but in 2009 its Ministry for Refugees, Immigrants and Integration formulated a set of requirements to be fulfilled in order for diplomatic assurances to be deemed reliable and sufficient.[66]

The practice of diplomatic assurances has been widely denounced by human rights organisations and international bodies. These bodies argue against this 'rebalancing' of rights not only because the measure has a direct impact on the suspect who could be subjected to torture or inhuman and degrading treatment, but also because this practice has a potentially devastating long term impact on the absolute nature of the prohibition against torture. Louise Arbour, speaking at the time in her capacity as United Nations High Commissioner for Human Rights, described diplomatic assurances as having an 'acutely corrosive effect on the global ban on torture and cruel, inhuman or degrading treatment',[67] while in 2005 a group of human rights organisations stated that 'the use of such assurances violates the absolute prohibition against torture and other ill-treatment and is eroding a fundamental principle of international human rights law'.[68]

The European Court of Human Rights has recognized that a state is allowed to deport non-nationals whom they consider to be threats to national security. The European Convention of Human Rights even allows states to apply more abbreviated procedures in case of deportation on

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[64] ECHR Case of *Ramzy vs Netherlands* in The European Court of Human Rights, Observations of the Governments of Lithuania, Portugal, Slovakia, and the United Kingdom, paragraph (hereafter, para.) 1, available at: http://www.redress.org/Government_intervenors_observations_in_Ramzy_case%20_21November.pdf

[65] ibid

[66] Betænkning om administrativ udvisning af udlændinge, der må anses for en fare for statens sikkerhed, no. 1505 of February 2009 (Report on administrative expulsion of foreigners considered to constitute a threat/danger to national security). Quoted in Amnesty International, *Dangerous Deals: Europe's Reliance on Diplomatic Assurances Against Torture* (2010) available at: http://www.amnesty.org.uk/uploads/documents/doc_20299.pdf, 2010 at 21: 'The committee formulated a set of requirements that it considered would need to be fulfilled in order for diplomatic assurances to be deemed reliable and sufficient: 1) The assurances could not be a broad declaration of intention, but rather a very precisely worded legal agreement as to the treatment of persons on return to their country of origin; 2) Provision would need to be made in the assurances clearly stipulating the right of the deporting/expelling state to monitor through direct access the circumstances, living conditions, and well-being of the deportee; and 3) Clear provisions would need to be included in the assurances regarding the consequences of any violation of the diplomatic assurances with respect to the harm/human rights violations suffered by a returned person'.

[67] Louise Arbour, High Commissioner for Human Rights, Human Rights Day statement – On Terrorists and Torturers ,United Nations, New York, 7 December, 2005 available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E

[68] Call for Action Against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment, Joint statement by Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human Rights, and World Organisation Against Torture, 12 May 2005, available at: http://www.statewatch.org/cia/documents/ai-hrw-joint-statement.pdf

national security grounds.[69] In the case of *Chahal v. United Kingdom*, the European Court of Human Rights made it clear that the prohibition of deportation to face treatment contrary to Article 3 is absolute.[70] In *Saadi v. Italy*, the Court explicitly rejected the balance argument of the UK and others, holding:

> 'The Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole. Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule.[71]

However, the Court did not explicitly reject the practice of diplomatic assurances as such, but noted that they would assess whether such assurances provided 'in their practical application' a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention. The weight to be given to assurances from the receiving State depended, 'in each case, on the circumstances obtaining at the material time'.[72] The Court had already found that the extradition of applicants based on an assurance by the Uzbek government that they would not be subjected to torture, did not violate Article 3.[73] In 2012, the Court offered a more detailed ruling on the practice of diplomatic assurances. In the controversial case of *Othman v. UK*, the Court listed eleven factors it takes into account to assess the quality of assurances given and whether, in light of the receiving state's practices, they can be relied upon: (1) whether the terms of the assurances have been disclosed to the Court, (2) whether the assurances are specific or are general and vague, (3) who has given the assurances and whether that person can bind the receiving State, (4) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them, (5) whether the assurances concern treatment which is legal or illegal in the receiving State, (6) whether they have been given by a contracting State, (7) the length and strength of bilateral relations between the sending and receiving states, including receiving State's record in abiding by similar assurances, (8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers, (9) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible, (10) whether the applicant has previously been ill-treated in the receiving State, (11) whether the reliability of the assurances has been examined by the domestic courts of the

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[69] Council of Europe , Convention for the Protection of Human Rights and Fundamental Freedoms Article 1, Protocol No.7 as amended by Protocol No. 11 (1984)

[70] 'Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. . . . In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration'

ECHR Case of *Chahal v. The United Kingdom,* Appl No. 22414/93 par.79-80, Council of Europe: European Court of Human Rights, 15 November 1996

[71] ECHR Case of *Saadi v. Italy*, Appl. No 37201/06, par. 138., Council of Europe: European Court of Human Rights, 28 February 2008

[72] ibid, para. 148

[73] ECHR Case of *Mamatkulov and Askarov v. Turkey*, 46827/99 and 46951/99, par. 72, Council of Europe: European Court of Human Rights, 4 February 2005

sending/contracting State.[74]

The Court repeated that it 'never laid down an absolute rule that a State which does not comply with multilateral obligations cannot be relied on to comply with bilateral assurances', and called the Court to consider that,

> the United Kingdom and Jordanian Governments have made genuine efforts to obtain and provide transparent and detailed assurances to ensure that the applicant will not be ill-treated upon return to Jordan. The product of those efforts, the MOU, is superior in both its detail and its formality to any assurances, which the Court has previously examined.[75]

While the Court made a clear principled statement against the abstract idea that Article 3 would apply less to non-nationals in *Saadi v. Italy*, its judgment in *Othman v. UK* demonstrates the Court's pragmatic approach to diplomatic assurances as a practical measure to address the non-refoulement obligation in concrete cases. In other words: the Court refuses the practice of a sending state delegating its responsibility for the absolute prohibition on torture to the receiving state alone, but accepts that the sending state can seek assurances from the receiving state to respect its Article 3 obligations.

2.4 Interim conclusion

Drawing on this case law, and for the purposes of this deliverable, we define 'impact' as the negative effect of a counter-terrorism measure on the protection of human rights. At the outset we distinguished between a direct and indirect negative impact. A direct negative impact of a counter-terrorism measure results in decreased (procedural) safeguards for terrorist suspects subjected to the measure(s) in question, while an indirect negative effect of a counter-terrorism measure manifests itself only over a longer period of time in that these decreased safeguards can become a standard in a non-ordinary context and as such slowly erase a particular human right.

This section highlighted the indirect, potential long-term negative impact of three particular counter-terrorism measures. These included (a) the corrosive effect of the use of terrorist listings on the ordinary criminal justice system by expanding unaccountable executive powers at the expense of the evidentiary and procedural requirements of the criminal justice system, (b) the long term impact of glorification laws on legitimate political debates especially within minority communities and (c) the corrosive effect of the practice of diplomatic assurances on the global ban on torture and cruel, inhuman or degrading treatment

Our three case-studies demonstrate that the European Court of Human Rights does not seem to take long-term negative effects of specific counter-terrorism measure into account in deciding on their lawfulness. Rather than making normative statements on specific counter-terrorism measures, the Court takes an individual, contextualized, case-by-case approach in order to determine the proportionality of a specific counter-terrorism measure as applied in the particular case before it. The Court therefore only focuses on the direct impact of a counter-terrorism measure. In hindsight, this is not entirely surprising, given the fact that the Court has given a rather large margin of appreciation to states' counter-terrorist measures, stressing on numerous occasions that it is aware that states face 'particular challenges posed by terrorism and terrorist violence'.[76] Thus, the breadth of this margin varies depending on a number of factors including the nature of the Convention right in issue, its importance for the individual, and the nature of the interference.

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[74] ECHR Case of *Othman (Abu Qatada) v. The United Kingdom,* Application No. 8139/09, par. 189, Council of Europe: European Court of Human Rights, 17 January 2012

[75] ibid para.194.

[76] See: ECHR Case of *Brogan and Others v. the United Kingdom*, 29 November 1988, § 61, Series A no. 145-B; ECHR Case of *Öcalan v. Turkey* [GC], no. 46221/99, §§ 104, 192-196, ECHR 2005-IV; *Ramirez Sanchez v. France* [GC], no. 59450/00, §§ 115-116, ECHR 2006-IX; and ECHR Case of *Finogenov and Others v. Russia*, cited above, § 212

Our methodological choices affect the scope of the conclusions of this chapter. It could be argued that national courts would be less deferential to governments in anti-terrorism cases because they are not subsidiary courts.[77] This remains a subject for future comparative law scholarship, and we hope that this paper can be used as a starting point to investigate this hypothesis.

3. Assessing the effectiveness of counter-terrorism legislation

Our working-definition of 'impact' was a negative definition in the sense that it was partly defined in opposition to 'effectiveness'. A counter-terrorism measure can be said to be effective if it is successful in producing an intended, positive result, which in this context would mean the improved prevention or prosecution of terrorist activities. Some of these measures are deliberately intended to limit directly the (procedural) rights of terrorist suspects, and are justified by governments as a necessary response to a terrorist threat. However, this justification requires that there is a reasonable relationship between the security objective to be achieved and the means used to achieve it. Assessing the effectiveness of a specific measure can therefore influence the necessity, and hence the legality, test applied by the European Court of Human Rights. This section will analyse the extent to which the European Court of Human Rights has taken into account considerations of effectiveness in determining the legality of a counter-terrorism measure.

From the outset it is important to note that the Court makes a distinction between actions that were taken when a state of emergency was declared, and actions undertaken in 'ordinary' times. Article 15.1 of the European Convention of Human Rights allows states to derogate from a number of obligations under the Convention 'in time of war or other public emergency threatening the life of the nation'. Not every disturbance or catastrophe qualifies as such an emergency; the term refers to 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed' [78] insofar as normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are deemed to be 'plainly inadequate'.[79] The purpose of Article 15 is to permit states to take derogating measures to protect their populations from 'future risks'.[80] The Court has ruled that a major terrorist attack – and even a terrorist threat – would allow a state to derogate from a number of rights under the Convention. In this context, it is interesting to note that the European Court of Human Rights has ruled that a terrorist threat does not have to be 'imminent' and can exist for many years.[81] Contrary to the findings of the UN Human Rights Committee for instance, the Court's case-law has never explicitly incorporated the requirement that the emergency be temporary. The Court has stated that the applicability of a derogation regime is limited to the geographical area that is explicitly named in the notice of derogation. [82]

In a way, this derogation mechanism suggests an inverse relationship between impact and effectiveness: a country can intentionally decrease legal safeguards for terrorist suspects in order to allow for an effective investigation and/or prosecution. This does not mean however that all bets are off; such 'effective' measures can only be taken 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. These provisions act as safeguards to prevent emergency measures from taking place in a legal vacuum. Last but not least, Article 15.2 explicitly states that no derogations can be made from Articles 2, 3, 4.1 and 7. Interrogation techniques that amount to torture or degrading

[77] A similar claim has been made in de Londras, F., *Detention in the 'War on Terror': Can Human Rights Fight Back?* (2011, Cambridge; Cambridge University Press),Chapters 5-6.
[78] ECHR Case of *Lawless v. United Kingdom Application no.* 332/57*, Council of Europe: European Court of Human Rights,* 1 July 1961*, para. 28.*
[79] ECHR Greek Case (1969) 12 YB 1, § 153
[80] ECHR Case of *A and Others v. United Kingdom Application no. 3455/05, Council of Europe: European Court of Human Rights, 19 February 2009,* para. 177.
[81] ECHR Case of *A and Others v. United Kingdom Application no. 3455/05, Council of Europe: European Court of Human Rights, 19 February 2009, para. 177-178*

[82] ECHR Case of *Sakik and others v. Turkey* (87/1996/67/897-902) 26 November 1997, para. 39.

treatment are therefore never allowed, even in times of emergencies. For instance, between August 1971 and October 1971 twelve IRA-members were subjected to five interrogation techniques by UK security forces, which 'led to the obtaining of a considerable quantity of intelligence information, including the identification of 700 members of both IRA factions and the discovery of individual responsibility for about 85 previously unexplained criminal incidents,'.[83] The Court ruled that the five techniques constituted 'inhuman and degrading treatment' but not torture., and reiterated that the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct or in the event of a public emergency threatening the life of the nation.[84]

While many European countries have faced serious terrorist threats in the past decades,[85] it is interesting to note that only three countries seem to have derogated from the European Convention of Human Rights by referring to a terrorist threat: the United Kingdom, Ireland and Turkey.

In the following section, we are interested in how states have explained the effectiveness of these derogating measures, and whether the European Court of Human Rights has taken the perceived effectiveness of these measures into account when determining the legality of such a derogation measure. In section 3.2, we will do the same exercise but then in determining the legality of a counter-terrorism measure in 'ordinary' times. For this last section we analysed around 50 cases the court deemed to be most important in its fact sheet on terrorism cases.[86]

3.1 Measures taken in times of emergency

3.1.1 Ireland

By letter of 20th July 1957 the Irish Minister for External Affairs informed the Secretary-General of the Council of Europe that it derogated from the obligations of the Convention –

without explicitly mentioning any Articles – after it adopted a law that conferred on Ministers of State special powers of detention without trial. The Irish Government expressly stated that, 'the detention of persons under the Act is considered necessary to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution'.[87] The European Commission on human rights found at the time that the situation in Ireland could be characterised as a 'public emergency threatening the life of the nation' because

> 'in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957'.[88]

The Commission assessed the necessity of the administrative detention regime in light of possible alternatives that Ireland could have taken to address this emergency, with or without derogating from the European Convention, such as the application of the ordinary criminal law, the institution of special criminal courts of the type provided for by the Offences against the State Act, 1939, or of

[83] ECHR Case of *Ireland v. United Kingdom,(5310/71,) 18 January 1978,* para 98.
[84] ECHR Case of *Ireland v. United Kingdom,(5310/71,) 18 January 1978,* para 163. See also A & Others vs. UK, *(3455/05), 19 February 2009,* para. 126.
[85] See for instance the kidnappings and bombings committed by the Rote Armee Fraktion in Germany, the Red Brigades in Italy or the CCC in Belgium in the 1970s and 1980s, the CSPPA in France in 1986, or the bombings committed by ETA in Spain and the GIA in France in the mid-1990s.
[86] See http://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf
[87] ECHR Case of *Lawless v. Ireland* (para. 16 and 24) (332/57) 1 July 1961, para. 16 and 24.

[88] ibid para. 28.

military courts, the sealing of the border between the Republic of Ireland and Northern Ireland.[89] According to the Court, these alternatives would not have made it possible 'to deal with the situation existing in Ireland in 1957'. The administrative detention appeared therefore, 'despite its gravity, to be a measure required by the circumstances'.[90] The Court also noted the existence of safeguards in Irish law designed to prevent abuses in the operation of the system of administrative detention.

(1) The act was subject to constant supervision by Parliament, which not only received precise details of its enforcement at regular intervals but could also at any time, by a Resolution, annul the Government's Proclamation which had brought the Act into force;
(2) The Act provided for the establishment of a 'Detention Commission' made up of three members, which the Government did in fact set up, the members being an officer of the Defence Forces and two judges; any person detained under this Act could refer his case to that Commission whose opinion, if favourable to the release of the person concerned, was binding upon the Government;
(3) The ordinary courts could themselves compel the Detention Commission to carry out its functions;
(4) Immediately after the Proclamation which brought the power of detention into force, the Government publicly announced that it would release any person detained who gave an undertaking to respect the Constitution and the Law and not to engage in any illegal activity, and that the wording of this undertaking was later altered to one which merely required that the person detained would undertake to observe the law and refrain from activities contrary to the 1940 Act. The persons arrested were informed immediately after their arrest that they would be released following the undertaking in question. In a democratic country such as Ireland the existence of this guarantee of release given publicly by the Government constituted a legal obligation on the Government to release all persons who gave the undertaking.[91]

In 1962, the Irish government suspended the special detention period, pursuant to Part II of the Offences Against the State Act (1939), in response to the IRA's decision to halt its border campaign. [92]

3.1.2 The United Kingdom

In the 1970s Ireland alleged that the UK's extrajudicial detention powers in Northern Ireland were not in line with Article 5 since they failed to meet in full the requirements of Article 15. The United Kingdom had sent six notices of derogation to the Secretary-General of the Council of Europe, which enabled the UK to derogate from Article 5 in order to effect what the Court called 'extrajudicial deprivation of liberty' in three basic categories: initial arrest for interrogation; detention for further interrogation and preventive detention.[93] The Court accepted that the crisis in Northern Ireland was a public emergency threatening the life of nation. This was 'perfectly clear', according to the Court, given the statistics provided by the UK government, which claimed that 'over 1,100 people had been killed, over 11,500 injured and more than £140,000,000 worth of property destroyed during the recent troubles in Northern Ireland'.[94]

From 9 August 1971 until 7 November 1972 the authorities in Northern Ireland decided to introduce four extrajudicial detention powers: (i) arrest for interrogation purposes during 48 hours (under

[89] ibid para. 35-36
[90] ibid para. 36.
[91] ibid para. 37
[92] Report of the Committee to Review the Offences against the State Acts 1930–1998 (the Hederman Report), available at: http://www.justice.ie/en/JELR/Pages/Review_of_the_Offences_against_the_State_Acts
[93] ECHR Case of *Ireland v. United Kingdom,(5310/71,) 18 January 1978,* para. 78-79.

[94] ibid, para. 12.

Regulation 10); (ii) arrest and remand in custody (under Regulation 11 (1)); (iii) detention of an arrested person (under Regulation 11 (2)); and (iv) internment (under Regulation 12 (1)).[95]

The UK government had quoted three principal reasons to introduce these measures:

> 'Firstly, the authorities took the view that the normal procedures of investigation and criminal prosecution had become inadequate to deal with IRA terrorists; it was considered that the ordinary criminal courts could no longer be relied on as the sole process of law for restoring peace and order. The second reason given, which was closely related to the first, was the widespread intimidation of the population. Such intimidation often made it impossible to obtain sufficient evidence to secure a criminal conviction against a known IRA terrorist in the absence of an admissible confession or of police or army testimony. Furthermore, the conduct of police enquiries was seriously hampered by the grip the IRA had on certain so-called 'no-go' areas, that is Catholic strongholds where terrorists, unlike the police, could operate in comparative safety. Thirdly, the ease of escape across the territorial border between Northern Ireland and the Republic of Ireland presented difficulties of control. In addition to the three 'security' reasons, there was, in the judgment of both the Northern Ireland Government and the United Kingdom Government, no hope of winning over the terrorists by political means, the reform programme initiated in 1969 having failed to prevent continuing violence. The authorities therefore came to the conclusion that it was necessary to introduce a policy of detention and internment of persons suspected of serious terrorist activities but against whom sufficient evidence could not be laid in court. This policy was regarded as a temporary measure primarily aimed at breaking the influence of the IRA.' [96]

The Court agreed with the UK that it was 'reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for'.[97] The Court submitted that the limits of its review powers are 'particularly apparent' where Article 15 is concerned.

> 'By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 (Art. 15-1) leaves those authorities a wide margin of appreciation'.[98]

The Court judges only whether states have gone beyond the extent strictly required by the exigencies of the crisis. This type of European supervision does not include an assessment of the effectiveness of a counter-terrorism measure. In this case, statistics proved that the extrajudicial deprivation of liberty had been ineffectual. The policy introduced on the 9th of August 1971 not only failed to put a brake on terrorism, but actually aligned with an increase in terrorist activity.. From August 1971 until 30 March 1975 there had been in Northern Ireland 1,130 bomb explosions and well over 2,000 shooting incidents. 158 civilians, 58 soldiers and 17 policemen had been killed, and 2,505 civilians, 306 soldiers and 107 RUC members injured.[99] Consequently, the British Government abandoned the policy. According to the Irish government, this proved 'that extrajudicial deprivation of liberty was not an absolute necessity'.[100]

The Court's response to this claim is its most clear statement on how it assesses the effectiveness of counter-terrorism measures:

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[95] ibid, para 81-84.
[96] ibid, para. 36.
[97] Ibid, para. 212.
[98] Ibid, para. 207.
[99] Ibid, para. 42, 44, 47-48.
[100] Ibid, para. 114.

> The Court cannot accept this argument. It is certainly not the Court's function to substitute for the British Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. The Court must do no more than review the lawfulness, under the Convention, of the measures adopted by that Government from 9 August 1971 onwards. For this purpose the Court must arrive at its decision in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied. Adopting, as it must, this approach, the Court accepts that the limits of the margin of appreciation left to the Contracting states by Article 15 para. 1 (Art. 15-1) were not overstepped by the United Kingdom when it formed the opinion that extrajudicial deprivation of liberty was necessary from August 1971 to March 1975.

The Court then specifically analysed how the UK legislation included or failed to include safeguards in the form of the availability of judicial remedies.[101] It ultimately concluded that although insufficient safeguards were initially included in the legislation, Article 15 must leave space for progressive adaptions. Since the UK constantly modified its emergency legislation to include more safeguards for individuals, it did not overstep its margin of appreciation.[102] The court is not willing to consider the effectiveness of a measure in its necessity and proportionality test, but instead considers the effectiveness of *safeguards* against the use of a measure – even if statistical evidence shows that a counter-terrorism measure has not been effective.

In 1984 the UK government had withdrawn its derogation when it arrested Brogan and others without a warrant under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984. This law allowed the Secretary of State to extend the period of arrest without a warrant for up to five days. While the derogation to Article 5 did not apply to this Act anymore, the Court held that this did not 'preclude proper account being taken of the background circumstances of the case',[103] which consisted of a situation where 'organised terrorism continued to thrive'.[104] The Court agreed with the UK that the fact that the complainants were neither charged nor brought before a court during their detention did not necessarily mean that the purpose of their detention was not in accordance with Article 5.1.c of the European Convention.

> Article 5 para. 1 (Art. 5-1-c) does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody. Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others.[105]

The Court accepted further that - *subject to the existence of adequate safeguards* – (*emphasis added*) – the context of terrorism in Northern Ireland had the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3 (Art. 5-3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer. The Court accepted that the difficulties of judicial control over decisions to arrest and detain suspected terrorists may call for 'appropriate procedural precautions',[106] but it questioned the need to dispense altogether with 'prompt judicial control'.[107] Even the legitimate aim of 'protecting the community as a whole from terrorism' was not seen by the Court as 'on its own sufficient' to interpret and apply a flexible notion of 'promptness'.

> To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word 'promptly'. An

[101] Ibid. para. 216 – 219.
[102] Ibid. para. 220.
[103] ECHR Case of *Brogan and Others v. the United Kingdom*, 29 November 1988, § 48.
[104] Ibid, at para 25.
[105] Ibid, at para 51.
[106] Ibid, at para 61.
[107] Idem.

> interpretation to this effect would import into Article 5 para. 3 (Art. 5-3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision.[108]

The decision was accompanied by 5 dissenting opinions from 10 judges (out of 19), in which much more weight was given to the exceptional nature of the situation in Northern Ireland. Judges Vilhjálmsson, Bindschedler-Robert, Gölcüklü, Matscher and Valticos stressed that,

> The nature and organisation of terrorism, the fear it inspires and the secrecy surrounding it make it difficult, having regard also to the applicable criminal procedure (which does not provide for the swift intervention of an investigating judge), to bring detainees promptly before a court.[109]

Judge Evans dissented along the same lines, arguing that the 'special factors', which underlined the provisions of the law, justified a flexible interpretation of the notion of 'promptness' in Art. 5.3. Those factors included,

> the difficulty faced by the security forces in these cases in obtaining evidence which is admissible and usable particularly in consequence of the training received by terrorists in anti-interrogation techniques, the highly sensitive nature of information on which suspicion is based in many such cases making impossible its production in court in the presence of the detained person or his legal adviser, and the extra time needed for examining and correlating evidence and for liaison with other security forces.

Judge Evans quoted statistics to justify the need for a flexible interpretation of Art. 5.3.

> The need for the exceptional powers under section 12 to which such factors give rise is supported by the statistics quoted in the same paragraph of the judgment - that in 1987, for instance, of some 83 persons detained in excess of five days, 39 were charged with serious terrorist offences during the extended period. (…) My conclusion is that the provisions in question are justified by the need to strike a fair balance in the circumstances and that they are consonant with what must also be the aim under the Convention of protecting human rights against the continuing inhumanity of terrorism in Northern Ireland.[110]

The most elaborate dissenting opinion came from Judge Martens, who argued that it was not the task of the Court to 'excessively clip the wings' of the executive, especially since

> (…) terrorism - and particularly terrorism on the scale obtaining in Northern Ireland - is the very negation of the principles the Convention stands for and should therefore be combated as vigorously as possible.

As a result,

> It seems obvious that to suppress terrorism the executive needs extraordinary powers, just as it seems obvious that Governments should to a large extent be free to choose the ways and means which they think most efficacious for combating terrorism.

Therefore, a wide margin of appreciation should be given to the actions of a country in this context in order to effectively counter terrorism. On the other hand, two judges believed that the Convention did not afford *any* margin of appreciation to the State regarding Article 5, since this

[108] Ibid, at para 62.
[109] Ibid, at p.25.
[110] Ibid, at p.32.

'would change the whole nature of this all-important provision which would then become subject to executive policy'.[111] They also quoted statistics, in order to make the point that

> the arrests in the present cases were for the purpose of interrogation at a time when there was no evidential basis for the bringing of any charge against them. No such evidence ever emerged and eventually they had to be released. That the legislation in question is used for such a purpose is amply borne out by the fact that since 1974 15,173 persons have been arrested and detained in the United Kingdom pursuant to the legislation yet less than 25% of those persons, namely 3,342, have been charged with any criminal offence arising out of the interrogation including offences totally unconnected with the original arrest and detention. Still fewer of them have been convicted of any offence of a terrorist type. The Convention embodies the presumption of innocence and thus enshrines a most fundamental human right, namely the protection of the individual against arbitrary interference by the State with his right to liberty. The circumstances of the arrest and detention in the present cases were not compatible with this right and accordingly we are of the opinion that Article 5 para. 1 (Art. 5-1) has been violated. [112]

Interestingly, the judges assessed very differently the effectiveness of the safeguards against arbitrary detentions. While two judges seemed to suggest that charging only 25% of the detainees between 1974 and 1984 amounted to an arbitrary interference by the State with the right to liberty, Judge Evans focused on the fact that 45% of those who were detained in excess of five days in 1987 were ultimately charged with serious terrorist offences during the extended period. One month after the judgment in *Brogan v. the UK*, the UK renewed its derogation from Article 5 in order to continue to be able to detain suspects for up to seven days in some cases without judicial intervention, because of the special difficulties associated with the investigation and prosecution of terrorist crime.[113] It remained the view of the UK that it is

> essential to prevent the disclosure to the detainee and his legal adviser of information on the basis of which decisions on the extension of detention are made and that, in the adversarial system of the common law, the independence of the judiciary would be compromised if judges or other judicial officers were to be involved in the granting or approval of extensions.[114]

The Court said again clearly that it is not its role to substitute 'its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other'.[115]

The Court stated that it was satisfied that enough safeguards were present against arbitrary and/or incommunicado detention, i.e. the availability of the remedy of habeas corpus, and the absolute right detainees had to consult a solicitor after 48 hours from the time of arrest.[116] Again there were dissenting opinions that questioned the effectiveness of the safeguards. Judge Walsh highlighted the fact that 'out of 1,549 persons arrested in 1990 only 30 were subsequently charged', which in his mind indicated 'a paucity of proof rather than any deficiency in the operation of the judicial function'.[117] Judge Makarczyk dissented along the same lines, saying that he would only accept the legality of the derogation if the government had been able 'to prove that extended detention without

[111] Ibid, at p.28.
[112] Ibid, at pp.28-29.
[113] ECHR Case of *Brannigan & McBride v. UK*, para. 51 (For a more detailed argument see Letter written to Secretary-General, quoted in para. 31.)
[114] Ibid, para. 58.
[115] Idem.
[116] Ibid, para 62-66.
[117] Ibid, Judge Walsh dissenting opinion, at 9.

any form of judicial control does in fact contribute both to the punishment and prevention of the crime of terrorism'.[118]

On 11 November 2001 the UK derogated from Article 5(1)(f) of the European Convention on Human Rights, which permits the detention of a person against whom action is being taken 'with a view to deportation or extradition'[119]. Part 4 of the UK's Anti-Terrorism Crime and Security Bill, which was introduced in the House of Commons one day later, set out powers which enable the detention of non-nationals suspected of being international terrorists, even where their deportation was for the time being impossible. The government argued that such a measure was needed, because in some cases, it could not deport terrorist suspects since there existed a real risk that the person would suffer treatment contrary to Article 3 of the Convention.

Doubts arose about the effectiveness of this discriminatory measure in addressing the terrorist threat, since the threat coming from UK citizens appeared to be as substantive as threats coming from foreigners.[120] When a Committee of Privy Counsellors suggested that the new powers of the 2001 bill should be applied to all persons within the UK's jurisdiction regardless of nationality the UK government answered that

> (…) such draconian powers would be difficult to justify. Experience has demonstrated the dangers of such an approach and the damage it can do to community cohesion and thus to support from all parts of the public that is so essential to countering the terrorist threat.[121]

In 2004 the House of Lords assessed Part 4 of the 2001 Act, and concluded that it did not *rationally* address the threat to security and that was a disproportionate response to that threat. The House of Lords focused *inter alia* on two effectiveness-arguments to come to this conclusion: (1) the detention scheme applied only to non-nationals suspected of international terrorism and did not address the threat which came from United Kingdom nationals who were also suspected; (2) the scheme left suspected international terrorists at liberty to leave the United Kingdom and continue their threatening activities abroad. [122] As a result, the European Court of Human Rights also focused *en passant* on the effectiveness of the measure, but only because the House of Lords had done this in its judgment.[123]

> Part 4 of the 2001 Act was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing *adequately* to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists.[124] (*emphasis added*)

The Court then further stressed that it had not been provided with any evidence, which could persuade it to overturn the conclusion of the House of Lords, that the difference in treatment was unjustified

> Indeed, the Court notes that the national courts, including SIAC, which saw both the open and the closed material, were not convinced that the threat from non-nationals was more serious than that from nationals.

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[118] Ibid, Judge Makarczyk dissenting opinion at 3
[119] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950

[120] A & Others vs. UK, *(3455/05), 19 February 2009,* para. 98.
[121] Ibid, at para 99.
[122] Ibid, at para 20-21.
[123] Ibid, at para 182: 'the Court considers that it should in principle follow the judgment of the House of Lords on the question of the proportionality of the applicants' detention, unless it can be shown that the national court misinterpreted the Convention or the Court's case-law or reached a conclusion which was manifestly unreasonable.'
[124] Ibid, at para 186.

Again, the Court stressed its subsidiary role, and notes that national courts, being in direct and continuous contact with the forces of their countries, can better assess the effectiveness of a counter-terrorism measure. It will only disagree with the national court when it can be shown that the latter misinterpreted the Convention or the Court's case-law or reached a conclusion which was manifestly unreasonable.[125] Therefore, the Court, like the House of Lords, found that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals.

3.1.3 Turkey

The Court dealt in detail with the Turkish governments' justifications to derogate from Article 5 in southeast Turkey in the case of *Aksoy v. Turkey*. Mr. Aksoy, an alleged PKK member, had been detained on suspicion of aiding and abetting PKK terrorists for at least 14 days without being brought before a judge or other judicial officer. According to the Turkish government such detention was needed because

> the members of terrorist organisations were expert in withstanding interrogation, had secret support networks and access to substantial resources. A great deal of time and effort was required to secure and verify evidence in a large region confronted with a terrorist organisation that had strategic and technical support from neighbouring countries. These difficulties meant that it was impossible to provide judicial supervision during a suspect's detention in police custody.[126]

While the Court acknowledged the difficulties of a terrorist investigation, it did not comment on the effectiveness of the prolonged detention in this case. It did focus however on the absence of judicial supervision, especially since this absence left the applicant vulnerable 'not only to arbitrary interference with his right to liberty but also to torture'. The Court failed to see how judicial intervention would have an effect on the effectiveness of the investigation:

> The Government has not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable.[127]

In a similar case, *Demir and others v. Turkey*, the Court put it even more strongly:

> As to the Government's assertions about the 'thorough' and 'careful' nature of the police investigation that had to be conducted, they do not provide an answer to the central question at issue, namely for what precise reasons relating to the actual facts of the present case would judicial scrutiny of the applicants' detention have prejudiced the progress of the investigation. In respect of such lengthy periods of detention in police custody it is not sufficient to refer in a general way to the difficulties caused by terrorism and the number of people involved in the inquiries.[128]

3.2 Effectiveness of counter-terrorism measures in 'ordinary' times

The *Brogan* case discussed in section 3.1 has already demonstrated that the European Court of Human Rights takes into account the timing and location in which anti-terrorism measures are being used in order to assess their necessity, even when a state party does not derogate from the Convention. In *Leroy v. France* the Court ruled that the conviction of a cartoonist for publishing a drawing presenting 9/11 with a caption 'We have all dreamt of it... Hamas did it' in a Basque magazine was necessary in a democratic society. The Court recognized that there was an interference with freedom of expression, but this interference had to be assessed in a very specific

[125] Ibid, at para. 182.
[126] ECHR Case of Aksoy v. Turkey (21987/93) 18/12/1996, para.72
[127] ibid, para. 78.
[128] ECHR Case of *Demir and others v. Turkey* (21380/93, 21381/93, 21383/93) 23-09-1998, para. 52.

context: two days after 9/11 took place, at a time when there was 'global chaos', [129] with 'no precautions as to language, at a time when the entire world was still in a state of shock at the news'. In addition, the impact of such a message in the Basque country, 'a politically sensitive region' was not to be overlooked; the publication of the drawing had provoked a reaction that could have 'stirred up violence and suggested that it may well have affected public order in the region'.[130] One year later the Court affirmed that the dissolution of the Batasuna party [banned after it was uncovered ETA was receiving public money through the party] had been a necessary interference with Article 11 'in view of the situation that has existed in Spain for many years with regard to terrorist attacks, more particularly in the 'politically sensitive region' of the Basque Country that link (between ETA and Batasuna) may objectively be considered a threat to democracy'.[131] Equally, in the Nada case, the Court was 'prepared to take account of the fact that the threat of terrorism was particularly serious at the time of the adoption, between 1999 and 2002' of the Security Council resolutions prescribing the listing of Mr. Nada.[132] 'That is unequivocally shown by both the wording of the resolutions and the context in which they were adopted'.[133]

The Court has accepted that the effective investigation of terrorist cases requires in limited circumstances far-reaching measures, and the context in which these measures are taken can affect its assessment of the necessity of these measures. We have seen that in times of emergency, the Court does not want to substitute the assessment of the national authorities for any other assessment of what might be the best policy in this field, while stressing that states do not enjoy an 'unlimited discretion' to choose 'whatever measures they deem appropriate'.[134] In the following section, we will assess whether the Court uses the same reasoning in cases where there is no derogation under Article 15, i.e. in 'ordinary' times.

3.2.1 Use of force against terrorist suspects

In *McCann v. UK* the Commission had to rule whether the killing by members of the British Army of three IRA members suspected of involvement in a car bombing mission in Gibraltar constituted a breach of Article 2 of the Convention. The three IRA-members turned out to be unarmed, and not in a possession of a radio-controlled device that could detonate the actual car bomb. The Court accepted, however, that the soldiers honestly believed, in light of the information that they had been given, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. The Court considered that

> the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (Art. 2-2) of the Convention may be justified under this provision (Art. 2-2) where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.[135]

Despite this statement, the Court found that the counter-terrorism operation as a whole was organised in a way that was absolutely necessary under Article 2(2). Here, the Court questioned details of the UK's plan to arrest the suspects at an appropriate stage, which had always been its

[129] ECHR Case of *Leroy v. France*, 36109/03, 2 October 2008 para. 41.
[130] Leroy at 45. For a criticism of the Leroy judgment see Sottiaux, S., 'Leroy v. France: Apology of Terrorism and the Malaise of the European Court of Human Rights' Free Speech Jurisprudence', *European Human Rights Law Review* 2009, 3, 415-427.

[131] ECHR Case of *Batasuna v. Spain*, 25803/04, 30/06/2009 at 89.
[132] ECHR Case of *Nada v. Switzerland*, 10593/08, 12 September 2012, para. 186.

[133] ibid
[134] ECHR Case of *Klass v. Germany*, 15473/89, 22/09/1993, para. 49.

[135] ECHR Case of *McCann and others v. the U.K*, 18984/91, 27/09/1995 at 200.

main intention. The Court went through an alternative option with the UK government, namely: the possibility of arresting suspects at the border upon arrival to Gibraltar. The absence of such a measure 'set the scene' in which the fatal shooting happened, and, hence, was a 'relevant factor' that the Court took into account in assessing the complete counter-terrorism operation.[136] The Court here de facto commented upon what it saw as the most effective measure to protect the population of Gibraltar.

> In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (Art. 2-2-a) of the Convention. [137]

A significant minority (9 out of 19 judges) disagreed however with the majority's assessment, and were satisfied that no failings had been shown in the organisation and control of the operation by the authorities which could justify a conclusion that force was used against the suspects disproportionately to the purpose of defending innocent persons from unlawful violence. The following remark in particular stood out:

> It would be wrong to conclude in retrospect that a particular course would, as things later transpired, have been better than one adopted at the time under the pressures of an ongoing anti-terrorist operation and that the latter course must therefore be regarded as culpably mistaken. It should not be so regarded unless it is established that in the circumstances as they were known at the time another course should have been preferred. [138]

3.2.2 Level of suspicion required to arrest a terrorist suspect

Mr. Fox and Ms. Campbell had been arrested in 1986 under section 11(1) of the Northern Ireland (Emergency Provisions) Act 1978, which allowed any constable to arrest any person without a warrant whom he or she suspects of being a terrorist. According to the applicants they had not been arrested and detained on 'reasonable' suspicion of having committed an offence. Article 5.1.c of the Convention speaks of a 'reasonable suspicion' rather than a genuine and bona fide suspicion.

The Court argued that 'what may be regarded as reasonable will depend upon all the circumstances'.[139] In this regard the Court claimed that terrorism in Northern Ireland falls into a special category, and therefore the 'reasonableness of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime.'[140] The Court acknowledged that states cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity. Nevertheless, the Court argued that its main task – within this context – was to ensure that 'the essence of the safeguard afforded by Article 5.1.c' had been secured.[141] Without commenting on the necessity of the lower threshold of suspicion in the law itself, the Court ruled that in this particular case there were not enough sufficient elements to support the conclusion that there was

[136] Ibid, par. 203-204.
[137] Ibid, para. 203.
[138] Ibid, para. 8, pg. 57
[139] ECHR Case of *Fox, Campbell and Hartley v. the UK,* 12244/86, 12245/86, 12383/86, 13 July 1989, para. 32.

[140] Idem.
[141] ibid at 34.

'reasonable suspicion'. The Court applied the same reasoning[142] in *Murray v. the UK*, but here reached the conclusion that the 'level of factual justification required at the stage of suspicion and the special exigencies of investigating terrorist crime' provided sufficient facts to justify a suspicion against Mrs Murray.[143] In *O'Hara v. UK* the Court admitted that there may be 'a fine line' between those cases where the suspicion grounding the arrest is not sufficiently founded on objective facts and those which are. 'Whether the requisite standard is satisfied and whether the guarantee against arbitrary arrest laid down by Article 5 . 1 (c) is thereby satisfied depends on the particular circumstances of each case'.[144]

3.2.3 Suspected terrorists' right to remain silent

Heaney and McGuinness had been arrested and detained after a large explosion killed six people at a checkpoint in County Derry. Both men were suspected members of the IRA, and thought to be involved in the bombing. They refused to answer questions about their movements on the day of the bombing, contrary to section 52 of the Offences against the State Act1939. At a trial for a special criminal court they were acquitted of the charge of membership of the IRA, but they were convicted of failing to provide an account of their movements during a specified period contrary to section 52 of the 1939 Act. They complained that section 52 of the Act violated their rights to silence and against self-incrimination guaranteed by Article 6 . 1 of the Convention and inverted the presumption of innocence guaranteed by Article 6 . 2. The government contended that section 52 was a proportionate response to the subsisting terrorist and security threat given the need to ensure the proper administration of justice and the maintenance of public order and peace.[145] The Court, however, relying on its previous judgment in *Brogan*, found that these concerns could not justify a provision 'which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 . 1 of the Convention'. [146] The Court considered that these rights are an essential safeguard to protect an accused against improper compulsion by authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6.[147]

3.2.4 Powers to stop and search terrorist suspects

The UK's Terrorism Act 2000 [148] gave a constable the power to stop and search a vehicle or pedestrian (including anything carried by the pedestrian) in a specified area. Section 45 of the Act gave the constable the power for the purpose of 'searching for articles of a kind which could be used in connection with terrorism' (...) whether or not the constable has grounds for suspecting the presence of articles of that kind. The constable could require a person to remove headgear, footwear, an outer coat, a jacket or gloves. The Court was 'struck by the statistical and other evidence showing the extent to which resort is had by police officers to the powers of stop and search under section 44 of the Act[149]'.

> The Ministry of Justice recorded a total of 33,177 searches in 2004/5, 44,545 in 2005/6, 37,000 in 2006/7 and 117,278 in 2007/8. In his Report into the operation of the Act in 2007, Lord Carlile noted that while arrests for other crimes had followed searches under section 44, none of the many thousands of searches had ever related to a terrorism offence; in his 2008 Report, Lord Carlile noted that examples of poor and unnecessary use of section 44 abounded, there being evidence of cases where the person stopped was so obviously far

[142] ECHR Case of *Murray v. UK, 14310/88*, 28 October 1994, para 47.
[143] ibid, para. 63.
[144] ECHR case of O'Hara v. the UK, *37555/97,* 16 October 2001, para. 41.
[145] ECHR case of Heaney and McGuinness v. Ireland, *34720/97*, 21 December 2000, para. 56.
[146] Ibid, para. 58.
[147] Ibid, para. 40.
[148] *The Terrorism Act 2000* [*United Kingdom of Great Britain and Northern Ireland*], 2000

[149] ibid, pg. 25

> from any known terrorism profile that, realistically, there was not the slightest possibility of him/her being a terrorist, and no other feature to justify the stop.[150]

Nevertheless, the Court did not comment upon the effectiveness of the measure; instead it focused on the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act, which it deemed to be neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.

3.2.5 Interim conclusion

From our analysis it is clear that the European Court of Human Rights defers to both national courts and states in assessing the effectiveness of counter-terrorism measures. While the court recognizes the specific difficulties counter-terrorism-operations pose, it rarely discusses the effectiveness of a given counter-terrorism measure, nor does it take measures of effectiveness explicitly into account to determine the legality, necessity or proportionality of a counter-terrorism measure. In *Ireland v. UK* the Court admitted that the limits of its review powers are 'particularly apparent' where Article 15 is concerned. The Court gives a great margin of appreciation to national authorities to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. It does not want to second-guess governments' assessments of what might be the most prudent or expedient policy to combat terrorism, even if it is presented with statistical evidence that at least suggests that a measure is highly ineffective. Only in the *Lawless* [151] case in the 1950s did the Court directly assess the effectiveness of the derogation by comparing it to other alternatives the Irish government could have taken to counter the terrorist threat it was facing. In *A and Others v. UK* the Court referred to the effectiveness of the discriminatory detention of non-nationals suspected of being international terrorists only because the House of Lords had questioned the effectiveness of this measure. The Court stressed here that national courts, being in direct and continuous contact with the forces of their countries, can better assess the effectiveness of a counter-terrorism measure than it can.

The Court only refers in a limited amount of cases directly or indirectly to the effectiveness of a counter-terrorism-measure in 'ordinary' times. Only in *McCann v. UK* did the Court question directly the effectiveness of the UK's methods, and this assessment influenced its decision on whether the killing of the three terrorists was absolutely necessary. However, this line of reasoning was highly controversial. Nine out of nineteen judges disagreed with the majority's assessment, and were satisfied that no failings had been shown in the organisation and control of the operation by the authorities which could justify a conclusion that force was used against the suspects disproportionately. Instead of analysing the effectiveness of a particular counter-terrorism measure the Court assesses the effectiveness of the safeguards that accompany extraordinary counter-terrorism powers. In *Brogan v. UK* for instance, judges focused on different sets of statistics to assess the effectiveness of the safeguards against arbitrary detentions. The Court has further held that the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the safeguard secured by Article 5 . 1(c) is impaired. Similarly, it ruled in *Heaney and McGuinness* that the situation in Northern Ireland did not justify the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6.1 of the Convention.

These conclusions apply to how the European Court of Human Rights has assessed the effectiveness of counter-terrorism measures. As the case of *A and Others v. UK* shows, national courts could attach more importance to effectiveness considerations in their evaluations of counter-terrorism measures. So too could other judicial review mechanisms (such as committees of enquiry, or national reviews) or quasi-legal review mechanisms (such as the UK's independent reviewer of terrorism measures). It is also important to briefly mention here that another European subsidiary body, the European Court of Justice, has asked questions about the effectiveness of the

[150] ECHR Case of *Gillan and Quinton*, 4158/05, 12/01/2010, para. 84
[151]

EU's Data Retention Directive in the oral hearing of 9 July 2013 in order to assess its legality. The Data Retention Directive is considered in detail in Deliverable D2.4.

4. Sunset-clauses and the legitimacy of counter-terrorism measures from a legal perspective

Questions around law and legitimacy in a counter-terrorism context have often focused on controversial issues, such as the legitimacy of violence committed by self-determination movements, or the legitimacy of the UN to act as a global legislator. From a legal perspective we are more interested in how counter-terrorism laws include mechanisms that allow for an assessment of a given counter-terrorism measure in order to determine its acceptability. This is important, since we have seen that the long-term negative impact of counter-terrorism measures on human rights and fundamental freedoms can be profound. As we have seen above, the European Court of Human Rights remains silent about the broader long term negative impact of counter-terrorism measures, but it has stressed on occasions that 'maintaining or even reinforcement of those measures over the years must be explained and justified convincingly'.[152] Inserting a sunset-clause[153] in counter-terrorism legislation allows, in theory, a society to assess the impact and effectiveness of a given counter-terrorism measure, in order to decide whether its existence and enforcement remains legitimate. These clauses put a temporal limitation on the use of those counter-terrorism measures to which they are attached; when the clause expires a broad public debate should determine the need to renew or revoke a number of counter-terrorism measures. Such a debate should include a meaningful review of the impact of the measures on civil liberties such as non-discrimination. Interestingly, sunset laws seem to be a predominantly common-law phenomenon. A thorough search for sunset-related legal terms in the UNODC database of anti-terrorism laws only provided results for the UK, US, Canada, India, and Australia. These countries lend themselves to comparison, not only because they are all common law jurisdictions, but also because counter-terrorism-measures that were subject to sunset clauses have since expired in all five jurisdictions. As such, we can assess whether sunset clauses in practice live up to their theoretical aspirations.

4.1 Australia

To date more than fifty anti-terror laws have been enacted in Australia.[154] Only 4 of these laws included sunset clauses. The 2003 amendment of the Australian Security Intelligence Organisation (ASIO) Act 1979 (Cth)[155] was the first Australian anti-terror law to include a sunset clause. The 2003 Amendment established a new system of warrants permitting ASIO to apply extended powers when detaining and questioning individuals in order to gather information about terrorism offences. While ASIO made use of its extended questioning powers sixteen times, it did not apply for any detention warrants under its extended powers.[156]

The ASIO Amendment Act 2003 was one of the most controversial acts passed by the Commonwealth Parliament.[157] As a result, the discussion in Parliament, and ultimate entry into force of the Act, took 15 months. Interestingly, the main debate in these 15 months focused on the

[152] ibid para..186.
[153] Black's Law Dictionary defines a sunset law as 'a statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed'. Garner, B.A. (2009). Black's Law Dictionary, 9th edition (June 25, 2009), published by West.
[154] Williams, G. (2011). 'A Decade of Australian Anti-Terror Laws'. *Melbourne University Law Review* (35), 1136, 1137.

[155] Australia: Legislation Amendment (Terrorism) Act 2003 (Cth). Accessed 18.07.2013: http://www.comlaw.gov.au/Details/C2004A01162/Download
[156] ibid.
[157] McGarrity, N. (2010). An Example of 'Worst Practice'? The Coercive Counter- Terrorism Powers of the Australian Security Intelligence Organisation. *Vienna Journal on International Constitutional Law* 4(3), p. 467.

question of inclusion or exclusion of a sunset clause.[158] Ultimately it was agreed that a sunset provision of three years would be included in the legislation. The final sunset clause stipulated that 'this Division ceases to have effect 3 years after it commences'. [159]Interestingly, the law also stipulated that a Joint Committee composed of members of the Coalition Government and the Opposition would review the legislation prior to its expiry.[160] This review took place in 2005 and the resulting report was submitted to Parliament in November of that year. While conducting the review, the Joint Committee tried to include opinion and expertise from a wide range of the public.[161] It asked numerous stakeholders and experts from government, academic, non-governmental agencies and the legal profession to comment on the terms and operation of the legislation. Furthermore, four public hearings were held in different cities to allow a wide range of the public to participate in the evaluation. These activities led to a total of 113 submissions from various actors.[162]

Essentially, the Joint Committee concluded that the Special Powers Regime initiated by the ASIO Amendment Act 2003 should remain in force with a prolonged sunset clause of five and a half years.[163] Furthermore, 19 recommendations for amending the legislation have been made.[164] Most of these recommendations address the negative implications of the law on human rights and suggest including better safeguards.[165] Ultimately, the government fully agreed to six recommendations and partly to an additional six.[166] This inclusion made the special powers regime more transparent and provided more safeguards for individuals subjected to warrants. According to McGarrity, these improvements to the ASIO Act show the potential power of sunset clauses:

> The need to make a decision, combined with the public spotlight shone on the legislation by the Joint Committee's review, placed pressure on the government to address problems with the legislation in a meaningful way.[167]

However, not all recommendations were reflected in the new legislation.[168] For example, a new sunset clause, to expire after 10 years, was ultimately adopted by the government.[169] Furthermore, the government did not accept the request to abolish the gag order that made it a criminal offence to disclose the existence of a warrant.[170] These mixed results provide some doubts over the effectiveness of sunset clauses as a comprehensive review mechanism. McGarrity for instance

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[158] More information about the process and parliamentary debates: See McGarrity, N. et al. (2012). Sunset Clauses in Australian Anti-Terror Laws. *Adelaide Law Review*, (33), pp. 312-320.
[159] Australia: Legislation Amendment (Terrorism) Act 2003 (Cth) 34Y. Accessed 18.07.2013: http://www.comlaw.gov.au/Details/C2004A01162/Download
[160] Intelligence Services Act 2001 (Cth) s 29(1)(bb), available at: http://www.comlaw.gov.au/Details/C2013C00283
[161] Joint Committee, Parliament of Australia. (2004). The Parliamentary Joint Committee on ASIO, ASIS and DSD's Review of ASIO's Questioning and Detention Powers: Background paper. Accessed 18.06.2013, available at: http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=pjcaad/asio_ques_detention/report.htm
[162] ibid., n. 11, 109.
[163] Parliamentary Joint Committee on Intelligence and Security (PJCIS), Commonwealth of Australia, 2005. Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers.
[164] Joint Committee, Parliament of Australia. (2004). The Parliamentary Joint Committee on ASIO, ASIS and DSD's Review of ASIO's Questioning and Detention Powers: Background paper. Retrieved 18.06.2013 from http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=pjcaad/asio_ques_detention/report.htm

[165] Parliamentary Joint Committee on Intelligence and Security (PJCIS), Commonwealth of Australia, 2005. Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers. (Greater access to legal representation of persons subject to a warrant (rec. 4, 5, 7, 9); better transparency of the Special Powers regime (rec.16, 17)).
[166] ibid. Full agreement: Recommendations 2, 3, 6, 8, 11 and 12; Partly agreement: Recommendations 4, 5, 7, 10, 13 and 19.
[167] McGarrity, N. et al. (2012). Sunset Clauses in Australian Anti-Terror Laws. *Adelaide Law Review,* (33), p. 324.
[168] Australian Government (2006), 'Parliamentary Joint Committee on Intelligence and Security — Report on the Operation, Effectiveness and Implications of Division 3 of Part 3 of the Australian Intelligence Security Organisation Act 1979 ' (Government Response, 29 March 2006) 8.

[169] ibid.

points out that the positive changes to the legislation could have also been merely a result of the composition of the Parliament at the time.[171]

In addition to the 2003 Amendment of the ASIO Act, Australia's Anti-Terrorism Act (No 2) 2005 (Cth) (ATA (No2) 2005) also included a sunset clause. The act empowered members of the Australian Federal Police (AFP) to issue control and preventative detention orders. This enabled the AFP to stop, search and question individuals suspected of being involved in 'terrorist activity'. Furthermore, it empowered them to seize personal belongings, without a warrant, in Commonwealth places.[172] These extended powers permitted considerable limitations on an individual's liberty without proof of criminal guilt by an Australian Court. Section 104.32 of the Act introduced a sunset clause to the power to issue control and preventative detention orders:

> (1) A control order that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at that time.
>
> (2) A control order cannot be requested, made or confirmed after the end of 10 years after the day on which this Division commences.[173]

A similar sunset clause was introduced for preventive detention orders and a prohibited contact order in section 105.53.[174]ATA (No 2) 2005 also extended the AFP's powers under the Crimes Act 1914 (Crimes Act). In regard to this law, the following sunset provisions apply:

> (1) A police officer must not exercise powers or perform duties under this Division (other than under section 3UF) after the end of 10 years after the day on which the Division commences. (2) A declaration under section 3UJ that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at that time. (3) A police officer cannot apply for, and the Minister cannot make, a declaration under section 3UJ after the end of 10 years after the day on which this Division commences.[175]

Since the introduction of these measures there have been only two cases where control orders have been issued.[176] In contrast, the AFP did not apply for any preventative detention orders so far.[177] Whether the rare use of the special powers will be taken into consideration when reviewing ATA (No 2) 2005 provisions in 2015 remains to be seen.

4.2 Canada

After 9/11, Canada rapidly adopted the Anti-Terrorism Act (ATA).[178] This complex law triggered changes in at least 10 public laws.[179] Essentially, the ATA broadened the definition of terrorism by criminalizing the financing and membership of terrorist organisations. It expanded the investigative powers of the police by providing for preventative arrest and investigative hearings. In practice, it permitted police to arrest terrorist suspects without a warrant and detain them for up to three days

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[170] ibid.
[171] McGarrity, N. et al. (2012). Sunset Clauses in Australian Anti-Terror Laws. *Adelaide Law Review*, (33), p. 324.
[172] Australia: Crimes Act 1995, (div 3A) and Criminal Code Act 104.4(1)(c)–(d); 104.14, 104.16.
[173] Criminal Code Act 1995 (Cth) sch 1, 104.32.
[174] Criminal Code Act 1995 (Cth) sch 1, 105.53.
[175] Crimes Act 1914, 3UK.
[176] Jaggers, B. (2008). Anti-Terrorism Control Orders in Australia and the United Kingdom: A Comparison. Research Paper No 28, Parliamentary Library, Parliament of Australia, 2008. For a short summary of these cases see: McGarrity, N. et al. (2012). Sunset Clauses in Australian Anti-Terror Laws. *Adelaide Law Review*, (33), (p. 312)

[177] Attorney-General's Department (June 2011) (Cth), National Human Rights Action Plan: Baseline Study Consultation Draft ,11.
[178] The law was finalized just three month after 9/11 in December 2001 and achieved royal assent as bill C-36. Pue, W. (2003) The War on Terror: Constitutional Governance in state of Permanent Warfare?, 41 Osgoode Hall Law Journal 267.
[179] Roach, K. 'Canada's Response to Terrorism' in Victor Ramraj et al eds. *Global Anti Terrorism Law and Policy 2nd ed* (Cambridge: Cambridge University Press, 2012) at 514-540 [p. 512]

without charges.[180] Due to the human rights impact of these measures, the ATA stipulated a review of the provisions and operation of the Act after 3 years,

> by such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, or that purpose. (2) The committee referred to in subsection (1) shall, within a year after a review is undertaken pursuant to that subsection or within such further time as may be authorized by the Senate, the House of Commons or both Houses of Parliament, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committee recommends. [181]

There was no expiration date set to the legislation as a whole, but the most controversial provisions of ATA were subject to a sunset clause. These provisions dealt with the 'power to compel reluctant witnesses to reveal information relevant to terrorism investigations in investigative hearings and the power to make preventive arrests in terrorism cases.'[182] The Articles stipulating these measures were subject to a five-year sunset clause:

> 83.32 (1) Sections 83.28, 83.29 and 83.3 cease to apply at the end of the fifteenth sitting day of Parliament after December 31, 2006 unless, before the end of that day, the application of those sections is extended by a resolution—the text of which is established under subsection (2)—passed by both Houses of Parliament in accordance with the rules set out in subsection (3).[183]

After a heated debate these sections expired in 2007.[184] The debates in the Canadian Parliament essentially dealt with evaluating the necessity and proportionality of the relevant provisions.[185] The government failed to provide convincing evidence for the necessity of the measures,[186] resulting in the following statement from a member of the Liberal Party, which captured the general resentment of a majority of parliamentarians:

> [t]hese two provisions especially have done nothing to fight against terrorism, have not been helpful, and have continued to create some risk for civil liberties.[187]

The sunset-clause brought an end to the controversial measures, but these were reintroduced after six years.[188] Essentially, Bill S-7 contains the same provisions that lapsed in 2007. Section 83.3 allows courts to detain individuals without a previously obtained arrest warrant. Furthermore, witnesses can be forced to provide information about a possible terrorist act even without being charged. These hearings can take place in secret and the refusal to provide information can lead to an arrest. In addition to this, Section 83.3 of Bill S-7 allows for preventive arrests if an individual is suspected of being involved in a terrorist crime. The individual can be brought before a judge who

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[180] Anti-Terrorism Act, 2001, §§ 83.28, 83.3m (Can.).
[181] ibid Article 145.
[182] McGarrity, N. et al. (2012). Sunset Clauses in Australian Anti-Terror Laws. *Adelaide Law Review*, (33), pp.321 quoting: Roach, K. (2008) 'The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law' 24(7) Windsor Review of Legal and Social (5,6).

[183] Anti-Terrorism Act (C-36), § 83.32.

[184] Bill C-19: An Act to Amend the Criminal Code (investigative hearing and recognizance with conditions)/LS-635 E, Mar. 20, 2009. Retrieved 18.07.2013 from: http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=E&ls=c19&Parl=40&Ses=2&source=library_prb
[185] For a summary of the debates in Parliament, see: Finn, J. (2009). Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation. *Columbia Journal Of Transnational Law* (48) pp. 471- 474
[186] CBC News (2007) Canadian Security: Anti-terrorism Act, http://www.cbc.ca/news/background/cdnsecurity/ (retrieved 18.07.2013)
[187] Clark, A. (2010) Canada Scraps 2 Anti-Terrorism Measures: House of Commons Doesn't Renew Legislation Allowing Preventive Arrests and Forced Testimony, CBS News: http://www.cbsnews.com/stories/2007/02/27/terror/main2522480.shtml
[188] Combating Terrorism Act (Bill S-7)

is allowed to restrict his/her freedom, for instance by limiting the right to communicate with particular persons. In cases of non-compliance, the individual can be jailed for up to one year. Bill S-7 also includes a five-year sunset provision. Section 83.32 reads as follows:

> (1) Sections 83.28, 83.29 and 83.3 cease to have effect at the end of the 15th sitting day of Parliament after the fifth anniversary of the coming into force of this subsection unless, before the end of that day, the operation of those sections is extended by resolution — whose text is established under subsection (2) — passed by both Houses of Parliament in accordance with the rules set out in subsection (3).

It remains to be seen whether Bill S-7 will expire after this period in 2018.

4.3 India

India's Prevention of Terrorism Act (POTA) was adopted in 2002 after a ten-hour debate in Parliament.[189] Essentially, POTA permits the detention of terrorist suspects for up to 180 days without being charged.[190] Moreover, it allows for extensive interception of communications and the establishment of special courts for terrorist suspects.[191] POTA was not only controversial because of these provisions but also because the law would further aggravate cases of abuse and corruption in the Indian police and judicial system.[192] POTA contained a general three-year sunset-clause in Article 1 (6), but was repealed in 2005 – earlier than expected.[193] This was not because of its overly intrusive provisions, but because it was an election promise by the political party United Progressive Alliance.[194] According to one observer, POTA's repeal in 2004 'likely made it the first law to be repealed before such a (sunset) clause was actually triggered.'[195] After the Bombay attacks in 2008, the Indian Parliament introduced the 'Unlawful Activities (Prevention) Amendment Bill, which contained many problematic provisions[196] including a broad definition of terrorism, allowing for easy stigmatization of political, ethical or religious movements. The definition of what consists an 'unlawful activity' is extremely broad, as it outlaws 'actions causing' or aim to cause 'disaffection against India'.[197] Additionally, the Unlawful Activities (Prevention) Amendment Bill (2008) authorizes any designated authority to search any property and detain any person, if there is information that 'hints at the involvement in an unlawful activity'.[198] Contrary to POTA, the 2008 Amendment Bill does not contain a sunset clause.[199]

4.4. United Kingdom

After 9/11, the UK government adopted the Anti-Terrorism, Crime and Security Act (ATCSA) in 2001. ATCSA partly overlapped with the complex Terrorism Act introduced in 2000. ATCSA supplemented the Terrorism Act in several ways. Most importantly, ATCSA allowed the government to indefinitely detain foreign terrorist suspects without trial. [200] The only requirement that was needed to justify detention was a certification by the Home Secretary stating that

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[189] Prevention of Terrorism Act, No. 15 of 2002, 89 (to what does the 89 refer)
[190] Prevention of Terrorism Act, No. 15 of 2002, 89 § 49 (b).
[191] Prevention of Terrorism Act, No. 15 of 2002, 89. Chapter V and IV.
[192] Anil Kalban et al., (2006) Colonial Continuities: Human Rights, Terrorism, and Security Laws in India 20 Colum. J. Asian L. 93, 186.
[193] Prevention of Terrorism Act, No. 15 of 2002, 89, § 1 (6). 'However, any ongoing investigation, reliability, penalty falling under this act shall continue to have effect.'
[194] Finn, J. (2009). Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation. *Columbia Journal Of Transnational Law* (48) p.482.

[195] Finn ibid quoting: Thomas, K. V. (2004) Corruption in Indian Police, ACAD. J. Retrieved 18.07.2013 from http://www.svpnpa.gov.in/html/publications/OldJoumals/uploadJoumals/2004janjun.pdf
[196] Unlawful Activities (Prevention) Amendment Bill, No. 76-C of 2008. Retrieved from http://www.satp.org/satporgtp/countries/india/document/papers/76-c.htm
[197] Unlawful Activities (Prevention) Amendment Act 2008, see section 2.
[198] ibid., section 43A.
[199] Human Rights Watch (2010). Back to the Future: India's 2008 Counterterrorism Laws. Retrieved 18.07.2013 http://www.hrw.org/sites/default/files/reports/india0710webwcover_0.pdf [p. 2]
[200] Anti-terrorism, Crime and Security Act, 2001, c. 24, §§ 21-32.

reasonable grounds existed to suspect a person of being involved in terrorist activity.[201] This controversial section was subject to a heated debate in Parliament and ultimately a sunset clause was linked to the relevant provisions of the law.[202] According to the sunset clause, the operative section would cease to have effect 15 months after ATCSA took effect. However, '(…) the Secretary of State could extend the expiry date for 12-month periods as far as 10 November 2006 by way of statutory instrument approved by the affirmative resolution procedure.'[203]

In 2004 the House of Lords ruled that the indefinite detention of foreign terror suspects as regulated in ATCSA was not in line with the ECHR.[204] In response the government substituted Part Four of ATCSA with the complex control orders regime created by the Prevention of Terrorism Act 2005 (PTA).[205] While the control orders regime was meant to solve the problems created by part four of ATCSA, it has remained controversial ever since. Control orders limit the liberty of suspected individuals much like a strict set of bail conditions. A 12-month sunset clause was again imposed on the operative parts of PTA: 'Except so far as otherwise provided under this section, sections 1 to 9 expire at the end of the period of 12 months beginning with the day on which this Act is passed.'[206] Here, the PTA provided again that the Secretary of State can postpone the cessation for 12-month periods through statutory instruments approved by the affirmative resolution procedure.[207] Compared to others this is a very weak sunset-clause since it neither provides for a clear cessation date nor for a comprehensive review of the measure by a parliamentary committee.[208] The Act was repealed on 14 December 2011 by section 1 of the Terrorism Prevention and Investigation Measures Act (TPIM) 2011. This Act is subject to a five-year sunset-clause: 'Except so far as otherwise provided under this section, the Secretary of State's TPIM powers expire at the end of 5 years beginning with the day on which this Act is passed.'[209] However, in line with the sunset provisions of PTA and ATCSA, the Secretary of State can again under statutory instrument extend the Act for five years.[210]

After the London bombings in 2005, the Terrorism Act 2006 was introduced, which criminalized, inter alia, encouragement of terrorism.[211] Furthermore, the Act extended police powers by allowing the detention of terrorist suspects up to 28 days without charge (compared to 14 days before).[212] Again there was a theoretical sunset clause of 12 months, which could be extended by the Secretary of State through a statutory instrument.[213] In July 2010, after the government's review of its counter-terror measures, the 28 days detention provision of the Terrorism Act 2006 was allowed to expire leading to a return to the 14-day detention period.[214]

In addition to the legislation outlined above, in 2010 the government adopted the Terrorist Asset Freezing (Temporary Provisions) Act. The legislation was mainly a reaction to the UK Supreme Court ruling in *Ahmed v. HM Treasury*, which annulled certain orders introduced by the United Nations Act 1946.[215] This Act intended to implement several UN Security Council resolutions that were adopted to freeze terrorist assets. It also included a general sunset-clause, which would

[201] Anti-terrorism, Crime and Security Act, 2001, c. 24, part 4.
[202] Anti-terrorism, Crime and Security Act 2001, c.24 § 29. For a description of the affirmative resolution procedure, see: Select Committee on Modernisation of the House of Commons, *The Legislative Process* (2005-06, HC 1097) 8.
[203] Ip, J. (2013). Sunset Clauses and Counterterrorism Legislation. [2013] *Public Law 74,* [p. 7]
[204] *A v Secretary of state for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.
[205] Prevention of Terrorism Act 2005, § 16(2).
[206] Prevention of Terrorism Act 2005, § 13 (1).
[207] Prevention of Terrorism Act 2005, § 13 (2) and (4).
[208] Walker,C. (2009) Blackstone's Guide to the Anti-Terrorism Legislation OUP Oxford; 2 edition.
[209] Terrorism Prevention and Investigation Measures Act 2011, § 21
[210] ibid., § 21 (2).
[211] Terrorism Act 2006, § 1-4.
[212] Terrorism Act 2006, § 23 (7).
[213] Terrorism Act 2006, § 25 (1).
[214] Travis, A. (2011), 'Theresa May allows 28-day limit on detaining terror suspects without charge to lapse' published by the Guardian. Retrieved 18.07.2013 from http://www.guardian.co.uk/politics/2011/jan/19/28-day-limit-terror-suspects-lapse
[215] *HM Treasury v Ahmed* [2010] UKSC 2, [2010] 2 AC 534

terminate the legislation by the end of 2010.[216] Nevertheless, around two weeks before the expiry, the permanent Terrorist Asset-Freezing Act 2010 replaced the Act.[217]

4.5 United States

In late October 2001, the US Congress adopted the controversial Patriot Act, which extended powers to counter and prevent terrorist threats. Firstly, it gave law enforcement agencies more powers to search and retain email communications, telephone, medical data, financial data and other records.[218] Secondly, it extended the right of government agencies to collect intelligence beyond the borders of the US from both US and non-US citizens.[219] Ultimately, the Patriot Act gave more powers to the Secretary of the Treasury to regulate financial transactions; referring especially to those transactions involving foreign citizens and companies.[220]

The Patriot Act included a four-year sunset-clause, which predominantly covers provisions that give law enforcement authorities more powers to conduct searches and surveillance activities.[221] The Sunset clause is located in section 224 and reads as follows:

> (a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005. (b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect.[222]

The sunset-clause appeared to be quite selective, as other controversial measures were not subject to such a clause. For example, Section 21 allows law enforcement personnel to perform 'sneak and peek searches' without informing the suspect that they are under scrutiny.[223] Considering this inconsistency with the application of sunset clauses, former GOP congressman Bob Barr, a leading critic of the Patriot Act, saw

> no rhyme or reason to which elements of the law have sunsets and which do not. (…) It may be that the extreme sense of urgency surrounding the passage of the Act contributed to the apparent inconsistency.[224]

Originally, the provisions subject to the sunset-clause were set to expire at the end of 2005,[225] but in March 2006, the government made 14 of the 16 provisions, which were subject to the sunset-clause, permanent.[226] While doing so, Congress incorporated some more judicial review mechanisms to certain surveillance provisions.[227] Section 206 and 215 were not made permanent: concerning the surveillance of suspects via roving wiretaps and the power of the government to access 'business records' or any other 'tangible items', respectively. Congress changed these

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[216] Terrorist Asset Freezing (Temporary Provisions) Act 2010, §1.
[217] Terrorist Asset-Freezing (Temporary Provisions) Act 2010, s 52 and s 2. For a general overview: Smith, B. (2010). The Terrorist Asset-Freezing Etc. Bill 2010-11' (*House of Commons Library*, 10.11.2010) Retrieved 18.07.2013 from http://www.parliament.uk/briefingpapers/commons/lib/research/rp2010/RP10-070.pdf
[218] Patriot Act, Title II, §§ 201-04, 215.
[219] Patriot Act, §§206 07,214 15,218,225.
[220] Patriot Act, Title III.
[221] These provisions are in Title II of the Patriot Act.
[222] Patriot Act, Sec. 224.
[223] Finn, J. (2009). Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation. *Columbia Journal Of Transnational Law* (48), p. 464.
[224] ibid.
[225] Patriot Act, § (need to make this clear throughout) 224
[226] USA Patriot Improvement and Reauthorization Act of 2005, Pub L No 109-177, § 102(a).
[227] Goldsmith, J. (2009). Long-Term Terrorist Detention and a U.S. National Security Court. In Wittes, B. (ed), *Legislating the War on Terror* (Brookings Institution Press) p. 92.

provisions by attaching more safeguards.[228] The revised Sections 206 and 215 were extended to 2009.[229] Subsequently, the expiry of these three provisions had been postponed several times. Most recently in 2011, the sunset clause was extended until 2015.[230] The recent NSA-revelations demonstrated that the US Congress was not fully aware of how section 215 was interpreted by the Foreign Intelligence Surveillance Court and the National Security Agency. As a result of this external factor, the US Congress might discuss the expiry of section 215 earlier than envisaged.[231]

In addition to the Patriot Act, some recent amendments to the Foreign Intelligence Surveillance Act (FISA) also included sunset-clauses. The Protect America Act (PAA) [232] further facilitated the surveillance of communications surveillance outside the US.[233] PAA included the following six-month sunset clause: 'Except as provided in subsection (d), sections 2,3, 4, and 5 of this Act, and the amendments made by this Act, shall cease to have effect 180 days after the date of the enactment of this Act.'[234] The PAA controversially expired in February 2008 after revelations in Congress about the broad application of PAA powers by the government.[235] Nevertheless, in 2008 the Congress introduced the FISA Amendment Act of 2008 (FISAA),[236] which effectively contains the same PAA provisions but with some additional, limited, safeguards.[237] In addition, it included sunset provisions with an expiry at the end of 2012.[238] This was followed by another extension of FISAA subjected to a five-year sunset clause.[239]

4.6 Interim conclusion

Finn claims that sunset clauses ideally have deliberative,[240] informational[241] and distributive benefits.[242] Consequently, sunset clauses are successful if they lead to a positive outcome in all three areas. By taking similar parameters into consideration, Ip argues that to be effective, sunset clauses need to fulfil substantive and procedural criteria. A sunset clause has substantive success if it leads to the expiry of a law or if it leads to substantial changes of the law in question.[243] Procedural success is achieved when

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[228] Main safeguard added to Section 215: annual review, order must be obtained to make use of Section 215, stronger regulation of retention and dissemination. Main safeguard added to Section 106: Inclusion of judicial review process, See: T Yeh, B. and Doyle, C. (2006). USA PATRIOT Improvement and Reauthorization Act of 2005: A legal analysis. (Congressional Research Service, 21 December 2006) pp. 5-10, 16-18. Retrieved 18.07.2013 from http://www.fas.org/sgp/crs/intel/RL33332.pdf

[229] USA Patriot Improvement and Reauthorization Act of 2005, Pub L No 109-177, §§102(b) & 103.

[230] Kane, P. and Somnez, F. (2011). Patriot Act extension signed into law despite bipartisan resistance in Congress' *Washington Post* (Washington DC, 27 May 2011). Retrieved 18.07.2013 from http://www.washingtonpost.com/politics/patriot-act-extension-signed-into-law-despite-bipartisan-resistance-in-congress/2011/05/27/AGbVlsCH_story.html

[231] Tsukayama, H.,(2013). Legal battle over NSA surveillance grows. *Washington Post*. July 08, 2013. Retrieved 18, 07, 2013: http://articles.washingtonpost.com/2013-07-08/business/40440809_1_verizon-customer-google-and-microsoft-supreme-court

[232] Protect America Act of 2007, Pub L No 110-55.

[233] Protect America Act, sec. 2,3,4,5.

[234] ibid, §6 (c)

[235] See Banks, W, C., Programmatic Surveillance and FISA: Of Needles in Haystacks' (2010) 88 *Texas Law Review* 1644-1645.

[236] Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub L No 110-261.

[237] For instance: FISA Amendments Act § 702 stipulates that the Attorney General needs to authorize Surveillance of non-Americans. For more details, see Banks, W, C. (2010). Programmatic Surveillance and FISA: Of Needles in Haystacks. 88 *Texas Law Review* 1645-1649.

[238] Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub L No 110-261, § 403(b)(1).

[239] Berman, E. (2012). The Paradox Of Counterterrorism Sunset Provisions. *Fordham Law Review*, 81 (2). p. 1779.

[240] Defined as 'elements or characteristics that improve second stage legislative decision-making by improving the quality and functioning of the deliberative process' Finn, J. (2009). Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation. *Columbia Journal Of Transnational Law* (48). p. 448

[241] Finn, 448: 'sunset clauses allow to collect more information about the issue before making it permanent'

[242] Finn, 449: 'sunset clauses may advantage the legislature 'relative to the executive,' as well as allocate agenda control between current and future-time legislatures' .

[243] Ip, J. (2013). Sunset Clauses and Counterterrorism Legislation. [2013] *Public Law* (forthcoming) http://ssrn.com/abstract=1853945, p. 14.

> sunset clauses contribute to improved deliberation either by allowing legislative reconsideration to occur in the future with better information, or by allowing meaningful reconsideration to occur later in a calmer environment.[244]

Our review above suggests mixed results as to the effectiveness of sunset-clauses to analyse the legitimacy of counter-terrorism measures. First there is a need to add a disclaimer: it is hard to assess the 'effectiveness' of sunset clause without taking into account external[245] and internal[246] factors, such as actual terrorist attacks (such as the attack on London in 2005, and the Mumbai attack in 2008) or foiled plots (such as the foiled attack on a passenger train in Canada) and different parliamentary constellations. These factors are often much more important to the instigation of a legislative review process than is the mere existence of a sunset clause. That being said, in at least two cases sunset-clauses seem to have started an informed debate about the legitimacy of a number of anti-terror measures. The review of Australia's ASIO act incorporated observations by a wide range of stakeholders from government, civil society and legal professionals. As a result, more legislative safeguards were included to reduce the impact of ASIO's special powers regime on civil liberties. In Canada, the parliamentary debate that followed after the sunset clause of ATA was triggered, did not lead in a renewal of the law. Both sunset-clauses explicitly required the expiry of the laws, without there being automatic or easy renewal mechanisms (which is the case in the U.K). However, sunset-clauses can have a number of unintended (negative) consequences as well. Arbitrariness in selecting which provisions expire can give other provisions, which are equally problematic, an aura of normality since it could be implied that these don't need to be reviewed anymore.

5. Conclusion

This Report, which has been a state of the art investigation into legal interpretations of the effectiveness, impact and legitimacy of counter-terrorism measures, will conclude with a brief return to the definitions of the three concepts of impact, legitimacy and effectiveness, and the main takeaway content to be found under each heading.

5.1 A Return to the Definitions

Impact was defined as a *negative* effect of a counter-terrorism measure on the protection of human rights, which could fall into a direct or indirect category. A direct negative impact of a counter-terrorism measure results in decreased (procedural) safeguards for terrorist suspects, while an indirect negative effect of a counter-terrorism measure manifests itself only over a longer period of time in that these decreased safeguards can become a standard in a non-emergency context and as such slowly erode a particular human right.

Whereas impact considers the negative human rights implications of counter-terrorism measures, a counter-terrorist measure is deemed to be effective if it is successful in producing an intended, positive result, which, for the purposes of this Report, was the improved prevention or prosecution of terrorist activities.

Finally, it was asserted that counter-terrorism measures could be seen as 'legitimate' if their effectiveness and impact are assessed within a predetermined period of time by a public justificatory deliberation mechanism that has the capacity to meaningfully change or abort the measure.

5.2 Findings

An analysis of the most relevant judgments of the European Court of Human Rights suggests that this subsidiary court rarely makes comments on the indirect impact of counter-terrorism measures,

[244] ibid., p. 16.
[245] External factors: events influencing the negotiations (e.g. recent terror attacks, revealed human right violation by the law in question).
[246] Internal factors: how do procedures, party constellation and the information and experiences of the law as such influence the outcome.

but instead focuses on the direct impact of a specific counter-terrorism measure on the (procedural) dimension of a specific human right. NGO's and other international human rights bodies tend to focus on both the indirect and direct impact of a specific measure.

Similarly, it was clear the European Court of Human Rights rarely discusses the effectiveness of a given counter-terrorism measure, nor does it take measures of effectiveness explicitly into account to determine the legality, necessity or proportionality of a counter-terrorism measure. The Court is reticent to second-guess governments' assessments of what might be the most prudent or expedient policy to combat terrorism, even if it is presented with statistical evidence that at least suggests that a measure is highly ineffective. Instead of analysing the effectiveness of a particular counter-terrorism measure the Court assesses the effectiveness of the safeguards that accompany extraordinary counter-terrorism powers.

The Report ended with an analysis on understandings of legal legitimacy using sunset clauses in jurisprudence, as they can, in theory, meet the relevant conditions for determining the legitimacy of a counter-terrorism measure. Inserting a sunset-clause in counter-terrorism legislation offers a society an opportunity to assess the impact and effectiveness of a given counter-terrorism measure, in order to decide whether its existence and enforcement remains legitimate. The study on the effectiveness of sunset clauses in counter-terrorism focused on five countries - UK, US, Canada, India, and Australia. The mixed results delivered by this case-review suggest limited effectiveness of sunset-clauses as an analysis tool in determining the legitimacy of counter-terrorism measures.