Reconciliation of Human Rights and Freedoms with Security in the Context of Terrorism: Access to Information and the Role of Judges from the Perspective of the Council of Europe

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Although I am an administrative judge and I have served for ten years in several courts, I will express myself today as the legal advisor of the permanent representative of France to the Council of Europe, position I have been holding now for one year.

International organization composed of 47 members states, devoted to human rights, democracy and the rule of law, and mainly based on the conventional system of the European Convention on Human Rights (ECHR), the Council of Europe cannot but be concerned and involved in such an important issue as access to information. In this field, which puts at stake the fundamental rights of individuals and the role of judges in protecting them, the challenge of the conciliation between competing interests, particularly between human rights, freedoms and security is difficult to address. All the more difficult or, at least tricky, in a context where a lot of states, several of them being European states and members of the Council of Europe, have to face terrorism. As Mr Aharon Barak, former president of the supreme Court of Israel said, in January 2016, during a seminar held in Strasburg ("The human rights in time of terror – a judicial point of view"), "*The ability of the judges to protect democracy is tested everyday, but it is in the context of terrorism that they have to face the supreme challenge*". In a way, the question of terrorism and of national security leads to highlight, in a generally emotional and passionate context, the permanent necessity of conciliation between public interests and individual rights and freedom, in which the judge, and especially the administrative judge take a capital part. That's for this reason and because it is often the way by which the Council of Europe had to face the question of access to information that I wanted to mention the context of terrorism in the title of my presentation today, even if I won't confine myself to this aspect.

The heart of the matter of access to information, indeed, remains the demanding compromise we have to find between different legitimate interests. In order to examine the issue of access to information in the perspective of the Council of Europe, I would like, in a first part, expose the legal and judicial framework in which this organization deals with this field. In a second part, I will evoke several matters of concern that the Council of Europe is currently facing as regard this question.

First part : The legal and judicial framework of the Council of Europe with regard to access to information

I will expose the legal and judicial framework offered by the Council of Europe in that matter following the three main topics of this conference, namely: access of everyone to information held by public authorities (A), access of applicants to information in judicial proceedings (B) and access of the judges to relevant information (C).

A. Access of everyone to information held by public authorities:

If over two hundred conventions have been concluded in the auspices of the Council of Europe, few of them provide for a right of citizens to information.

However, one should mention, as a matter of illustration, the Council of Europe Convention on Access to Official Documents. This convention, open for signature in 2009, is not entered into force, for lack of the necessary number of ratifications (at the time of writing this presentation: 9 ratifications instead of the 10 required). However, this Convention was the first binding international legal instrument to recognise a general right of access to official documents held by public authorities. It lays down a right of access to official documents, so that limitations on this right are only permitted in order to protect certain interests like national security, defence or privacy. The Convention sets out the minimum standards to be applied in the processing of requests for access to official documents (not least forms of and charges for access to such documents), review procedure and complementary measures. It allows national laws to build on this foundation and provide even greater access to official documents.

Apart from this convention, so far unapplied for the reasons above, the question of access of citizens to information held by public authorities is tackled through two conventional instruments, in the field of both data protection and the substantial rights enshrined in the ECHR.

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (open for signature on 28 January 1981), also known as Convention 108, is an important instrument in the protection of fundamental rights of individuals in the field of data procession. From the point of view of access to information, this convention provides, in its Article 8 that any person shall be enabled to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file and to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form.

These rights to information are in connection with the rights to obtain, as the case may be, rectification or erasure of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles set out in Articles 5 and 6 of this Convention and to have a remedy if a request for confirmation or, as the case may be, communication, rectification or erasure as referred to in paragraphs b and c of this Article is not complied with.

Article 9 of the Convention provides that derogation from the provisions of Articles 8 shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences; protecting the data subject or the rights and freedoms of others.

This convention, which has broadly shaped the domestic legislation on data protection of the member states of the Council of Europe and beyond, is currently in a process of modernization, as it was the case recently in the framework of the European Union. The draft protocol of amendment subject to negotiations now provides for a broader obligation of transparency on the controller. The latter is required to act transparently when processing data in order to ensure fair processing and to enable data subjects to understand and thus fully exercise their rights in the context of such data processing.

The corresponding draft explanatory report indicates that certain essential information has to be compulsorily provided in a proactive manner by the controller to the data subjects when directly or collecting their data, subject to the possibility to provide for exceptions in line with Article 9. Information on the name and address of the controller, the legal basis and the purposes of the data processing, the categories of data processed and recipients, as well as the means of exercising the rights can be provided in any appropriate format (either through a website, technological tools on personal devices, etc.) as long as the information is fairly and effectively presented to the data subject. Moreover, the information presented should be easily accessible, legible, understandable and adapted to the relevant data subjects. Any additional information that is necessary to ensure fair data processing or that is useful for such purpose, such as the preservation period, the knowledge of the reasoning underlying the data processing, or information on data transfers to a recipient in another Party or non-Party is also to be provided.

The question of access to information held by public authorities is also of great interest with regard to substantial rights enshrined by the ECHR. Most often, the debate is articulated around the necessary conciliation between those rights and other competing interests, such as public interest.

This is especially the case with regard to Article 8 ECHR, which enshrines the right to respect for private and family life. In this field, the ECHR holds that the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8. However, in determining whether the personal information retained by the authorities involves any private-life aspect, the Court has due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained ..." (S. and Marper v. the United Kingdom, nos. 30562/04 and 30566/04, 4 December 2008, § 67). Such an approach has important consequences on the access to information. In this perspective, indeed, the right to respect for private life may be invoked either to limit or to require the disclosure of the relevant information.

Thus, the case, Leander v. Sweden, no 9248/81, 23 March 1987, concerned the use of a secret police file in the recruitment of a carpenter. The applicant, who had been working as a temporary replacement in a Naval Museum, next to a restricted military security zone, complained about the storage of data related to his trade-union activities a long time before and alleged that this had led to his exclusion from the employment in question. He argued that nothing in his personal or political background could be regarded as of such a nature as to make it necessary to register him in

the Security Department's register and to classify him as a "security risk". Nevertheless, the Court held that there had been no violation of Article 8 of the Convention. Noting that both the storing in a secret register and the release of information about an individual's private life fell within the scope of Article 8 of the Convention, the Court recalled that, in a democratic society, the existence of intelligence services and the storage of data could be lawful and prevail over the interest of citizens provided that it pursued legitimate aims, namely the prevention of disorder or crime or the protection of national security. It found that the safeguards contained in the Swedish personnel-control system satisfied the requirements of Article 8 of the Convention and that the Swedish Government had been entitled to consider that the interests of national security prevailed over the applicant's individual interests.

In another context, illustrated by the case Segerstedt-Wiberg and Others v. Sweden, no 62332/00, 6 June 2006, the applicants were denied access to the full files held on them by the Swedish Security Police, on the grounds that to give them such access might compromise the prevention of crime or the protection of national security. The Court ruled that there had been no violation of Article 8 of the Convention on account of the refusal to grant the applicants full access to information stored about them by the Security Police. It recalled, at first, that a refusal of full access to a national secret police register was necessary where the State might legitimately fear that the provision of such information might jeopardise the efficacy of a secret surveillance system designed to protect national security and to combat terrorism. As a result, the Court found that Sweden, having regard to the wide margin of appreciation available to it, was entitled to consider that the interests of national security and the fight against terrorism prevailed over the interests of the applicants in being advised of the full extent to which information was kept about them on the Security Police register.

Other substantive rights may be concerned by the problematic of access to information held by public authorities. In the case Bucur and Toma v. Romania, no 40238/02, 8 January 2013, one of the applicants, a former employee of the Romanian services of information, had been convicted for disclosing secret information related to allegedly illegal phone-tapping. In the course of his judgment, he had argued in particular the absence of authorizations and the non-existence of circumstances which would have proved a threat for the national safety and justified the interception of telephone communications in question. The national authorities refused to disclose some ultrasecret classified evidence intended to verify the authenticity of the authorizations of interception. The Court observed that the disclosed information had been of particular importance in a society which had known, during the communist regime, a policy of strict surveillance by the secret services.

Furthermore, the civil society was directly affected by the disclosed information, everybody being possibly subject to interception of one's telephone communications. In addition, this information had something to do with abuses committed by high-ranking state employees and with the democratic basis of state. This is very important questions for the political debate in a democratic society, the public opinion of which has a legitimate interest in being informed. The Court ruled that in refusing to verify whether the classification as "ultrasecret" seemed justified and to answer the question of whether the interest of the preservation of the confidentiality of the information had precedence over the interest of the public be informed of the alleged illegal interceptions, domestic courts had not sought to examine the case under all its aspects, depriving this way the applicant of the rights to freedom of expression and to a fair trial, respectively enshrined in Articles 10 and 6 of the ECHR.

As one can see, though rarely and indirectly tackled in the conventional instruments of the Council of Europe, the question of access of citizens to information puts at stake the necessary conciliation between competing principles and rights, what can also be observed when it comes to access of the applicants in judicial proceedings.

B. Access of applicants to information in judicial proceedings (the question of fair trial)

In that field, the Council of Europe has developed a range of tools, some of them pertaining to "soft law" and others to ECtCH specific case law.

1) The general approach based of the soft law:

Several instruments are worth mentioning. In its document named "The Rule of Law Checklist", adopted in March 2016, the European commission for democracy through law, well known as the Venice Commission (organ of the Council of Europe combining specialists in constitutional matters), ranked the right to a fair trial among the most fundamental principles of the rule of law. With that regard, it considered as inherent to such principle "the right to timely access to court documents and files ensured for litigants".

Likewise, in its Recommendation Rec(2004)20 to member states on judicial review of administrative acts adopted on 15 December 2004, the Committee of Ministers of the Council of Europe stated that the proceedings "should be adversarial in nature and that all evidence admitted by the tribunal should in principle be made available to the parties with a view to adversarial argument".

This approach seems to have been shared by the consultative council of european judges of the Council of Europe in its opinion no. 8 (2006, § 27 to 30) to the attention of the Committee of Ministers on "the role of judges in the protection of the rule of law and human rights in the context of terrorism". In this opinion, the CCEJ recalled that the right to a fair hearing in particular shall be guaranteed under Article 6 of the European Convention on Human Rights, what implies inter alia that there shall be equality of arms between the parties to the proceedings and that the proceedings shall be adversarial in nature. It stressed the right to a fair hearing requires that all evidence admitted by the court should in principle be made available to the parties with a view to adversarial arguments. As the CCEJ recalled it, however, the question arises as to what extent limitations to access to documents, witnesses or other sources of evidence might be admissible, if security reasons are involved. In consequence, stated the CCJE, when access to evidence is granted to lawyers and not to the parties personally, because direct disclosure to persons concerned of sources of evidence may jeopardise the public interest, potentially difficult issues arise as to whether it is or not a substantial limitation of effective remedy and of defense . Whatever the solution might be as regards access to evidence by the parties and defence lawyers, the CCJE is of the opinion that no limitations should apply to the possibility for the judge to have direct and personal access to documents, witnesses and other sources of evidence, in order to allow the court to ascertain all relevant facts and thus rule on an effective remedy (Article 13 of the European Convention on Human Rights).

This "soft approach" widely conforms with ECtHR case law, that it endorse and generalize.

2) The specific approach based on the ECHR:

The ECtHR has developed an elaborate case law related to the conciliation between the right of everyone to a fair trial and the competing interests which may lead to restrict the disclosure of material evidence during the trial. While the principles underlying this case law emerged mainly in

the scope of criminal law, they apply to every case in which Article 6 of the ECHR is relevant (I will return to this later on).

These principles have been well summarized, for instance, in Leas v. Estonia, no. 59577/08, 8 June 2012, para. 78 and 79. They are articulated around the more general principle of equality of arms, viewed as one of the features of the wider concept of a fair trial, under which each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. In this regard, the Court's case law is founded on a "holistic approach" of the procedural fairness, in which restrictions to disclosure have to be assessed in the light of the proceedings as a whole.

The first principle held by the ECtHR is the following. The Court rules that the entitlement to disclosure of relevant evidence is not an absolute right. In any civil or criminal proceedings, adds the Court, there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see as well Doorson v. the Netherlands, no 20524/92, 26 March 1996, § 70).

Those three categories of competing interests have been illustrated in a number of cases.

As concerns national security, the Court, in A. And others v. United Kingdom, no 3455/05, 19 February 2009), considered as being such a public interest the fact of maintaining the secrecy of sources in the fight against terrorism, in particular of sources of information related to al'Qaeda and its associates. Likewise, it was not disputed, in Chahal case, (Chahal v. United Kingdom, no 22414/93 15 November 1996), that a detention under rules related to the Prevention of Terrorism was in connection with national security.

However, the ECtHR may prove to be critical when national security is invoked. An example was given in the case Bobek v. Poland, no 68761/01, 17 July 2007, concerning a lustration proceedings (administration purging in post soviet countries). As the applicant complained that the proceedings in her case had been unfair, in violation of Article 6 ECHR, the Court recognised that at the end of the 1990s the State had an interest in carrying out lustration in respect of persons holding the most important public functions and that there may be a situation in which there is a compelling State interest in maintaining the secrecy of some documents, even those produced under the former regime. Nevertheless, the Court ruled that such a situation will only arise exceptionally given the

considerable time which has elapsed since the documents were created and that is was for the Government to prove the existence of such an interest in the particular case, because what is accepted as an exception must not become the norm.

One can refer, as well, to Bucur et Toma v. Romania, no 40238/02, 8 January 2013, in which The Court held that in refusing to verify whether the classification of undisclosed evidence as "ultrasecret" seemed justified and to answer the question of whether the interest of the preservation of the confidentiality of the information had precedence over the interest of the public be informed of the alleged illegal interceptions, domestic courts had not sought to examine the case under all its aspects, depriving this way the applicant of the rights to freedom of expression and to a fair trial

Concerning the protection of witnesses at risk, the Court acknowledged, in Doorson v. The Netherlands, § 70 that Article 6 of the ECHR does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.

In Doorson v. The Netherlands , the Court considered a sufficient public interest the need for maintaining the anomity of two witnesses who had express their fear of possible reprisals, based on previous threats and attacks they had been victim of. On the contrary, in the case Van Mechelen and others v. The Netherlands, no 21363/93, 21364/93, 21427/93 ans 22056/9, 23 April 1997, §§ 56, 57 and 58, the ECtHR held that, the balancing of the interests of the defence against arguments in favour of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the police force of the State. Although their interests - and indeed those of their families - also deserve protection under the Convention, it must be recognised that their position is to some extent different from that of a disinterested witness or a victim. They owe a general duty of obedience to the State’s executive authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional

circumstances. Moreover, the domestic court has to assess the possible threat of reprisals against the police officers or their family in a concrete manner, and not by basing itself on the seriousness of the crimes committed (§ 61).

Interestingly, in its opinion no. 8 (2006) on "the role of judges in the protection of the rule of law and human rights in the context of terrorism" (§ 68), the consultative council of european judges stated, in this regard, that "A judge has to strike a balance between the need for protection of the witnesses/victims of the crime and the right of the defendant to a fair trial. This balance poses difficulties when the witnesses and victims are under a protection programme, in which cases contact between the suspects and/or their defence lawyers may be prevented, even during a trial."

Concerning, at last, the public interest in protecting the on-going investigations, the Court ruled, for instance, that the refusal to disclose the report carried out by an undercover police officer may be justified by the need to continue with the infiltration of drug-dealing circles and protect the identity of informers (Lüdi v. Switzerland, no 12433/86, 15 June 1992).

The second principle set out in the Court's case compensates and supplements the first one. Despite the existence of a sufficient public interest, said the Court, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.

The Court made also clear that, in cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. In any event, in many cases, where the evidence in question has never been revealed, it would not be possible for the domestic court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material. Such a domestic court must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.

The question of the time and facilities that an accused shall be entitled are to be assessed (and may vary) in the light of the circumstances of each case (Galstyan v. Armenia, no 26986/03, 15 November 2007 ; Leas v. Estonia). Such an assessment gives rise to a case by case approach.

In several cases, the Court held that the difficulties cause to the applicant hadn't been adequately counterbalanced.

Let's evoke, first, the case Lüdi v. Switzerland, already evoked. This case originates in the situation of a Swiss national, charged with trafficking in drugs. A police officer had passed himself off as a potential purchaser of drugs and had got in touch with the man. Further, this agent carried out a report and transcripts of the telephone conversation they had, which were used against the trafficker during the criminal proceedings, without the court having agreed to hear this police agent as a witness. The applicant argued that his conviction had been based above all upon the undercover agent's report and the transcripts of his telephone conversations with the agent, although he had not had an opportunity to question him or to have him questioned. He considered he had been deprived of the possibility of clarifying to what extent this agent's actions had influenced and determined his behavior and the domestic courts had been prevented from forming their own opinion on the latter's credibility.

Then the ECtHR held that neither the investigating judge nor the trial courts were able or willing to hear the police agent as a witness and carry out a confrontation which would enable this agent's statements to be contrasted with Mr Lüdi's allegations. Moreover, added the EctHR, neither Mr Lüdi nor his counsel had an opportunity to question him and cast doubt on his credibility. Yet it would have been possible to do this in a way which took into account the legitimate interest of the police authorities in a drug trafficking case in preserving the anonymity of their agent, so that they could protect him and also make use of him again in the future. It resulted in a violation of paragraph 1 of Article 6 (art. 6-3-d, art. 6-1).

In the case Leas v. Estonia, criminal proceedings were initiated in respect of the applicant, mayor of the rural municipality and suspected of demanding bribes in a call for tenders for renovation work. According to the applicant, the principle of equality of arms had been violated and he had not had adequate facilities for the preparation of the defence, due to restrictions on his access to the surveillance file in the criminal proceedings against him. The Court found a failure to adequately counterbalance the difficulties caused to the defence by its restricted access to the surveillance materials and thus, a violation of Article 6 ECHR, stressing that the applicant only

retroactively learned from the prosecutor that the County Court had examined the surveillance materials and that he was neither informed of the reasons for non-disclosure nor of the nature of the undisclosed materials nor, indeed, of whether the surveillance file did include any undisclosed material evidence. The defence had been deprived of possibility of presenting their counterarguments to the County Court's position on why it had been strictly necessary to restrict their rights to disclosure.

A similar failure was found in the case A. And others v. United Kingdom**.** In the aftermath of the terrorist attack's perpetrated in New York on 11 September 2001, several people suspected to be involved in terrorist activities were subject, in the United Kingdom, to detention under the Anti-Terrorism Crime and Security Act 2001. Before the domestic courts, they argued that the detention was unlawful as there were no reasonable grounds for a belief that their presence in the United Kingdom was a risk to national security. The court ruled that, when full disclosure was not possible, Article 5 § 4 required that the difficulties caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.

When processing to such an assessment, the Court relied on several concret aspects of the proceedings. Firstly, On the material before it, the Court has no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case. Secondly, the Court considered that the domestic court was fully independent and could examine all the relevant evidence, both closed and open, and was best placed to ensure that no material was unnecessarily withheld from the detainee. Thirdly, it pointed out the role played by the special advocate who was appointed in compliance with domestic law. It noted that this special advocate could provide an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. According to the Court, the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings.

The Court stressed, however, that the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. The Court observed that, even where the evidence was not to a large extent disclosed and the open material played the

predominant role in the determination, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations.

Accordingly, the Court made a distinction in the situations of the different applicants. As concerned some of these applicants, the Court noted that the open material against them had included detailed allegations about the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places. By contrast, as concerned the other applicants, the principal allegations were that they had been involved in fund-raising for terrorist groups linked to al'Qaeda. But, in each case, the evidence which allegedly provided the link between the money raised and terrorism was not disclosed to either applicant. In these circumstances, the Court did not find a violation of Article 5 § 4 against the first applicants, but considered that the other applicants suffered this violation, since they hadn’t been in a position effectively to challenge the allegations against them.

In other cases, on the contrary, the court held that the difficulties faced by the applicants had been adequately counterbalanced.

The case Doorson v. The Netherlands, concerns an applicant who was charged with drug trafficking and finally convicted, on the basis of statements made by witnesses who, alledgedly, had recognized him from a photograph. The decision was taken by the domestic court not to reveal to the suspected trafficker the identity of two witnesses who expressed their fear of reprisals. This time, the court found no violation of the right to a fair trial. It noted that the anonymous witnesses were questioned at the appeals stage in the presence of counsel by an investigating judge who was aware of their identity. It also stressed that the Court of Appeal had been able to draw conclusions as to the reliability of their evidence and that the Counsel had been not only present, but also put in a position to ask the witnesses whatever questions he considered to be in the interests of the defence except in so far as they might lead to the disclosure of their identity. It was, at last, taken into account that these questions had been all answered, so that the interests of the applicant had been in this respect outweighed by the need to ensure the safety of the witnesses.

Likewise, in the case Kennedy v. United Kingdom, no 26839/05, 18 May 2010, the applicant, an ex-convict become active in campaigning against miscarriages of justice, was convinced that he had been subject to interceptions of his mail, telephone and email. AS a result, he lodged several complaints with the Investigatory Powers Tribunal ("IPT"), arguing that his communications had been being intercepted in "challengeable circumstances" and had led to an interference with his rights under Article 8 ECHR. The IPT notified the applicant that no determination had been made in his favour in respect of his complaints. This meant either that there had been no interception or that any interception which took place had been lawful, but, pursuant to the domestic law, the applicant was not given access to some information, which were kept secret.

The Court held that documents submitted to the IPT in respect of a specific complaint, as well as details of any witnesses who have provided evidence, were likely to be highly sensitive, particularly when viewed in light of the Government's "neither confirm nor deny" policy (consist in preserving the secrecy of whether any interception had taken place). The Court agreed that, in the circumstances, it had not been possible to disclose redacted documents or to appoint special advocates as these measures would not have achieved the aim of preserving such a secrecy. It stressed that where the IPT found in the applicant's favour, it could exercise its discretion to disclose such documents and information under domestic Rule, so that the restrictions on the procedure before the IPT did not have violated the applicant's right to a fair trial.

In reaching this conclusion, the Court emphasizes the breadth of access to the IPT enjoyed by those complaining about interception within the United Kingdom and the absence of any evidential burden to be overcome in order to lodge an application with the IPT. In order to ensure the efficacy of the secret surveillance regime, and bearing in mind the importance of such measures to the fight against terrorism and serious crime, the Court considered that the restrictions on the applicant's rights in the context of the proceedings before the IPT were both necessary and proportionate and did not impair the very essence of the applicant's Article 6 rights.

The ECtHR, at last, adopted a third principle, which concerns in particular the situation in which a conviction has been based on anonymous statements. The ECtHR held that even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements (Doorson v. The Netherlands). However, this assessment seems to be strict and protective for the person prosecuted. In Lüdi v. Switzerland, The court ruled that while the Swiss courts did not reach their decisions solely on the basis of the undercover agent's statements, theses

played a part in establishing the facts which led to conviction, with the result that they had to be taken into account in order to assess the respect of the right to a fair trial.

At this stage, I would like to make some final observations. Having regard to the cases I have mentioned, mainly dealing with criminal proceedings, let's precise that this case law do not concern only these proceedings. Indeed, it may cover all kind of proceedings falling in the scope of Article 6 CEDH, along with other Articles of the Convention or its additional protocols granting procedural guarantees. Proof of this lies in the decisions of the Court themselves. In Kennedy v. United Kingdom § 184, after the Court had recalled the rules applicable to disclosure of relevant evidence in the criminal proceedings, the Court took special care in specifying that "A similar approach applies in the context of civil proceedings".

Even more explicitly, the court stated in several of its judgments that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1 and considered unnecessary to examine the applicant's allegations separately from the standpoint of paragraph 3 when they amount to a complaint to the question of whether the proceedings in their entirety were fair (Edwards v. the United Kingdom, no 46477/99, 14 March 2002 ; Jasper v. the United Kingdom, no 27052/95, 16 February 2000 ; Leas v. Estonia).

It results that the principles aforementioned may apply to administrative judge matters. In this regard, a special question warrants consideration, namely whether such principles are applicable to decisions regarding the entry, stay and deportation of aliens, as the ECtHR (Maaouia v. France no 39652/98, 5 October 2000, paragraph 40) held that such decisions do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention". To my knowledge, the Court has not yet had an occasion to firmly decide this issue. However, we can assume that such principles could be inherent to the right to an effective remedy. What could support this interpretation is the fact that, in A. And others v. United Kingdom, the ECtHR applied these principles pursuant to Article 5 § 4 ECHR, providing for the right of everyone deprived of his liberty by arrest or detention to take proceedings by which the lawfulness of his detention shall be decided by a court. The ECtHR recalled that Article 5 § 4 was a lex specialis in relation to the more general requirements of Article 13. And we know that Article 13 requires that some independent body should be appraised of all the facts and evidence and entitled to reach a decision. With due caution, one can assume, therefore, that principles aforementioned could be applicable, under Article 13, to decisions regarding the entry, stay and deportation of aliens. The

same reasoning could be made under Article 1 of the additional protocol 7, providing for procedural safeguards relating to expulsion of aliens, in particular the right to have his case reviewed.

This approach is consistent with the opinion no 8 of the consultative council of european judges of the Council of Europe on "the role of judges in the protection of the rule of law and human rights in the context of terrorism". In this opinion, the CCEJ declared that the above stated principles also apply to the decisions concerning expulsion or deportation of an alien or refusal of a residence permit or of any form of protection (for example refugee status or subsidiary protection), if charges of a terrorist danger are involved. Although Article 6 of the ECHR is not applicable as regards expulsion and deportation of aliens, the right to a fair hearing has to be observed also with respect to these measures. The CCJE considered that similar judicial supervisory powers should be effectively guaranteed with regard to the application of limitations to aliens' freedom of movement pending procedures of expulsion or deportation. In addition, surveillance on conditions of such limitations should be guaranteed on a similar basis as for detention conditions.

In the "holistic approach" above described, the role of judges appears to be crucial, what has now to be examined further.

C. Access of judges to relevant information :

Such a question is raised not only before the national judges, but also before the ECtHR itself.

1) The question of access of national judges to relevant information:

In its Recommendation Rec(2004)20 to member states on judicial review of administrative acts, adopted on 15 December 2004, the Committee of Ministers of the Council of Europe stated the following: "Unless national law provides for exceptions in important cases, the administrative authority should make available to the tribunal the documents and information relevant to the case."

Such a recommendation is complementary to the opinion no. 8 (2006) of the CCJE on "the role of judges in the protection of the rule of law and human rights in the context of

terrorism" (§ 28), when stating: "Whatever the solution might be as regards access to evidence by the parties and defence lawyers, the CCJE is of the opinion that no limitations should apply to the possibility for the judge to have direct and personal access to documents, witnesses and other sources of evidence, in order to allow the court to ascertain all relevant facts and thus rule on an effective remedy (Article 13 of the European Convention on Human Rights)".

This approach confirm the idea that access of the judge to evidence may be a requirement under Article 13, and, at least, a decisive element to ensure the right of everyone to a fair trial. That's also what we can read in a series of judgments of the ECtHR. Let's mention, for instance, Fitt v. The United Kingdom, no 29777/96, 16 February 2000. In this case, the applicant was a person convicted of conspiracy to rob, possession of a firearm and possession of a prohibited weapon prior to the start of the trial. On the prosecution's request and by judge's ruling, the defence were only served with a summary of a co-accused statement, on the ground that this statement revealed sources of information. Even if the Court notes, that the material which was not disclosed in the present case formed no part of the prosecution case whatever, and was never put to the jury, it stresses as well in that it was his duty to monitor throughout the trial the fairness or otherwise of withholding the evidence. The Court concluded that The domestic trial court in the present case thus applied standards which were in conformity with the relevant principles of a fair trial embodied in Article 6 § 1 of the Convention.

The safeguard that the assessment by the trial judge provides with regard to the guarantee of a fair trial had already been stressed by the Court in Jasper v. The United Kingdom, in which the defence were notified that an application was to be made, but were not informed of the category of material which the prosecution sought to withhold, in so far as defence were given the opportunity to outline the case to the trial judge, who examined the material and ruled that it should not be disclosed.

That kind of reasoning is consistent with the Court's stance as concerns its own access to relevant information

2) The question of access of the ECtCH to relevant information:

The issue of access to sensitive information may now be raised before the ECtHR itself. One example was given with Al Nashiri v. Poland, no 28761/11, 24 July 2014. In this case, the applicant, suspected of terrorist attacks in 2000 in Yemen, complained he had been arrested and transferred with the knowledge of the polish authorities, to a secret place of detention in Poland where he had been a victim of ill treatment before being taken to the territory of the United States and detained in the Guantanamo Bay Naval Base in Cuba.

On giving notice of the application lodged by Mr Al Nashiri to the Government, the ECtHR requested the Government to supply, on a confidentiality basis under Rule 33 § 2 of the Rules of Court, a series of confidential documents related to the detention of the latter in Poland, the alleged CIA rendition operations in Poland, the participation of Poland or other States in that operation, the scope and course of the investigation conducted in this respect in Poland as well as any classified useful materials.

Poland refused to submit evidence as such, alleging a lack of sufficient procedural safeguards guaranteeing the confidentiality of the material that they were asked to provide. The ECtHR held that Poland had failed to discharge their obligation, under Article 38 of the Convention, to furnish al necessary facilities to make possible a proper and effective examination of applications.

In this judgment, the ECtHR recalled what should do a respondent state when national security or confidentiality concerns are involved. In cases, said the Court, where the Government have advanced confidentiality or security considerations as the reason for their failure to produce the material requested, the Court has had to satisfy itself that there were reasonable and solid grounds for treating the documents in question as secret or confidential. Where such legitimate concerns exist, the Court may consider it necessary to require that the respondent Government edit out the sensitive passages or supply a summary of the relevant factual grounds. Furthermore, such concerns may, depending on the document, be accommodated in the Court's proceedings by means of appropriate procedural arrangements, including by restricting access to the document in question under

Rule 33 of the Rules of Court, by classifying all or some of the documents in the case file as confidential vis-à-vis the public and, in extremis, by holding a hearing behind closed doors. The procedure to be followed by the respondent Government in producing the requested classified, confidential or otherwise sensitive information or evidence is fixed solely by the Court under the Convention and the Rules of Court. As a result, the respondent Government cannot refuse to comply with the Court's evidential request by relying on their national laws or the alleged lack of sufficient safeguards in the Court's procedure guaranteeing the confidentiality of documents or imposing sanctions for a breach of confidentiality.

To condemn Poland, the ECtHR added that, over many years the Convention institutions had established sound practice in handling cases involving various highly sensitive matters, including national-security related issues. According to the Court, examples of procedural decisions emerging from that practice demonstrated that the Court was sufficiently well equipped to address adequately any concerns involved in processing confidential evidence by adopting a wide range of practical arrangements adjusted to the particular circumstances of a given case.

In comparing the requirements of the ECtHR's case law in terms of access by the judges to relevant information and documents according to whether they are national judges or those of the ECtHR, one is struck by the paramount role given, in both cases, in examining evidence, assessing the necessity of keeping them undisclosed and, if so, determining par which means the proceedings can remain adversarial and fair. It highlights the increasing need for the conciliation between the right to information and competing interests, mainly public interests, to take place in the framework of judicial debate. The evolution of the standards in that matter, in a context in which, at the same time, some new threats to public interests are arising, leads the Council of Europe to express concerns. That's what I would like to illustrate in the second part of this presentation.,

Second part: The question of access to information and the current matters of concern for the Council of Europe:

Faced with the necessity to reconcile the right to information with competing interests, mainly in the current context of terrorism, the Council of Europe can be seen today as having both reasons for optimism (A) and for vigilance (B).

A. Some reasons for optimism :

The reasons for optimism, in my view, come from the progress made by domestic law and domestic judicial review to best apply the ECtHR case law and the standards of the ECHR with regard to access to information. This case law and these standards seem to be more and more integrated in most member states, as well as in the action of the different organs of the Council of Europe.

1) The example of states striving to fully execute the judgments of the Court:

The first illustration is to be found in the way the states that were condemned by the Court strive to put their legislation and their practices in compliance with the judgments of the Court, under the control of the Committee of Ministers. According to Article 46 ECHR, this organ of the Council of Europe is responsible for the surveillance of the execution of the judgments of the Court. In order to insure this execution, the respondent states have to submit action plans to the Committee of Ministers. In this regard, two of these action plans are particularly worth reading. One concerns the case A. and others v. United Kingdom. The authorities of the United Kingdom mention different decisions in which the Law Lord have followed the ECtHR. They add that this case law, legally binding on the Secretary of State, guides her approach in conducting disclosure exercises and that, within the UK, there are also avenues by which any concerns about the use of closed material procedures can be made, including to the Independent Reviewer of Terrorism Legislation and to Parliamentary Select Committees. The second interesting action plan is that submitted by Poland following a group of judgments concerning the lustration procedures. Poland stresses that its authorities have undertaken a series of measures to change the legal situation which led to the violations. Poland mention in particular the Act of 18 October 2006 on disclosing information about documents of state security agencies from 1944-1990 and the content of such documents, providing new safeguards in the lustration proceedings. The action plan also notes the large process of amendments of the different legal acts regulating the legal status of classified information. It stresses

that, as a consequence, the number of classified materials used in lustration procedures has decreased significantly, thanks, in particular to the change in the definition of a "state secret". Those summarized examples show that the judgments of the Court led to substantive modification and progress in the domestic law of the states concerned.

2) The example of the counter terrorism legislation in the Netherlands:

Another example can be found in the recent action of the Commissioner for human rights as regards counter terrorism in the Netherlands. Let me specify that the Commissioner for Human Rights is an independent institution within the Council of Europe. He is mandated to promote the awareness of and respect for human rights in Council of Europe member states. While not being entitled to act upon individual complaints, he may encourage reform measures to achieve tangible improvement in the area of human rights promotion and protection, in particular at the occasion of his visits in the countries. He is also entitled to intervene as a third party before the European Court of Human Rights.

On 2 November 2016, the current Commissioner, Mr Nils Muižnieks, wrote a public letter to the Minister of Interior and Kingdom Relations and the Minister of Security and Justice of the Netherlands. He wished to share with them some preliminary observations concerning three bills prepared by the government in the context of efforts to fight against terrorism, namely, in particular, the temporary administrative (counter terrorism) measures Bill and the amendment of the Netherlands Nationality Act.

Regarding the temporary administrative (counter terrorism) measures Bill, The Commissioner recalled that the text included several restrictions on the freedom of movement, with possible interference on people's human rights (liberty of movement and private and family life)

- The imposition of reporting obligations on a person ;
- bans on their presence in certain areas or near certain objects;
- The possibility of a ban on being in the vicinity of certain persons;
- electronic tagging to ensure compliance of these restrictions.
- the imposition of an international travel ban, impacting on one's right to leave a country, including their own;
- finally, the fact that intentional non-compliance was punishable by a custodial sentence of up to one year.

The Commissioner expressed his concern that all these measures could be imposed by ministerial decision, without any prior judicial approval, regretting that, across Europe he had seen how, in the context of the fight against terrorism, states had circumvented judicial review safeguards (notably contained in Article 6 ECHR) by adopting administrative measures which are often very far-reaching.

Regarding the amendment of the Netherlands Nationality Act and the intelligence an security services Bill, the Commissioner recalled that this bill was to make possible, including by ministerial decision, the revocation of nationality of Dutch citizens, if on the basis of their behaviour it was apparent that they had joined an organization that the government had put on a list of organizations being party to an internal or international armed conflict and posing a threat to national security. He expressed the regret that several of the terms in the Bill which were key to triggering the revocation of nationality might be perceived as vague, in particular the phrase “based on his behaviour” and the definition of “joining” an organization posing a threat to national security.

Bearing in mind those deep concerns, on matters of substance, the Commissioner asked the Dutch government for information on how “fair trial” standards were preserved in the face of the use of evidence from the security services that couldn’t be disclosed to the person concerned. He got worried that such a disclosure might put the individual at a very significant disadvantage when challenging the legitimacy of these measures. He recalled that, according to the Strasbourg Court’s case law (referring to A. and others v. the United Kingdom, judgment of 19 February 2009, paragraph 205), such proceedings must ensure a sufficient counterbalance to the difficulties that the use of secret evidence poses for the individual.

On 25 November 2016, the Dutch government replied. He began by observing that decisions of government bodies that constitute an interference in the private lives of citizens can be challenged before the administrative courts, including decisions fully or partly based on official reports by the General intelligence and Security Service (AIVD). The governement acknowledged that, in such cases, it was not always possible to make public the information from that service on which the decision was based or share it with the person concerned, either partially or fully, in order not to jeopardise the activities and operational methods of the intelligence and security services or the safety of sources.

However, the government stated that the General Administrative Law Act provided for a specific procedure concerning the way in which confidential information can be made available in

court proceedings. Under this Act, parties may refuse to provide confidential information on the grounds of compelling reasons, including national security, or may stipulate that it can only be shared with the court. If the court decides that restricted access to the information is justified (this is thus subject to judicial scrutiny), it must have the consent of the other parties before it gives judgment based fully or partly on the information in question. This provision seeks to strike a balance between the disadvantage suffered by the person concerned (in that they are unable to access confidential information on which certain government measures are based), and the compelling reasons which may prevent such information being disclosed to him or her. In light of the above, the government was of the opinion that the legal protection against certain government measures that the person concerned can obtain from the administrative courts is effectively safeguarded.

This exchange between the Commissioner for human rights and the authorities of the Netherlands shows, in the one hand, that the case law of the court has been fully endorsed by the other bodies and organs of the council of Europe and, in the other hand, that domestic legislations have changed as well in order to find the best way to conduct the proceedings related to terrorism in compliance with the standards enshrined by the case law of the Court.

3) The example of the United Kingdom:

A last example is given by a recent application Kashif Tariq v/ UK no 3960/12. This case originates in the situation of M. Tariq, a British national, employed by the Home Office of the United Kingdom as an immigration officer, holder of special security clearances for the needs of his professional activities. Mr Tariq was suspended from duty after his brother and cousin had been arrested during a major counter-terrorism investigation into a suspected plot to mount a terrorist attack on transatlantic flights. Finally, his brother had been released without charge whereas his cousin had been convicted of conspiracy to murder. Then the Home Office decided to withdraw his security clearance on the ground that his association with individuals suspected of involvement in plans to mount terrorist attacks put him at risk of their attempting to exert undue influence to abuse his position. In the course of the proceedings before the Employment Tribunal, Mr Tarik was supplied with a bundle of papers, called “open bundle”, and was informed that a further bundle of papers, called close bundle would be made available only to the Employment Tribunal and a special advocate appointed. The Home Office explained that, for national security reasons, it could provide no further information than that contained in the open bundle, what the Employment Tribunal confirmed, with the result that a special advocate was appointed by the Attorney General. M. Tariq’s counsel argued

that the Tribunal should not consider any document which Mr Tariq had not seen nor hear any witness in his absence. The Tribunal, along with the Court of appeal held that there was no inherent compatibility between the closed material procedure and Article 6 ECHR but considered that disclosure was required to enable a person to be provided with adequate details of the allegations against him so that he can give effective instructions to his special advocate. By a majority of its judges, the House of Lords upheld the appeal of the Home Office and dismissed Mr Tarik's cross appeal. Mr Tarik applied to the ECtHR under Article 6 § 1 ECHR, arguing that the procedure before the Employment Tribunal interfered with his rights to an adversarial hearing, to equality of arms and to a reasoned decision.

This case is still pending at the time of this presentation. Nevertheless, the summary of this case is available on the website of the ECtHR. In this regard, what is interesting is to observe the reasoning made by the judges of the House of Lords, as it is exposed in this summarize. Indeed, the majority of the judges seems to have been sensitive to the argument that , in civil, as opposed to the criminal, context, a balance might have be struck between the interests of claimant and defendant if a defendant could only defend itself by relying on material the disclosure of which would damage national security. In this context, they noted that Mr Tarik or his counsel had been provided with sufficient detail of the allegations made against him to enable him to give instructions to his legal representative on them. They added that Mr Tarik and his counsel already knew of the general nature of the Home Office's case. Finally, they noted that Employment Tribunal, with the assistance of the special advocate, had kept under review and hab been able to determine whether any and what further degree of gisting of the Home Office's case, or of disclosure regarding the details of allegations made in support of it is required is the light of the competing interests to take into account. A minority of judges disagreed, putting forward, basically, that the reason given to Mr Tarik for non disclosure hadn't been enough informative.

We are not in a position, at this stage, to determine whether the ECtHR will share the views of the House of Lords. But several elements disserve being pointed out. First and foremost, this case shows that the case law of the ECtHR as regards secret evidence and the right to a fair trial has been fully integrated in the reasoning of the House of Lords, that's to say of a domestic judge. Secondly, the domestic law itself, with the example of the special advocates, tend to offer safeguards in case the evidence can't be disclose for well-founded reasons. Thirdly, this case delivers an interesting example of application of the ECHR case law in the civil context within the meaning of Article 6 ECHR and, more specifically, in an administrative context, putting at stake the national security and the fight against terrorism.

If these different examples tend to show a positive evolution, others are matter of concern.

B. Some reasons for vigilance:

When evoking the need for a conciliation between security and freedom, a special mention has to be made to the situations in which some member states of the Council of Europe, with regard with a conflict or a terrorism context, have declared the state of emergency and decided to derogate, under Article 15 of the ECHR, to the obligations deriving therefrom. Currently, three member states are concerned: France, Turkey and Ukraine. I will let Bernard Even present the issue of state of emergency in France.

As far as I am concerned, I will tackle the case of Turkey. As you may know, after the coup attempt on 15 July 2016, Turkey decided to declare the state of emergency and notified to the Secretary General of the Council of Europe a derogation under Article 15 ECHR. This Article allows the Parties to the ECHR to take measures derogating from their obligations under the ECHR, in time of war or other public emergency threatening the life of the nation, except for certain rights considered as "absolute" (right to life, prohibition of torture are inhuman or degrading treatment, prohibition of slavery or servitude and the rule no punishment without law). Even in case of a right likely to be derogated, the necessity and proportionality of such derogations have to be assessed, as Article 15 provides that derogating measures can be taken to the extent strictly required by the exigencies of the situation.

In that context, a series of Decree Laws were taken within this framework and exceptional measures were issued namely: dismissal or discharge from the public service, profession or organization in which the persons held office, discharge from studentship, closure of associations, foundations, trade unions, federations, confederations, private medical institutions, private schools, foundation higher education institutions, private radio and television institutions, newspapers and periodicals, news agencies, publishing houses and distribution channels, annulment of ranks of retired personnel.

All these measures were taken on the grounds of the alleged membership, affiliation, links or contacts of the people concerned with terrorist organizations. Such measures, deriving directly from Decrees Laws couldn't be challenged before administrative or constitutional courts. However, the standards of ECHR required that an effective remedy should be put in place. That's why, on the

request of the Secretary General, Turkey issued a Decree Law No. 685 on 23 January 2017 in order to establish and Inquiry Commission on the State of Emergency Measures with the aim to creating an effective domestic remedy for those who were affected by the measures under the decree laws. The decisions of the commission, regarded as an administrative body, can be challenged before the administrative courts.

This commission, whose members have been appointed a few days ago, has not yet started its activities. In a recent decision, the ECHR declared inadmissible an application lodged by a dismissed civil servant, considering that this commission offers, at this stage, a remedy which has to be exhausted before one can lodge any application to the ECtHR.

The real question which is raised is whether such a commission, together with the administrative courts that will control its decisions, can be considered as an effective remedy within the meaning of Article 13 ECHR and whether the whole proceedings will comply with the requirement of Article 6 for a fair trial. In this regard, the Decree Law No. 685 provides that the commission shall ask all the competent organs for any relevant information or document. The Decree Law adds that, without prejudice to the provisions of the legislation concerning confidentially of investigations and state secrecy, public administrations and judicial authorities are bound to provide the commission, without further delay, all information or document it may need for the discharge of its mandate or to allow the commission to examine such document on the ground. Having regard to the wording of the decree law on that matter, the question is knowing to what extent the rules of confidentiality and state secrecy will be opposed to the commission, bearing in mind that this commission will have to determine whether or not the applicants have been members or have been connected, linked or in touch with terrorist organizations. The question of access by the applicants to the relevant documents is raised as well. Additional rules for the functioning of the commission are to be issued in the next weeks. They will have to determine in particular to what extent the proceedings will be adversarial.

On this topic like on the previous ones, the Council of Europe is especially concerned by the appropriate balance between security and freedom. Thank you for your attention.