

**LAW AND
POLICIES OF
HUMAN RIGHTS:**

**COUNTER-
TERRORISM
AND HUMAN
RIGHTS**

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1. GLOBAL RISKS: THE SECURITY AND THE INDIVIDUAL RIGHTS IN JEOPARDY

1.1. RISKS THREATENING NATIONAL SECURITY



The issue of global risks has surfaced on every country's political agenda:

- food safety risks,
- pandemics,
- global warming
- other environment-related risks,
- cyber-crime,
- financial crises,
- terrorism.

APPROACH TO THE DEFINITION ON TERRORISM



- Terrorism in the EU Directive on terrorism (2017)
- To commit one within a group of offences (attacks, murders, kidnappings, extensive destruction, seizure of aircraft, threatens...) committed with the aim of:
 - Seriously intimidating a population.
 - Unduly compelling a government or an international organisation to perform or abstain from performing any act.
 - Seriously destabilising or destroying the fundamental political, constitutional economic or social structures of a country or an international organisation.

- The US State Department in its annual document, called, “Patterns of Global terrorism”, defines terrorism as
 - “politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience”.

DIFFICULTIES TO TARGET TERRORISM

- Political biases increase difficulties in defining the term because of its subjective nature.
- Reasons:
 - 1st Relativism: Many times, “one man's terrorist is another man’s freedom fighter”.
 - 2nd problem is related to the contents of the definition (e. g. What are non-combatants,...).
 - 3rd all the definitions portray non-state actors as terrorists, while completely ignore terrorism perpetrated by the state.

- **Difficult difference between revolutionary violence and terrorism**

- The activities of freedom fighters cannot always be termed as 'terrorism', because their target is the repressive government (Martha Crenshaw).
- The distinction between 'freedom fighting' and 'terrorism' must be made on the grounds of the legitimacy of the movement for independence, recognized by the UN Article I (2) of the UN Charter recognizes the right of self-determination of the peoples.
 - E.g. The liberation movements are deprecated as terrorists by the governments against which the struggles for independence are conducted.

Terrorism is a 'process of terror' having three elements:

the act or threat of violence,

the emotional reaction to extreme fear on the part of the victims or potential victims,

and the social effects that follow the violence (or its threat) and the consequent fear.

1.2. THE SO-CALLED INTERNATIONAL TERRORISM, NEW TERRORISM, GLOBAL TERRORISM, ISLAMIC TERRORISM,... JIHADISM/THE JIHADIST TERRORISM

- The global **Jihadist terrorism** has its base in radical Islamism and its maximum expression in Al Qaeda, the terrorist group Islamic State and the dense network of groups and cells that emerged around them after 9/11, Boko Haram,...



ISLAMIST EXTREMISTS' TERRORIST ATTACKS (ALL AROUND THE WORLD)

Date	Deaths	Injuries
1970s	244	180
1980s	657	303
1990s	1,049	7,757+
2000	38	44
2001	4,687	13,500+
2002	821	2,897+
2003	418	2,321+
2004	1,066	4,016+
2005	348	1,857+
2006	319	981
2007	621±	1,730±
2008	350+	362+
2009	58	87+
2010	673+	1,794+
2011	717+	1,757+
2012	799+	2423+
2013	768+	1,839+
2014	2,120+	1,046+
2015	3,108+	3,445+
2016	1,413+	2,959+
2017	466+	998+
Totals:	20,706±	52,044±

https://en.wikipedia.org/wiki/List_of_Islamist_terrorist_attacks

Terrorist attacks
of September 11,
2001 (9/11)



Spain (2004) and
London's (2005)
bombings



Series of terrorist
attacks in different
European
countries after
Charlie-Hebdo
(2015)



NEW TERRORISM (JIHADISM) AS A GLOBAL PHENOMENON

- New terrorism with new features:
 - dispersed structure,
 - with a high degree of fanaticism which facilitates immolations with high power to cause damage,
 - telematic networks for financing and recruitment of followers, to indoctrinate, propaganda, campaign in social networks,
 - its persecution is difficult,
 - it seems to be an enemy that cannot be seen and that can appear as an isolated cell in the corner of any city...
 - it is a diffuse danger.



terrorism

- “...history of the rise of IS, perforce, constitutes an account of the many US failures to develop a consistent policy focus in the Middle East after the withdrawal of forces from Iraq at the end of 2011...”
- Salafism: based on Sayyid Qutb’s theories (joined Muslim Brotherhood). The Global Jihad.
- Al-Qaeda was born in 1988 in Afghanistan (88% Sunnis) against Soviet invasion, aided by the US. Leader: Osama Bin Laden.
- 1996-2001. Taliban movements controlled South of Afghanistan.
- The rise and development of the IS go from its origins in Iraq after the US invasion in 2003 up to late 2014. Then, proclamation of the Caliphate IS by its leader Abu Bakr Al Bagdadi in the summer of 2015 (Murdered in July 2017). Social networks propaganda.
 - Mobilization among individuals from particularly vulnerable social segments within Western European societies.
 - At home
 - Many young people travel to Syria and Iraq to fight in the ranks of ISIS



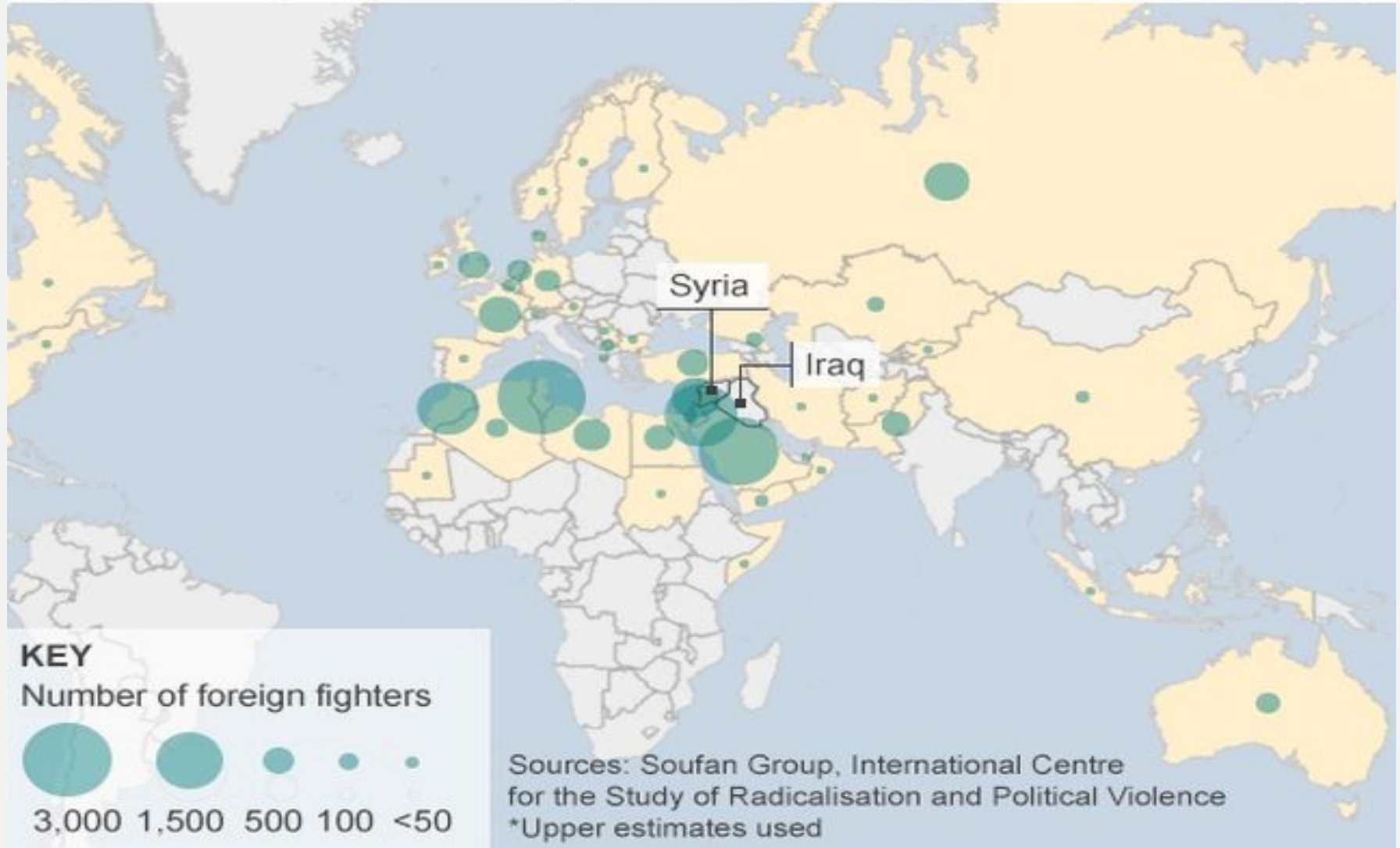
- foreign terrorist fighters

- The phenomenon of the Foreign Terrorist Fighters

- They are nationals traveling or attempting to travel to a State other than their State of residence or nationality, and others who travel or attempt to travel from their territories to a State other than their State of residence or nationality, with the purpose of committing, planning or preparing terrorist acts or participate in them, or providing or receiving training for terrorist purposes.

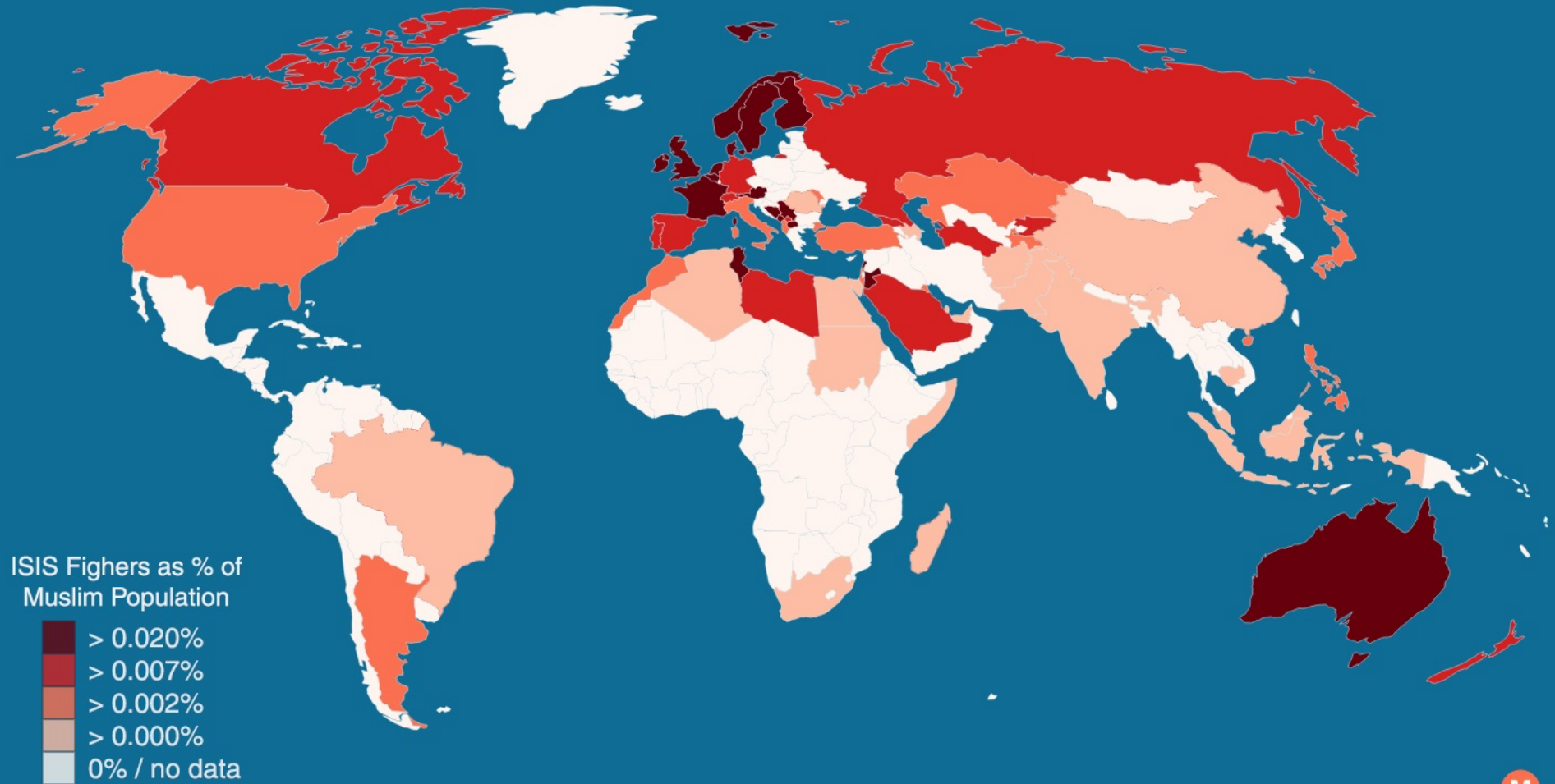


Origin of foreign fighters in Syria and Iraq



Who's Joining ISIS?

Foreign ISIS recruits as a percentage of each country's Muslim population



- UN Security Council Resolutions 2170(2014) and 2178(2014) on Foreign Terrorist Fighters:
 - Urged the states to cooperate to prevent terrorists from recruiting and fight against violent extremist propaganda and incitement on the Internet.
 - Stressed the importance of cooperation with civil society and the private sector.
 - Invited a greater exchange of information with the purpose of identifying those fighters.
 - Appeal to the Member States to use the INTERPOL databases and demand that the airlines of their jurisdiction provide advance information on passengers.

- [CoE adopted an additional protocol](#) to the Convention on the Prevention of Terrorism to address the phenomenon of foreign terrorist fighters, 2015 (open to signatures).

- Despite continuing, serious setbacks on battlefields in Syria and Iraq in 2016-17, the Islamic State (IS) remains a force to be reckoned with not only in the regions bordering these two countries, but also further afield, in Africa, Europe and the United States.

1.3. A SENSE OF INSECURITY/VULNERABILITY

- Many governments adopted measures that, although designed to safeguard such interest, were not innocuous.
- Such measures simply resulted in the erosion and in some cases the infringement of fundamental rights.

1.4. RESPONSES: OVERREACTION?



UN SECURITY COUNCIL

Resolution No. 1368
(2001), the Security
Council of the United
Nations

- Terrorism is a threat to international peace and security

Resolution No. 1373 (2001)

- Urged all States to take measures to prevent the commission of terrorist acts

Resolution No. 1535

- Counter-T Committee Executive Directorate, 2004

- In **2006** the United Nations (UN) put forward a **Global Counter-Terrorism Strategy**. One of its major purposes was **to stop terrorism at its roots by acting for prevention**. The UN strategy listed a number of conditions conducive to the spread of terrorism, namely:
 - Prolonged unresolved conflicts
 - Discrimination and intolerance
 - Xenophobia
 - Poverty and economic inequalities
 - Social exclusion and high youth unemployment
 - Political exclusion
 - Human rights deficits and lack of good governance

DOMESTIC LAW I

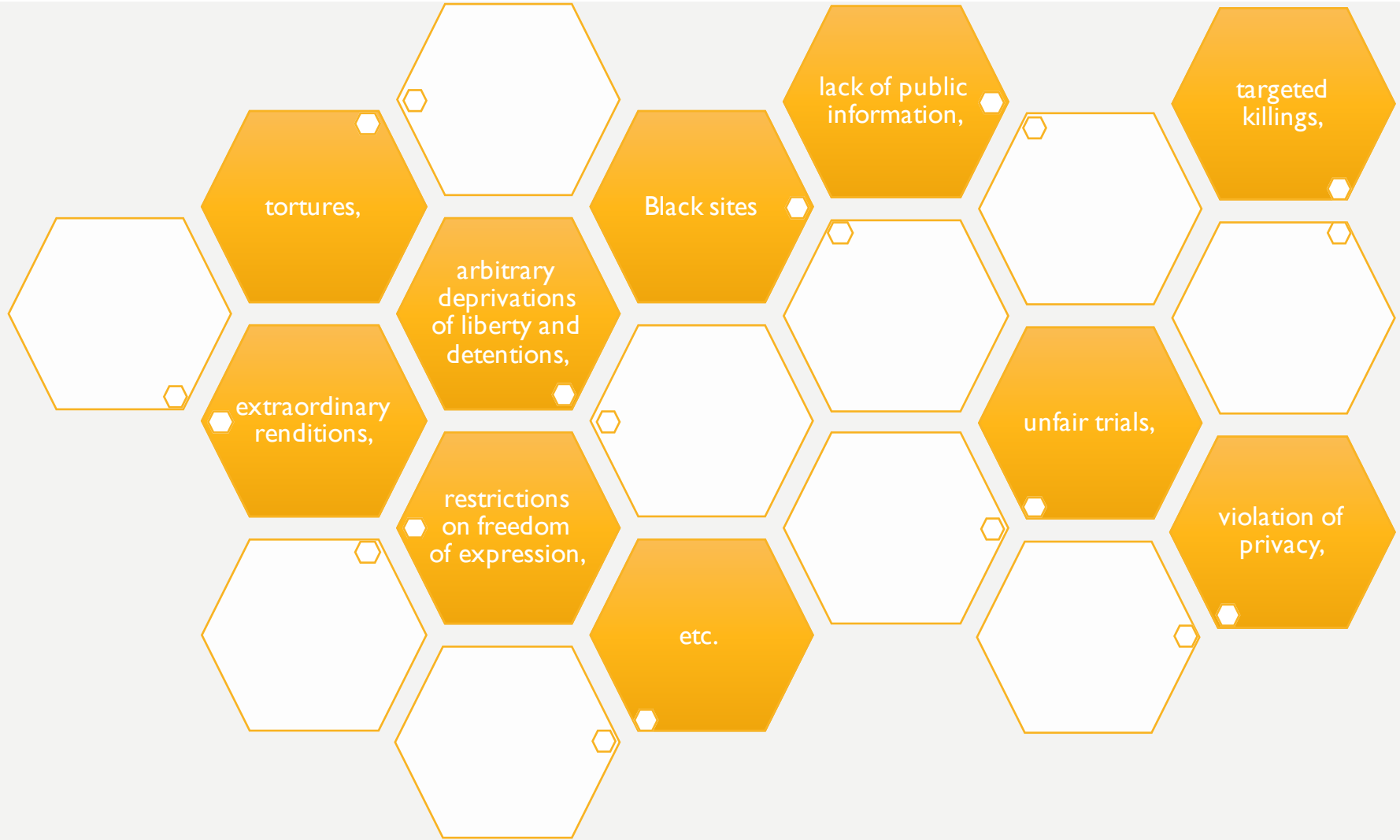
USA: Patriot Act 2001 (*Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*); *Detainee Treatment Act*

GB: in 2001, the British Parliament enacted the *Counter-Terrorism, Crime and Security Act*

CANADA: 2001 *Antiterrorist Act*

ITALIA: Criminal Law was amended to introduce new terrorist crimes 2001

GERMANY: New counter-terrorist measures in 2001



DOMESTIC LAW II



FRANCE: 2005 Counter-terrorist Act

UK Prevention on terrorism Act and Terrorist Act 2006

Amendments on Germany and Canadian Terrorist Laws 2006

France since 2015: Declaration of state of emergency until 2017
when a new counter-terrorist law was adopted

Amendments in many European domestic Criminal Laws

FRENCH NEW LAW TO STRENGTHEN INTERNAL SECURITY AND THE FIGHT AGAINST TERRORISM OCT 2017

- ***Security Zones.*** The power to designate public areas and sporting or cultural events, including music concerts, that are deemed to be at risk of terrorism, as security zones. to search all persons or vehicles.
- ***Closing Places of Worship.***
- ***House Arrest.*** Any individual for whom there are “serious reasons to believe that his or her conduct constitutes a particularly serious threat to public security and public order” may be placed under house arrest — without the prior approval of a judge — for a period of three months, renewable.
- ***Search and Seizure.*** To ask a judge for a warrant to search the home of anyone suspected of posing a threat to public security.
- ***Radicalized Public Servants.***
- ***Electronic Surveillance and Data Collection.*** To collect the telephone and email communications of suspicious individuals “for the prevention, detection, investigation and prosecution of terrorist offenses and serious crimes”. Also travel data.
- ***Border Checks.*** Police to conduct warrantless identity checks at more than 118 border areas and 373 airports, seaports and train stations, as well as the surrounding areas up to a radius of 20 kilometres.

SPAIN

Spain suffered “the worst Islamist attack in European history” on March 11, 2004, when blasts from 10 bombs on Madrid commuter trains killed 191 people.

- Not a change in the law after 2004 attacks.
- Art. 55.2 SC
- 2015 amendment to the Criminal Code including new crimes and more penalties:
 - The Organic Act 2/2015 now penalises those who are trained or receive indoctrination regarding the carrying out of terrorist offenses (Article 575), as well as individuals who regularly access communication services available to the public through the Internet that are designed to encourage the incorporation of a terrorist organisation or collaborate with it, and, equally, any individual who moves to a Jihadist territory to collaborate with the terrorist movement.
- Law 4/2015, on the protection of citizen security.
- Law 13/2015, of October 5, on modification of the Criminal Prosecution Law to strengthen procedural measures and the regulation of the technological research measures.
- Law 36/2015, on National Security.



Liberty

Security



- DISPROPORTIONAL RESPONSES ??????

- In general, are those risks always clear? Are possible future risks overestimated?
- Are the actions that governments carry out to prevent the risk of terrorism justified in every case?
- When are governments entitled to take such measures involving the limitations of my rights?
- What about proportionality?

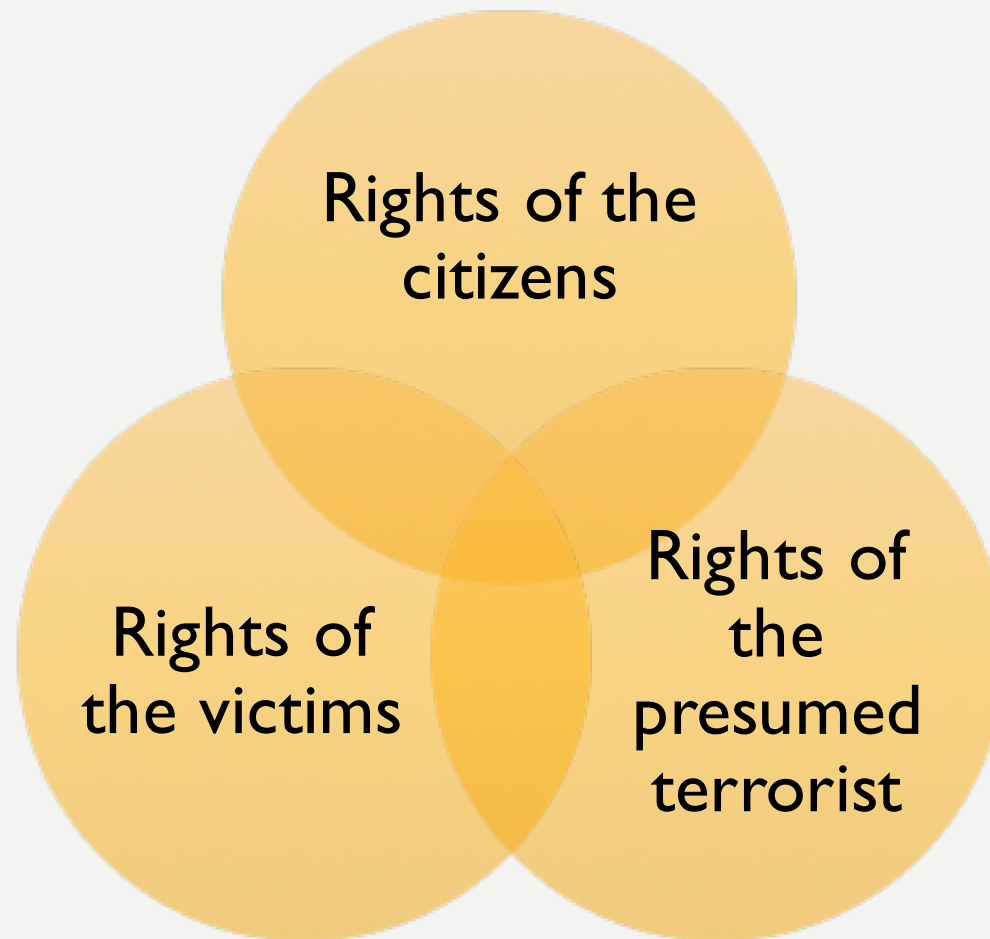


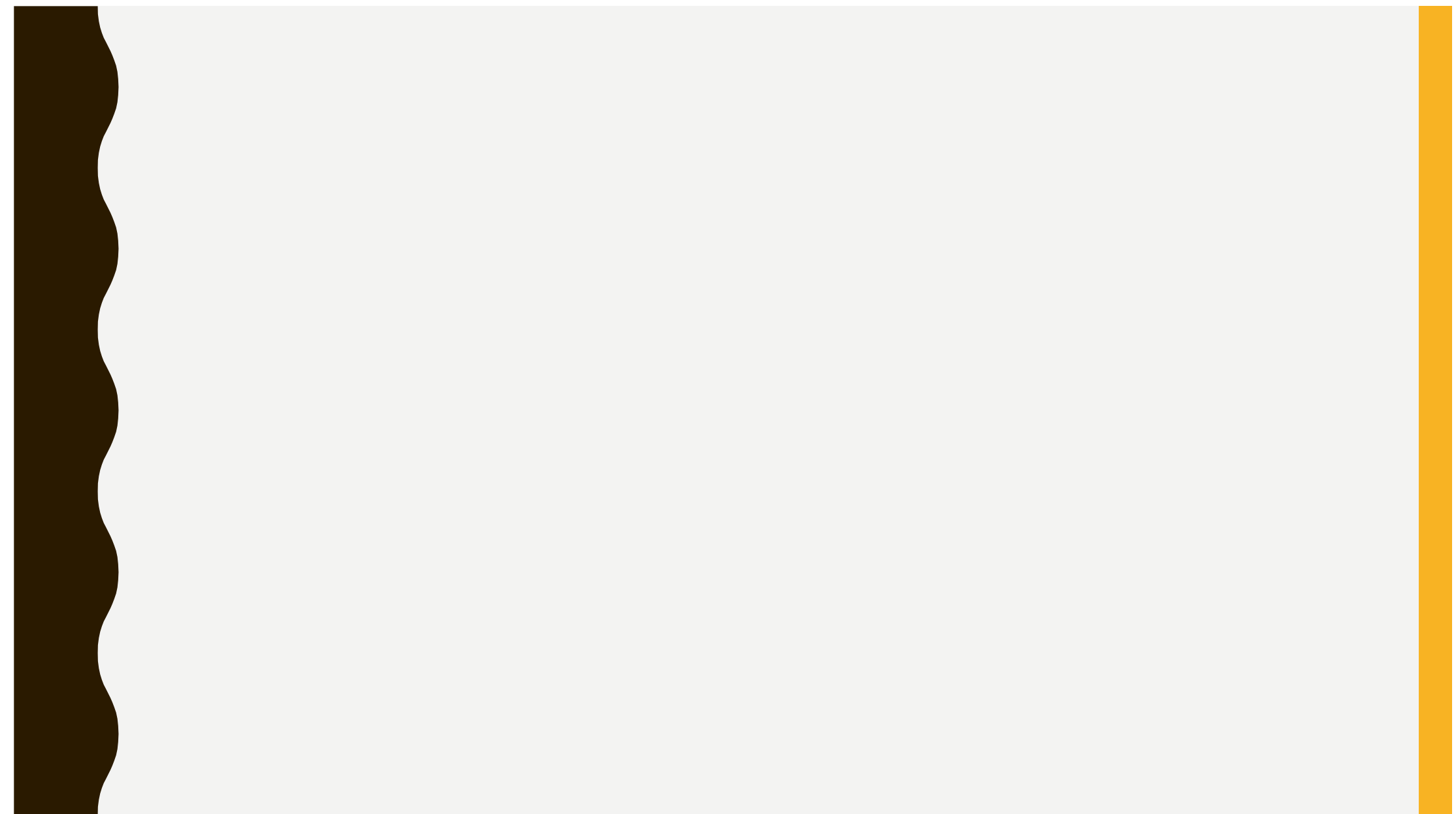
- PROPORTIONALITY:

- State's intervention only is possible when adequate, necessary and suitable to protect against the risks/dangers.
- But this principle was held when concrete dangers existed, not to face hypothetical/abstract risks

- History teaches that after the security crisis has passed, it generally becomes evident that there was not a rational factual basis for sacrificing rights in favor of security needs.

THE RULE OF LAW AND HUMAN RIGHTS MUST BE RESPECTED FOR EVERYBODY WHEN FACING TERRORISM





2. FIGHTING TERRORISM FROM A HUMAN RIGHTS PERSPECTIVE. SECURITY VS. HUMAN RIGHTS



2.1. HOW TO ASSESS THE THREAT OF TERRORISM?

- Global risk and the fear of those risks (such as terrorism) is an undeniable phenomenon currently occurring on a global scale and, one that involves fundamental rights, which calls for a supranational response.
- State should provide a timely and appropriate response to terrorism and other global risks.
- Security means protecting people's freedom in such a way that everyone can enjoy life without being threatened, BUT also without the fear of being continuously under surveillance or constrained in their liberties.

Rawls' reflections on the "rule of clear and present danger" theory

- We must consider whether a greater interest exists (a clear risk) that justifies the limitation of certain individual rights. The intensity of the risk, the consequences in the event that the perceived danger occurs, and the probability of this happening need to be evaluated.
- Time should be taken to consider alternative, less invasive solutions, or to calculate the consequences for particular individuals, groups or the society at large.

THE “TSHWANE PRINCIPLES” (2013)

- Persuasive principles were drafted by 17 organisations and five academic centres throughout Africa, the Americas, Europe and Asia based on conversations and information provided by more than 500 experts from more than 70 countries, including government and former government officials and military officers, at meetings around the world over a two-year period.
- Guidelines for those engaged in drafting, revising or implementing laws or provisions relating to the State’s authority to withhold information on the grounds of national security

2.2. AS A GLOBAL RISK... MORE THAN DOMESTIC SOLUTIONS ARE NEEDED

THE SUPRANATIONAL CONTEXT

- **UNITED NATIONS**
- **COUNCIL OF EUROPE**
- **EUROPEAN UNION**

Human rights standards as a limitation to governmental security actions

A) Some steps taken within the United Nations

- In the framework of the United Nations, the Security Council has gradually accepted the connection between upholding human rights and preserving international peace and security, expressly referred to human rights in the context of counter-terrorism.
- A new approach to human rights was later adopted, when the Security Council, under Resolutions No. 1456 (2003) and No. 1624 (2005) and subsequent resolutions, stressed that States needed to ensure that any measure taken to combat terrorism “complies with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law”.
- Despite this, there still remain strong currents of opinion which hold that the human rights perspective is not duly anchored in the UN Security Council’s agenda.

Overview of Terrorism: UN Global Counter-Terrorism Strategy 2006

Conditions Conducive



Areas of Focus



UN GLOBAL COUNTER-TERRORISM STRATEGY (REVIEWED EVERY 2 YEARS)

Pillar I

Addressing the
Conditions
Conducive to the
Spread of
Terrorism

Pillar II

Preventing and
Combatting
Terrorism

Pillar III

Building States'
capacity and
strengthening
the role of the
United Nations

Pillar IV

Ensuring Human
rights and the
rule of law

- The UN Human Rights Committee (UNHRC) has also dealt with several cases reflecting the need to strike a balance between fundamental rights and the counter-terrorism fight. For instance, on March 31, 2009, the UNHRC adopted its decision on the **case of AK and AR v. Uzbekistan** (CCPR/C/95/D/1233/2003). Terrorist bombings took place in Tashkent, the capital of Uzbekistan in 1999 and the Government accused the Islamic Movement of Uzbekistan of being behind these actions. In the investigation, AK and AR were arrested after the authorities discovered several publications and other written material on religious matters. The detainees were convicted for offences related to the dissemination of the ideology of the Islamic Movement of Uzbekistan. The Committee found that the Uzbek authorities based their actions on a perceived threat to national security, thereby not violating any of the stipulations of the International Covenant on Civil and Political Rights 1966 (ICCPR).

- The Committee has also examined cases related to the placement of individuals on a suspected terrorist list (The **case of Sayadi and Vinck v. Belgium**, CCPR/C/94/D/1472/2006). Here, the Committee found that Belgium acted prematurely, and therefore wrongfully, in transmitting the authors' names to the Sanctions Committee before the conclusion of the criminal investigation into the authors' activities initiated by the State's Public Prosecutor, with adverse consequences for their freedom of movement, their honour and reputation, and which led to interference in their private life.

B) THE EUROPEAN COURT OF HUMAN RIGHTS: A LONGER WALK

- It is in Europe perhaps where the steps taken towards protecting rights in the counter-terrorism fight have been more visible.
- In the context of the Council of Europe,
 - The General Assembly adopted the Guidelines on human rights and the fight against terrorism (2002)
 - The guidelines seek to reconcile legitimate national security concerns with the protection of fundamental freedoms within the context of the European system.
 - European Convention on the prevention of terrorism (2005).
 - An [additional protocol](#) to the Convention on the Prevention of Terrorism to address the phenomenon of foreign terrorist fighters, as well as an [action plan](#) on the fight against violent extremism and radicalisation leading to terrorism. The Protocol was opened for signature on October 22, 2015 in Riga.
 - The [Committee of Experts on Terrorism](#) (CODEXTER) follows the implementation of the Council of Europe legal instruments against terrorism and coordinates the Council of Europe activities in combating terrorism.
- Very important role of the ECHR.

- ***Case El-Masri v. the Former Yugoslav Republic of Macedonia*** case on secret “rendition” operations
- It recently held that keeping a convicted terrorist in solitary confinement during the first ten years of life imprisonment under poor conditions constituted inhuman or degrading treatment.
 - *Abdullah Öcalan v Turkey*, March 18, 2014.
- On procedural rights during the detention and trial of alleged terrorists, the ECHR found inadmissible infinite or overdue detentions.
 - *A. and others v. the United Kingdom*, February 19, 2009 (Grand Chamber).
- The European Judges also ruled against the prohibition of deportation or extradition whenever there is an actual risk of ill-treatment in another State.
 - *Chahal v. the United Kingdom*, November 15, 1996; *Saadi v. Italy*, February 28, 2008 (Grand Chamber); *Ben Khemais v. Italy*, February 24, 2009; *Labsi v. Slovakia*, May 15, 2012.
- Recognised the right to be tried within a reasonable time.
 - *Berasategi v. France*, *Esparza Luri v. France*, *Guimon Ep. Esparza v. France*, *Sagarzazu v. France and Soria Valderrama v. France*, January 26, 2012.
- Court has ruled on the measures taken by States in the fight against terrorism, confirming that they must respect human rights and the rule of law, and exclude arbitrariness and discriminatory or racist treatment.
 - *McCann and others v. the United Kingdom*, September 27, 1995; *Gillan and Quinton v. the United Kingdom*, January 12, 2010; *Nada v. Switzerland*, September 12, 2012 (Grand Chamber).

C) THE EUROPEAN UNION'S CHALLENGES TO TERRORISM

- EU counter-terrorism policies have always attempted not to overlook fundamental rights, at least in the texts.
 - Council Framework Decision, of June 13, 2002, on combating terrorism established 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” (Recital No. 10).

- Council Framework Decision, of 13 June 2002, on combating terrorism
- EU counter-terrorism strategy (2005)
- *EU Internal Security Strategy* (2010)
- Counter-Terrorism Coordinator in the Council
- Agreement with other countries to share information, even classified information
- EU Directive on combating terrorism (2017)

- ***Kadi case***

- The ECJ essentially had to decide whether a UN Security Council Resolution should take precedence over EU law. This was not found on the grounds that the enforcement of that UN Resolution would constitute a clear and obvious violation of human rights.
- Kadi was identified as a possible supporter of Al-Qaida by the UN Security Council and was sanctioned. The EU transposed this UN sanction by means of a regulation that Kadi then challenged before the EU Courts. Kadi had not been informed of the grounds for his inclusion in the list of individuals and entities subject to the sanctions stated. The ECJ reviewed the lawfulness of the EU regulation transposing the UN resolution, arguing that the protection of fundamental rights forms part of the very foundations of the EU's legal order.

- The ECJ has ruled on several occasions regarding the inclusion of individuals on lists of terrorists (terrorist blacklists). It found that “it is made clear that the names of persons, groups or entities can be kept on the list only if the Council reviews their situation periodically. All such matters must be open to judicial review”.
 - *Generalbundesanwalt beim Bundesgerichtshof v. E and F*, June 29, 2010, C-550/09; *Bundesrepublik Deutschland v. B and D*, November 9, 2010, C-57/09 and C-101/09; *France v. People’s Mojahedin Organization of Iran*, December, 21 C-27/09 P.
- Also ruled on cases concerning secret evidence.
 - Case C-27/09 P *French Republic v. OMPI*, 2011.
- It also ruled on suspected terrorist activists, whereby it found that an individual must, in any event, be informed of the essence of the grounds leading to a decision.
 - Case of *ZZ v. Secretary of State for the Home Department*, 2013. Case C-300/11.

Our main future discussions will revolve around the question of how we assess the risks and what behaviors we recommend as a consequence.

IN THE STRUGGLE OF TERRORISM DO NOT FORGET

- **I. Fundamental rights are an essential part of a democratic legal system and occupy a privileged position within it.**
- The ECHR warned about the problem of overreacting to terrorism: “it is fully aware of the undeniable difficulties of combating terrorism—in particular with regard to obtaining and producing evidence—and of the ravages caused to society by this problem, but considers that such factors cannot justify restricting *to this extent* the rights of the defence of any person charged with a criminal offence”, *Case Hulki Gunes v. Turkey*, June 19, 2003, para. 90. See also *case Klass v. Germany*, September 6, 1978.
- ECHR “an interference” (on rights) will be considered “necessary in a democratic society”.

2. Even in exceptional circumstances, there is a minimum level of respect for fundamental rights that cannot be transgressed.

- The declaration of emergency requires the concurrence of certain circumstances.
- The law offers authorities the possibility to restrict the scope of rights or their exercise on account of national security interests.
- Remember: the state of emergency should be exceptional.
- It is necessary to highlight the fundamental limits to State power in times of an emergency. This is the only way to ensure an effective and efficient protection of human rights and avoid abuses.
 - In France the state of emergency was intended to be a temporary measure but has since been extended 6 times. In October 2017 France passed the Anti-Terrorist Act. It enshrined some state of emergency measures into law.

3. The rule of law constitutes another core lesson drawn from constitutionalism, which is of significance to fundamental rights.

- Any action concerning rights must be executed under the law.
- Any counter-terrorism action impacting on civil rights has to be adopted in accordance with the law.
- The effectiveness of the rule of law is linked to the principle of accountability of public authorities (both judicial and political).

4. Fourthly, civil rights impose obligations on the State, which are both negative and positive.

- The constitutional right to security entitles people to be protected by the State, since citizens are unable to provide this for themselves. Against the threat of terrorism, people may expect policies to be adopted which act to make them feel more secure.
- Security should not be attained at the expense of unjustified restraints on other freedoms.

5. Human rights reach beyond State borders and their protection constitutes a supranational issue.

- In the case of the terrorism risk, since this has become a global issue, a global response is required in the form of a supranational strategy of human rights promotion.
- Therefore, it is essential to keep the human rights dimension firmly within the fight against terrorism and other global risks.

SOME IDEAS TO TACKLE TERRORISM

1. Make a good and rational evaluation of the risks or menaces.

2. Anticipate to the exceptional risks, not lightly ruling the responses. Good laws are made while cool-headed.

3. Adopt measures step by step.

4. Adopt exceptional measures temporarily and review them.

5. Judicial control.

6. Establish a good system of grounds for justification (that could justify rights' limitations).

It is important not to appeal to the State of necessity in a lightly way.



2.

3. COUNTER-TERRORISM VS. FREEDOMS OF THE PRESUMED TERRORISTS



- AFTER PATRIOT ACT and particularly during the period between 2002 and 2005
- **CIA** (Central Intelligence Agency) was accused of:
 - Arbitrary arrests
 - Extraordinary renditions. CIA secretly held its prisoners in the so called '[black sites](#)'.
 - many detainees, when presumed to be terrorists, have been subjected to treatment that can be qualified as torture, while others continue to be deprived of liberty even after many years
 - abuses of suspected terrorist prisoners occurred at Abu Ghraib, Guantanamo Bay, Bagram and at other such camps.
- The White House announced the finish of that programme in 2005.
- targeted killings have been ordered
- Blacklisting suspected terrorists exist
- A similar flood of accusations was made against the **British secret service (MI6)**, for showing complicity with the CIA in the torture of suspected terrorists abroad.

ARBITRARY DETENTIONS AND TORTURES

- Arbitrary arrests started from the very first moment after the 9/11. Arrests were practiced by the CIA or British Intelligence Services in many cases. Those detentions were practised with arbitrariness, tortures...
- That continues to happen in other countries (with a lower level of arbitrariness and tortures)
- Even today, particularly after terrorist attacks in France in 2015, dozens of French Muslims filed cases for wrongful detention and excessive use of force, arguing that police raids at their homes or workplaces had destroyed their reputations and livelihoods, prompting critical reports from Amnesty and Human Rights Watch.

Secret detentions

- Secret and highly secure detention facilities, so-called “black sites”, were established in at least seven different overseas locations, to which the CIA delivered its detainees for “enhanced interrogation”.
- Detention in CIA custody meant being indefinitely kept in secret, incommunicado, solitary confinement.

Extraordinary renditions

- The practice of “renditions”, i.e. the informal transfer of a person from the jurisdiction of one State to that of another on the basis of negotiations between administrative authorities of the two countries (often the intelligence services).
- European government authorities (at least 25) were deeply complicit in the counter-terrorism strategies pursued by the CIA. They permitted, protected and participated in CIA operations which violated fundamental tenets of our system of justice and human rights protection. Therefore, European governments caused further suffering and violated human rights law.
- **WITH NO RESPONSIBILITY:** In many cases, an abuse of the state secrets privilege has hampered judiciary and parliamentary initiatives to determine responsibility. Though secrecy is sometimes necessary to protect the state, it should never serve as an excuse to conceal serious human rights violations.



Abu Ghraib,
Guantanamo Bay,
Bagram Camp
and at other such
camps

Torture/ill-treatments

- The prohibition of torture and inhuman or degrading treatment is one of the most fundamental values of a democratic society.
- The absolute prohibition of torture not only obliges state officials to abstain from torture or any degrading or inhuman treatment but also implies the obligation to provide individuals with adequate protection against such serious human rights violations, to carry out effective investigations and impose dissuasive sanctions on very person responsible.
- Moreover, such unlawful methods:
 - Did not provide security agencies with reliable information.
 - Rather, incidents from Guantanamo Bay and Abu Ghraib have strengthened the position of the extremists, including in Europe.
 - The obtained information has no value before a judge.

- **Case *El-Masri v. The Former Yugoslav Republic of Macedonia*** case on secret “rendition” operations.
- This concerned the torture of an individual wrongly suspected of being involved in terrorist activities who was transferred from Macedonia to the US intelligence services. The US intelligence agents transported Mr. El-Marsi to a black site in Afghanistan for the purpose of interrogation until they concluded that he was not involved in any terrorist activity and was returned to Albania. However, this did not occur until after several days of being repeatedly subjected to “enhanced” interrogations, severely beaten, stripped and sodomised. The ECHR found that by seizing, detaining and secretly transferring Mr. El-Masri to the custody of US intelligence agents, Macedonia violated the prohibition of torture and inhuman and degrading treatment, the prohibition of arbitrary detention, the right to a private life and a family life and the right of access to Court as stipulated under the European Convention on Human Rights.

- **UN Working Group on Arbitrary Detention** was established by the Commission on Human Rights

- LEGAL OPINION REGARDING THE DEPRIVATION OF LIBERTY OF PERSONS DETAINED AT GUANTANAMO BAY (December 16, 2002)



- So long as a “competent tribunal” has not declared whether the status of prisoner of war may be considered applicable or not, the persons detained in Guantanamo Bay provisionally enjoy the guarantees stipulated in articles 105 and 106 of the third Geneva Convention.
- Requested the United States to take urgent measures to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.

- **UN Working Group on Arbitrary Detention**

- Report on **LEGAL OPINION ON PREVENTING ARBITRARY DETENTION IN THE CONTEXT OF INTERNATIONAL TRANSFER OF DETAINEES, PARTICULARLY IN COUNTERING TERRORISM**. January 9, 2007.
- Studied other cases of detentions by US forces and arbitrary renditions. Prisoners moved to Guantanamo Bay or Baghram Air Base (outside Kabul) 2005.
- Syrian men living in the UK, Turkey or the US were deported to the Syrian Arab Republic, where they were immediately arrested at the airport, detained at secret locations or otherwise incommunicado. 2006.
- Permanent detainees in Guantanamo.

- In September 2009, the Pentagon made public a new policy guidance for detentions in Afghanistan. The new guidance replaces the Unlawful Enemy Combatant Review Board (UECRB) procedures with new Detainee Review Board (DRB).
- BUT, ANYWAY...
- AND TRUMP???

TARGETED KILLINGS

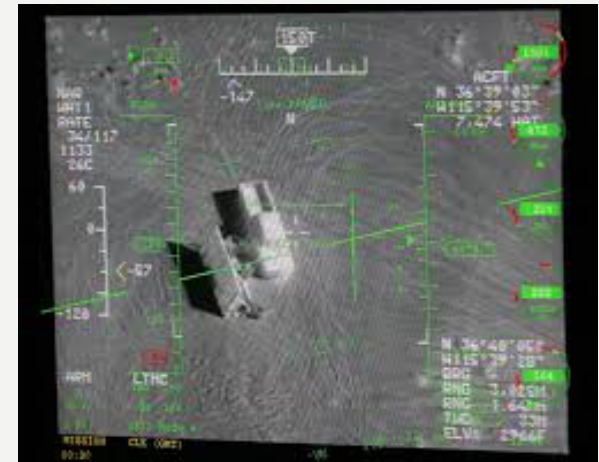
Targeted killings are premeditated acts of lethal force employed by states in times of peace or during armed conflict to eliminate specific individuals outside their custody.



- The Pentagon and the Central Intelligence Agency have employed that controversial practice more frequently in recent years, both as part of combat operations in Afghanistan and Iraq and in counter-terrorism efforts in Pakistan, Yemen, and Somalia. Since then, there has been an increase in the number of targeted killings.
- The successful killing of Osama bin Laden in a US Navy SEAL raid in May 2011 and the September 2011 drone strike on Anwar al-Awlaki, an American-born Yemeni cleric and al-Qaeda in the Arabian Peninsula propagandist, are prime examples of this trend.
- Permitted in the US by the law passed by the Congress after 9/11 (right to self-defence).

THE DRONES

- Have ballooned under the Obama administration.
- The issue of collateral civilian deaths:
 - Some official Pakistani sources claim that seven hundred innocents were killed in 2009 alone, while the US government sources claim that fewer than thirty civilians were killed from May 2008 to May 2010.



UNDUE PROCESS OF LAW



- States have an obligation in international law to protect the public from acts of terrorism and to bring to justice persons who commit, or prepare or assist the commission of acts of terrorism.
- Some States have:
 - Extended the maximum limit of pre-charge detention, limited the possibility of a review of the legality of detention, impact on the presumption of innocence, used evidence such as confessions obtained through physical or undue psychological pressure...
 - Established special or specialised chambers within the ordinary courts or special courts to deal with terrorism-related cases.

- **UN Counter-Terrorism Implementation Task Force ,“Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism” October 2014**

- All individuals must have effective access to justice
- by a competent, independent and impartial tribunal established by law,
- the right to a public hearing,
- the right to be presumed innocent,
- right no to be compelled to testify against herself or himself, or to confess guilt,
- right to a fair hearing,
- right to be tried in his or her presence,
- legal counsel,
- restrictions on the disclosure of information for the defence may be justified in certain cases and subject to conditions,
- the right to a genuine review of the conviction and/or sentence by a higher tribunal.

THE BLACK LISTS

- Terrorist blacklisting has been a central plank of the “war on terror” pursued by western states since 9/11.
- [UN Resolution 1267](#) (and the resolutions that amended it) created the UN sanctions committee, comprised of all members of the security council, to compile a list of individuals and groups “associated with” Osama bin Laden, al-Qaida and the Taliban and compel states to bring proceedings or penalise those designated.
- The formal basis for such procedures lies in a Security Council resolution in 2000 which established a list of individuals suspected of having connections with al-Qaeda, Osama bin Laden and the Talibans and compel states to bring proceedings or penalise those designated.

- Terrorist groups blacklisting.
- Individual blacklisting.



UN Security Council Current Members

Permanent and Non-Permanent Members

The Council is composed of 15 Members:

- five permanent members: [China](#), [France](#), [Russian Federation](#), [the United Kingdom](#), and [the United States](#),
- and ten non-permanent members elected for two-year terms by the General Assembly (with end of term date):
 - [Bolivia](#) (2018)
 - Côte d'Ivoire (2019)
 - [Equatorial Guinea](#) (2019)
 - Ethiopia (2018)
 - [Kazakhstan](#) (2018)
 - [Kuwait](#) (2019)
 - [Netherlands](#) (2018)
 - [Peru](#) (2019)
 - [Poland](#) (2019)
 - [Sweden](#) (2018)

Non-Council Member States

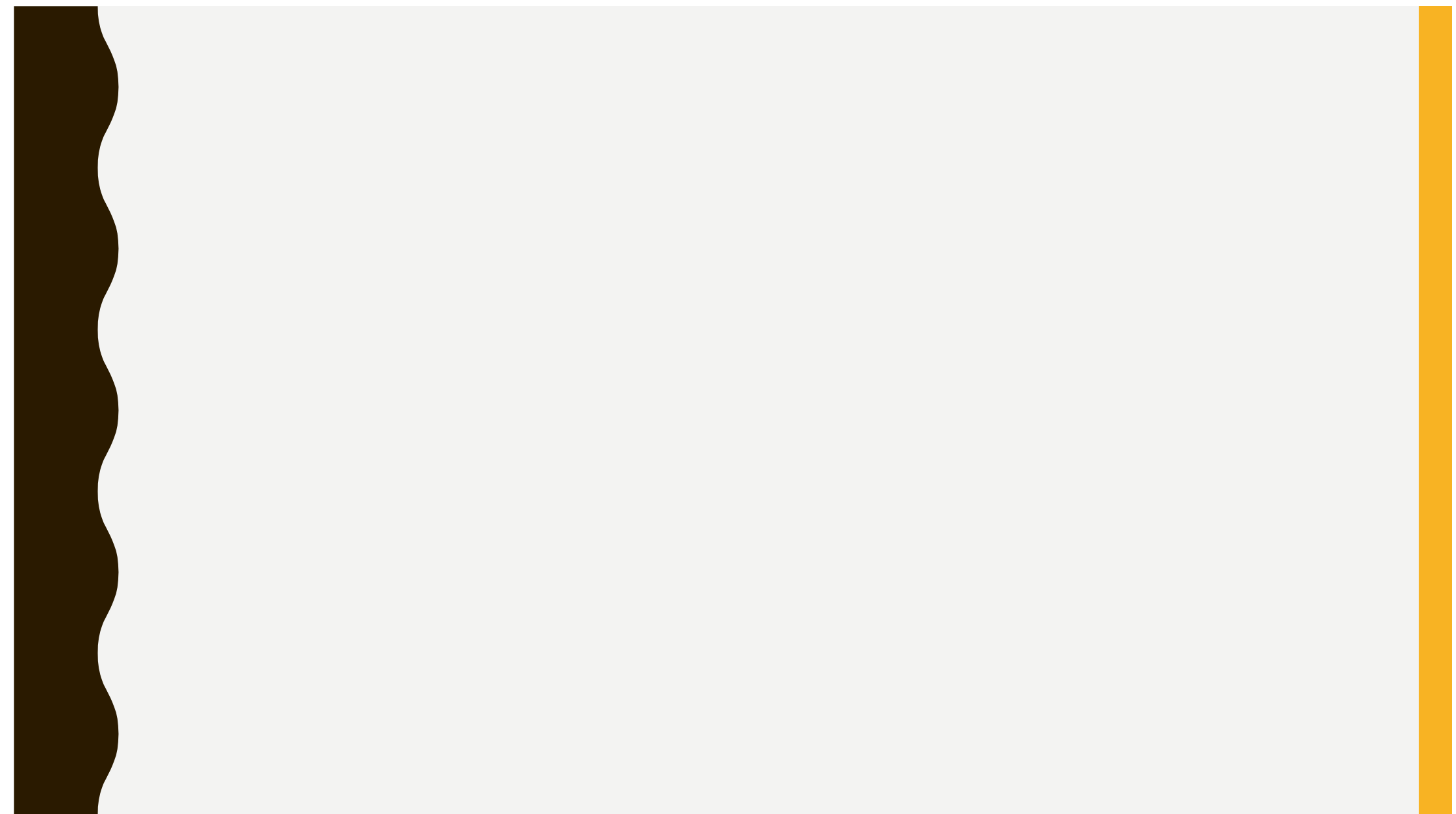
More than 60 United Nations Member States have never been Members of the Security Council.

A State which is a Member of the United Nations but not of the Security Council may participate, without a vote, in its discussions when the Council considers that country's interests are affected.

Both Members and non-members of the United Nations, if they are parties to a dispute being considered by the Council, may be invited to take part, without a vote, in the Council's discussions; the Council sets the conditions for participation by a non-member State.

THE USE OF PROFILE AND BLACK LISTS OF ALLEGED TERRORISTS

- The formal basis for such procedures lies in a Security Council resolution in 2000 which established a list of individuals suspected of having connections with al-Qaeda, Osama bin Laden and the Taliban.
- Consequences of blacklisting or profiling:
 - These sanctions include the freezing of financial assets, control of any economic transaction,...
 - Scrutiny of movements, not allowing entry nor asylum due to links with terrorism.
 - Reinforcement of screenings in frontiers of individuals with certain profiles.
- Guaranties needed:
 - E.g. the case Kadi, respect with the fundamental rights.
 - ECJ :“The names of persons, groups or entities can be kept on the list only if the Council periodically reviews their situation. All these matters must be open to judicial review”.
- Risks:
 - Stigmatisation of collectives
 - Discriminatory treatment
 - False positives (errors)





4. COUNTER-TERRORISM VS. PRIVACY

4.1. NEED FOR INFORMATION/SECRECY

- State and Intelligence services need information to preserve the State from risk:
 - Prevention
 - Secrecy
- Need for information to struggle against terrorism:
 - From open sources (websites, open spaces, open chats on the Internet, the street,...).
 - From close sources (mail, closed webpages, homes, non public databases, social networks, financial transactions,...). Problems with privacy.



The net

- Crucial and useful for terrorists to commit crimes, earn and share black money, laundry of money, raise funds for attacks, seek supporters, defend their causes, coordinate groups, and mount terrorist attacks...
- Since terrorists make use of the digital era's tools, governmental monitoring and supervision of digital communications and data can be justified.
- EU governments have pressed for more power to gather intelligence.



- Today, it is technically possible to intercept telephone and electronic communications that take place anywhere or enter into databases all over the world.
- The problem is that the control and collection of such information...
 - appears to be **increasingly incisive** (data are collected and evaluated with perspective, mapping people)
 - and is **conducted in a global manner** (millions of citizens are under surveillance) **without adequate controls**.
 - Snowden's disclosure of US National Security Agency (NSA) information revealed a vast surveillance operation existing all around the world. Idem British Intelligence Services (GCHQ) and from other States.



- 
- 
- Significant risk that these massive counter-terrorism operations could **erode fundamental rights** protected by the international framework, as well as by domestic constitutions,
 - including the right to intimacy,
 - the secrecy of communications,
 - and the right to self-determination regarding our data.

4.2. NECESSITY TO FIND AND RESPECT AN APPROPRIATE BALANCE BETWEEN SECURITY AND PRIVACY

- The development of new technical tools, the existence of Internet services providers—which store data for millions of customers—, and more powerful software applications, able to collect and treat data while extracting relevant quality information, create enhanced law enforcement possibilities.
- All this leaves us open to abuse of our fundamental human right to privacy.
- In this new scenario, it is necessary to find and respect an appropriate balance between security and privacy.





the

CHILLING

effect



4.3. MASSIVE WIRETAPE (BULK CONTROL)

CASE ON MASSIVE WIRETAPS (BULK CONTROL)

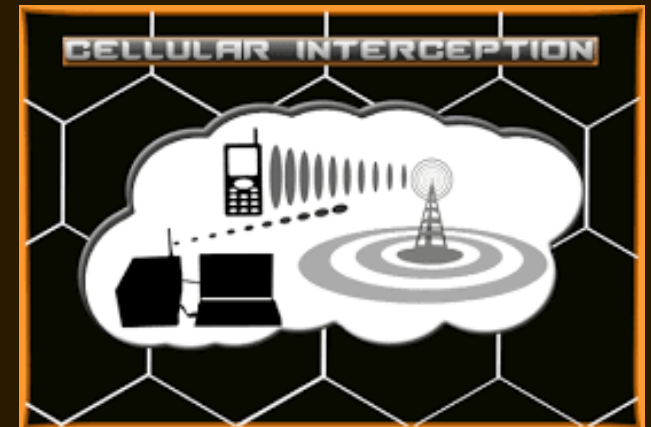
ECHR, July 1, 2008, the case Liberty and others v. United Kingdom

- It was discovered that the British Defence Services had been intercepting all telecommunications between the two British Telecom stations (Clwyd and Chester), a connection that supported most of the communications traffic to and from Ireland.
- This information was stored and filtered through keywords, etc., before being transferred to intelligence analysts.
- The European Court understood that this involved an interference in the rights of privacy and secrecy of communications since such controls are not sufficiently foreseen by law.
 - It extended the guarantees that must accompany these rights when it comes to interception of communications to specific individuals to strategic or general interceptions, as was the case, demanding the Law fixed the guarantees and limits to the power that should be established in that retrospective surveillance.
 - The Court warned that “furthermore, since the application of secret surveillance of communications measures is beyond the control of both the interested parties and the public in general, the “Law” would conflict with the supremacy of the right in question if the discretionary faculty granted to the Administration had no limits (para. 94).

THEREFORE,

- Secret, massive and indiscriminate surveillance programmes are not in conformity with European human rights law and cannot be justified by the fight against terrorism or other important threats to national security.
- Such interferences can only be accepted if they are
 - authorized by law,
 - strictly necessary
 - and proportionate to a legitimate aim.

4.4. INTERCEPTING COMMUNICATIONS



- In Belgium or in France to carry out wiretapping the authorisation of the judge is generally required, in addition, in the case of Belgium, to be carried out only in the case of attempted or completed offenses.

BUT EXCEPTIONS

- In **Belgium**, the Law of July 20, 2015, to strengthen the fight against terrorism has extended the possibility that the police perform them, not only to the case of attempted or completed crime, but to a whole set of related actions of terrorism (e.g. participation in an organisation with terrorist links, or incitement to terrorism, or the threat of terrorism...).
- In the **United Kingdom**, in the interception of communications in a terrorism investigation, a judge warrant is not needed, but of the government: it is the police that carries it out, authorised by the Crown Prosecution Service (CPS).
- **France**, in terrorism investigations, a warrant of a member of an Administrative Commission of Communications' control (no judge). In case of "absolute emergency", no warrant is needed.
 - And an **Act for the surveillance of international communications** was adopted at the end of 2015, which also uses vague concepts to justify the possible control and treatment of data obtained in international communications.
 - **The new law October 2017**
 - authorises the Interior Minister, the Defence Minister and the Transport Minister to collect the telephone and email communications of suspicious individuals "for the prevention, detection, investigation and prosecution of terrorist offenses and serious crimes".
 - The law also allows security services to access travel information, including from travel agencies, about airline and maritime passengers.
 - Data collection "shall exclude personal data that may reveal a person's racial or ethnic origin, religious or philosophical beliefs, political opinions, trade union membership, or data relating to the health or sexual life of the person concerned".

- **Ex. In Spain, when collecting communications data** that may affect secrecy (telephone or electronic wiretaps), the 1978 Constitution requires a court order, without distinguishing between type of communications or bulk surveillance of communications (Article 18.3).
- **When wiretaps are carried out by intelligence services**, as part of their duties, the law is more ambiguous.
 - However, the intelligence services are required to observe the provisions of the Organic Act 2/2002, providing for prior judicial control of the National Intelligence Centre. In particular, the Secretary of State, acting as Director of the National Centre of intelligence, must request the competent Justice of the Supreme Court for authorisation to adoption measures affecting home inviolability and secrecy of communications.
- We cannot find differences (regarding guaranties) among individual telephonic control or massive ones.

In Spain

- SITEL
- The Act on Criminal Procedure was amended by the Organic Act 13/2015 to strengthen procedural protections and to regulate technological research measures. It includes overseeing electronic communications, PCs, USBs, etc., for the first time.
 - As a general rule, cyber-surveillance is only permitted when the government is investigating terrorism (or other serious crimes)
 - and the Act almost always requires a judicial warrant as a condition of such surveillance.
 - General principles:
 - Speciality: The surveillance must be related to the investigation of a particular crime.
 - Suitability: this requirement means that the government must define the objective and subjective scope and duration of the measure.
 - Exceptionality and necessity: The principle of necessity requires that surveillance can be done, and data processed, only if the measures taken are adequate, relevant and not excessive.
 - Proportionality: This principle requires a balancing of two interests: security vs. privacy. The intervention must be carried out without unduly prejudicing the rights and freedoms of citizens.

4.5. DATA SURVEILLANCE

- Surveillance technology is developing with breathtaking speed, including a numerous transactions, through access to private and public-sector databases.
- Nowadays, technologies exist which allow
 - for the use of virtually undetectable listening and tracing devices;
 - and for the surreptitious installation of “spyware” on someone’s computer capable of secretly monitoring the online activities and e-mails of the user, and even turning on the computer’s camera and microphone.
 - Among other uses



- The storing of enormous amounts of personal data in social security, medical data, travelling, and consumer “lifestyle”, built by specialised data mining companies, is a matter of serious concern. Combining these databases and linking them with other databases creates a previously detailed picture of our lives and interests, including financial and medical aspects, and cultural, religious and political affiliations.
- Police and secret services search through such databases in order to find a “match” against a pre-determined “profile”.



The exchange of data among intelligence services has been a fact (always)

4.6. PERSONAL DATA EXCHANGE

UN

- **U.N. Security Council Resolution 2178(2014) on Foreign Terrorist Fighters:** a general call for granting more data surveillance authority to intelligence agencies and require that airlines under their jurisdiction provide advance passenger information.
- On the basis of these international provisions and following Jihadist attacks in Paris (2015) and Brussels (2016), **the EU** reached agreements on data transfer that had been long debated.

ECHR

- The exchange of personal data or data on communications is covered by the principle of consent
- Exceptions: Art. 8.2. ECHR:
 - There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
 - Prevention of terrorist attacks could be a ground for it.
 - But, any way, law must be respected and the data need to be covered by the principles ruling data processing.

EU

- *Case ECJ Digital Rights Ireland y Seitlinger and others (2014)*
- EU Data Retention Directive compelled all ISPs and telecommunications service providers operating in Europe **to collect and retain** a subscriber's incoming and outgoing phone numbers, IP addresses, location data, and other key telecom and Internet traffic data for a period of six months to two years.
- It therefore seeks to ensure that the data are **available for the purpose of the prevention, investigation, detection and prosecution of serious crime, such as, in particular, organised crime and terrorism.**
- mandated data retention impacts millions of ordinary users by **compromising online anonymity** which is crucial for whistleblowers, investigators, journalists, and those engaging in political speech.
- The Court of Justice declares the Data Retention Directive to be invalid (not clear; not proportional...)

4.7. WHEN THE DATA CROSS THE EXTERNAL BORDERS. THE EXCHANGE OF DATA WITH THIRD COUNTRIES

- Agreement on PNR with USA and with Australia
- The failed PNR Agreement with Canada and the requirements of the court of justice regarding the transfer of passenger data (ECJ 26 July 2017)
- *ECJ Case Digital Ireland (2014)* → *EU-US Umbrella Agreement 2016, for investigation of crimes, terrorism*
- ~~The Safe Harbour Agreement~~ (ECJ Case *Schrems*, 2015) → *EU-US Privacy Shield 2016*



DATA EXCHANGE IN BORDERS

TERRORISM AS A GLOBAL PHENOMENON

REGARDING BORDERS, THE AIM IS:

- To stop foreign terrorist Fighters
- To avoid the entry of suspected terrorists or pursue them for arrest

The utility of data exchange

An early warning mechanism

Cooperation

THE IMPORTANCE OF DATA EXCHANGE ON THE TRANSFER OF BORDERS IN THE SCHENGEN AREA

- Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities. Schengen Information System (SIS)
- Treaty of Prüm 2005
 - DNA profiles, fingerprint data, records of vehicle registration and other personal data
 - Visa Information System (VIS) 2014
- Regulation adopting the Schengen borders code 2016, amended in 2017
 - Data control of all people when crossing external borders
 - Contrast with the data that appear in databases of police interest
 - Possibility of selective controls
- Adoption of an Entry-Exit System (EES)
- Drafting a Registered Travelers Program (RTP)
- Negotiating an European travel information and authorisation system (ETIAS)



FRONTEX AS A TOOL IN COUNTER-TERRORISM

- *Council Regulation (CE) No. 2007/2004*, on the European Agency for the Management of External Borders



THE NEW DIRECTIVES ON THE PROCESSING OF DATA VS. THE SAFEGUARDING OF NATIONAL SECURITY

Regulation 2016/679 on data processing

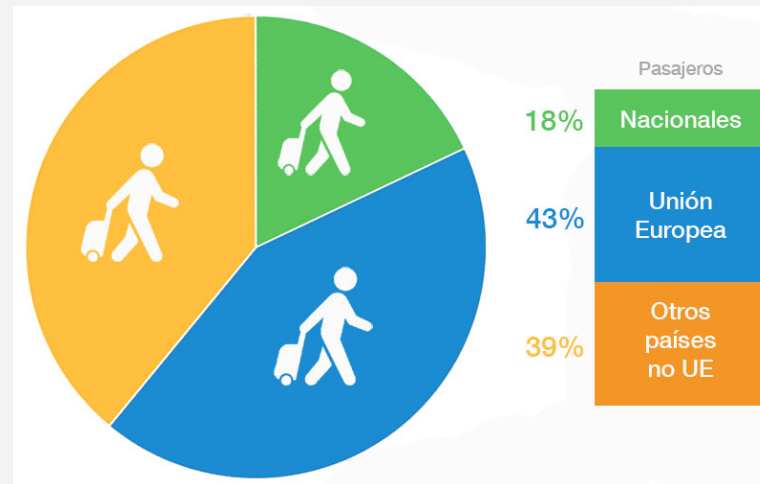
Directive regulating the use of Passenger Name Record (PNR) data in the EU for the prevention, detection, investigation and prosecution of terrorist offences and serious crime that was adopted on April 21, 2016.

Directive (UE) 2017/541, European Parliament and the Council on combating terrorism.



THE *PERSONAL NAME RECORD* REGISTER (PNR)

- Macro database of passengers passing through European airports
- **DIRECTIVE (UE) 2016/681**, April 27, 2016, on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime



<http://www.aertecsolutions.com/2016/05/02/pnr-el-registro-internacional-de-pasajeros-aereos/>

- 1. Name and surname. They are the essential data of the registry, although they will be automatically “masked” after six months.
- 2. Date of the trip.
- 3. Date of reservation of the ticket.
- 4. Locator.
- 5. Traveller’s information: Phone number, email.
- 6. Destination and origin.
- 7. Other previous trips of the traveller.
- 8. Contact address. Data are not masked at six months as the identity.
- 9. Means of payment (card or cash).

- 10. Seat on the flight.
- 11. If traveling alone or in a group.
- 12. Information on the ticket: Rate, round trip, date of purchase.
- 13. Intermediaries: Travel agency or means of ticket acquisition.
- 14. Specify whether the traveller made use of his/her ticket or not.
- 15. Luggage.
- 16. Reservation: To know if any modification was made in the flight reservation.
- 17. Shared code.
- 18. General data.
- 19. Changes in the 18 measures cited.

THE USE ON THE FRONTIERS OF PROFILE AND BLACK LISTS OF ALLEGED TERRORISTS

- Consequences of blacklisting or matching a profile:
 - Scrutiny of movements, not allowing entry, not asylum due to links with terrorism.
 - Reinforcement of registration in frontiers of individuals with certain profiles.
- Risks:
 - Stigmatisation of collectives.
 - Discriminatory treatment.
 - False positives (errors).



SOME PARTIAL CONCLUSIONS

TERRORISM: NEED OF A RESPONSE

- The exchange of data on the transit of individuals across borders is an extremely useful tool.

TWO DIFFERENT PHENOMENA

- Immigration and terrorism
- Change in the Spanish National Strategy Plan 2017

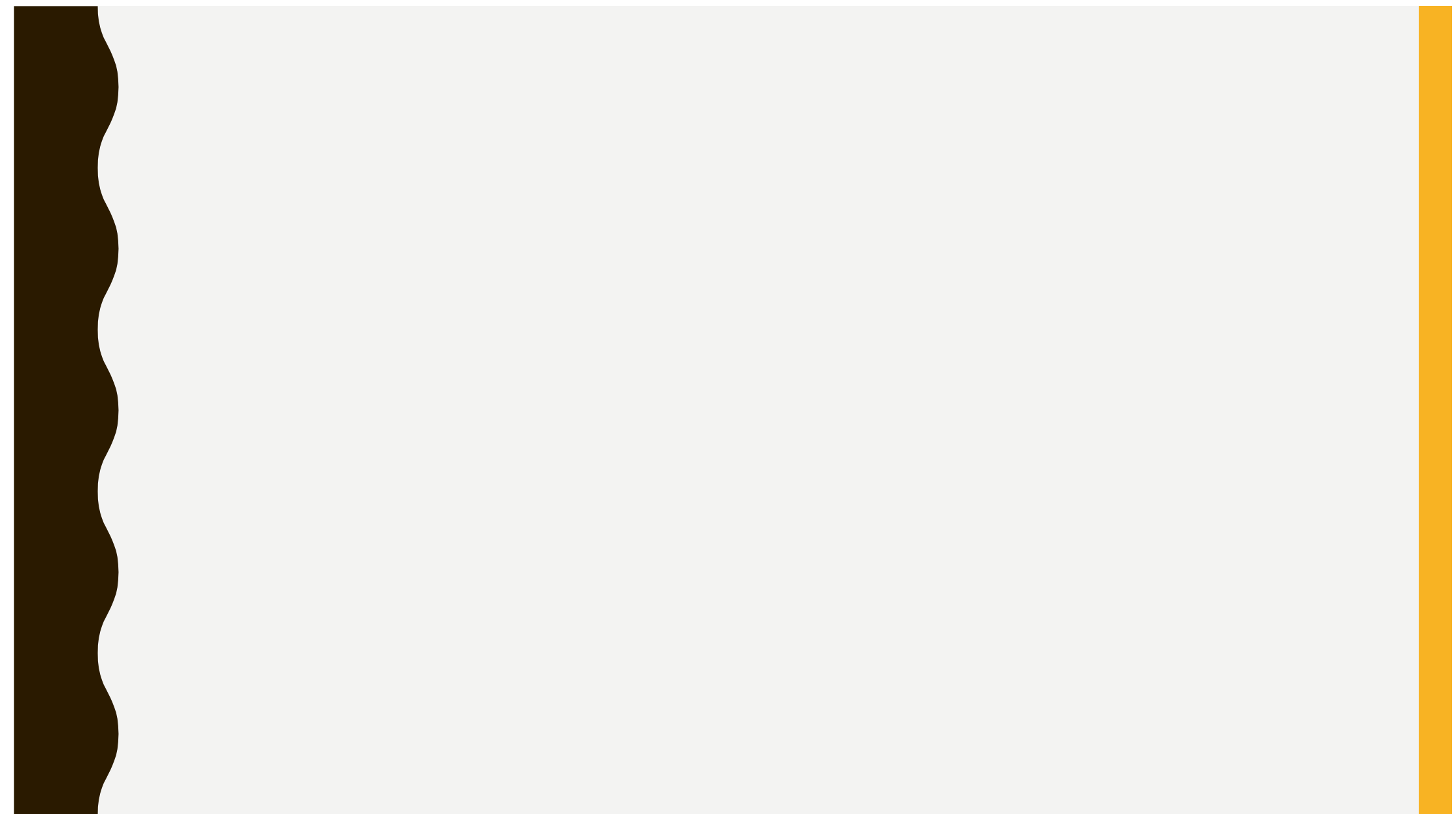
DO NOT FORGET

- Principles governing data processing in the counter-terrorism policies in borders.
- Principle of *favor libertatis*.



THE ROLE OF THE COMMUNICATION SERVICES' PROVIDERS

- Apple and San Bernardino Case (in California)
- Warrant Case before the US Supreme Court of Justice



5. COUNTER-TERRORISM VS. THOUGHTS, BELIEVES AND THEIR EXTERNAL EXPRESSION



CONTENTS

Undue limits to Freedom of the press

Limits to freedom of expression: restraint from apology of terrorism

Vest limitations. Pretending save security against religious symbols

Limits to right to meeting and associate in the struggle against terrorism.

5.1. ARBITRARY LIMITATIONS TO FREEDOM OF THE PRESS

- Freedom of the media is one of the prime achievements in a democracy.
- The role of the press
- Restricting freedom of expression under cover of anti-terrorism activities is close to handing victory to the terrorists.



- THINGS HAPPEN...
- Fixing microphones and geolocation tags in journalists' devices or homes, as well as the use of mechanisms allowing interception of communications, use of means to break the confidentiality of journalistic sources and the professional secrecy.....

- **State's secret** cannot be always an excuse to limit access to information. It is absolutely crucial to enable journalists to carry out their work and to give them the opportunity to decide whether or not disseminate a piece of information.
- But ECtHR has decided on the liability of journalists for obtaining and publishing secret information in several cases (they violated criminal law that prohibits the dissemination of secret information)
- Also prosecution of whistle-blowers

ON LIMITS TO JOURNALIST'S WORK

- Committee of Ministers CoE 2005 issued a “Declaration on freedom of expression and information in the media in the context of the fight against terrorism” called on member states...
 - to respect media rights and to not unnecessarily introduce new restriction on freedom of expression and information and not treat journalists’ reporting of terrorism as supporting of it
 - To ensure access to information, scenes of acts and judicial proceedings
 - To protect their sources and materials
 - Not to pressure them
- In 2007 further guidelines on “protecting freedom of expression in times of crisis”, including terrorist attacks.


- Notwithstanding,
- In Europe, there have been cases of:
 - electronic and prospective surveillance of communications by secret services on journalists' working in areas that are the responsibility of the intelligence services. Initially, the ECHR did not recognize that such surveillance was contrary to the European Convention on Human Rights because there was sufficient legal coverage for such control and because it responded to a legitimate interest.
 - Limits to journalist in the access to information.
 - The laws were used to prosecute journalist for obtaining information from certain sources and justified surveillance on the need to identify the sources (breaking down the professional secrecy).

- **On difficulties to access to information**

- Case Youth Initiative for Human Rights V. Serbia, ECtHR of June 25, 2013.

- An NGO, aware that its Government was conducting electronic checks on citizens, requested information from the Intelligence Agency on how many people had been monitored this way during 2005. This information was denied and they resorted to the Information Commission (internal body in charge of ensuring the correct application of the Serbian Information Law) that recognised them such a right, but then the Intelligence Agency reported that it no longer had the information requested. The Court of Strasbourg issued a laudable (although possibly unexpected) ruling recognising that the refusal of the secret services to provide the required information violated the right to receive information and to disseminate it later (Article 10 of the Convention), since it was obvious that the interest of the NGO in this information resided in the will to disseminate it and contribute to the public debate.

- in the **case Üper and others v. Turkey**, ECtHR October 20, 2009, (role of the press)
- Turkish authorities had suspended and banned the dissemination of certain articles and copies of newspapers as propaganda on behalf of a terrorist organisation. However, the Court of Strasbourg understood that there had been a violation of the right to freedom of expression and press freedom, because the draconian measures imposed by the Turkish authorities were of such magnitude and lack of justification that they damaged the role of the press as a public watchman in a democratic society. In addition, the total closure of some publications supposed by the authorities the belief that journalists would continue to publish the same type of content in the future.

- 
- Association confraternelle de la presse judiciaire and others v. France

- **Case Weber and Saravia v. Germany, ECtHR of June 26, 2006,**
- A German journalist who investigated issues that were subject to the supervision of the Federal Intelligence Service, and that travelled to different countries in Europe, South America, and Central America, considered that it could deliberately be intercepted in their communications in any of these places after the introduction by the Government of a system of prospective control (strategic monitoring). With this system, following certain keywords, the communications and personal data of any citizen were tracked, whether in Germany or abroad, all in order to obtain information to prevent terrorist attacks or other risks. For the applicant, these controls restricted her journalistic work, because when she worked on such matters (terrorism, drugs, arms trafficking...) she could be spied on and could no longer be sure that her information and journalistic sources could remain confidential, which was crucial for press freedom in a democratic state. The Court, after analysing the legal regulation of these strategic controls, considered that this was sufficiently guaranteed to ensure the non-abuse of this instrument by the authorities and understood that this possible interference in communications or the possible danger to press freedom. they were sufficiently justified by the safeguarding of a legitimate interest, national security.

- **Case Telegraaf Media Nederland Landelijke Media and others v. Netherlands (ECtHR November 22, 2011)**

- Some journalists had disseminated information about activities of the intelligence agency and were subject to surveillance in order to find out their sources of information. The Court did not dispute that, in fact, behind the surveillance action operated by the intelligence services was the interest of safeguarding national security, but it applied the test of “the need in a democratic society”. This test requires to determine if the “interference” was justified in an “imperious social need”, if it was proportionate to the legitimate aim pursued and if the reasons alleged by the national authorities to justify it were pertinent and sufficient. The Court considered that the legislation in the Netherlands had not passed this test and did not provide for sufficient safeguards in relation to the surveillance powers used by the State against the plaintiffs in order to discover their journalistic sources. And it ended by reiterating once again the importance of protecting these sources for the free press in any society.

5.2. THE NET AS PLACE TO EXPRESS IDEAS

- The fight against terrorism could be a risk to the free flow of online information. Even a number of ‘old democracies’ have considered or implemented various restrictions, including new ways to block, filter, monitor, and otherwise obstruct or manipulate the openness of the Internet.
- Certain protective measures are important to ensure that the Internet remains a safe place and not a tool that can be used to perpetrate crimes.
 - To the Internet must only be subjected to restrictions that are strictly necessary
 - There should be prior judicial authorization of restrictive measures as well as judicial review;
 - the principle of proportionality must be strictly respected in this endeavour.



5.3. LIMITS TO FREEDOM OF EXPRESSION: RESTRAINT FROM APOLOGISING FOR JIHADISM (TERRORISM SPEECH)



APOLOGISING FOR JIHADISM, A CRIME

- Internet services are in certain cases abused by third parties to carry out illegal activities online, for instance disseminating certain information relating to terrorism or illegal hate speech
- Several UN Decisions and EU Framework Decision 2008/919/JAI, Eu Directive on the struggle against terrorism
- In compliance with these supranational demands, the Criminal Codes established as crimes certain manifestations of freedom of thought when they constitute apology or glorification of terrorism or indoctrination in the particularly radical Islamist theories that support this phenomenon.

FREEDOM OF SPEECH >

Second Spanish rapper sentenced to prison for praising terrorism

The case involving Pablo Hásel comes in the same week that artist Valtonyc was given a jail term for his lyrics



FERNANDO J. PÉREZ

Madrid - 2 MAR 2018 - 15:25 CET



Pablo Hásel in a file photo. PAUL WHITE (AP)

The Spanish High Court (Audiencia Nacional) has sentenced Spanish rapper Pablo Rivadulla, known by the artistic name of Pablo Hásel, to two years and a day in jail for repeatedly praising terrorism, and for slandering Spanish state and royal institutions.

Rivadulla expressed these views in 64 Twitter messages and in a song he shared on YouTube. He has also been told to pay a €24,300 fine in connection with the case.

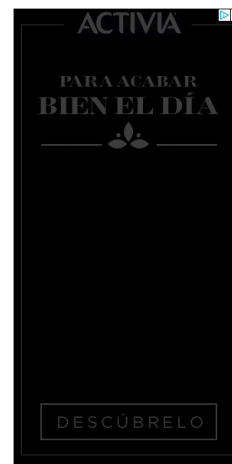
Two judges felt that the messages were "directed against the authority of the State in its multiple forms"

This is the second court decision against the rapper, who was convicted of similar crimes in March 2015 by the Supreme Court and handed another two-year sentence. In that case, Rivadulla had written and shared songs that praised attacks carried out by terrorist groups such as the Basque separatists ETA,

Spanish Maoist group GRAPO, Al-Qaeda, the Marxist-Leninist organization Red Brigade, and more. In some songs, he called on the terrorists to repeat their attacks.

This is the third high-profile case involving freedom of speech on social media to make headlines in Spain in recent days.

Last month the Supreme Court upheld a three-and-a-half-year prison sentence



SIGN UP TO OUR NEWSLETTERS

YOU MAY ALSO LIKE

Spanish rapper Valtonyc to spend three years in prison for insulting the king



Spanish court throws out jail sentence for woman who posted jokes on Twitter



Spanish court slaps student with jail term for tweeting terrorism jokes



"Two and a half years in jail for tweets is madness": Granddaughter of



FREEDOM OF SPEECH >

Spanish court throws out jail sentence for woman who posted jokes on Twitter

Student Cassandra Vera was given a year in prison over tweets poking fun at the Franco-era assassination of Prime Minister Luis Carrero Blanco



FERNANDO J. PÉREZ

Madrid - 2 MAR 2018 - 11:40 CET



Cassandra during her High Court trial. **BALLESTEROS (EFE)**

Spain's Supreme Court has thrown out a jail sentence for Cassandra Vera Paz, a young woman from Murcia who, between 2013 and 2016, published 13 tweets making jokes about the 1973 murder of a Spanish prime minister. The court has thus reversed the sentence handed down in March 2017 by the High Court, which saw her receive a year in jail (suspended) for the offense of glorification of terrorism for humiliating the victims.

In its ruling, the Supreme Court found that repeating well-known jokes in bad taste about an attack that happened 44 years ago, without any abusive comments toward the victim, "is socially and even morally reprehensible in terms of mocking a serious human tragedy," but "a penal sanction is not proportionate."

I am frightened by a society where freedom of speech can mean a jail term

LUCÍA CARRERO-BLANCO, GRANDDAUGHTER OF ASSASSINATED PRIME MINISTER

??



SIGN UP TO OUR NEWSLETTERS



- **ECtHR Case Leroy v. France, of October 2, 2008**

- This is the case of a cartoonist of the publication *Ekaitza*, named Denis Leroy. He was condemned for advocating terrorism in a drawing on September 11, 2001 that symbolised the attack on the Twin Towers with the message "All of us have dreamed about it... Hamas has done it".
- The plaintiff filed an appeal for cassation defending the "right to disseminate, through a drawing, an opinion that is not shared by the majority, or an opinion likely to offend or shock". According to him, it constituted his way of expressing an anti-American thought, and satirically transmitting the decline of US imperialism. However, when this demand arrived before the ECHR, it did not consider these arguments. For the Tribunal, the plaintiff expressed his support and moral solidarity of the alleged perpetrators and favourably judged the violence perpetrated against thousands of civilians. The Court understood that this threatened the dignity of the victims. The Court considered that the drawing published on September 13 had no precaution in the language and was not protected within the freedom of expression.

- **EU Internet Forum on progress on removal of terrorist content online, 10 March 2017**
- The EU Internet Forum has two key objectives:
 - to reduce accessibility to terrorist content online;
 - and to empower civil society partners to increase the volume of effective alternative narratives online.
- These two objectives have materialised into:
 - a referral mechanism with the participation of Europol to remove internet content;
 - the creation of a prototype database of hashes developed by the internet industry to create a shared database to help identify potential terrorist content on social media and prevent its reappearance on other platforms;
 - and the establishment of a Civil Society Empowerment Programme

- **Code of Conduct on Countering Illegal Hate Speech Online (June 2017)**

5.4. THE ROLE OF MEDIA ACTORS IN CONFRONTING TERRORISM

- UNESCO has launched a handbook for journalists related to the coverage of terrorism, The publication is designed to help them carry out their work informing the public while avoiding the risk of actually helping terrorists achieve their aim of dividing societies and turning people against each other. (March 2017)

- **Responsability of the media**
- **ECtHR Case Belek and Velioglu v. Turkey, (6 October 2015),**
- It referred to the conviction of the plaintiffs by a State Security Court for publishing an article in a newspaper containing a statement from an illegal armed organisation. The plaintiffs argued that their criminal conviction and the prohibition of the newspaper's publication constituted a violation of their right to freedom of expression. The Court held that Article 10 (right to freedom of expression) of the Convention had been violated. For the Court, paying special attention to the language used in the article in question and the context of its publication, and taking into account the difficulties of the fight against terrorism, noted that the text, as a whole, contained no appeal to the violence, armed resistance or insurrection and had not been translated into hate speech, which is the main factor to be taken into account.

ONLINE CONTENTS: MEDIA OR SERVICES PROVIDERS' RESPONSIBILITY

- June, 2017, Council of Europe held a Colloquium on the role of media actors in confronting terrorism, They stated that it *"expects industry to ... develop new technology and tools to improve the automatic detection and removal of content that incites to terrorist acts. ..."*
- The European Parliament, its resolution of 15 June 2017, urged those online platforms *"to strengthen measures to tackle illegal and harmful content"*.
- On 28 September 2017, the Commission adopted a Communication with guidance on the responsibilities of online service providers in respect of illegal content online (COM(2017) 555 final of 28 September 2017)
- Directive (EU) 2017/541 of the European Parliament and of the Council, which is to be transposed into national law by 8 September 2018, contains similar provisions in respect of online content constituting public provocation to commit a terrorist offence.

- **EU COMMISSION RECOMMENDATION of 1.3.2018 on measures to effectively tackle illegal content online**
- Illegal content online should be tackled **with proper and robust safeguards to ensure protection of the different fundamental rights** at stake of all parties concerned. Those rights include, as the case may be,
 - the freedom of expression,
 - including the freedom to receive and impart information,
 - the rights to respect for a person's private life
 - and to the protection of personal data
 - as well as the right to effective judicial protection of the users of the services concerned.
- Hosting service providers should expressly set out in their terms of service that they will not store terrorist content.

THE CLOSURE OF WEBPAGES THAT PROMOTE JIHADISM

- The success of these terrorist groups is also due to a planned and centralised communication strategy based on the use of the Internet and on new technologies. In this context, Twitter has risen as a primary protagonist; in 2014, ISIS had more than 40,000 related accounts.
- This strategy and their ability to adapt to the new tendencies, faster than the counterterrorism, allowed them to reach a huge audience, to publicise their actions, frighten populations and to attract followers.
-
- SO,
- A counter-terrorist measure: to close these webpages, withdraw contents, ...
 - A judicial warrant should be necessary.
- Domestic law at this regard.

5.5. THE CONFLICT BETWEEN RELIGIOUS FREEDOM AND THE PRETENDED SECURITY



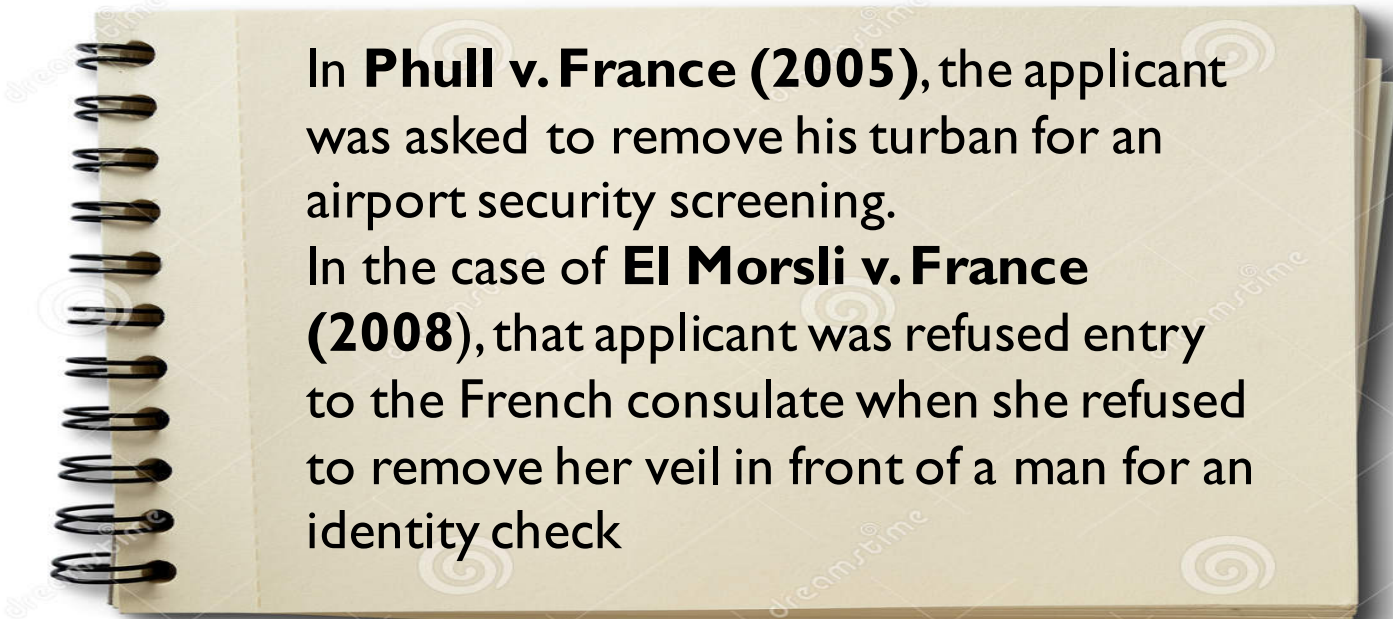
DRESS CODES FOR “SECURITY”

- ECtHR
 - considered a number of claims alleging that bans on religious clothing resulted in violations of the Convention



- **Public safety and order**

- The European Court has declared inadmissible two applications concerning French laws that required the temporary removal of religious head or face coverings for the purpose of identification and security measures.



In **Phull v. France (2005)**, the applicant was asked to remove his turban for an airport security screening.

In the case of **El Morsli v. France (2008)**, that applicant was refused entry to the French consulate when she refused to remove her veil in front of a man for an identity check

In *Mann Singh v France* [\[2008\] ECHR 1523](#) the ECtHR unanimously declared inadmissible a claim by Mr Shingara Mann Singh, a French national, that the domestic requirement that a photograph intended for use on a driving licence should show the subject “bareheaded and facing forward” discriminated against practising Sikhs. He had argued that refusing to allow him to wear his turban in the photograph to be used on his licence violated his rights under Articles 8 (private and family life), 9 (thought, conscience and religion) and 14 (discrimination) ECHR.

He decided to try another route – Geneva – on a very similar issue. In ***Shingara Mann Singh v France*** [\[2013\] UN Human Rights Committee CCPR/C/108/D/1928/2010](#), published on 26 September, he complained that when he had attempted to renew his passport for the fourth time in 2005 with a photograph showing him wearing his turban. He maintained that the turban was an integral part of a Sikh's faith and identity.

The Committee concluded that the formal requirements were a disproportionate limitation on Mr Mann Singh's freedom of religion, in violation of article 18 of the Covenant.

- In **SAS.Vs. France (2014)** ECtHR considered legal French prohibition to wear the burka and other elements that cover the face in the public spaces in accordance with the Convention (justification on the ground of public safety).



- **INTERFERENCES WITH RELIGIOUS PRACTICES OR ACTS OF WORKSHIP**



Interferences with religious practices or acts of worship

ECtHR. Case Güler and Uqur v. Turkey, of 2 December 2014,

It referred to the conviction of the plaintiffs for propaganda promoted by a terrorist organization for their participation in a religious service. The religious service was organized in the premises of a political party in memory of three members of an illegal organization (the PKK) that had been killed by the security forces. The plaintiffs alleged that their conviction had been based on their participation in a religious service that had consisted of a simple public demonstration of their religious practice.

They also maintained that their conviction had not been sufficiently predictable, given the wording of the applied Law against terrorism.

The Court considered a breach of their freedom of religion, given the Anti-terrorist law was not enough clear in relation with that type of activities.

5.6. Limits to right to meeting and associate in the struggle against terrorism.

- E.g. In France during the state of emergency:
 - Closing of Mosques
 - Prohibition of demonstrations
 - Not movement permitted in certain areas (near Mosques)
 - Dissolution of associations or political parties
- French new Law to Strengthen Internal Security and the Fight Against Terrorism oct 2017
 - **Security Zones.** the power to designate public areas and sporting or cultural events, including music concerts, that are deemed to be at risk of terrorism, as security zones. to search all persons or vehicles
 - **Closing Places of Worship.**

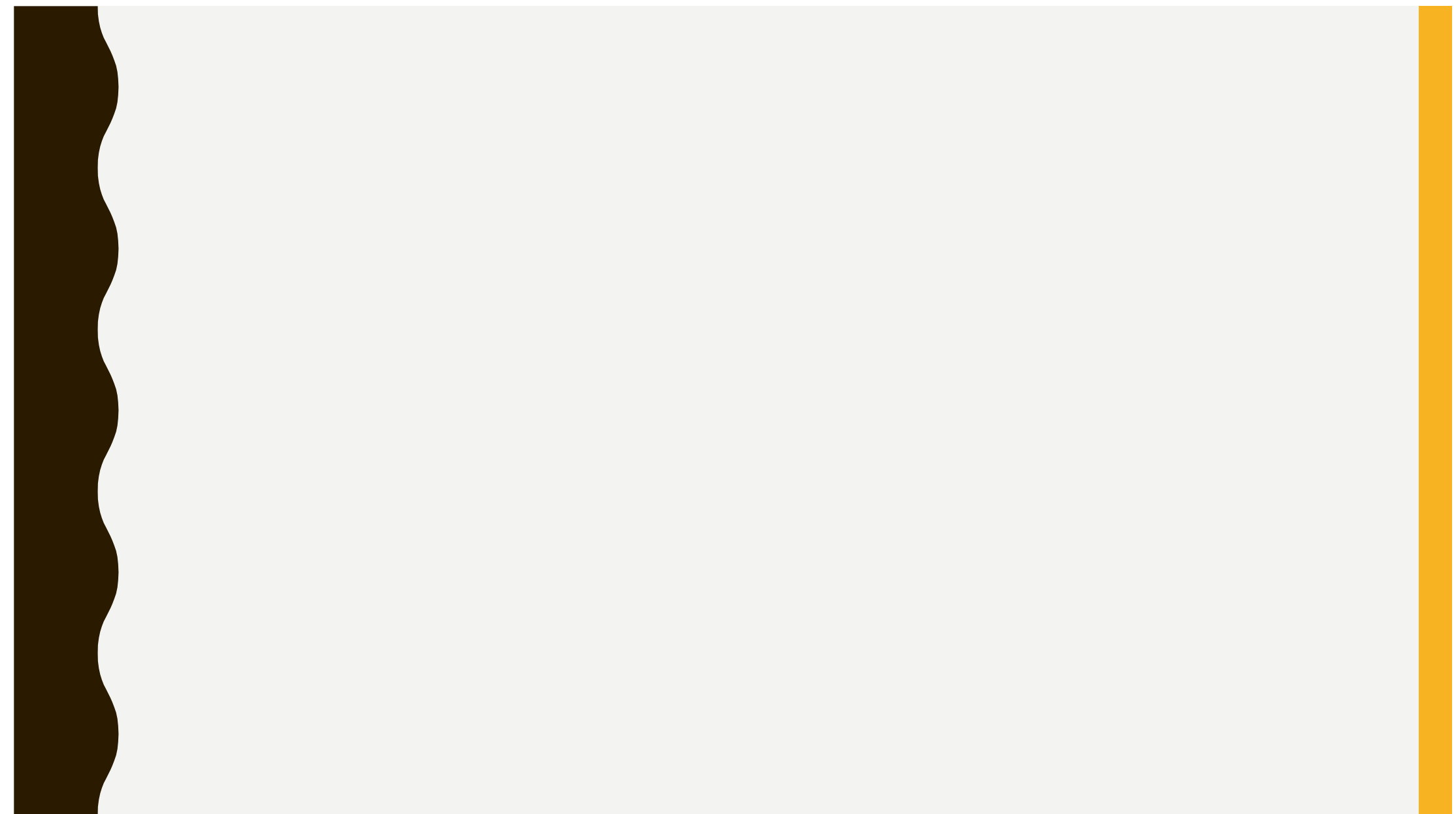
- **Use of religious dress in a ceremony in public spaces**

- **Ahmet Arslan and others v. Turkey (2010)** (use of religious dress in a ceremony in the streets of the city, ECtHR considers violation of freedom of religion)



SECURITY IN JEOPARDY?





6. RIGHTS OF THE VICTIMS



WHO IS THE VICTIM OF A JIHADIST ATTACK?

- The overall number of deadly terrorist attacks in France, the UK, Spain and the US, however, is very low by international standards.
 - Between 2004-2013, the UK suffered 400 terrorist attacks, mostly in Northern Ireland, and almost all of them were non-lethal. The US suffered 131 attacks, fewer than 20 of which were lethal. France suffered 47 attacks. But in Iraq, there were 12,000 attacks and 8,000 of them were lethal.
- Terrorist commit acts that would bring about much media coverage so that their acts would be witnessed by a maximum number of people, which in turn would maximise the likelihood that their actual target would pay attention to them and comply with their demands.

TYPE OF VICTIMS

Direct or Primary Victims:

Those victims that are in the immediate area of the terrorist attack.

Direct Professional/Volunteer Victims:

People who were at the scene of the terrorist attack as part of their job or as volunteers.

Indirect or Secondary Victims:

This group includes family members, friends, co-workers etc. of direct victims.

Community or Tertiary Victims:

This group of victims includes those who may have had their daily routine affected, or have work/school access problems. It also includes people who have been affected by images and reports on television.

Re-victimised victims:

Those people who have been victims of previous terrorist attacks, but are now re-traumatised by a new attack or report of a thwarted attack.

SERIOUS DAMAGES

- Serious injuries can be complex and varied: from death to physical or moral injuries.
- Some people can suffer from prolonged, severe, debilitating and overwhelming symptoms, such as depression and an inability to cope with daily life.
- People who are bereaved are likely to be emotionally, psychologically, practically and financially affected.

RIGHTS

- Assistance to victims of terrorism and their families is a key part of EU counter-terrorism efforts.
- Be informed (access to translation or interpretation services).
- Help and advice by victim support specialists.
- Have access to confidential victim support services free of charge, before, during and for an appropriate time after criminal proceedings.
- Medical evacuation, payment of immediate medical expenses and costs involved with returning.
- Information, personal privacy and dealing with the media.

- Assistance and support for victims of terrorism during criminal investigations and prosecutions
 - Protection of victims' privacy and confidentiality
 - Ensuring an opportunity to speak with the prosecutor
 - Ensuring victims have the opportunity to attend to the court hearings
 - Ensuring victims have a right to address the court at sentencing and parole hearings
 - Giving victims the rights of restitution or other forms of compensation
 - Giving victims the ability to have legal representation during criminal proceedings
 - Right to timely notice of all hearings
 - Conformity with internationally recognised human rights standards and the rule of law

LAW

- UNODC is working with Member States to strengthen the implementation of national legislation and policies that support and protect victims of acts of terrorism.
- UN, 2015, Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework.
- **Directive 2004/80/EC on compensation for victims of crime in other EU countries.** The directive has two main elements.
 - It requires all EU countries to have a **compensation scheme** for victims of violent intentional crime committed on their territories. The organisation and operation of such schemes is left to the discretion of each EU country.
 - It sets up a **EU-wide cooperation system** based on those national schemes.
- The European Commission has also been providing [funding](#) for projects led by public and private organisations.
- [Directive 2012/29/EU](#) establishing minimum standards on the rights, support and protection of victims of crime.
- [European Network of Associations of Victims of Terrorism](#) (NAVVT).
- Law 29/2011, September 22, on Recognition and Comprehensive Protection to the Victims of Terrorism.



That's it

Thank you for your time and attention!