COMMISSIONER FOR HUMAN RIGHTS

COMMISSAIRE AUX DROITS DE L'HOMME

CommDH/Speech(2009)10

Wilton Park Conference on *Terrorism, Security and Human Rights: Opportunities for Policy Change*, 1-4 October 2009

Strong and co-ordinated action is needed to prevent and punish terrorist acts.

The real challenge for states and their co-operation following September 11 is not the determination to respond, but the choice of methods: terrorism must not be fought with terrorist means.

The US-led "war on terror", also in Europe, violated core principles of human rights and international law: protection against torture, presumption of innocence, no deprivation of liberty without due process, the right to a fair trial, the right of appeal and the right to reparation following states' unlawful acts.

It is a fundamental principle that respect for human rights, fundamental freedoms and the rule or law be upheld also in times of tension and crisis – and by everyone.

Against this backdrop, the Council of Europe Committee of Ministers adopted in 2002 the 17 *Guidelines on Human Rights and the Fight against Terrorism* which reminded the 47 member states of some of their basic undertakings following their entry into the Council of Europe and especially as contracting parties to the European Convention on Human Rights (e.g. prohibition of arbitrariness, absolute prohibition of torture, measures interfering with privacy should be lawful).

Tendencies to see the protection of human rights as an obstacle to effective work against terrorism must be discarded. It is of utmost importance to uphold human rights standards in times of crisis – that is when the strength of our values is tested.

In this context, attempts to redefine the very meaning of torture must not be accepted. Simulated drowning ("water boarding") remains torture, also when used against terrorist suspects. Sending back people to situations where they risk torture is unacceptable – so-called diplomatic assurances from regimes that practise torture cannot be used as a pretext to circumvent the ban on such deportations.

The first step to restore the primacy of these values is to recognise the facts.

In 2006 and 2007 Senator Dick Marty in the Council of Europe Parliamentary Assembly managed in his investigation to uncover the co-operation of European countries in the "spider's web" of detainee transportation to Guantánamo, as well as to secret prisons.

Another rule that should be highlighted at this point is that independent, effective national investigations should be set up whenever there are credible allegations of unlawful renditions or secret detentions. Council of Europe member states are required to investigate human rights violations under the European Convention on Human Rights and the Court's case law.

This was indeed one of the recommendations resulting from inquiries conducted by the Parliamentary Assembly of the Council of Europe, the Council of Europe Venice Commission and the Temporary Committee of the European Parliament. The Secretary General of the Council of Europe suggested measures to oversee the activities of national and foreign security agencies and also to prevent the illegal transportation by air of detainees.

Three problems, in particular, were addressed in these recommendations:

First, transiting civil and state aircraft should be controlled so that illegal transport of detainees is prevented

Secondly, measures should be taken to ensure that secrecy doctrines and state immunity do not become a shield against investigating serious violations of human rights

Last, but not least, activities of national and foreign civilian and military intelligence services operating in European countries or elsewhere should be regulated.

Indeed, one argument against investigations in Europe has been the fear of damaging relations with the US intelligence services. Exchange of secret information between the security agencies is essential for each of them. However, the Canadian authorities demonstrated in the case of Maher Arar – a Canadian citizen who was stopped at a US airport and handed over to the Syrian security police and badly tortured – that a thorough and fair investigation is possible without endangering the intelligence nerve system.

This is also about a crucial principle. Democracies should never accept the use of secrecy doctrines to excuse lack of action against serious human rights violations. It should be absolutely clear that security agents must also be held accountable – parliamentary and judicial scrutiny must be possible. One of the lessons from the mistakes made during the "war on terror" is that the national security agencies must be kept under *effective democratic oversight, a fundamental principle to be complied with at all times.*

In 2007 the European Commission for Democracy Through Law (Council of Europe Venice Commission) published an interesting Report on how democratic control could be organised in order to ensure state accountability. Though it does not cover military and foreign intelligence services, the analysis of the Commission is particularly useful. It

deals with *four different forms of accountability: parliamentary, judicial, expert and complaints' mechanisms*.

• *The formal authority of the security agency should be based on parliamentary supervision.* The Parliament could itself set up an oversight body whose members would have to respect the necessary confidentiality. Such a mechanism might convince the broader population that there is indeed a continuous review even if the facts about activities are withheld from the public.

• *Decisions to authorise special investigative measures could rest with the judiciary.* Also, it can play a role in reviewing such methods afterwards. However, the Venice Commission notes that data-mining and other information gathering methods tend to escape judicial control.

• *Expert bodies could be set up to assist in overseeing security activities.* This may be preferable when there is a need to ensure that the members are independent experts and also have more time than parliamentarians and judges to fulfil a control function. There are also models of joint supervisory bodies – both experts and parliamentarians.

• *Special mechanisms are necessary to give individuals who claim to have been adversely affected by the security services the possibility of redress before an independent body.* This might strengthen accountability and encourage improvements in the system as such.

A final word should be added on the notion of "international co-operation" against terrorism, tackled by this session. Co-operation among states should be pursued, not only for punishing, preventing and eliminating terrorist activities, but also for the *reparation of the victims of state anti-terrorism practices, especially those detained unlawfully and/or ill-treated.*

On 5 June 2009, following my visit to Washington DC, I addressed a letter to the 47 state members of the Council of Europe on the possibility of resettlement to member states of certain detainees from the Guantánamo detainee facility.

Expert reports have made clear that the majority of the Guantánamo detainees have not committed hostile acts against the US or its allies, only less than ten per cent have been characterised as al-Qaeda fighters and several of them are no more than "volunteer foot soldiers".

It is beyond doubt that a number of the Guantánamo detainees are in need of international protection, for which inter-state co-operation is also necessary. Reliable reports have indicated that some of those released and returned to their home countries have suffered serious human rights violations, such as torture and unlawful detention.

I made the point during my visit that the US authorities must offer to allow at least some of the 'cleared' detainees with protection needs the possibility of settling in the United States.

However, it is likely that some detainees would not, for obvious reasons, accept to stay in the country. It is for this major reason that European states should lend a hand.

Thus I called upon last June the 47 state members of the Council of Europe to consider receiving a few released detainees for whom return home is not really an option. Such transfers should of course be voluntary in nature.

I was glad to hear that last August two Syrian detainees were accepted by and transferred from Guantánamo to Portugal while in September two Uzbek nationals were transferred to Ireland. I do hope that more European states will promptly follow these examples.

Such decisions by Council of Europe member states constitute not merely a gesture of a humanitarian nature. In effect, they strengthen international co-operation in the fight against terrorism by reaffirming that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms, for which the Council of Europe was created and has worked for sixty years now.