

The Right to Liberty and the Prohibition of Preventive Detention:

**On the Use of Pre-trial Detention of Suspected Terrorists
in the XXI Century within the Framework of
the European Convention on Human Rights**

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2012**

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PREFACE

This study was originally conceived as a master's thesis within the framework of the European Master's Degree in Human Rights and Democratisation (EMA). The bulk of this research and the entire drafting were carried out at the Institute for Human Rights of Åbo Akademi University, Finland, under the supervision of Professor Markku Suksi and co-supervision of Professor Elina Pirjatanniemi and the thesis was successfully defended at the Monastery of San Nicolò-EIUC (Lido di Venezia) in September 2011. Its contents have since been updated as of January 2012.

I can hardly imagine to work in a more conducive place to develop my inquiry than Åbo Akademi University and in particular its Institute for Human Rights. Besides a privileged setting for students and researchers and its excellent research facilities, the staff were always kind and willing to help. Therefore, I am very grateful to them, starting with Markku Suksi, who, not only guided my research in such a suggestive, intelligent and respectful manner that would always lead me to come up with my own ideas but also introduced us, EMA students (Rita, Laura and I), into the lifestyle and beautiful lands of Finland in a very dynamic and comprehensive way. Many thanks also to Elina Pirjatanniemi for her enlightening comments, and to Harriet Nyback, since without her helping hand the outcome of this research would certainly not have been as fruitful.

Moreover, I would like to express my most sincere gratitude to Benet Salellas for introducing me into the problem of criminalising remote harm or the anticipatory prosecution of suspected terrorists and for the crucial primary sources he provided me with, to my parents and my sister for being there with heart-warming and encouraging words and to my friends who cheered me up in long (Finnish) winter days and busy midnight sun "evenings". Last but not least, I want to thank my bright and knowledgeable brother Andreu for all his support and patience.

Finally, I would like to acknowledge those individuals, whose right to liberty was wrongly interfered with by counter-terrorism dragnets, in particular in the framework of pre-trial detention schemes, who are struggling to obtain justice and reparation.

ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACSA	Anti-Terrorism, Crime and Security Act 2001
AI	Amnesty International
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
FBI	Federal Bureau of Investigation
GA	United Nations General Assembly
HRC	United Nations Human Rights Committee
HRW	Human Rights Watch
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
LEC	Spanish Criminal Procedure Code
SIAC	Special Immigrations Appeal Commission
UK	United Kingdom
UN	United Nations
UNSR	United Nations Special Rapporteur
US	United States

ABSTRACT

States have traditionally vindicated the need to loosen up standards of detention to face extraordinary circumstances. In the political context dominated by the global War on Terror, there is an ongoing debate among scholars and law-makers about the use of preventive detention as necessary means to prevent further terrorist attacks. The use of arbitrary detention in Guantánamo and the breach of the absolute prohibition of torture have widely raised concerns as regards the interplay between counter-terrorism and human rights. Nevertheless, less striking practices such as an abusive use of pre-trial detention, or obstacles to the right to effectively challenge the lawfulness of the detention, can equally shake the foundations of highly developed constitutional democracies by impairing the right to personal liberty and the presumption of innocence.

In this context, this thesis examines whether detention outside the scope of criminal proceedings is allowed under the European Convention of Human Rights and to what extent the European Court of Human Rights accommodates national security concerns when addressing unlawful curtailments on the right to personal liberty. Subsequently, challenges liable to be addressed in the near future by the European Court of Human Rights are identified by looking at how the Spanish judiciary order and review pre-trial detention of suspected international terrorists.

Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.¹

1. INTRODUCTION

The world post-September 11 is on constant alert over the terrorist threat; few hours after Osama Bin Laden was killed in Pakistan by a United States (US) Army special forces unit, the Secretary of State Hillary Clinton pointed out that “[t]he fight [against terrorism] continues”.² Some months before the death of the head of Al-Qaeda, US Secretary of Homeland Security warned that the “threat continues to evolve”.³ In this atmosphere of fear and anxiety bolstered by powerful political actors worldwide, states place themselves in a situation of permanent security alert with no end in sight.⁴ Their main concern is to prevent the perpetration of terrorist attacks. Therefore, all kinds of intelligence, surveillance and security service related measures have been put in place to abort any plausible threat leading to terrorist actions. Some of the policies designed to tackle terrorism have been heatedly criticised for the extent to which have resulted in the curtailment of states’ human rights obligations. Although defended by sectors of the population and influential political actors, realities such as Guantánamo, Abu Ghraib, extraordinary renditions and secret prisons have brought about a public outcry and significantly damaged the pillars of democratic systems.

Besides the mentioned practices, human rights concerns stem from more common measures and institutions that are not necessarily linked to counter-terrorism but are, however, often present in the current framework such as deprivation of liberty on the basis of national security concerns, either within criminal proceedings or when ordered by the executive branch.⁵

¹ Hamilton, 1787, para. 4.

² Hillary Rodham Clinton, ‘Remarks on the Killing of Usama bin Ladin’ (Press statement), 2 May 2011 at: <http://www.state.gov/secretary/rm/2011/05/162339.htm> (consulted on 10 May 2011).

³ *Washington Post*, 9 February 2011 at: <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/09/AR2011020904896.html> (consulted on 11 February 2011).

⁴ Dyzenhaus, 2005, p. 67, argues that “legal responses after 9/11 are not to a state of emergency, classically conceived. Rather, prompted by the allegation that terrorism is here to stay, these responses seek to deal with the emergency not as a temporary external threat, but as an internal, permanent problem”.

⁵ Burch, 2009, p. 133.

Nowadays, a significant percentage of the prison population in Europe is held in detention pending trial issued by a court order as a precautionary measure while a criminal procedure is ongoing. This measure is foreseen in international human rights treaties as one of the lawful interferences with the right to liberty. Nevertheless, its use constitutes a matter of concern of international human rights bodies such as the UN Special Rapporteur on Human Rights and Counter-Terrorism⁶ who has warned about the dangers that its pervasive use entails,⁷ mainly because it is considered a subsidiary and exceptional measure (only applicable as last resort in situations where other means cannot ensure the pursued aim of the criminal proceeding), as the European Court of Human Rights (ECtHR) recalls.⁸

Although already used before 11 September 2001 in response to national security concerns, especially in countries affected by terrorism, it was in the aftermath of these events that criminal justice systems were adapted in order to face the unprecedented threat.⁹ Special statutory provisions were established, definitions of what constitutes “terrorism” have been broadened to encompass international networks and detention practices have changed when terrorist suspects are involved, notwithstanding the fact that pre-trial detention of terrorist suspects within the European and Latin American legal framework is, still, largely regulated by the common provisions of the penal code regarding this institution.¹⁰

Thus, the perception of facing a threat without precedent characterized by the thought that “something worse might be in store” has been driving the responses of the three branches of government to international terrorism. That is illustrated by the fact that even countries with previous experience in tackling terrorist groups operating in their territory have strengthened counter-terrorism measures. Fenwick and Phillipson underline this point by describing the situation in the United Kingdom (UK) where “the counter-

⁶ The official name is “UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism” (hereinafter, UNSR on Human Rights and Counter-Terrorism).

⁷ Report of the UNSR on Human Rights and Counter-Terrorism, mission to Spain, 16 December 2008, p. 13. More recently, the CoE Commissioner for Human Rights, Thomas Hammarberg, in one of the latest Human Rights Comments issued, appraised as “excessive” the current use of pre-trial detention in Europe (Human Rights Comment, Excessive Use of Pre-Trial Detention runs against Human Rights, 18 August 2011, posted at: http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=169, [consulted on 15 September 2011]).

⁸ See *Demirel v Turkey*, no. 39324/98, 28 January 2003 (*Demirel v Turkey*), para. 57 and *Vrenčev v Serbia*, no. 2361/05, 23 September 2008, para. 59.

⁹ See *A. and others v UK*, no. 3455/05, 19 February 2009 (*A. and others v UK*), para. 10.

¹⁰ Burch Elias, 2009, p. 130.

terrorist scheme post-2000 aimed mainly at extreme Islamic groups and at ‘international terrorists’ generally, is more extensive than in the worst years of Irish terrorist violence”.¹¹

In Spain, the rate of detainees held in pre-trial detention amounted to 19 per cent out of a prison population of 63.403 inmates (11.874 preventive regime, 50.737 convicted) in December 2010 and “terrorism-related activities” was the type of offences with a highest rate of individuals detained pending trial vis-à-vis people already convicted for the same category of crimes.¹² Moreover, the numbers show that whereas there are a large number of arrests for offences linked to terrorism, the number of convictions is very small.¹³ Noteworthy is the fact that similar scenarios are also found in other European countries including France or the UK.¹⁴

These numbers suggest that pre-trial detention¹⁵ for terrorism suspects might not be an exception in Europe as foreseen by the system built upon the European Convention on Human Rights¹⁶ (ECHR), but a rather common practice, or a “culture” that has come to being after the 9/11 attacks in order to stop future terrorists,¹⁷ which could constitute an impairment of the presumption of innocence and the right to liberty of the victims who suffer an irreparable damage with lasting consequences.¹⁸ Moreover, noteworthy is the fact that added difficulties emanate to challenge the detention (and the following trial) since files of the investigation, namely determinant evidences, may be sealed for state security reasons and, hence, the chances for a defence in equality of arms may be at stake.

In this context, questions regarding compliance of the current use of pre-trial detention of suspected terrorists with international human rights standards come to light. To what

¹¹ Fenwick & Phillipson, 2005, p. 459; by the same token, in Germany there is the impression that while the terrorist attacks of the 1970s were the work of a limited number of individuals, the new attacks are committed by members of a worldwide network of Islamic terrorists which can cause a devastating number of casualties and, hence, the threat has been elevated (Boyne, 2003, p. 113).

¹² See statistics from Spanish Penitentiary Institutions at: <http://www.institucionpenitenciaria.es/web/portal/documentos/estadisticas.html> (consulted on 11 February 2011).

¹³ Salellas Vilar, 2009, p. 89.

¹⁴ Twenty-fourth report of the Joint Committee on Human Rights of the House of Lords and the House of Commons, 2005–2006, para. 92; see also, Privy Counsellor Review Committee, Anti-terrorism, Crime and Security Act 2001 Review: Report (Newton Report), 2003, para. 416.

¹⁵ Also referred to as “detention on remand” or “detention pending trial”.

¹⁶ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, entered into force 3 September 1953, Art. 5.

¹⁷ Duffy, 2010, p. 56.

¹⁸ For a comprehensive analysis of the socioeconomic impact of pre-trial detention, see the report of Global Campaign for Pre-Trial Justice, Open Society Justice Initiative, 2011, available at: http://www.soros.org/initiatives/justice/articles_publications/publications/socioeconomic-impact-detention-20110201 (consulted on 20 September 2011).

extent do substantive and procedural traits of the pre-trial detention framework as applied nowadays in the struggle against terrorism fall within a lawful deprivation of individuals' liberty as enshrined in Article 9 of the International Covenant on Civil and Political Rights¹⁹ (ICCPR) and Article 5 of the ECHR?

The focus of this research will be the use of the so-called “pre-trial detention framework” framed within the evolving meaning of the ECHR, which, to date, under the ECtHR does not contemplate the so-called “preventive detention”²⁰ outside proceedings conducted in the context of criminal justice as a lawful precautionary interference with the right to liberty. That is, unlike in many countries outside the European continent where schemes of detention that are not aimed to bring the suspected terrorist to trial but to thwart a *predicted* terrorist threat have been adopted under the ICCPR, the ECtHR has maintained a very restrictive interpretation by which the possibility to take measures amounting to detention without charge in normal times under the auspices of the ECHR has been discarded.

Nevertheless, the events of the past decade and the unfolding *permanent* terrorist threat prompted several European countries hit by terrorist attacks or plots to put in place measures and practices which entail limitations on safeguards attached to the right to liberty that could be regarded as steps towards a model approaching the preventive or executive detention framework. Besides, some scholars are also pushing for an interpretation of the ECHR which could embrace preventive detention.²¹

In this context, and bearing in mind the scarcity of ECtHR's case law responding to post-9/11 cases of deprivation of liberty of suspected terrorists as well as of literature critically analysing pre-trial detention as applied today in Europe, this thesis will try to shed more light to the current standing point we depart from besides giving some clues when trying to respond to questions such as: is detention without charge on national security grounds

¹⁹ International Covenant on Civil and Political Rights, opened for signature 19 December 1966, entered into force 23 March 1976, Art. 9.

²⁰ In this study “preventive detention” (also called “executive detention” or “administrative detention”) will be referred to as deprivation of liberty which has as main purpose to foil terrorist attacks and which is ordered as a result of a decision taken by the executive branch on the basis of intelligence rather than evidence, as opposed to “pre-trial detention” which aims at the prosecution of a suspected terrorist under a reasonable suspicion that he or she has committed an offence or is about to commit a criminal act or omission. For a typology of the different models or frameworks that regulate detention of suspected terrorists or individuals threatening public order and safety there is only one academic source available, namely the research carried out by Burch Elias, 2009, pp. 101–201; see also, Pati, 2009, p. 74.

²¹ See, e.g., Claire Macken's article, 2006, in which the author argues that preventive detention is specifically provided for under the second ground of detention in Article 5 para. 1 (c).

(or preventive detention) clearly prohibited for States Parties to the ECHR? Is there a clear conceptual and practical delimitation and separation between pre-trial detention and preventive detention in the European context?

The first hypothesis is that the fight against terrorism has brought about the creation of legal systems with double standards on the basis of national security arguments, even in European countries where rules applying are still mainly the same. Hence, what is required to be analysed is if different thresholds can be sustained from a human rights' perspective. Formulated as a question, where is the watershed between the margin of appreciation of states and the violation of the right to liberty as understood by international human rights law?

In this setting, the right to an effective remedy for victims of the so-called false or wrongful imprisonment category arises as a barometer to assess the compliance with human rights of governments while countering terrorism²² and hence, as a useful indicator to appraise the integrity and strength of democratic institutions and the rule of law in any given country.²³ That is, any interference with the right to liberty entails a very grave measure of coercion on individuals and a remedy suitable to successfully activate proceedings by which the lawfulness of the detention is reviewed by a court must be accorded to detainees. This principle emerged already in the era of feudal monarchy,²⁴ in the form of the right to be brought before a judge on a motion of habeas corpus and it was enshrined within the “struggle between subject and crown” in the Habeas Corpus Act of 1679 described by Blackstone as “a second *magna charta*, and stable bulwark of our liberties”.²⁵

Moreover, it has become clear over the years that a critical component of the international system of human rights protection is the victim's right to redress.²⁶ Proof of that is the

²² Ní Aoláin, 2007, p. 92.

²³ While much has been written about state practices that could impinge on human rights, less attention has been paid to analysing pre-trial detention as applied today in Europe notwithstanding its great impact on society, and even less attention has been devoted to study the remedies available to individuals deprived of personal liberty.

²⁴ *Charkaoui v Minister for Citizenship and Immigration of Canada*, [2007] 1 S.C.R. 350, 2007 SCC 9 (*Charkaoui v Canada*), para. 28.

²⁵ Judge Scalia, dissenting opinion in *Hamdi et al. v Rumsfeld, Secretary of Defense, et al.* case, 542 U.S. 507 (2004), section 1, p. 4.

²⁶ Bassiouni, 2006, p. 211.

ongoing movement of terrorist suspects who claim to be innocent challenging their detentions and seeking redress for the harm done.²⁷

It must be pointed out that the main concern here is with regard to innocent individuals wrongfully detained by public authorities under allegations of having linkages with international terrorism.²⁸ As it has been recalled above, human rights are one of the pillars needed to tackle the evolution of the terrorist threat. When individuals are arbitrarily deprived of their liberty, harassed or even ill-treated by law enforcement bodies or intelligence agencies in the name of the fight against terrorism, the triggering and structural causes underlying the presence of terrorism are not being addressed;²⁹ the victims of these unjust acts bear resentment, not just because of the mentioned acts but also because familiar, social and professional ties may be irreparably damaged.

Mostly at the national level, victims of wrongful pre-trial detention are seeking the fulfillment of the right to an effective remedy by bringing claims before judicial and administrative bodies. However, are mechanisms to claim the right to an effective remedy at their disposal comparable to those under detention on remand for other kinds of offences? That is, whether or not individuals affected by pre-trial detention have the same mechanisms and the same chances to be successful in having reviewed the reasons for the detention and being granted compensation³⁰ regardless of the original purpose of the interference with the right to liberty.

In short, an analysis of the European pre-trial detention framework in terms of accordance to human rights norms will be carried out having as underpinning concern the need to discern and preserve the different features of detention as a precautionary

²⁷ According to Nowak, 2005, p. 239, states are devoting more resources to ensure innocent detainees are granted compensation: “[t]he domestic laws of an increasing number of States provide for compensation on the grounds that a longer period of pre-trial detention might cause considerable pecuniary damages and moral suffering to innocent persons”.

²⁸ The concern about the so-called “false positives” or innocent detainees was already present in Hurd, 1876, p. 225: “[i]t cannot be denied where ‘a probable ground is shown that the party is imprisoned without just cause, and therefore, hath a right to be delivered’, for the writ then becomes a ‘writ of right’, which may not be denied but ought to be granted to every man that is committed or detained in prison or otherwise restrained of his liberty”.

²⁹ Different causes were pointed out and explained by Martin Scheinin on 2 May 2011 within the framework of the course “Human Rights and Terrorism”, Åbo Akademi University.

³⁰ Compensation is the component within the right to redress that has expanded the most over the last years within the context of victims’ rights as pointed out by Bassiouni, 2006, p. 205; this tendency has been perceived by scholars which, for instance, are proposing systems of compensation for innocent detainees within the framework of the struggle against terrorism (see Ackerman, 2004(a), p. 1884; Kalajdzic, 2009, p. 204).

measure within criminal proceedings as construed by the ECtHR,³¹ on one side, and preventive detention outside the framework of criminal justice, on the other. Furthermore, in line with a victim-centric perspective, the rights of suspected terrorists subjected to detention will be examined in the light of the right to seek proceedings by which the lawfulness of the detention is reviewed and obtain compensation as enshrined in the ICCPR and in the ECHR. Thereby, this dissertation will detect patterns of practices that jeopardise compliance with human rights of states when resorting to pre-trial detention and will identify which remedies, both *de jure* and *de facto*, have innocent detainees held in occasion of counter-terrorist operations.

In order to point out pitfalls in monitoring the compliance of laws and practices with the spirit and scope of the ECHR and particularly with the requirements set out to lawfully interfere with the right to liberty, this research project focuses on relevant cases involving Muslim communities settled down in the Autonomous Community of Catalonia (Spain) who were struck by several law enforcement operations conducted in order to prevent terrorist actions within Spain and abroad. It is noteworthy to mention that these operations were taken note by the US embassy in Madrid; in a cable disclosed by Wikileaks, the embassy made the following statement: “[i]n light of recent suspected activity, there is little doubt that the autonomous region of Catalonia has become a prime base of operations for terrorist activity”.³² Hence, the purpose of this thesis is to bring up some problems that arise from the current use of pre-trial detention in one of the most active European countries in countering terrorism.

However, this thesis does not aim to draw conclusions applicable to pre-trial detention practices of suspected terrorists at the European level taking into account its limited length and the small sample of cases used to carry out the analysis. Nevertheless, similarities in criminal procedure, criminal law, anti-terrorist policies and human rights standards across Europe will make the findings relevant in terms of getting a broader

³¹ See *Ciulla v Italy*, no. 11152/84, 22 February 1989 (*Ciulla v Italy*), para. 38: “[t]he Court points out that sub-paragraph (c) (art. 5-1-c) permits deprivation of liberty only in connection with criminal proceedings”.

³² Cable with the subject “Proposal to create a Southern European law enforcement, counterterrorism, and regional intelligence hub in Barcelona”, ID07MADRID1914, 2 October 2007, leaked on 11 December 2010, original cable available at: <http://wikileaks.org/cable/2007/10/07MADRID1914.html> (consulted on 14 June 2011).

understanding of the challenges faced by most European states in dealing with such cases.³³

As regards the methodology to carry out the research, it will be divided into three levels: at the descriptive level, the international legal framework of the right to liberty and the right to an effective remedy and redress, together with relevant cases and relevant laws adopted will be set forth; at the level of diagnosis and analysis, challenges related to current conceptual and practical issues touching upon deprivation of liberty of suspected terrorists will be identified and remedies available for them will be assessed relying upon the outcome of criminal proceedings in European countries where suspected terrorists have been detained and accused of criminal offences; finally, at the lessons learned level, this research project intends to shed light on the way forward by using constructive criticism.

The main sources used to conduct this research analysing criminal and procedural law and the interplay with human rights law will be international human rights conventions coupled with case law of adjudicative and treaty bodies of international organisations, mainly the United Nations Human Rights Committee (HRC), the European Court of Human Rights and the monitoring bodies of the American system; reports of the UNSR on Human Rights and Counter-terrorism; and documents from advisory panels and non-governmental organisations, mainly Amnesty International and Human Rights Watch. At the state level, statutory norms will be examined and, besides, judgments and court orders deciding on the need for detention pending trial will be drawn on since they constitute the primary source to ascertain if human rights standards are indeed respected; as secondary sources, this paper will review the current literature on the right to personal liberty, the right to effective remedy and the relation of both rights with counter-terrorism measures, opinions from practitioners and scholars, as well as electronic sources.³⁴

³³ See, *e.g.*, Stevens, 2009, p. 166, who points out that many European countries have relaxed the rules on pre-trial detention for reasons of preventing further terrorist harm; for example, Article 67 para. 4 of the Dutch Code of Criminal Procedure loosens the degree of suspicion necessary for the first period of pre-trial detention for terrorist crimes.

³⁴ “Electronic sources”: websites of relevant international governmental and non-governmental organisations, national governmental and non-governmental bodies as well as webpage designed as research and news forums such as “legalift.wordpress.com”, administered by Mathias Vermeulen, a research assistant of Martin Scheinin, the UNSR on Human Rights and Counter-Terrorism, at the European University Institute, which updates relevant news and legal issues in the fight against terrorism.

2. NORMATIVE FRAMEWORK OF PRE-TRIAL DETENTION UNDER THE ECHR

2.1. The Right to Liberty: a “Preferential Freedom”³⁵

The right to liberty³⁶ as enshrined in Article 3 of the Universal Declaration of Human Rights³⁷ and Article 9 of the ICCPR, as well as in the regional human rights conventions, aims at ensuring the freedom of bodily movement, that is, liberty of person understood in the physical sense.³⁸ The interference with personal liberty will be culminated when individuals are forced to remain within a constrained area, such as detention facilities (of which prisons are the most common example), psychiatric facilities, detoxification facilities and orders of house arrest.³⁹ Noteworthy is the fact that deprivation of liberty brings about the limitation or even interference with other human rights such as the right to private life, the right to freedom of expression, etc. Hence, this curtailment of the personal liberty entails a very grave measure of coercion on individuals which, even when it has been recognised as a potential lawful interference, needs to be applied in a very narrow and cautious manner.⁴⁰

At the regional level, Article 5 of the ECHR, Article 7 of the American Convention on Human Rights (ACHR)⁴¹ and Article 6 of the African Charter on Human and Peoples’ Rights (ACHPR)⁴² are devoted to establish the right to personal liberty and, besides, set out conditions by which this right can be interfered with. It can be inferred, hence, that

³⁵ Idea extracted from Trechsel, 2006, p. 463.

³⁶ The right to liberty can be traced back to the English Magna Carta (1215), clause 39, and the US Declaration of the Rights of Man and Citizen (1789). Even though the Magna Carta only guaranteed rights to a limited group of people, namely feudal noblemen, it nevertheless required that arrest or detention be lawful, and protected the individual against the excesses of his/her ruler (Icelandic Human Rights Centre, The Right to Liberty, available at: <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/substantivehumanrights/therightstoliberty/> (consulted on 14 April 2011).

³⁷ Universal Declaration of Human Rights, adopted by the UN General Assembly, on 10 December 1948, Art. 3.

³⁸ Nowak, 2005, p. 212.

³⁹ Jacobs, White & Ovey, 2010, p. 213; Nowak, 2005, p. 212.

⁴⁰ See, e.g., Trechsel, 2006, p. 407: “One of the most frequently invoked human rights is the right to personal liberty. This is of little surprise as the interference with this right certainly causes considerable suffering. Moreover, contrary to the right to life and to physical integrity, it is a right which the authorities regularly and lawfully interfere with, particularly in the context of crime control. It is the most serious measure of coercion permitted both by domestic and international criminal-procedure law and by the international human rights instruments”.

⁴¹ Organization of American States, American Convention on Human Rights, 22 November 1969, entered into force 18 July 1978, Art. 7.

⁴² Organization of African Unity, African Charter on Human and Peoples’ Rights (“Banjul Charter”), 27 June 1981, entered into force 21 October 1986, Art. 6.

personal liberty, in contrast with other guarantees such as the prohibition of torture or slavery, is not of an absolute nature or, as stated by Nowak, “does not strive toward the ideal of a complete abolition of State measures that deprive liberty”.⁴³ Rather, it is a right the deprivation of which is permitted as long as it is respecting the limits provided by international human rights treaties. However, the right is “of the highest importance in a democratic society” as the ECtHR has stressed multiple times.⁴⁴

In order to proceed with the depiction and analysis of requirements and conditions enabling authorities to hold individuals in custody, international conventions and case law of the most influential adjudicatory and advisory bodies will be examined; nevertheless, since the main concern in this study is the use of pre-trial detention under the auspices of the ECHR, the jurisprudence developed by the ECtHR will be subject to closer scrutiny. Moreover, regarding the focus on the European jurisprudence, the ECHR is the only international human rights instrument which sets out an (exhaustive) list of particular factual situations in which detention may legitimately be ordered. As a result, the ensuing jurisprudence has evolved in a more systematic and detailed way dealing with the different exceptions. Last but not least, as it will extensively be discussed throughout the thesis, the ECtHR has been the most restrictive international adjudicative body when pinpointing the contours of the exceptions under which pre-trial detention is allowed to the extent that it has repealed in the European context any possibility to use detention as a precautionary measure in the absence of any concrete and completed or imminent offence. The HRC has not taken the same narrow approach.

Among the six exceptions foreseen by the ECHR, the one set forth in Article 5 para. 1 (c), dedicated to pre-trial detention or detention on remand, will be the main focus of study since it constitutes the object of this research project.

Before proceeding with the main legal features of detention on remand, it has to be pointed out that Article 5 is inextricably connected with Article 6, which regulates fair trial and in particular with Article 6 para. 2 that enshrines the right to be presumed innocent until proven guilty.⁴⁵ Pursuant to this provision, everyone kept in custody pending trial is to be treated as innocent and hence is to enjoy as possible the other rights contained in the ECHR.

⁴³ Nowak, 2005, p. 211.

⁴⁴ *Medvedyev and others v France*, no. 3394/03, 29 March 2010, para. 76.

⁴⁵ Trechsel, 2006, p. 180.

This guarantee is crucial in the distinction between “detention” and “imprisonment” since while it constitutes an underpinning procedural safeguard in cases of detention, it is waived from the moment the person is convicted and sentenced to a prison term. Thereby, presumption of innocence, even when not explicitly mentioned in Article 5, is a guarantee embedded in the regime of pre-trial detention. Hence, if the deprivation of liberty is found to be unlawful or arbitrary it could as well amount to a breach of the right to be presumed innocent if the suspicion prescribed in Article 5 para. 1 (c) is not sufficiently grounded.⁴⁶

Here it is convenient to make clear the distinction between the term “detained person” and the term “imprisoned person” because reasons, conditions and consequences derived from these situations differ from each other. According to the “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment”, the first one refers to any person deprived of personal liberty except as a result of conviction for an offence, while the second one means the opposite situation, persons deprived as a result of being convicted.⁴⁷ Both categories imply an interference with the right to personal liberty, however, when it comes to criminal proceedings, reasons justifying detention as well as the principles ruling its enforcement differ from the ones applied in cases of imprisonment.

2.2. Updated Review of the ECtHR’s Jurisprudence

2.2.1. Lawfulness and prohibition of arbitrariness

Article 5 para. 1 of the ECHR states that no one is to be deprived of liberty save for the purposes set out in the same provision and in accordance with a procedure prescribed by law. In order for the deprivation of liberty to be in compliance with personal liberty and respectful of the presumption of innocence, a double test of legality is needed:⁴⁸ procedures which regulate the above-mentioned interference are required to be

⁴⁶ Noteworthy is the fact that when a violation of Article 5 para. 3 is found due to the excessive length of detention on remand, it will not give rise to a separate issue under Article 6 para. 2 since the former disposition prevails over the latter as it is considered *lex specialis* (see *Erdem v Germany*, no. 38321/97, 5 July 2001, para. 49).

⁴⁷ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, “use of terms”.

⁴⁸ Trechsel, 2006, p. 420.

“prescribed by law” which refers to domestic law⁴⁹ and the arrest or detention must be “lawful”, that is, according to substantive rules.⁵⁰ Furthermore, following the interpretation given by the ECtHR, legal provisions need to satisfy certain qualities: be accessible to all individuals subject to the jurisdiction and precise enough, that is, grounds enabling the detention or arrest are required to be clearly set out as to allow individuals to foresee the consequences of their acts. The required level of precision will be assessed in the light of the nature, content and scope of the piece of legislation in question.⁵¹

Foreseeability where deprivation of liberty is concerned is particularly important as stated repeatedly by the ECtHR. Thus, the general principle of legal certainty constitutes a key requirement to be met in order for domestic authorities to fulfil the standard of “lawfulness” both as regards the offence which is to be clearly defined by domestic law and as regards the conditions for depriving the suspects of his or her liberty which are required to be set out unequivocally. In other words, the law at stake must be sufficiently precise to allow the person to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail.⁵² This requirement, as will be seen throughout the thesis, is particularly relevant in light of the prominent trends of current anti-terrorism legislation and recently amended criminal law statutes which can extend criminal responsibility under broad legal frameworks that may encompass uncertainty and consequently impair the basic guarantees to respect the right to personal liberty.⁵³

Moreover, an unlimited power of discretion is precluded and therefore the legal provisions mentioned must afford mechanisms of protection against arbitrary interferences by public authorities, that is, in words of the ECtHR, “the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise”.⁵⁴

While Article 9 of the ICCPR sets out explicitly the condition of non-arbitrariness, Article 5 of the ECHR does not mention this prerequisite. However, the exhaustive list of

⁴⁹ *Bik v Russia*, no. 26321/03, 22 April 2010, para. 30.

⁵⁰ Jacobs, White & Ovey, 2010, p. 216.

⁵¹ See, e.g., *Leva v Moldova*, no. 12444/05, 15 December 2009 (*Leva v Moldova*), para. 51.

⁵² *Ibid.*

⁵³ To further explore on laws and practices neglecting the observation of the principle of legal certainty and foreseeable consequences of the acts, an illustrative example to take into consideration is the *Sami Al-Arian* case in the US, in which the suspect was held and tried accused to provide material support to the Palestinian jihad, while as to the facts proven he was a professor advocating for the Palestinian cause, activity that would be allowed under freedom of expression. On freedom of expression as one of the “casualties” in the war on terror or the impact of counter-terrorism legislation on political dissent, see Za’ tara, 2009.

⁵⁴ *Maestri v Italy*, no. 39748/98, 17 February 2004, para. 30.

exceptions or categories in Article 5 para. 1 arises as a guarantee against arbitrary deprivation of liberty⁵⁵ enhanced by the fact the Court has stated that only a narrow interpretation is “consistent with the aim of that provision”.⁵⁶ Furthermore, the Court has repeated that the basic safeguard laid down in Article 5 is precisely impeding arbitrary interferences with the right to liberty.⁵⁷ Hence, it can be asserted that the prohibition of arbitrariness constitutes the second general limitation; it is applicable both to the provisions enacted and to enforcement practices.⁵⁸

As regards the concept of arbitrariness, it has a broader scope than the mere illegality, as was already pointed out by the majority of delegates assigned with the drafting of the ICCPR. As it has been stated by the HRC,⁵⁹ the term “arbitrariness” “must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability”.⁶⁰ General Comment no. 16 (1988), dedicated to Article 17 of the ICCPR on private life, develops further the final meaning of arbitrariness saying that this concept “is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”.⁶¹ Along the same lines, the ECtHR has said that “the law must itself be in conformity with the Convention, including the general principles expressed therein”.⁶²

The concept of arbitrariness is not only linked to the nature and procedures governing detention but also to the manner this is executed and extended over time. As will be further examined in the comment on para. 3 of Article 5, arbitrariness can also be found

⁵⁵ According to the HRC, the prohibition on arbitrary detention, while not listed as a non-derogable right in Art. 4 of the ICCPR, is also *jus cogens* and may never be derogated from pursuant to the fact that “the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2” (HRC, General Comment no. 29 (2001), para. 11).

⁵⁶ *Medvedyev and others v France*, para. 78.

⁵⁷ *Tanrikulu and others v Turkey*, no. 29918/96, 29919/96 and 30169/96, 6 October 2005 (*Tanrikulu and others v Turkey*), para. 29.

⁵⁸ Jacobs, White & Ovey, 2010, pp. 209–213.

⁵⁹ Another important mechanism under the UN that deals specifically with arbitrary detention is the UN Working Group on Arbitrary Detention. Regard must be paid to the fact that this Working Group is the only non-treaty based mechanism whose mandate expressly provides for consideration of individual complaints.

⁶⁰ *Van Alphen v Netherlands*, no. 305/1988, 23 July 1990, para. 5.8.

⁶¹ HRC, General Comment 16 (1988), para. 4.

⁶² See Macken, 2005, p. 6: “the word ‘arbitrary’ is concerned with the actual content of laws, not just compliance with procedures in accordance with law”.

“ad hoc” if detention lasts beyond the period for which the authorities can provide appropriate justification.⁶³

2.2.2. The grounds that render an arrest or detention lawful

Of the five exceptions listed in Article 5 para. 1 of the ECHR, detention on remand is foreseen in paragraph (c), which provides as follows:

The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

This subparagraph can be characterised, without probably overdoing it, as one of the most unfortunate of the ECHR in terms of understanding of what is set forth. Still after more than fifty years since it was drafted, there is seldom consensus as regards the exact purpose, meaning and scope of this phrase.

What seems to be clear is that the main purpose of the arrest and detention as put forward is to bring the person affected to the “competent legal authority”, which has been interpreted as judicial authority; in other words, any deprivation of liberty within the framework of paragraph 1 (c) needs to be ordered with the purpose of subjecting the person to judicial control. The next question arising is: which “competent legal authority” is assigned to carry out this task? Is this the legal authority referred to in Article 5 para. 3? According to the case law, it does not suffice to bring the suspect before a judge in order to fulfil the requirements set out in Article 5 para. 3 since, as will be further developed below, the lawfulness of the detention foreseen in para. 1 (c) will have to be regularly reviewed by a judge. That leads to the answer that by “legal authority” is ultimately meant the court or judge that will decide on the merits.⁶⁴

As regards the variants set out in para. 1 (c) the only modality or ground with normative meaning, as will be seen, is the one that enables the arrest and detention to be carried out on the basis of a reasonable suspicion that the individual *has* committed an offence. The final aim is to ensure the successful progress of a criminal investigation which can be

⁶³ See Jacobs, White & Ovey, 2010, p. 222; also under the ICCPR, see HRC, *C. v Australia*, no. 900/1999, 28 October 2002, para. 8.2.

⁶⁴ Trechsel, 2006, p. 428.

seen as the legitimate “raison d’être” of detention on remand. This can be observed as well through the cases the ECtHR has dealt with in the framework of detention on remand, the vast majority of which consist of the arrest or detention under the “reasonable suspicion of having committed an offence”.⁶⁵

In order to assess if the requirement of “reasonable suspicion” is met, the Court has employed the criterion of the “objective observer”; if the information available is such as to make plausible to an objective observer the idea that the person concerned has committed an offence, the detention will fall within Article 5.⁶⁶ It follows that sufficient evidence must be in place to give rise to a reasonable suspicion. As it will be addressed in the third chapter, in cases dealing with offences linked to terrorism the test of reasonableness will take into account the special conditions surrounding the case.

Turning to the variant which takes into account the reasonable need to *prevent* someone committing an offence, it can be asserted that it has only been used by governments to justify the detention in very few cases. In all the cases the ECtHR has said that it constitutes one of the “permissible” grounds set out in Article 5 para. 1 (c). However, there is not even one case in which the employment of this reason has been found to be appropriate and justified. Moreover, with regard to the scope of this permissible goal, the ECtHR laid down its interpretation in the *Guzzardi* case (1980):

In any event, the phrase under examination [reasonably necessary to prevent he detained person committing an offence] is not adapted to a policy of general prevention directed against an individual or a category of individuals who, like mafiosi, present a danger on account of their continuing propensity to crime; it does no more than afford the Contracting States a means of *preventing a concrete and specific offence*. This can be seen both from the use of the singular (“an offence”, “celle-ci” in the French text; see the Matznetter judgment of 10 November 1969, Series A no. 10, pp. 40 and 43, separate opinions of Mr. Balladore Pallieri and Mr. Zekia) and from the object of Article 5 (art. 5), namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion.⁶⁷ (emphasis added)

This means that only in cases where “concrete” and “specific” offences are being envisaged the authorities will be enabled to interfere with the right to personal liberty.⁶⁸

⁶⁵ Pati, 2009, p. 76.

⁶⁶ *Leva v Moldova*, para. 50.

⁶⁷ *Guzzardi v Italy*, 7367/76, 6 November 1980, para. 102; see also *Ciulla v Italy*, para. 141–142.

⁶⁸ Along these lines, in the *travaux préparatoires* of the ICCPR it was said that “it may be necessary in certain circumstances to arrest an individual in order to prevent his committing a crime, even if the facts which show his intention to commit the crime do not of themselves constitute a penal offence” (Bossuyt, 1987, p. 260).

In other words, the purpose cannot be to prevent future criminal conduct if the basis for the suspicion is speculative, namely, imprecise activities, allegedly prejudicial to the public interest. There must be the expectation that the reasons triggering the detention can be successfully tested in a trial. Otherwise, the purpose and duty of bringing any person detained under para. 1 (c) to trial would be disregarded. It can be concluded that pursuant to this interpretative approach, the ECtHR has discarded to date the possibility of preventive detention schemes.⁶⁹

Had the ECtHR allowed this kind of practices, preventive detention would constitute a legitimate exception within the ECHR framework; fortunately for the sake of individual liberty, the ECtHR has not authorised “preventive detention” up to now and the second modality is only applicable when an imminent “actus reus” can be proven.

Nevertheless, some authors disagree and either argue that this second alternative is redundant, since there is always the obligation to bring the detained to trial, as long as there is a suspicion that the person has *actually* committed an offence or attempted to do so;⁷⁰ or contend that preventive detention is allowed in the light of the standards laid down in the ECHR by suggesting that the obligation to bring the detained to the competent authority or even to trial only applies in the first modality (that is, when there is a reasonable suspicion that an offence has been perpetrated).⁷¹ Needless to say that this debate would not have come to light if Article 5 had a clearer wording, particularly in relation to the syntax of para. 1 (c).

As regards the third ground, that is, the possibility to prevent the concerned individual from fleeing after having committed an offence, it is based on an unlikely set of circumstances since the person will have presumably committed an offence if he or she is trying to abscond. As Trechsel has suggested, “[i]t can only be assumed that the drafters intended to cover a scenario where the suspect was ‘caught in the act’”.⁷²

⁶⁹ Supporting this view, see Jacobs, White & Ovey, 2010, p. 218.

⁷⁰ Trechsel, 2006, p. 426.

⁷¹ See, e.g., Macken, 2006, p. 200, who has argued that preventive detention is allowed under the ECHR according to a “wide interpretation” of the provision by which “the distinct meaning of the second ground enables arrest and detention to actually *prevent* a person from committing a criminal *offence at some point in the future*” (emphasis in original).

⁷² Trechsel, 2006, p. 428.

2.2.3. Right to be informed of the reasons for the arrest and any charges

Article 5 para. 2 of the ECHR enshrines the right everyone who is arrested has to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest and the charge against him or her. The ECtHR has been interpreting this provision as follows:

The Court notes that Article 5 § 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4.⁷³

Para. 2 can be mainly characterised as, first, *a condition sine qua non* to enable further claims challenging the lawfulness of the detention in the sense of para. 4⁷⁴ and, second, as an objective itself since it satisfies the need to know of individuals deprived of liberty.⁷⁵

However, the ECtHR has mainly stressed the purpose linked to para. 4 to the point that, in a couple of cases, it has concluded that since anyone entitled to have the lawfulness of his or her detention speedily decided cannot make effective use of that right unless he or she is promptly and adequately informed of the facts and legal authority relied on to deprive him of his liberty, complaints under para. 2 amount, in the particular circumstances, to no more than one aspect considered in relation to paragraph 4 provided that “there is no call to rule on the merits of a particular issue which is part of and absorbed by a wider issue”.⁷⁶

Whether the content and promptness of the information conveyed are sufficient is to be assessed in each case according to its special features.⁷⁷ However, information must not necessarily be given at the very first moment of the arrest to fulfil the requisite of promptness nor does it have to be explicit. With this regard, the Court has not found a breach when, in the subsequent interrogation carried out following the arrest, the grounds

⁷³ See, e.g., *Muradverdiyev v Azerbaijan*, no. 16966/06, 9 December 2010, para. 72.

⁷⁴ The HRC shares this approach; see, e.g., *Campbell v Jamaica*, no. 307/1988, 24 March 1993, para. 6.3.

⁷⁵ See Trechsel, 2006, p. 456; also Macken, 2011, p. 57.

⁷⁶ *X. v UK*, no. 7215/75, 5 November 1981 (*X. v UK*), para. 66.

⁷⁷ *Ladent v Poland*, no. 11036/03, 18 March 2008, para. 42.

behind the detention are made apparent to the person detained or, in words of the Court, “sufficiently brought to his or her attention during the interview”.⁷⁸ Therefore, if the person can reach the information indirectly through a process of deduction it will be considered within the parameters of Article 5 para. 2.

Notwithstanding the fact that this is the state of the art, critical authoritative voices have disapproved this approach since it could lead to thinking that the intrinsic objective of the provision, namely the right to receive a clear answer as regards reasons justifying the detention, is being overlooked.⁷⁹

2.2.4. The obligation to bring individuals in custody promptly before a judge

The first part of Article 5 para. 3 of the ECHR sets out the duty of states to ensure that detained persons are brought promptly before a judge or another officer authorised by law to exercise judicial power. As stated by the ECtHR, this mechanism of review must be automatically activated as soon as the arrest takes place.⁸⁰ There are different reasons why early detention must be judicially controlled. The main one inferred from a systematic interpretation of Article 5 and the rulings of the ECtHR is the need to tackle arbitrary interferences by public authorities with the right to personal liberty.⁸¹ The second one derives from concerns arising with regard to the right to physical integrity and the need to scrutinize that action by law enforcement officers has been proportionate and following legal procedures.⁸²

According to the nature of this review, judicial officers will have to make a *prima facie* evaluation of whether the conditions for detention under paragraph 1 (c) and provisions

⁷⁸ *Murray v UK*, no. 14310/88, 28 October 1984 (*Murray v UK*), para. 77, where the sister of a suspected member of a proscribed organisation was questioned for possible involvement in the collection of funds for purchasing arms but without this offence being made explicit during the interview. For further cases, see ECtHR, *Fox, Campbell and Hartley v UK*, no. 12244/86, 12245/86, 12383/86, 30 August 1990 (*Fox, Campbell and Hartley v UK*), para. 41, IACHR, *Acosta Calderón v Ecuador*, no. 11.620, 24 June 2005 (*Acosta Calderón v Ecuador*), para. 73.

⁷⁹ As suggested by Trechsel, 2006, p. 461, “the essence of the duty to give reasons for the arrest is to prevent the person concerned from having simply to guess but to get a clear answer to the question ‘why have I been arrested?’”.

⁸⁰ Jacobs, White & Ovey, 2010, p. 219, concluding that “[i]n contrast to the right to judicial review of the legality of the detention under Article 5 para. 4, which may be conditional on the application of the detained person, the right under Article 5 para. 3 is to be brought promptly before a judge: it is the duty of a Contracting Party on its own initiative to see that this is done” (emphasis added). See as well, *McKay v UK*, no. 543/03, 3 October 2006 (*McKay v UK*), para. 34.

⁸¹ *Aquilina v Malta*, no. 25642/94, 29 April 1999, para. 48; likewise, IACHR, *Tibi v Ecuador*, 7 September 2004, para. 114.

⁸² Trechsel, 2006, pp. 505–506.

of domestic law are fulfilled based on the vestigial elements of evidence gathered at the first stage of the investigation.

The onerous character of the interference regulated in Article 5 is on the basis of the guarantee foreseen in para. 3. Deprivation of liberty within the framework of criminal proceedings must be only used as a last resort⁸³ and a judge is entrusted the role to make a first appraisal of whether the detention is justified under paragraph 1 (c) or, in case there are no reasons to justify detention, order the release activating the principle “in dubio pro libertate”.⁸⁴

Article 9 of the ICCPR goes even further by laying down that detention should not become the general rule when establishing that “it shall not be the general rule that persons awaiting trial shall be detained in custody”.⁸⁵

In this context, it does not suffice to back the reasonable suspicion for interference with the liberty on objectively verifiable facts pointing to the likely criminal liability of the suspect.⁸⁶ In order not to compromise the presumption of innocence, there is a need to prove that there are distinct grounds that render pre-trial detention as the only possible choice, namely the risk of absconding, the risk of tampering with evidence, the risk of collusion and the risk of reoffending.⁸⁷ As restated by the ECtHR in the recent judgment *Romanova v Russia*, the protection of public order can also be relied on as a ground for detention in exceptional circumstances, namely when the internment is based on facts capable of showing that the release of the suspect would actually give rise to public disquiet and, hence, prejudice public order.⁸⁸ However, in that case Russia was found in breach of Article 5 para. 3 because domestic law does not foresee danger to public safety

⁸³ See *Demirel v Turkey*, para. 57: “A cette fin, il leur faut examiner toutes les circonstances de nature à révéler ou écarter l’existence d’une véritable exigence d’intérêt public justifiant, eu égard à la présomption d’innocence, une exception à la règle du respect de la liberté individuelle et en rendre compte dans leurs décisions rejetant des demandes d’élargissement”.

⁸⁴ Noteworthy here is the interpretative approach followed by the IACHR (see, e.g., *Vélez Loo v Panama*, no. 12.581, 23 November 2010, para. 107) which, by virtue of the principle *pro persona*, has extended the guarantee of bringing the suspects before a judicial authority to cases where the detention or arrest of a person is based on his or her immigration status stressing the need to take into account his or her special vulnerability.

⁸⁵ ICCPR, Article 9, para. 3.

⁸⁶ Pati, 2009, p. 78.

⁸⁷ Although the ECtHR has held that the existence of reasonable suspicion may justify detention at an initial period, it has also been stressed that “even at this stage” the opportunity to have judicially assessed the possibility of release pending trial must be available, pursuant to para. 3, since “there will be cases where the nature of the offence or the personal circumstances of the suspected offender are such as to render detention unreasonable, or unsupported by relevant and sufficient grounds” (*McKay v UK*, para. 47).

⁸⁸ *Romanova v Russia*, no. 23215/02, 11 October 2011, para. 131.

as a ground for detention or for its extension. Furthermore, the ECtHR contended that domestic courts in charge of ordering and reviewing the deprivation of liberty did not explain why the continued detention of the applicant was necessary in order to prevent public disquiet even when the ECtHR declared itself “not oblivious to the fact that the applicant was prosecuted on terrorist charges”.⁸⁹

As regards the requirement of promptness, the ECtHR has assessed if it is met on a case-by-case basis, *i.e.* taking into consideration the specific features of every case. However, it has established that it is a matter of a “few days”⁹⁰ since, as noted above, the extension of the detention is only justified as long as it is needed to carry out some inquiries as to allow the judicial authority to decide based on the outcome of the first investigations.

In fact, since *Brogan and others v UK*, where the ECtHR held that detention during four days and six hours constituted a violation of this norm, the maximum period allowed has been four days.⁹¹ Moreover, it has to be noted that only in extraordinary cases this limit can be reached, in the rest of cases this duration would not satisfy the quality of promptness.⁹² As restated by the ECtHR, “the degree of flexibility attached to the notion of promptness is limited”, as it can be inferred from the connotations of the word *aussitôt* (immediately) in the French version of the ECHR.⁹³

It needs to be pointed out that the requirement of judicial control laid down in para. 3 may in some cases overlap with the right to challenge the lawfulness of the detention enshrined in para. 4. As regards the relation between those two provisions, the ECtHR has not achieved a consistent position; it has been observed that in some cases the first oversight by a court can serve the aim of para. 4 in the sense of granting an effective means of challenging the detention according to the “doctrine of incorporation”.⁹⁴ Nevertheless, the ECtHR has stated that compliance with para. 3 cannot be ensured by making a remedy available (para. 4) due to the fact that the safeguard provided for in para. 3 has a distinct nature from the one in para. 4.⁹⁵

⁸⁹ *Romanova v Russia*, paras. 132–133.

⁹⁰ *Brogan and others v UK*, no. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988 (*Brogan and others v UK*), para. 59.

⁹¹ *Ibid.*, para. 62.

⁹² See Nowak, 2005, p. 231.

⁹³ *Brogan and others v UK*, para. 59.

⁹⁴ Trechsel, 2006, p. 507; the relationship between paras. 3 and 4 of Article 5 will be further addressed in section 5.3.

⁹⁵ *Aquilina v Malta*, para. 49.

2.2.5. The presumption in favour of release and the conditions and limits for a prolonged detention

The second part of Article 5 para. 3 of the ECHR sets out that everyone arrested or detained in accordance with the provisions of para. 1 (c) of Article 5 has to be entitled to trial within a reasonable time or to release pending trial.

This second part of paragraph 3 must be read as a guarantee to limit detention on remand to those cases where it is necessary to preserve the public interest; that is, although the wording of the provision seems to suggest that release pending trial is just a simple alternative, the ECtHR has rejected this approach stating the exceptionality of this measure. It could then be affirmed that the ECHR entails in this provision a “presumption in favour of release”.⁹⁶

Therefore, a continued detention on remand must be justified so that reasons that lead domestic courts to reject release are “relevant and sufficient”.⁹⁷ As stated by the ECtHR, “suspicion that the detained person has committed an offence, while a necessary condition, does not suffice to justify detention continuing beyond a short initial period, even where the accused is charged with a particularly serious crime and the evidence against him is strong”.⁹⁸ In this vein, the Court, in defiance of domestic authorities which often resort to this argument, has rejected the gravity of the alleged offence as the only reason justifying a prolonged detention.⁹⁹ Besides, grounds brought up cannot be too abstract or alleged in a stereotypical or routinary way but respond to a case-by-case analysis.¹⁰⁰

Regarding the need to craft a solid reasoning to render the detention legitimate, the case of *García Asto and Ramírez Rojas* adjudicated by the IACHR is highly illustrative. The IACHR concluded that Peru had conducted an arbitrary detention because putting forward the gravity of the alleged offence and the attendant detrimental consequences as the only reason to justify the prolonged detention did not meet the requirements

⁹⁶ Jacobs, White & Ovey, 2010, p. 221; see also the jurisprudence in the case *McKay v UK*, para. 41, in which the ECtHR held what follows: “[t]he presumption is in favour of release. As established in *Neumeister v Austria* ..., the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable”.

⁹⁷ *Pleshkov v Ukraine*, no. 37789/05, 10 February 2011, para. 34, *McKay v UK*, para. 44.

⁹⁸ *Tomasi v France*, no. 12850/8727, 27 August 1992, para.15.

⁹⁹ *Ibid*, para. 91.

¹⁰⁰ HRC, *Koné v Senegal*, no. 386/1989, 5 December 1989, para. 7.4.

stemming from Article 7 para. 3 of the ACHR.¹⁰¹ Moreover, the IACHR recalled that the principle of presumption of innocence gives rise to the obligation of the state not to restrict the liberty of the detainee beyond the limits of what is strictly necessary to ensure that he will not impede an efficient investigation or avoid law enforcement. In this regard, it added, “preventive imprisonment [referring to pre-trial detention] is a precautionary measure, not a punitive one”.¹⁰²

Furthermore, a prolonged detention requires *periodical* review of the grounds on which the deprivation of liberty is based.¹⁰³ Otherwise the detention will be rendered arbitrary.¹⁰⁴ As regards the time frame, the ECtHR has ascertained that the review of the need for detention, even when there is no express requirement of “promptness” as in the first sentence of para. 3, must take place with “due expedition, in order to keep any unjustified deprivation of liberty to an acceptable minimum”.¹⁰⁵

In any case, the right to stand in a trial must be fulfilled within a “reasonable time”. The assessment of what constitutes “reasonable time” will depend on the specific circumstances of the case, particularly the nature of the offence, and it can be an onerous task to ascertain whether the duration was excessive or not.¹⁰⁶

However, it can be asserted that the test of reasonableness must consist of a thorough balance to be struck between the interests surrounding criminal justice and public order, on one hand, and the need to regard carefully the rights of an individual still considered “innocent”, on the other.¹⁰⁷ That is, there is a risk that as time goes by the detention turns out to display functions more linked to the serving of a prison sentence and presumption of innocence is undermined. In other words, the individual must be released within a

¹⁰¹ *García Asto and Ramírez Rojas v Peru*, nos. 12.413, 12.423, 25 November 2005 (*García Asto and Ramírez Rojas v Peru*), paras. 128–129; also *Acosta Calderón v Ecuador*, para. 75.

¹⁰² *García Asto and Ramírez Rojas v Peru*, para. 106.

¹⁰³ See Jacobs, White & Ovey, 2010, p. 239.

¹⁰⁴ HRC, *Van Alphen v Netherlands*, para. 5.8.

¹⁰⁵ *Ibid.*

¹⁰⁶ Trechsel, 2006, pp. 521–522: “[D]etention on remand may never go beyond the time of a prison sentence realistically incurred in case of conviction”.

¹⁰⁷ In this vein, the IACHR has held (see, e.g., *García Asto and Ramírez Rojas v Peru*, para. 106) that detention on remand, being the most burdensome measure that can be applied on a criminal suspect, must be ordered exceptionally, must be constrained by the principles of legality, presumption of innocence, necessity and proportionality, essentials in a democratic society, and hence it can never have a punitive character.

“reasonable time” as far as the deprivation of liberty cannot be used to “anticipate a custodial sentence”.¹⁰⁸

Thus, presumption of innocence, which seeks to protect the individual against arbitrary and excessive state action, especially taking into account the state far-reaching powers to investigate, prosecute, try and punish, arises as a barrier against pre-trial detention aiming at acting as a punishment. Moreover, it constitutes also a limit as regards the use of detention which in view of the presumed innocence of the suspect must be exceptional. This has also been the view of the European Commission which in its “Green Paper on mutual recognition of non-custodial pre-trial supervision measures”,¹⁰⁹ aimed at reducing excessive use and length of pre-trial detention, sets out as one of the main goals the strengthening of the presumption of innocence. Likewise, the Committee of Ministers of the Council of Europe in its “Recommendation on the use of remand in custody” stresses the presumption’s fundamental importance.¹¹⁰

Article 5 para. 3 also protects detainees from undue delays of justice, similarly conceived as the guarantee foreseen in Article 6 para. 1. However, the level of protection is higher since, as it has been explained, what is at stake in Article 5 entails an added degree of suffering, namely the deprivation of individual liberty. Thereby, national courts must display “special diligence” while conducting the proceedings to bring the case to trial and the case must be given priority.¹¹¹ Hence, the detention will be unreasonable if there are unnecessary prolongations even when the investigating authorities raise allegations as the excessive workload or the shortage of resources.¹¹²

As regards the end of detention on remand, as falling within the scope of Article 5 para. 3, the ECtHR has said that “applicant’s detention on remand comes to an end for the purposes of the Convention with the finding of guilt and sentencing at *first instance*”.¹¹³ That is, all the issues arising from a potential detention after the trial at first instance will be absorbed by Article 6 since the ECtHR considers that this is not detention on remand

¹⁰⁸ *Tomasi v France*, para. 91.

¹⁰⁹ Commission of the European Communities, Green paper on mutual recognition of non-custodial pre-trial supervision measures, 17 August 2004, “Explanatory Memorandum”.

¹¹⁰ Committee of Ministers, Recommendation to Member States on the Use of Remand in Custody, the Conditions in which it Takes Place and the Provision of Safeguards against Abuse, 27 September 2006, Preamble and Art. 3.

¹¹¹ *Matznetter v Austria*, no. 2178/64, 10 November 1969, para. 12.

¹¹² The HRC, though, has taken in this type of arguments pointing to exceptional conditions in particular countries, such as grave budgetary difficulties (see Nowak, 2005, p. 232).

¹¹³ *B. v Austria*, no. 11968/86, 28 March 1990, para. 35.

anymore, but imprisonment to satisfy the conditions of the sentence. There is an ongoing debate as to whether the ECtHR should uphold this position despite the fact that the presumption of innocence lasts until the judgment has become final.¹¹⁴ An added reason to question the approach taken is that in several countries detention before the final judgment is still under the regime of pre-trial detention.¹¹⁵

¹¹⁴ Jacobs, White & Ovey, 2010, p. 223.

¹¹⁵ Trechsel, 2006, p. 520.

3. ECtHR'S APPROACH TO THE PROBLEM OF TERRORISM AND CONSTRAINTS ON THE RIGHT TO LIBERTY

3.1. The Position of the ECtHR: the Specific Nature of the Investigation and Prosecution of Terrorist-Type Offences

Throughout the years of its existence, the ECtHR has been faced several times with the question of ascertaining whether states have found the proper balance between the need to preserve peace and democratic institutions from terrorism, on one side, and the need to respect individual rights, on the other.

The landmark cases involving states counter-terrorism actions have been mostly related with two organised violent movements: the Irish Republican Army (IRA) and the secessionist Kurdish movement headed by the Kurdistan Workers' Party (PKK).

In the early years of the "Troubles" and through the 1990s, the majority of cases challenging emergency laws and practices were brought against UK¹¹⁶ and particularly by IRA suspects. Since complaints regarding the right to liberty of suspected members of transnational terrorist nets linked to Islamic movements are yet to be dealt with in Strasbourg,¹¹⁷ the analysis in this section will mainly be focused on the jurisprudence emanating from the complaints brought by IRA and PKK suspects.

Firstly, it has to be noted that in all cases that will be examined the authorities avail themselves of legal instruments which entail special arrest and detention powers. The background has always been the existence of a life-threatening danger for the nation. It points to the fact that, regardless whether a state of emergency has been formally declared or not, those actions have taken place in the framework of the struggle against allegedly highly damaging activities.

This point is extremely relevant since the ECtHR has been sympathetic with these particular circumstances when trying to pinpoint the contours of the margin of appreciation permitted vis-à-vis the need for extraordinary powers.¹¹⁸ Thus, the ECtHR has stated that even when "having a reasonable suspicion presupposes the existence of

¹¹⁶ It was not surprisingly that the UK proposed to include in the draft of the ECHR a clause similar to Article 4 of the ICCPR (derogation clause); see Pati, 2009, p. 256.

¹¹⁷ With the exception of the case *A. and others v UK*, cf. p. 46.

¹¹⁸ See *Brogan and others v UK*, para. 61, where the ECtHR acknowledges that "[t]he investigation of terrorist offences undoubtedly presents the authorities with special problems".

facts or information which would satisfy an objective observer that the person concerned may have committed the offence, what may be regarded as ‘reasonable’ will however depend upon all the circumstances”.¹¹⁹ Following this discussion, the ECtHR has said that “terrorist crime falls into a special category” since in view of the difficulties inherent in the investigation and prosecution, the reasonableness of the suspicion justifying such arrests cannot always be judged according to the same standards as those applied in dealing with conventional crime.¹²⁰

In the light of these considerations, it can be stated that different thresholds will apply when ascertaining whether the arrest and detention rely on a “reasonable” suspicion or not. The reasons alluded therein are mainly related to the necessity to carry out an urgent action against possible extremely harmful events and to the complexity of the investigation, which will often include the use of information not susceptible to be revealed to the suspect or be produced in court in order to back a charge. As set out by the ECtHR, “due account will be taken of the special nature of terrorist crime, the threat it poses to democratic society and the exigencies of dealing with it”.¹²¹

3.2. The Derogation from Article 5 pursuing Article 15: the Appraisal of the Existence of a Public Emergency

The condition of “emergency” has been drawn on by states when justifying rights being encroached upon. Consequently, when allegedly facing times of “war or other public emergency threatening the life of the nation”, the provisional opt-out foreseen in Article 15 has been activated by states as to limit the extent of some of the obligations internationally undertaken.

The lodging of a notice of derogation¹²² has mainly affected the application of Article 5 since, as alleged by respondent governments and upheld by the ECtHR, in times of crisis, arrests and detentions are a crucial tool to combat disturbances and, hence, extra powers in this field are required.¹²³ Noteworthy is the fact that the overwhelming majority of

¹¹⁹ *Leva v Moldova*, para. 50.

¹²⁰ *Murray v UK*, para. 51.

¹²¹ *Ibid*, para. 47.

¹²² Four countries to date have applied for the temporal opt-out foreseen in Article 15: Greece, Ireland, United Kingdom and Turkey.

¹²³ See, e.g., *Ireland v UK*, no. 5310/71, 18 January 1987 (*Ireland v UK*), para. 220.

cases examining Article 15 by the ECtHR address states counter-terrorism policies and practices.¹²⁴

In such circumstances, the ECtHR has been several times asked the question of whether derogations from Article 5 have been entered in compliance with the wording and purpose of the ECHR, *i.e.*, the measures taken were strictly required by the exigencies of the situation and not inconsistent with other state obligations under international law.

In order to review the lawfulness of the measure, the ECtHR has articulated a sort of questionnaire by which first it inquires into the existence of a public emergency threatening the life of the nation¹²⁵ and then it evaluates if the measures were strictly required by the exigencies of the situation. That is, the ECtHR must be satisfied that it was a genuine response to the emergency situation, fully justified by the special circumstances of the emergency and with adequate safeguards against abusive practices in place.

This approach implies that where the measures looking at the general situation in the country concerned are found to be disproportionate to the threat and “discriminatory in their effect” the derogation will be rendered inappropriate and, in turn, there will be no need to go further and examine the individual complaints.¹²⁶

When it comes to determine whether there is indeed a serious public emergency, the approach taken by the ECtHR clearly obeys the rules of the doctrine of the “margin of appreciation”. That is, the ECtHR does not second-guess the substantive grounds alleged to assert the existence of exceptional circumstances which ask for exceptional measures mainly to be taken by the executive branch. It has rather been considered by the ECtHR as a matter of *bona fide*, which in the end reflects strong deference to the government’s assessment of crisis.¹²⁷

For instance, in *Brannigan and McBride v UK*, even when it was set forth by the applicant and submitting parties that the threat in Ireland was not of sufficient magnitude

¹²⁴ Pati, 2009, p. 255.

¹²⁵ As to the meaning of the “public emergency threatening the life of the nation” in the context of Article 15, the ECtHR, in *A. and others v UK*, para. 176, has stated that it refers to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.

¹²⁶ *Ibid*, para. 185.

¹²⁷ Gross & Ní Aoláin, 2006, p. 271.

any more, the ECtHR came to the conclusion that “there can be no doubt that such a public emergency existed at the relevant time”.¹²⁸

However, the assumption had little basis on the immediate state of affairs, since to carry out its own assessment, the ECtHR recalled the cases *Lawless v Ireland* and *Ireland v UK*, which were handed down twenty-two and fifteen years ago, respectively, to depict the impact of terrorist violence in Northern Ireland and elsewhere in UK; moreover, the description of the situation was based on general statistics of casualties tracing back to the beginning of the 1970s and was drafted in a wording resembling by and large the one used to portray the situation in *Brogan and others v UK* and in *Fox, Campbell and Hartley v UK*.

This way to fill in the background information, with broad brush strokes, without referring essentially to the circumstances prevailing at the material time to assess if there was indeed a public emergency, denotes on one side, the leeway left to states to appreciate the extent of the threat and, on the other side, the unwillingness or incapability of the ECtHR to challenge the reality of the public emergency assertion.¹²⁹ The ECtHR lays down this rationale in the same judgment when affirming that “by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it” and “accordingly in this matter a wide margin of appreciation should be left to the national authorities”.¹³⁰

Lastly, noteworthy is the fact that the ECtHR has already been faced with the evaluation of a notice of derogation filed in the aftermath of the 11 September 2001 bombings. UK contended that the threat from international terrorism was a continuing one and, therefore, a public emergency, within the meaning of Article 15 para. 1 of the ECHR existed in the country. In the merits, the ECtHR concluded, after recalling the wide margin of appreciation to be enjoyed by governments “as guardians of their own people’s

¹²⁸ *Brannigan and McBride v UK*, nos. 14553/89, 14554/89, 26 May 1993 (*Brannigan and McBride v UK*), para. 47.

¹²⁹ See Ní Aoláin, 2007, p. 68, who suggests that “[t]he case [*Brannigan and McBride*] illustrates the danger of the burden of proof shifting silently in favour of the state in a way that creates the danger that derogation functions only as an edifice for accountability”.

¹³⁰ See *Ireland v UK*, para. 207, where the ECtHR averred that the limits on the Court’s powers of review are “particularly apparent” where Article 15 is concerned. For more critical opinions, see Soulier, 1992, pp. 26–28; Ní Aoláin, 2007, pp. 64–74.

safety”, that there was a public emergency threatening the life of the nation. Nevertheless, it noted that it was “striking that the UK was the only Convention State to have lodged a derogation in response to the danger represented by Al-Qaeda”.¹³¹

3.3. Extended and Extrajudicial Detention as a Key Tool to Prevent and Combat Terrorism: Limited or Wide Margin of Appreciation?

Once the existence of a public threat has been analysed, the following step is to examine whether the measures were strictly required in the given circumstances. Notwithstanding the fact that states are granted margin of manoeuvre when designing and implementing measures in times of internal crisis, the power is not unfettered since the ECtHR keeps oversight powers to review that the circle of action drawn by states does not overstep the letter and scope of the ECHR, even when state practices are in compliance with domestic law in force. The rationale of the ECtHR has been crafted through the following wording:

In this matter a wide margin of appreciation should be left to the national authorities. Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the ‘extent strictly required by the exigencies’ of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation.¹³²

In a series of cases involving suspected members of the IRA, the ECtHR has repeatedly sided with the government when asserting that the investigation and prosecution of terrorism-related offences make more difficult for the executive branch to comply with the requirements afforded in Article 5. Thus, extrajudicial detention and even periods of detention for more than one year have been found lawful arguing that Article 5 was “unfortunately” not applicable.

The case *Brannigan and McBride v UK* constitutes an illustrative example of the ECtHR’s position. The Government alluded that there was a need for an extended period of detention which would not be subject to judicial control since it was essential to prevent the disclosure of information about the detainees, on the basis of which decisions on the extension of detention were made. The mentioned lack of disclosure would

¹³¹ *A. and others v UK*, para. 180.

¹³² *Demir and others v Turkey*, nos. 71/1997/855/1062–1064, 23 September 1998, para. 43.

compromise the independence of the judiciary if judges were to be involved in granting an approval of extensions. The response of the ECtHR was to conclude that the Government did not exceed their margin of appreciation in deciding, in the prevailing circumstances, against judicial control.¹³³

Opposite to this set of reasons, in several cases brought against Turkey, the ECtHR has not authorised the executive branch to provisionally take over powers of arrest and detention.¹³⁴ For instance, in *Demir and others v Turkey*, three suspected members of the proscribed organisation PKK were arrested and held in police custody between sixteen and twenty-three days, during which none of them appeared before a judge or other judicial officer. It was alleged by the Government that due to the exceptional complexity of judicial investigations concerning terrorist networks, it was sensible to provide longer periods of police custody to allow the Turkish authorities to complete the investigation of the offences concerned in order to ensure that they could bring those responsible for terrorist acts before the courts. The ECtHR, however, noted that the Government failed to explain the reasons that could justify why judicial scrutiny of the applicants' detention would have prejudiced the progress of the investigation and added that "in respect of such lengthy periods of detention in police custody it is not sufficient to refer in a general way to the difficulties caused by terrorism and the number of people involved in the inquiries".¹³⁵

It needs to be noted that the ECtHR position "legitimising" measures outside the scope of Article 5 in the fight against terrorism within the umbrella of Article 15 is highly criticisable since the premise of the "non-applicability" under certain circumstances of

¹³³ *Brannigan and McBride v UK*, paras. 58–60.

¹³⁴ It would seem that the ECtHR has exerted a more scrupulous oversight role in cases concerning Turkey. Along these lines, Ní Aoláin, 2007, p. 66. Gross & Ni Aoláin, 2006, p. 264 have seen as problematic that the ECtHR tends to grant consolidated democracies such as UK a wider margin of appreciation than those states with lesser reputations for rights enforcement.

¹³⁵ *Demir and others v Turkey*, para. 52; the argument used here by the ECtHR points to the same direction as the one used by judges Pettiti and Makarczyk in *Brannigan and McBride v UK*. Along the same lines, in the case *Tanrikulu and others v Turkey*, paras. 41–42, the ECtHR found a breach of Article 5 para. 3 because the duration of the detention without judicial control for ten days was "not strictly required by the crisis relied on by the Government", even whilst considering the actions of the PKK in south-east Turkey and the "special features and difficulties of investigating terrorist offences".

the provision devoted to the right to liberty inevitably brings about added limitations on rights.¹³⁶

Thus, concerns arising from the position of the majority of judges within the ECtHR have been expressed several times by dissenting judges. It seems that the ECtHR, tacitly embracing the non-interference principle, is not willing to ask some governments to prove that they have attempted by all means to comply with Article 5, requirement that is decisive in order to limit the number and breadth of measures interfering with the personal liberty out of the scope of Article 5.¹³⁷ It must be clearly demonstrated by states that exceptional measures and restrictions permitted by the Convention would be “plainly inadequate” to deal with the emergency.¹³⁸

An illustrative case is again the aforementioned *Brannigan and McBride v UK*: the view of the majority was not upheld by four judges which dissented from the reasoning employed in this case and the conclusion reached¹³⁹ since they argued that the requirements imposed by the notion of “strictness” had not been met.¹⁴⁰ Among them, judge Pettiti recalled the arguments of the dissenting members of the Commission “who noted that the Government had neither provided any evidence nor put forward any convincing arguments as to the reasons for which they had not chosen to proceed otherwise than by using the derogation, namely by the introduction of judicial review of the extension of detention from four to seven days”.¹⁴¹ Furthermore, judge Makarczyk claimed that the UK Government should have strived to prove before the ECtHR that extended administrative detention does in fact contribute to eliminate the reasons which justified the introduction of extraordinary measures instead of focusing on the alleged detrimental effects on the judiciary that control over extended detentions would entail.¹⁴²

¹³⁶ Noteworthy here is the approach taken by the IACHR in the advisory opinion *Judicial Guarantees in a State of Emergency*, Advisory Opinion OC-9/87, 6 October 1987, IACHR, Series A No. 9 para. 25.

¹³⁷ Nevertheless, it must be noted that the Grand Chamber in the case *A. and others v UK*, para. 186, did second-guess the measures taken by the UK while countering international terrorism. Concretely, it concluded as follows: “[t]he choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists”.

¹³⁸ European Commission on Human Rights, *Greek case*, report, 5 November 1969, paras. 152–154.

¹³⁹ The conclusion drawn was that Article 5 had not been violated in the arrest and detention of the suspects for up to six days, fourteen hours and thirty minutes without judicial control because the derogation from Article 15 was lawfully invoked.

¹⁴⁰ On the “necessity” to undertake such measures, see also the dissenting opinion of judge de Meyer.

¹⁴¹ Dissenting opinion of judge Pettiti, in *Brannigan and McBride v UK*.

¹⁴² *Ibid*, Dissenting opinion of judge Makarczyk.

3.4. The “Reasonable Suspicion” of Having Committed an Offence in Cases Involving Terrorist Suspects

As it has been addressed in the previous section of this chapter, the arrest or detention of an individual must be based on the reasonable suspicion that the person has committed an offence. As also said above, in cases of alleged terrorist crimes the ECtHR has set out that the “reasonableness” of the suspicion cannot always be judged according to the same standards as those applied in dealing with conventional crime. However, the essence of the safeguard must be secured and, thus, public authorities have to furnish at least some facts or information capable of satisfying the court that the arrested person was reasonably suspected of having committed the alleged offence.¹⁴³ As stated by the ECtHR:

the exigencies of dealing with terrorist crime cannot justify stretching the notion of ‘reasonableness’ to the point where the essence of the safeguard secured by Article 5 §1 is impaired.¹⁴⁴

The reasons adduced by the ECtHR when asserting that different standards apply are related to the difficulties attached to the investigation and prosecution of terrorism-type offences. The ECtHR has also noted that the facts raising a suspicion do not necessarily need to be of the same level as those justifying a conviction, or bringing a charge.

For instance, in *Brogan and others v UK* the applicants alleged that they were arrested and held for a couple of days for the purpose of gathering information, thus neglecting the enshrined aim of bringing the suspect to court. Thereby, the features would seem to be more proper of a measure resembling administrative detention since they were finally released without charges. The ECtHR, however, did not sustain this argument and upheld the position of the Government when claiming that the purpose of bringing the person before a judge must be considered “independently of its achievement” and “sub-paragraph (c) of Article 5 para. 1 does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody”.¹⁴⁵

¹⁴³ *Fox, Campbell and Hartley v UK*, para. 34.

¹⁴⁴ *Ibid*, para. 50.

¹⁴⁵ *Brogan and others v UK*, para. 53.

Moreover, in order to justify measures taken by the authorities, the ECtHR alleged difficulties whilst obtaining evidence in this kind of cases and the impossibility to produce them in court without endangering the lives of others and the sake of the criminal proceedings. In sum, the ECtHR relied on the *bona fide* of the arresting authorities when detaining the individuals concerned in order to confirm or dispel the concrete suspicions that grounded their arrest through the investigation, because “had it been possible, the police would, it can be assumed, have laid charges and the applicants would have been brought before the competent legal authority”.¹⁴⁶

Nonetheless, two years later, in 1990, the ECtHR came up with a different outcome in the ruling on the case *Fox, Campbell and Hartley v UK*. As in *Brogan and others v UK*, the applicants were held under the Northern Ireland (Emergency Provisions) Act 1978 by which special powers of detention and arrest were granted. They were also interrogated to ascertain if they were members of the IRA and about their involvement in terrorist acts. In this case, though, the threshold set up by the criterion of “good faith” relied on by the ECtHR in *Brogan and others v UK* was dismissed since it was observed that it did not suffice to fulfil the requirement of “reasonable suspicion”. Thus, the ECtHR concluded that the fact that the applicants had criminal records and that they were questioned about specific terrorist acts could not satisfy an objective observer that the applicants might have committed these acts. In short, the ECtHR was not satisfied with the argument built upon the impossibility to disclose the severely sensitive material on which the suspicion was based, as it seemed to be in *Brogan and others v UK*.¹⁴⁷

However, the most extreme case is *Ireland v UK*. The suspected terrorists were liable to be detained for up to twenty-eight days with the possibility of extension without being brought before a judge nor being granted an effective means to challenge the lawfulness of the detention. In fact, periods of administrative detention were extended for up to two years since the “initial arrest for interrogation” could be followed by “detention for further interrogation” and afterwards by “preventive detention”.

Those actions were in compliance with domestic law (*Special Powers Regulations*), in particular with laws enacted with the purpose of granting special powers of arrest and

¹⁴⁶ *Brogan and others v UK*.

¹⁴⁷ *Fox, Campbell and Hartley v UK*, para. 35.

detention to tackle the influence of the IRA;¹⁴⁸ they enabled the authorities to effect what in the judgment is called “extrajudicial deprivation of liberty”. The initial arrest had merely to be for the preservation of the peace and maintenance of order, and the purpose of the deprivation of liberty was not linked to the efficiency of criminal proceedings against the person detained but to prevent future terrorist acts and to interrogate about the activities of others.

When analysing the situation, the ECtHR stated that such regulations, in the absence of suspicion of an offence, did not fulfil the requirements set out in Article 5 para. 1 (c) because the detentions were neither carried out for the purpose of bringing the detainee before the competent legal authority, nor was the lawfulness of the detention decided speedily by a court, although “[a]t first sight, the different forms of deprivation of liberty may appear to bear some resemblance to the cases contemplated by sub-paragraph (c)”.¹⁴⁹ Nevertheless, it concluded that the UK had not overstepped the limits of the margin of appreciation “when it formed the opinion that extrajudicial deprivation of liberty was necessary from August 1971 to March 1975”.¹⁵⁰

Thus, the ECtHR rejected the arguments brought by the Irish Government alluding to the lack of effectiveness of extrajudicial deprivation of liberty shown by the experience, which even had the counterproductive effect of increasing terrorist activities, a fact that would confirm that extrajudicial deprivation of liberty was not an absolute necessity. One more time, in sum, the ECtHR closed ranks with the Government by giving its stamp of approval to the emergency legislation and, hence, to far-reaching extraordinary powers of arrest and detention¹⁵¹ instead of taking a step forward in limiting the contours and purpose of Article 15 when it operates as a derogation clause from Article 5.¹⁵²

It must be noted that especially in those cases where the public emergency is prolonged over time (as it is claimed nowadays by a significant amount of political and academic voices as regards the terrorist threat), the position taken by the ECtHR upholding the

¹⁴⁸ It needs to be observed that Ireland had entered a notice of derogation from the guarantees of a judicial nature afforded by Article 5.

¹⁴⁹ *Ireland v UK*, para. 196.

¹⁵⁰ *Ibid*, para. 214.

¹⁵¹ It must be pointed out that not the HRC nor the other regional human rights bodies have to date ever permitted such extraordinary powers of arrest and detention (see Pati, 2009, p. 257).

¹⁵² Likewise, reference must be made to the case *Lawless v Ireland*, no. 332/57, 1 July 1961 (*Lawless v Ireland*), para. 36, where the applicant was held for five months without being brought before a judge. The ECtHR held that administrative detention of individuals suspected of intending to take part in terrorist activities, appeared, despite its gravity, to be a measure required by the circumstances.

departure from fundamental procedural guarantees in times of emergency is not as protective as it could be expected from one of the most praised authoritative references worldwide in the field of the international protection of human rights. As put forward by “Liberty and Others” *amicus* submissions in *Brannigan and McBride* “if States are to be allowed a margin of appreciation at all, it should be narrower the more permanent the emergency becomes”.¹⁵³

Concerning the approach followed by the ECtHR as regards preventive detention, the analysis carried out up to this point seems to indicate that the only circumstance that enables the authorities to detain individuals under Article 5 para. 1 (c) is the reasonable suspicion that he or she has committed an offence. Only in times of emergency the ECtHR has held that “administrative detention” (as in *Lawless v Ireland*) is permitted, but it does not fall within the cases foreseen in Article 5 because it operates when a derogation has been lodged.

This approach proscribing other deprivations of liberty than the ones expressly set out in the ECHR has been recently restated in a landmark case, *A. and others v UK*. UK argued that legislation enacted to detain foreigners after 9/11 was in view to deportation or extradition (exception set out in Article 5 para. 1 (f)). Moreover, the Government claimed that a balance needed to be struck between individual’s right to liberty and the interest of states in protecting its population from the terrorist threat.¹⁵⁴

However, first, the ECtHR noticed that it was clear from the terms of the derogation notice and the Anti-Terrorism, Crime and Security Act 2001 (ACSA) that the applicants were held because it was believed that their presence at liberty in the country gave rise to a threat to national security since they were suspected of being involved in international terrorism. Secondly, and more important for the sake of the right to personal liberty, it proclaimed for the first time in its trajectory in such clear terms that preventive detention

¹⁵³ *Brannigan and McBride v UK*, para. 42.

¹⁵⁴ *A. and others v UK*, para 171; the need to strike a balance was also raised by the UK Government in the case *Saadi v Italy*, no. 37201/06, 28 February 2008, paras. 117–123, where they contended that a balance should be struck between the risk the individual posed to the society and the risk the same individual would face to be tortured in case of being deported to the home country. However, Scheinin, 2009, pp. 56–57, has pointed out the need for a “categorical approach” by judicial organs when required and has warned about the risk of balancing rights by arguing what follows: “[j]urisprudence even in the finest democracies of the world, by highly respected judicial organs, runs the risk, in particular in the post 9/11 era of global terrorism, to accept too many compromises in the name of balancing. If such a court in normal times lets itself be strongly ‘pulled’ into the approach of balancing, it may be unable to break loose of that frame when the day comes when it should”.

without charge of suspected international terrorist for reasons of national security (in this case using as a shield Article 5 para. 1 (f)) was incompatible with the fundamental right to liberty under Article 5 and, therefore, no balance could be struck when it would imply the impairment of the right concerned out of the scope of the written exceptions and in the absence of a valid derogation under Article 15.¹⁵⁵

More recently, the ECtHR has ratified its approach regarding the detention of suspected terrorists in the case *Al-Jedda v UK*. UK was found in breach of Article 5 para. 1 for holding the applicant in a detention centre run by British forces in Basrah, Iraq, from October 2004 until December 2007. The Court stated that “[i]t has long been established that the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time”.¹⁵⁶

3.5. The Indication of the Involvement in Terrorist Activities Does Not Suffice as to Fulfil the Requirement of Information Required by Article 5 para. 2

As examined above, Article 5 para. 2 establishes the duty of states to inform the arrested of the reasons that led to their deprivation of liberty. With this regard, the jurisprudence produced by the ECtHR does not contain cases dealing with the circumstances surrounding the information accorded to suspected terrorists but the need to provide legal and factual grounds for the arrest in a simple and understandable manner has been restated in a handful of cases. Hence, the mere assertion that individuals are arrested on suspicion of being terrorists would fall short of the constraints imposed by the provision enshrined in Article 5 para. 2.

In the case *Fox, Campbell and Hartley v UK*, the ECtHR held that the “bare indication of the legal basis for the arrest [suspicion of being terrorists], taken on its own”, was insufficient for the purposes of Article 5 para. 2.¹⁵⁷ However, the ECtHR stated that the

¹⁵⁵ *A. and others v UK*, paras. 169–171.

¹⁵⁶ *Al-Jedda v UK*, no. 27021/08, 7 July 2011, para. 100. This case was of outstanding relevance since the ECtHR found that UK did not live up to the standards of Article 5 as a consequence of a detention carried out in Iraq when UK was a Member State within the Multi-National Force. UK argued that United Nations Security Council Resolution 1546 explicitly authorised the Multi-National Force to take all necessary measures to contribute to the maintenance of security. However, the ECtHR considered that this Resolution did not place Members of the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the European Convention.

¹⁵⁷ *Fox, Campbell and Hartley v UK*, para. 41.

requirement of information was satisfied since the involvement of the suspects in specific criminal acts and their membership of proscribed organisations were supposedly brought to their attention during the interrogation.

This approach has recently been confirmed in the case *Atti and Tedik v Turkey* in which the ECtHR held that two students allegedly involved in violent activities carried out by the PKK were not given the reasons for the arrest promptly, even though the authorities' aim was to "protect the community as a whole against terrorism", since one of them was told to be arrested on the "suspicion of his appearance/condition"¹⁵⁸ and the other "in relation to an investigation".¹⁵⁹

3.6. The Elasticity of the Notion of "Promptness" when Assessing the Scope of Time Limitations Annexed to the Obligation of Bringing the Arrested before the Judge

Article 5 para. 3 in connection with terrorism-related offences has been mainly discussed as regards the notion of "promptness" attached to the obligation of states to bring the detained before a judge. The evolving interpretation of the ECHR carried out by the ECtHR has led to a differentiation in respect of the scope of the term based on the gravity and exceptionality of the offence. Thus, whereas the detained is suspected of having committed an ordinary criminal offence time constraints will be absolutely tight, if the individual is accused of involvement in terrorism or other offences endangering the integrity of the state and the public safety the interpretation of the notion will be slightly more flexible. The argument put forward by the ECtHR is the need to cope with the special difficulties associated with the investigation of terrorist offences, which justifies "a somewhat longer period of detention than in normal cases".¹⁶⁰

Translated into practical terms, a period of four days in ordinary cases and five days in exceptional cases has been considered compatible with the requirement of promptness enshrined in Article 5 para. 3.¹⁶¹ The case *Brogan and others v UK* has become a landmark as regards the threshold allowed; besides concluding that the detention of the application satisfied the constraints imposed by the notion of "reasonableness" of the detention, the ECtHR held that there was a breach of the provision mentioned.

¹⁵⁸ Referring to the outward or visible aspect of a person.

¹⁵⁹ *Atti and Tedik v Turkey*, no. 32705/02, 20 October 2009, para. 23.

¹⁶⁰ *Brogan and others v UK*, para. 57.

¹⁶¹ *Ibid.*

Even agreeing with the Government on the fact that judicial control over decisions to arrest and detain suspected terrorists might affect the manner of implementation of Article 5 para. 3, for instance, in requiring additional procedural precautions in view of the nature of the suspected offence, the ECtHR concluded that the alluded difficulties could not justify either dispensing with prompt judicial control or being released swiftly following the arrest. Therefore, noting that the scope for flexibility in interpreting and applying the notion of “promptness” is very limited,¹⁶² the ECtHR held that even the shortest of the four periods of detention, namely four days and six hours, fell short of the time permitted by para. 3.

Soon after this judgment the UK Government lodged a notice of derogation (23 December 1988) to avoid being in breach of their obligations by not bringing the applicants promptly before a court. Within this context, the case *Brannigan and McBride* reached Strasbourg. The ECtHR was faced with the question of whether detaining the two applicants for up to seven days without judicial intervention was a proportionate and necessary exercise of power.

Upon completing a review of the legislation on the prevention of terrorism by commissioning various reports, the Government concluded that the use of extended detention in view of the problems inherent in the prevention and investigation of terrorism was “indispensable”.¹⁶³ Among the reasons put forward to uphold this assertion there was the incapability of the judiciary to exert an independent control granted that the information grounding the decision of extending the detention could not be disclosed to the person in detention, or their legal adviser, without risk to individuals assisting the police or the prospect of further valuable intelligence being lost.¹⁶⁴ Moreover, in this context the police was required to undertake extensive checks and inquiries. The underpinning rationale was the assumption that it was not feasible to introduce a system which would be compatible with Article 5 para. 3 but would not weaken the effectiveness of the response to the terrorist threat.¹⁶⁵

In the same manner as the former European Commission of Human Rights had concluded, the ECtHR gave the blessing to this set of arguments advocating for different

¹⁶² *Brannigan and McBride v UK*, para. 62.

¹⁶³ *Ibid*, para. 15.

¹⁶⁴ *Ibid*, para. 56.

¹⁶⁵ *Ibid*.

standards and procedures in times of crisis and drew the conclusion that the Government did not exceed the margin of appreciation in advocating in the prevailing circumstances against judicial control. In other words, the ECtHR “conceded” that the added difficulties in combating terrorism indeed gave rise to the need for an extended period of detention without judicial control by recalling one more time that it was not its role to appraise what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation instead of the government. Last but not least, the ECtHR attached great importance,¹⁶⁶ to the need to preserve the public confidence in the independence of the judiciary in “the context of Northern Ireland, where the judiciary is small and vulnerable to terrorist attacks”.¹⁶⁷ Thus, it can be inferred that the ECtHR took in the assumption that in times of crisis the role of the judiciary may be undermined if the executive branch does not take over special powers of arrest and detention beyond the sphere of influence of the courts.¹⁶⁸

Far from the logical reasoning displayed in *Brannigan and McBride*, in the case *Demir and others v Turkey* the ECtHR held that the periods of detention fell out of the constraints laid down by the notion of “promptness” even noting the public interest at stake when tackling terrorism. The Government of Turkey posed arguments similar to those alluded by UK in the cases examined, such as the complexity of the inquiries, the gravity of the alleged offence and that “there should be longer periods of police custody to allow the Turkish authorities to complete the investigation of the offences concerned and thus be sure that they [could] bring those responsible for terrorist acts before the courts”.¹⁶⁹ Nevertheless, the ECtHR considered the main question at issue, namely, for what precise reasons relating to the actual facts of the present case would judicial scrutiny of the applicants’ detention have prejudiced the progress of the investigation, as not answered and concluded that “in respect of such lengthy periods of detention in police custody it is not sufficient to refer in a general way to the difficulties caused by terrorism and the number of people involved in the inquiries”.

Finally, the ECtHR found a breach of Article 5 para. 3 that was not countered by the notice of derogation since Turkey had overstepped the margin of appreciation when considering as strictly required by the exigencies of the situation taking such measures

¹⁶⁶ To the extent that it appears as the crucial deciding factor in the adjudication by the ECtHR.

¹⁶⁷ *Brannigan and McBride v UK*, para. 59.

¹⁶⁸ This matter will be further addressed in section 5.3.

¹⁶⁹ *Demir and others v Turkey*, para. 47.

without giving a satisfactory answer as regards their grounds. Introducing an innovative approach, which could be interpreted as deviating from the one displayed in *Brannigan and McBride*, the ECtHR concluded that “the requirements of the investigation cannot absolve the authorities from the obligation to bring any person arrested ... ‘promptly’ before a judge” and “[w]here necessary, it is for the authorities to develop forms of judicial control which are adapted to the circumstances but compatible with the Convention”.¹⁷⁰

¹⁷⁰ *Demir and others v Turkey*, para. 41.

4. EFFECTIVE REMEDY: NORMATIVE FRAMEWORK AND ACCOMMODATION IN CASES INVOLVING TERRORISM-RELATED ACTIVITIES

4.1. The Non-Derogable Right to Have the Lawfulness of the Detention Reviewed

The specific right of those deprived of liberty to challenge the legality of the detention, as enshrined in Article 9 para. 4 of the ICCPR, Article 5 para. 4 of the ECHR and Article 7 para. 6 of the ACHR, being one of the main concerns of this thesis, will be explored in this chapter in an attempt to pinpoint the content and scope of this procedural safeguard. Some of the difficulties faced by detainees allegedly involved in terrorism whilst questioning the deprivation of liberty will be brought up by analysing the case law on the matter with a particular emphasis on the ECtHR's approach and its efforts to accommodate national security concerns. With this purpose in mind, the case *A. and others v UK* will be paid special attention since it is a unique judgment due to the analysis of the concerns derived from the terrorist threat in the aftermath of 9/11 in a context of deprivation of liberty and the right to have the detention meaningfully reviewed by a court.

Article 5 of the ECHR sets out the right of everyone who is deprived of his or her liberty by arrest or detention to take proceedings by which the lawfulness of the detention is decided speedily by a court and the release ordered if the detention is rendered not lawful. Almost identical is the wording of the ICCPR with the replacement of “speedily” by “without delay”. Similar is the provision laid down in the ACHR.¹⁷¹

The three provisions contain a right which is the *lex specialis* in relation to the general right to an effective remedy provided in Article 2 para. 3 of the ICCPR, Article 13 of the ECHR and Article 25 of the ACHR.¹⁷² In the ACHR there is no provision providing habeas corpus or similar proceedings; however, Article 7 has been construed by the

¹⁷¹ This right enshrined in Article 9 para. 4 is commonly referred to as the right to habeas corpus proceedings (literal translation: you are to have the body), especially in the common law framework, since it constitutes a deeply rooted legal principle (see *Charkaoui v Canada*, para. 28, on the old origin of this guarantee). During the drafting of the ICCPR it was even discussed to include this Latin expression in the final text; however, since it is characteristic of the common law system its incorporation was not deemed to be appropriate for the sake of promoting a flexible interpretation by domestic frameworks. (See Trechsel, 2006, pp. 462–464, Nowak, 2005, p. 235, Bossuyt, 1987, p. 212–214).

¹⁷² The ECtHR has stated that there is no ruling on Article 13 when Article 5 para. 4 applies since the requirements of the former are “less strict” than those of the latter, which must be regarded as the *lex specialis* in respect of complaints under Article 5 (*De Jong, Baljet and Van den Brink v Netherlands*, no. 8805/79; 8806/79; 9242/81, 22 May 1984, para. 60).

African Commission on Human and Peoples' Rights as including the right to have the case heard when the right to liberty is interfered with.¹⁷³

Taking into account the general recognition of the right to effective remedy provided in Article 13 of the ECHR, this specific remedy is not superfluous since it can be regarded as a further guarantee against interferences with the most essential freedom, *i.e.* personal liberty. This assertion is upheld by the existence of two additional guarantees: the lawfulness of the detention must be reviewed by a judicial authority and the decision must be taken speedily and effectively.¹⁷⁴

Along these lines, the outstanding relevance of the right to liberty that enhances the idea of it as a preferential right is also illustrated by another instrument of protection: the right to compensation set forth in Article 9 para. 5 of the ICCPR and Article 5 para. 5 of the ECHR, which may be seen as a subtype included within the framework of effective remedy.¹⁷⁵

As regards the scope of application of the right to challenge the lawfulness of the detention, it must first be noted that it covers all situations of deprivation of liberty perpetrated by public authorities, regardless of the grounds set forth to justify the measure and, hence, it is also to be observed in cases of detention mandated by the executive branch as a pre-emptive manoeuvre. That is, as a remedy available to individuals kept in custody, it grants an effective chance to challenge the substantive and formal legality of the arrest or detention, vesting thereby a guarantee against arbitrary deprivation of liberty or, in other words, providing an essential tool when facing deprivation of liberty in cases where the grounds and procedures fall short of the ones permitted.¹⁷⁶

Moreover, it could be argued that this guarantee is becoming a *ius cogens* norm since the HRC in General Comment 29 (2001) on states of emergency construed the right to have the detention reviewed by a court as a functionally non-derogable right granted that,

¹⁷³ See Schönteich, 2006, p. 4.

¹⁷⁴ Trechsel, 2006, p. 464.

¹⁷⁵ The HRC, accordingly, is of the view that the State Party is under an obligation to "provide the victim with effective remedies, including compensation, for human rights violations" (*William Torres Ramirez v Uruguay*, no. 4/1977, 13 February 1997, para. 19).

¹⁷⁶ See Nowak, 2005, p. 235; also Möller & de Zayas, 2009, p. 199: "[m]any of the cases of alleged breaches of article 9 para. 4 arise when someone is detained on security grounds. Whether or not such detention is considered as compatible with article 9 as a whole there must be the possibility of court review as required under article 9 para 4".

albeit not listed among those non-derogable rights according to Article 4 para. 2 of the ICCPR, it is indispensable to ensure that listed non-derogable rights are fulfilled.¹⁷⁷

4.2. Requirements

As interpreted by the HRC, the term “court” includes not only ordinary courts but also military courts; nonetheless, the basic requirements to be fulfilled by the body entitled to review the detention are independence and impartiality (especially from the executive branch),¹⁷⁸ therefore, ministries or higher military officers cannot be considered a court.¹⁷⁹ Besides the mentioned qualities, courts must be empowered to use the discretion to review not only formal but also substantial issues such as the individual circumstances of the detainee and the proportionality of the measure, and finally decide on the petition for release on the basis of the evidence provided.¹⁸⁰

Along these lines, as to the scope of the remedy, the HRC held in *A. v Australia* that Article 9 para. 4 provides more than a formal right to go to court and seek release, since the guarantee requires the possibility to have access to courts with real power to review the detention and order release when it contravenes not just domestic law but also the lawfulness according to the standards laid down in the ICCPR. Therefore, in a couple of cases as regards detention of non-citizens by Australia the HRC concluded that the review was not in compliance with Article 9 para. 4 because it was “confined purely to a formal assessment of the question whether the person was a ‘non-citizen’”.¹⁸¹

The ECtHR has elaborated in greater detail on the scope of the remedy concluding that Article 5 para. 4 of the ECHR does not empower the courts to exert the same scrutiny as in a trial. In that case, the ECtHR has insisted upon the need for the review to be wide enough to bear on those conditions which are essential for the lawful detention of a person according to Article 5 para. 1.¹⁸²

¹⁷⁷ HRC, General Comment 29 (2001), para. 16; to see more elaborated comments on the non-derogability of rights associated to personal liberty, see Pati, 2009, pp. 274–278, Macken, 2011, pp. 92–93.

¹⁷⁸ *A. v Australia*, no. 560/1993, 3 April 1997, para. 7.4.

¹⁷⁹ See *Antti Vuolanne v Finland*, no. 265/1987, 31 October 1987, para. 9.6.

¹⁸⁰ On the nature and features of the term “judicial authority”, see ECtHR, *X. v UK*, para. 53 and *Benjamin and Wilson v UK*, no. 28212/95, 26 September 2002, para. 34.

¹⁸¹ *C. v Australia*, para. 8.3.

¹⁸² *E. v Norway*, no. 11701/85, 29 August 1990, para. 50.

It follows that in order to grant a thorough right to challenge the lawfulness of detention, individuals taken into custody and courts must have at their disposal the essential information which brought about the deprivation of liberty in order to effectively trigger and proceed with the safeguard laid down.

It is noteworthy to mention that the information given to detainees must include factual considerations and legal reasons that led to their arrest or detention. That is, the right to be promptly informed of the reasons for the arrest analysed in section 2.2. is inextricably linked to Article 5 para. 4 since, as already noted, the former constitutes *a condition sine qua non* to meet the requirements attached to testing the legality of the detention. As stated by the ECtHR, “anyone entitled to take proceedings to have the lawfulness of his detention speedily decided cannot make effective use of that right unless he is promptly and adequately informed of the facts and legal authority relied on to deprive him of his liberty”.¹⁸³

Nevertheless, a question remains open as regards the extent to which the guarantees for a fair trial set out in Article 6 of the ECHR are applicable to the proceeding instituted to review the decision of arrest or detention. The ECtHR has had the opportunity to develop a more extensive jurisprudence on the character of the proceedings. In the case *X. v UK* it established that, although judicial review did not necessarily require the same guarantees as those granted by Article 6 para. 1, safeguards should be appropriate to the kind of deprivation in question and, at least, the fundamental guarantees of procedure should be granted bearing in mind the particularly burdensome nature of the circumstances surrounding such proceedings.¹⁸⁴

This leads to the need to ensure an adversarial procedure and equality of arms between the parties, one critical element to meet procedural fairness.¹⁸⁵ In the course of time, the ECtHR has construed the scope of the adversarial procedure when it is applied within the context of the special remedy provided in Article 5. In this regard, standards laid down in Article 5 have been depicted as less strict; the position of the ECtHR is well illustrated in the *Garcia Alva* case:

¹⁸³ *X. v UK*, para. 66; also *De Jong, Baljet and Van den Brink v Netherlands*, para. 58.

¹⁸⁴ *X. v UK*, para. 58.

¹⁸⁵ As required feature for the review of the detention, a hearing with the presence of the detainee or his/her legal representation must be guaranteed. As stated by the ECtHR, “[t]he possibility for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty” (*Allen v UK*, no. 18837/06, 30 June 2010, para. 38).

According to the Court’s case-law, it follows from the wording of Article 6 — and particularly from the autonomous meaning to be given to the notion of “criminal charge” — that this provision has some application to pre-trial proceedings ... It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure.¹⁸⁶

In any case, to meet the procedural standards, the detainee or the suspect’s lawyer must have access in an appropriate manner to those documents of the investigation file which are essential to gather the substance of the case; in other words, the detainees must be given a real and sufficient opportunity to take cognisance of the allegations and the attendant pieces of evidence, since, as stated in *Garcia Alva*, “it is hardly possible for an accused to challenge the reliability of any account properly without being made aware of the evidence on which it is based”.¹⁸⁷ Hence, even in cases where part of the outcome of the investigation needs to be kept confidential, substantial restrictions on the rights of the applicants cannot be imposed.¹⁸⁸

Thus, the ECtHR has vested the specific remedy to try the legality of the detention with the relevant procedural and substantive safeguards set forth for trials, as set out in Article 6 of the ECHR, availing itself of an extensive interpretation.

4.3. Judicial Review of the Deprivation of Liberty and Accommodation of National Security Concerns in the Aftermath of 9/11: *A. and others v UK*

As pointed out in the first chapter, the case *A. and others v UK* was the first one to be addressed by the ECtHR in relation to detention on the basis of national security grounds after 9/11.

It is also the only one to date in which the ECtHR has discussed the use of special advocates in the European framework to grant detainees a meaningful opportunity to challenge the reasons underpinning their deprivation of liberty.¹⁸⁹ However, this institutional arrangement was already referred to by the ECtHR in *Chahal v UK* as means to counterbalance the vulnerability of individuals allegedly engaged with terrorism-

¹⁸⁶ *Garcia Alva v Germany*, no. 23541/94, 13 February 2001, para. 39.

¹⁸⁷ *Ibid*, para. 41.

¹⁸⁸ *Ibid*, para. 42.

¹⁸⁹ Cf. p. 26 above.

related activities, drawing on role played by Canada's special advocate under the Canadian Immigration Act 1976, as amended by the Immigration Act 1988.¹⁹⁰ Soon after, UK took in the suggestion and enacted the law foreseeing special advocates within the framework of the internment of foreigners for public order and security reasons.

In *A. and others v UK*, the issue under review was the extended power (of a temporary nature) to arrest and detain foreign nationals¹⁹¹ under the ACSA, which entrusted the Secretary of State with the task of issuing a certificate indicating that the person's presence in UK was a risk to the national security on suspicions of his or her involvement in international terrorism. This measure was enacted upon lodging a notice of derogation from Article 5 para. 1 pursuant to Article 15 of the ECHR¹⁹² and it was presented as a measure "strictly required by the exigencies of the situation" and hence in line with Article 15.¹⁹³

Detainees certified as "international terrorists" had a right to challenge the legal and factual grounds on the basis of the detention through the Special Immigrations Appeal Commission (SIAC), the body in charge of reviewing the adequacy of the certificate (at regular intervals). Although it was not a court of justice, it was set up as an independent body which was also empowered to release the detainee. In this sense, it could theoretically be categorized within the terms of Article 5 para. 4 as the ECtHR concluded. It must be noted that the detainee could be released at any time by agreeing to leave UK.¹⁹⁴

As regards procedural guarantees to ensure the effectiveness of the proceedings, the special advocate was conferred a key role. In order to withhold information highly

¹⁹⁰ *Chahal v UK*, no. 22414/93, 15 November 1996, para. 131: "there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice".

¹⁹¹ It was considered (by the Home Office) that the serious threats to the nation emanated predominantly, albeit not exclusively, and more immediately from the category of foreign nationals.

¹⁹² On 18 December 2001, the Government of the United Kingdom lodged a notice of derogation pursuant to Article 15 of the ECHR, basing the measure on the allegation that the country was a "particular target of attacks against civilian targets on an unprecedented scale" due to its "close links with the US" which had recently been hit by the 11 September 2001 terrorist attacks.

¹⁹³ *A. and others v UK*, "The facts" – The Antiterrorism, Crime and Security Act 2001".

¹⁹⁴ This provision was criticized by judge Lord Bingham, *A. and others v Secretary of State for the Home Department* [2004], UKHL 56, para. 20, who, commenting on the decision of two of the named persons to leave the United Kingdom, questioned the purpose linked to national security concerns by noting that "allowing a suspected international terrorist to leave our shores and depart to another country as close as France, there to pursue his criminal designs, is hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of this country".

valuable to fight terrorism, neither detainees nor their counsel were allowed to have access to the “closed” material. There was, hence, a difference between information likely to be disclosed and confidential information. In order to represent the interests of the detainee, to compensate the lack of access to crucial information, a “special advocate”¹⁹⁵ would be disclosed all permissible evidence and allegations. However, special advocates were not authorised to talk with detainees about the findings stemming from the information disclosed *in camera* hearings.¹⁹⁶

On the concrete circumstances of each case, the first seven individuals affected by this piece of legislation¹⁹⁷ challenged the legality of the derogation before the SIAC claiming that their detention was in breach of several articles of the ECHR, among them, Article 5. The SIAC granted leave to appeal to the House of Lords which issued a quashing order in respect of the derogation order and a declaration under section 4 of the Human Rights Act of 1998 stating that section 23 of the ACSA¹⁹⁸ was incompatible with Articles 5 para. 1 and 14 of the ECHR insofar as it was disproportionate and permitted discriminatory detention of suspected international terrorists.¹⁹⁹

However, the House of Lords’ ruling had only a declarative nature and, hence, it did not have the immediate effect of striking down the legislation and activating the release of the detainees. In this context, eleven non-UK nationals lodged an application against the UK to the ECtHR on 21 January 2005 claiming that there had been a breach of Article 5

¹⁹⁵ On a definition of “special advocates”, see *ibid*, para. 22; see also Barak-Erez & Waxman, 2009, p. 28, who describe the mechanism as a “procedural check on unquestioned governmental authority to determine what can be disclosed”.

¹⁹⁶ This shortcoming was pointed out by nine of the thirteen serving special advocates in the “Written evidence to the House of Commons Constitutional Affairs Committee”, Ev. 38, 7 February 2005, para. 9, saying that “the inability to take instructions on the closed material fundamentally limits the extent to which the Special Advocates can play a meaningful part in any appeal”. Along these lines, CoE Commissioner for Human Rights, 8 June 2005, para. 21, concluded that “the proceedings fall some way short of guaranteeing the equality of arms, in so far as they include *in camera* hearings, the use of secret evidence and special advocates unable subsequently to discuss proceedings with the suspect of the order”.

¹⁹⁷ The applicants that claimed to have been detained unlawfully were mainly refugees who had arrived in the UK in the 1990s from Maghreb and Middle East and were involved in fund raising activities for refugees from Chechnya and welfare projects in Afghanistan such as a school for Arab speakers. Allegations made by the Government pointed to links or continued association with individuals and groups themselves linked to Al-Qaeda or involvement in the preparation or instigation of acts of international terrorism by procuring any kind of material and assistance.

¹⁹⁸ Section 4 of the Human Rights Act of 1998 provides that where a court finds that primary legislation is in breach of the Convention, the court may make a declaration of incompatibility. Such a declaration does not affect the validity of the provision in respect of which it is made and is not binding on the parties to the proceedings in which it is made (*A. and others v UK*, para. 94).

¹⁹⁹ *A. and others v UK*, para. 23.

para. 4 since the procedure before the SIAC did not grant them an effective opportunity to challenge the lawfulness of the detention.

As regards whether the right to challenge the lawfulness of the detention had been respected, the ECtHR first asserted that, even when detention did not fall within any of the categories listed in Article 5 para. 1, the case law relating to judicial control over detention on remand was relevant, since in such cases also the reasonableness of the suspicion against the detained person was a *sine qua non*.²⁰⁰ Moreover, it added that in the circumstances of the case and in view of the harsh impact of the lengthy deprivation of liberty on the applicants' fundamental rights, Article 5 para. 4 had to import substantially the same fair trial guarantees as Article 6 para. 1 in its criminal aspect.²⁰¹ Hence, it implies that as much information should be disclosed as possible without compromising national security or the safety of others since where full disclosure is not possible, Article 5 § 4 requires that the difficulties this causes be counterbalanced in such a way that each applicant still has the possibility effectively to challenge the allegations against him.²⁰²

As held by the ECtHR, while assessing the detainees' real chances to question the detention, the SIAC was best placed to ensure that no material was unnecessarily withheld from the detainee, especially taking into account the additional safeguard accorded by the special advocate; in light of these observations, it concluded that the level of secrecy employed was justified. However, the ECtHR noted that secrecy concerns should not preclude the SIAC from providing the detainee with sufficient information about the allegations against him or her in order to give effective instructions to the special advocate, thereby being able to refute the allegations.²⁰³

When carrying out the assessment of the effective remedy accorded to the detainees on individual basis, the ECtHR found a violation of Article 5 para. 4 in respect of four applicants due to the general nature of the disclosed allegations and the insubstantiality of

²⁰⁰ *A. and others v UK*, para. 217; on the need for procedural fairness beyond the sphere of criminal proceedings, see *Charkaoui v Canada*, para. 18.

²⁰¹ *A. and others v UK*, para. 217.

²⁰² *Ibid*, para. 218.

²⁰³ *Ibid*, paras. 219–220.

the evidence put forward.²⁰⁴ The criterion used by the ECtHR to appraise each case focuses on the nature of the material; when the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 para. 4 would not be satisfied. To the contrary, although it is more desirable having evidence to a large extent disclosed and open material playing a predominant role, even when most of the underlying evidence remained undisclosed, the requirements could be met if the allegations contained in the open material were sufficiently specific.²⁰⁵

This case is a good example to illustrate the courts' struggle to countervail the weight of state interests when protecting individual rights. Moreover, the ECtHR has devised a minimum set of procedural guarantees that states cannot fail to meet. Firstly, the requirement of "importing substantially" the guarantees of the fair trial taking into account the grave intrusion on the right to personal liberty that the detainees face in the portrayed context. Secondly, it is translated into practice by the requirement to give detainees sufficient information on the allegations in order to give effective instructions to the special advocate.

In this context, the ECtHR has stated the need for a substantial measure of procedural justice when accommodating legitimate security concerns about the nature and sources of the information provided by law enforcement authorities and intelligence agencies. What is significant from a human rights perspective is the endeavour of the ECtHR to ensure that there is no balance struck but a set of procedural standards that need to be observed without any distinction based on the nature of the offence or danger faced. However, even when such efforts are worth remarking, the ECtHR's approach in this case can also be problematic since, even when no balance is theoretically to be struck, there is a *de facto* acknowledgment that procedural safeguards for individuals allegedly involved in terrorism can be substantially weaker. Thus, the interpretation by the ECtHR of the extent to which such limitations on the effective remedy of suspected terrorists can fall within the contours set out by the ECHR could have been more sensitive with the critical voices raised by official bodies such as the CoE Commissioner for Human Rights or NGOs like Justice.

²⁰⁴ In two of the cases, there was disclosed evidence as regards fraud, but the evidence which allegedly provided the link between the money raised and terrorism were not presented and hence the ECtHR concluded that there the applicants were unable to question the allegation.

²⁰⁵ *A. and others v UK*, para. 206–207.

5. THE STANDING POINT: CHALLENGES WITHIN THE ECHR'S FRAMEWORK OF THE EUROPEAN PRE-TRIAL DETENTION OF SUSPECTED TERRORISTS

5.1. Introductory Remarks and Presentation of the Cases

This chapter draws on some cases to point out pitfalls when monitoring the compliance of laws and practices with the spirit and scope of the ECHR and particularly with the requirements set out to lawfully interfere with the right to liberty under Article 5 para. 1 (c).

With this purpose, cases concerning long-established Muslim communities in Catalonia who were hit by several dragnets conducted in order to hamper terrorist actions within Spain and abroad are drawn on and analysed. As pointed out in the introductory chapter, the Catalan region was singled out by Spanish and US authorities as a major base of terrorist activity and also as the “major Mediterranean centre of radical Islamist activity”.²⁰⁶

Spain has been praised for its efficiency in foiling terrorist plots while being respectful with the guarantees accorded to the suspects within the framework of criminal justice. The fact that, after the March 11 attacks in Madrid, Spain did not call for the suspension of international human rights law in respect of counter-terrorism measures has been seen as a proactive attitude to ensure the human rights of suspects. For instance, on the international level, the UNSR on Human Rights and Counter-Terrorism highlighted that Spain endorsed the imperative of respecting human rights while fighting against terrorism, both as an end in itself and as a key factor for the efficiency of action against terrorism.²⁰⁷

However, Spain has also been target of critics as regards its counter-terrorist strategies and practices being one of the main concerns set forth the extensive use of pre-trial detention and the shortcomings in the stage of granting an effective means to challenge

²⁰⁶ Cable with the subject “Proposal to create a Southern European law enforcement, counterterrorism, and regional intelligence hub in Barcelona”, ID07MADRID1914, 2 October 2007, leaked on 11 December 2010, original cable available at: <http://wikileaks.org/cable/2007/10/07MADRID1914.html> (consulted on 14 June 2011).

²⁰⁷ UN Special Rapporteur on Human Rights and Counter-Terrorism, Visit to Spain: Preliminary findings, 14 May 2008; also Human Rights Watch, “Setting An Example? Counter-Terrorism Measures in Spain”, 26 January 2005 (hereinafter, HRW Report on Spain 2005), p. 15, available at: <http://hrw.org/reports/2005/spain0105/> (consulted on 13 March 2011).

the lawfulness of the detention. In this context, it was not incidentally that the UN highest authority on the field of monitoring compliance with human rights while fighting terrorism visited this country in 2006. By the same token, the HRC as well as several NGOs such as Human Rights Watch (HRW) have also warned about the use of pre-trial detention.²⁰⁸

In the ensuing lines, it will be discussed if these concerns have a significant bearing on the facts by exploring the safeguards as applied in practice and the main challenges posed as regards the European system of human rights. Some challenges regarding the use of pre-trial detention and the relation between the executive and the judiciary branch in cases presented as sweeping operations against international terrorism will be identified. First, a brief presentation of the cases is required.

In chronological order, the first case is the *Operación Lago* (“Operation Lake”) popularly known as “Commando *Dixan*”. Islamists were arrested in Catalonia in January 2003 in a police operation against Islamic fundamentalism; according to the words of the president of the Spanish Government at the time, José María Aznar, a network, with connections in France and UK, which was preparing to commit attacks with explosives and chemicals was dismantled. The suspects were well-established and respected citizens in their respective communities in the Catalan province of Girona. They were charged with conspiracy to commit a crime of terrorism, possession of explosives and falsification of documentation. However, most of the suspects were acquitted in the trial or lowered the convictions, especially on appeal before the Supreme Court, since apart from the statements made by suspects arrested in France, there were no sufficient indications of criminal conduct.²⁰⁹ In contradiction with the information contained in a report submitted by the US Federal Bureau of Investigation (FBI) which stated that the substances intercepted could be used to make “homemade napalm”,²¹⁰ the product found was actually soap (hence the operation was popularly named *Dixan*, after one of the most

²⁰⁸ Criticisms of Spanish counter-terrorism policy were set out by HRW in its report on Spain 2005, which nevertheless also praised Spain for seeking to counter terrorism through the criminal justice system.

²⁰⁹ As regards this operation, it is to be mentioned the comment made by the current Spanish President José Rodríguez Zapatero back at that time when he was the leader of the opposition: “soap is soap and lies are lies” (Cortes Generales, *Diario de Sesiones del Congreso de los Diputados*, 2004, VIII Legislatura, num 11, p. 43).

²¹⁰ See National Court judgment no. 6/2007, 7 February 2007, legal ground no. 6.

widely sold washing powders in Spain) and other innocuous substances normally used in order to clean and unblock toilettes.²¹¹

The only proven facts are that some of the suspects fought in Islamist groups in Algeria and then fled to Spain. The judgment by the Spanish National Court (*Audiencia Nacional*)²¹² stated that the aims of the group were to spread Islamic extremist ideology and that the cell was “available and ready to take action”.²¹³

According to the words of an expert in explosives reproduced in the judgment of this case: “pure alcohol is highly inflammable but the presence of wine in a house does not imply the *possession* of inflammable materials since it does not contain the purity required for such combustibility”.²¹⁴ This observation was brought up by the magistrate Clara Eugenia Bayarri García to uphold the conclusion that the materials seized in that case were neither suitable to carry out a terrorist attack nor met the features or typical elements of the mentioned offence.

The unclear circumstances and reasons to inchoate criminal proceedings and to detain the suspects brought about a wide campaign in Catalonia including demonstrations, claiming for the release and innocence of the detainees. The actions were framed in the context of street protests against military intervention in Iraq, since the investigations of “commando *Dixan*” were actually used by the government as another justification to uphold the engagement in the Iraq war.²¹⁵

The second case was named by the law enforcement authorities *Operación Chacal* (“Operation Chacal”). The object of investigation and prosecution was a terrorist cell established in a town in the outskirts of Barcelona. According to the evidence gathered by

²¹¹ National Court judgment no. 6/2007, 7 February 2007, legal ground no. 6.

²¹² Remark must be taken to the fact that in all the cases related to Spain discussed in this chapter investigation and prosecution was led by the Spanish National Court. At its inception, after the end of the dictatorship, this court was conceived to try ETA members and other minor armed groups, such as GRAPO. It has jurisdiction over all Spain and one of the main competences is to try serious crimes such as terrorism, international crimes or money laundering. In most cases the rulings and decisions of these different divisions of the *Audiencia Nacional* can be appealed before the Supreme Court of Spain, as it has been the case in the three operations analysed.

²¹³ The availability criterion has been linked in the context of international terrorism to the concept of the “sleeper cells”, which even when not active or plotting concrete attacks, are to be stopped due to their potential or available readiness to undertake actions; see Zabel & Benjamin, 2008, pp. 18–19; see also, Salellas Vilar, 2009, p. 67 and Chesney, 2005, p. 28.

²¹⁴ National Audience judgment (in Spanish) no. 6/2007 de 7 febrero, ARP 2007\222, “on the merits”, 6th ground.

²¹⁵ See, e.g., the campaign against the conduction of criminal proceedings, available (in Spanish) at: http://www.nodo50.org/csca/agenda2003/estany_26-09-03.html (consulted on 14 May 2011).

the Investigating Central Court no. 6 of the National Court,²¹⁶ the main goal of this operation was the recruitment, indoctrination and logistical support to networks supplying suicide bombers to war-torn countries, especially Iraq as well as the collection of funds for the Moroccan Islamic Combatant Group (GICM).²¹⁷ There was also a religious agenda pursued by the group to promote a Salafi jihadist interpretation of Islam. The concrete fact that triggered the inception of criminal proceedings was the reasonable suspicion that the cell recruited, trained and deployed a suicide bomber whose terrorist action in Nasiriyah on 12 November 2003 caused multiple casualties, among them Iraqi and Italian civilians and soldiers.

The third case is commonly referred to as *11 del Raval* (“Raval’s 11 plotters”), that is the number of suspects detained and the neighbourhood they were living in Barcelona.²¹⁸ All suspects came from Pakistan but settled in Barcelona. They were detained in a massive operation that set off the social alarm bells. The alleged terrorists were plotting a terrorist attack in the subway of the city with similar features to the terrorist bombings in Madrid; the threat was qualified as “imminent” by the mass media²¹⁹ who reported on the criminal proceedings led by the National Court’s investigating judge Ismael Moreno. However, throughout the investigation, it turned out that what was supposed to be a plot in an advanced stage had no bearing on the evidence gathered. The key evidence triggering the outset of the criminal investigation was a protected witness that came from France to inform on the attack. No explosives were ever found. As in the “Commando *Dixan*” case, the detentions also brought about the mobilization of the Barcelonan civil society. In particular, the inhabitants of *El Raval* campaigned for their release because they knew the detainees since long time and were convinced of their innocence.²²⁰ It has been suggested

²¹⁶ The National Court has six investigating or instructing judges and an equal number of criminal trial chambers, each presided over by a panel of three judges. Crimes under the jurisdiction of the National Court are not subject to trial by jury; more information on: www.poderjudicial.es (consulted on 12 June 2011).

²¹⁷ Investigating Central Court no. 6 of the National Court, pre-trial detention order, Preliminary Proceedings 82/2005, pre-trial detention order, 13 January 2006, “on the facts”.

²¹⁸ *El Raval* is located in the old town, along the famous *Ramblas*, and of the most highly populated areas of Barcelona traditionally habituated by low income families and more recently by an increasing population of immigrants all around the world.

²¹⁹ See, e.g., *El País*, Armados con el explosivo “la madre de Satán”, 20 January 2001 available at: http://www.elpais.com/articulo/espana/Armados/explosivo/madre/Satan/elpepiesp/20080120elpepinac_1/Tes (consulted on 19 May 2011).

²²⁰ Even a book, *Rastros de Dixan. Islamofobia y construcción del enemigo en la era post-11S*, was published after the case, with articles written by professors from Catalan universities and legal practitioners, among others, laying out shortcomings in the *11 del Raval* criminal proceedings and warning about an Islamophobic approach to terrorism.

that a scheduled visit of the President of Pakistan to Spain could have played a critical role in triggering the criminal investigation and the ensuing arrests.²²¹

5.2. The “Reasonableness” Test: Problems Linked to the Criminalisation of Remote Harm and the Requirement of the “Objective Observer”

As pointed out in previous chapters, prosecution of terrorism-related offences is one of the main goals shared by democracies struggling to prevent and tackle the terrorist threat. That is to say, the aims of criminal justice system are pursued on the basis of the rule of law and democratic principles to achieve general and special prevention as well as incapacitation and punishment for the offender. The ECtHR has further fostered the prosecution of terrorists since those law enforcement actions entailing severe consequences which are allowed under the ECHR are to be undertaken within the framework of criminal law.²²² Hence, deprivation of liberty is only allowed if serving the purpose of ensuring the prospects of a criminal case.

As a result, in a context in which prevention is regarded as the foremost priority,²²³ criminal justice systems tend to bring forward the point at which criminal liability arises along the continuum between inclination and action with the aim of increasing the chances to deactivate or incapacitate and prosecute plotters prior they have reached an advanced stage in their planning.²²⁴ This pattern has been referred to as “preventative prosecution”, “preventative charging”²²⁵ or the “criminalisation of remote harm”.²²⁶

²²¹ *Publico*, Una célula islamista que planeaba fabricar bombas, 17 January 2008, available (in Spanish) at: <http://www.publico.es/espana/38802/cae-en-barcelona-una-celula-islamista-que-planeaba-fabricar-bombas> (consulted on 7 June 2011).

²²² That is deprivation of liberty and potential criminal convictions, but also other measures linked to the law enforcement sphere which are crucial in the detection and collection of leads or evidence to follow up in criminal investigations and also to disrupt terrorist activity; *i.e.* conventional police methods under the label of “surveillance” (see Privy Counsellor Review Committee, Report on the Anti-Terrorism, Crime and Security Act 2001 Review, 12 December 2003, paras. 246–247). In the context of the prevention of terrorism, authors have also brought up the need to tackle structural problems of social nature such as the marginalization and discrimination of migrants or the ignorance about Islam (see Salellas Vilar, 2009, p. 84).

²²³ See, *e.g.*, statement of US Attorney General John Ashcroft before Senate Committee on the Judiciary, 107th Cong. 310, 2001.

²²⁴ Chesney, 2009, p. 676.

²²⁵ See, *e.g.*, Chesney, 2005, p. 31.

²²⁶ Salellas Vilar B., lecture in the course “Terrorism and War against Terror: limits to its punishment in democratic states”, Pompeu Fabra University, 16 July 2010.

The prosecution of some offences has long been used to put in motion preventive law enforcement strategies such as attempt to commit a crime or conspiracy;²²⁷ however, even when criminal law has traditionally provided inchoate criminal liability, the contours of those concepts are being pushed in the post- 9/11 era.²²⁸ In this vein, other offences such as unlawful possession of explosives are triggering inchoate criminal liability.

In the *11 del Raval* case, one of the main arguments relied on to order pre-trial detention²²⁹ and charge the suspects was the fact that there were *sufficient* grounds to believe that they were unlawfully possessing explosives. In the description of the facts upon which allegations were built, it is said by the investigating judge that the materials seized such as nitrocellulose and “mechanical and electrical elements” were *suitable* for the *fabrication* of one or several explosive devices. Nevertheless, it is pointed out by that the materials seized would not have the sufficient destructive power to be used to launch a terrorist attack in which ravages were guaranteed.²³⁰

That is, despite possession of elements susceptible to be transformed into dangerous material was put forward as factual reason justifying the detention of these suspected terrorists,²³¹ on one hand, no explosives were found and, on the other, the materials seized could not have been transformed into powerful explosives liable to cause serious damage.

In this context doubts arise not just about the existence of potential criminal liability which would have to be analysed under the standards attached to fair trial but also about the extent to which detention on remand meets the threshold of reasonable suspicion of an offence being committed, as set out in Article 5 para. 1 of the ECHR. In other words, pursuant the criterion used by the ECtHR, it is doubtful that the supporting evidence available in *Operación Lago* or *11 del Raval* cases would have satisfied an objective observer that the persons concerned had committed an offence and pre-trial detention was to be ordered, even when taking into account the special conditions pointed out by the

²²⁷ See Jacobs, White & Ovey, 2010, p. 218

²²⁸ See, e.g., Steiker, 1998, Chesney, 2009, p. 676, Salellas Vilar, 2009, p. 67, Zabel & Benjamin, 2008, p. 31.

²²⁹ In the Spanish criminal procedural law framework, pre-trial detention is called provisional imprisonment (*prisión provisional*).

²³⁰ Investigating Central Court no. 2 of the National Court, pre-trial detention order, Preliminary Proceedings no. 30/2008–C, 23 January 2008, “on the facts”, para. 4.

²³¹ A similar rationale can be grasped by the facts alluded when describing the “Commando *Dixan*” case.

ECtHR surrounding terrorism-related activities, since there is no clear connexion or inference between the vestigial indicia found and the alleged offence.²³² In any case, it is applicable here the observation made by the FBI Deputy Director John Pistole about the so-called “Liberty City Seven” case pointing at the fact that the plans were “more aspirational than operational” since the group did not have the means to carry out attacks on the targets.²³³

Taking into account these circumstances, early intervention in the chain of events that eventually led to the completion of a criminal act could be regarded as means to incapacitate potential dangerous individuals in a way that approaches the purposes of preventive detention if deprivation of liberty is resorted to. That is, at this early stage of the continuum it is difficult to justify both the deprivation of liberty and the conduction of criminal proceedings due to the lack of solid substantive grounds on the basis of which the criminal justice system can be called to step in.²³⁴

The fact that absence of decisive evidence does not deter criminal justice from intervening raises concerns with regard to the underlying grounds that triggered the detention of certain individuals and the inchoation of criminal proceedings. It is out of the scope of this thesis to elaborate on criminal policy and law enforcement strategies; however, a brief comment on this matter is required.

The *11 del Raval* case will be used as an illustrative example: evidence was rather weak, not only regarding the possession of explosives, but also the other alleged offence, that is membership in terrorist organisation. In the pre-trial detention order, it was argued to justify the suspicion and the deprivation of liberty that the detainees were members of an organised group which endorsed an extremist view of the Islam with a clear and specialised division of functions. Accordingly, the organisation was led by the members

²³² For more information on the evidence that triggered the detention, see judgment no. 78/1009, 11 December 2009, “as to the proven facts”, no. 6.

²³³ Chesney, 2009, p. 685; in the “Liberty City Seven” case, a group of men in the Miami area (neighborhood of Liberty City) allegedly plotted to bomb the Sears Tower and other locations on behalf of Al-Qaeda and as a result were charged with a mix of material support and conspiracy charges. Although the Government possessed a considerable amount of audio and video evidence, it could not show that the defendants possessed any weapons or explosives or had done much else beyond talk.

²³⁴ See Chesney, 2009, p. 676: “the very nature of preventive intervention involves uncertainty as to whether the harmful act ever actually would have occurred, and thus we normally cannot be sure whether any given instance of preventive prosecution in fact realizes a harm-prevention benefit”; also Chesney, 2009, p. 685: “the earlier the intervention, the less evidence there will be as to the defendants’ commitment to carrying out their agreement, considerations of proof thus act as an important practical limitation on the broad preventive reach of conspiracy liability”.

with widest religious knowledge. The group was said to profess a rigorous version of the Tablighi Jamaat movement which would uphold a radical interpretation of Islam to justify an indiscriminate use of violence as a legitimate tool to achieve political and religious goals. Based on the religious beliefs and customs of the suspects, and the statements made by a protected witness, it was “inferred” by the investigating judge that, even if explosives were not found, the members of the deactivated *terrorist cell* “were intending to carry out several suicide attacks over the last weekend in the public transportation system of Barcelona”.²³⁵

From a legal point of view, bearing in mind the lack of sufficient evidence, there is little doubt that the assessment made by the prosecutor and later on by the judge ordering the detention was based on the *potential dangerousness* of the individuals derived from their religious beliefs and their ways of practicing worship collectively.²³⁶ Such strategy to incapacitate and even punish individuals would encroach upon the principle of *actus reus*, Latin term for the “guilty act”, which requires the existence of an objective external element of a crime.²³⁷ Furthermore it edges closer to the criminalisation of thoughts, beliefs and social relations.²³⁸ It also needs to be noted that Islamism is not the only religious, political or philosophical trend of thought that has been criminalised. Anarchists and “squatters” professing this ideology have been associated traditionally with violent actions and public nuisance and the contemporary media narrative appears to use the term as an euphemism for “dangerous” or “violent”, thereby legitimising pre-emptive arrests and detentions characterised by a relaxation of the rules of procedural justice.²³⁹

²³⁵ Investigating Central Court no. 2 of the National Court, pre-trial detention order, Preliminary Proceeding no. 30/2008-C, 23 January 2008, “on the facts”, no. 4.

²³⁶ See Salellas Vilar, 2009, p. 67: “the incrimination [in cases involving sleeper cells] is based usually on subjective appraisals that rely on the religiosity of individuals under investigation and on their personal and professional relations with persons living abroad” (author’s translation from the original in Spanish).

²³⁷ Ibid, pp. 66–67.

²³⁸ This phenomenon or pattern has been also referred to by scholars as “enemy criminal law” using the concept of *Feindstrafrecht* elaborated by Günther Jakobs, which is a common alluded term in debates on risk, prevention and dangerousness; for a critic of Jakobs’ theory see Ohana, 2010.

²³⁹ In a recent article on *the Guardian*, ‘Anarchists have civil liberties too’, 2 May 2011, the journalist Ellie Mae O’Hagan refers to “suspected anarchists being the victims of McCarthyist policing, ostensibly in the name of national security”.

5.3. Infringement of the Presumption of Innocence?

As highlighted in the second chapter, pre-trial detention needs to be applied in a way which does not impair the presumption of innocence. This normative assumption has two practical implications: first, deprivation of liberty must be the last resort or, in other words, it needs to be resorted to in a very restrictive way, once having discarded less onerous measures through which to achieve the same purposes sought by the deprivation of liberty in the light of the foregoing vicissitudes of a criminal case. Second, *continued* deprivation of liberty must be subject to close review to be in line with the right to liberty and the presumption of innocence. Thus, *added* grounds of a relevant and sufficient nature must be put forward and assessed to decide on the extension of the detention.

There are growing concerns raised on the *abusive* use of pre-trial detention; as pointed out in the second chapter, the European Union and the Council of Europe have recently released documents that aim at cutting down on the use of pre-trial detention. The situation is particularly worrying when the measure is exerted on suspected terrorists. Defence lawyers have alarmed about the differences between cases involving suspect terrorists and other cases when it comes to the extent to which substantive issues are discussed in orders deciding on or extending deprivation of liberty.²⁴⁰

In the *11 del Raval* case not only the test of the “reasonable suspicion” might have been neglected, but also the requirement to give specific reasons backing the need to resort to deprivation of liberty with relation to each of the suspects. In the pre-trial detention orders, there is no reference to the particular circumstances of the individuals concerned such as their familiar, professional and economic situation, but only a general reference to the danger of absconding as a decisive factor.²⁴¹ Although in the orders the investigating judge states that the danger needs to be weighed up with other elements such as the personal circumstances or the extent to which the individual is well-integrated into the society, there is no reference to the concrete elements that were taken into account to exert the assessment that led to the decision to interfere with the right to liberty. To the contrary, the *ratio decidendi* is the nature of the offence and gravity of the penalty.²⁴² As a clear indication of the lack of specificity, the main section of the orders, which is meant

²⁴⁰ Interview with Salellas Vilar, B., lawyer, 11 April 2011.

²⁴¹ Investigating Central Court no. 2, National Court, pre-trial detention order, Preliminary Proceedings no. 30/2008-C, 23 January 2008, legal ground no. 2.

²⁴² *Ibid*, legal ground no. 3.

to carry out an assessment whether the requirements to order pre-trial detention are met in the light of the factual circumstances on an individual basis, has literally the *same wording* for each of the individuals under suspicion.

According to the ECtHR's line of interpretation of Article 5 para. 3, judicial officers will have to make a *prima facie* evaluation of whether the conditions for pre-trial detention under paragraph 1(c) are met based on the vestigial elements of evidence gathered at the first stage of the investigation and also of whether the provisions of domestic law are fulfilled. Applying the rules to the facts under examination, it is questionable whether Article 5 para. 3 was fully observed and specially when looking at the compliance with domestic law. The Spanish Criminal Procedure Code (*Ley de Enjuiciamiento Criminal*, LEC) in Article 503 para. 1 (1) foresees that in case the aim pursued by the detention is to ensure the presence of the suspect in the proceedings because there is the risk of flight, attention must be paid, when assessing the existence of the danger, to: the nature of the act, the gravity of the offence and the *personal, professional and financial situation* of the suspect among other factors.²⁴³ It is not apparent through the reading of the order that the judge exerted a thorough *prima facie* evaluation considering the requirements set out in Article 5 para. 1 (c) bearing in mind the principle "in dubio pro libertate" while examining carefully if no other measures less burdensome could have been used in light of the concrete circumstances.

As regards *continued* deprivation of liberty, *added* grounds of a reasonable and sufficient nature must be put forward by the authorities asking for the extension of the detention or by the examining judge. That is, the first provisional assessment must be complemented by a more thorough and exhaustive one when the detention is prolonged since the findings out of a more advanced investigation as well as the personal circumstances of the detainees will have to be weighed again so that the interference with the liberty of the suspect does not become an anticipation of a custodial sentence.

In the *Operation Chacal* the investigating judge of Section 4 of the National Audience ordered, on 13 January 2006, the detention of seven individuals allegedly involved in the above described activities. In the following lines, the court order dated 24 June 2008,²⁴⁴

²⁴³ LEC, 14 September 1882, available in English at: <http://legislationline.org/documents/section/criminal-codes> (consulted on 11 June 2011).

²⁴⁴ Criminal Chamber no. 2 of the National Court, order deciding on the appeal against court order 29 October 2007, Committal Proceedings 21/2006, 24 June 2008.

deciding on the appeal against the decision extending the detention on remand for two more years for two of the suspects will be discussed.

The decision on the extension of the detention and concretely the section setting out the legal reasons is based on one argument, namely the appearance of a grave crime or the criminal relevance of the facts. The alleged participation of the suspects in those actions *suffices* to endorse the extension of the adopted precautionary measure.²⁴⁵ Along these lines, the judge argues that the risks against which pre-trial detention arises as a precautionary measure, such as the risk of flight or the risk of reoffending are inextricably linked or conditioned by the likely prospect of conviction and the apparent gravity of the crimes. Thus, Criminal Chamber no. 2 of the National Court concludes that the measure is justified due to the need to address the risk of flight which is claimed to be higher given “the advanced stage of the proceedings” and the circumstantial evidence pointing at the involvement of the detainees in a “global network with international contacts which would facilitate the evasion of the suspect and consequent ineffectiveness of the proceedings”. Finally, the court holds what follows:

The time elapsed is always relevant when it comes to assess the need and convenience to uphold this measure, but the time elapsed in the case of the suspect is not at all decisive bearing in mind the context portrayed.²⁴⁶

Reading the court’s decision, the first thing that can be grasped is that there is little doubt that the detainee on remand is guilty. The main argument put forward is the gravity of the offence *allegedly* committed from which it is inferred that all the procedural aims pursued with pre-trial detention could be endangered in case of lifting the measure. Particularly striking is the last statement reproduced above; although rather vague in terms, it clearly shows a rationale by which the extension of the deprivation of liberty *counts* as long as it is not associated to the suspicion of a felony or grave crime.

When analysed in light of the international standards on the right to liberty detailed in the second chapter and particularly within the framework of the ECHR, the grounds alleged in the decision finally upholding the prolongation of the detention do not seem to reach the threshold set out for a continued detention. As noted, the main reason used to justify the extension is the gravity of the offence and, as seen, the ECtHR requires *additional*

²⁴⁵ Criminal Chamber no. 2 of the National Court, order deciding on the appeal against court order 29 October 2007, Committal Proceedings 21/2006, 24 June 2008, legal ground no. 1.

²⁴⁶ *Ibid*, legal ground no. 3.

reasons for the measure to be proportionate and not to impose a burden that oversteps the limits allowed for the interference with the right to liberty as enshrined in Article 5 of the ECHR. The only *added* factual grounds justifying the high risk of evasion are the advanced stage in the proceedings and the alleged existence of a “global network” which would increase the chances to successfully abscond. Both grounds are problematic. About the advanced phase in the proceedings, it is not a reason that can be put forward as crucial factor since it is not case-based, that is, is a self-evident assertion that is applicable in all cases of prolonged detention. Therefore, this reason is only to be alluded on the top of stronger arguments individually appraised. About the existence of a global network, even when indeed it can increase options, for instance, to successfully abscond, it is not sufficient to back the need for continued detention in conjunction with the gravity of the crime.

Moreover, an assessment taking into consideration the particular circumstances surrounding detainees is missed out to the extent that the content of the mentioned orders issued by Criminal Chamber no. 2 is identical only with the names and other data linked to the identification of the proceedings and suspects changed. As explained in the analysis of the normative framework, grounds brought up cannot be too abstract or alleged in an identical or stereotyped form of words but respond to a case-by-case analysis.

Can anyone be convinced in such circumstances that the decision was taken on a case-by-case basis and on account of *relevant* and *sufficient* grounds? After almost two years of detention, it can be ascertained that the gravity of the offence continues to be the main ground to justify the continued deprivation of liberty. In other words, there is no mention to reasons independent or detached from the one pointing to the seriousness of the crime. Besides, no balance is struck between the reasons to uphold the measure in relation to the effectiveness of the criminal proceedings and the personal situation of the detainees.

In this context, where there are no other reasons than the expectation of an offence being committed for which the suspect has not been tried yet, pre-trial detention acquires a punitive dimension that sticks out beyond the onerous character attached unavoidably to any deprivation of liberty. In this vein, it can be argued that the principle “innocent until proven guilty” governing the presumption of innocence is jeopardised to “guilty until proven innocent”.

Thus, the *status quo* described above departs from the strict normative curtailment on the use of pre-trial detention because the requirements are interpreted rather leniently and less burdensome alternatives to the deprivation of liberty are not paid due attention whereas extensions of detention periods are granted easily and rather using stereotypical and general arguments.²⁴⁷

This worrisome trend has not been overlooked by the HRC which in the concluding observations on the fifth report of Spain expressed its concerns about the length of pre-trial detention, which can last for four years in terrorism-related cases, and the fact that it is ordered merely on account of the length of the sentence incurred or the gravity of the offence, situation that was held to be “clearly incompatible” with Article 9 para. 3 of the ICCPR.²⁴⁸

As regards the frequency in which the extension is prolonged in cases involving terrorism, HRW has warned about the fact that, as shown above in connection with *Operación Chacal*, the two year extension is “practically automatic” when there is a suspicion surrounding the participation in a terrorist act. Moreover, HRW denounced that the requirement of “special diligence” to avoid undue diligence is not applied in practice with the consequence of excessive times of detention pending trial.²⁴⁹ That is, despite the usual complexity, breadth and international dimensions of proceedings against suspected members of international terrorist nets, the investigative phase cannot be lingering for years while there are individuals held without their criminal responsibility having been established.²⁵⁰ In the meantime, Spanish high officials in the Ministry of Justice have

²⁴⁷ As regards criticisms raised by lawyers of suspected terrorists, it is noteworthy to mention reflections made by several which participated in one of the first case against alleged members of an Al-Qaeda cell in Spain, which brought about long pre-trial detention periods for a significant proportion of the suspects, pointing to the use of pre-trial detention as an “anticipatory sentencing” or “preventive detention”. Also with respect to the detentions in connection with the March 11 bombings, one lawyer told Human Rights Watch that “what should be an exceptional measure has in this case been applied as the rule ... they have used preventive detention, and that is barbaric. It looks like they just went around arresting everyone in the same circle” (HRW Report on Spain 2005, p. 39).

²⁴⁸ HRC, Consideration of reports submitted by States Parties under Article 40 of the Covenant: Concluding observations (Spain), UN Doc. CCPR/C/ESP/CO/5 (2009); with this regard, the UNSR on Human Rights and Counter-Terrorism, after the visit in 2008, observed, besides highlighting the mentioned recommendation by the HRC in 2008, that pre-trial detention was applied in respect of more than half of those initially arrested in the case of the Madrid bombings and that it should not be the general rule that persons awaiting trial on criminal charges be detained in custody (UNSR on Human Rights and Counter-Terrorism Report on Spain, 2008, para. 24).

²⁴⁹ HRW Report on Spain 2005, p. 38.

²⁵⁰ The UNSR has acknowledged the complexity of the investigation of major cases of international terrorism which may result in “significant delay before actual trial” (UNSR on Human Rights and Counter-Terrorism Report on Spain, 2008, para. 24).

pointed out that the extension of pre-trial detention by another two years even when the circumstances make unlikely that the case will be brought to trial within that period is *necessary* in complex cases involving many suspects.²⁵¹ However, as suggested by Salellas Vilar, the defence lawyer of many of the accused in the mentioned dragnets, the delay as regards the inception of the trial can be undue when there is meagre or no proof of criminal activity.²⁵² The following section explores how these challenges are intertwined with shortcomings in the judicial control on the lawfulness of the measure of pre-trial detention.

5.4. Constraints on the Right to Have the Lawfulness of the Detention Reviewed by a Court

5.4.1. Deference to assessment by the executive branch

As underlined in section 3.3, in *Brannigan and McBride v UK* the ECtHR based the decision to uphold the lack of judicial review on the fact that the independence of the judiciary would be compromised if judges were to be involved in granting extensions of detention in cases where it was essential to prevent the disclosure of decisive information. It could be argued that the approach showed in that case by the ECtHR was formulated in negative terms. That is, long periods of preventive detention were allowed since the opposite outcome would jeopardise the independence of the judiciary and the separation of the three branches of government due to the lack of access to critical information by courts.

A similar picture can be portrayed in the current state of affairs but it is depicted in positive terms. That is, deference to the executive is required in criminal proceedings involving terrorism since this branch is the best placed as far as it possesses extensive documentation in relation with the nature and extent of the danger being faced.²⁵³ Governments have pushed for this approach by calling attention to the difficulty of producing in court some pieces of information on which the suspicion is based, due to their acute sensitivity.²⁵⁴

²⁵¹ HRW Report on Spain 2005, p. 38.

²⁵² *Ibid*, p. 54.

²⁵³ On the tendency of courts to be deferential to executive decisions, especially in times of emergency, see Ackerman, 2004(b), p. 1042, Barack-Erez & Waxman, 2009, pp. 44–46, Ní Aoláin, 2007, p. 67.

²⁵⁴ See, e.g., *Brogan and others v UK*, para. 56.

Either way, stemming from the normative assumption that the judiciary is required to oversee detention procedures according to the international standards, even when states avail themselves of derogation clauses, whether this deference complies with the safeguards internationally endorsed needs to be carefully examined.

In this sense, it is worthwhile to explore the arguments put forward by Criminal Chamber no. 4 of the National Court to turn down the appeal against the decision by the investigating judge that ordered pre-trial detention of one of the suspects within the context of the *Operación Chacal*.²⁵⁵

Prior to the analysis, it needs to be pointed out that in this section the right to have the lawfulness of the detention reviewed is interpreted in broader terms than what the ECtHR has held. That is, the ECtHR has contended that in cases where the pre-trial detention order is issued by a court, the review provided in Article 5 para. 4 is subsumed under the guarantee foreseen in Article 5 para. 3 since the intervention of the judicial officer will also account for the revision of the detention. The position in this thesis follows what has been argued by one of the most respected judges that the ECtHR has had, Stefan Trechsel, namely that the detainee should have the right to have the decision ordering the detention reviewed by a *different* judicial body. In that case, appeal proceedings against pre-trial detention ordered by an investigating judge would fall within Article 5 para. 3.²⁵⁶ Be that as it may, whether in the cases discussed the appeal falls within Article 5 para. 4 or is out of its scope, the ECtHR has stated that when the right to appeal is granted, it has to be vested with the same procedural guarantees as in the first judicial control.²⁵⁷

²⁵⁵ To understand the context of criminal proceedings involving terrorist crimes in Spain, it must be noted that the one responsible for ordering the detention, requesting and gathering evidence, and drawing up a document at the close of the investigation which contains a summary of the facts and the applicable criminal provisions in view of the decision whether to prosecute or not, akin to preparing an indictment, is the investigating judge (*juez de instrucción*). Therefore, his or her independence and impartiality may be open to doubt. Trechsel, in this regard, states that “the judge or the other officer must be an authority which is not charged with the investigation” since “[t]he requirements and attributes of an investigator are incompatible with the neutrality required of an authority charged with supervising a deprivation of liberty” (Trechsel, 2006, p. 510).

²⁵⁶ Trechsel, 2006, p. 509.

²⁵⁷ According to a broad interpretation, effective remedy would extend beyond what in Spain is called writ of habeas corpus. In countries such as Spain or Germany defence lawyers do not consider filing a writ of habeas corpus on behalf of their clients because the detention has been ordered and supervised by a competent judge. In this regard, one of the March 11 lawyers said that “[h]abeas corpus is hardly ever used in Spain. It’s absurd ... it only serves to place [the detainee] at the disposal of the judge, and in this case it didn’t make sense, all of the time frames were respected”. Hence, following a narrow approach, Article 5 para. 4 would *a priori* always be observed, as it has already been pointed out by high-level representatives of the Ministry of Justice (HRW Report on Spain 2005, pp. 38–39).

In the context of the *Operación Chacal*, against the arguments posed by the legal defence of the suspect, who argued that the deprivation of liberty was disproportionate,²⁵⁸ Criminal Chamber no. 4, in a two-pages long order, held that “in light of the gravity of the accusations included in the report carried out by the Public Prosecutor’s Office (*Ministerio Fiscal*), on the basis of the investigations and of the particular circumstances of the appellant [which again were not specified]” the suspect’s degree of social integration in the country could not outweigh the need for pre-trial detention.²⁵⁹

In this court order reviewing lawfulness of pre-trial detention, deference to the views of the Public Prosecutor’s Office can be perceived granted that instead of carrying out an independent assessment, the competent court does not second-guess the arguments posed by the executive branch pointing to the alleged necessity of resorting to the deprivation of liberty of the suspect.

Executive branches have traditionally been given wide leeway in cases involving terrorist suspects or in situations of emergency.²⁶⁰ In this sense, the reluctance shown by courts to scrutinise material and statements produced by the executive branch on charges of terrorism can be seen as a continuation of such policies. This trend may entail highly damaging consequences for the preservation of the rule of law and the separation of powers. That is, if there is a pattern by which the standard of review is deferential to the interests of the executive branch, which is the party interested in ordering the interference with the right to liberty of the suspect, the legitimacy of the adjudicatory process and the independence of the judiciary power may be jeopardised.²⁶¹

²⁵⁸ Due to the lack of criminal and policial records of the appellant who worked in the construction industry, and was the Imam of the Mosque of Vilanova i la Geltru (village). His main goal was developing the pastoral mission, without prejudice of other elements which also indicated that he was well-established in the country such as being legally working and having a family in respect of which he was the only income source.

²⁵⁹ Criminal Chamber 4 of the National Court, order deciding on appeal against pre-trial detention, Preliminary Proceeding 82/05, 13 March 2006.

²⁶⁰ As seen in chapter 3 when portraying the ECtHR’s approach to the problem; see Barack-Erex & Waxman, 2009, pp. 46–48.

²⁶¹ Even when it is framed within the context of the internment of foreigners suspected of involvement in international terrorism, noteworthy to mention is, as deference can follow similar patterns, that the Supreme Court of Canada has expressed its apprehension as regards this peril as showed in the *Charkaoui* case about the certificates of inadmissibility issued against foreigners, paras. 35–36: “[w]hen reviewing the certificate, the judge sees all the material relied on by the government The named person is not there. His or her lawyer is not there. There is no one to speak for the person or to test the evidence put against him or her. These circumstances may give rise to a perception that the designated judge under the [Immigration and Refugee Protection Act] IRPA may not be entirely independent and impartial as between the state and the person named in the certificate” (emphasis added).

In procedural terms, this approach can lead to a progressive weakening of standards to be observed by governments when it comes to furnishing the need for detention. Namely, a consequence of an assessment giving a prevailing weight on the outcomes raised by the prosecutor and, in turn, the executive branch, is taking for granted the accuracy and authenticity of the sources given.²⁶² Moreover, the so-called “risk of capture”, that is, that that judicial officers will over time favour state security services because of their continuing interaction and dependency on those services for information and effective administration of judicial duties,²⁶³ is higher in frameworks such as the Spanish since judges dealing with terrorism-related cases are mainly those appointed to the National Court.

This setting can lead in the worst case scenario to an implicit rebuttable presumption in favour of pre-trial detention when a defendant faces terrorism charges. In this setting, the burden of proof would shift from the executive to the individual detained with the concomitant dramatic consequences on individuals’ rights.²⁶⁴ At this stage, the role of judicial review becomes a barometer to assess the performance of the rule of law in a given country. That is, particularly when procedural guarantees risk to be diluted due to the specific vicissitudes of counter-terrorism operations, courts are entrusted the role of testing indicia and evidence in order to uncover or deter abusive practices such as improper surveillance practices.

Furthermore, the need to keep information in secrecy, which may indeed be legitimate and reasonable, cannot be used as to insulate government policies and practices from public accountability. To the contrary such allegations must be closely scrutinised by courts which remain the “guardians” of procedural fairness and, hence, the main responsible bodies when it comes to putting a hold on pre-trial detention since they are entrusted the role to properly examine the arguments and factual indications resorted to by the executive when asking for the inchoation of proceedings and such precautionary

²⁶² In *Al Rabiah v US*, 658 F. Supp. 2d 11 (D.D.C 2009), p. 5, the US Government deemed to be necessary and appropriate a presumption in favour of its evidence that should remain rebuttable. Specifically, the Government’s motion aimed at having its evidence admitted under a presumption of accuracy and authenticity.

²⁶³ Barak-Erez & Waxman, 2009, p. 44.

²⁶⁴ On an analysis of the US Bail Reform Act and presumption in favour of pre-trial detention, see Cole, 2009, pp. 746–750.

measure.²⁶⁵ In this vein, Barak-Erez and Waxman have suggested that on a regular basis an effective review by judges of decisions regarding detention not only has the ability to function as a guarantee ensuring procedural fairness in the individual process at hand but also as an effective form of systemic control or effective review of the system over time.²⁶⁶

5.4.2. Inequality of arms fostered by the non-disclosure of information

A second set of problems when delving into the proceedings to have the lawfulness of the detention reviewed by a court in connection with cases of international terrorism is the existence of critical information withheld from the suspect and his or her lawyer for the safety of the source and the success of the proceedings against the terrorist nets. As a matter of fact, the suspected terrorist is in disadvantage as regards detainees which face other kinds of accusations since the former have lesser knowledge on the materials relied on to back the allegations and the case against them.

As seen in the previous chapter, it is hardly possible for an accused to challenge the reliability of any account without being properly made aware of the evidence on which it is based. That is to say, in order for the individual to prepare exculpatory arguments and test the quality of the evidence, the fundamental guarantees required for a fair trial are to be granted bearing in mind the particularly onerous nature of the measure. As held by the ECtHR in the *Garcia Alva* case, particularly important here is the need to vest procedural safeguards respectful of the right to an adversarial procedure and an equal standing between the parties. In any case, to meet the procedural standards, the detainee or the suspect's lawyer must have access in an appropriate manner to those documents in the investigation file which are essential to be given a real and sufficient opportunity to take cognisance of the allegations and the attendant pieces of evidence. Hence, even in cases where part of the outcome of the investigation needs to be kept confidential, substantial restrictions on the rights of the defence are precluded.

Against this backdrop, detainees' right to effective remedy is in fact significantly curtailed by the lack of chances to know and challenge crucial pieces of evidence. In the

²⁶⁵ See, e.g., Stubbins, 2011, p. 208, pointing out that as regards the allusion to the sensitivity of certain evidence "judges should not accept uncritically mere assertions on the part of the executive or intelligence agencies that particular evidence is too sensitive to be examined."

²⁶⁶ Barak-Erez & Waxman, 2009, p. 46.

Spanish context, this constraint on the rights of suspected terrorists is legally sanctioned by a legal provision foreseeing the “secrecy of the investigation” (*secreto de sumario*),²⁶⁷ by which in criminal investigations the examining magistrate can totally or partially restrict the access to the files of the investigation by the defence when it is deemed to be necessary for the well-being of the proceedings. At the stage of pre-trial detention, according to Article 506 para. 2 of the Criminal Procedure Code, *secreto de sumario* provides for the limitation of information on the legal and factual grounds surrounding the detention to a “succinct description of the alleged act” as well as the indication of pre-trial detention aims pursued by the deprivation of liberty.

Confidential information often concerns details on the sources of information that provided crucial incriminatory evidence, thereby being difficult to challenge the allegations therein; for instance, it can be a person such as an infiltrator whose identity is not revealed. That was the case in the *11 del Raval* case. All the allegations put forward to justify the opening of criminal proceedings against the suspects were hanging on one source: a protected witness (*testigo protegido*) whose identity remained anonymous.²⁶⁸

An associated problem is the use of information gathered by intelligence agencies, which usually has a preponderant role, in detriment of the compilation of evidence. This trend raises concerns as regards procedural requirements and the need for a reasonable suspicion based on evidence and not on intelligence information as a requirement to interfere with someone’s freedom.

That was precisely the point made by the defence lawyer in the *11 del Raval* case. In the appeal against the indictment, he argued that the use of intelligence reports prevailed and thereby the need to provide sufficient information to vest a reasonable suspicion was neglected. This allegation was based on concerns arising from the fact that relevant questions about the protected witness, essential factual reason backing the suspicion, such

²⁶⁷ The procedure aims to protect the integrity of judicial investigations, and the Constitutional Court has held that it constitutes a justifiable limitation on the right to defend oneself, in the interests of preventing interference with or manipulation of the investigation. Under Article 302 of the Code of Criminal Procedure, *secreto de sumario* can be imposed for a period of one month, but the Constitutional Court has deemed lawful the renewal of *secreto de sumario* on a monthly basis, provided that it is necessary in the circumstances of the case, until 10 days before the end of the investigation (Ull Salcedo, 2005, p. 440).

²⁶⁸ Salellas Vilar, 2009, p. 72.

as his origin, the reasons why he decided to travel to Barcelona, the identity of the person who gave him instructions, were not revealed to the defendants.²⁶⁹

In sum, overreliance on information derived from intelligence services can be identified. In this context, it is noteworthy to mention that any sort of valuable information is to be processed and used according to procedural and evidential rules of the criminal justice system or, in other words, needs to be turned into evidence in order to be relied on within proceedings involving deprivation of liberty. That is, information gathered by intelligence services should only be resorted to as long as it can be turned into admissible evidence and, hence, usable. As pointed out by the Joint Committee on Human Rights which monitors the United Kingdom counter-terrorism policy “intelligence should always be gathered with one eye on the problem of how to turn it into admissible evidence before a judge in a criminal court”.²⁷⁰ In turn, the need to “screen” intelligence information through the filter of the evidentiary rules in criminal proceedings is not only relevant as regards the impact on fair trial rights but also the impact on the right to liberty. Therefore, intelligence information should not be the main source of information triggering the detention of an individual on the basis of a reasonable suspicion, since there is a need to rely on some sort of initial evidence.

In practical terms, when this rule is not respected, deprivation of liberty is being effected on account of not sufficiently robust information, for instance “hearsay” unverified statements by co-conspirators or anonymous witnesses whose origin is unclear.²⁷¹ Thus, examining judges and those overseeing the detention have to give the appropriate weight to every piece of intelligence when evaluating the information and reasoning out the detention.²⁷²

It is worth noting that in this setting, the earlier the stage in which criminal justice intervenes, the harder it is to acquire admissible evidence in criminal proceedings since as it has been pointed out when analysing cases of preventive charging, it is more difficult to

²⁶⁹ Appeal against indictment, Preliminary Proceedings 30/2008–C, in Committal Proceeding 26/2008–C, 11 July 2008, allegation no. 3.

²⁷⁰ Twenty-fourth report of the Joint Committee on Human Rights of the House of Lords and the House of Commons, 2005–2006, para. 88.

²⁷¹ Ibid, paras. 32 and 103; *11 del Raval* case.

²⁷² Along the same approach, the Newton Report, p. 9, notes that the “threshold test” in the Code for Crown Prosecutors which introduces a threshold for charging “*must be based on evidence which will be admissible at trial and not merely intelligence information*”.

have solid evidence the wider the distance between the acts under investigation and the actual completion of a criminal act.

In short, norms themselves and their application in practice encompass elements that can make difficult for the detainee to have access to a meaningful judicial review of the detention. In the Spanish context, the provision in the Criminal Procedure Code setting out the requirements to be met when the summary is secret can give room to further relaxation of the procedural guarantees laid down in the context of Article 5 paras. 3 and 4 which places the detainee in a situation of uncertainty and defencelessness.

Addressing this sort of concerns, scholars such as Ull Salcedo have asked for an overhaul of the procedural norms for instance foreseeing a new review of the lawfulness of the detention with hearing included within 72 hours after the secrecy of the summary is lifted. It is at this stage when the detainee would have access to the wholesale of reasons and factual assumptions that have rendered the detention allegedly necessary and proportionate. This way the situation of vulnerability faced by the detainee due to the secrecy of the files would be at least partially redressed.²⁷³

Not only defence lawyers are warning about the situation depicted in this section towards the curtailment of the rights of suspected terrorists, but NGOs and even United Nations bodies have denounced difficulties to effectively challenge pre-trial detention in the Spanish context bearing in mind the legal context and pervasive practices.²⁷⁴

For instance, the International Commission of Jurist in the “Submission on list of issues” for the 5th Periodic Report of Spain by the HRC highlighted as an issue that should be of particular concern to the Committee in its consideration of the Spanish report the fact that “secreto de sumario also means that the defence lawyer may know little detail of the factual basis for pre-trial detention, and therefore have great difficulty in challenging it”.²⁷⁵

This concern was also recognised by the Special Rapporteur on Human Rights and Counter-Terrorism who noted that in the context of the proceedings to bring to trial the

²⁷³ Ull Salcedo, 2005, p. 441.

²⁷⁴ Salellas Vilar, 2009, p. 83.

²⁷⁵ International Commission of Jurists, Human Rights Committee Consideration of the 5th Periodic Report of Spain: Submission on list of issues, 2008, p. 6 available at: <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICJSpain93.pdf> (consulted on 15 May 2011).

suspects for the Madrid bombings, the possibility of contesting specific details of the pre-trial detention order with the purpose of seeking the release of those detained was substantially diminished because “most parts of the investigation were declared secret and sealed for the defence for years”.²⁷⁶

5.5. The Right to Compensation

Article 5 para. 5 of the ECHR enshrines the right of those detained in contravention of the provisions laid out by the ECHR to be compensated. This provision entails a self-standing right to compensation within Article 5 which was drafted to somehow counter the deleterious impact of any measure amounting to deprivation of liberty. There is no right to be compensated for the mere fact that an acquittal or the dismissal of the proceedings have followed a detention on remand.

However, in the European context, countries such as France and Germany have enacted laws that grant the right to full compensation for any material or moral harm caused to *anyone* detained on remand during the course of proceedings that have ended with a decision to drop the case or an acquittal that has become final.²⁷⁷

Suspected terrorists seeking for compensation after being deprived of liberty have probably been detained on remand for several years, as seen, and moreover have had to surmount the added difficulties throughout the proceedings put forward in this thesis.²⁷⁸

In this context, the right to compensation should arise as a valuable tool to redress the harm done due to counter-terrorism measures involving deprivation of liberty. Some of the arguments posed by Bruce Ackerman in the US context when defending the right to financial compensation for all innocent detainees “caught up by the emergency sweeps” should be considered since, as he argues, there is a “moral intuition” according to which

²⁷⁶ UNSR on Human Rights and Counter-Terrorism Report on Spain, 2008, para. 24.

²⁷⁷ Article 149 of the French Code of Criminal Procedure; noteworthy to add that in the same provision it is set out the obligation the authorities have to inform the affected on the right to demand compensation when the decision to drop the case or the acquittal is made known to him or her. Likewise Article 2 para. 2 of the German Act on Compensation for Wrongful Prosecution provides compensation under the same circumstances.

²⁷⁸ Suspected terrorists can also be denied the right to seek justice and redress in account of the alleged impossibility to disclose confidential information that would favour the claims of the detained. Such was, for instance, the case of Khaled El-Masri, a German citizen who while on holiday was forcibly abducted and transported to a secret prison in Afghanistan where he was kept and subject to inhumane conditions and coercive interrogations for several months. The state secrets privilege was claimed by the executive power and it led to the absolute denial of the right to compensation since his action was dismissed (*El-Masri v US*, 479 f. 3d 296 4th Circuit Court of Appeals); for more information, see Chesney, 2007(b), pp. 1254–1263.

individuals disproportionately affected by states' public action should be entitled to compensation.²⁷⁹ Compensation could also be regarded as a proactive best practice vis-à-vis the effective respect for human rights by strengthening the legitimacy of the criminal justice system and, in turn, boosting confidence in the authorities and the rule of law, especially among those directly affected.

In Spain, suspected terrorists for several years held have seen rejected their applications for compensation. The difference between Spain and the French and German frameworks is that the former requires for the suspected to be acquitted or for the case to be dismissed granted the *proven inexistence of the alleged criminal act*.²⁸⁰ It deserves to be mentioned that the Supreme Court has interpreted this provision extensively, following a purposive interpretation, thereby also including the cases in which the criminal responsibility of the suspect has been discounted.²⁸¹ In appliance of this legal framework, the individual will not be granted the right to be accorded compensation if he or she was released or acquitted in virtue of the presumption of innocence due to the lack of evidence pointing to his or her criminal liability, that is when the inexistence of the alleged criminal act has not actually been proven. That is often the case in proceedings such as the ones portrayed or in “preventive charging” scenarios where the uncertainty about the factual truth can remain even after trial.²⁸²

In this given framework, only one case has led to compensation of a suspected international terrorist in Spain and it was a rather extreme case. The applicant, Mohamed Nebbar, was an alleged member of a terrorist cell in the *Operación Lago* and he was in

²⁷⁹ Ackerman, 2004(a), p. 1884.

²⁸⁰ Article 294 of the Statutory Law on the Judiciary Power (*Ley Orgánica Poder Judicial*), 1 July 1985.

²⁸¹ Supreme Court, judgment no. 17/1989, 2 June 1989.

²⁸² It would exceed the scope of this thesis to delve into the legal status of those deprived of liberty under the circumstances portrayed. That is, whereas the rights of victims of grave international human rights violations have been set out on the international level through the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law and Serious Violations of International Human Rights Law and the UN Declaration of Basic Principles of Justice of Crime and Abuse of Power, the situation of those deprived of liberty under the pre-trial detention framework remains unclear since deprivation of liberty under internationally recognised detention frameworks would hardly constitute a serious violation of the international standards. Therefore, the question of the situation of innocent suspected detainees deprived of liberty as regards the right to an effective remedy and reparation as internationally enshrined is still open and it should be soon addressed in depth in order to depict ways to counter the defencelessness they face. In case they were susceptible to be considered victims of human rights breaches committed in counter-terrorist operations, compensation should be extended to the other modalities internationally set out to fulfil the right to a remedy and reparation; those are the four other types of reparation detailed in the Basic Principles and Guidelines (*i.e.*, restitution, rehabilitation, satisfaction and guarantees of non-repetition) and moreover the right to truth and justice; see Stubbins Bates, 2011, pp. 191–217.

pre-trial detention from 26 January 2003 until 21 March 2003 and from 23 March 2004 until 4 December 2006 (in sum, 1046 days). The judgment handed down on 7 February 2007 by the National Court acquitted the suspect of the charges of membership to terrorist organisation, possession of explosives and falsification of public documents.

As to the proven facts, Nebbar, a technical engineer of electricity who resided in the province of Girona, accepted to drive to France through secondary roads an individual, so called by the judiciary authorities “Carlos Ramón”.²⁸³ According to the version of Nebbar, Carlos Ramón told him that the purpose of the trip was to join his son on Christmas Eve. There is no evidence that Nebbar had another purpose but to help someone he knew.²⁸⁴ At the first stage of the application for compensation, the Secretary of Justice dismissed the request. At the appeal’s level, the National Court granted EUR 200.000 as compensation on the basis of the criteria set out by Article 294 para. 2, that is, the length of the deprivation of liberty and attendant personal and familiar consequences.²⁸⁵

It has to be pointed out that, as regards the reparation phase, the harm caused to the social reputation of the victims is particularly severe in terrorism-related offences due to the stigma and social alarm of this type of crimes. Thus, it becomes paramount to provide effective mechanisms to clear the names of the innocent suspects. As noted by Stubbins Bates, reparation is not simply a question of financial compensation, but should be multi-faceted and, in this case, suited to the needs of suspected terrorists who turned out to be innocent.²⁸⁶

²⁸³ Carlos Ramón was in the end found guilty of belonging to a terrorist organisation and falsification of public documents with terrorist purposes.

²⁸⁴ National Court, judgment no. 122/2010, 3 December 2010, legal ground no. 3.

²⁸⁵ Ibid, legal ground no. 4, as noticed by the magistrates in the same legal ground: “[i]t is common ground that deprivation of liberty brings about a grave moral damage due to the discredit/loss of prestige and the breakdown with the social environment it entails as well as the distress, anxiety, insecurity, restlessness, frustration, annoyance and fear that usually entails. However, the circumstances of age, familiar and professional status, health, civic behaviour, alleged criminal conduct and criminal records are also decisive when assessing the harm provoked by the measure, which should be reflected in the amount of the compensation. The practical chances to redress the lost honour and achieve social oblivion of the facts, as well as the trace that the deprivation of liberty leaves upon the personality and behaviour of the affected, are also relevant in this context”. (author’s translation into English from the original in Spanish).

²⁸⁶ Stubbins Bates, 2011, p. 197.

6. CONCLUSIONS

This thesis has shown that the safeguards crafted around potential deprivation of liberty under the ECHR set up a normative bulwark against arbitrary interferences with the right to liberty perpetrated by public authorities. In the recent case *A. and others v UK* the ECtHR restated that any model of detention that departs from criminal proceedings to seek prevention under the exception (c) of Article 5 para. 1 constitutes a breach of the right to liberty.²⁸⁷ However, this conclusion concerning the internment of foreigners on national security grounds did not bind UK since this country had previously filed a notice of derogation from Article 5 on account of the 9/11 terrorist attacks which had been given the green light by the ECtHR.

This case illustrates the wide margin of appreciation given to states when it comes to appraising the need for derogation translated into the unwillingness of the ECtHR to examine whether states are actually experiencing a public emergency threatening the life of the nation. Besides, it has been observed that the ECtHR has laid down limits on the states' leeway when acting pursuant to the derogation. For instance, in *Demir and others v Turkey* periods of detention without judicial scrutiny up to twenty-three days were held a breach of Article 5 para. 3 even in light of the PKK activities in south-east Turkey.

However, a rather permissive approach has been identified, especially in cases affecting UK versus IRA members,²⁸⁸ giving broad leeway to states when assessing to what extent measures are strictly required by the exigencies of the situation. In this context, when the ECtHR addressed if extraordinary measures were necessary in the light of the emergency it tended to be sympathetic with the assumption that in times of crisis the role of the judiciary may be undermined if the executive branch does not take over special powers of arrest and detention beyond the sphere of influence of the courts. In this regard, one of the most illustrative cases is *Ireland v UK* where the ECtHR took in the alleged claim that extrajudicial deprivation of liberty was necessary in the circumstances.

²⁸⁷ Moreover, in this thesis it has been ascertained that the variant included in para. 1 (c) that allows detention "when it is reasonably necessary to prevent" an individual committing an offence lacks in fact normative meaning, in spite of scholars upholding the opposite view, because the ECtHR has rejected to date any preventive connotation beyond imminent concrete offences (which then would be subsumed in the modality "reasonable suspicion that the individual has committed an offence" due to the punishment of preparatory acts).

²⁸⁸ Ni Aoláin, 2007.

In the context of the permanent global alert of terrorist attacks, state derogations to extend detention periods and stretch procedural safeguards, as the British experience shows, cannot be ruled out. When it occurs, the ECtHR is expected to play a role in assessing thoroughly the rationale of the measures taken by the derogating state. *Demir and others v Turkey* illustrates the broad scope of the ECtHR's oversight capacity that can constitute a relevant check in requiring a more detailed and meaningful justification when the need to depart from the rule is claimed. Moreover, states need to show that measures permitted by the ECHR would be plainly inadequate to deal with the emergency to the extent that derogation is required as a last resort; in words of the ECtHR, "it is for the authorities to develop forms of judicial control which are adapted to the circumstances but compatible with the Convention".²⁸⁹

When looking at the current use of pre-trial detention in cases involving suspected terrorists some tendencies and shortcomings that could collide with the standards under the ECHR have been identified. First, the threshold of the reasonable suspicion of having committed an offence can be *de facto* lowered when a well or ill-founded fear exists that a terrorist group is available to potentially carry out lethal attacks. In the *11 del Raval* case, the warning of an imminent attack by an undisclosed source triggered the arrest and detention of eleven individuals. Even when alarm bells set off in such scenarios, the reasonable suspicion test must be individually assessed, whereas in the case analysed some individuals were held in pre-trial detention on the basis of factual allegations such as living with someone who is allegedly involved in criminal activities or praying in the same mosque as other suspected terrorists. Moreover, the risk of overlooking the reasonableness test is higher the earlier the arrest of the individual takes place.²⁹⁰ Thus, an increased reliance on the so-called anticipatory or preventive charging may foster weak allegations and last but not least may bolster the number of "false positives", that is, prosecutions of persons who would not in fact have gone on to commit the anticipated violent act.²⁹¹ Along these lines, Ronald Dworkin has warned about the fact that "requirements of fairness are fully satisfied, in the case of suspected terrorists, by laxer

²⁸⁹ *Demir and others v Turkey*, para. 41.

²⁹⁰ Moreover, a risk exists that stretching procedural safeguards in order to strike the appropriate balance between the rights of the suspect and the public interest at stake in terrorism-related cases may have a spill-over effect and for instance involve lowering the threshold of the "reasonable suspicion" and weakening evidentiary standards in ordinary criminal cases (See Burch Elias, 2009, p. 158, Chesney, 2009, p. 687); Mukasey M., "Jose Padilla Makes Bad Law", *Wall Street Journal*, 22 August 2007, at A15, available at: http://www.americanbar.org/content/dam/aba/migrated/2011_build/law_national_security/mukasey_padilla_wsj.authcheckdam.pdf (consulted on 13 June 2011).

²⁹¹ Chesney, 2007(a), p. 448.

standards of criminal justice which run an increased risk of convicting innocent people”.²⁹² In the end, the danger exists that this strategy is used as means to incapacitate individuals deemed dangerous, for instance, active believers that profess certain Islamic interpretations, rather than exclusively as means to prosecute committed crimes. In that case, an analogy could be drawn with the so-called preventive detention frameworks, since the goals are shared. However, there is still a crucial element of distinction which is that pre-trial detention is based upon charged criminal conduct.²⁹³

As regards possible problems when deciding on the extension of the detention on remand, again, the need for a more individualised and thorough assessment has been highlighted. In this sense, respect for the presumption of innocence arises as a critical element in assessing the need for the prolongation of the measure so as to reject any form of detention amounting to an anticipated punishment. As illustrated in the analysis of the *Operación Chacal*, there is a risk that courts do not reason out carefully the strict necessity for a continued interference with the right to liberty in terrorism-related criminal proceedings. To the contrary, assessments of the need to prolong the deprivation of liberty are made from a rather abstract point of view, focusing mainly on the gravity of the offences.²⁹⁴

In this context, the essential right to challenge the lawfulness of the detention has evolved over the centuries as a basic tool against arbitrary interferences with the right to liberty. Guantánamo detainees have headed for the last years the struggle for an effective realisation of this right more than two hundred years after Alexander Hamilton praised the establishment of the writ of habeas corpus in the US Constitution as one of the “greater securities to liberty against the practice of arbitrary imprisonments ..., in all ages one of the favourite and most formidable instruments of tyranny”.²⁹⁵ At the European level, the *A. and others* case has reaffirmed that everyone, including suspected terrorists,

²⁹² Dworkin, 2002, p. 9, para. 35.

²⁹³ Along these lines, in the report for Human Rights First “In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts” drafted by Zabel & Benjamin, 2008, p. 52, it is contended that “[s]ince many suspects who are arrested under these alternative statutes [referring to the broadening of the statutes use to prosecute suspected terrorists] will be detained, *the alternative prosecution strategy often achieves the objective of incapacitating dangerous individuals*. Indeed, in some respects, *the strategy serves almost as a surrogate for preventive detention*” (emphasis added). By the same token, the Former Assistant Attorney General, in the US, Viet Dinh, noted that “[w]e do not engage in preventive detention. In this respect, our detention differs significantly from that of other countries ... What we do here is perhaps best described as preventative prosecution.” (Zabel & Benjamin, 2008, p. 52).

²⁹⁴ *Tomasi v France*, p. 91, also involving a suspected terrorist, denounces similar tendencies.

²⁹⁵ Hamilton, 1788, para. 5.

has to have the chance to a meaningful review of the causes of the detention. Nevertheless, doubts arise as to what extent the procedures envisaged by the Anti-Terrorism, Crime and Security Act of 2001 were able to ameliorate the “dramatic unfairness”²⁹⁶ caused to the appellants by the non-disclosure of evidence. In this vein, the ECtHR’s approach in connection with such procedures has been so far rather problematic.

In the introduction of this thesis, one of the main concerns put forward was the implementation of this right in practice and the extent to which available mechanisms to suspected terrorists detained were comparable to those at the disposal of those suspected of other crimes. De jure, this guarantee is at hands of *all* those deprived of liberty by public authorities. However, as a matter of fact, chances to effectively challenge the detention can be curtailed when there are terrorism-related crimes involved.

First, courts in charge of overseeing the detention of suspected terrorists face the challenge of having to pay due regard to pressing detention demands posed by the executive branch in cases where national security is at stake and, besides, ensuring procedural fairness and a meaningful review in the individual cases. As shown by the cases examined in this thesis, deference to the law enforcement bodies and ministries of home affairs is often perceived. This trend can give rise to problems as regards the independency and impartiality of courts.

Moreover, equality of arms can be actually impaired if the detainee does not have access to essential pieces of information that are used as incriminatory evidence or he or she is only informed of the allegations against him or her in a general fashion. This element of unfairness has been vastly analysed by scholars and human rights advocates in the context of the right to a fair trial, that is, in the stage of the trial. However, as seen in the fourth chapter, procedural fairness plays also a relevant role in the context of Article 5 para. 4 taking into consideration that the scrutiny must be tighter the more burdensome the detention is and the more vulnerable the detainee taking into account the given circumstances.

Therefore, courts or judicial officers in charge of the review must display an active role when admitting and using evidence, especially when the information comes from

²⁹⁶ In words of the British section of the International Commission of Jurists (*A. and others v UK*, Third party intervention submissions by Justice, 26 March 2008, para. 62).

intelligence services. In other words, judicial authorities in order to grant the applicant a meaningful opportunity to claim his or her liberty should take on the task of critically scrutinising assertions made by the executive that particular evidence is too sensitive to be disclosed and should second-guess the accuracy and authenticity of the evidence provided.

Indeed, pre-trial detention can be a useful tool when it is the only mechanism considered appropriate in order to ensure that the suspect will not abscond and that evidence can be gathered without risk of collusion, manipulation or destruction. In the context of the prevention and prosecution of terrorism-related offences, the decision to order detention on remand is often the last useful resort to avoid manoeuvres by well organised and sophisticated networks.

In any case, the need for detention on remand must be carefully assessed by courts in the light of individual rights at stake since, recalling the words of Victor Ramraj, “[e]ven allowing that the executive has a special expertise in assessing the *magnitude* of the risk of terrorism because of its privileged access to intelligence information, it still has no special expertise in measuring the risk of terrorism against state incursions on fundamental, but intangible public values, such as liberty”.²⁹⁷ That is, according to the international standards protecting the right to liberty, this measure has to be applied when it is strictly necessary and this need should be *only* exceptionally affirmed. Nevertheless, practices in place do not live up to the normative framework. In the prosecution of crimes involving terrorism, requirements of pre-trial detention *are* applied leniently and what should be the exception becomes the rule.

The question that remains open and that should arouse the interest of all those in favour of the rule of law and democratic systems is whether supporting a lenient use of detention practices that can last for several years pursuant counter-terrorism dragnets is legitimate and necessary in a democratic society. If the answer happened to be affirmative, regional and universal human rights bodies will have to craft further safeguards to counter the vulnerability of those deprived of liberty for the sake of alleged national security concerns, *i.e.* involvement in terrorist activities.

Likewise, as regards judicial review, it is to be further questioned to what extent some elements of procedural unfairness which render suspected terrorists in a disadvantaged

²⁹⁷ Ramraj, 2005, p. 120 (emphasis in original).

position as regards other detainees meet the requirements of Article 5 para. 4 of the ECHR and whether they are to be supported or rejected.²⁹⁸ In the meantime, more attention should be paid by scholars and governments to the plight of those innocent victims of counter-terrorism operations who have been deprived of liberty without *de facto* having at their disposal the full package of safeguards normally accorded by criminal and international law.

Last but not least, do strategies of “preventive charging” or “preventive prosecuting” entail a “preventive” detention rationale that offends the guarantees crafted in Article 5 of the ECHR? It remains to be seen how the ECtHR will address the challenges laid out in this thesis arising as regards pre-trial detention laws and practices in the aftermath of 9/11, which surely encompass some problematic elements vis-à-vis the European normative framework of the right to liberty.

In the end, the ECtHR can play a positive role in addressing the legal challenges posed by pre-trial detention of suspected terrorists by overcoming the non-interference rationale that has been guiding its rulings in counter-terrorism cases up to now. The indeterminate and pervasive nature of the terrorist threat and the fact that there is no end in sight have triggered the extension of law enforcement powers, the broadening of criminal and anti-terrorist legislation, and the existence of abusive practices without formal resort to derogation by states. However, what were considered exceptional or emergency measures in the past are now regarded as ordinary in light of the recent introduction of more drastic emergency powers, thereby a shifting understanding of what “normalcy” stands for can be ascertained.²⁹⁹

In this context, the ECtHR should heighten its scrutiny to conclusively reject double standards and intrusive practices while taking a step forward in defining and hence calling states to be aware of the boundaries between “normalcy” and “emergency”. The words of Aharon Barak, former president of the Israel Supreme Court, are deemed enlightening to conclude with:

²⁹⁸ On the need for a meaningful judicial review, Ramraj, 2005, p.125, has stated that “judicial review ... can serve as a check on democratic law-making to ensure that in times of heightened emotion and widespread fear, a decision to limit individual liberty is not lightly taken”.

²⁹⁹ As noted by “Liberty and others” amicus submissions in *Brannigan and McBride*, para. 42, “if States are to be allowed a margin of appreciation at all, it should be narrower the more permanent the emergency becomes”; see also Ni Aoláin, 2007, pp. 66–67.

Often the executive will argue that “security considerations” led to a government action and request that the court be satisfied with this argument. Such a request should not be granted. “Security considerations” are not magic words. The court must insist on learning the specific security considerations that prompted the government’s actions. The court must also be persuaded that these considerations actually motivated the government’s actions and were not merely pretextual. Finally, the court must be convinced that the security measures adopted were the available measures least damaging to human rights.³⁰⁰

³⁰⁰ Barak, 2002, pp. 157–158.

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