

Submission by the United Nations Special Rapporteur on the Promotion and protection of human rights and fundamental freedoms while countering terrorism in *Muhammad and Muhammad v. Romania* (Application No. 80982/12) before the European Court of Human Rights

1. INTRODUCTION

- 1.1 The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism established pursuant to Human Rights Council resolution 40/16 has the honour to submit this amicus brief in the case of *Muhammad and Muhammad v. Romania* for the consideration of the European Court of Human Rights pursuant to the leave to intervene granted by the President of the Grand Chamber on 29 May 2019, in accordance with Rule 44 § 3 of the Rules of Court.
- 1.2 The submission of the present amicus brief does not constitute a waiver, express or implied, of any privileges or immunities which the United Nations, the Office of the High Commissioner for Human Rights, or the Special Rapporteur enjoy under applicable international instruments, including the 1946 Convention on the Privileges and Immunities of the United Nations and recognized principles of international law.
- 1.3 The Special Rapporteur reports regularly to the UN Human Rights Council and General Assembly on the protection of human rights and fundamental freedoms while countering terrorism. Having consistently addressed issues of fair trials and the use of evidence in country assessments and particularly in the context of counter-terrorism-related proceedings, the use of secret evidence in terrorism and security related cases relates to the core work and concerns of the mandate.
- 1.4 As a result, the Special Rapporteur is in a unique position to assess the broad human rights implications related to the use of such evidence to the European Court of Human Rights (ECtHR). This case offers an opportunity for the Court, in addressing this important issue, to set international best practice for compliance with human rights standards.
- 1.5 At the core of the ECtHR's sustained contribution to the development of international human rights law, has been its trenchant emphasis on the essential importance of fair trial, fair hearing, fair proceedings and due process to the overall protection of human rights in a democratic society.¹ In the most serious of proceedings affecting the fundamental rights of individuals, the commitment to regular process, and the full protections of due process rights have remained an important touchstone for the Court.² In this context, the use of exceptional process in trial or legal proceedings has consistently been subject to deep scrutiny and constraint by the Court under Article 6 and Protocol 7, ECHR.³ Cases that adjudicate

¹ Noting the remarks of Judge Sicilianos, President of the European Court of Human Rights, “[t]he right to a fair trial, [which] constitutes the cornerstone of a system governed by the rule of law” in his SEDI/ESIL lecture, October 16, 2015 entitled *The European Court of Human Rights at a Time of Crisis in Europe* found at:

https://www.echr.coe.int/Documents/Speech_Judge_Sicilianos_Lecture_ESIL_20151016_ENG.pdf

² *Nideröst-Huber v. Switzerland*, (App no. 18990/91) 18 February 1997, para 23; *Dağtekin and Others v. Turkey*, (App no. 70516/01) 13 December 2007, paras 32-35

³ *Ljatići v. The Former Yugoslav Republic of Macedonia*, (App no. 19017/16) 17 May 2018, the Court noting “...even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting

States' use of secret evidence are exceptional by nature, because they abrogate the regular assumptions of equal access to and scrutiny of the evidential basis for a legal determination. This exceptionality holds whether the proceedings are criminal, civil or immigration-related in nature. Claims about the validity of secret evidence engage the Executive's inherent reluctance to disclose any sensitive information on the one hand and the legal obligations to ensure an individual's fundamental protections on the other.

1.6 This submission draws on comparative analysis of the use of secret evidence in terrorism cases broadly reviewed, highlighting the challenges to fair trial and immigration procedure across multiple States as well as international jurisprudence and other relevant UN and regional rights standards. The submission touches on the following issues:

- (a) **the issues of procedural fairness in the production, storage and use of such evidence,**
- (b) **the question of equality of arms raised by the use of secret evidence, and in particular the effects of secret evidence on the independence of lawyers representing clients in proceedings where such evidence is used,**
- (c) **the relationship between secret evidence and other aspects of trial in terrorism cases, and the concerns about the use of secret evidence as a means to expand exceptional legal regimes in multiple dimensions, and**
- (d) **the specific human rights related risks associated with the use of secret evidence in removal proceedings, including as they pertain to non-refoulement.**

2. THE RELEVANT LEGISLATIVE FRAMEWORK AND PRACTICE IN ROMANIA

2.1 This case addresses the expulsion of two applicants, Adeel Muhammad and Ramzan Muhammad, The first applicant entered Romania September 2012 on a visa valid until 2015 the second applicant entered Romania in 2009 to study and had a long-stay visa. Legal proceedings were formally commenced in December 2012 by the Prosecutor's Office to declare the two applicants' undesirable. Legal proceedings were premised on classified information provided by the Romanian Intelligence Service (SRI) that the two individuals were alleged to be engaged in activities that could be dangerous for national security. An emergency ordinance was the legal basis relied on by the Prosecutor and the incriminating document was also transferred as a strictly classified document to the Court of Appeal. During a hearing before the Court of Appeal, it appears judges reviewed this file, and issued an expulsion order. Counsel of choice for the applicants could not review the materials.

3. APPLICABLE INTERNATIONAL STANDARDS REGARDING USE OF SECRET EVIDENCE

3.1 International law standards pertaining to secret evidence engage the fair trial protections of treaty and customary law.⁴ The Special Rapporteur holds these general and universal standards as applicable to a range of legal proceedings, including removal processes. Fair trial is among the most essential of fundamental guarantees in the corpus of human rights,⁵ intimately related to checking the arbitrary power of the State and protecting the individual at his most vulnerable. The ECtHR has consistently validated the value of fair trial and fair proceedings,⁶ and their *a priori* importance in protecting a range

fundamental human rights be subject to *some form of adversarial proceedings* before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information".

⁴ Prosecutor v. Aleksovski, the ICTY found that the right to fair trial was "of course" a requirement of customary international law.

⁵ Affirmed by the decision of the Inter-American Court of Human Rights in the *Judicial Guarantees in a State of Emergency* decision which affirmed the de facto non-derogable nature of certain judicial guarantees protecting fair trial notwithstanding claims of national emergency by the State. Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987); See also, UN Human Rights Committee, General Comment No. 32 (UN Doc CCPR/C/GC/32), para 67

⁶ *Khan v. the United Kingdom*, Application no 35395/97 (2000) §§34-40 [affirming the autonomy of fair trial in the ECHR from domestic definitions and practice]; *Saknovskiy v. Russia* [GC] Application no, 21272/03 (2010), §§99-107 [affirming that the right to fair trial must be effectiveness not theoretical or illusory]. Article 6 is essentially concerned with whether an applicant was afforded

of rights under the Convention as a whole. The rights bearing role of fair trial and fair proceedings is also affirmed in other regional human rights systems including the Inter-American and African.⁷ Soft law instruments also recognise the importance of fair trial and fair procedure standards as well as adequate safeguards in the face of national security concerns.⁸ The core elements of ‘fair trial’ involve a fair and public hearing, within a reasonable time, adversarial competence, and an independent and impartial court.

3.2 Fair trial/procedure as understood under the Convention has multiple and intersecting layers. First, formal, specific and defined protections expressly set out in Article 6(1)-(3) of the Treaty (noting here in particular the importance of Article 6(1) to expulsion proceedings). Second, understanding the Convention as a ‘living instrument’⁹ requires interpretation of fair trial in the light of present-day conditions. These both give rise to a third layer leading to integral rights being protected indirectly including, the right of access to a court.¹⁰ A sustaining motif in all these layers has been the right to ‘equality of arms’. In practice, to meaningfully implement such equality in rights bearing adjudication the defendant has the right to be heard, the right to know the case against him and the evidence on which the case is built, the right to be represented by counsel of his choosing, and a reasoned judgement based on a thorough sifting and disputation over evidence fairly conducted by all sides on an equal basis.

3.3 Many national courts are confronted with claims to validate concealed or limited access to evidence in multiple legal settings. Secret evidence strikes at the heart of these essential guarantees and is the antithesis of them. The use of national intelligence information raises genuine concerns about equality before the law and the ability of judicial authorities to validate intelligence information.¹¹ The extent that it compromises the essential right to fully and transparency review prejudicial evidence, and to do so with counsel of choice should not be under-estimated in relation to the following areas:

- (a) Choice of legal representation in the conduct of proceedings, including but not limited to criminal trial is essential to the balance of fairness. Lawyers have a particular responsibility to provide access to the rule of law, based on their professional, ethical

ample opportunities to state their case and contest the evidence that they considered false, and not with whether the domestic courts reached a right or wrong decision (*Karalevičius v. Lithuania* Application no 53254/99 (2005)).

⁷ For example, *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria* (2000) AHRLR 212 (ACHPR 1998), (documents required by the accused for their defence had been removed from their residences and offices during a forced search). *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) (violation to be tried at a secret military tribunal without having the opportunity to state their defence, access to counsel, or know the charges against them until trial). *Courson v Equatorial Guinea* (2000) AHRLR 93 (ACHPR 1997) (the right of a defendant to examine evidence against him “includes the right to be informed of the charges against him, as well as the evidence of said charges; [and] all sorts of elements required to prepare his defence . . .”). *Kenneth Good v. Republic of Botswana* [2010], No. 313/05 at ¶114 (the accused was “deprived by law from accessing information relating to the reasons for his being declared a threat to national authority,” and was denied a fair trial); IACtHR see Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987, ser. A: Judgments and Opinions, No. 8 (1987) [hereinafter Habeas Corpus].

⁸ See e.g. paragraph 76 of the UN Counter-Terrorism Implementation Task Force (CTITF) Guide on the Right to a Fair Trial and Due Process in the Context of Countering Terrorism (2014), section 4 of Abuja Recommendations on the Collection, Use, and Sharing of Evidence for Purposes of Criminal Prosecution of Terrorist Suspects (2018), good practice #6 of The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses (2015), Good Practice #6 of The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses (2015), principles 3, 27 and 29 of Geneva Centre for Security Sector Governance (DCAF): Global Principles on National Security and the Right to Information, principles 1.2 and 20 of Johannesburg Principles: National Security, Freedom of Expression and Access to Information (1995)

⁹ *Marckx v. Belgium*, Application no 6833/74 (1979) §41; *Tyrer v. the United Kingdom*, Application no. 5656/72 §31.

¹⁰ *Golder v. the United Kingdom*, §§26-40, the right to enforcement of judgments; *Hornsby v. Greece*, §§40-45) and the right to finality of court decisions; *Brumărescu v. Romania*, §§60-65.

¹¹ Didier Bigo, Sergio Carrera, Nicholas Hernanz & Amandine Scherrer, *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges*, 78 *Liberty & Security in Europe* 1, 22 (January 2015).

and social duty to protect the fundamental rights of individuals.¹² Effective legal representation is directly and indirectly required by multiple human rights treaties.¹³

- (b) Lack of access to evidence combined with limits on access to evidence for counsel of choice constitutes a double barrier to fairness, and both engage violations of the principle of “equality of arms”, one reinforcing and exacerbating the harms accrued from the other.¹⁴
- (c) The sources of intelligence evidence make the importance of transparency all the more urgent. When evidence is adduced from the Security Sector including the intelligence services, where the providence of information is compromised, and often not subject to or fully regulated by the rules of information gathering that apply in normal policing investigations, the push for transparency is all the more compelling.

3.4 This can become particularly important given that countries may use classified material from other nations’ national intelligence agencies as evidence in terrorism cases, making this precedent from the European Court on secret evidence use all the more weighty.¹⁵ Positively, some national courts have defended the importance of transparency and the capacity to openly review all evidence reinforcing the necessity for procedural and other safeguards on the use of secret evidence. Thus, for example,

- (a) with respect to closed material proceedings (CMPs) in the United Kingdom, the case of *Secretary of State for the Home Department v. AF* held that if the court’s decision to convict or maintain detention was based “solely or to a decisive degree on closed material, the procedural requirements of Article 5(4) would not be satisfied.”¹⁶ It has also been held that the defendant subject to CMPs must be given sufficient information to know the ‘gist’ of the allegations being made against him.¹⁷
- (b) In the Netherlands, the Administrative Division of the Council of State found in favour of an individual who applied for a position at an airport but had his contract ended when the Interior Minister refused to grant a certificate of no-objection based on information from the General Intelligence and Security Services (AIVD). His right under art. 6 of the ECHR had been violated¹⁸ The procedural interests of defendant had to be weighed in determining whether classified materials may remain closed and be relied upon.
- (c) In Germany, secret evidence is forbidden in trials under article 103 of the German Constitution guaranteeing everyone the right to be heard, which the Federal Constitutional Court held includes the right to comment on all evidence.¹⁹

¹² U.N. Human Rights Comm., General Comment No. 32: Right to equality before courts and tribunals and to a fair trial, 19th Sess., U. N. Doc. CCPR/C/GC/32, ¶ 13 (2007).

¹³ International Covenant on Civil and Political Rights Article 2(3), Article 9(4), Article 10, Article 14(1) and Article 14(3); *See also*, Basic Principles on the Role of Lawyers (Adopted August 27-September 7, 1990); STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS (2006)

¹⁴ OMKAR SIDHU, THE CONCEPT OF EQUALITY OF ARMS IN CRIMINAL PROCEEDINGS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2017), Chapter 19.

¹⁵ *See e.g.*, Ferman Abdullah and Ali Berzengi involving conviction and sentencing for terrorist financing offenses in Sweden using classified material from US intelligence services. The evidence was presented orally by an FBI representative and not in written form, contrary to Sweden’s standard legal practice. The court justified the use of US intelligence information as a source coming from “international legal assistance.” *See*, Bigo, *supra* note 17, at 16; *Country Reports on Terrorism*, U.S. Dept. of State 93 (April 2008).

¹⁶ *Secretary of State for the Home Department v. AF* (No. 3) [2010] 1 AC269.

¹⁷ *Secretary of State for the Home Department v. BM* [2012] 1 WLR 2734; *see also* *A v. UK* (2009)(Application no. 3455/05 before the European Court of Human Rights).

¹⁸ ABR 30 November 2011, LJN BU6382, AB 2012/142 (note that the case has been anonymized).

¹⁹ Federal Constitutional Court held in 1981 (26.5.1981, 2 BvR 215/81). Some limited exceptions are permitted based on the Fredrich Cremer case, Federal Constitutional Court, 26.5.1981, 2 BvR 215/81; *see also* Bundesverfassungsgericht, 27.10.1999, 1 BvR 385/90.

- (d) In France, Italy, and Canada, judicial authorities can only use declassified and open materials in courts. In Italy, the rights of defence and fair trial are protected by articles 24 and 111 of the Constitution. For this reason, evidence will either be declared inadmissible or disclosed to all parties as ordinary evidence.²⁰

3.5 The patchwork of European decisions highlights the importance of a clear, unambiguous and rights-affirming approach to the use of secret evidence by the ECtHR which upholds the substantive right to equality of arms as a fundamental rule of fair trial and procedure, underpinned by the tapestry of rights necessary to make that right meaningful including the right to review the case against you and the right to have a lawyer of your choice defend you – most particularly in cases of national security where those two inter-linked and interlocking rights are the bare bones of ensuring fair process for the individual.²¹

4. THE ELUSIVE CONCEPT OF NATIONAL SECURITY AND THE EXCESSIVE AND EXPANDING USE BY STATES

4.1 The established ECtHR jurisprudence has stressed the need to precisely (and not generically) define the national security element, the requirement of foreseeability, and the avoidance of arbitrariness. The Special Rapporteur's intervention emphasises two particular dimensions. First, the exceptionality of using 'national security' as the legitimizing basis for the use of exceptional trial procedures, and the broader threat to fair trial that over-reaching national security claims pose. Second, the particular exceptionality of 'secret evidence' as the basis for substantive adjudication in legal proceedings for democratic societies.

4.2 The Special Rapporteur also underlines the "seepage effect", i.e. that measures taken under the guise of exceptionality (i.e. 'will only apply in national security cases') in practice seep into and reframe ordinary criminal justice systems, undermining the fundamental protections for each individual.²²

4.3 The Special Rapporteur brings to the Court's attention the significant challenges in the definition of 'national security', a matter that she has addressed in previous reports to the Human Rights Council and the General Assembly.²³ The European Commission of Human Rights considered that the phrase could not be comprehensively defined,²⁴ thereby affording it an unhealthy degree of domestic elasticity and flexibility. This enormous latitude resulting from the absence of a global definition is aggravated by a vast array of activities defined as criminal national security threats under domestic law in numerous states, many of which simultaneously constitute legitimately protected acts under international law.²⁵ Moreover, comparative analysis of the various EU Member States (EUMS) national legal systems shows a deficiency in any precise definitions of the concept of 'national security'. There are several concepts which are often used or prescribed in EU Member States, yet there is no commonly held legal definition that meet the necessary legal certainty criteria under ECHR Article 7(1) and ICCPR Article 15(1).

²⁰ Bigo, *supra* note 17, at 18. In Italy there are some exceptions to this see e.g. Abu Omar case Trib. pen di Milano, judgment 535/2009; Italian Constitutional Court, judgment 106/2009; Corte App., sez. III pen., judgment 3688/2010; Cass., sez. V pen., judgment 46340/2012; Corte App., sez. IV pen., judgment 985/2013; Cass., sez. I pen., judgment 20447/2014.

²¹ Noting here Directive 2013/48/EU on the Right of Access to a Lawyer in Criminal Proceedings, building on the ECtHR case of *Salduz v. Turkey* Application no. 36391/02 (2008) and *A.T. v. Luxembourg* (2016) Application no 30460/15.

²² OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIME OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006).

²³ A/HRC/40/52

²⁴ https://ec.europa.eu/home-affairs/what-we-do/policies/crisis-and-terrorism_en

²⁵ For multiple country assessments evidencing the imprecise and overly vague definitions of national security, terrorism and extremism see *inter alia* A/HRC/40/52. Add.3 (Sri Lanka); A/HRC/40/52. Add.2 (Kingdom of Saudi Arabia).

- 4.4 The Special Rapporteur has documented that absent a consensus definition by states on terms such as ‘national security’ or ‘terrorism’, there is significant practice and evidence of misuse and/or expansion of legal regulation using these terms to apply to a broad range of complex regulatory challenges for States, including in Europe.²⁶ The perceived advantage to the State of these terms is that they are often accompanied by a presumption of deference to the assessment of threat. This underscores the critical role the European Court plays in oversight, scrutiny and standard-setting with respect to claims rooted in the exceptionality of national security. In particular, the Court’s insistence that claims of national security be objectively demonstrated, on the basis of robust evidence, constitutes a critical aspect of oversight and an important global benchmark. The Special Rapporteur would also emphasise the value of a strictly necessary test in this context, placing the burden of proof on the State to demonstrate why a particular exceptional measure could not have been equally dealt with by the ordinary law. The emphasis on ‘ordinary’ law first, is the clearest means to safeguard the fundamental operation of the national legal order, and to safeguard human rights protections for the short, medium and long term. Extremely broad notions in this regard render what is supposed to be an exceptional basis commonplace and more readily abused.²⁷
- 4.5 The Special Rapporteur has consistently documented the expansionist tendencies of national security and counter-terrorism regulation. This necessitates in parallel robust protections and a renewed commitment to the essential protections that provide stability to the meaningful protection of the rule of law. The European Parliament, in the wake of the Snowden revelations,²⁸ highlighted how this complicated landscape provides room for the State to manoeuvre in justifying violations of the rule of law. The Special Rapporteur stresses to the Court that trial processes have consistently been at the forefront of national security expansionism, and the pressures on fair trial are significant ranging from exceptional courts to modified rules of procedures and evidence, limitations on legal representation, and attempts to circumvent or limit judicial role in proceedings where national security claims are raised.
- 4.6 In light of this, the Special Rapporteur notes that there has been a consistent expansion of state claim-making around national security. This expansion has been noted and tracked by the Special Rapporteurs’ Reports to the Human Rights Council in 2017 and 2018.²⁹ The Special Rapporteur observes that national security is increasingly being used as a generic framing to cover a range of regulatory challenges for states including but not limited to general criminality, economic policy, immigration regulation and finance regulation.
- 4.7 For many States presumed judicial deference to national security claims provides a regulatory shortcut and allows for the use of exceptional legal measures that would otherwise not be permitted by domestic or international law. This has resulted in the abuse of this concept to justify interference with other fundamental rights and freedoms, such as freedom of expression and information, as well as to limit protection for whistle-blowers, thereby restricting scope for disclosure of these issues in the public interest and the resultant undermining of democratic

²⁶ A/HRC/40/52 Human Rights Council Report on the role of measures to address terrorism and violent extremism on closing civic space and violating the rights of civil society actors and human rights defenders. Benchmarking in particular the 66% of all communications to the SRCT mandate between 2005-2018 involved the use of national security or counter-terrorism measures against HRD’s and civil society actors.

²⁷ For example, Dutch case law has recognised the discretion of the main intelligence agency (AVID) in deciding what constitutes a threat to national security. See Raad van State, 04-07-2006, 200602107/1.

²⁸ C. Moraes *Draft Report on the US NSA Surveillance Programme*, LIBE COMMITTEE (2014). The Moraes Report affirms compelling evidence of the existence of far-reaching, complex, and highly technologically advanced systems designed by the US and some [E.U.] Member States’ intelligence services to collect, store, and analyse communication and location data and metadata of all citizens around the world on an unprecedented scale and in an indiscriminate and non-suspicion-based manner.

²⁹ A/HRC/40/52 HRC Report on the role of measures to address terrorism and violent extremism on closing civic space and violating the rights of civil society actors and human rights defenders; A/HRC/37/ 52 Report on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism.

principles. The Council of Europe has noted that “*in relation to national security, there is as yet no real cornerstone to uphold the rule of law*”.³⁰

4.8 The Special Rapporteur affirms that the Court therefore has an important role in restricting the expansive approach to ‘national security’, including but not limited to confidentiality, that government agencies are all too naturally inclined to adopt. This was noted by the Canadian Federal Court in *Abdullah Khadr v Attorney-General of Canada*. This case concerned an application for disclosure of information which related to Mr Khadr’s defence in extradition proceedings, including the fact that Canadian officials had been informed three years earlier that US authorities had paid a bounty to Pakistan for his capture prior to his alleged abuse and detention by US and Pakistani agents. The courts assessed the confidentiality request, finding that disclosure would not injure national security due to the time that had elapsed since the information was received, the change of circumstances in Pakistan since the events occurred and the fact that no human source appeared to be at risk. More importantly, Mosley J concluded that in relation to national security risks “there is no apparent limit to how far” the argument that national security could be injured by seemingly innocuous information “can be taken”. If “carried to an extreme”, this “would justify the withholding of all information no matter how innocuous”.³¹

4.9 Courts, and in particular the European Court of Human Rights, play a critical role in requiring the term national security to be precisely benchmarked against a specific and defined security need or threat (necessity test), an inquiry as to whether the ordinary law is sufficient to address the regulatory issue at hand (least restrictive means test), and a non-discrimination test to ensure that exceptional measures are not being used to target discrete and vulnerable groups specifically protected by international law. In this case, the Special Rapporteur encourages the Court to adopt a robust approach to the appraisal of national security exceptions, mandate that the State provide a factual and legal basis for the invocation of such this claim, and subject the exceptionality approach to an analysis of least restrictive means, under the operative rule that if the ordinary law of the state is presumed capable to address both criminal and immigration matters, the presumption should be that this is the primary approach before a resort to exceptionality is validated.

5. THE FLAWED CONCEPT OF ‘SECRET EVIDENCE’ AND ITS ROLE IN ARGUMENTS FOR EXCEPTIONALITY IN FAIR TRIAL PROVISION

5.1 The Special Rapporteur now turns to address the matter of the use of ‘secret evidence’ or undisclosed sources in legal proceedings of a national security nature. In the first instance she notes that the invocation of national security combined with the use of ‘secret evidence’ places a double burden on the individuals subject to expulsion from the State. The exceptional category of ‘national security’ threat, has a pejorative and stigmatizing effect on individuals placed within in, subjecting them in practice to a higher burden of proof as to their ‘non’ threat within a democratic society.³² This is precisely because the ubiquity of terrorism threat and the censure attached to it places unique and discernible burdens on those included within the category by the State.

5.2 Fair trial in a democratic society is determined by the quality and fairness of the procedures which introduce evidence. Robust, fairly adduced, transparent and rebuttable evidence is the basis for preventing arbitrariness in legal proceedings which determine the civil and criminal liabilities of individuals. “Secret” evidence as a class of information in legal proceedings is *prima facie* an anti-

³⁰ See Council of Europe (2014), “The rule of law on the Internet and in the wider digital world”, Issue paper published by the Council of Europe Commissioner for Human Rights, December, p. 19.

³¹ *Abdullah Khadr v Attorney-General of Canada* 2008 FC 549 at [77].

³² Stephane J. Baele, Olivier C. Sterck, Thibaut Slingenever & Gregoire P. Lits, *What does the “Terrorist” label really do? Measuring and Explaining the Effects of the “Terrorist” and “Islamist Categories* 42 (5) *Studies in Conflict and Terrorism* 520 (2019)

democratic and a rights negating category. While there is no generally agreed international legal definition of ‘secret evidence’, it is usually material which is claimed by the State to be potentially damaging to international relations, national security and/or national defence should it come into the public (or legal) domain. This class of information is often under-regulated by law, and is retrieved, used and stored by the security sector(s) of the State, and increasingly shared with other States under co-operative agreements that are generally under-regulated by national and international law. While the use and exchange of non-public information in other sectors (e.g. intelligence gathering/surveillance) is broadly accepted though not unproblematic from a human rights perspective, its cross-over into public, legal proceedings which have criminal and civil consequences for individuals is where its use has been most controversial. In this context, ‘secret’ evidence raises complex questions about disclosure, human rights and due process in a variety of legal proceedings.

5.3 The Special Rapporteur views the use of ‘secret evidence’ as an exceptional legal measure in a democratic society for which the burden of use must be unambiguously high.³³ The general rule on “secret evidence” should be *prima facie* presumed impermissibility in the context of fair trial. In the context where use of such evidence will have a disproportionately pejorative effect on the legal rights of persons,³⁴ any use must be deemed uniformly exceptional, safeguards must be absolute and oversight must be stringent and independent to prevent abuse.

5.4 A number of comparative judicial decisions give assistance to the Court in this case and illustrate judicial consensus on the exceptionality of ‘secret’ evidence to trial process. These concerns were addressed by the Human Rights Committee in the British case of *Ahani v Canada*. This case touches on the specific human rights related risks associated with the use of secret evidence in removal proceedings. The rights discussed herein relate to those endowed by Article 13 of the ICCPR which concerns the “*procedural safeguards relating to the expulsion of aliens*”. In this case, which concerned national security deportation and the question of torture or other ill-treatment on return, it was found:

“Concerning ... the decision ... whether the affected individual was at risk of substantial harm and should be expelled on national security grounds was faulty for unfairness, as he had not been provided with the full materials on which the Minister based his or her decision and an opportunity to comment in writing thereon and further as the Minister's decision was not reasoned.

[t]he failure of the State party to provide him, in these circumstances, with the procedural protections deemed necessary in the case of Suresh, on the basis that the present author had not made out a prima facie risk of harm fails to meet the requisite standard of fairness.

*Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, "compelling reasons of national security" existed to exempt the State party from its obligation under that article to provide the procedural protections in question”.*³⁵

³³ The Canadian Supreme Court decision in *Charkaoui v. Canada (Citizenship and Immigration)* [2007] 1 S.C.R. 350. SCC found it unconstitutional for named person not to be given nature of case against them See also, *Charkaoui v. Canada (Citizenship and Immigration)* [2008] 2 S.C.R.

³⁴ On the negative rights-based effects of the use of ‘secret evidence’ in Canada see Graham Hudson and Daniel Alati (2019) “Behind Closed Doors: Secret Law and the Special Advocate System in Canada” *Queen's LJ* 44:1

³⁵ *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002 (2004), paragraphs 10.6 to 10.8, emphasis added.

- 5.5 The Court must remain seized and fully aware of the practical effects on individual rights when undisclosed evidence is the basis for a legal proceeding, here expulsion, particularly prior to the conclusion of the exhaustion of all reasonable legal remedies domestically. Where there is undisclosed information pertaining to the status of a designated ‘terrorist’, or ‘engagement of/support to/ consorting with’ terrorism, the harm is not only expulsion (which is severe), but also the status of ‘terrorism-related’ expulsion which attaches to the individual in question indefinitely. This status may have further effects (notwithstanding the lack of criminal trial and conviction) of placing that individual on national or international watchlists, exposure to terrorism financing consequences including freezing, withholding and lack of access to assets, administrative sanctions in the country of return, and inability to travel outside of country of return due to the status on which the expulsion was based. The key point here is that the consequences for the individual include but is not necessarily limited to expulsion making robust, transparent, and adversarial review of documentation a critical aspect of protecting a range of rights which accrue to that individual.
- 5.6 The Court should also remain attuned to the consistent efforts by States to justify non-disclosure in cases involving national security claims and beyond by various forms of procedural compensation. In some contexts, domestic efforts to enable undisclosed evidence have included the use of compensatory measures including ‘security-approved’ lawyers, redactions, and summaries of some undisclosed evidence available to the Court. In some cases, judges may be able to view the evidence in question but uniformly counsel of choice are not given access to the relevant security documentation. All of these measures have proven consistently inadequate to protect the essence of the fair trial rights of individuals, and to mitigate the cumulative prejudice resulting from the non-disclosure of evidence.³⁶ The creep of secret evidence remains undulating, underscoring the necessity of strong judicial oversight, coupled with the preservation of full and independent legal representation and a clear signal to States of the incompatibility of such non-disclosure with fair process in a democratic society.
- 5.7 The Special Rapporteur calls the Court’s attention to the adjudicative dynamic that secrecy generates in a security context, which may over time condition a judge to favour secrecy over disclosure and the reliance on the executive to supply and characterise the evidence from which the secret evidence is drawn.³⁷ This room for intentional abuse was utilised by the Royal Canadian Mounted Police which deceived a Canadian court on the prospect that secret evidence obtained from Syrian Military Intelligence, and used in support of a warrant application, was obtained through torture. This was only discovered after the Inquiry released its reports and sought a court order to authorise disclosure over the government’s objections. That the government nonetheless resisted disclosure on national security grounds for over two years after the Inquiry’s establishment, highlights the necessity of thorough, independent judicial review to determine whether secret powers have been abused. Fish JJ and LeBel of the Canadian Supreme Court noted that an action of this type by states “*compromises the very function of judicial review*”.³⁸
- 5.8 The robustness of some domestic courts on this matter provides positive examples to the Court. In the Netherlands, the District Court of Rotterdam noted the far-reaching effects of a legislative provision which sought to elevate classified information to the official status of “written material”, meaning that they could potentially be used as standalone evidence without requiring additional supporting proof. This approach was rejected in a 2016 case where the court found that if secret

³⁶ John Ip, ‘Al Rawi, Tariq and the Future of Closed Material Procedures and Special Advocates’ (2012) 75 *Modern Law*; John Jackson, ‘Justice, Security and the Right to a Fair Trial’ [2013] *Public Law* 606, 617

³⁷ For country specific analysis see John Jackson and Sean Doran, *Judge Without Jury: Diplock Trials in the Adversary System* (1995)

³⁸ *Charkaoui v Canada (Minister of Citizenship and Immigration and Solicitor General of Canada)* 2008 SCC 38 at 61-62

intelligence reports are to be used as principal evidence, the information contained in them needs to be sufficiently supported by the rest of the evidence in a court dossier. If this is not the case, then reliance on intelligence information as primary evidence would be in conflict with the right to fair trial under Article 6 of the ECHR.³⁹ A subsequent 2017 case decided in the same court confirmed this approach. The court concluded that while the circumstances of the case and the defendants' statements were most certainly suspicious, without sufficient reliable evidence they were no more than that – just suspicious. In a more striking rebuke, the court added that the specific intelligence report “does not amount to evidence, not even in cases concerning terrorist crimes.”⁴⁰

5.9 In sum, the Court has an important opportunity given the emerging practices of reliance on secret evidence in a range of legal proceedings, to repudiate the turn to exceptionality in immigration proceedings as well as criminal trials, to stamp out the overuse of 'national security' as a short-cut regulatory category for States, and to underscore the importance of regular process as the expected norm in criminal and other proceedings.

6. WHY EXCEPTIONALITY CARVED OUT FOR NATIONAL SECURITY MUST BE STRICTLY REGULATED, GIVEN THE DANGER OF SLIPPAGE AND CROSS-OVER TO LESS SOPHISTICATED LEGAL SYSTEMS

6.1 The Court should also be aware of the dangers that approval of national mitigating measures in the context of non-disclosure have global and comparative effects. While some European States may make the argument that as democratic states they have sufficiently robust judicial oversight, independent legal counsel and mechanisms of legal oversight, the export of such measures to other non-democratic and non-rule of law compliant States (appointed State legal representatives, the use of State-appointed 'experts', and State oversight mechanisms appointed largely from the ranks of political parties with complete control over the legal process) are not abstract and have been noted in the country reports of the Special Rapporteur in the context of the fairness of terrorism trials.⁴¹ The Court should also be wary of assuming that in practice the independence of oversight and judicial systems in the European context is sufficient uniform in terrorism designated cases, and that abuse is not occurring.⁴²

7. CONCLUSION

3.21 The Court occupies a fundamental role in guarding the integrity of Article 6 and Protocol 7, Article 1 by applying a strict standard on equal disclosure of evidence in national security contexts. The Court plays a unique role in this regard recognizing the pressure that security claims and pressure involve for national courts particularly in times where the ubiquity of national security claims is inescapable. The Court is also guarding against the insidious creep of exceptionalism into the heart of the Convention system by being steadfast and clear on the importance of essential procedural safeguards to fair trial and fair proceeding for all.

³⁹ ECLI: NL: RBROT: 2016: 6681 - <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2016:6681>

⁴⁰ ECLI:NL:RBROT:2017:2713 - <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2017:2713&showbutton=true&keyword=10%2f692109-16>

⁴¹ <https://www.ohchr.org/EN/Issues/Terrorism/Pages/Visits.aspx>

⁴² A matter addressed by the Special Rapporteur in certain communications and country reports concerning the application of terrorism measures in European States, see France, Belgium and Hungary. <https://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx>