# INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

*"dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights"*


Retsudvalget
L 217 - Bilag 15
Offentligt

**Folketinget**
Retsudvalget
Christiansborg
1240 København K

København den 12. april 2006

**L 217, Forslag til lov om ændring af straffeloven, retsplejeloven og forskellige andre love. (Styrkelse af indsatsen for at bekæmpe terrorisme m.v.).**

International Commission of Jurists danske sektion (ICJ) ser med bekymring navnlig på fraværet af traditionelle retssikkerhedsmæssige garantier og konkrete proportionalitetsvurderinger i dele af lovforslaget.

ICJ har ikke ressourcer til at foretage en tilbundsgående analyse af lovforslaget. Det begrænsede omfang af de følgende bemærkninger kan derfor ikke anses som en anerkendelse af de øvrige dele af lovforslaget.

**Sammenfatning**

ICJ har forståelse for forslaget om at give PET adgang til at aflytte de telefoner, den mistænkte indehaver eller kommer til at indehave i den periode på op til fire uger, hvor personkendelsen kan gælde, men forslaget går videre end nødvendigt og betyder tilsyneladende, at enhver telekommunikation, som den mistænkte benytter sig af, skal kunne aflyttes på grundlag af en forudgående generel retskendelse, uanset hvem der er indehaver af kommunikationsmidlet.

I forhold til forslaget om personkendelser foreslår ICJ

at aflytning af tilfældige personer, der ikke er involveret i den mistænktes kriminalitet, ikke skal være omfattet af den foreslåede bestemmelse,

at det tydeliggøres, at PET ikke på grundlag af en personkendelse kan foretage aflytning af læger, advokater, præster m.v.,

at PET konkret over for retten skal begrunde, hvorfor den brede regel om personkendelse skal bruges frem for den nugældende, snævre regel om telefonkendelse,

at Justitsministeriet redegør

(i) for kravet i grundlovens § 72 om en "kendelse" inden meddelelseshemmeligheden gennembrydes,

(ii) for lovforslagets forhold til Den Europæiske Menneskerettighedsdomstols praksis, og

(iii) for om andre lande har indført - eller foreslået indført - sammenlignelige regler.


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**Konkrete bemærkninger**
ICJ vil af ressourcemæssige årsager koncentrere sine bemærkninger om forslaget om personkendelser (lovforslagets § 2, nr. 4 til en ny bestemmelse i retsplejelovens § 783, stk. 2).

I dag kan PET foretage indgreb i meddelelseshemmeligheden efter rettens forudgående kendelse. Retten skal i kendelsen anføre de telefonnumre m.v., som indgrebet angår. Retten skal også i kendelsen anføre de konkrete omstændigheder i sagen, hvorpå det støttes, at betingelserne for indgrebet er opfyldt (§ 783, stk. 1).

Såfremt indgrebets øjemed ville forspildes, dersom retskendelse skulle indhentes, kan politiet foretage indgrebet og efterfølgende forelægge sagen for retten (snarest muligt og senest inden 24 timer fra indgrebets iværksættelse, § 783, stk. 3).

Der skal både efter de gældende og de foreslåede regler gives efterfølgende underretning til indehaveren af telefonen m.v. Retten kan dog godkende, at underretning undlades eller udskydes (§ 788). Reglerne omfatter også indgreb i kommunikation via telefax, e-mail og internettet.

Ifølge lovforslaget skal PET i stedet for en kendelse på konkrete telefonnumre m.v., som indgrebet angår, indhente en generel kendelse på en person. Anvendelsen af den generelle personkendelse skal efterfølgende kontrolleres af retten (ny § 783, stk. 2). Forslaget er begrundet i det forhold, at kriminelle personer ofte skifter mellem flere forskellige telefoner, og at det derfor er besværligt for PET at gå i retten og indhente kendelser. Dette besvær opleves almindeligvis af politiet og det må derfor forudses, at den vedtagne regel vil blive forslået indført mere eller mindre generelt.

Forslaget indebærer en principiel ændring af retsplejelovens system med retskendelser. I dag skal forudgående og konkrete retskendelser så vidt muligt indhentes, og hvis det ikke er muligt, skal den efterfølgende kontrol foretages snarest muligt. Forslaget afviger fra det system ved at indføre en generel forudgående tilladelse og en efterfølgende kontrol op til fire uger senere.

ICJ har forståelse for behovet for at kunne aflytte de telefoner, som den mistænkte ejer eller har rådighed over. Men forslaget går videre end til at give PET adgang til at aflytte de telefoner, den mistænkte indehaver eller kommer til at indehave i den periode på op til fire uger, hvor personkendelsen kan gælde. Forslaget betyder tilsyneladende, at enhver telekommunikation, som den mistænkte benytter sig af, skal kunne aflyttes, uanset hvem der er indehaver af kommunikationsmidlet.

Det mest principielle spørgsmål er, om PET på grundlag af en generel kendelse om aflytning af den mistænkte skal kunne aflytte andre personers telefoner uden konkret kendelse m.v. men mod en efterfølgende kontrol op til fire uger senere.

*Aflytning af tilfældige personer*
PET vil allerede i dag kunne aflytte de personer, den mistænkte taler med fra sine egne telefoner. Det er formålet med aflytning. PET vil ifølge lovforslaget også kunne aflytte tilfældige personer, der på ingen måde er involveret i den mistænktes kriminalitet. Det kan være venner og familie, kolleger og forretningsforbindelser, rådgivere og andre. I lovforslaget tales således om beskikkelse af en advokat for personer, der "mere eller mindre tilfældigt" bliver berørt af personkendelsen.

Det ligger ICJ særlig på sinde at gøre opmærksom på, at de tilfældigt omfattede bipersoner ikke er personer, der er involveret i den mistænktes kriminalitet. Såfremt den mistænkte deler telefoner med andre personer, der er involveret i kriminaliteten, kan PET indhente selvstændige aflytningskendelser over for sådanne personer. De tilfældige bipersoner, der tænktes på, er derfor alene bipersoner, der ikke er genstand for nogen mistanke, som kunne begrunde en selvstændig aflytning.

**ICJ foreslår**, at aflytning af tilfældige personer, der ikke er involveret i den mistænktes kriminalitet, ikke skal være omfattet af den foreslåede bestemmelse. Aflytning af sådanne personer må følge de regler, der gælder i dag. Det kan være nødvendigt at aflytte personer, der ikke er omfattet af den mistænktes kriminelle aktiviteter, men det bør så vidt muligt kræve en dommers konkrete og forudgående tilladelse.

*Aflytning af læger, advokater, præster m.v.*
Såfremt den mistænkte er på besøg hos sin læge, advokat, præst m.v. vil PET kunne ønske at aflytte vedkommendes telekommunikation for det tilfælde, at den mistænkte låner f.eks. telefonen og fører samtaler om kriminelle aktiviteter.

Der kan også være tale om, at den mistænkte besøger en person, der er læge, advokat, præst m.v. – uden at der er tale om den mistænktes læge, advokat, præst m.v. I begge tilfælde vil samtaler med andre patienter, klienter, menighedspersoner m.v. kunne ønskes at være genstand for aflytning.

Lovforslaget indeholder ingen redegørelse for, i hvilket omfang PET på baggrund af en personkendelse vil kunne foretage aflytning af læger, advokater, præster m.v.

Efter retsplejelovens § 782, stk. 2, må telefonaflytning m.v. ikke foretages "med hensyn til den mistænktes forbindelse med personer, som efter reglerne i § 170 er udelukket fra at afgive forklaring som vidne". Efter retsplejelovens § 170 må vidneforklaring ikke afkræves "præster i folkekirken eller andre trossamfund, læger, forsvarere og advokater om det, som er kommet til deres kundskab ved udøvelsen af deres virksomhed."

Retsplejeloven udelukket ikke, at de pågældende læger m.v. pålægges at afgive vidneforklaring. Bortset fra forsvarere i straffesager kan retten pålægge læger og advokater at afgive vidneforklaring, "når forklaringen anses for at være af afgørende betydning for sagens udfald, og sagens beskaffenhed og dens betydning for vedkommende part eller samfundet findes at berettige til, at forklaring afkræves."

**ICJ foreslår**, at det tydeliggøres, at PET ikke på grundlag af en personkendelse kan foretage aflytning af de nævnte personers telekommunikation. Såfremt PET befrygter, at den mistænkte vil kunne benytte f.eks. en advokats telefon, må PET så vidt muligt indhente rettens forudgående og konkrete tilladelse af f.eks. advokatens telekommunikation.

*Konkrete begrundelser*
PET skal ifølge lovforslaget ikke konkret godtgøre, at den mistænkte bruger flere telefoner m.v. PET vil principielt og i praksis kan bruge den foreslåede nye og brede aflytningsbestemmelse, selv om der ikke er nogen grund til det i den konkrete sag. Den oprindelige arbejdsgruppe foreslog ikke en så vidtgående regel, som Justitsministeriet nu har foreslået på dette punkt.

**ICJ foreslår**, at PET konkret over for retten skal begrunde, hvorfor den brede regel om personkendelse skal bruges frem for den nugældende, snævre regel om telefonkendelse. Det vil også gøre det muligt for retten at begrunde, hvorfor særreglen om personkendelser kan anvendes.

Det vil ikke slække effektiviteten af PET's arbejde at vente med at bruge de brede regler til problemet opstår i en konkret sag, fordi aflytningen i den situation kan fortsættes uden retskendelse, hvis øjemedet ellers forspildes.

*Grundloven, Den Europæiske Menneskerettighedskonvention og andre lande*
Justitsministeriets lovforslag indeholder ingen overvejelser om, hvilken betydningen Grundloven eller Den Europæiske Menneskerettighedskonvention har for det konkrete forslag om personkendelser.

**ICJ foreslår**, at Justitsministeriet anmodes om at redegøre nøje for, om der er støtte i den forfatningsretlige teori og praksis for den fortolkning, at kravet i grundlovens § 72 om en "kendelse" inden meddelelseshemmeligheden gennembrydes er opfyldt, (i) såfremt der er tale om en "generel kendelse" over for én person (den mistænkte), og (ii) såfremt aflytningen omfatter en anden person (den ikke mistænkte biperson), der ikke kommunikerer med den mistænkte, men hvis kommunikationsmidler den mistænkte kan tænkes at benytte sig af.

**ICJ foreslår** desuden, at Justitsministeriet anmodes om at redegøre nøje for, at der er støtte i Den Europæiske Menneskerettighedsdomstols praksis for at aflytte én person (den ikke mistænkte biperson) på baggrund af lovbestemmelser (og kendelser) om aflytning af en anden person (den mistænkte).

**ICJ foreslår** endelig, at Justitsministeriet anmodes om nøje at redegøre for, om Justitsministeriet er bekendt med andre lande, der har indført eller foreslået indført sammenlignelige regler, herunder om andre lande har foreslået sammenlignelige regler, som ikke er blevet vedtaget.

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ICJ's begrænsede bemærkninger til lovforslag L 217 kan som nævnt ikke anses som en anerkendelse af betimeligheden og hensigtsmæssigheden af de øvrige dele af lovforslaget.

ICJ henleder derfor afslutningsvis retsudvalgets opmærksomhed på International Commission of Jurists Berlin Deklaration om beskyttelsen af menneskets rettigheder og retssikkerheden i forbindelse med bekæmpelsen af terrorisme.

Berlin Deklarationen blev vedtaget 28. august 2004 af 160 jurister fra verden over. En kopi af erklæringen vedlægges (www.icj.org/IMG/pdf/Berlin_Declaration.pdf).

På vegne International Commission of Jurists danske sektion

Sune Skadegård Thorsen
Formand for bestyrelsen

Henrik Andersen
General sekretær

# INTERNATIONAL COMMISSION OF JURISTS

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# THE BERLIN DECLARATION

## The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism

*Adopted 28 August 2004*

*160 jurists, from all regions of the world, meeting as Commissioners, Honorary Members, National Sections and Affiliated Organisations at the International Commission of Jurists (ICJ) Biennial Conference of 27-29 August 2004, in Berlin, Germany, where it was founded 52 years ago, adopt the following Declaration:*

The world faces a grave challenge to the rule of law and human rights. Previously well-established and accepted legal principles are being called into question in all regions of the world through ill-conceived responses to terrorism. Many of the achievements in the legal protection of human rights are under attack.

Terrorism poses a serious threat to human rights. The ICJ condemns terrorism and affirms that all states have an obligation to take effective measures against acts of terrorism. Under international law, states have the right and the duty to protect the security of all people.

Since September 2001 many states have adopted new counter-terrorism measures that are in breach of their international obligations. In some countries, the post-September 2001 climate of insecurity has been exploited to justify long-standing human rights violations carried out in the name of national security.

In adopting measures aimed at suppressing acts of terrorism, states must adhere strictly to the rule of law, including the core principles of criminal and international law and the specific standards and obligations of international human rights law, refugee law and, where applicable, humanitarian law. These principles, standards and obligations define the boundaries of permissible and legitimate state action against terrorism. The odious nature of terrorist acts cannot serve as a basis or pretext for states to disregard their international obligations, in particular in the protection of fundamental human rights.

A pervasive security-oriented discourse promotes the sacrifice of fundamental rights and freedoms in the name of eradicating terrorism. There is no conflict between the duty of states to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. On the contrary, safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state. Both contemporary human rights and humanitarian law allow states a reasonably wide margin of flexibility to combat terrorism without contravening human rights and humanitarian legal obligations.

International and national efforts aimed at the realization of civil, cultural, economic, political and social rights of all persons without discrimination, and addressing political, economic and social exclusion, are themselves essential tools in preventing and eradicating terrorism.

Motivated by the same sense of purpose and urgency that accompanied its founding, and in the face of today's challenges, the ICJ rededicates itself to working to uphold the rule of law and human rights.

In view of recent grave developments, the ICJ affirms that in the suppression of terrorism, states must give full effect to the following principles:

1. *Duty to Protect*: All states have an obligation to respect and to ensure the fundamental rights and freedoms of persons within their jurisdiction, which includes any territory under their occupation or control. States must take measures to protect such persons, from acts of terrorism. To that end, counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination.

2. *Independent Judiciary*: In the development and implementation of counter-terrorism measures, states have an obligation to guarantee the independence of the judiciary and its role in reviewing state conduct. Governments may not interfere with the judicial process or undermine the integrity of judicial decisions, with which they must comply.

3. *Principles of Criminal Law*: States should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorist acts are only charged with crimes that are strictly defined by law, in conformity with the principle of legality (*nullum crimen sine lege*). States may not apply criminal law retroactively. They may not criminalise the lawful exercise of fundamental rights and freedoms. Criminal responsibility for acts of terrorism must be individual, not collective. In combating terrorism, states should apply and where necessary adapt existing criminal laws rather than create new, broadly defined offences or resort to extreme administrative measures, especially those involving deprivation of liberty.

4. *Derogations*: States must not suspend rights which are non-derogable under treaty or customary law. States must ensure that any derogation from a right subject to derogation during an emergency is temporary, strictly necessary and proportionate to meet a specific threat and does not discriminate on the grounds of race, colour, gender, sexual orientation, religion, language, political or other opinion, national, social or ethnic origin, property, birth or other status.

5. *Peremptory norms:* States must observe at all times and in all circumstances the prohibition against torture and cruel, inhuman or degrading treatment or punishment. Acts in contravention of this and other peremptory norms of international human rights law, including extrajudicial execution and enforced disappearance, can never be justified. Whenever such acts occur, they must be effectively investigated without delay, and those responsible for their commission must be brought promptly to justice.

6. *Deprivation of liberty*: States may never detain any person secretly or incommunicado and must maintain a register of all detainees. They must provide all persons deprived of their liberty, wherever they are detained, prompt access to lawyers, family members and medical personnel. States have the duty to ensure that all detainees are informed of the reasons for arrest and any charges and evidence against them and are brought promptly before a court. All detainees have a

right to *habeas corpus* or equivalent judicial procedures at all times and in all circumstances, to challenge the lawfulness of their detention. Administrative detention must remain an exceptional measure, be strictly time-limited and be subject to frequent and regular judicial supervision.

7. *Fair Trial*: States must ensure, at all times and in all circumstances, that alleged offenders are tried only by an independent and impartial tribunal established by law and that they are accorded full fair trial guarantees, including the presumption of innocence, the right to test evidence, rights of defence, especially the right to effective legal counsel, and the right of judicial appeal. States must ensure that accused civilians are investigated by civilian authorities and tried by civilian courts and not by military tribunals. Evidence obtained by torture, or other means which constitute a serious violation of human rights against a defendant or third party, is never admissible and cannot be relied on in any proceedings. Judges trying and lawyers defending those accused of terrorist offences must be able to perform their professional functions without intimidation, hindrance, harassment or improper interference.

8. *Fundamental Rights and Freedoms*: In the implementation of counter-terrorism measures, states must respect and safeguard fundamental rights and freedoms, including freedom of expression, religion, conscience or belief, association, and assembly, and the peaceful pursuit of the right to self-determination; as well as the right to privacy, which is of particular concern in the sphere of intelligence gathering and dissemination. All restrictions on fundamental rights and freedoms must be necessary and proportionate.

9. *Remedy and reparation*: States must ensure that any person adversely affected by counter-terrorism measures of a state, or of a non-state actor whose conduct is supported or condoned by the state, has an effective remedy and reparation and that those responsible for serious human rights violations are held accountable before a court of law. An independent authority should be empowered to monitor counter-terrorism measures.

10. *Non-refoulement*: States may not expel, return, transferor extradite, a person suspected or convicted of acts of terrorism to a state where there is a real risk that the person would be subjected to a serious violation of human rights, including torture or cruel, inhuman or degrading treatment or punishment, enforced disappearance, extrajudicial execution, or a manifestly unfair trial; or be subject to the death penalty.

11. *Complementarity of humanitarian law*: During times of armed conflict and situations of occupation states must apply and respect the rules and principles of both international humanitarian law and human rights law. These legal regimes are complementary and mutually reinforcing.

## Commitment to Act

- The ICJ, including its Commissioners, Honorary Members, National Sections and Affiliated Organisations, consistent with their professional obligations, will work singly and collectively to monitor counter-terrorism measures and assess their compatibility with the rule of law and human rights.

- The ICJ will challenge excessive counter-terrorism legislation and measures at the national level through advocacy and litigation and will work towards the promotion of policy options fully consistent with international human rights law.

- The ICJ will work to ensure that counter-terrorism measures, programs and plans of action of global and regional organisations comply with existing international human rights obligations.

- The ICJ will advocate the establishment of monitoring mechanisms by relevant intergovernmental and national institutions to help ensure that domestic counter-terrorism measures comply with international norms and human rights obligations and the rule of law, as called for in the joint NGO Declaration on the Need for an International Mechanism to Monitor Human Rights and Counter-Terrorism adopted at the ICJ Conference of 23-24 October 2003 in Geneva.

- The ICJ will invite and work with jurists and human rights organisations from around the world to join in these efforts.

- The judiciary and legal profession have a particularly heavy responsibility during times of crisis to ensure that rights are protected. The ICJ calls on all jurists to act to uphold the rule of law and human rights while countering terrorism:

  - *Lawyers*: Members of the legal profession and bar associations should express themselves publicly and employ their full professional capacities to prevent the adoption and implementation of unacceptable counter-terrorism measures. They should vigorously pursue domestic and, where available, international legal remedies to challenge counter-terrorism laws and practices in violation of international human rights standards. Lawyers have a mandate to defend persons suspected or accused of responsibility for terrorist acts.

  - *Prosecutors*: In addition to working to bring to justice those responsible for terrorist acts, prosecutors should also uphold human rights and the rule of law in the performance of their professional duties, in accordance with the principles set out above. They should refuse to use evidence obtained by methods involving a serious violation of a suspect's human rights and should take all necessary steps to ensure that those responsible for using such methods are brought to justice. Prosecutors have a responsibility to tackle impunity by prosecuting persons responsible for serious human rights violations committed while countering terrorism and to seek remedy and reparation for victims of such violations.

  - *The Judiciary*: The judiciary is the protector of fundamental rights and freedoms and the rule of law and the guarantor of human rights in the fight against terrorism. In trying those accused of acts of terrorism, judges should ensure the proper administration of justice in conformity with international standards of independence, due process and fair trial. Judges play a primary role in ensuring that national laws and the acts of the executive relating to counter-terrorism conform to international human rights standards, including through judicial consideration of the constitutionality and legality of such norms and acts. In the development of jurisprudence, judges should wherever possible apply international standards relating to the administration of justice and human rights. Judges should ensure that judicial procedures aimed at human rights protection, such as *habeas corpus,* are implemented.