

THE FIGHT AGAINST TERRORISM AND DEROGATIONS TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract: *This article discusses the impact of terrorism on human rights. The article explains that effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of States' duty to protect individuals within their jurisdiction. The attention is paid to the derogation to the European Convention on Human Rights in the face of terrorism and jurisprudence of the European Court of Human Rights.*

Keywords: *derogation, European Convention on Human Rights, terrorism, obligations.*

БОРБАТА СРЕЩУ ТЕРОРИЗМА И ДЕРОГАЦИИТЕ ОТ РАЗПОРЕДБИТЕ НА ЕВРОПЕЙСКАТА КОНВЕНЦИЯ ЗА ПРАВАТА НА ЧОВЕКА

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Резюме: *Тази статия разглежда въздействието на тероризма върху правата на човека. Статията обяснява, че ефективните мерки за борба с тероризма и защитата на правата на човека са взаимно допълващи се и взаимно подкрепящи се цели, които трябва да се преследват заедно като част от задължението на държавите да защитават лицата в рамките на тяхната юрисдикция. Обръща се внимание на дерогацията от разпоредбите на Европейската конвенция за правата на човека по отношение на тероризма и съдебната практика на Европейския съд по правата на човека.*

Ключови думи: *дерогация, Европейска конвенция за правата на човека, тероризъм, задължения.*

Abbreviations

CE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
PACE	Parliamentary Assembly of the Council of Europe

Introduction

The tragic events of 11 September 2001 have led to a dramatic change in the perception of international terrorism. It soon became clear that the so-called ‘war on terrorism’ will be one of the defining conflicts of the 21st century. Governments around the world answered by enacting new legislation as part of their campaign to combat international terrorism.¹

So, I will start from the position that combating terrorism requires a comprehensive, multi-agency approach involving all available capacities. Generally speaking the democratic institutions, and the safety of the population, are vital public and private interests that deserve protection. Additionally, states are even obliged to provide protection and also have to reconcile their actions in fighting terrorism with their obligation to respect human rights.

Let me point out that the terrorists do not view themselves as “terrorists”, they see themselves as warriors, freedom-fighters, or revolutionaries.² The 22nd March 2016 bomb attacks in Brussels have once again highlighted the security risk Europe faces from terrorism³. Security and safety have been one of the most basic needs of the human-beings since ancient times. Real security means that everybody in society can exercise his or her basic human rights without being threatened by violence. Maintaining security is meant to be in the interest of ensuring human rights, and thus should respect those rights. State security and fundamental rights are, consequently, not competitive values, they are each other's precondition. In the long run, security is best protected by the enhancement and not by a weakening of the rule of law, democratic principles and the protection of human rights.⁴

¹ See Michaelsen, Christopher, *Derogating from International Human Rights Obligations in the ‘War Against Terrorism’? — A British–Australian Perspective*, (2005), p. 118.

² Brannan, David W. and Strindberg, N.T. Anders, *Critical Analysis of Terrorism and Terrorist Groups*, 2012 ” p. 30.

³ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL, delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union, Brussels, 20.4.2016 COM(2016) 230 final, p. 2.

⁴ See the eighth paragraph of the Preamble of the Council of Europe Convention on the Prevention of Terrorism, CETS No. 196: "Recalling the need to strengthen the fight against terrorism and reaffirming that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms as well as other provisions of international law, including, where applicable, international humanitarian law". See also CDL-AD(2007)016, Report on the Democratic Oversight of the Security Services “The protection of internal security must include the protection of the fundamental values of the State which, for a liberal democratic State,

The impact of terrorism on human rights

My account continues with the very first principle in the ‘Guidelines on Human Rights and the Fight against Terrorism’, adopted by the Committee of Ministers of the Council of Europe, which is ‘States’ obligations to protect everyone against terrorism.⁵ Terrorism clearly has a very real and direct impact on human rights. Terrorist attacks in the EU are a real and serious danger. In my opinion, one of the central features of the impact of terrorism is to strike when society as a target thinks that it is secure.

Terrorism is a scourge which has affected many countries. It has claimed the lives of many innocent people and it goes against fundamental democratic values and human rights starting with the right to life, which all States bound by the ECHR have a duty to protect.⁶ It is also important to be noted that to prevent terrorism, States may take measures that, for instance, interfere with the right to respect for private life, freedom of expression or association.

Despite scholarly and professional efforts to devise ways to prevent terror attacks, terrorism will certainly remain an effective strategic practice globally for many years to come, if not forever.⁷ For instance, the terrorist incidents in France and Belgium indicate that terrorists continue to target crowded places because they usually afford the potential for mass fatalities and casualties. For terrorists, impact, symbolism, and dramatic effect are all essential ingredients to a successful attack.⁸ Terrorism has a direct impact on the enjoyment of a number of human rights, in particular, the rights to life, liberty and physical integrity.

In order to fulfil their obligations under ECHR to protect the life and security of individuals under their jurisdiction, States have a right and a duty to take effective counter-terrorism measures, to prevent and deter future terrorist attacks and to prosecute those that are responsible for carrying out such acts. At the same time, the countering of terrorism poses grave challenges to the protection and promotion of human rights. As part of States

means inter alia democracy and human rights: However, in practice, the values of freedom and security can easily be perceived as opposing values” § 58.

⁵ Committee of Ministers, Council of Europe, Guidelines on Human Rights and the Fight against Terrorism (2002), at 20.

⁶ Article 1 of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002.

⁷ Mueller, John, “Six Rather Unusual Propositions about Terrorism,” *Terrorism and Political Violence* 4, no. 17 (2005).

⁸ Toohey, “Terrorism,” 432.

duty to protect citizens, all measures taken to combat terrorism must themselves also comply with States' obligations under ECHR.

To sum up the analysis of the paragraph above, effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of States' duty to protect individuals within their jurisdiction.⁹

Derogations from human rights: conditions of application and limitations

My account continues with a discussion of the conditions of application and limitations of derogations to human rights. The story is a long and complex one and I will try to tell it here only in its bare outlines. First of all, in Europe, the ratification of the ECHR by all European states means that the European Court of Human Rights will have jurisdiction over the striking of a balance between the response to terrorism and the rights of individuals.

Second, the ECHR contains a specific provision which allows states to derogate human rights obligations in exceptional circumstances. Apparently, it seems a contradiction, because ECHR has been drafted with the main purpose of protecting human rights. Article 15 ECHR¹⁰ constitutes the legal foundation which allows States to derogate from most of their obligations under the ECHR "*in time of war or other public emergency threatening the life of the nation*". In my opinion, a state of emergency must be understood as a truly exceptional, temporary measure to which may be resorted only if there is a genuine threat to the life of the nation.

From my perspective, the words "in time of war or other public emergency threatening the life of the nation" refer to an exceptional situation

⁹ Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counter-terrorism, Fact Sheet No. 32, Printed at United Nations, Geneva ISSN 1014-5567 GE.08-41872-July 2008-7,820, p. 19.

¹⁰ Article 15 ECHR reads:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law.
2. No derogations from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

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.

This provision enables a State to unilaterally derogate from some of its obligations to the ECHR in certain exceptional circumstances and has been used by certain States in the context of terrorism. Article 15 serves as a kind of emergency button, making it possible for States and governments to switch from an ordinary level of human rights protection to a lower, emergency level of protection.¹¹

It is important to be noted that some rights are declared non-derogable by Article 15¹². These are so-called absolute rights: the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and of slavery. Even before invoking Article 15, States can restrict most Convention rights, those which are not regarded as absolute, on certain grounds. This includes emergency situations, such as for instance, a threat of an imminent terrorist attack, but is not limited to such situations. States enjoy what the Court has called a wide margin of appreciation, in other words, wide discretion, to balance the rights of individuals against the interests of national security¹³.

It must be clarified that derogations are considered an *extrema ratio* instrument for the restoration of peace and order.¹⁴ It goes without saying that the state parties may not derogate from the entire ECHR, they may legally suspend their obligation to respect and enforce specific rights contained in the convention during times of ‘war or other public emergency threatening the life of the nation’.

In other words, not all rights enshrined in the ECHR are absolute. But even during the gravest of emergencies, a number of rights are strictly ‘non-derogable’ on the grounds that they are too fundamental and too precious to be dispensed with.¹⁵

In addition, the state is bound by the principle of proportionality in that the measures taken must be “strictly required by the exigencies of the situation” and Article 15 para 2 provides that there can be no derogation

¹¹ Jan-Peter Loop, CRISIS SITUATIONS, COUNTER TERRORISM AND DEROGATION FROM THE EUROPEAN CONVENTION OF HUMAN RIGHTS A Threat Analysis, p.37, In: Antoine Buyse (ed.), *Margins Of Conflict. The ECHR and Transitions to and From Armed Conflict* (Series on Transnational Justice, no. 5), Antwerp-Cambridge-Portland: Intersentia 2010.

¹² Cf. for example, *EtCHR, Aksoy v. Turkey*, Judgment of 18 December 1996, § 62.

¹³ *Leander v. Sweden*, 9248/81, § 59, 26 March 1987.

¹⁴ *di Martina Elvira Salerno*, In the fight against terrorism, does Article 15 of the ECHR constitute an effective limitation to states’ power to derogate from their human rights obligations?, *Giurisprudenza penale* (2016), <http://www.giurisprudenzapenale.com>.

¹⁵ See Michaelsen, Christopher, *Derogating from International Human Rights Obligations in the ‘War Against Terrorism’? — A British–Australian Perspective*, (2005).

from the right to life or from the Article 3 prohibition of torture, inhuman and degrading treatment or punishment, the Article 4 prohibition of slavery and the principle of the non-retroactivity of the criminal law under Article 7. All of the above-mentioned conditions in Article 15 are reviewable by the Strasbourg Court.¹⁶

Derogation to the European convention on human rights in the face of terrorism

In the European context, counter-terrorism measures can be legally justified by invoking derogation from the European Convention on Human Rights.¹⁷ From my perspective, terrorism today is a complex and global problem, not necessarily a localised and domestic one. It is also important to mention that, the need to respect human rights is not an obstacle to the effective fight against terrorism. As the US coordinator for counterterrorism, ambassador Francis X. Taylor pointed out, ‘small cells of terrorists have become true transnational threats – thriving around the world without any single state sponsor or home base’.¹⁸ In other words, nowadays the threat scenario is much more diffuse, abstract and complex.

When the Roman Senate determined that a grave emergency existed and that ordinary methods were inadequate to secure the safety of the Republic it would propose that the Consuls appoint a Dictator. This has been described as an elective tyranny. The arguments for electing a dictator rested on what is essentially the justification for a modern-day derogation from the ECHR. With traditional Roman wisdom, the constitutional lawyers of the day also recognised that there were inherent dangers in conferring such a large amount of power on one political figure. Important safeguards against abuse or excess of power were regarded as essential.¹⁹

It should also be noted that the phenomenon of terrorism was not contemplated when the ECHR was drafted in the aftermath of World War II. But most of the cases that have reached the ECtHR on Article 15 have concerned threats to internal security arising from acts of terrorism. Bearing in mind that the fight against terrorism does not give States carte blanche to interfere with the rights of those within their jurisdiction. Governments will

¹⁶ O’Boyle, Michael, Emergency Government and Derogation under the ECHR (Lecture given to the Law Society, Dublin, on 15 March 2016), p. 5.

¹⁷ Lehmann, Julian M., Limits to Counter-Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights, p. 1.

¹⁸ Taylor, Francis X, Address to the Institute for National Strategic Studies, National Defense University, Washington DC, 23 Oct. 2002. Also available at <http://www.state.gov/s/ct/rls/rm/14570pf.htm>. (emphasis added).

¹⁹ O’Boyle, Michael, Emergency Government and Derogation under the ECHR (Lecture given to the Law Society, Dublin, on 15 March 2016), p. 3.

always need to demonstrate that the measures that they have taken to combat terrorism were justified on one or more of the grounds set out in the Convention text, or as interpreted by the Court in its judgments.²⁰

We must also not forget that on 24 November 2015 the French authorities notified the Secretary General of the Council of Europe (CE) under Article 15 of the ECHR that France was derogating from the Convention. The Notice of derogation referred to the large scale terrorist attack that took place on 13 November 2015 in the Paris region. In addition, the Government had decided by Decree to declare a state of emergency and later extended it by three months. The Notice of derogation has since been forwarded by the Secretary-General to all the other member states of the CE.

It is also important to be noted that the events in Paris remind us that there exist real threats to our democratic way of life with an enemy that is capable of striking randomly at civilian targets. But a former President of PACE, *Anne Brasseur*, reacted to the prospects of the French state of emergency with a cautionary warning: “We have to be honest and clear: there is no free society without threats to security. Human rights should not be sacrificed on the altar of the fight against terrorism – this is precisely what the terrorists want! We must not give this to them”.²¹

On 21st July 2016, the Secretary-General of the Council of Europe has been informed by the Turkish authorities that Turkey will notify a derogation from the ECHR under Art. 15 of the Convention.²² In that case, we must not forget that the ECHR will continue to apply in Turkey. Where the Government seeks to invoke Art. 15 in order to derogate from the Convention in individual cases, the ECtHR will decide whether the application meets the criteria set out in the Convention, notably the criteria of proportionality of the measure taken.

Jurisprudence of the European Court of Human Rights

It must be noticed that the role of the European Court’s jurisprudence involving Article 15 is crucial. I am not going to go through all jurisprudence of the ECHR on terrorism. But I want to draw attention to certain strengths and weaknesses of the practice. The principal achievement, it seems to me, is that the Court has been able to elaborate an increasingly extensive view of human rights obligations of the states but one which possesses sufficient

²⁰ See <http://hudoc.echr.coe.int>.

²¹ See <http://website-pace.net/web/apce/anne-brasseur>.

²² See the news release published on the Council of Europe website on 21 July 2016. See also the communication related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 25 July 2016.

flexibility that states have seldom found the need to have recourse to the emergency derogation provision in Art. 15.²³

The ECtHR has recognized to each state a margin of discretion to assess whether a state of emergency exists and whether the derogation measures imposed are proportionate.²⁴ States have freedom of action in case of emergency, but the pretext of the urgency to take counter-terrorist actions cannot justify an abuse of power. From my perspective, the cases in Strasbourg do not go all one way because the ECHR sets a minimum standard of protection, states sometimes have a margin to depart from their ordinary standards of rights protection before they reach the floor established by the Convention.

In a limited set of circumstances, such as a public emergency which threatens the life of the nation, States may take measures to derogate from certain human rights provisions under the ECHR. We must also not forget that past and recent history demonstrate that States face serious challenges from terrorism and the violence it spawns and that they are frequently required to take exceptionally stringent measures in response. As the Court stated in one of its judgments, a State cannot be required “to wait for disaster to strike before taking measures to deal with it”²⁵.

When examining whether anti-terrorism measures comply with or violate the Convention, the ECtHR looks carefully at all the circumstances of the case. The ECtHR primary concern when examining the proportionality of derogations in emergency situations is to see whether there are adequate safeguards against abuse. In recent years, however, the measures adopted by States to counter terrorism have themselves often posed serious challenges to human rights and the rule of law.

According to Art. 8 of the ECHR, everyone has the right to respect for his or her private life. However, the fight against terrorism permits the use of special surveillance methods in order to collect information which might help prevent terrorist acts or aid in the arrest and prosecution of suspected terrorists. In *Klass and others v Germany* (1978) 2 EHRR 214, although the Court acknowledged a margin of appreciation to domestic authorities when taking counter-terrorism actions, it specified that this discretion is not limitless. Indeed, ‘Contracting states may not, in the name of the struggle against espionage and terrorism, adopt whatever measures

²³ Warbrick, Colin, The European Response to Terrorism in an Age of Human Rights, EJIL (2004), Vol. 15 No. 5, 989–1018, p. 11.

²⁴ di Martina Elvira Salerno, In the fight against terrorism, does Article 15 of the ECHR constitute an effective limitation to states’ power to derogate from their human rights obligations?, p. 7.

²⁵ A. and Others v. the United Kingdom [GC], 3455/05, § 177, ECHR 2009.

they deem appropriate'²⁶. With regard to the gap that there may be between legislation and practice, the applicants in the *Klass* case invoked the danger of abuse as a ground for their contention that the legislation they challenged did not fulfil the requirements of Article 8 § 2.

Additionally, in *A. and Others v. the United Kingdom* [GC²⁷], the Court took the view that, in choosing, in order to avert a real and imminent threat of terrorist attack (post-11 September), to use an immigration measure to address what was essentially a security issue, the Government and Parliament had failed adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists.

In the case *Labsi v. Slovakia* the Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment), Article 13 (right to an effective remedy) and Article 34 (right of individual petition) of the Convention. It found in particular that terrorist suspects faced a serious risk of ill-treatment in Algeria at the relevant time and that the applicant's expulsion, in disregard of an interim measure issued by the Court, had prevented it from properly examining his complaints.²⁸

In a number of cases, the Court has thus taken the view that, although a State had relied on a derogation based on Art.15, the measures adopted, were not ultimately "necessary" to deal with the emergency threatening the nation. Thus, in the case of *Aksoy v. Turkey*²⁹, the Government had not adduced any detailed reasons before the ECtHR as to why the fight against terrorism in southeastern Turkey rendered judicial intervention impracticable. Although the Court took the view that the investigation of terrorist offences undoubtedly presented the authorities with special problems, concluded that it could not accept that it was necessary to hold a suspect for 14 days without judicial intervention.

To briefly summarize what has been said so far when analysing the different cases the ECtHR has taken into account the existence, in the domestic legislation, of adequate safeguards, in order to prevent that the suspension of the enjoyment of certain rights and procedural guarantees, may result in an abuse of power. Moreover, what the ECtHR does is to evaluate

²⁶ *Klass*, para 49.

²⁷ *A. et autres c. Royaume-Uni* [GC], no 3455/05, CEDH 2009.

²⁸ This case concerned the expulsion of an Algerian man, convicted in France of preparing a terrorist act, from Slovakia following his unsuccessful asylum request. The applicant was expelled to Algeria in April 2010, despite the fact that the Court had issued an interim measure in 2008, under Rule 39 of its Rules of Court, to the effect that he should not be extradited to Algeria before the final outcome of his asylum case before the Slovakian Constitutional Court.

²⁹ *Aksoy c. Turquie*, 18 décembre 1996, Recueil des arrêts et décisions 1996-VI.

the suitability of the measures and whether they have been adequately applied in the instant case.

These are just a few of the many cases dealing with the issue of the restriction and derogation of human rights in the face of terrorism. To sum up the analysis of the paragraphs above, from my perspective, the debate is still open.

Conclusion

In my opinion, the fight against terrorism has become a top priority for everyone following the terrorist attacks in recent years. For purposes of this essay, I assume that respect for human rights and the rule of law must be the bedrock of the global fight against terrorism. This requires the development of national counter-terrorism strategies that seek to prevent acts of terrorism, prosecute those responsible for such criminal acts, and promote and protect human rights and the rule of law.³⁰

It is well-established that the derogation clauses in ECHR are considered indispensable in the fight against terrorism, to guarantee minimum standards for the human rights protection and to prevent the right to derogate from being used arbitrarily by states. But let us be clear that in crises, such as those brought about by terrorism, respect for human rights is even more significant.

As I have mentioned above, because terrorism has a serious impact on a range of fundamental human rights, states have not only a right but a duty to take effective counter-terrorism measures. In their fight against terrorism, they are required to strike a balance between their duty to protect national security and the lives of those within their jurisdiction and their obligation to respect other rights and freedoms guaranteed by the ECHR. Also, states have an obligation to ensure the human rights of their nationals and others by taking positive measures to protect them against the threat of terrorist acts and bringing the perpetrators of such acts to justice.

If we sum up all, in an era where terrorism and other serious crime operate across borders, States have a responsibility towards their citizens to deliver an area of internal security where individuals are protected, in full compliance with EU fundamental rights.

³⁰ Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counter-terrorism, Fact Sheet No. 32, Printed at United Nations, Geneva ISSN 1014-5567 GE.08-41872–July 2008–7,820, p. 2.

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