



Bringing the Convention closer to home
La Convention à votre porte

Terrorism¹

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1. Key notions on terrorism and the ECHR

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 Convention have a duty to protect². Governments, police, secret police and the courts have been at the forefront of fighting terrorism, but how can they do this and make sure they respect their own human rights obligations? Would it be right to torture suspects in order to obtain information? What about surveillance of telephone calls and emails? Should a government be able to cancel elections, close down newspapers or hold trials in secret?

These are the kinds of questions the European Court of Human Rights has had to answer in its work of upholding the European Convention on Human Rights in the signatory countries. Indeed, the Court's very first judgment³, in 1960, concerned a man who had been detained under special anti-terrorism powers in Ireland. As you will see, the Court's judgments demonstrate that States have to reconcile their actions in fighting terrorism with their obligation to respect human rights.

Let me point out that the Convention does give States some leeway to deal with what is regarded as emergency situations. This is to be found in Article 15, which allows States to derogate from certain

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The contents of this text do not bind the Court.

² 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

³ *Lawless v. Ireland*, 332/57, 14 November 1960

obligations. This can be done “in time of war or other public emergency threatening the life of the nation”. Any measures can only be to the extent strictly required by the situation and have to be consistent with a State’s other obligations under international law.

However, and to answer one of the questions raised earlier, there are certain rights which cannot be overridden, including the right not to be subjected to torture or other forms of ill-treatment, as guaranteed by Article 3. This is one of the rights considered as absolute by the Convention and no derogation is possible under any circumstances⁴.

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 security⁵.

As will be shown in this presentation, the fight against terrorism does not give States carte blanche to interfere with the rights of those within their jurisdiction. Governments will 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.

Let’s now have a look at some key cases involving issues related to terrorism.

2. Prevention of terrorism

To prevent terrorism, States may take measures that, for instance, interfere with the right to respect for private life, freedom of expression or association, or the right to free elections.

Article 8 of the Convention says 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.

As early as the 1970s, the Court accepted that legislation granting powers of secret surveillance over post, mail and telecommunications was, in exceptional circumstances, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime⁶. More recently, the Court found that the surveillance of suspected terrorists using a global positioning system (GPS) did not violate their right to privacy as guaranteed by Article 8⁷. In that case the Court was satisfied that adequate safeguards were in place to prevent the arbitrary use of such methods.

On the other hand, powers granted to the police under special anti-terrorist legislation to stop and search people without any reasonable grounds to suspect them of an offence were found to breach the applicants’ right to respect for their private life⁸. In that case the discretion conferred to the police was too broad and was not accompanied by adequate legal safeguards against abuse.

⁴ *Öcalan v. Turkey* [GC], [46221/99](#), § 179, ECHR 2005-IV and *A. and Others v. the United Kingdom* [GC], [3455/05](#), § 126, ECHR 2009

⁵ *Leander v. Sweden*, [9248/81](#), § 59, 26 March 1987

⁶ *Klass and Others v. Germany*, [5029/71](#), 6 September 1978, Series A, No. 28, § 48

⁷ *Uzun v. Germany*, [35623/05](#), § 80, ECHR 2010 (extracts)

⁸ *Gillan and Quinton v. the United Kingdom*, [4158/05](#), § 87, ECHR 2010 (extracts)

Let's now look at freedom of expression, which is protected by Article 10, in the context of the prevention of terrorism. The Court found that the conviction of journalists for publishing statements made by suspected members of an armed terrorist group, which were seen as an incitement to violence, did not violate the journalists' rights under that provision⁹. Likewise, a moderate fine for complicity in condoning terrorism, which had been imposed on the author of a caricature and provocative caption about the attack on the World Trade Center in 2001, was not found to have breached the author's Article 10 rights. In that case the Court accepted that, given the timing of the publication, just two days after the attack, the author must have been aware of the impact it was likely to have¹⁰.

In another case, suspending the publication of newspapers under special anti-terrorist legislation, even for a relatively short period of time, was found to breach Article 10¹¹. By employing a form of censorship, the domestic courts had, in the Court's view, imposed unjustified limitations on the crucial "watchdog" role of the press.

No violation of Article 10 was found in a case which was brought by a majority shareholder of a weekly newspaper, who had been convicted of disseminating separatist propaganda. The weekly he owned had published strongly-worded readers' letters accusing the authorities of brutal acts of suppression in south-east Turkey. Given the overall context of terrorism in which the texts had been published, and the fact that they were capable of stirring up violence and hatred, the Court accepted that the domestic authorities had given sufficient and relevant reasons for interfering with the applicant's freedom of expression¹².

So what about the prevention of terrorism and freedom of association, which is protected by Article 11, and which includes the rights of political parties and other organisations? Well, one government was found to not have violated that provision when it dissolved political parties whose direct political aims were contrary to the democratic principles of that country's Constitution¹³. In that case, the domestic courts had already found that the political parties in question had been instrumental to a terrorist organisation and that the acts and speeches of their members had not ruled out the use of force in order to achieve their aims.

In another case the Court found no violation of the right to free elections where electoral groups who had pursued illegal party activities and who had been dissolved because of their links with a terrorist organisation, had been excluded from taking part in an election¹⁴. The dissolution of the groups had been proportionate to the aim of the protection of democracy and, given a lack of any arbitrariness on the part of the authorities, had not infringed the free expression of the opinion of the public.

⁹ *Falakaoğlu and Saygılı v. Turkey*, [22147/02](#) and 24972/03, §§ 29-37, 23 January 2007

¹⁰ *Leroy v. France*, [36109/03](#), §§ 36-48, 2 October 2008

¹¹ *Ürper and Others v. Turkey*, [14526/07](#) et al., §§ 44-45, 20 October 2009

¹² *Sürek v. Turkey* (no. 1) [GC], [26682/95](#), §§ 59-65, ECHR 1999-IV

¹³ *Herri Batasuna and Batasuna v. Spain*, [25803/04](#) and 25817/04, §§ 94-95, ECHR 2009

¹⁴ *Etxebarria and Others v. Spain*, [35579/03](#) et al., §§ 51-56, 30 June 2009

Herritarren Zerrenda v. Spain, [43518/04](#), § 43, 30 June 2009

3. Interventions seeking to stop terror attacks

To stop terror attacks, States may be required to use lethal force.

However as mentioned earlier, they are under an obligation to protect everyone's right to life, as guaranteed by Article 2, and this includes the lives of those suspected of terrorism. The use of lethal force in self-defence must be "absolutely necessary" if it is to be justified under that provision. For example, the 1988 killing by British military servicemen of three members of the Irish Republican Army suspected of preparing a bomb attack was found to violate Article 2 since the operation could have been carried out without recourse to lethal force¹⁵.

On the other hand, the death of hostages in a Moscow theatre due to a gas which had been used to neutralise the hostage-takers was not found to violate Article 2¹⁶. Although the gas was dangerous and potentially lethal, it had not been intended to kill. The gas had produced the desired effect on the terrorists, rendering most of them unconscious, had helped in the liberation of the rest of the hostages and had reduced the likelihood of an explosion. However, in that case the Court found separately that Russia had failed to comply with their positive obligations under Article 2 as the operation to rescue some 900 hostages had been insufficiently prepared.

4. Arrest and pre-trial detention of terrorist suspects

The arrest or pre-trial detention of suspected terrorists must be in conformity with their right to liberty and security, as guaranteed by Article 5.

In the first place, there must be reasonable grounds to suspect someone of terrorism if his or her arrest is to be justified under that provision¹⁷. However, the police may frequently need to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting the source of the information in jeopardy, be revealed to the suspect or produced in court. The Court has therefore held that Article 5 § 1 of the Convention should not be construed so as to put a disproportionate burden on the authorities when taking effective measures to counter terrorism in order to discharge their obligation under the Convention to protect life¹⁸.

However, in a case against the United Kingdom, the Court ruled that the indefinite detention on national security grounds of foreign nationals suspected of terrorism, when those people could not be deported as they risked ill-treatment in the receiving country, was contrary to Article 5¹⁹. To allow that type of detention, Britain had claimed a derogation under Article 15, which we looked at earlier, but the measure was found to have unjustifiably discriminated between British and foreign nationals.

In general, the length of detention of a suspected terrorist should not exceed a reasonable time. Accordingly, the pre-trial detention of detainees accused of belonging to a Basque terrorist

¹⁵ *McCann and Others v. the United Kingdom* [GC], [18984/91](#), 27 September 1995, § 213, Series A no. 324

¹⁶ *Finogenov and Others v. Russia*, [18299/03](#) and 27311/03, ECHR 2011 (extracts)

¹⁷ *Fox, Campbell and Hartley v. the United Kingdom*, [12244/86](#), 12245/86 and 12383/86, 30 August 1990, Series A no. 182, § 35

¹⁸ *O'Hara v. the United Kingdom*, [37555/97](#), § 35, ECHR 2001-X, *Sher and Others v. the United Kingdom*, [5201/11](#), 20 October 2015 (not final)

¹⁹ *A. and Others v. the United Kingdom* [GC], [3455/05](#), § 190, ECHR 2009

organisation for between four and a half and almost six years was found to be contrary to Article 5 § 3²⁰.

Article 5 § 4 guarantees the right of those suspected of terrorism to have the lawfulness of that detention reviewed speedily. The absence of such a review led to the finding of a violation of that provision in the case of an Iraqi national suspected of having links with Al-Qaeda who had been detained in a closed transit centre pending deportation from Belgium²¹.

States must also respect the procedural guarantees of review. No violation of Article 5 § 4 was found in a case concerning the withholding on national security grounds of material related to the lawfulness of the detention of foreign nationals suspected of terrorism²². In that case, the procedural requirement of review was satisfied as the non-secret material against five of the applicants had been sufficiently detailed to enable an effective challenge of the lawfulness of the applicants' detention.

5. Criminal proceedings against terrorist suspects

Just like anyone else facing criminal charges, suspected terrorists have the right to a fair trial, as guaranteed by Article 6.

In the first place, security or public order concerns cannot justify a violation of the right of the accused to remain silent and to not incriminate himself or herself²³.

The Court found that a statement which the police had obtained from a minor, who had been arrested on suspicion of aiding and abetting a terrorist organisation and who had been denied access to a lawyer during police custody, could not be used as evidence against him²⁴.

In another case, prohibiting a detainee's access to a lawyer for almost seven days, limiting the number and duration of their meetings and preventing them from taking place in private was also found to violate Article 6 § 3 (c) of the Convention²⁵.

Moreover, the use in criminal proceedings of statements which were obtained through torture or any other form of ill-treatment renders the proceedings as a whole automatically unfair, that is, contrary to Article 6²⁶. This applies not only where the victim of the treatment contrary to Article 3 is the actual defendant, but also where third parties are concerned.

For instance, the Court ruled that the expulsion of an applicant from the United Kingdom to Jordan, where he had been convicted in his absence of various terrorist offences, would violate his right to a fair trial. This was because there was a real risk that evidence obtained through the torture of other people would be admitted against him in a retrial in Jordan²⁷.

²⁰ *Berasategi v. France*, [29095/09](#), 26 January 2012; *Esparza Luri v. France*, [29119/09](#), 26 January 2012; *Guimon Esparza v. France*, [29116/09](#), 26 January 2012; *Sagarzazu v. France*, [29109/09](#), 26 January 2012 and *Soria Valderrama v. France*, [29101/09](#), 26 January 2012

²¹ *M.S. v. Belgium*, [50012/08](#), § 166, 31 January 2012

²² *A. and Others v. the United Kingdom* [GC], [3455/05](#), § 220-222, ECHR 2009

²³ *Heaney and McGuinness v. Ireland*, 34720/97, § 58, ECHR 2000-XII

²⁴ *Salduz v. Turkey* [GC], [36391/02](#), §§ 62-63, ECHR 2008

²⁵ *Öcalan v. Turkey* [GC], [46221/99](#), §§ 148, CEDH 2005-IV

²⁶ *Gäfgen v. Germany* [GC], [22978/05](#), § 187, 1 June 2010

²⁷ *Othman (Abu Qatada) v. United Kingdom*, [8139/09](#), §§ 285 and 287, ECHR 2012

Another example is the case of a Moroccan national arrested and prosecuted in Belgium for taking part in terrorist activities. The Court found that the incriminating statements, which had been obtained from a witness in a third country, should not have been admitted into evidence by the Belgian courts without first ascertaining whether the witness in question had been subjected to treatment contrary to Article 3, as had been claimed by the applicant in that case²⁸.

6. Treatment of suspected or convicted terrorists while in detention

Suspected terrorists in pre-trial detention also have to be treated in a way which is not contrary to Article 3 and, as mentioned earlier, its absolute ban on torture and inhuman and degrading treatment. The use of certain interrogation techniques such as hooding, the deprivation of sleep, food and water, or subjecting someone to noise, has been found to be incompatible with Article 3 in view of the intense physical and mental suffering they cause to the victims²⁹.

Convicted terrorists enjoy the same protection against treatment contrary to Article 3 while in prison. For example, the full body searches, including the most intimate parts of the person, to which a convicted terrorist was subjected after each prison visit for over two years were considered to constitute degrading treatment³⁰.

However no violation of Article 3 was found in the case of a dangerous international terrorist who had been sentenced to life imprisonment and had been kept in solitary confinement for eight years³¹. In that case the Court decided that his overall conditions of detention had not been severe enough to amount to inhuman or degrading treatment as it took into account the physical conditions of the applicant's detention, the fact that he had not been in complete isolation, and also his character and the danger he posed.

In the case of another detained terrorist, the Court held that a lack of communication facilities coupled with major difficulties with access to the prison for his visitors amounted to inhuman treatment³². However, an increase in activities with other detainees and in the frequency of family visits was found to have made his subsequent detention compatible with Article 3.

7. Expelling or extraditing suspected or convicted terrorists

Where there is a real risk of a suspected or convicted terrorist being subjected to ill-treatment in another State, the prohibition on a return to that country is absolute, regardless of his or her past offences or conduct³³.

For example, the Court ruled that enforcing a decision to deport a terrorist to Tunisia, where he had been convicted in his absence, would violate his Article 3 rights since the Italian Government had not been provided with sufficient diplomatic assurances that the applicant would not risk treatment prohibited by the Convention³⁴.

²⁸ *El Haski v. Belgium*, [649/08](#), § 99, 25 September 2012

²⁹ *Ireland v. the United Kingdom*, [5310/71](#), judgment of 18 January 1978, Series A no. 25, § 168

³⁰ *Frérot v. France*, [70204/01](#), §§ 47-48, 12 June 2007

³¹ *Ramirez Sanchez v. France* [GC], [59450/00](#), § 150, ECHR 2006-IX

³² *Öcalan v. Turkey* (no. 2), [24069/03](#) et al., 18 March 2014

³³ *Saadi v. Italy* [GC], [37201/06](#), ECHR 2008

³⁴ *Saadi v. Italy* [GC], [37201/06](#), § 147-149, ECHR 2008

The Court has also been faced with cases where respondent States extradited or deported suspected terrorists, despite an indication from the Court to the Government concerned under Rule 39 of the Rules of Court to refrain from doing so until it had had an opportunity to examine the merits of the applicant's complaints. For example, the Court found a violation of Article 3 and Article 34 where an applicant, a Tunisian national, had been extradited, despite a ruling under Rule 39 by this Court, from Belgium to the United States – where he faced life imprisonment for terrorist offences which could not be regarded as reducible under of the Convention³⁵.

8. “Extraordinary renditions” of terrorist suspects

In recent years, certain States have been involved in what is called the "extraordinary rendition" of suspected terrorists. Also known as "extrajudicial transfer", it is a measure which involves the transfer of a person from one jurisdiction or State to another, for the purposes of detention and interrogation outside the ordinary legal system. It is absolutely incompatible with the rule of law and the values protected by the Convention because of its deliberate disregard of the guarantees of due process³⁶.

For instance, the Court found a violation of Article 5 in the case of the unlawful detention of a German national of Lebanese origin who had been suspected of having links with terrorists and who had been the subject of an "extraordinary rendition". In particular, he had been handed over to agents of the Central Intelligence Agency of the United States (CIA), who had been operating at the time in "the former Yugoslav Republic of Macedonia"³⁷. In that case, the Court also found a violation of Article 3 on account of the torture and inhuman and degrading treatment to which he had been subjected while in detention.

Breaches of four Articles of the Convention, Articles 2, 3, 5 and 6, were found in the case of a suspected terrorist, who had been handed over to CIA agents operating in Poland and who had been detained at the United States naval base in Guantánamo Bay in Cuba following an "extraordinary rendition"³⁸. In its judgment, the Court also required Poland to seek assurances from the United States authorities that the applicant would not be sentenced to death following his "extraordinary rendition".

9. Final remarks on terrorism and the ECHR

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"³⁹.

As has been shown in this presentation, in their fight against terrorism, States 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 Convention.

³⁵ *Trabelsi v. Belgium*, [140/10](#), §§ 121-139 and 144-154, 4 September 2014

³⁶ *Babar Ahmad and Others v. the United Kingdom* (dec.), [24027/07](#), 11949/08 and 36742/08, § 114, 6 July 2010

³⁷ *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], [39630/09](#), ECHR 2012

³⁸ *Al Nashiri v. Poland*, [28761/11](#), §§ 518-519, 24 July 2014

³⁹ *A. and Others v. the United Kingdom* [GC], [3455/05](#), § 177, ECHR 2009

When examining whether anti-terrorism measures comply with or violate the Convention, the Court looks carefully at all the circumstances of the case. This kind of scrutiny, at the European level, is to help make sure that the fight against terrorism and the protection of human rights can co-exist.

All the cases referred to in this presentation can be found in the HUDOC database⁴⁰. Further information is available on the Court's website⁴¹ and in the relevant training materials of HELP⁴², the Council of Europe's Programme on Human Rights Education for Legal Professionals.

⁴⁰ <http://hudoc.echr.coe.int>

⁴¹ www.echr.coe.int

⁴² www.coe.int/help