

Originalan naučni rad
UDK 323.28:342.7
Primljeno: 17.09.2014.
Odobreno: 25.10.2014.

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BASES AND LIMITS TO FIGHTING TERRORISM AS SET BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

This paper aims to consider how European Convention on Human Rights affects counter-terrorism efforts of EU states, both in terms of legal base for fighting terrorism and of legal limits posed to this fight. EU states must follow a rather narrow and difficult path between the states' obligation to actively protect the human rights and fundamental freedoms as well as important elements of the public security and the prohibition to violate these rights and freedoms, which, sometimes, poses limits to counter-terrorism operations. Paper will also discuss relation between European Convention on Human Rights and various international conventions, ratified by EU states, related to the fight against terrorism.

Key words: terrorism, EU, European Convention on Human Rights, international conventions, human rights

INTRODUCTORY REMARKS

If you click on the website of the European Court of Human Rights (ECtHR) Judgment Collection¹ under “terrorism” between 16 May 2007 and today, i.e. for a period of exactly 5 years, you get a list of cases exceeding 100! This is on the one hand side due to the extremely high political, social and legal importance of fighting terrorism, on the other side the result of a rather narrow and difficult path between the states' *obligation to actively protect* the human rights and fundamental freedoms as well as important elements of the public security and *the prohibition to violate* these rights and freedoms in the mean time. It is the noble duty of all

¹ URL: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click HUDOC collection!)

Council of Europe Member States having ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR, and basically of all countries which have agreed to the International Covenant on Civil and Political Rights²) to permanently strive to excel in fulfilling this delicate task.

The council of Europe has adopted four international law conventions relating to the fight against terrorism of which three are in force³. On the global level there are – as far as I see – 14 multilateral conventions aiming at the prevention and suppression of, as well as the international cooperation to investigate, terrorist acts. It is obvious that I will not be able in this short time to go into great depth for each of the questions at stake. I will address first some general topics and then follow a series of particular issues as dealt with by the Strasbourg Court interpreting the most prominent articles of the ECHR.

THE TERM “TERRORISM”

The first big question arises from the term “terrorism”. What falls under the scope of a legal definition of this colloquially “clear” and frequently used word?

There is *no worded definition!* It is the *summary of different international law conventions* focusing on particular criminal activities (including financing such criminal endeavours) linked to – what is to be defined: Art. 1 of the Council of Europe convention on the Prevention of Terrorism⁴ reads as follows:

2 Adopted by the United Nations General Assembly on 16 December 1966, in force since 23 March 1976 (in Serbia in force since 27 April 1992).

3 European Convention on the Suppression of Terrorism (CETS 090; 27 January 1977), Council of Europe Convention on the Prevention of Terrorism (CETS 196; 16 May 2005), Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198; 16 May 2005); not in force: Protocol amending the Convention on the Suppression of Terrorism (CETS 190; 15 May 2003).

4 CETS 198 (FN 3).

„Article 1 – Terminology

1. For the purposes of this convention, “terrorist offence” means any of the offences within the scope of and as defined in one of the treaties listed in the Appendix.”

The appendix lists – as mentioned – ten UN Conventions⁵⁶.

The last one mentioned in this list is the International Convention for the Suppression of the Financing of Terrorism⁷. In paragraph 2 of art. 2 it adds a supplementary definition of a criminal act to be considered as part of terrorism:

“(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”

Yet, a most important element for a definition is integrated in the first European Convention on the Suppression of Terrorism⁸, it is a negation:

“Article 1

5 “1 Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;

2 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971;

3 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on 14 December 1973;

4 International Convention Against the Taking of Hostages, adopted in New York on 17 December 1979;

5 Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980;

6 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988;

7 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988;

8 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988;

9 International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997;

10 International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999.”

6 Interestingly the International Convention against the Taking of Hostages, 17 December 1979, in force since 3 June 1983 (UR: <http://www.unhcr.org/refworld/docid/3ae6b3ad4.html>, looked up: 12 May 2012) is not among those listed establishing “terrorist acts”.

7 UN Convention, adopted in New York on 9 December 1999.

8 CETS 090 (FN 3).

For the *purposes of extradition* between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:...”⁹

The exclusion of “political” offences or offences connected with a political offence or as “an offence inspired by political motives” *applies only to the extradition issues* but is not to be considered as exemption from the statutory definition of such offences, i.e. the states are free to accept political motives as not fulfilling the necessary subjective statutory element of such a crime¹⁰.

This is certainly a handicap for the fight against terrorism yet also one of the oldest issues of the legitimacy of the state as such and the states monopoly of force; it can be traced back to PLATO, ARISTOTLE AND AUGUSTINE e.g. by the example about the difference by definition between a state and a robber band¹¹. Along this borderline we find still today the distinction between freedom fighter and terrorist.

9 The list that follows is somewhat different from the one of the Convention on the Prevention of Terrorism since it is older. It reads:

“ an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;

an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;

a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;

an offence involving kidnapping, the taking of a hostage or serious unlawful detention;

an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;

an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.”

10 Cf. e.g. art. 260^{quinquies} of the Swiss Criminal code (SR 311):

“³The act does not constitute the financing of a terrorist offence if it is carried out with a view to establishing or re-establishing a democratic regime or a state governed by the rule of law or with a view to exercising or safeguarding human rights.”

11 See e.g. ANDREAS KLEY, Staatliches Gewaltmonopol – Ideengeschichtliche Herkunft und Zukunft, in: Wolfgang Lienemann /Sarah Zwahlen (ed.), Kollektive gewalt, Kulturhistorische Vorlesungen 2003/2004 Collegium generale, Berne 2006, 13 ff.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND OTHER IMPORTANT INTERNATIONAL LAW CONVENTIONS

The ECHR as one of the fundamental reactions¹² to the atrocities of the Nazi and Stalinist regimes as well as the Second World War has had – and still has – its purpose in protecting the people against *illegitimate force, i.e. violence*, applied by states, or more bluntly to ban state terrorism. Unfortunately, this foremost aim has kept being necessary, even crucial. Although lots of progress has since been made with regard to democratisation and the framework of the rule of law there is still – in modern speak – a large potential for improvement as many examples prove. Meanwhile the ECHR has experienced a widening of its meaning with regard to protecting human rights and fundamental freedoms: The dogmatic focus has shifted from the origin or source of violating fundamental rights to these themselves. Still, the negative obligation, the prohibition for the state to violate fundamental rights, is most important. However, with the fundamental rights themselves at the centre of interest, the *positive obligation* of the state *to protect* people from suffering the violation of their fundamental rights by so called “third parties” has been added¹³. And in this context a third function of the fundamental rights has been “amended”: the state’s *obligation to investigate* thoroughly the violation of a fundamental right regardless whether allegedly committed by someone acting on behalf of the state or a private¹⁴. The investigation must be independent¹⁵ and effective, i.e. thorough, aiming at identifying those responsible, accountable for the acts violating fundamental rights. This is an obligation by means applied, not by results¹⁶.

This third function attempts to make the system of protecting the fundamental rights “watertight”. All methods used in fighting terrorism might be scrutinised if there are allegations of a violation of fundamental rights which are not “manifestly ill-founded”. If later “caught” having violated a fundamental right it might be frustrating for the entire law enforcement community if – after a successful

12 Most important are the foundation of the United Nations: Charter of the UN, San Francisco, 26 June 1945, and the Universal Declaration of the Human Rights, Paris, 10 December 1948.

13 Cf. e.g. ECtHR *J.L. v. Latvia* (no. 23893/06), 17 April 2012, § 64; *Shumkova v. Russia* (no. 9296/06), 14 February 2012, §§ 89, 104; *A. v. Croatia* (no. 55164/08), 14 January 2011, § 57.

14 Cf. e.g. *Nitsov v. Russia* (no. 35389/04), 3 May 2012, §§ 56 ff.; *Georgiev v. FYR of Macedonia* (no. 26984/05), 19 April 2012, § 61.

15 ECtHR *Scavuzzo-Hager c. la Suisse* (no. (no.41773/98), 7 May 2006), § 78.

16 Cf. ECtHR *Ramsahai v. The Netherlands* (no. 52391/99), Grand chamber 15 May 2007, §§ 321 ff.

prosecution – the state has to pay a considerable amount to a convicted terrorist for compensation such a violation of e.g. procedural rights¹⁷.

1 Guidelines

Within the framework of the Council of Europe there is an abundance of recommendations and resolutions of the Parliamentary Assembly as well as of the Committee of Ministers. It is impossible to go into any detail¹⁸.

2 The Basic Challenge

The basic challenge in fighting terrorism is precisely the small, steep and difficult path between the obligation to protect people within a state's jurisdiction and not simultaneously violating one of these fundamental rights of the suspects, indicted persons, or prisoners by applied means and methods, treatments or procedural steps¹⁹. It is the concrete aspect of the tension between freedom and security, *freedom as the substance of being a human being*²⁰. In this regard we have to bear in mind that *security is function to preserve freedom* – not vice versa. Of course, it is hugely difficult to observe the strict limits of legal *and* legitimate methods yet in our democratic countries under the rule of law we defend precisely the values of the democracy and the regime of rule of law.

3 The Bases

The most important articles of the ECHR in this context are:

art. 2, right to life

art. 3, prohibition of torture (as well as inhumane or degrading treatment or punishment)

art. 4, prohibition of slavery and forced labour

art. 5, right to liberty and security

art. 6, right to a fair trial

art. 7, no punishment without law

art. 8 right to respect for private and family life

17 See ECtHR Ramirez-Sanchez (known as „Carlos“) v. France (no. 59450/00), 4 July 2006, §§ 167 ff. (France had to pay € 10'000 for costs and expenses [tax-free, with interest], though no moral justification since there was no claim for.)

18 See „Action on Terrorism – Council of Europe activities“ (URL: http://www.coe.int/t/dlapil/codexter/Source/leaflet/leaflet_terrorism_en.pdf; and: http://www.coe.int/t/dlapil/codexter/default_en.asp?expandable=0; both looked up: 10 May 2012).

19 ECtHR Finogenov and others v. Russia (no. 18299/03 and 27311/03), 20 December 2011 (request for referral to Grand Chamber pending).

20 Cf. e.g. JEANNE HERSCH, *Die Hoffnung Mensch zu sein*, 6. Auflage, Zürich 1991, p. 13, 37 ff.

art. 9, freedom thought, conscience and religion

art. 10, freedom of expression

art. 11, freedom of assembly and association,

art. 13, right to an effective remedy

art. 14, prohibition of discrimination.

Art. 3 ECHR in particular is supported by the UN Convention against Torture, Other Cruel, Inhumane or Degrading Treatment or Punishment²¹, amended by an Optional Protocol²² in order “to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment” (art. 1).

The Council of Europe, either, has agreed to the European Convention for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment²³ (also known under the acronym CPT) with the same objective.

4 The Individual Legal Aspects in Identifying the Limits

A short overview on some aspects shall underline how difficult and challenging the task to protect the people within a country’s jurisdiction may be. Only a selection of legal issues primarily linked to the tasks of the police in the fight against terrorism will follow. There are many other questions (e.g. defence rights, fair trial, mutual assistance in criminal matters, extradition) which cannot be covered in this short lecture.

A state’s positive obligations under art. 2 ECHR (to protect life) are, of course, not without limits, or not unqualified. A duty arises only if the *authorities knew or ought to have known at the time of a real and immediate risk to life and the authorities had the concrete possibility to (re)act accordingly* (control of the situation)²⁴.

4.1 Prevention of Terrorism and the Right to Life (art. 2 ECHR)

a) No question, the *duty to prevent terrorist acts* is of highest importance since *existential* rights, life, physical and mental integrity, *human dignity*, freedom as well as – at least in Europe so far²⁵ – most important elements of the public security, the

21 UN, adopted 10 December 1984, in force since 26 June 1987 (in Serbia since 12 March 2001).

22 CETS 126, adopted 18 December 2002, in force since 22 June 2006 (in Serbia since 26 September 2006), amended by 2 Protocols (CETS 151 and 152, both in force as of 1 March 2002) regulating details of the implementation of the Committee.

23 Of 26 November 1987, in force since 1 February 1989 (in Serbia since 1 July 2004).

24 ECtHR *Finogenov and others v. Russia* (FN 19), § 209 (with further references).

25 In other “theatres” atrocious terrorist acts are committed – mostly by alleged religious motives – without an apparent objective of a realistic political change.

sovereignty of the democratically elected authorities are at stake. The destruction of parts of the public security may result itself in violation of individual fundamental rights.

This is the basis, if we take each human right and fundamental freedom, as listed above, separately, then we have the plural, the bases.

Art. 3, paragraph 1, of the International Convention Against the Taking of Hostages²⁶ e.g. reads as follows:

“The State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure.”

b) Of course, these are not, and cannot be, the only legal fundamentals for the fight against terrorism. *The states are obliged to enact the necessary laws.* Again, the ECHR sets standards for the *formal quality* of a law. With regard to the regulation of interferences of fundamental rights, the material aspect, the ECtHR follows – with one exception – the principle of proportionality summarised in the frequently used sentence “*necessary in a democratic society*”.

The *quality of a law* requires that the applied provision to interfere with someone’s fundamental rights must be based on, or at least be directly “traceable” to, a parliamentary legislation, i.e. the law itself must be *in conformity with the ECHR*²⁷. It has to satisfy the *principle of legal certainty*, “it must be *sufficiently accessible, precise and foreseeable in its application*, in order to avoid all risk of arbitrariness”²⁸.

c) Furthermore, the state has to *provide sufficient and capable services* for the accomplishment of this difficult task. The necessary capabilities and capacities need to be made available and implemented for the *planning*, the *operational control (lead)*, the *core action*, i.e. to disable the terrorist perpetrators with the least of the really effective means and methods at disposition by the “front officers”, as well as for the following *effective and efficient assistance* (i.e. evacuation, medical and psychological care etc.) *to all affected by the intervention*²⁹.

d) The entire planning and implementation of the planning must strictly follow the *principle of proportionality*, i.e. those means and methods considered to be

26 Adopted 17 December 1979 (FN 6; in Serbia in force since 12 March 2001).

27 See e.g. ECtHR Lonka Yongeu v. Latvia (no. 57229/09), 12 February 2012, §§ 120 f.

28 Loc.cit.

29 ECtHR Finogenov and others v. Russia (FN 19), §§ 243 ff. and § 263 “...the state’s obligation to “take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life”

effective with the least possible interference with fundamental rights must be chosen³⁰. Paragraph 2 of art. 2 of the ECHR exempts the deadly use of force as a violation of the right to live in paragraph 1 only if it was “*absolutely necessary*”. This is a stricter and more compelling criterion for the necessity than – as used e.g. in several articles³¹ of the ECHR – “necessary in a democratic society”³².

4.2 *Victims of Terrorism*

As mentioned the *real victims* of, or *persons threatened by a real and immediate risk to life* through, terrorist acts have a right to be protected by the state having jurisdiction if the competent authorities knew or ought to have known about at the relevant time³³. The ECtHR judgement³⁴ in the case of the hostage taking by Chechen terrorists in the Dubrovka theatre in Moscow shows in detail what the requirements are in regard to the protection of the victims’ life and limb including the mental health.

4.3 *Reasonable Suspicion (art. 5 ECHR)*

a) A case in England prompted the Strasbourg court to examine whether the Terrorism Act 2000 was in conformity with the ECHR – and came to a negative conclusion³⁵: The Act permitted the police to stop and search people in a before fixed period of time and area *without a suspicion* if a senior officer considered such procedure to be “expedient” and decided accordingly. The court found that “the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse”³⁶.

Even fighting terrorism does not allow deviating from the observation of the relevant ECHR safeguards. The laws and their implementation by the police, i.e. the *bona fide* interpretation of the legal provisions and the assessment of the applicability to the concrete situations are on demand.

b) Obviously, the law enforcement officers if they interfere with someone’s human rights and fundamental freedoms must be sure to target the right person(s). The

30 ECtHR McCann and others v. The United Kingdom (no. 18984/91), 27 September 1995, §§ 205 ff.

31 Art. 8 para. 2, art. 9 para. 2, art. 10 para 2 and 11 para. 2.

32 ECtHR McCann and others v. The United Kingdom (FN 30), § 149.

33 ECtHR Finogenov and others v. Russia (FN19), § 209, ECtHR Osman v. the United Kingdom (no. 87/1997/871/1083), 28 October 1998, § 116.

34 FN 19.

35 ECtHR Gillan and Quinton v. The United Kingdom (no.4158/05), 12 January 2010, §§ 83 ff.

36 Loc. cit., § 87.

stronger the interference the higher the demands! If lethal force is used no legal remedy can bring the dead person back to life. The shooting and killing of a young Brazilian in London's underground will be judged by the ECtHR³⁷.

c) A special problem poses the "black list" of persons adopted and updated by the UN Security Council as part of the fight against Al-Qaïda and the Taliban leading to several restrictions imposed by the respective national authorities. There are cases known for mistakes of names or reasons. Based on the hierarchy of the international law with regard to UNSC sanctions there is no legal remedy available in conformity with art. 13 ECHR. An arrest based on insufficient grounds results in a violation of art. 5 (right to liberty and security) and art. 8 (right to respect for private and family life)³⁸.

4.4 Prompt Judicial Review After Arrest (art. 5 ECHR)

Art. 5 para. 3 provides the right of everyone arrested to be "brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial". "Promptly" means under "normal circumstances" within about 48 hrs. But what "promptness" means is to be assessed in each case according to its complexity. The ECtHR has accepted that terrorist cases present special problems³⁹. But this is no *carte blanche*. In another case⁴⁰ the Court has determined that four days and six hours was not in conformity with the required promptness of art. 5 para. 3 ECHR.

4.5 Ill-Treatment (art. 3 ECHR)

a) One of the most frequent complaints of applicants to the ECtHR in connection with terrorism concerns a violation of art. 3 ECHR, the prohibition of torture, inhuman or degrading treatment or punishment. It is to be noted that the Court judges only whether it came to the conclusion there was a violation of art. 3 and does not differentiate between the differences of the intensity of an ill-treatment except that this treatment needs to be of a certain severity⁴¹.

37 ECtHR *Armani da Silva v. The United Kingdom* (no. 5878/08); *Patricia Armani da Silva* is the cousin of Jean Charles de Menzes who was shot and killed (details under URL: <http://alumni.coventry.ac.uk/NetCommunity/Document.Doc?id=88>, LOOKED UP: 120512).

38 Currently a case is pending at the Grand Chamber, *Nada v. Switzerland* (no. 19593/08)

39 ECtHR *İkincisoğlu v. Turkey* (no. 26144/95), 15 December 20004, § 102.

40 ECtHR *Brogan and others v. The United Kingdom* (no. 11209/84; 11234/84; 11266/84; 11386/85), 29 November 1988, §§ 55 ff.

41 Cf. e.g. ECtHR *Beganović v. Croatia* (no. 46423/06), 25 September 20090, § 64.

Ill-treatments reach from repeated strip searches in prison⁴², solitary confinement for eight years⁴³, special interrogation methods (wall standing, hooding, subjection to noise and deprivation of sleep, food and drink)⁴⁴, sentenced to death following an unfair trial⁴⁵ to real torture, i.e. e.g. “Palestinian hanging” (stripped naked, with arms tied together behind back, and suspended by Arms)⁴⁶.

b) Zooming in on a problem linked to art. 3 ECHR there is a very prominent judgement with a remarkable wording to be looked at: *Gäfgen v. Germany*⁴⁷ although this case had nothing to do with terrorism. *Art. 3 ECHR does not contain an exemption clause* as art. 2 and 8 to 11. There are no exceptions allowed. Furthermore, art. 3 like art. 4 (prohibition of slavery and forced labour) are part of the *mandatory international law*.

In a case of kidnapping of a boy the perpetrator could be identified and arrested yet without the victim. The police presuming that the boy was kept at a hide-out alive tried to convince the suspect to reveal the location. He refused. The investigator in charge of this operation of still life saving character ordered another investigator to “threaten the applicant with considerable physical pain, and, if necessary, to subject him to such pain in order to make him reveal the boy’s whereabouts”⁴⁸. Ten minutes later the suspect disclosed the precise locality of the boy whom he had murdered before already. The Court recalled his long established practice that “even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned”⁴⁹. It continued: “Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult.”⁵⁰

42 ECtHR *Frerot v. France* (no. 70204/01), 12 September 2007.

43 ECtHR *Ramirez-Sanchez v. France* (FN 17).

44 ECtHR *Ireland v. The United Kingdom* (no. 5310/71), 18 January 1978.

45 ECtHR *Öcalan v. Turkey* (no. 46221/99), 12 March 2003.

46 ECtHR *Aksoy v. Turkey* (no. 21987/93), 18 December 1996.

47 No. 22978/05, 1 June 2010, GC.

48 *Loc. cit.* § 15 f.

49 *Loc. cit.* § 87.

50 *Loc. cit.* § 107.

This judgement is also dogmatically most interesting. In view of forms of chemo- or bioterrorism *scenarios* have to be taken into account in which scores of people may be subjected to dying a wretched death atrociously⁵¹. If these fundamental human rights consist also of the positive obligation to protect people against attacks from third parties there remains an unresolved question. The two cited sentences of the judgement can only be interpreted (and understood) in the historic context of the ECHR as mentioned before (no. 3) yet the argumentation could get awry in scenarios which are, unfortunately, to be considered possible. The dogmatic questions are: has the protection of fundamental human right priority before the source of the threat or is the negative obligation of the state not to violate human rights to be put first? Is this negative obligation of the state so important that it renders the obligation to protect hundreds or thousands of innocent people against cruellest methods of being killed by terrorist nil? A most interesting discussion of this issue has taken place between two renowned German law professors⁵².

Might there be, under extreme circumstances, a *limitation to limits* as a legal figure or do we shy away from a predominantly political breach of a taboo? The arguments of the Court are well understandable because of the indisputable risk of misuse in case of an exception from this “iron regulation”. Yet, it leaves to decide in such awful situations to the practitioners following the demands of ethics of responsibility facing huge risks only without a legal emergency exit⁵³.

4.6 Interference with Privacy (art. 8 ECHR)

Beside possible infringements of privacy by various interrogation and search procedures any *data processing* needs to be in conformity with the safeguard of the privacy rights by following strict data protection requirements. From data collection via data management (storing, keeping updated, changing, blocking, deleting) to data transmission to or sharing with other law enforcement agencies all these acts are important under the aspect of privacy. Special attention has to be given if data are collected and processed without knowledge of the targeted person(s). There is an obligation, if the investigative methods are not revealed in a court trial, to inform the person about the secret data processing – with only a few very limited

51 See e.g. the sarin gas attack by members of the Aum Shinrikyo group on 20 March 1995 at several underground stations in Tokyo (URL: http://en.wikipedia.org/wiki/Sarin_gas_attack_on_the_Tokyo_subway; looked up: 13 May 2012).

52 WILFRIED BRÜGGER and BERNHARD SCHLINK, in: Humboldt Forum Recht, 4-2002, 45 ff. (URL: <http://www.humboldt-forum-recht.de/deutsch/4-2002/index.html>; looked up: 13.05.2012).

53 Cf. MARKUS H.F. MOHLER, Grundzüge des Polizeirechts in der Schweiz, Basel 2012, no. 408 f. with further literature indicated.

exceptions⁵⁴. Again, the ECHR requires precise legislation leaving no space to arbitrariness.

5. Procedural Requirements, Record Keeping

As mentioned before, the third function of the human rights and fundamental freedom is to investigate all the circumstances if it is in a defensible way alleged that one of these essentials fundamental rights was violated. It is irrelevant whether the alleged violation was committed through “the state” or a third party and whether the interference was intended or not⁵⁵. It is to be noted that if the situation during which such a violation allegedly occurred was – or should have been – *under control of the state* the *burden of proof is reversed*. This requires a painstakingly precise record keeping from the first to the last moment of an action as well as of a following investigation. A precise and conclusive operational journal indicating *what why* (intelligence assessment) *where* was done *when by whom against whom* and *how on whose order* is mandatory. Lacking documentation itself can be a violation of the obligation to investigate. A missing documentation either by not keeping records sufficiently or destroying them after the operation or both may be judged itself as violation of the obligation to investigate the circumstances and responsibilities of a case⁵⁶.

FINAL REMARK

The requirements to fight terrorism – or any other crime, particularly all forms of organised crime⁵⁷ – within the framework of the ECHR are very compelling. These demands are firstly directed towards the national legislators. They need to respect what the established practice of the Court considers as “necessary in a democratic society” (which means to a good extent the *principle of proportionality* for the legislation itself) and “under the rule of law” with all its elements (mentioned before, no. 7.1). Furthermore, the competent political authorities have to provide the

54 ECtHR *Klass and others v. Germany* (no. 5029/71), 6 September 1978.

55 ECtHR *Giuliani and Gaggio v. Italy* (no. 23458/02, GC), 24 March 2011, §§ 298 ff.; ECtHR *Scavuzzo-Hager et autres c. la Suisse* (FN 15), §§ 50, 53.

56 ECtHR *Finogenov and others v. Russia* (FN 19), §279 (“The Court is surprised by the fact that, as the Government explained, all of the crisis cell’s working papers were destroyed [see paragraph 169 above]. In the Court’s opinion those papers could have been an essential source of information about the planning and conduct of the rescue operation (especially in a situation where most of the members of the crisis cell were not questioned.”).

57 Cf. The leading case ECtHR *Rantsev v. Cyprus and Russia* (no. 25965/04), 10 May 2010.

indispensable resources to enable the various law enforcement agencies to perform their duties accordingly. Above all this means the careful selection, training and permanent retraining of all personnel. The Court is well aware of this necessity and has stressed it repeatedly. Most recently: “The Court reiterates that the States are expected to set high professional standards within their law-enforcement systems and ensure that the persons serving in these systems meet the requisite criteria (see, *mutatis mutandis*, *Abdullah Yilmaz v. Turkey*, no. 21899/02, §§ 56-57, 17 June 2008). In particular, when equipping police forces with firearms, not only must the necessary technical training be given but the selection of agents allowed to carry such firearms must also be subject to particular scrutiny.”⁵⁸ Whether the applied means and methods satisfy the required standards is also measured against important *soft law*⁵⁹.

These requirements are huge challenges for all those involved. And they will not only remain but will be increased by the more and more unscrupulous acts of organised criminals and terrorists. The good part of it: It is a most interesting and fascinating task with never a dull moment...

Abbreviations used:

Art. article

CETSCouncil of Europe Treaty Series

Cf.Confer, i.e. compare with

ECHREuropean Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHREuropean Court of Human rights

e.g.(*exempli gratia*) for example

FNFootnote in this text

⁵⁸ ECtHR *Gorovenky and Bugara v. Ukraine* (nos. 36146/05 and 42418/05), 12 January 2012, § 38.

⁵⁹ Cf. e.g. ECtHR *Finogenov and others v. Russia* (FN 19), § 162; ECtHR *Şimşek and others v. Turkey* (nos. 35072/97, 37194/97), 26 October 2005, § 105. Regularly used soft law are *Basic Principles on the Use of Force and Firearms by Law Enforcement Officers*, 1990 (UR: http://www2.ohchr.org/English/bodies/hrcouncil/docs/A.RES.60.251_En.pdf), Recommendation Rec(2001)10 on the European Code of Police Ethics (URL: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1277584&SecMode=1&DocId=1426998&Usage=2>); Recommendation R (87) 15 of the Committee of Ministers to Member States regulating the Use of Police Data in the Police Sector (URL: http://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/Rec_1987_15.pdf).

GA General Assembly (of the United Nations)

GC Grand Chamber of the European Court of Human Rights (Appellate Court, last instance)

i.e. (id est) that is

Loc.cit. (loco citato) in the just mentioned work, or (in the same work) at the same place

Res./RES Resolution

SR (Systematische Rechtssammlung) Systematic collection of the Swiss legislation

UN United Nations

v. versus (against)

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OSNOVE I OGRANIČENJA U BORBI PROTIV TERORIZMA KOJE JE USPOSTAVILA EVROPSKA KONVENCIJA O LJUDSKIM PRAVIMA

Apstrakt

Cilj ovog rada je da utvrdi kako se Evropska konvencija o ljudskim pravima odražava na kontraterorističke napore evropskih zemalja, kako u smislu pružanja pravne osnove za borbu protiv terorizma tako i u smislu postavljanja pravnih granica ovoj borbi. Države Evropske unije moraju da prate usku i tešku stazu između obaveze država da aktivno štite ljudska prava i osnovne slobode, kao i važne elemente javne bezbednosti i zabrane kršenja ovih prava, što ograničava kontraterorističke napore. U radu će se takođe razmatrati odnos između Evropske konvencije o ljudskim pravima i raznih međunarodnih konvencija, koje su države EU ratifikovale, koje su povezane sa borbom protiv terorizma.

Ključne reči: terorizam, EU, Evropska konvencija o ljudskim pravima, međunarodne konvencije, ljudska prava