

# **POTENTIAL EFFECTS OF TERRORISM ON THE JURISDICTION OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE 21ST CENTURY**

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## **Introduction**

Throughout the world, we face new terrorist threats every day. Trains and buses are being blown up, airplanes are torn apart by explosions, shopping malls and restaurants go up in flames. The world must address this challenge, including the necessary legal actions to be taken against the perpetrators. Such actions undoubtedly affect human rights. Following the greatest tragedy of the 20th century, WW2, the constitutional states recognized the need to address the issue of human rights more universally, instead of permitting it to be the internal affair of each state. Nazi Germany abused human rights pursuant to the laws of the Third Reich. Therefore, certain countries decided to create The European Convention on Human Rights (further referred to: the Convention). Within the Council of Europe, an independent court was established to supervise the execution of such decisions. Thus the European Court of Human Rights was created. Several other international human rights organizations are also present in Europe, for example the Human Rights Court of the United Nations in Geneva, or the Court of Hague which is to be addressed solely by states. However, the operations of other Courts are not so closely related to acts of terrorism. This study will not concentrate on their jurisdiction as none of these courts are authorized to make judgments compulsory to the member states. The Court of Hague has jurisdiction over the perpetrating individuals only. The Court of the UN is lacking the necessary jurisdiction to make judgments to be executed; it simply establishes the violation of the law. The European Court of Human Rights (further referred to as the Court) in Strasbourg solely has the authority to state the violation of the Convention by one of the states, and to impose a just satisfaction to the victim. (Contrary to common belief, the Court may not alter or revoke national court decisions.) During the last few decades, the Court has gained a reputable status. Its judgments and principles are respected and followed by the states they pertain to, as well as by

the rest of the states in an attempt to avoid similar applications against them. The Convention contains only a few basic directives related to human rights. (For example: the right to life, the freedom of speech, and the right to protect personal property). The Court's individual decisions fill these basic directives with content. Therefore, the actual content of the Convention is affected by the operations of the Court. In the following, we intend to highlight the Court's decisions as they relate to human rights and terrorism. Based on the events of the 21st century, we will examine how this will be sustainable.

**Article 2 (Right to life)**

1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*
  - a) *in defence of any person from unlawful violence;*
  - b) *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
  - c) *in action lawfully taken for the purpose of quelling a riot or insurrection.*

The member states attached several Protocols to the Convention. Two of these pertain to the right to life. They contain the following regulations:

**Protocol 6**

**Article 1 (Abolition of death penalty)**

*The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.*

**Article 2 (Death penalty in time of war)**

*A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.*

**Protocol 13****Article 1 (Abolition of the death penalty)**

*The death penalty shall be abolished. No one shall be condemned to such penalty or executed.*

It is obvious that according to the Convention and its Protocols, nobody in Europe may receive a death penalty, not even during war. Even a previous death sentence may not be executed. This principle is deeply rooted in the European culture as well as in European law. Nevertheless several cases of dispute have been tried by the Court.

Such was the case of McCann and Others. British authorities were informed of a terrorist threat made by the IRA in Gibraltar. The terrorists were planning a remote controlled explosion against hundreds of civilians. A special unit of British officers monitored the terrorists, who were suspected to keep the remote control in their pockets. When the terrorists were called to surrender, one of them reached for his pocket. The soldiers suspected that he is reaching for the remote, and gunned down all of them. Later they did not find any arms or bombs on the terrorists. However, their van packed with explosives was recovered. The Court held, by 10 votes to 9 (!), that there had been a violation of Article 2 of the Convention. They established that the action performed by the soldiers violated Article 2 of the Convention, however, in light of the circumstances, damages were not paid to the victims. The Court contended that the training received by the soldiers was inadequate, and it encouraged the use of firearms under similar circumstances. A speciality of the case was that prior to the Court the Commission, who is generally more likely to declare violations of the Convention, ruled by 11 votes to 6 that there had been no violation of Article 2 in this case (McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324).

9 judges of the Court emphasized that while the authorities in Strasbourg had many months and ample information to make a judgment, the soldiers only had a few seconds to protect the potential victims of the threat. Since then, the number of such terrorist attacks have multiplied. In Madrid and in London hundreds of passengers traveling in crowded subway cars and trains became victims to terrorism. If the above mentioned case was tried by the Court 20 years later, we suppose that the majority would have ruled against finding a violation.

Obviously a sensible balance must be established between acceptable force to prevent disaster, and thoughtless use of firearms at random. Shortly after the attacks, a Brazilian man became a victim of such shooting. In another case tried by the Court, a security guard of a mine was mistakenly shot by Turkish na-

tional security officers. (Unfortunately in many countries, the warning shot is aimed at the head of the target individual.) The Court ruled that the Turkish authorities violated Article 2. The force used by the officers was deemed to be neither necessary nor proportionate if the goal was indeed to arrest the victim, and rather than to combine investigation, Court proceedings and execution in one simple shot. (*Ogur v. Turkey* judgment of May 1999, no. 21594/93). The case in Gibraltar is a contrast to this one. We believe that the British soldiers acted within their margin of appreciation when they did not give a chance to identified terrorists to destroy innocent lives.

With a certain likelihood, in the 21st century, the Court's rulings will be adapted to the terrorist threats, and they will consider the protection of human lives as their priority. Article 2 undoubtedly refers to the protection of the life of the perpetrator as well. However, the member states are under obligation to protect individuals on their territory. No state can prefer to protect the lives of the perpetrators, and sacrifice the lives of civilians. Given such a conflict, the states will obviously move to protect the lives of innocent civilians, and rule against the terrorists who endanger others as well as their own lives due to criminal behavior. This fact is even more pronounced in the case of suicide bombers (e.g. in the London metro case). In these cases, the terrorist exhibits an even more unscrupulous act: and since he is already aware of his own demise, he will not be deterred from committing the crime. Therefore, it appears to be reasonable rather to kill the terrorist than to sacrifice the lives of those he intended to kill.

The anticipated severity in ruling must not pertain to death penalties. Capital punishment must not be restored, not even as a result of terrorism. The Kurdish terrorist, Öcalan, who was captured in Kenya did not receive the death penalty from the Turkish government, even though he was proved to have committed a number of acts of serious terrorism. (*Öcalan v. Turkey* judgment of 12 March, 2003, no. 46221/99). There is a definite difference between killing a terrorist in order to avert a threat, and executing an already captured, and therefore harmless terrorist. When there is an imminent danger to civilian lives, killing a terrorist is regarded as lawful self-defense, and emergency legal measures may also apply. The protection of civilian lives is a justified reason for the state. The captured and harmless terrorists may not be executed. Captured terrorists obviously still represent a social threat. Therefore, they may receive a life sentence, in order to keep them out of society, but according to the Convention, they may not be executed.

Article 5 which declares the right to liberty and safety also relates to terrorism. The Article contains the following:

**Article 5. Right to liberty and security**

1. *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

- a) the lawful detention of a person after conviction by a competent court;*
- b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
- c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
- d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
- e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
- f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to expulsion or extradition.*

2. *Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

3. *Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall 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. Release may be conditioned by guarantees to appear for trial.*

4. *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.*

This Article contains the rights related to arrest and detention. It defines the reasons of arrest and detention for the states. If the states violate any of these conditions by unlawful actions, this will be regarded as a breach of the Convention. The entire Article pertains to terrorism; however we would like to highlight 1 c).

As a preventive measure in the fight against terrorism and organized crime, certain states allowed detention, if they deemed that the individual imposed a threat on society. So far such detention did not qualify as in conformity with the Convention. Section c) requires that reasonable grounds for suspicion must pertain to concrete criminal activity. Therefore, an imposed threat to society may not be a lawful ground of detention. Italian authorities ordered preventive measures in the Ciulla case. Since they suspected that the individual was involved in organized crime, they ordered his special house-arrest. The Court found a violation of Paragraph 1 of Article 5 in the present case, emphasizing that preventive measures are not listed among the possible reasons for detention. (*Ciulla v. Italy* of 22 February 1989, Series A no. 148). Based on the current practice of the Court, without a new Protocol, under Article 5 there will be no realistic chance for arrest, even if the individual is proven to have imposed a threat to society.

If we examine the Court practice more thoroughly, we will find aspects that are not expressed by the Convention, however, the Court acknowledges them as valid reasons for detention. The Court acknowledges the threat of a “collusion”, even though it is not mentioned in 1 c). The Court found a violation against Austria in the Ringeisen case, because the circumstances were deemed to have not supported the threat of collusion or the committing of future crimes. The suspect was arrested and detained twice, and between those two occasions, he had the opportunity to make collusion, however, he made no attempts to do so, moreover, it was obvious that he was not able to commit further acts of fraud. Thus, the second detention violated Paragraph 3 of Article 5. (*Ringeisen v. Austria* judgment of 16 July 1971, Series A no. 13). This leads us to believe that the Court acknowledged the danger of collusion and of future crimes as a valid reason for detention, only its application in the given case was considered as a violation of the Convention.

Let us take a look at a different case. A few years ago the Court ruled that the continued detention of a mentally insane individual beyond the security measures was in conformity with the Convention. The individual committed several acts of violence in the past, and in lieu of this fact, the Court decided that the continued detention ordered by the national courts was in fact well-substantiated and aimed to prevent further crimes. (*Eriksen v. Norway* judgment of 27 May 1997, Reports 1997-III., p. 839). In this case the Court anticipated further criminal activity; therefore they considered the continued detention of the petitioner was in accordance with the Convention. The literal interpretation of the Convention does not support any of the above decisions.

We suppose that the Court might interpret the Convention, even without any further Protocols and as a result of their own legal interpretation, in a way that according to Paragraph 1 of Article 5 of the Convention, a proven threat to the society will justify the detention of a terrorist in the protection of society. Such would be the case when Muslim religious leaders or other extremists encourage others to commit acts of terrorism as part of their religious beliefs, and the authorities are not informed when such attacks will take place. In some cases, there is not enough evidence to arrest individuals, who are suspected to be engaged in terrorist activities. The arrest may still be justified. Such would be the case of exhibiting suspicious behavior in a crowded place, or a person who leaves a package in a suspicious location. If these events occur, the authorities may arrest and keep an innocent person detained even beyond 72 hours. However, such arrests and detentions seem to carry less weight, even in respect of human rights, than the potential loss of dozens of human lives in a possible explosion.

Individuals sometimes fall victims to negative profiling. This represents a separate case from the previously mentioned ones (*Smirnova v. Russia* judgment of 24 July 2003, nos. 46133/99 and 48183/99). In the previous Paragraph we referred to cases when the authorities are required to act promptly and without much information or evidence. Following the speech of a religious leader, a terrorist attack may occur shortly. The suspicious package or behavior may also lead to an explosion in a few moments. This is not the case when someone is being arrested or detained simply because the authorities refer his personality traits that make it likely for the individual to commit a terrorist act. In such cases, the authorities have ample time to conduct the investigation regarding the potential reasons for the detention in accordance with Article 5. If there is no such reason, the detention is regarded as being unlawful according to the Convention.

Article 8 declares the right to privacy. This does not seem to relate closely to terrorist activities. However, the Court decides on immigration and expulsion/extradition issues as well, which are discussed within the privacy rights. This Article is completed by the 4th and 6th Protocols.

***Article 8. (Right to respect for private and family life)***

*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

**Protocol 4 Article 2. (Freedom of movement)**

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. *Everyone shall be free to leave any country, including his own.*
3. *No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
4. *The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.*

**Article 3. Prohibition of expulsion of nationals**

1. *No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.*
2. *No one shall be deprived of the right to enter the territory of the state of which he is a national.*

**Protocol 7. Article 1 . Procedural safeguards relating to expulsion of aliens**

1. *An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:*

- a) *to submit reasons against his expulsion,*
- b) *to have his case reviewed, and*
- c) *to be represented for these purposes before the competent authority or a person or persons designated by that authority.*

2. *An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.*

The Court has overseen diverse cases during the last few decades that ranged from expulsions to interceptions of telephone conversations. The above listed Protocols seemingly strictly prohibit the expulsion of citizens, and only allow the expulsion of foreign citizens under extreme conditions.

The question how to execute the expulsion of terrorists and their accomplices legally is a popular subject. Obviously a distinct line must be drawn between each state's own citizens and other (foreign citizens, and those without citi-



zenship) individuals. Protocol 4 Article 3 categorically prohibits the expulsion of citizens from their own state. The Court is highly unlikely to change this through any legal interpretations. It also may not be a necessary measure. If the perpetrator of a serious terrorist act has citizenship – a naturalized immigrant, or born from foreign parentage – the consequence will most likely be a life sentence. During his/her detention, he/she will not impose any threats to society, and he/she is not likely to be released back into society. On the other hand, the expulsion of the individuals who are only engaged in subversive activity (for example the Muslim preachers), but did not commit actual crimes (the necessary legal elements to constitute a crime are missing) will not be lawful.

The states who ratified Protocol 4 obviously waived their right to expel terrorist subverters if they previously obtained legal citizen status. This study will not elaborate on other legal aspects of this matter, but those related to the human rights issues. If the individual states wish to curb the activities of such persons, they must modify their criminal code in order to label these behaviors as sui generic crimes or abetting of other crimes (such as manslaughter, terrorist act, crimes against humanity), so as to make them crimes according to law.

Different issues are raised in case of foreign citizens, or persons without a citizenship. The above mentioned Protocols permit the expulsion of such individuals, provided that all the appropriate conditions prevail. The states are permitted to expel individuals based on the circumstances of the activity, as long as the expulsion is not of collective nature. Thus the fact of the expulsion does not violate Protocol 7 of the Convention. Decisions based on this Protocol, however, have been scarce so far, therefore an established legal practice has not been adopted. In case the expelled persons were not given the opportunity to represent themselves individually during the proceedings, this may be deemed as the violation of Protocol 4 Article 4.

A case brought against Belgium pertains mostly to the subject of this study. Roma minorities from the Slovak republic applied for refugee status in Belgium. Belgian authorities, however, treated them as a homogeneous group. They were required to appear at the police station all at the same time, and even the decisions that were made regarding their status were identical in text. The Court ruled that this was a violation of Protocol 4 Article 4. (*Conka v. Belgium* judgment of February 2002, no. 51564/99).

Violation of Protocol 4 Article 2 was established in another case against Cyprus when the authorities monitored the motion of the local Turkish community with extreme vigilance. The concerned persons were not permitted to travel freely in the southern parts of the country, and they were required to report all their entries and returns from the region occupied by Turkey, otherwise known as “Northern-Cyprus Turkish Republic”. Since the extreme monitoring was not

lawful, and such supervision was also not regarded as necessary in a democratic society, the Court unanimously held that there had been a violation of the Convention (*Denici and Others v. Cyprus* judgment of May 2001, nos. 25316-25321/94 and 27207/95).

The above mentioned issues are most prominent when the concerned individuals are new immigrants who apply for resident or refugee status. It presents other problems when the individual has resided in the state without citizenship for a period of time. These usually pertain to Article 8 of the Convention. During the last few decades many cases were reported when families applied for reunification, and were declined. The applicants' expulsion or extradition to another state was initiated. This used to be a typical case for former colonies. However, lately it has become a problem all over Europe, and it is closely related to terrorism.

According to the legal practices of the Court, if the authorities hinder an individual to reside in a particular state where his/her relatives legally reside, this may become the violation of Article 8. This principle has undergone a lot of refinement recently. No one has the right to obtain the citizenship or even a residence permit of a country of his/her own choice. States are not obliged to grant resident status to spouses and children of their citizens either. The Court decides such cases after careful investigation. We do not wish to elaborate on the detailed practices of the Court in such matters. However, we want to point out that the following aspects are being investigated: the individuals' close contact to his country of origin as well as the country where he applies for resident status, the residency rights of the individual in his/her chosen country, the family's opportunity to live as a family in the applicant's country of origin, and whether it can be expected from the family to follow the expelled individual to his/her country of origin. They also investigate the age of the applicant, whether he/she is proficient in the language of the country of origin, whether he/she has a family living in his/her country of origin, and whether he/she is suffering from any illness that would threaten with imminent death (for example AIDS).

Although the Court will investigate all the above aspects, we believe that, in respect of the present study's aspects, the most significant factor will be the individual's criminal activities. So far the Court has tried criminal activities related to drug trafficking and violent crimes, and does not have any rulings about terrorist attacks. It does not violate the Convention in itself if an individual who got married after being convicted for residing in the country without legal permit is expelled. In a particular case refugees from Kosovo complained that Finland expelled half of a family only. The Commission that has since merged with the Court has investigated, and established that Finland originally

intended to expel the entire family, however, some members of the family went into hiding, and the authorities were not able to locate them. Therefore they expelled the rest of the family only. (No. 23159/94, Dec.19.5.94, D.R. 77-A, p. 126).

The life style of the individual is a determining factor when criminal activity is viewed. In a case the Court ruled against a petitioner from Tunisia. Although his parents and his 10 siblings resided in France, the individual was convicted of several violent crimes. Therefore, his expulsion was not regarded as the violation of the Convention. (*Boughanemi v. France* judgment of 24 April 1996, Reports 1996-II., p. 593). Another applicant from Algiers had lived in France with his parents and 9 siblings since the age of 2. (After his returning to France illegally, he even married a French woman, and had a child with her.) He was still expelled from the country, because he was convicted of rape, and therefore he was deemed to be a threat to public safety. The Court also mentioned that his illegal return, marriage, and the fact that he had a child did not render the previous decision obsolete. (*Bouchelkia v. France* judgment of 29 January 1997, Reports 1997-I., p. 47). Similarly, the Court found no violation of Article 8 when a woman and a man from Algiers were expelled due to smuggling heroin, or when a Moroccan man was expelled for armed robbery. (*Dalia v. France* judgment of 19 February 1998, Reports 1998-I., p. 76, *Baghli v. France* judgment of November 1998, no. 34374/97, and *Boujlifa v. France* judgment of October 1997, Reports 1997-VI., p. 2250).

Two decisions that were made on the same day, illustrate how the Court's judgments can be different due to seemingly insignificant details. Both petitioners had lived in France since childhood with their entire families, and they both had children from French women. France decided on their expulsion due to serious drug trafficking charges in both cases. One man had been married with 3 children. All of his children were French citizens. He got married a few years prior to his expulsion. In this case the Court decided that France violated the Convention. (*Mehemi v. France* judgment of 26 September 1997, Reports 1997-VI., p. 1959). The other petitioner was married to a woman only for a short period of time, and he only acknowledged the child they had after his expulsion. Moreover, the Court also found that the latter petitioner had closer bonds with his country of origin. Therefore, the Court ruled against the petitioner, and decided that France did not violate the Convention. (*El Boujaidi v. France* judgment of 26 September 1997, reports 1997-VI., p. 1980).

In summary, the Court considers family status and relationship to the country important factors when a decision is made about one's expulsion due to serious crimes. Unfortunately, seemingly excellent fathers and husbands, upstanding citizens turn out to be agents of terrorist organizations, who were just waiting

for the right moment for a particular terrorist attack. Therefore, the current practice of the Court will hopefully be reviewed. Prior to the merge of the Court and the Commission, the Commission considered the protection of the economic welfare, and the employment market when they made decisions about resident permits in the affluent Switzerland. Hopefully, the safety of the citizens will also be regarded as a significant factor. (No. 13654/88, Dec. 8.9. 88, D.R. 57, p. 287).

In our opinion, when the terrorist activity, or aiding and abetting thereof are proven, the state involved should have the authority to decide on expulsion. Family status and citizen's rights should not be considered, for they were used to cover criminal activity.

The Article which declares Free Speech is also related to the issue of terrorism. It contains the following:

***Article 10 . Freedom of expression***

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The legal practice of the Court in this regard is fairly extensive. The criterion for limitation is rather severe. While the Court protects the right to freedom of speech, also in respect of the media, these rights are not endless. In order to curb Kurdish terrorism, Turkey often faces issues related to its legal borders. Several Kurdish applicants lodged applications with the Court claiming that Turkey had violated Article 10. Turkish authorities often imposed fines on the owners or publishers of Kurdish newspapers who supported the Kurdish movement. They also arrested several individuals who exercised their right to freedom of speech.

The Court itself is fairly divided on such matters, a number of decisions were based on narrow votes. Decisions were mostly based on the evaluation how these newspaper articles endangered the particular interests that are protected by the Convention (national security, regional autonomy, etc.). When the articles included abetment to criminal activity, or encouraged the creation of an independent Kurdish nation, the Court did not find a violation of Article 10. (*Sürek v. Turkey* (no. 1) judgment of 8 July 1999, no. 26682/95, and *Sürek v. Turkey* (no 3.) judgment of 8 July 1999, no. 24735/94). The Court also did not find that Turkey violated the Convention in a case when the petitioner was detained due to his statements in the media related to Kurdish terrorist attacks. The Court realized that the political situation was rather tense; therefore, the short detention was necessary in order to maintain public safety. Thus the detention was regarded as a proportionate measure despite the fact that the petitioner did not support the terrorists, he rather expressed his views in their protection only. (*Zana v. Turkey* judgment of 25 November 1997, Reports 1997-VII., p. 2533).

In other cases the Court held that Turkey violated Article 10 of the Convention. In one case, the applicant was detained for 6 month and a severe fine was imposed on him, because he disseminated political flyers. These flyers were not encouraging violent or terrorist acts. In this case the Court established that the applicant was not responsible for terrorist attacks. (*Incal v. Turkey* judgment of 9 June 1998, Reports 1998.IV., p. 1547). In another case, the applicant was not able to appear at a political rally due to his medical condition. Therefore, he sent his speech in a written form to be read to the audience. The speech included some statements about the independence movement of the Kurds, which were of Marxist nature. Turkish authorities sentenced the applicant to 1 year and 8 months detention. In addition they imposed a fine, and when the applicant was not able to pay this, they changed the fine to another jail sentence. The Court regarded this as a violation of the Convention as the punishment was too severe in a democratic state (*Gerger v. Turkey* judgment of 8 July 1999, no. 24919/94). The Court had several similar rulings against Turkey. (*Ceylan v. Turkey* judgment of 8 July 1999, no. 23556/94, *E. K. v. Turkey* judgment of 7 February 2002, no. 28496/95, *Dicle v. Turkey* judgment of 10 November 2004, no. 34685/97, and *Odabasi v. Turkey* judgment of 10 November 2004, no. 41618/98 etc).

When the articles were not meant to incite hate, the Court considered even moderate fines to be disproportionate to the act, and found a violation [*Sürek v. Turkey* (No.4) judgment of 8 July 1999, no 24762/94 and *Sürek and Ozdemir v. Turkey* judgment of 8 July 1999, nos. 23927/94 and 24277/94]. The Court also ruled against the state in cases when newspaper owners, publishers and persons interviewed by newspapers were detained due to their statements.

(Baskaya and Okcoglu v. Turkey judgment of 8 July 1999, nos 23536/94 and 24408/94, Erdogdu and Ince judgment of 8 July 1990, nos. 25067/94 and 25068/94 and Okcoglu v. Turkey judgment of 8 July 1999, no. 24246/94).

In summary, the Court does not tolerate abetment to terrorist and violent acts. The Court does not consider severe punishments against terrorists a violation of the Convention. The legal practice of the Court regarding terrorism does not seem to present any debatable data.

Article 11 which grants the right to free assembly also relates to terrorism.

***Article 11 . Freedom of assembly and association***

*1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

*2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

We examined this Article as it relates to the establishing of organizations which include terrorist goals in their missions. It should be investigated whether these organizations can be terminated or their creation may be prohibited if their profile includes high probability to commit or support acts of terrorism.

According to the Court's jurisdiction an organization cannot be presumed to exhibit illegal activity without well substantiated evidence. Turkey violated the right to freedom of assembly, when the authorities dissolved The United Communist Party of Turkey before the party even began its operation. The leaders were not permitted to form another organization either. The Court found a violation by stressing that the party did not even begin its operation, therefore, it did not have the opportunity to endanger national security, regional autonomy etc. Therefore the prohibition violated Article 11 of the Convention (United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, Reports 1998-I., p. 1). The Socialist Party was also dissolved in Turkey shortly after it was created. The state was worried that they will receive too many Kurdish votes. The Court decided that the party did not impose a terrorist threat, and the reference to the "Kurdish threat" was inappropriate (Socialist Party and Others v. Turkey judgment of 25 May 1998, reports 1998-III., p. 1233). Turkey often referred to the "Kurdish threat" in other cases when de-

cided to dissolve political parties (ÖZDEP v. Turkey judgment of 8 December 1999, no. 23885/94). Similar events took place in other states as well. Greece also prohibited the registration of a Macedonian organization. They claimed that the operations of the organization would endanger the regional autonomy of the state. The Court ruled against the state, and stated that the “threat” was unfounded (Sidiropoulos and Others v. Greece judgment of 10 July 1998, reports 1998-IV., p. 1594).

The Court often rules in favour of the state based on Paragraph 2 of Article 11. Prohibiting fascist parties obviously serves the interest of public safety and the protection of citizens. When a religious party attempts to gain control of the state, and insinuates the termination of democracy, the state may interfere in order to protect public interest and safety. The dissolution of such parties and disqualifying its leaders does not violate Article 11 of the Convention. When the Islamic party called Refah won the national elections (1/3 of the seats in the Parliament) in Turkey, they expressed their intent to prohibit civil law and introduce “shariat” law based on religious dogma. They also stated that they wanted to follow the Islamic Fundamentalist direction. Due to the above threats the Turkish Constitutional Court requested intervention. The Court established that the party placed the fundamental institutions of a pluralistic democracy under attack. Dissolving the party and banning its leaders from public office was required to protect the interest of citizens and their rights which were granted by the Convention. Therefore, Article 11 was not violated [Refah Partisi (The Welfare Party) and Others v. Turkey judgment of 31 July 2001, nos. 41340/98, 41340/98, 41342/98 and 41344/98]. However, the Court held that there had been a violation of Article 11 as Turkey banned the Turkish Labour Party. This party protested against military actions. The Court decided that a critical approach does not render the party the equivalent of a terrorist group, or an armed force, therefore the state had no reason to intervene (Yazar and Others v. Turkey judgment of 9 April 2002, nos. 22723/93, 22724/93 and 22725/93).

In summary, the Court currently rules against the creation of evidently anti-democratic organizations which may impose a terrorist threat. However, states may not anticipate such activities when they deny the right to the registration of an organization. We believe that the Court will modify its legal practice when individuals who have a criminal history for participating in terrorist activity will intend to form organizations. In this case, there is reason to believe that the new organizations are also created with a similar purpose, and the state should not take the risk to permit the operations of such organizations while the lengthy legal procedures of investigations take place. Intervention is appropriate when similar organizations to Refah, or even a more moderate version of such parties are forming. Circumstances (national security, public safety, pro-

tection of the rights of citizens) cited in Paragraph 2 of Article 11 will offer a legitimate reason for the states to ban the organization.

Finally we want to mention Article 1 of Protocol 1 which states the protection of property rights.

***Article 1. Protection of property***

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

This Article is relevant for us as it also pertains to the confiscation of financial tools and accounts which were established for the financial support of terrorist activities. The Court does not differentiate between citizens and non-citizens, or third parties in the process of confiscation.

During an illegal trafficking case, British authorities confiscated personal property from a third party. British law would have allowed for the release of the goods, but the authorities decided against it. The Court decided that the authorities did not violate Article 1 of Protocol 1 (*Agosi v. United Kingdom* judgment of 24 October 1986, Series A no. 108). According to Paragraph 2 of Article 1, the individual states exercise their margin of appreciation regarding taxes, fees and duties. We believe that the Court would not follow a more severe practice regarding bank accounts which were established to support terrorist activity. (*Gasus Dosier- und Fördertechnik GmbH v. the Netherlands* judgment of 23 February, Series A no. 306-B).

We should also take into consideration another case which took place in the UK, when it was presumed that all income of the perpetrators of drug related crimes originated from the illegal drug trafficking in the past. Therefore, the courts confiscated the income and personal properties, but this practice did not violate the Convention (*Phillips v. the United Kingdom* judgment of 5 July 2001, no. 41087/98). The Court seems to approve of the confiscations when they deem that the bank accounts are related to illegal activities. On the other hand, if the confiscation is later proved to be unlawful, the funds must be returned to the owner. Confiscations ordered in accordance with the law rarely violate the Convention. In case the confiscation of money or property is lawful, however, at the end of the proceedings they are returned to the owner who is



acquitted, the previous confiscation does not violate the Convention (*Kokavec v. Hungary* decision of 20 April 1999, no. 27312/95). If the authorities fail to return the unlawfully confiscated goods, this will amount to a violation of the Convention. This was the case when a Romanian applicant was unable to demand gold coins which had been confiscated from his family, however officially remained in his property (*Vasilescu v. Romania* judgment of 22 May 1998, Reports 1998-III, p. 1064).

Confiscation of a vehicle which was used during criminal activity also does not violate the Convention as e.g. Hungarian criminal law also permits this. In another case of illegal trafficking, British authorities seized an airplane which was the property of Air Canada. Prior to this incident, British authorities frequently warned the airlines. They repeatedly found big amounts of drugs in these planes, and concluded that the airline does not follow the necessary safety protocol. This time, several hundred pounds of illegal drugs were discovered in a container. British authorities seized the airplane, and imposed a significant fine. The Court decided that the large fine was proportionate with the intent of the British authorities, that is, the prevention of illegal drug traffick, accordingly, the Convention was not violated. (*Air Canada v. United Kingdom* judgment of 5 May 1995, Series A no. 316).

Based on the above practice of the Court, the certain anti-terrorist measures of the states concerned will probably not violate the Convention.

### Summary

In this study, we examined six aspects of the operations of the European Court of Human Rights as they relate to the current terrorist threats and also tried to anticipate the future decisions of the Court. The Court's decisions are clearly influenced by the very needs and challenges of the current situation. The protection of human rights must include also the rights of the perpetrators and it would be illegal to deprive them of their rights. But this also means that the Court must keep the appropriate balance between individual and public interest, and decide whether the perpetrator or the public should take priority.

When the public is threatened, individual interests should not be considered as first priority. These ideas are not far from the basic principles of the Convention. For example Articles 8, 9, 10, 11 all include Paragraphs 2, which elaborate the conditions of such restrictions. These conditions, beyond some other basic conditions (measures prescribed by law, necessity in a democratic society etc.), also refer to the public interest when restricting the rights of private individuals.

Further restrictions which were not expressed by the Convention, but could be derived from the Court's jurisdiction are not unreasonable or unfair to the individual, for the criminal behavior of the individual is the cause of a public threat and, accordingly, also of an intervention. Terrorist acts are even more dangerous to the public than regular criminal activities. A regular serial killer will usually have 5-10 victims. As recent events showed, one single terrorist attack can have hundreds or even thousands of victims. The prevention of such attacks requires more severe safety measures than the traditionally accepted ones. It seems sensible that the Court should not hinder such severe preventive measures beyond a reasonable standard. No terrorist threat should e.g. mandate the reestablishment of capital punishment or physical torture. But it appears to be reasonable that the Court would accept the prevention of a terrorist attack through the killing of the perpetrator, as well as the ban on the formation of terrorist groups.

The European Court of Justice of Human Rights includes over 40 justices. The justices often make their decisions on a narrow vote. Such a huge institution (with over 100 administrative officers) is likely to move at a slow pace. Change will be slow and gradual. Our hope is to see the first step towards change soon as for even the thousand mile road starts with this first step...

## SUMMARY

### **Potential Effects of Terrorism on the Jurisdiction of the European Court of Human Rights in the 21<sup>st</sup> Century**

ANDRÁS GRÁD

The study discusses possible impacts of acts of terrorism on the future practice of the European Court of Human Rights. The issue is relevant because never before have most of the European Union Member States faced such terrorist challenges and threats, which evidently require countermeasures. The Member States have to protect their citizens' lives, property and rights – which are obligations provided for by the European Convention on Human Rights and Fundamental Freedoms and its five Protocols. However, in many cases those rights can only be protected at the cost of restricting the rights included in those very documents. The dilemma is like this: how to draw a line where those rights and freedoms may be restricted in a way that is compatible with the above Convention and what are the acts meaning a violation of the Convention.

The essay is a scholarly attempt at examining cases of the European Court of Human Rights during the past half a century from this point of view and bearing in mind the future. Instead of examining the entire relevant body of legislation, which would run beyond the scope of the study, the author restricts his analysis to articles of the Convention that are the most directly related to combating terrorism. The topics covered are as follows in this order: Article 2: the right to life and the related protocols; Article 5: the circumstances of detention; Article 8: right to respect of private and family life, interpreted in a broad sense; provisions carried in the protocols on the freedom of movement and prohibition of expulsion; Article 10: freedom of expression; Article 11: freedom of assembly and association; and Article 1 of Protocol 1: protection of property.

## RESÜMEE

### **Die potentiellen Auswirkungen des Terrorismus auf die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im 21. Jahrhundert**

ANDRÁS GRÁD

Die vorliegende Studie untersucht die möglichen Auswirkungen des Terrorismus auf die zukünftige Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte. Dies ist für uns deshalb von besonderer Bedeutung, weil der internationale Terrorismus im 21. Jahrhundert für die Mehrheit der Mitgliedstaaten bisher unbekannte neue Herausforderungen und Bedrohungen darstellt, gegen die sie sich verständlicher Weise wehren müssen. Das Problem ist, dass sie auf der einen Seite das Leben, die Güter und die anderen Rechte ihrer Staatsbürger schützen müssen – wobei diese Verpflichtungen selbst in der Europäischen Menschenrechtskonvention, bzw. in den beigefügten ergänzenden Protokollen enthalten sind –, auf der anderen Seite jedoch diesen Schutz oft nur durch die Einschränkung der in diesen Dokumenten enthaltenen Rechte gewährleisten können. Das Problem kann wie folgt dargestellt werden: wo ist die Grenze zu ziehen, innerhalb dessen diese Rechte und Freiheiten noch der Konvention entsprechend eingeschränkt werden können, und welche sind die Handlungen, die bereits eine Verletzung der Menschenrechtskonvention bedeuten.

Die vorliegende Studie versucht, auf Grund der gut ein halbes Jahrhundert zurückreichenden Fallrechtpraxis des Europäischen Gerichtshofs für Menschenrechte und der in dieser zur Geltung kommenden Trends eine Antwort auf die oben angeführten Fragen zu geben – und zwar im Hinblick auf die Zukunft. In diesem Kreis schenkt er – auch aus Gründen des Umfangs – nicht dem gesamten Rechtsmaterial Aufmerksamkeit, sondern nur den vom Kampf gegen den Terrorismus am ehesten betroffenen Artikeln. Diese sind die Folgenden: Artikel 2: Recht auf Leben mit den dazu gehörenden Zusatzprotokollen; Artikel 5: Freiheitsentzug/Festnahme; Artikel 8: Recht auf Achtung des Privat- und Familienlebens im weiteren Sinne, sowie die Vorschriften des Zusatzprotokolls über die Freizügigkeit und den Schutz gegen Ausweisung; Artikel 10: Freiheit der Meinungsäußerung; Artikel 11: Versammlungs- und Vereinigungsfreiheit, und schließlich Artikel 1 des ersten Zusatzprotokolls: Schutz des Eigentums.