
Liberty *versus* security? A human rights perspective in times of terrorism*

Christina BINDER

Universität Professor
Chair for International Law and International Human Rights Law
Bundeswehr University Munich
christina.binder@univie.ac.at

Sumario: 1. INTRODUCTION. 2. A GENERAL HUMAN RIGHTS PERSPECTIVE ON LIBERTY *VERSUS* SECURITY. 3. LIBERTY *VERSUS* SECURITY? – THE FRAMEWORK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS. 4. LIBERTY *VERSUS* SECURITY? – THE EUROPEAN COURT OF HUMAN RIGHTS AND THE MOVE TOWARDS THE DOMESTIC SPHERE. 5. CONCLUDING EVALUATION.

1. INTRODUCTION

This contribution is written in homage to Professor Romualdo Bermejo García and Professor Cesáreo Gutiérrez Espada.

In times of terrorism, the need for security in societies grows. Indeed, the terrorist threat seems omnipresent. Public media inform on a nearly daily basis of looming or recently prevented terrorist attacks. Hand in hand with increasing insecurity, state measures to reduce the perceived threat are adopted. Measures include, for example, intensified video or telephone surveillance, the prohibition of media and political parties, which are accused of spreading terrorist propaganda, or the detention of suspected terrorists. At times, «convincing» interrogation techniques, the expulsion of terrorists to third states or even their «elimination»/execution to prevent an imminent terrorist attack are at stake.

These measures are adopted in the name of «security» and should protect society against the perceivably growing terrorist threat. At the same time, anti-terrorist measures partly massively encroach upon human rights and civil liberties, such as, for example, the right to private and family life, the freedoms of expression, assembly and association, the right to liberty and security of person but also the prohibition of torture and the right to life. There is thus

* The author wishes to thank Alexander Flaig for valuable research assistance.

an obvious tension between the rights and freedoms of the individual and the security of the overall society. Where is the line between liberty and security to be drawn? How much interference with individual/civil liberties have to be accepted in the name of security? How much security for a society is permissible (and perhaps even required) from a human rights perspective?

The answer is not easily found. On the one hand, a state has the positive obligation to protect its society against terrorist attacks. Restrictions of individual freedoms are therefore even warranted at times. On the other hand, states must avoid disproportionate, arbitrary or excessive restrictions of human rights. The relationship between liberty and security is thus complex.

Against this background, this contribution proposes to examine the criteria/elements to balance liberty *versus* security from a human rights perspective and to – ideally – find an adequate equilibrium between both poles. How can the tension between liberty and security be approached through the lens of human rights? This will be examined with reference to the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR). It is argued that in search of the adequate balance between liberty and security, the ECtHR increasingly turns towards the domestic sphere.

2. A GENERAL HUMAN RIGHTS PERSPECTIVE ON LIBERTY *VERSUS* SECURITY

A general/theoretical human rights perspective provides first guidance on the tension between liberty and security in times of terrorism. What is at stake, more particularly, are the state obligations to respect, protect (and fulfil).¹

Civil rights are generally conceived as freedoms *against* the state. In their classic conception, they define a room which remains free from state interference. This requires, accordingly, abstention on the part of the state. In human rights terminology, this is generally called the «duty to respect» which refers to the state obligation not to interfere, in principle, with civil freedoms.

Still, human rights do not only entail a duty to abstain on the part of the state. Rather, a state also has the duty to protect against human rights violations by private actors and must, horizontally, prevent human rights violations

¹ See NOWAK, M., *Introduction to the International Human Rights Regime*, Martinus Nijhoff, Leiden/Boston, 2003, pp. 48 *et seq.* for further reference as regards state obligations to respect, protect, fulfil.

by other individuals. This aspect is particularly at stake in times of terrorism.² Terrorism poses a major threat to core human rights, such as the rights to life, physical integrity but also freedom of movement. States thus have a positive duty to fight terrorism under their obligation to protect.³ At the same time, this may imply restrictions/interferences with human rights guarantees. The spread of terrorist propaganda may need to be prevented and suspected terrorists kept under surveillance and/or detained. This generally interferes with the concerned individuals' rights to freedom of expression, private and family life or liberty and security of person. The fight against terrorism is thus characterized by the tension between a state's duty to respect and the duty to protect human rights.

This tension is, however, not unresolvable from a human rights perspective. Rather, the mentioned interferences are, to a certain extent, already foreseen in the relevant human rights provisions, such as the freedom of expression (Article 10 ECHR) or the right to private and family life (Article 8 ECHR). Both provisions refer to «national security», «the rights [and freedoms] of others» as well as to «the prevention of disorder or crime» as permissible aims of restrictions in their respective paragraphs 2.⁴ Hence, the structure of human rights protection acknowledges that certain interferences may be necessary, for example, to protect the rights and freedoms of others in light of an increased terrorist threat. This is in line with the mentioned state obligation to protect human rights on a horizontal level. It is thus less the question of «whether» but

² As will be shown in detail below, this duty entails, most essentially, to establish an adequate legal framework/enact according criminal laws; to conduct thorough police investigations in case of terrorist attacks, to put alleged terrorists to trial and to afterwards «neutralise» convicted terrorists via imprisonment.

³ See also «Guidelines on Human Rights and the Fight against Terrorism», Council of Europe Publishing, Strasbourg, 2005, Guideline I: «States' obligation to protect everyone against terrorism. State are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.» See furthermore ECtHR, *L.C.B. v. UK*, 09 June 1998, Appl. No. 23413/94, para 36: «[...] the first sentence of Article 2 para 1 enjoin the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard lives of those within its jurisdiction. This obligation [...] may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.»; See furthermore ECtHR (Grand Chamber), *Osman v. UK*, 28 October 1998, Appl. No. 23452/94, para 115; ECtHR, *Kilic v. Turkey*, 28 March 2000, Appl. No. 22492/93, paras 62 and 76.

⁴ A different but similar respect is likewise inscribed in Article 5 ECHR – right to liberty and security. See below, Part 3.

rather of «how far» and to what extent civil liberties may be restricted in the fight against terrorism. Where should the line between warranted and excessive interference be drawn? How can a balance between liberty and security in times of terrorism be achieved from a human rights perspective?

3. LIBERTY *VERSUS* SECURITY? – THE FRAMEWORK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The wording of the relevant ECHR provisions provides a first answer of how to balance liberty and security in times of terrorism. The space left by the Convention's provisions for security considerations varies. Broadly, one may distinguish between the following constellations.

In some cases, interferences with liberties in the name of security are required. This is the case, for example, as regards hate speech. The International Covenant for Civil and Political Rights (ICCPR) establishes an explicit state obligation to prevent hate speech in Article 20.⁵ The ECHR does not have a comparable provision. Article 17 ECHR nevertheless prohibits to abusively rely on the rights incorporated in the ECHR.⁶ In case of abusive reliance, the protection under the Convention is lost; the respective situation will not be covered by the ECHR. To advocate for terrorist activities, for example, would be outside the scope of the freedom of expression (Article 10 ECHR) and could be prohibited in the name of security; in certain cases, there might even be a state obligation to do so. In these constellations, liberty and security are not in tension. They rather mutually complement each other since the prohibition of hate speech protects the rights and freedoms of other individuals.

This is also confirmed in the jurisprudence of the ECtHR, although the Court has relied on Article 17 ECHR comparatively few times so far. An illustrative example is *Norwood v. the United Kingdom*⁷ (2004): Mr. Norwood, an active member of the British National Party, had put a poster in his window

⁵ Art 20 ICCPR: «[...] 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.»

⁶ Art 17 ECHR: «Prohibition of abuse of rights: Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in this Convention.»

⁷ ECtHR, *Norwood v. UK*, 16 November 2004, Appl. No. 23131/03. See also ECtHR, *Glimmerveen and Hagenbeek v. the Netherlands*, 11 October 1979, Appl. Nos. 8348/78 and 8406/78.

which called for the fight against Islam.⁸ After the removal of the poster by British police and Mr. Norwood's conviction to a fine for an «aggravated offence against the public order», Mr. Norwood turned to the ECtHR and complained about a violation of his freedom of expression (Art 10 ECHR). However, the ECtHR rejected the applicant's reliance on his freedom of expression. Taking recourse to Article 17 ECHR, the Court noted that the removed poster was a public assault on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, which associated the whole group with terrorism, was considered incompatible with the values proclaimed and guaranteed by the ECHR, notably tolerance, social peace and non-discrimination. Since the applicant's display of the poster in his window constituted an act within the meaning of Article 17 ECHR, he could, as a consequence, not enjoy the protection of Article 10 ECHR. Hence, the ECtHR rejected the application as being incompatible *ratione materiae* with the provisions of the Convention.

On the diametrically opposed end of liberty and security, absolute rights such as the prohibition of torture (Article 3 ECHR) draw an intransgressible line. Under no conditions may a state restrict absolute rights. Torture may never be justified in the name of security; i.e. in reliance on the argument that a society had to be protected against terrorist attacks. In line with these considerations, the ECtHR has found a violation of Article 3 ECHR in relation to British interrogation techniques such as sleep deprivation or the use of noise against suspected IRA terrorists in the 1970s, at times of the conflict in Northern Ireland (*Ireland v. the UK*⁹, 1978). In *Aksoy v. Turkey*¹⁰ (1996), the ECtHR found that Turkish practices such as the «Palestinian hanging» constituted a violation of Article 3 ECHR. In *Frérot v. France*¹¹ (2007), the ECtHR established a violation of Article 3 ECHR in case of massive bodily searches such as strip searches of a former member of the extreme left armed movement «Action directe» who had been convicted to 30 years of imprisonment for – among others – terrorism.¹² In *Gäfgen v. Germany*¹³ (2010) – while the case concerned

⁸ The poster showed the Twin Towers in New York in flames and the words «Islam out of Britain – Protect the British People» and a symbol of a crescent and star in a prohibition sign.

⁹ ECtHR, *Ireland v. UK*, 18 January 1978, Appl. No. 5310/71.

¹⁰ ECtHR, *Aksoy v. Turkey*, 18 December 1996, Appl. No. 21987/93.

¹¹ ECtHR, *Frérot v. France*, 12 June 2007, Appl. No. 70204/01.

¹² Note that the ECtHR established in addition violations of Art 13 ECHR and Art 6 para 1 ECHR.

¹³ ECtHR (Grand Chamber), *Gäfgen v. Germany*, 1 June 2010, Appl No 22978/05.

a kidnapper and not a terrorist it is nonetheless telling – even the *threat* with torture was found to constitute inhumane treatment. On this basis, the ECtHR established a violation of Article 3 ECHR.¹⁴

Likewise, the extradition or expulsion of suspected terrorists to countries where they are at risk to be exposed to torture is considered a violation of Article 3 ECHR. In standing jurisprudence, the ECtHR has confirmed that, where there was a risk of torture, extradition/expulsion was impermissible in light of Article 3 ECHR. No public interest considerations – such as the reference to national security – could outweigh the danger of mistreatment/torture in case of the extradition/expulsion of an individual. This also applies to suspected terrorists. Accordingly, the ECtHR decided in *H.R. v. France*¹⁵ (2011) in relation to the applicant who had been convicted for terrorist activities in France and who ran the risk of torture in case of his expulsion to Algeria, that Article 3 ECHR would be violated in case of expulsion. The Court reached the same conclusion in *Daoudi v. France*¹⁶ (2009). In *Daoudi*, the applicant, an Algerian national, had been detained and convicted in the course of an operation against a radical/militant Islamist group with connection to Al Qaeda. He was also suspected to have planned a suicide attack on the US Embassy in Paris. Notwithstanding the severity of charges, according to the ECtHR, an expulsion would have violated Article 3 ECHR given the risk of torture in Algeria. Along similar lines, the ECtHR found in *Saadi v. Italy*¹⁷ (2008) that Saadi's extradition to Tunisia (where the applicant had been convicted in 2005 to 20 years of prison because of membership in a terrorist organisation) would be considered a violation of Article 3 ECHR because of the imminent risk of torture. Notably, in *Saadi*, while acknowledging states' «immense difficulties» in combating the contemporary terrorist threat,¹⁸ the ECtHR also maintained that even a suspected involvement in terrorist activity did not take away the absolute nature

¹⁴ More particularly, convicted of kidnapping and killing of a child, the applicant alleged that the police threatened him with torture to make him reveal where the child was (at a time when they believed the boy to be still alive), and that evidence obtained by coercion was used against him in trial.

¹⁵ ECtHR, *H.R. v. France*, 22 September 2011, Appl. No. 64780/09.

¹⁶ ECtHR, *Daoudi v. France*, 3 December 2009, Appl. No. 19576/08.

¹⁷ ECtHR (Grand Chamber), *Saadi v. Italy*, 28 February 2008, Application No. 37201/06, para 17. For further reference see also LONDRAS De, Fiona, «*Saadi v. Italy*: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition Cases», ASIL Insights, 2008, https://www.asil.org/insights/volume/12/issue/9/saadi-v-italy-european-court-human-rights-reasserts-absolute-prohibition#_edn1.

¹⁸ ECtHR, *Saadi v. Italy*, 2008, *supra cit.*, para 137.

of their rights under Article 3 ECHR.¹⁹ The ECtHR thus firmly upholds the absolute prohibition of torture: torture may never be justified in the name of security/the fight against terrorism. In this instance, liberty trumps security.

The prohibition of discrimination constitutes a similarly strict limit: arbitrary, discriminatory or racist measures are prohibited under all circumstances. The CoE «Guidelines on Human Rights and the Fight against Terrorism»²⁰ which build primarily on the case law of the ECtHR²¹ establish accordingly that: «All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment [...]» Thus, also arbitrary/discriminatory measures are absolutely prohibited.

Somehow less rigorous but still severe is the ECHR's standard regarding Article 2 ECHR, the right to life.²² An interference – such as the elimination/execution of a person to prevent an imminent terrorist attack – is permissible only under the exceptions exhaustively listed in Article 2 ECHR. The execution must be absolutely necessary, *inter alia* in defence of a person from unlawful violence. The ECtHR subjects state measures to a strict scrutiny in light of Article 2 ECHR. In doing so, the Court does not restrict its assessment to the very act of execution/elimination but also refers to the overall diligence in the planning of the anti-terrorist operation. The case perhaps best known is *McCann v. the United Kingdom*²³ (1995). It concerned the execution of three members of the Provisional IRA suspected of having a remote-control device to detonate a bomb, who were shot dead in Gibraltar by the SAS (*Special Air*

¹⁹ «As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct, the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.» (EctHR, *Saadi v. Italy*, 2008, *supra cit.*, para 127; internal references omitted).

²⁰ CoE, «Guidelines on Human Rights and the Fight against Terrorism», Council of Europe Publishing, Strasbourg, 2005, Guideline II.

²¹ See the reference in the Guidelines concerning their legal basis: «[...] The Convention and the case-law of the Court are [...] a primary source for defining guidelines for the fight against terrorism. [...]» (*Ibid.*, p. 13).

²² Art. 2 ECHR: 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.»

²³ ECtHR (Grand Chamber), *McCann v. UK*, 27 September 1995, Appl. No. 18984/91.

Service) soldiers/the British secret service.²⁴ Afterwards, it became clear that that the information on the supposed bomb explosion had been wrong. This could have been recognized if the British secret service had conducted a more thorough investigation and had planned the operation more carefully. The ECtHR found on this basis that the killing was not «absolutely necessary» since the operation could have been planned and controlled without the need to kill the suspects. On this basis, the Court established a violation of the right to life (Article 2 ECHR) by the United Kingdom.

This line of jurisprudence was followed by the ECtHR also in other cases, as, for example, in *Finogenov et al v. Russia*²⁵ (2011) in relation to the violent termination of a hostage taking by Chechen separatists in the Dubrovka theatre in Moscow in 2002. More than 100 persons had been left dead after Russian authorities had decided to overcome the terrorists and liberate the hostages with gas. The ECtHR established an according violation of Article 2 ECHR; not because of the decision of Russian authorities to liberate the hostages with violence and through the use of gas but because of the negligence in the planning of the operation and because of the inadequate medical treatment/care in relation.²⁶ The Court thus also considered the «procedural side» of Article 2 ECHR. In sum, in carefully defined exceptional situations, interferences with the right to life are permitted in the name of security. Still, the ECtHR subjects these interferences to a very strict scrutiny.

The other group of cases concerns the so-called «relative rights» which include, for example, the freedoms of association, assembly and expression or the right to private and family life. Relative rights leave states a certain room for manoeuvre to act in the name of security. The ECtHR only engages in a subsidiary control. This becomes particularly evident in situations of national

²⁴ More particularly, the ECtHR referred to the very strict test applied the measures interfering with the right to life: «a stricter and more compelling test of necessity must be employed than that which is normally applicable when determining whether a measure is «necessary in a democratic society» under paragraphs 2 of Articles 8 to 11 of the Convention». ECtHR, *McCann v. UK*, 1995, *supra cit.*

²⁵ ECtHR, *Finogenov and Others v. Russia*, 20 December 2011, Appl Nos. 18299/03 and 27311/03. Note that the case has been referred to the Grand Chamber where it was still pending at the time of writing.

²⁶ In addition, the ECtHR criticized the lack of an independent investigation/review concerning the mentioned reproaches. For details see below, Part 4. See also ECtHR, *Wasilewska and Kalucka v. Poland*, 23 February 2010, Appl Nos. 28975/04 and 33406/04. where the ECtHR established a violation of Art 2 ECHR in case of a killing of suspected terrorists in the context of an antiterror-operation since the Polish government had not given any information on the administrative and procedural safeguards to protect persons against arbitrary use of force.

emergency where Article 15 ECHR allows for derogations from relative rights under certain conditions.²⁷ These derogations enable states to take additional/more severe measures in the name of security. Derogations in reliance on Article 15 ECHR thus broaden states' room of action in the fight terrorism. States also made use of this possibility in reaction to a perceived terrorist threat. For example, the United Kingdom has derogated from Convention guarantees in accordance with Article 15 ECHR in reliance on perceived terrorist threats in the context of the conflict in Northern Ireland and after the World-Trade Center attacks of 11 September 2001.²⁸ Recently, also France has derogated from ECHR guarantees after the terrorist attacks in Paris in November 2015.²⁹

Respectively, especially two cases against the United Kingdom concerning the length of detention (Article 5 ECHR) in the context of the conflict in Northern Ireland illustrate that derogations in accordance with Article 15 ECHR broaden a state's room for action in the name of security. In the first case, in *Brogan v. the United Kingdom*³⁰ (1988), the United Kingdom had not derogated under Article 15 ECHR. The ECtHR found that the length of detention of the four applicants, who were suspected of terrorist acts and had been detained for four days and even longer, violated Article 5(3) ECHR.³¹ Conversely, in *Brannigan und McBride v. the United Kingdom*³² (1993), the arrest

²⁷ Art. 15 ECHR: Derogation in time of emergency. «1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.»

²⁸ ECtHR, *A. and Others v. UK*, 19 February 2009, Appl. No. 3455/05, paras 11-12.

²⁹ Concerning the French derogation, see ECtHR, Annual Report 2015, p. 13. See also the recent derogations by Ukraine and Turkey in reliance on Art. 15 ECHR. (CoE, Notification by Ukraine – JJ8318C Tr./005-205, p. 3; CoE, Notification by Turkey – JJ8190C Tr./005-192, p. 5.)

³⁰ ECtHR, *Brogan and Others v. the United Kingdom*, 29 November 1988, Appl Nos. 11209/84, 11234/84, 11266/84 and 11386/85.

³¹ The applicants had been arrested by the police in Northern Ireland in late 1984 and, after being questioned for periods between 4 and 6 days released without having been charged or brought before a judge.

³² ECtHR, *Brannigan and McBride v. UK*, 26 May 1993, Appl. Nos. 14553/89 and 14554/89. The ECtHR rejected the arguments of the United Kingdom concerning the difficult situation in Northern Ireland among others on the basis that the British Government had withdrawn its derogation under Art. 15 ECHR already in August 1984 and *Brogan* could thus not be considered in light of Art. 15 ECHR.

and detention of two individuals, both suspected members of the IRA, was even longer than in the *Brogan* case.³³ Still, the ECtHR did not find a violation of Article 5(3) ECHR on the basis that the United Kingdom could rely on its derogation from the ECHR in accordance with Article 15 ECHR.³⁴ The room of the United Kingdom to act in the name of security was thus widened through its derogation under Article 15 ECHR.³⁵

Also when a state has not derogated under Article 15 ECHR, relative rights leave states a certain room of manoeuvre. Interferences in the public interest – here in the name of national security or for the protection of rights (and freedoms) of others – are permissible under certain conditions. Restrictions of relative rights in the fight against terrorism are thus in principle possible. They are, however, subject to strict conditions. The respective provisions – e.g. freedom of expression, right to private and family life – outline the relevant framework in their respective paragraph 2. Article 8(2) ECHR establishes, for example: «[...] There shall be no interference by a public authority with the exercise of this right [respect for private and family life] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, [...] for the prevention of disorder or crime, [...] or for the protection of the rights and freedoms of others.» Accordingly, interferences must be established by law; they must pursue one of the exhaustively enumerated legitimate aims; and be necessary in a democratic society, i.e. be proportional.

In case of relative rights, liberty and security are thus to be carefully balanced. Possible cases relate, for example, to the dissolution of political parties for the alleged dissemination of terrorist propaganda. This was examined by the ECtHR in relation to the freedom of association (Article 11 ECHR): *United Communist Party of Turkey and Others v. Turkey*³⁶ (1998) concerned the dissolution of the United Communist Party of Turkey («TBKP»)³⁷ and the prohibition directed against their leader to occupy a similar post in another

³³ One applicant had been held for six days and fourteen and a half hours; the other for four days, six hours and 25 minutes in custody

³⁴ More particularly, the UK had derogated on 23 December 1988 from Art. 5 ECHR.

³⁵ Notably, the ECtHR made its own assessment of the situation governing UK's derogation. Still, in the light of the evidence at its disposal as to the extent and effects of the terrorist violence in Northern Ireland and elsewhere in the United Kingdom, the ECtHR found it not to be in doubt that there genuinely was a public emergency threatening the life of the nation in the circumstances.

³⁶ ECtHR (Grand Chamber), *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Appl. No. 19392/92.

³⁷ This was on the basis that the Party had incorporated «communist» into its name which was against Turkish law and, in particular, that it had encouraged separatism and the division of the Turkish nation.

political party. The ECtHR decided that the dissolution was not «necessary in a democratic society» and thus disproportionate, especially since there was no proof/evidence of the fact that the TBKP was responsible for the terrorist problems in Turkey. On this basis, the ECtHR established a violation of Article 11 ECHR (freedom of assembly and association).³⁸

In other cases, measures taken in the name of the fight against terrorism interfered with the freedom of expression (Article 10 ECHR). In *Ürper et al v. Turkey*³⁹ (2009), the ECtHR considered the Turkish prohibition of publication and dissemination of newspapers because of alleged propaganda for a terrorist organisation to be disproportionate and found an according violation of Article 10 ECHR.⁴⁰ Likewise, in *Association Ekin v. France*⁴¹ (2001), the ECtHR held that the prohibition of dissemination of a book about the Basque culture constituted a violation of Article 10 ECHR. The ECtHR observed, more particularly, that the book did not contain any content which would amount to incitement of hatred or separatism. The interference with the freedom of expression of the applicant had therefore not been, according to the ECtHR, necessary in a democratic society.

Also, interferences with the right to private (and family) life (Article 8 ECHR) in the fight against terrorism are at stake. There are various examples. In *Gillan and Quinton v. the United Kingdom*⁴² (2010), for instance, the ECtHR found a violation of Article 8 ECHR (right to private and family life) in relation to the power given to the police in accordance with Articles 44-47 of the UK Terrorism Act of 2000 which made it possible to stop and search persons without reasonable suspicion of wrongdoing.⁴³ Other cases/judgments relate

³⁸ See also the similar cases, ECtHR (Grand Chamber), *Socialist Party and others v. Turkey*, 25 May 1998, Appl. No. 21237/93; ECtHR (Grand Chamber), *Freedom and Democracy Party (ÖZDEP) v. Turkey*, 8 December 1999, Appl. No. 23885/94; ECtHR, *Yazar and Others v. Turkey*, 9 April 2002, Appl. Nos 22723/93, 22724/93 and 22725/93.

³⁹ ECtHR, *Ürper and Others v. Turkey*, 20 October 2009, Appl. Nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07.

⁴⁰ See also the similar cases ECtHR, *Gözel and Özer v. Turkey*, 6 July 2010, Appl. Nos. 43453/04 and 31098/05; ECtHR, *Turgay and Others v. Turkey*, 15 June 2010, Appl. Nos. 8306/08, 8340/08 and 8366/08.

⁴¹ ECtHR, *Association Ekin v. France*, 17 July 2001, Appl. No. 39288/98.

⁴² ECtHR, *Gillan and Quinton v. UK*, 12 January 2010, Appl. No. 4158/05.

⁴³ See CoE Factsheet, «Terrorism and the ECHR», available at http://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf (31.01.2018), p. 24: «The Court held that there had been a violation of Article 8 (right to respect for private life) of the Convention. It considered that the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They were not, therefore, in accordance with the law».

to telephone surveillance. At times, the ECtHR found a violation of Article 8 ECHR because of the deficient legal basis: either there was no legal basis at all (*Malone v. UK*, 1984; *Khan v. Germany*, 2000);⁴⁴ or the law did not provide sufficient protection against arbitrariness on the part of the state. In *Van Vondel v. the Netherlands*⁴⁵ (2007), for example, the ECtHR found that there was no protection against the misuse of telephone surveillance on the part of the state. In *Kruslin v. France*⁴⁶ (1990), the law did not determine with sufficient clarity the discretion of state institutions. On this basis, the ECtHR generally established according violations of Article 8 ECHR.

In contrast, the ECtHR did not find a violation of Article 8 ECHR in *Klass and others v. Germany*⁴⁷, a case which was already decided in 1978 but which remains a leading case. In *Klass*, the ECtHR had to determine in relation to a complaint by five German lawyers whether German legislation empowering the authorities to monitor their correspondence and telephone communications without obligation to inform them subsequently of the measures taken against them violated Article 8 ECHR. The ECtHR held that in view of the threat of sophisticated forms of espionage and terrorism, domestic legislation which conferred powers of secret surveillance were, under exceptional conditions, «necessary in a democratic society» in the interests of national security and/or the prevention of disorder and crime. Accordingly, in *Klass*, the restrictions with freedoms were permissible and did not violate Article 8 ECHR. Notably, the ECtHR reached its judgment especially in light of the numerous safeguards, which were foreseen in the German law to prevent misuse.⁴⁸

The ECtHR decided along similar lines in *Weber and Saravia v. Germany*⁴⁹ (2009) where the enlarged competences of the *Bundesnachrichtendienst* (German Secret Service) in relation to the strategic monitoring of communications, inter alia to prevent serious dangers on the national territory such as by terrorist at-

⁴⁴ ECtHR, *Malone v. UK*, 26 April 1985, Appl. No. 8691/79; ECtHR (Grand Chamber), *Khan v. Germany*, 21 September 2016, Appl. No. 38030/12. See also ECtHR, *PG and JH v. UK*, 25 September 2001, Appl. No. 44787/98: the ECtHR established a violation of Art 8 ECHR because at the time the use of secret surveillance techniques was not legally regulated.

⁴⁵ ECtHR, *Van Vondel v. The Netherlands*, 25 October 2007, Appl. No. 38258/03.

⁴⁶ ECtHR, *Kruslin v. France*, 24 April 1990, Appl. No. 11801/85.

⁴⁷ ECtHR, *Klass and Others v. Germany*, 6 September 1978, Appl. No. 5029/71.

⁴⁸ The ECtHR held: «[...] in view of the risk that a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse» (*Klass*, para 106). For details, see also Part 4.

⁴⁹ ECtHR, *Weber and Saravia v. Germany*, 29 June 2006, Appl. No. 54934/00.

tacks, were at stake. The ECtHR considered the complaint as inadmissible/manifently ill-founded especially in light of the many safeguards German laws fore-saw to prevent misuse.⁵⁰ Also in *Uzun v. Germany* (2010),⁵¹ the ECtHR found in relation to GPS tracking and the use of data obtained thereby in criminal proceedings concerning the applicant's suspected involvement in bomb attacks by a left wing extremist movement, that there was no violation of Article 8 ECHR. Rather, the GPS tracking was considered proportionate in the light of the seriousness of the offence. There is therefore a careful balancing between the degree of interference with individual freedoms/liberties and the security of society.

The right to liberty and security (Article 5 ECHR), which provides protection against state measures in relation to deprivations of liberty, offers similar options to weigh liberty versus security.⁵² Article 5 ECHR establishes that every person detained or arrested must be brought promptly before a judge (Article 5(3) ECHR). It also foresees that a detained or arrested individual has the right to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and the release ordered if the detention is not lawful (Article 5(4) ECHR).

The elements of Article 5 ECHR were further detailed in the jurisprudence of the ECtHR. For example, the requirement of *reasonable* suspicion in

⁵⁰ ECtHR, *Weber and Saravia v. Germany*, 2006, *supra* cit.; See also similar cases ECtHR, *Leander v. Sweden*, 26 March 1987, Appl. No. 9248/81, para 60; ECtHR, *Szabo and Vissy v. Hungary*, 12 January 2016, Appl. No. 37138/14, para 57; ECtHR (Grand Chamber), *Roman Zakharov v. Russia*, 4 December 2015, Appl. No. 47143/06, para 232; ECtHR, *Kennedy v. UK*, 18 May 2010, Appl. No. 26839/05, paras 153-154; ECtHR, *Kvasnica v. Slovakia*, 9 June 2009, Appl. No. 72094/01, para 80; ECtHR, *Dragojevic v. Croatia*, 15 January 2015, Appl. No. 68955/11, para 83.

⁵¹ ECtHR *Uzun v. Germany*, 2 September 2010, Appl. No. 35623/05. The applicant, suspected of involvement in bomb attacks by a left-wing extremist movement, complained in particular that his surveillance via GPS and the use of the data obtained thereby in the criminal proceedings against him had violated his right to respect for private life.

⁵² Art 5 ECHR: 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: [...] (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; [...] 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.»

Article 5(3) ECHR was specified accordingly. More particularly, the ECtHR accepted certain detentions in the fight against terrorism when detentions/arrests were based on evidence or secret service information in relation to terrorist activities. In *Murray v. the United Kingdom*⁵³ (1994), no violation of Article 5 ECHR was established because the applicant was under suspicion to have collected money for the IRA. Nor was a violation found in *O'Hara v. the United Kingdom*⁵⁴ (2001) where a prominent member of Sin Fein was arrested because of suspected participation in a murder. Since these arrests were based on sufficient evidence, according to the ECtHR, they thus could be considered to comply with the requirement «that the arrested person was reasonably suspected of having committed the alleged offence»⁵⁵. Conversely, in *Fox, Campbell and Hartley v. the United Kingdom*⁵⁶ (1990), where the applicants were arrested in Northern Ireland on the basis of a law (abolished since) which allowed to detain every person suspected of terrorism up to 72 hours by the police, the ECtHR held that there were not sufficient proofs for a «reasonable suspicion» and established a violation of Article 5 ECHR.⁵⁷ What is more, the ECtHR generally held that detention was not permissible only for the purposes of gathering information.

Overall, the rights contained in the ECHR provide for a flexible framework to balance liberty and security which is further detailed in the case law of the ECtHR.⁵⁸ The relation between liberty and security depends therefore, from a human rights perspective, firstly on the category of the rights at stake, i.e. absolute or relative. In case of absolute rights, interferences in the name of security are completely prohibited. No reliance on security considerations such as the need to fight terrorism may ever justify torture or discriminatory and arbitrary measures. Likewise, the right to life is examined on the basis of

⁵³ ECtHR, *Murray v. UK*, 21 October 1996, Appl. No. 22384/93.

⁵⁴ ECtHR, *O'Hara v. UK*, 16 October 2001, Appl. No. 37555/97.

⁵⁵ Criteria established in ECtHR, *Fox, Campbell, Hartley v. UK*, 10 May 1988, Appl. Nos. 12244/86, 12245/86 and 12383/86, paras 32 and 34.

⁵⁶ ECtHR, *Fox, Campbell, Hartley v. UK*, 1988, *supra cit.*

⁵⁷ See ECtHR, *Fox, Campbell, Hartley v. UK*, 1988, paras 32 and 34, *supra cit.*

⁵⁸ See also, respectively, the CoE «Guidelines on Human Rights and the Fight against Terrorism» which summarize the relevant case law of the ECtHR as follows: «VII. Arrest and police custody. 1. A person suspected of terrorist activities may only be arrested if there are reasonable suspicions. He/she must be informed of the reasons for the arrest. 2. A person arrested or detained for terrorist activities shall be promptly before a judge. Police custody shall be of a reasonable period of time, the length of which must be provided for by law. 3. A person arrested or detained must be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court.»

a strict standard – that of absolute necessity. In case of relative rights, such as the right to private and family life, the freedoms of expression, association and assembly or the right to liberty and security, a state has, in comparison, more room to take action. Under certain conditions (provided for by law, legitimate aim; proportionality), interferences with relative rights are permissible and, in some cases, even required (for example, as mentioned, in instances of hate speech). Thus, the balance between liberty and security depends primarily on the freedom/right at stake.

In addition, when developing the ECHR provisions in its jurisprudence, the ECtHR has increasingly paid attention to the relevant safeguards at domestic level. This will be examined next with special emphasis on the criteria which are considered necessary by the Court for interferences in the name of security to be permissible.

4. LIBERTY *VERSUS* SECURITY? – THE EUROPEAN COURT OF HUMAN RIGHTS AND THE MOVE TOWARDS THE DOMESTIC SPHERE

The case law of the ECtHR provides considerable insights on how to balance liberty and security especially as regards the domestic plane. In fact, the ECtHR assesses the permissibility of state measures in the name of security also in the light of the safeguards at national level which are established to prevent abuse. Necessary requirements relate to the appropriate legal basis; adequate domestic supervisory mechanisms especially in case of data collection and surveillance; a proper domestic investigation in case of alleged violations; and effective domestic remedies. Respectively, especially the ECtHR's jurisprudence in relation to relative rights is informative when these are restricted in the fight against terrorism. It will be examined next.

First, the ECtHR has developed detailed criteria in relation to the requirement that an interference be «provided for by law». The ECtHR finds, first, that «in accordance with the law» implies that interferences must be conducted on the basis of a law which is predictable – i.e. sufficiently precise and accessible.⁵⁹ Put differently, a law must give citizens «adequate indi-

⁵⁹ See CoE «Guidelines on Human Rights and the Fight against Terrorism»: «III. Lawfulness of anti-terrorist measures: 1. All measures taken by States to Combat terrorism must be lawful. 2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.»

cation» about the competences of domestic authorities and must delimitate the discretion of these authorities accordingly. In light of these requirements, especially the collection and processing of personal data in the course of the targeted surveillance of communication and according restrictions of the right to private and family life (Article 8 ECHR) is illustrative.⁶⁰ For example, the ECtHR established violations of Article 8 ECHR when the legal basis was lacking (*Malone v. the United Kingdom*⁶¹, 1984) or when the law did not provide adequate protection against the arbitrary use of surveillance techniques (here: telephone surveillance) (*Van Vondel v. the Netherlands*⁶², 2007; see also *Kruslin v. France*⁶³, 1990). Still, most detailed as to the necessary legal requirements in relation to the collection and processing of personal data is perhaps *Rotaru v. Romania*⁶⁴ (2000). In *Rotaru*, the ECtHR criticized Romanian laws for their failure to lay down limits on the powers of domestic authorities as follows:

«[...] for instance, domestic law does not define the kind of information that may be recorded, the categories of people against whom surveillance measures such as gathering and keeping information may be taken, the circumstances in which such measures may be taken or the procedure to be followed. Similarly, the Law does not lay down limits on the age of information held or the length of time for which it may be kept. [...] The Court notes that this section contains no explicit, detailed provision concerning the persons authorised to consult the files, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained. [...] It also notes that although section 2 of the Law empowers the relevant authorities to permit interferences necessary to prevent and counteract threats to national security the ground allowing such interferences is not laid down with sufficient precision.»⁶⁵

Accordingly, in *Rotaru*, detailed criteria are provided by the ECtHR: the domestic law must, *inter alia*, identify the group of persons who is targeted, provide for according procedures and establish what use is made of the collected data afterwards. Since the Romanian law was considered too broad, the

⁶⁰ ECtHR (Grand Chamber), *Rotaru v. Romania*, 4 May 2000, Appl. No.28341/95, paras 57f.

⁶¹ ECtHR, *Malone v. UK*, 2 August 1984, Appl. No. 8691/79.

⁶² ECtHR, *Van Vondel v. The Netherlands*, 25 October 2007, Appl. No. 38258/03.

⁶³ ECtHR, *Kruslin v. France*, 24 April 1990, Appl. No. 11801/85.

⁶⁴ ECtHR, *Rotaru v. Romania*, 2000, *supra cit.*

⁶⁵ ECtHR, *Rotaru v. Romania*, 2000, paras 57f., *supra cit.*

ECtHR found Romania in violation of its obligations under the ECHR. Thus, detailed legal provision must be made to delimitate state authorities' discretion, otherwise the ECtHR will establish a violation.

Conversely, adequate domestic safeguards may broaden a state's means to fight terrorism in the name of security. In fact, the ECtHR puts especial emphasis on adequate domestic supervisory authorities and institutions in case of data collection and personal surveillance, requiring independent supervisory mechanisms. A telling example is *Klass v. Germany*⁶⁶ (1978). As stated, in *Klass*, the ECtHR did not establish a violation of the ECHR in relation to a law which empowered the German authorities to monitor the correspondence and telephone communications of lawyers in particular with reference to the numerous mechanisms to prevent abuse.⁶⁷ The relevant safeguards were installed by the German legislation at different levels. This was considered satisfactory by the ECtHR since the supervisory bodies were considered as sufficiently independent to give an objective ruling.⁶⁸ Also in *Weber v. Germany*⁶⁹ (2006), in relation to strategic surveillance to prevent terrorist attacks, the ECtHR referred to the existing domestic safeguards to prevent abuse. In the specific German context this was a control organ established in the German *Bundestag* as well as a G-10 Commission established for this purpose whose members were selected by the control organ of the *Bundestag*. Their chairman, in addition, needed to qualify as judge. This was considered sufficient by the ECtHR which did not establish a violation.

The ECtHR thus finds national mechanisms of particular importance to restrict the rights listed in the ECHR; this especially when surveillance measures restrict freedoms in the name of security. According to the ECtHR, an

⁶⁶ ECtHR, *Klass v. Germany*, 1978, *supra cit.*

⁶⁷ More particularly, in ECtHR, *Klass v. Germany*, 1978, *supra cit.*, the ECtHR took notice of the fact that «democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction». It had therefore to be accepted that «the existence of some legislation granting powers of secret surveillance over the mail, post and, telecommunications is, under exceptional conditions, necessary in a democratic Society in the interests of national security and/or for the prevention of disorder or crime» (See ECtHR, *Klass v. Germany*, 1978, paras 39 et seq.).

⁶⁸ ECtHR: «[The established supervisory institutions] may, in the circumstances of the case, be regarded as enjoying sufficient independence to give an objective ruling» (ECtHR, *Klass v. Germany*, 1978, paras 39-60, *supra cit.*).

⁶⁹ ECtHR, *Weber and Saravia v. Germany*, 2006, *supra cit.*

accompanying or subsequent control of surveillance measures is necessary in any case; an *ex ante* permission is required in case of particularly severe interferences (such as surveillance of media). The permission must be given by an institution which is independent from the executive branch. Ideally, it should be the judiciary. The respective supervisory institutions have to have sufficient legal competences as well as access to relevant information to comply with their task effectively.

Likewise more generally, the ECtHR requires mechanisms at the national level which provide protection against arbitrary interferences with freedom rights/ECHR guarantees in the name of security. Firstly, there has to be an independent domestic investigation to look into alleged violations. This especially in case of torture or alleged interferences with the right to life. In fact, the ECtHR examines not only whether there was a substantive violation of the respective rights but also, whether an independent state investigation has dealt with possible allegations of negligence or misconduct made in relation. If there is no appropriate domestic investigation, the ECtHR will establish violations of the procedural limb of Articles 3 and 2 ECHR also without substantive violation of ECHR guarantees. For example, in *Martinez Sala v. Spain*⁷⁰ (2004), the ECtHR found a violation of the procedural limb of Article 3 ECHR in case of individuals who had been arrested in the course of investigations of terrorist acts and claimed mistreatment during police custody. Since the Spanish authorities had failed to provide for an effective official investigation in relation to the applicants' reproaches to have been mistreated, the ECtHR found a violation of Article's 3 ECHR procedural limb. Thus, the ECtHR requires an according domestic investigation in cases of alleged interferences with the prohibition of torture. Similar conclusions may be drawn in relation to interferences with the right to life (Article 2 ECHR).⁷¹

Finally, the ECtHR examines whether there are effective domestic remedies in place to look into alleged violations of human rights in the name of security. If these remedies are missing, the ECtHR will establish a violation of

⁷⁰ ECtHR, *Martinez Sala and Others v. Spain*, 2 November 2004, Appl. No. 58438/00.

⁷¹ For example, as stated, in ECtHR, *Fimogenov and others v. Russia*, 20 December 2011, Appl. Nos. 18299/03 and 27311/03, the ECtHR did not establish a violation of the right to life by Russia (Art. 2 ECHR) in relation to the decision to end the hostage taking by violent means and through the use of gas. Still, the ECtHR found that – beside the inadequate planning and the insufficient medical supply – there had been an insufficient investigation in relation to allegations relating to the authorities' negligence in the conduct of the operation and the inadequate medical support. The ECtHR established an according violation of the procedural limb of Art. 2 ECHR.

the right to an effective remedy (Article 13 ECHR). This also in cases where no violation of the underlying right is found. For example, in *Ramirez Sanchez v. France*⁷² (2006), the applicant, also known as «Carlos the jackal», who was presumed to be the most dangerous terrorist worldwide in the 1970s, claimed a violation of Article 3 ECHR because of his eight years of solitary confinement. The ECtHR did not find a violation of Article 3 ECHR as regards the duration of the solitary confinement. However, the Court found a violation of the right to an effective remedy (Article 13 ECHR) because the French legislation did not foresee any mechanisms, which would have allowed the applicant to complain about the prolongation of his solitary confinement.

Also in other cases, violations of Article 13 ECHR were found when the relevant domestic law did not foresee effective remedies. This, for example, in *Rotaru v. Romania*⁷³ in relation to secret service acts/files. Since there were no remedies to complain about the data storage and counter the information contained in the files, the ECtHR established violations of Articles 8 and 13 ECHR.

In line with the above, the need for effective remedies also figures prominently in the CoE Guidelines on the fight against terrorism. The Guidelines refer to the necessary existence of an external independent authority to prevent abuse.⁷⁴ More particularly, they emphasize that it must be possible to challenge the lawfulness of measures⁷⁵ which interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, the surveillance of correspondence and the use of undercover agents) before a domestic court.⁷⁶

In sum, the existence of relevant mechanisms at national level, which are a corrective for disproportionate interferences in liberties in the name of security, are of central relevance. The ECtHR will examine, for example, whether adequate investigations in relation to alleged violations of freedoms/rights were conducted and whether adequate remedies exist at the national level. How the ECtHR perceives the balance between liberty and security from a human rights perspective will thus depend to a large extent on the mechanisms at the national level which are put in place to prevent abuse.

⁷² ECtHR (Grand Chamber), *Ramirez Sanchez v. France*, 4 July 2006, Appl. No. 59450/00.

⁷³ ECtHR, *Rotaru v. Romania*, *supra* cit.

⁷⁴ See CoE «Guidelines on Human Rights and the Fight against Terrorism», V. Collecting and processing of personal data by any competent authority in the field of State security.

⁷⁵ Respectively, the CoE «Guidelines on Human Rights and the Fight against Terrorism» also highlight that the measures must be lawful.

⁷⁶ See CoE «Guidelines on Human Rights and the Fight against Terrorism», Guideline VI.

5. CONCLUDING EVALUATION

The European system of human rights protection provides for an elaborate framework to balance liberty and security in times of terrorism from a human rights perspective.

The ECHR establishes first standards in this regard. The Convention distinguishes between different groups of rights. In case of absolute rights, such as the prohibition of torture, interferences are completely prevented. No reliance on security considerations can ever justify encroachments upon absolute rights. There cannot be any weighing of interests on the basis of liberty versus security. Every interference with absolute rights is considered a violation. In case of relative rights, conversely, such as the right to private and family life or the right to liberty and security of person, in comparison, the ECHR allows for interferences under certain (strict) conditions. Interferences must be provided for by law, pursue a legitimate aim and be «necessary in a democratic society», i.e. proportionate in view of the relation between the interest at stake and the severity/degree of interference. These criteria can also be drawn upon in times of increased terrorist threats. In times of terrorism, a state's room for action is – slightly – widened and the balance shifts towards security when consideration is given to what is «necessary in a democratic society». This shows even more in case of derogations from relative rights. In line with Article 15 ECHR, states can suspend certain (relative) human rights guarantees in the fight against terrorism and therewith broaden their room of action. Thus, the ECHR sets limits to state action in the fight against terrorism from a human rights perspective. Still, the Convention also leaves a space for domestic action in the name of security.

The case law of the ECtHR has further detailed the standards set in the ECHR. The Court's careful approach to the tension between liberty and security shows in particular in relation to the domestic sphere. There, the special role of the ECtHR as final guardian of human rights becomes evident. In fact, the scrutiny exercised by the ECtHR is always subsidiary. The Court does not replace domestic authorities which are usually considered closer to the situation and in a better position to judge how much security is good for a society from a human rights perspective. Rather, the ECtHR will give national institutions a certain room of action to take the measures they consider necessary to deal with a perceived terrorist threat in the most appropriate way. This enables states to find an optimal balance between liberty and security at domestic level.

At the same time, there are (human right) limits to state action. To circumscribe the room of domestic action, the ECtHR has developed detailed

criteria to qualify state measures in times of increased terrorist threats. The ECtHR pays particular attention to the existence of adequate *domestic* remedies and mechanisms of protection. The balance of liberty and security in times of terrorism depends thus to a large part on a state functioning under the rule of law with an according separation of powers, impartial and independent courts and adequate checks and balances. European human rights guarantees put certain absolute limits, e.g. as regards the prohibition of torture; in many respects they defer however to domestic mechanisms as being closest to the situation and frequently best placed to act.

To balance liberty and security in times of terrorism from a human rights perspective is thus multi-layered and complex. It first depends on the right which is encroached upon in the name of security. Second, domestic procedural guarantees and supervisory mechanisms are crucial as well as effective domestic remedies to look into alleged human rights violations in the name of security. The ECtHR, in the end, thus returns the ball to domestic authorities. This seems useful. National institutions are perhaps best placed to engage – within the parameters/limits set by the ECtHR – in the balancing between liberty and security in times of terrorism on a case by case basis and in a context specific way. This, of course, under the attentive eye of the ECtHR.

