

# **TERRORISM AND THE EUROPEAN COURT OF HUMAN RIGHTS**

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## I. INTRODUCTION

The Council of Europe currently consists of 47 European Countries.<sup>1</sup> In order to join and remain a member of the Council of Europe,<sup>2</sup> countries must ratify and adhere to the European Convention on Human Rights [*Convention*.]<sup>3</sup> Through the *Convention*, the European Court of Human Rights (“ECtHR”) is empowered to ensure that the *Convention* is adhered to<sup>4</sup> as well as to develop binding<sup>5</sup> case law to progress the interpretation of the *Convention*. The ECtHR interprets the *Convention* as a “living instrument”<sup>6</sup> which has led to an expansive scope of its provisions. This article will examine the impact of developments in the ECtHR’s case law on governments and public officials in the context of combating terrorism. In particular, this article will examine the restrictions that the ECtHR has placed on parties to the *Convention* (“Member States”) under Articles 2, 3 and 6 of the *Convention*. It will be submitted subsequently that although restrictions on governments and public officials are generally necessary, the restrictions of the ECtHR are too far-reaching and unreasonable in the context of protecting the lives of innocent civilians.

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<sup>1</sup> Council of Europe, *Statute of the Council of Europe*, CETS No. 001 (1949) at Article 26 (as at May 2018).

<sup>2</sup> *Ibid* at Articles 3 and 8.

<sup>3</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No. 005 (1950), as amended by Protocols No. 11 and 14.

<sup>4</sup> *Ibid* at Article 19.

<sup>5</sup> *Ibid* at Article 46.

<sup>6</sup> *Soering v United Kingdom* [1989] ECHR 14 at [102].

## II. RIGHTS AFFORDED UNDER THE CONVENTION

All humans have the right to life and this is enshrined in Article 2 of the *Convention*. Under Article 3 of the *Convention*, all humans also have the right to be free from torture as well as inhuman or degrading treatment or punishment. Terrorists are defined as people who use violence and intimidation to coerce governments and communities.<sup>7</sup> These people commonly engage in unlawful activities that extend to the killing and torture of innocent civilians, thus depriving innocent civilians of these *Convention* rights.

Article 1 of the *Convention* provides that Member States must secure these rights and freedoms to everyone within their jurisdiction. This means that Member States must take measures to ensure that no individual is subjected to torture nor to inhuman or degrading treatment, whether committed by a public official or by private individuals such as terrorists.<sup>8</sup> Similarly, Members must also take “preventive operational measures” to protect individuals whose lives are at risk from the acts of other individuals, such as terrorists.<sup>9</sup>

These are positive obligations placed on Member States and public officials to ensure that innocent civilians are not killed or tortured by anyone, including terrorists.<sup>10</sup> They require Member States to take reasonable measures to prevent the killing<sup>11</sup> or torture<sup>12</sup> of anyone in cases where authorities had or ought to have had, at the material time, knowledge of a “real and immediate risk” of loss of life or torture.

However, these positive obligations are in addition to negative obligations placed on Member States not to kill or torture individuals within their jurisdiction, whether innocent civilian or terrorist.<sup>13</sup>

## III. RESTRICTIONS ON NON-JUDICIALLY SANCTIONED STATE ACTIONS

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<sup>7</sup> *The Concise Oxford Dictionary of Current English*, 9<sup>th</sup> Ed, *sub verbo*, “terrorist”.

<sup>8</sup> *Z v United Kingdom* [2001] ECHR 333 at [73]; *A v United Kingdom* [1998] ECHR 85 at [22].

<sup>9</sup> *Osman v United Kingdom* [1998] ECHR 101 at [115].

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid* at [116]; See also, *Edwards v United Kingdom* [2002] ECHR 303 at [121].

<sup>12</sup> *Z v United Kingdom* [2001] ECHR 333 at [73].

<sup>13</sup> *Supra* note 9 at [115].

### A. Deprivation of Life

Article 2(2) of the *Convention* provides exceptions where a Member State is permitted to use force that might result in the deprivation of life.<sup>14</sup> Under Article 2(2)(a), such force may be used “in the defence of any person from unlawful violence”. Such force must also have been “absolutely necessary” in order to achieve the aim in Article 2(2)(a)<sup>15</sup> and must therefore be “strictly proportionate”.<sup>16</sup>

As Articles 2 and 3 are fundamental and basic values of Member States,<sup>17</sup> the ECtHR subjects deprivations of life to careful scrutiny and will therefore consider both the actions of state agents who administer the force as well as surrounding circumstances such as the planning and control of the operation.<sup>18</sup>

The restriction on public officials using such force only when absolutely necessary is itself an uncontroversial restriction. An example demonstrating this necessity is the case of the innocent civilian who was shot dead by police officers on 22 July 2005 on board the London transport network because the public authorities had wrongly suspected that he was a terrorist.<sup>19</sup> Although the civil case was settled by mediation,<sup>20</sup> this case illustrates the need to hold public officials accountable for their counter-terrorism operations.

In most cases, the application of the test of “absolute necessity” (and its accompanying strict proportionality test) will be straightforward. The firing of guns directly at demonstrators<sup>21</sup> and usage of high-explosive indiscriminate aerial fragmentation bombs in an area populated with innocent civilians are clearly more than absolutely necessary.<sup>22</sup> However, in less straightforward cases, the manner of application of the test to the facts might result in a decision that places an

<sup>14</sup> *McCann v United Kingdom* [1995] ECHR 31 at [148].

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid* at [149].

<sup>17</sup> *Ibid* at [147].

<sup>18</sup> *Ibid* at [150].

<sup>19</sup> *Armani Da Silva v United Kingdom* [2016] ECHR 314, at [12] and [37]–[38].

<sup>20</sup> *Ibid* at [142].

<sup>21</sup> *Simsek v Turkey* [2005] ECHR 546 at [108] and [112].

<sup>22</sup> *Kerimova v Russia* [2011] ECHR 744 at [253] and [257].

unreasonable restriction on public officials, especially when applying strict proportionality.

In *McCann v United Kingdom*,<sup>23</sup> 4 soldiers shot dead 3 known terrorists in Gibraltar<sup>24</sup> after they made movements that appeared as if they were attempting to detonate a bomb.<sup>25</sup> It transpired that the terrorists were not armed and were only on a reconnaissance mission with the intention of eventually planting a bomb there.<sup>26</sup> The ECtHR held that by not making sufficient allowances for the possibility that intelligence information could be wrong and by not preventing the terrorists from travelling into Gibraltar, the overall situation led to the killing of the terrorists which was therefore not absolutely necessary, violating Article 2.<sup>27</sup> This controversial decision generated a strong political backlash in the UK against the ECtHR.<sup>28</sup>

It is submitted, in support of the minority judges, that the failure to make allowances for intelligence information being wrong was analysed by the majority judges with the benefit of hindsight.<sup>29</sup> Both the majority<sup>30</sup> and minority<sup>31</sup> judges agreed that the authorities had incomplete information and had no choice but to formulate their operation on the basis of information available at that time. Difficult operational choices had to be made involving unpredictable human conduct.<sup>32</sup> It must be recalled that the actions taken by the UK government must be judged based on the information available at the material time,<sup>33</sup> a position that is akin to the approach under UK Domestic Criminal Law.<sup>34</sup>

Judges in the majority had earlier found that since the soldiers honestly believed, based on the information that they had, that shooting the suspects was necessary to

<sup>23</sup> *Supra* note 14.

<sup>24</sup> *Ibid* at [199].

<sup>25</sup> *Ibid* at [196] and [197].

<sup>26</sup> *Ibid* at [219].

<sup>27</sup> *Ibid* at [213].

<sup>28</sup> Peter Cumper, “When the State Kills – McCann and Others v United Kingdom”, (1995) 4 Nottingham LJ 207.

<sup>29</sup> Joint Dissenting Opinion, *McCann v United Kingdom*, [1995] ECHR 31 at [8].

<sup>30</sup> *Supra* note 14 at [193].

<sup>31</sup> *Supra* note 29 at [8]

<sup>32</sup> *Supra* note 9 at [116].

<sup>33</sup> *Ibid*; see also *Edwards v United Kingdom*, [2002] ECHR 303 at [121].

<sup>34</sup> *Criminal Justice and Immigration Act 2008* (UK), c4, s76(3).

prevent serious loss of life. The soldiers thus did not violate Article 2: “to hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others”.<sup>35</sup> This stands in stark contrast against the subsequent finding that the UK Government violated Article 2, especially since the latter had also honestly believed, based on the information they had, that shooting those terrorists were absolutely necessary to save the lives of innocent civilians.

The consequences of the intelligence information being correct are devastating and as such no responsible government would have allowed the risk of such a detonation.<sup>36</sup> It is therefore submitted that the authorities were correct in proceeding on the worst-case scenario basis.<sup>37</sup> Failing to do so would show a “reckless failure of concern for public safety”<sup>38</sup> and a breach of the authorities’ duty to protect innocent civilians as well as their own military personnel.<sup>39</sup>

It is also submitted, in support of the minority judges, that it would not have been practicable for UK authorities to arrest and detain the terrorists at the border.<sup>40</sup> The UK Government’s reason for not arresting the terrorists at the border was because there was insufficient evidence to warrant the detention and trial of the suspects.<sup>41</sup> However, this was rejected by the majority.<sup>42</sup> The result of the majority’s finding places an unreasonable restriction on public authorities because arresting and releasing terrorists at that stage in time would have alerted the terrorists to the readiness of the authorities.<sup>43</sup> The risk of a successful renewed attack on innocent civilians would increase as a consequence.<sup>44</sup> Furthermore, the UK Government had no option of preventive detention of suspected terrorists as the ECtHR had previously ruled that

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<sup>35</sup> *Supra* note 14 at [200].

<sup>36</sup> *Supra* note 29 at [9].

<sup>37</sup> *Ibid* at [13].

<sup>38</sup> *Ibid.*

<sup>39</sup> *Supra* note 14 at [192].

<sup>40</sup> *Supra* note 28 at [11].

<sup>41</sup> *Supra* note 14 at [204].

<sup>42</sup> *Ibid* at [205].

<sup>43</sup> *Supra* note 28 at [11].

<sup>44</sup> *Ibid.*

detention without trial would be a violation of Article 5 of the *Convention*.<sup>45</sup> The incompatibility of preventive detention with the *Convention*, even in the context of terrorism, has subsequently been reinforced.<sup>46</sup>

As such, the ECtHR's imposition of a test of strict proportionality in determining whether the force was “absolutely necessary” effectively leaves the UK government without any options to protect innocent civilians from terrorists. On the facts of *McCann v United Kingdom*, there would have been nothing the UK government could have done and they would have been forced to risk innocent lives.

By way of contrast, on the opposite end of the spectrum, the USA frequently engages in targeted killings of terrorists via drones and airstrikes, even on targets located in foreign countries.<sup>47</sup> This itself is submitted to be too extreme an opposing view.

It is submitted that a middle ground should be adopted where the proportionality test is moderated to be more lenient, in line with general standards relating to private- or self-defence. Under UK Domestic Criminal Law, strict proportionality is not applied for these doctrines of defence because it is unrealistic to expect anyone to weigh the exact amount of force necessary for self-defence in the midst of a situation.<sup>48</sup> This position is similar elsewhere because the proportionality of a response should not be weighed on “golden scales” with the “luxury of time and calmness to think about the possible courses of action to take”.<sup>49</sup> The detached objectivity that is natural in courtrooms long after the incident has taken place is an inappropriate test for such proportionality.<sup>50</sup>

### *B. Torture, inhuman or degrading treatment*

#### (1) Obtaining Information

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<sup>45</sup> *Brogan v United Kingdom* [1988] ECHR 24.

<sup>46</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56; *A and Others v Secretary of State for the Home Department* [2009] ECHR 301.

<sup>47</sup> Philip Alston, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions”, (2010) United Nations, A/HRC/14/24/Add.6 at [18]-[22].

<sup>48</sup> *Supra* note 34 at s76(7)(a); *Palmer v R* [1971] AC 814 (Privy Council on Appeal from Jamaica).

<sup>49</sup> *PP v Vijayakumar s/o Veeriah* [2005] SGHC 221 at [52].

<sup>50</sup> *Jai Dev v State of Punjab*, AIR 1963 SC 612 (India) at 617.

Torture as well as inhuman or degrading treatment or punishment are widely accepted to be morally wrong and unacceptable behaviour. The issue here is whether there are circumstances where such behaviour can ever be justifiable. Much of this discourse tends to moral and philosophical quandaries as opposed to legal matters. It is therefore unsurprising that there is no international consensus on this issue. As much academic ink has been spilled on this issue – most of it being non-legal and beyond the scope of this article – the following will only provide a brief overview of the contrasting positions at the risk of oversimplification.

Deontologists favour an absolute moral prohibition because of the essence of human dignity which prevents such actions, regardless of any possible disastrous costs of an absolute prohibition.<sup>51</sup> A common illustration is to let a nuclear bomb go off in a city rather than getting the information needed to stop it.<sup>52</sup> The Council of Europe and the ECtHR both adopt positions in favour of the deontologist view. The prohibition against torture, and inhuman or degrading treatment or punishment is an absolute prohibition.<sup>53</sup> This is irrespective of the conduct of the person,<sup>54</sup> and has no exceptions and can have no derogations, “even in the event of a public emergency threatening the life of the nation”.<sup>55</sup> Even under difficult circumstances such as fighting organized terrorism and crime, violations of Article 3 are absolutely prohibited.<sup>56</sup> Furthermore, a sufficiently real and immediate threat of conduct violating Article 3 may also result in a violation of Article 3.<sup>57</sup> In addition, any physical force that has not been made strictly necessary by a suspect’s conduct may result in a violation of Article 3.<sup>58</sup> In light of the absolute nature of the Article 3 right, judicial corporal punishment such as

<sup>51</sup> Robert J Homant et. al., ‘Is Torture Ever Justified – College Students’ Attitudes Toward Coercion/Torture’ (2008) 8 JIJIS at p 153.

<sup>52</sup> *Ibid* at p 153.

<sup>53</sup> *Supra* note 12 at [73]; *Republic of Ireland v United Kingdom* [1978] ECHR 1 at [163].

<sup>54</sup> *Republic of Ireland v United Kingdom* [1978] ECHR 1 at [163].

<sup>55</sup> *Aksoy v Turkey* [1996] ECHR 68 at [62]; *Selcuk & Asker v Turkey* [1998] ECHR 36 at [75].

<sup>56</sup> *Ibid*.

<sup>57</sup> *Gafgen v Germany* [2010] ECHR 759 at [91].

<sup>58</sup> *Bouyid v Belgium* [2015] ECHR 819 at [100].

caning has also been ruled to violate Article 3, and therefore cannot be applied to any person<sup>59</sup> regardless of the crime committed.<sup>60</sup>

Under this view, one must also consider the possibility of suspects confessing false information to stop being tortured. Furthermore, suspects may not always possess the information as believed and may not even be the correct persons to apprehend.<sup>61</sup> Furthermore, opening the door to “some” torture might lead to a slippery slope as it is not possible to limit the boundary on torture, leading to more extensive torture.<sup>62</sup> Lastly, torture is more heinous than operational killings because a suspect is particularly vulnerable when held in police custody and deprived of liberty.<sup>63</sup> Where the suspect is already entirely under the public authorities’ control, the authorities must bear a duty to protect him or her.<sup>64</sup>

Consequentialists, on the other hand, acknowledge that there may be some circumstances where torture may be necessary for the greater good.<sup>65</sup> An example of the consequentialist view is the USA which engages in conduct that would violate Article 3 of the *Convention* during some of its interrogations.<sup>66</sup>

Under this view, a common example is known as the “ticking bomb” scenario where information is needed urgently to diffuse a bomb to save lives and torture is the only method that can obtain the information.<sup>67</sup> In such situations, at varying levels, consequentialists agree that torture would be necessary.<sup>68</sup> Beyond this common argument, it should be noted that in one case where the interrogation was held in breach of Article 3, the authorities obtained a “considerable quantity of intelligence information, including the identification” of 700 terrorists and solved 85 unexplained crimes.<sup>69</sup>

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<sup>59</sup> *Tyrrer v United Kingdom* [1978] ECHR 2 at [35].

<sup>60</sup> *Ibid* at [34].

<sup>61</sup> *Supra* note 50 at p 154.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ribitsch v Austria* [1995] ECHR 55 at [36] and [38]; *Bouyid v Belgium* [2015] ECHR 819 at [100].

<sup>64</sup> *Bouyid v Belgium* [2015] ECHR 819 at [103] and [107].

<sup>65</sup> *Supra* note 50 at p 154.

<sup>66</sup> Department of Defense Joint Task Force 170 on Guantanamo Bay in Cuba, APO AE 09860, *Declassified “Legal Brief on Proposed Counter-Resistance Strategies”*, JTF170-SJA (31 October 2002).

<sup>67</sup> *Supra* note 50 at p 153.

<sup>68</sup> *Ibid* at p 154.

<sup>69</sup> *Supra* note 54 at [98].

## (2) Obtaining Convictions

Where subsequent evidence is obtained as a result of information earlier obtained during treatment that violates Article 3 (torture, inhuman or degrading treatment), and if the evidence (resulting in a conviction) is a direct result of the violation, then it is automatically unfair to use the evidence.<sup>70</sup> The reason for this is because allowing such evidence to be admitted would be an incentive for public authorities to continue violations.<sup>71</sup> This only applies where the evidence had a bearing on a conviction, as opposed to reliance on other untainted evidence.<sup>72</sup> This means that the focus of the ECtHR is on the unfairness of the violation in light of the absolute nature of Article 3, as opposed to other factors in other jurisdictions such as reliability,<sup>73</sup> probative value<sup>74</sup> or voluntariness.<sup>75</sup>

While hardly any objection is taken to this approach, caution must be taken by the ECtHR to ensure that conduct in alleged violation actually meets the high thresholds of “torture, inhuman or degrading” treatment. The reason for this is because in interrogations, “some discomfort has to be expected”<sup>76</sup> and it should be borne in mind that “the police work in difficult circumstances” such that removing “all doubt of influence or fear” would mean that the police “would never be able to achieve anything”.<sup>77</sup>

## IV. RESTRICTIONS ON JUDICIALLY SANCTIONED STATE ACTIONS

The ECtHR has decided that Member States cannot extradite a criminal to a Non-Member State where there are substantial grounds to believe that there is a real risk

<sup>70</sup> *Ibid* at [173]; *Gocmen v Turkey* [2006] ECHR 2003.

<sup>71</sup> *Supra* note 54 at [178].

<sup>72</sup> *Ibid* at [178]-[181] and [187].

<sup>73</sup> *Poh Kay Keong v PP* [1995] 3 SLR(R) 887 (Court of Appeal, Singapore) at [42].

<sup>74</sup> *Muhammad bin Kadar v PP* [2011] SGCA 32 at [53].

<sup>75</sup> *Yeo See How v PP* [1996] 2 SLR(R) 277 (Court of Appeal, Singapore) at [40].

<sup>76</sup> *Ibid*.

<sup>77</sup> *Panya Martmontree v PP* [1995] 2 SLR(R) 806 (Court of Appeal, Singapore) at [29].

of torture, inhuman or degrading treatment or punishment for the criminal.<sup>78</sup> In light of the fact that judicial corporal punishment such as caning has been held to be prohibited by Article 3,<sup>79</sup> Member States are unable to extradite terrorists to Non-Member States to face caning. The ECtHR subsequently extended this to include the death penalty and execution,<sup>80</sup> such that Member States can no longer extradite criminals to Non-Member States to face the death penalty.<sup>81</sup> The ECtHR has also expanded this to include extradition to a Non-Member State where a terrorist faces a de facto irreducible life sentence without parole.<sup>82</sup> The ECtHR has made clear that these restrictions also prevent expulsions<sup>83</sup> and even to the deportation of illegal immigrants that have snuck into the country.<sup>84</sup> In one case where extradition was prohibited, the ECtHR has went so far as to say that the “serious threat to the community” does not diminish the risk of a terrorist suffering harm when deported.<sup>85</sup>

Leaving aside any potential diminution of deterrent effect from death penalties or caning, the implication of the ECtHR’s decisions is that Member States are no longer able to get rid of terrorists that were originally not within their jurisdiction. Furthermore, an extension of this would be that terrorists from Non-Member States might specially flee to seek refuge in Member States since they cannot be deported back to face the death penalty or judicial corporal punishment even if they entered the Member State illegally.

A possible workaround in recent times has been to ensure that the state requesting for extradition agrees not to impose judicial corporal punishment on the suspect.<sup>86</sup>

<sup>78</sup> *Supra* note 6 at [91] and [111].

<sup>79</sup> *Supra* note 59 at [35].

<sup>80</sup> *Al-Saadoon & Mufdhi v United Kingdom* [2010] ECHR 282 at [120] and [137].

<sup>81</sup> *AL (XW) v Russia* [2015] ECHR 964 at [64].

<sup>82</sup> *Trabelsi v Belgium* [2014] ECHR 893 at [138] and [139].

<sup>83</sup> *LM v Russia* [2015] ECHR 908 at [126].

<sup>84</sup> *Jabari v Turkey* [2010] ECHR 369 at [42].

<sup>85</sup> *Saadi v Italy* [2008] ECHR 179.

<sup>86</sup> John Geddie and Robert Birsel (ed), “Singapore says won’t cane suspected bank robber if deported from UK”, (20 February 2018) *Reuters World News*, online: <<https://www.reuters.com/article/us-singapore-bank-robbery/singapore-says-wont-cane-suspected-bank-robber-if-deported-from-uk-idUSKCN1G40Y9>>; “StanChart robbery: Singapore agrees to UK request to not cane suspect if found guilty”, (20 February 2018) *Channel News Asia*, online: <<https://www.channelnewsasia.com/news/singapore/stanchart-robbery-singapore-david-roach-uk-request-extradition-9974270>>.

This can logically be extended to securing an agreement not to impose the death penalty as well. It remains, however, less than ideal. Apart from questions of sovereign equality or those of imposing of subjective values on other states, any Non-Member State is free to decide that it will not agree to the imposed terms for extradition, thus leaving the Member State potentially stuck with a terrorist. Furthermore, the ECtHR may not even be persuaded by the assurances provided by the state requesting for extradition if it finds that the foreign government is unable to adequately guarantee a freedom from Article 3 treatment.<sup>87</sup>

## V. CONCLUSION

The sum effect of developments in the ECtHR's case law is that governments and public officials in the Council of Europe are severely hampered from combating terrorism. Member States must fulfil a test of strict proportionality when making decisions relating to deprivations of life and are also unable to detain nor remove terrorists from their countries. These considerable restrictions place the lives of innocent civilians at significant risk and are therefore unreasonable in the context of fighting terrorism.

It is suggested that in analysing state behaviour in respect of terrorism, a useful analogy may be drawn from the opposing goals and values of Criminal Justice Systems. In the Criminal Justice System, a balance is normally struck somewhere along the spectrum between a model that primarily aims to suppress crime<sup>88</sup> (the "Crime Control Model") and a model that primarily seeks to protect an individual's rights<sup>89</sup> (the "Due Process Model"). When it comes to terrorism, many innocent lives are at stake. The severity of the risks involved mean that the appropriate balance required must be shifted towards the values of the Crime Control Model. It is thus submitted that the better way forward is to focus on suppressing terrorism, with the necessary compromise on some of the values of the Due Process Model. As such, primacy must be given to the protection of innocent lives with the necessary evil of watering down some of the rights in the *Convention*.

<sup>87</sup> *Chahal v The United Kingdom* [1996] ECHR 54 at [105].

<sup>88</sup> Herbert L Packer, *The Limits of the Criminal* (1968) Stanford University Press at p 159.

<sup>89</sup> *Ibid* at p 239.