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The Impact of Counter-Terrorism Security Measures on Fundamental Rights

What Constitutionalism and Supranational Human Rights standards offer to respond to the terrorist threat?*

di Rosario Serra-Cristóbal **

1. Introduction: Risks Threatening National Security

The issue of global risks has surfaced on every country's political agenda. Those risks include, for example, food safety risks, pandemics, global warming and other environment-related risks, financial crises,

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and terrorism. Concerns surrounding these issues generate a sense of insecurity that has to be addressed. The necessary steps may vary, but most of them are subject to the priority governments assign to securing both homeland security and the defense of the sovereign State. This is a challenge that no State can afford to face alone. As risks become increasingly global in nature, the strategic response to these must therefore be shaped at a supranational rather than national level. With this in mind, an effective international cooperation is required.

The problem is that, for reasons of domestic security, many governments adopted measures that, although designed to safeguard such interest, were not innocuous. Such measures simply resulted in the erosion and in some cases the infringement of fundamental rights. Ulrich Beck (2011, 5) states that governments sometimes react to global risks in a disproportional manner due to the fact that the political costs of failure are much higher than the political costs of overreaction.

To begin with striking a balance between human rights and security requires the analysis of a number of questions: Are those risks always clear? Are possible future risks overestimated? Are the actions that governments carry out to prevent those risks justified in every case?

We must analyze when State involvement is necessary in order to prevent further damage to other interests or rights. This intervention must be carried out without unduly prejudicing the rights and freedoms of citizens and, must always observe the rule of law. This has a major impact on everyday life. We must propose ways of striking such balance between ensuring security and safeguarding basic standards if we are to preserve our rights.



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Therefore, the struggle against terrorism, which precisely aims is specifically intended "to protect civil rights", may require the adoption of extraordinary measures that do not meet the minimum international standards for the protection of human rights¹.

Examples of this conflict between national security and limits to citizens' rights would be find in the way in which countries reacted to the terrorist attacks of September 11, 2001 (9/11), the bombings in Spain on March 11, 2004 and in Britain on July 7, 2005, or more recently in the announced measures of European governments after the terrorist attack to *Charlie Hebdo* Magazine in Paris, on January 2015².

From 2001, the terrorist attacks have created in the Western World a new perception of vulnerability that crystallized, especially in the United States, into a genuine necessity to increase homeland security through the fight against international terrorism which led to the adoption of measures which have generated considerable limitations to many rights and freedoms.

In Resolution No. 1368 (2001), the Security Council of the United Nations (UN) recognized that these attacks constituted a threat to international peace and security. Acting under the aegis of Chapter VII of the UN Charter, the Council adopted Resolution No. 1373 (2001), which

¹ On the different responses made in the fight against international terrorism after 9/11 see, among others, Roach (2014, 21-60).

² European leaders have begun looking for exceptional ways, including enhanced surveillance powers, to prevent international terrorism.



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urged all States to take measures to prevent the commission of terrorist acts, allowing a series of interventions that, over time, have hampered the establishment of a correct balance between the guarantees given by constitutional rights and national security. Indeed, many States prioritized security over civil rights, thus setting blatant limitations to the fundamental rights of citizens (e.g. extraordinary renditions, arbitrary deprivations of liberty and detentions, tortures, lack of public information, unfair trials, restrictions on freedom of expression, violation of privacy, targeted killings, etc.)

In the USA, Congress passed the *Patriot Act* and other bills such as the *Detainee Treatment Act* that included new counter-terrorism measures with unwelcome results vis-a-vis the traditional respect normally paid to constitutional rights. Since then, many detainees, when presumed to be terrorists, have been subjected to treatment that can be qualified as torture³, while others continue to be deprived of liberty even after many

³ Several sources reported that numerous abuses of suspected terrorist prisoners occurred at Abu Ghraib, Guantanamo Bay, Bagram and at other such camps. Many of the details of this torture were not known until after the declassification of secret documents ordered by the Obama Administration in April 2009. Those documents contain recollections of terrible arrests and interrogations of those prisoners by the USA during the period between 2002 and 2005. A similar flood of accusations was made against the British secret service (MI6), for showing complicity with the CIA in the torture of suspected terrorists abroad. In late 2005, the CIA director reported to the White House the suspension of the interrogation program, although there is no confirmation that those practices have been completely abandoned. Since then, a new approach has been implemented, with a shift from detention and interrogation techniques towards an increase in the number of targeted killings (Goldsmith 2012, 21).



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years, some have been tried by military courts, and targeted killings have been ordered⁴. Despite the support that the counter-terrorism policy received from Congress, some of these practices have been brought before the U.S. Supreme Court. In a series of split-vote decisions, the Court ruled that those measures surpassed both the limits and the guarantees of rights enshrined in the Constitution. Some of the interventions authorized by the *Patriot Act* as part of the fight against Islamic terrorism were found to be excessive by the judges. (See, inter alia, *Boumediene et al. v Bush*, ruled on June 12, 2008, Revenga Sánchez 2008, 175-188. See also cases *Hamdi et al. v. Rumsfeld*, *Rumsfeld et al. v. Padilla*, and *Rasul v. Rumsfeld*).

Likewise, in 2001, the British Parliament enacted the *Counter-Terrorism, Crime and Security Act*⁵, which raised serious doubts with regard to its compatibility with the European Convention on Human Rights⁶.

⁴ In the last years of the Bush Presidency and with the new Obama Administration, security policies were reviewed. Every area of counterterrorism policy, including military commissions, military detentions, surveillance, black sites, interrogation, habeas corpus, and the like, were revisited. Obama kept those policies unable to change the functioning of the security structures overnight (it is not easy to implement major changes in National Security) until he had access to reserved intelligence information on such policies (Goldsmith 2012, 11-22).

⁵ About this Act *vid.* Feldman (2005, 531-552).

⁶ For instance, in *Gillan and Quinton v United Kingdom (January 12, 2010)* the European Court of Human Rights ruled that the stop and search power, permitted by Sections 44 & 47 of the Terrorism Act 2000 (UK), violated Article 8 of the European Convention. Those Sections authorised policemen to stop and search vehicles and pedestrians without reasonable suspicion within a broad geographical area for up to 28 days. (Ip 2013, 729)



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Other countries also implemented aggressive counter-terrorism programs⁷ or permitted the use of their airspace and airports for extraordinary rendition operations, authorizing the transfer—without due legal process—of detainees into the custody of a foreign government for purposes of detention and interrogation⁸.

Many of these measures were executed not only to prosecute criminals, but also to prevent future attacks and combat the risk of terrorism. Among these (at times) preventive counter-terrorism actions, another great scandal made the headlines in 2013, due to the leaks of Edward Snowden, a former US National Security Agency contractor⁹. The NSA

⁷ For instance, the Report of the Open Society Foundations “Counterterrorism and Human Rights in Kenya and Uganda: The World Cup Bombing and Beyond”, published in 2013, looks at how the governments of Kenya, Uganda, the United States, and the United Kingdom responded to the 2010 World Cup bombing in Kampala, Uganda. The counterterrorism actions that were activated after the bombing were characterized by human rights violations, including allegations of arbitrary detention, unlawful renditions, physical abuse, and the denial of due process rights.

⁸ Regarding the cooperation of different States on extraordinary renditions, see Open Society Justice Initiative (2013).

⁹ Edward Snowden revealed to a British newspaper *The Guardian*, together with other information, the existence of a secret program that allowed the NSA to enter directly into the servers of Google, Facebook, Skype, Microsoft and Apple, as well as to the Swift’s transfer service of bank data.

On September 28, 2013, *The New York Times* reported that since 2010, the NSA was using this information to develop individual profiles and draw interrelations among different social network users (*N.S.A. Examines Social Networks of U.S. Citizens*, in *The New York Times*, September 28, 2013). On July 31, 2013, *The Guardian* disclosed the existence of a system used by the NSA called XKeyscore, which allows, through the use of metadata, (who, when and where someone accesses an account or sends a message) the extraction and sorting out of information contained in emails and digital conversations, in addition



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was authorized by President Bush (and later by Obama) and by Congress to put into place a program of widespread surveillance of the phone calls made by ordinary citizens as well as those made to suspected terrorists throughout the world. The leaks revealed that the NSA had been engaged in the mass surveillance of data of millions of citizens, and not only American citizens, but also foreigners, including senior officials from many States. This was justified on the grounds of national security. The NSA admitted this in front of a Senate Committee hearing, alleging that the information obtained was used for no other purpose than to safeguard homeland security.

Nevertheless, in January 2014, when faced with an international outcry in response to NSA's spying practices, President Obama stated that he would restrict the ability of intelligence agencies to gain access to phone records, and would ultimately remove data from governmental control. However, he went on to defend the need for data surveillance in order to guarantee State security. Except in emergencies, he would seek prior court approval each time an agency analyst needed to access telephone records. Obama added that he had explicitly forbidden the surveillance of the leaders of allied countries¹⁰. In March 2014 Obama's Administration was preparing a new legislative proposal with that objective¹¹. Nevertheless, at

to that from internet browsers (Glenn Greenwald, *XKeyscore: NSA tool collects 'nearly everything a user does on the internet'*, in *The Guardian*, July 31, 2013)

¹⁰ M. Lander and Ch. Savage, *Obama Outlines Calibrated Curbs on Phone Spying*, in *The New York Times*, Jan. 17, 2014.

¹¹ Charlie Savage, *Obama to Call for End to N.S.A.'s Bulk Data Collection*, in *The New York Times*, March 24, 2014.



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the beginning of 2015 President Obama presented a package of proposals that could result in less protection for citizens' data¹². The issue is still open.

Regardless of the promised limitations to espionage and the announced guarantees, public concern is still entrenched, not simply because one foreign country is spying on another, but because several States are involved in the same activity. In fact, the press quickly revealed that the practice of mass data collection has, over the years, become common practice in intelligence-gathering communities worldwide¹³.

Furthermore, in Europe, after the series of terrorist attacks by individuals or small groups across different countries, governments are pressing for more powers to gather intelligence from modern means of communication like Internet sites, including social media¹⁴. They are calling for more authority to intelligence agencies to monitor communi-

¹² See The editorial board, *Still Waiting for Strong Privacy Laws*, in *The New York Times*, Jan. 14, 2015.

¹³ See J. Follorou and F. Johannès, *Révélation sur le Big Brother français*, in *Le Monde*, July 4, 2013. S. Ackerman and James Ball, *Optic Nerve: millions of Yahoo webcam images intercepted by GCHQ*, in *The Guardian*, February 28, 2014. Europa Press, *CNI cooperated with the United Kingdom in the mass internet surveillance*, in *Público.es*, February 17, 2014. Gemma Galdón, *Espionaje and human rights: the limits to intrusion of privacy*, in *eldiario.es*, August 4, 2013. Web version: http://www.eldiario.es/turing/Espionaje-derechos-humanos_0_159934512.html.

¹⁴ Germany wants to revoke the ID cards of those suspected of traveling to join jihadist groups. In France, there is now a debate about increased surveillance powers, through something of a French "Patriot Act". In Great Britain are debating on the same issues. And Spain is also amending its Criminal Code on International terrorism.



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cations. And the same is happening in Canada, where the Prime Minister introduced legislation that would greatly expand the role of the spy service, allowing courts to remove online postings and increasing police detention powers.

Against this background, many citizens ask themselves: To what extent am I being controlled? Can the State do this? If they collect my data and control my communications to prevent future risks, are these measures always justified in all cases? Are these risks clear or are they overrated? When are governments entitled to take such measures involving the limitations of my rights?

This will form the focus of this essay. Because, «history teaches that after the security crisis has passed, it generally becomes evident that there was not rational factual basis for sacrificing rights in favour of security needs» (Gross 2013).

2. How to Assess the Threat of Terrorism?

One of the leading points is to analyze the capacity of the State to provide a timely and appropriate response to terrorism and other global risks. To maintain high security levels, it is necessary to adopt certain measures with the remit to restrict individual rights. However, a proportional balancing between those key interests (security and human rights) must be pursued. Security means protecting people's freedom in such a way that everyone can enjoy life without being threatened, but also without the fear of being continuously under surveillance or constrained. Are measures such as the maintenance of permanent terrorist



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blacklists or the mass data surveillance proportional to the perceived level of danger from terrorist attacks?

Here, Rawls' reflections on the "rule of clear and present danger" theory may prove useful with regard to this question. This theory was used in relation to the possible limitations to freedom of expression, but also, may similarly be applied with regard to the need to limit other rights when faced with a "clear and present threat" (Rawls 1981, chapter XI). The U.S. Supreme Court used this when asserting, «in each case [Courts] must ask whether the gravity of the damage, reduced by its improbability, justifies such invasion of [free speech] and is necessary to prevent the danger»¹⁵. Therefore, the rule does not require that the damage is imminent, but that it is at least sufficiently widespread and probable. For Rawls (1981), what is indispensable is the need to specify more precisely the type of situation that can justify the restriction of freedoms. In addition, it is essential that it is an emergency situation in which a present or foreseeable threat of serious prejudice arises. Restrictions on the content of rights can only be imposed if this is necessary to prevent further and more significant, either direct or indirect, damage to these freedoms.

Thus, we must consider whether a greater interest exists (a clear risk) that justifies the limitation of certain individual rights. The intensity of the risk, the consequences in the event that the perceived danger occurs,

¹⁵ Case *Dennis v. United States*, 341 U.S. 494 in 510, cit. 183 F. 2, in 212.



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and the probability of this happening, need to be evaluated. Low risk is not the same as “catastrophic” risk, with its serious and perdurable consequences. For instance, the probability of losing a large number of lives, as a result of a terrorist attack, can be considered to be a “catastrophic” risk (Weinstock 2011, 72).

It has been suggested that, in order to deal with those risks that threaten the global community, the employment of principles such as prevention, precaution, and anticipation is required, and also those of proportionality, justification, respect for the rule of law and accountability (Van Kempen 2013, 15-16). These features will be discussed at length below.

When combating a risk such as terrorism, it is necessary to assess whether there are specific objectives that justify intervention by the State. It should also gauge whether the means used in that struggle are proportional, and if they are truly required. For instance, time should be taken to consider alternative, less invasive solutions, or to calculate the consequences for particular individuals, groups or the society at large. Also one has to determine if there is a way to minimize the inevitable damage caused by counter-terrorism measures. Finally, an established deadline must be a requirement in addition to the periodic review of the maintenance of measures that restrict rights.

As Innerarity acknowledged (2011, 13), our main future discussions will revolve around the question of how we assess the risks and what behaviors we recommend as a consequence. This author suggests a democratic management of current existing risks. Other players also seek to express their viewpoints: social movements, civil society (Innerarity 2011, 19; Jáuregui 2011, 241). And, as Ulrich Beck states (2011,



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29), «civil society's agenda is surrounded by the halo of human rights and global justice». As a result of global social participation in this realm, some documents have been adopted. The "Tshwane Principles" (2013)¹⁶ set out detailed guidelines for those engaged in drafting, revising or implementing laws or provisions relating to the State's authority to withhold information on the grounds of national security or to punish the disclosure of such information. These persuasive principles are based on both, international and national law, standards and good practice. Or the "Principles on the Application of Human Rights to Communications Surveillance", July 10, 2013, signed by more than 400 organizations and experts around the world¹⁷.

Conclusively, it is impossible to forget that both participation and fundamental rights are the basis of constitutionalism.

3. Human Rights Standards as a Limitation to Governmental Security Actions

In every culture, fears may differ and governments can react to these in a variety of ways. The culture of fear, the need to ensure safety,

¹⁶ The Principles have been drafted by 17 organizations and five academic centres throughout Africa, the Americas, Europe and Asia based on conversations and information provided by more than 500 experts from more than 70 countries, including government and former government officials and military officers, at meetings around the world over a two-year period.

¹⁷ <https://en.necessaryandproportionate.org/text>.



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may vary, but in a global world, the trend is towards convergence. Global risk and the fear of such risks (such as terrorism) is an undeniable phenomenon currently occurring on a global scale and, one that involves fundamental rights, which calls for a supranational response. The point is that, as these risks have become globalized, so too has the need to create a “*ius commune*” or “global constitutionalism” to protect fundamental rights against preventive State action. It is crucial to establish international common standards for the protection of such rights.

That coincides with the theory of the existence of a “Global model of Constitutional Rights” (Möller, 2012). This theory argues that there is a coherent conception of constitutional rights in Europe and globally born as a result of a process. As Müller (2014, 74) wrote, «constitutional structures are both a result of (past) and a framework for (future) political struggle at a particular moment of international history and at the same time advance their own historical narrative linking the past, present and future of the respective international society». Global constitutionalism typifies the claim for the promotion of constitutional principles (such as checks and balances, democracy, human rights) in international law.

The concept of supranational rights has been present within the United Nations context and in Europe since the Second World War. As is well documented, following the war, and with the creation of the United Nations, the international community vowed never to allow such atrocities against mankind to happen again¹⁸. Human rights were considered

¹⁸ In line with this view, Article 55 of the 1945 United Nations Charter provides that universal respect for and observance of human rights and fundamental freedoms for all



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to be central to achieving those aims, which prompted the adoption of an international bill of rights, the Universal Declaration of Human Rights (UDHR, 1948). Despite the many weaknesses inherent in the system and the over-representation of some States within the UN, the fact remains that the UDHR constitutes a global reference document. The continuing posture of the Declaration and its permanent use reinforce its universal acceptance and the common understanding of human rights.

In Europe, —both within the EU and the Council of Europe—, the defense of rights, based on the common constitutional traditions of Member States, has been crucial to their institutional development¹⁹. Hence, the Preamble of the EU Charter of Fundamental Rights asserts: «Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; [...] This Charter reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of

with no distinction with regard to race, sex, language or religion are conditions of stability and well-being that are necessary for peaceful and friendly relations among nations.

¹⁹ Explicit references to fundamental rights did not exist in the European Treaties at the outset. The Maastricht Treaty (1992) introduced for the first time mention of such: «The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law» (art. F)



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the Court of Justice of the European Union and of the European Court of Human Rights».

This is the perspective that aligns best with this paper. Supranational organizations such as the United Nations (with its Human Rights Committee), the Council of Europe (with the European Court of Human Rights) or the EU (in the remit of its Charter or Fundamental Rights and its Court of Justice) play an important role in the consolidation of a common standard of rights²⁰. As stated above, a supranational strategy for human rights promotion is required when adopting measures against global risks and, in particular, in order to challenge existing counter-terrorism policies.

Certainly, another option for protecting rights against disproportionate counter-terrorism measures presents itself via domestic law, and moreover, through the coordination of national legal systems. Over time, domestic legislation and case law may influence the global framework. They can fertilize (*cross-fertilization*) other States whose legislators and courts imitate the policies of other countries. As noted by Hamai (2012, 1328), «judicial use of foreign law is a product of globalization of the practice of modern constitutionalism». Holding constructive dialogues among States produces fruitful exchanges of constitutional concepts (the migration and dissemination of ideas, dialogue, borrowing, legal transplants, etc.) (De Vergottini 2010, 56)²¹ that shape the inception of comprehensive standards for the protection of rights. These standards

²⁰ In similar terms, see Petersman (2002, 621-650).

²¹ On the “battle of metaphors” to refer to this phenomenon, see also Perju (2012, 1306).



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may act to limit State action justified on security grounds. It can be observed that in recent times, a favorable atmosphere for this mutual understanding among legal systems has been fostered. We must take advantage of this and continue to consolidate the adoption of universal guidelines for rights and freedoms. States may even share a minimum set of measures to protect human rights.

This interrelation is also possible among Constitutional/Supreme Courts and supranational courts (García Roca 2012, 183-224), or between two supranational courts, or among courts and human rights monitoring bodies²². In a multilevel system, it is likely that the degree of protection afforded to fundamental rights which can be guaranteed by one level (e.g. UN) does not attain the same level of protection that another level has developed and considers indispensable (e.g. EU or national level). This is where *cross-fertilization* assists in defining better standards for human rights protection. Of course, as highlighted by Kokott and Sobotta (2012,1024), it should be admitted that finding the correct balance between constitutional core values and effective international measures against terrorism is never an easy task.

The institutionalization of common standards with regard to the norms of human rights protection in supranational spheres could help, as affirmed by Burke-White (2004, 265), «to set a minimum floor of treatment for all citizens within the domestic policy». Therefore, providing a reasonable common standard for human rights protection against

²² Garlicki uses the term “cooperation” to refer to the interrelations in a triangle where its three vertices are occupied by (1) the various national supreme or constitutional courts, (2) the CJEU, and (3) the ECHR. (Garlicki 2008, 509).



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counter-terrorism strategies could offer the basis for evaluating national and international policies.

4. Some Steps in the Right Direction: Security from an International Human Rights Perspective

Although many rights have been curbed as a result of the implementation of measures to safeguard national and international security, steps in the right direction have been taken with regard to the supranational framework. This involves attempting to understand security from a human rights perspective.

As indicated above, the UN, the Council of Europe and the EU operate based on the primacy of the individual over the omnipotent State and the safeguarding of democracy as key instruments in the effective promotion of international peace and security.

4.1 Some Steps taken within the United Nations

In the framework of the United Nations, the Security Council has gradually accepted the connection between upholding human rights and preserving international peace and security. For the first time, the Council, in its preamble to Resolution No. 1269 (1999), expressly referred to human rights in the context of counter-terrorism (Flynn 2007, 378). But, after the 9/11 attacks, new Resolutions (e.g. Res. 1373, 2001) were adopted and a Counter-Terrorism Committee was created (2001). The threat of



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international terrorism at that time led to many States adopting counter-terrorism measures that were not conducive to respect for human rights, which provoked controversy among academia and social movements.

A new approach to human rights was later adopted, when the Security Council, under Resolutions No. 1456 (2003) and No. 1624 (2005) and subsequent resolutions, stressed that States needed to ensure that any measure taken to combat terrorism «complies with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law».

Despite this, there still remain strong currents of opinion which hold that the human rights perspective is not duly anchored in the UN Security Council's agenda (Flynn 2007, 371).

The first initiatives were mainly taken in the UN Security Council. The General Assembly and the Commission on Human Rights, however, soon became increasingly involved in matters related to human rights and terrorism. The United Nations established a new approach towards terrorism when, in 2005, it created the office of Special Rapporteur assigned to the promotion and protection of human rights and fundamental freedoms while countering terrorism. Moreover, in 2006 the General Assembly adopted the Global Counter-Terrorist Strategy²³, which stated that «effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing». The strategy includes a set of proposals to ensure respect for

²³ Resolution adopted by the General Assembly on 8 September 2006 (A/RES/60/288).



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human rights and the rule of law as the fundamental basis of the fight against terrorism. It also reaffirms that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.

The UN Human Rights Committee (UNHRC) has also dealt with several cases reflecting the need to strike a balance between fundamental rights and the counter-terrorism fight. For instance, on 31 March 2009, the UNHRC adopted its decision on the case of *A.K. and A.R. v. Uzbekistan* (CCPR/C/95/D/1233/2003). Terrorist bombings took place in Tashkent, the capital of Uzbekistan in 1999 and the Government accused the Islamic Movement of Uzbekistan of being behind these actions. In the investigation, A.K. and A.R. were arrested after the authorities discovered several publications and other written material on religious matters. The detainees were convicted of offences related to the dissemination of the ideology of the Islamic Movement of Uzbekistan. The Committee found that the Uzbek authorities based their actions on a perceived threat to national security, thereby not violating any of the stipulations of the International Covenant on Civil and Political Rights 1966 (ICCPR).

The UNHRC heard cases on arbitrary detentions (for example, see the case of *Al-Gertani v. Bosnia*, CCPR/c/109/D/1955/2010, concluded on 6 November 2013²⁴). Similarly, the Committee clarified its position on tor-

²⁴ The applicant was a Sunni Iraqi who worked for Saddam Hussein. After fleeing the country, he stayed in Yemen under a different identity and then moved to Bosnia and



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ture during the course of the *incommunicado* detention of a presumed terrorist (in the case of *Achabal Puertas v. Spain*, 23 May 2013, CCPR/C/107/D/1945/2010). The applicant, a presumed member of ETA, claimed to have been tortured during an *incommunicado* detention in 1996, during the course of which she was denied the right to be assisted by a lawyer or to communicate with her family. The Committee recalled its general comment No. 20 (1992)²⁵, on the prohibition of torture or other cruel, inhuman or degrading punishment, in addition to its case law²⁶, which establishes that denunciations of torture shall be investigated promptly, carefully and impartially by competent authorities and that appropriate actions must be taken against those found guilty.

Herzegovina where he was married and obtained Bosnian nationality. On May 3, 2009, the Foreign Affairs department decreed that the applicant be apprehended and placed under the custody of an Immigration Centre in Eastern Sarajevo until June 3, 2009. This decision was founded on him being a threat to the legal system, public order, peace and security of the State. After exhausting all domestic legal remedies, the applicant complained before the UNHRC. The Committee recalled that the notion of “arbitrariness” in a deprivation of liberty employed in Article 9, paragraph 1 of International Covenant on Civil and Political Rights is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law. In this case, the author was never provided with the reasons or evidence that led the authorities to the conclusion that he was a threat to its national security or any specific explanation as to why he could not receive any information on this matter.

²⁵ *General Assembly Documents, 47th period of sessions, Supplement No. 40 (A/47/40)*, annex VI, sec. A, para. 14.

²⁶ See, for instance, Communication No. 1829/2008, *Benítez Gamarra v. el Paraguay*, Opinion adopted on 22 March 2012, para. 7.5.



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The Committee has also examined cases related to the placement of individuals on a suspected terrorist list (The case of *Sayadi and Vinck v. Belgium*, CCPR/C/94/D/1472/2006). Here, the Committee found that Belgium acted prematurely, and therefore wrongfully, in transmitting the authors' names to the Sanctions Committee before the conclusion of the criminal investigation into the authors' activities initiated by the State's Public Prosecutor, with adverse consequences for their freedom of movement, their honour and reputation, and which led to interference in their private life.

These represent only a few examples of the approach of the main UN bodies to the question this work is focused upon. But they show a trend when looking at ways to secure an adequate balance between human rights and the maintenance of security in the fight against terrorism.

4.2 The European Court of Human Rights: a Longer Walk

It is in Europe perhaps where the steps taken towards protecting rights in the counter-terrorism fight have been more visible. Europe has, unfortunately, a great deal of experience with terrorism even prior to the rise of al-Qaeda. Possibly this is a different type of terrorism and it may require additional or new measures to combat it. Nevertheless, the same principles of respect for human rights must be adhered to when dealing with the risk of international terrorism. Both the Council of Europe and the EU have produced rules and jurisprudence to that effect.

In the context of the Council of Europe, in 2002 its General Assembly adopted the Guidelines on human rights and the fight against terrorism. The guidelines seek to reconcile legitimate national security concerns



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with the protection of fundamental freedoms within the context of the European system. Among these guidelines certain rules exist such as prohibition on arbitrariness and discrimination; prohibition on torture; regulation of surveillance; right to due process; prohibition on the death penalty; or provisions for the surveillance of a detainee's communications with legal representatives. A similar concern for rights in the fight against terrorism underlies the text of the European Convention on the prevention of terrorism (2005).

However, regarding these issues, the organization that has played a more crucial role is the European Court of Human Rights (ECHR). Its case law forms the human rights *acquis* followed by many European domestic courts and by other courts and human rights monitoring bodies around the world.

One of the best examples of the Court's approach in this field can be found in the *El-Masri v. The Former Yugoslav Republic of Macedonia* case on secret "rendition" operations, concluded on 13 December 2012 (Fabbrini 2013). This concerned the torture of an individual wrongly suspected of being involved in terrorist activities who was transferred from Macedonia to the US intelligence services. The US intelligence agents transported Mr. El-Masri to a black site in Afghanistan for the purpose of interrogation until they concluded that he was not involved in any terrorist activity and was returned to Albania. However, this did not occur until after several days of being repeatedly subjected to "enhanced" interrogations, submitted to severe beatings, stripped and sodomised. The ECHR found that by seizing, detaining and secretly transferring Mr El-Masri to the custody of US intelligence agents, Macedonia violated the prohibition of torture and inhuman and degrading treatment, the prohibition of arbitrary deten-



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tion, the right to a private life and a family life and the right of access to Court as stipulated under the European Convention on Human Rights²⁷.

But the ECHR was also seized of other cases concerning the prohibition of torture and inhuman or degrading treatments during the detention of an alleged terrorist²⁸. It recently held that keeping a convicted terrorist in solitary confinement during his first ten years of life imprisonment under poor conditions constituted inhuman or degrading treatment (*Abdullah Öcalan c. Turkey*, 18 March 2014). On procedural rights during the detention and trial of alleged terrorists, the ECHR found inadmissible infinite²⁹ or overdue³⁰ detentions. The Convention held that the detention of an individual for questioning merely as a part of an intelligence gathering exercise was not allowed, since the existence of a reasonable suspicion must be proven³¹; and it also recognized the right to be tried within a reasonable time³² and the right to a fair trial³³. The European Judges also

²⁷ Some other cases on extraordinary renditions are today pending before the ECHR.

²⁸ *Ireland v. the United Kingdom*, 18 January 1978; *Aksoy v. Turkey*, 18 December 1996; *Martinez Sala v. Spain*, 2 November 2004; *Öcalan v. Turkey*, 12 May 2005 (Grand Chamber); *Ramirez Sanchez v. France*, 4 July 2006 (Grand Chamber); *Frérot v. France*, 12 June 2007; *Andrey Yakovenko v. Ukraine*, 13 March 2014.

²⁹ *A. and others v. The United Kingdom*, 19 February 2009 (Grand Chamber).

³⁰ *Del Rio Prada v. Spain*, 21 October 2013.

³¹ *Murray v. the United Kingdom*, 28 October 1994; *O'Hara v. The United Kingdom*, 16 October 2001.

³² *Berasategi v. France*, *Esparza Luri v. France*, *Guimon Ep. Esparza v. France*, *Sagarzazu v. France* and *Soria Valderrama v. France*, 26 January 2012.

³³ *Salduz v. Turkey*, 27 November 2008 (Grand Chamber); *El Haski v. Belgium*, 25 September 2012.



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ruled against the prohibition of deportation or extradition whenever there is an actual risk of ill-treatment in another State³⁴.

Worth noting is its case law on expressions or ideas that could allegedly support terrorism (*Falakaoglu and Saygili v. Turkey*, 19 December 2006; *Ürper and others v. Turkey*, 20 October 2009). Moreover, of special relevance are those cases where the Court has ruled on the measures taken by States in the fight against terrorism, confirming that they must respect human rights and the rule of law, and exclude arbitrariness and discriminatory or racist treatment³⁵.

4.3 *The European Union's Challenges to Terrorism*

At the EU level, the primary responsibility for designing the legal system and implementing it at a national level rests with each Member State. Notwithstanding this national competence, the EU has embarked upon the harmonization of legal systems in order to achieve greater efficiency in the fight against terrorism (Art. 29 Treaty of the EU)³⁶. This be-

³⁴ *Chahal v. the United Kingdom*, 15 November 1996; *Saadi v. Italy*, 28 February 2008 (Grand Chamber); *Ben Khemais v. Italy*, 24 February 2009; *Labsi v. Slovakia*, 15 May 2012.

³⁵ *McCann and others v. the United Kingdom*, 27 September 1995; *Gillan and Quinton v. the United Kingdom*, 12 January 2010; *Nada v. Switzerland*, 12 September 2012 (Grand Chamber).

³⁶ A development of this cooperation can be found, along with others, in Art. 4 of Council Common Position of 27 December 2001, on the application of specific measures to combat terrorism (2001/931/CFSP); Council Decision of 28 November 2002, which establishes a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism (2002/996/JHA). See also Council Decision



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came more noticeable following the 9/11 attacks, the true launch date for a structured EU counter-terrorism policy. Since then, European cooperation has made great progress in this field.

In any case, EU counter-terrorism policies have always attempted not to overlook fundamental rights, as the fight against terrorism must be adopted taking into account the framework of human rights as guaranteed by the European Convention of Human Rights, as they emerge from the common constitutional traditions to the Member States, as principles of Community law, and as held in the EU Charter of Fundamental Rights. Mindful of this, the Council Framework Decision, of 13 June 2002, on combating terrorism established that: «Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate» (Recital No.10). Unfortunately, following this interpretation, there remains no provision in the said Framework Decision for the establishment of concrete actions to avoid damage to fundamental rights in the event of future terrorist threats.

A further step was taken with the adoption of the *EU Internal Security Strategy* (February 23, 2010), which sets out challenges, principles and guidelines for dealing with security issues within the EU. This Security

2003/48/JHA of 19 December 2002, on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP; Council Framework Decision, of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).



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Strategy was based on the understanding that «it is thus vital that [it] be able to adapt both, to the needs of citizens, and to the challenges of the dynamic and global twenty-first century». The EU «must consolidate a security model, based on the principles and values of the Union: *respect for human rights and fundamental freedoms, the rule of law, democracy, dialogue, tolerance, transparency and solidarity*»³⁷.

As stated in the Council's discussion paper on "EU Counter-Terrorism Strategy" (May 23, 2012), the international community needs guidelines to ensure that we not only build counter-terrorism capacity, but also ensure that the rule of law and human rights are inherent in counter-terrorism efforts (p. 10)³⁸.

In 2015, immediately after the Paris attacks to *Charlie Hebdo* Magazine, European officials reacted pledging reinforced cooperation in the fight against terrorism. Among the proposals, one key issue to be dis-

³⁷ As part of the EU General Programme "Security and Safeguarding Liberties", a Specific Programme on Prevention, Preparedness and Consequence Management of Terrorism and other Security related risks, were adopted for the period 2007-2013. The Council Decision of February 12, 2007 established for the period 2007 to 2013, part of the General Programme on Security and Safeguarding Liberties, the Specific Programme Prevention, Preparedness and Consequence Management of Terrorism and other Security related risks (2007/124/EC, Euratom) See also, Communication from the Commission to the European Parliament and the Council "The EU Internal Security Strategy in Action: Five steps towards a more secure Europe", it proposes actions for implementing the strategy during the period 2011-14 /* COM/2010/0673 final */

³⁸ Council of the EU, 9990/12. See also: Villy Søvndal is Denmark's foreign minister. Gilles de Kerchove is the EU's counter-terrorism co-ordinator. Ben Emmerson is the United Nations special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in "Counter-terrorism and human rights", *European Voice*, March 19, 2012.



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cussed is a proposal for EU states to share records of air passengers – or PNR – a measure that has been held up in the European Parliament over privacy concerns. Anyway, the recent terrorist shootings could spur new anti-terrorist measures. We hope they consider an adequate balance between security pursuit and individuals' rights.

In the realm of the EU case law, its judicial body —the European Court of Justice (ECJ)— has taken a number of actions in favor of the promotion of rights in the struggle against terrorism. In fact, the ECJ is a “newcomer” to the field of counter-terrorism law and other national security matters. The ECHR and other domestic constitutional courts are accustomed to facing national security crises and took their first decisions some decades ago. Cases brought before the ECJ are more recent and, due to the special features of the EU distribution of powers (national/supranational and inter-EU), playing the role of human rights monitoring body has increasingly become a difficult challenge, particularly when dealing with international terrorism.

Nevertheless, the ECJ always invokes the European common legacy on human rights and the rule of law. In the *Öcalan* case (C-229/05, 18 January 2007, First Chamber), the Court recalled: «The European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community's legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States [...] and in the European Con-



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vention on Human Rights». The Court recognised that while certain regulation can establish restrictive measures directed against certain persons and entities with a view to combating terrorism in the cited cases, extra limitations can also be placed on member States.

The difficulty faced by the ECJ is the need to fulfil its human rights monitoring role with regard to EU law (not always with full jurisdiction over all issues ³⁹), while, at the same time, doing so without leaving aside the common standards stemming from State Constitutions, the ECHR case law and the EU international agreements and obligations. The *Kadi* case (ECJ, 2008)⁴⁰ is an example of constitutionalism in action in a transnational setting. The *Kadi* case is perhaps the most visible and interesting ECJ case regarding external relations in recent years. The Court essentially had to decide whether a UN Security Council Resolution should take precedence over EU law. This was not found on the grounds that the enforcement of that UN Resolution would constitute a clear and obvious violation of human rights. As argued by Kokott and Sobotta (2012, 1016), the Court's approach in this case could be characterized as a variation of the so-called 'Solange' concept.

³⁹ The ECJ has only indirect and limited jurisdiction on Common Foreign and Security Policy. From 1 December 2014 the European Court of Justice (ECJ) will have full jurisdiction over Police and Judicial Cooperation in Criminal Justice measures that were adopted before the Lisbon Treaty came into force (Exchange of information, anti-terrorist cooperation, extraditions/arrest, the fight against organised crime...).

⁴⁰ *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (ECJ, Joined cases C-402/05 P and C-415/05 P, 3 September 2008).



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This concept was developed by the German Constitutional Court⁴¹ and also applied by the European Court of Human Rights⁴². As such, this made it possible to witness the interaction between the different domestic and supranational bodies. Kadi was identified as a possible supporter of Al-Qaida by the UN Security Council and was sanctioned. The EU transposed this UN sanction by means of a regulation that Kadi then challenged before the EU Courts. Kadi had not been informed of the grounds for his inclusion in the list of individuals and entities subject to the sanctions stated. Therefore he had not been able to seek a judicial review of these grounds, and consequently his right to be heard as well as his right to effective judicial review had been infringed. The ECJ reviewed the lawfulness of the EU regulation transposing the UN resolution, arguing that the protection of fundamental rights forms part of the very foundations of the EU's legal order. In accordance with which, all EU measures must be compatible with fundamental rights. The *Kadi* case has been the foundation for further decisions made such as during *Kadi II*⁴³ and other cases.

⁴¹ The "Solange" concept comes from the case *Solange I* (1974). Here, the *Bundesverfassungsgericht* decided to reserve for itself the right to review EU action *vis-à-vis* its conformity with national fundamental rights providing there was insufficient protection at EU level.

⁴² The European Court of Human Rights followed comparable reasoning in its *Bosphorus* ruling (2005) where it chose to abstain from exercising control with regard to EU acts. The *Bosphorus* judgment was seen by many commentators as a compromise offer, inviting the Luxembourg courts to continue their human rights jurisprudence and preparing the ground for the EU to be bound by the ECHR. (Garlicki 2008, 528).

⁴³ Case T-85/09 *Kadi v. Commission*, 2010. Case Law confirmed by the ECJ in the Judgement of 18 July 2013, *European Commission, UE Council and United Kingdom v. Yassin Abdullah Kadi* Case (Joined cases C-584/10P, C-593/10P and C595/10P)



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The ECJ has ruled on several occasions regarding the inclusion of individuals on lists of terrorists (terrorist blacklists). It found that «it is made clear that the names of persons, groups or entities can be kept on the list only if the Council reviews their situation periodically. All such matters must be open to judicial review»⁴⁴. The ECJ has also ruled on cases concerning secret evidence (*Case C-27/09 P French Republic v. OMPI, 2011*⁴⁵) and suspected terrorist activists, whereby it found that an individual must, in any event, be informed of the essence of the grounds leading to a decision (*case of ZZ v. Secretary of State for the Home Department, 2013*)⁴⁶.

5. Final conclusions: What Constitutionalism Offers to Mitigate Impairments on Civil Rights Resulting from Counter-Terrorism Measures?

All of the various approaches described above represent alternative solutions in the right direction. Many of them relate to the prosecution of terrorist crimes, where human rights must be respected in relation to the perpetrators of such crimes. However, this perspective on human rights cannot be overlooked when counter-terrorism policies are adopt-

⁴⁴ See also in relation to the blacklisting of persons, groups or entities presumably involved in terrorism, *Generalbundesanwalt beim Bundesgerichtshof v. E and F*, 29 June 2010, C-550/09; *Bundesrepublik Deutschland v. B and D*, 9 November 2010, C-57/09 and C-101/09; *France v. People's Mojahedin Organization of Iran*, 21 December, C-27/09 P.

⁴⁵ Case C-27/09.

⁴⁶ Case C-300/11.



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ed to prevent terrorist attacks, when intelligence services fight against the terrorist menace, when preventive measures are implemented not only to prosecute terrorists, but also to avoid new incidents.

As previously mentioned, following 9/11, civil rights suffered major significant limitations in numerous countries as a consequence of the so-called “war on terror” aimed at preventing future attacks and mitigating the terrorist threat. Such measures include the wide scale control of the communications of millions of citizens, new limitations on freedom of expression and association to avoid terrorist apology (and particularly radical Islamist theories that support terrorism). They also involve highly restrictive border entry requirements for certain nationals, preventive and unfounded deprivations of liberty, the introduction of a blacklist of presumed terrorist groups or individuals to monitor them and control their movements, large scale financial control to prevent economic assistance for terrorist activities, stricter conditions for access to public information related to homeland security (including the broadening of the concept of State secret), increased (and often discriminatory) checks at airports, to cite but a few examples.

Against this background, constitutionalism offers several lessons that may assist in the search for the right balance between security and rights; lessons, which some supranational courts have started to use. These core lessons are as follows:

1. First, fundamental rights are an essential part of a democratic legal system and occupy a privileged position within it. This results in the prohibition of their infringement except when justified on the grounds



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of general interest and with the limitation being proportionate to the perceived threat.

Consequently, it is imperative to determine which risks and threats to security, justify restrictions on human rights and under what conditions. The ECHR warned about the problem of overreacting to terrorism: «it is fully aware of the undeniable difficulties of combating terrorism—in particular with regard to obtaining and producing evidence—and of the ravages caused to society by this problem, but considers that such factors cannot justify restricting *to this extent* the rights of the defense of any person charged with a criminal offence»⁴⁷. In doing so, it required that the nature of the particular threat must be demonstrated and the proportionality of the response be established.

We cannot deny that many restrictions on rights are imposed in pursuit of legitimate aims (national security, public safety, the fight against international terrorism...), and sometimes they are the result of obligations derived from UN Security Council Resolutions or other international agreements. However, the ECHR held “an interference” (on rights) will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are “relevant and sufficient”⁴⁸. And it added that «for a measure to be regarded as proportionate and as necessary in a democratic society, the possibility of recourse to an alter-

⁴⁷ Case *Hulki Gunes v Turkey*, 19 June 2003, para. 90. See also case *Klass v. Germany*, 6 September 1978.

⁴⁸ Case *Nada v. Switzerland*, 12 September 2012, para. 181.



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native measure that would cause less damage to the fundamental right at issue whilst fulfilling the same aim must be ruled out»⁴⁹.

As such, the Court has taken into account the fact that the threat of terrorism may be particularly serious at the time of the adoption of the resolutions prescribing sanctions. However, with the passage of time, the maintenance or even reinforcement of these types of measures over must be explained and justified convincingly⁵⁰.

2. Secondly, even in exceptional circumstances, there is a minimum level of respect for fundamental rights that cannot be transgressed. Within constitutions, the State of emergency refers to a regulated situation whereby extended powers are conferred upon authorities in order to confront a threat to the stability of public institutions, the rights of citizens or other general interests. However, the declaration of emergency requires the concurrence of certain circumstances, the intervention of Parliament, its temporal limitation and, more importantly, the identification of those rights that could be limited and the extent of such limitation. The statutory definition of the state of emergency is precisely aimed at guaranteeing fundamental rights and ensuring that the State cannot abuse this and render the most essential part of the Constitution ineffective.

The risk of terrorism has shown that constitutional texts are not prepared for emergencies such as international terrorism. We are faced with a type of terrorism that stems from unknown places, is practiced by sub-

⁴⁹ Case *Nada v. Switzerland*, 12 September 2012, para. 183 (previously in *Case Glor*)

⁵⁰ Case *Nada v. Switzerland*, 12 September 2012.



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jects that can be found anywhere in the world, and uses new mechanisms through which to act (De Vergottini 2004, 24). Perhaps the Spanish Constitution is of the few that provides an individual suspension of rights for persons under investigation for belonging to terrorist organizations, albeit always accompanied by a judicial warrant and constitutional guarantees (Art. 55.2 Spanish Constitution). It is a provision designed to combat domestic terrorism (ETA), but it may also refer to any other type of terrorism.

The 9/11 attacks (as well as the Madrid and London bombings) created a type of “global state of emergency” which prompted the adoption of extraordinary measures. Many States around the world turned to the regulation of specific emergency regimes (state of emergency) to respond to the threat of terrorism⁵¹. In other States, as in the majority of European States, a raft of emergency laws has not appeared. In both cases, the adoption of counter-terrorism policies implied a restraint on individual rights. Since most civil rights may be derogated not only in times of public emergency, but also in normal circumstances, the law offers authorities the possibility to restrict the scope of rights or their exercise on account of national security interests. Some instruments of international human rights contain provisions outlining permissible derogations in times of genuine public emergency. Indeed, Art. 15 of the European Convention of Human Rights allows States to adopt measures derogating from their obligations under the Convention «in times of war or other public emergency threatening the life of the nation», «to the extent strictly required by the exigencies of the situation, provided that

⁵¹ Ibidem 18-20.



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such measures are not inconsistent with its other obligations under international law».

In the “war” on terror, will recourse to Article 15 become more frequent (Warbrick 2004, 1007). The ECHR addressed derogations in several British and Irish cases⁵². Following the Al-Qaeda attacks, the government considered that the United Kingdom was a particular target for terrorist attacks, such as to give rise to a “public emergency threatening the life of the nation” within the meaning of Art. 15 ECHR (derogation in time of emergency). The government believed that the threat came principally from a number of foreign nationals present in the United Kingdom, who were providing a support network for extremist Islamist terrorist operations linked to Al-Qaeda. The United Kingdom considered that it was necessary to create an extended power permitting the detention of foreign nationals as they could represent a risk to national security. The European Court recognized «a State could not be expected to wait for disaster to strike before taking measures to deal with it», but in that case found that the derogating measures had been disproportionate in that they had discriminated unjustifiably between nationals and non-nationals when only the latter group had been detained (*A. and others v. the United Kingdom*, 19 February 2009).

The derogation is narrowly drawn in the European Convention and cannot affect Articles 2, 3, 4.1 and 7 of the Convention⁵³. It is important

⁵² *Lawless v. Ireland*, 1 July 1961; *Ireland v. the United Kingdom*, 18 January 1978; *Brannigan and McBride v. the United Kingdom*, 26 May 1993.

⁵³ Article 4.2 the International Covenant on Civil and Political Rights also prohibits the suspension of a large number of rights even during a state of emergency.



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to limit this exceptionality, because *per se* any situation of exceptionality is not beneficial to human rights. Moreover, there is always a risk that States may make use of the security argument with a view to securing other interests they may have, thereby neglecting fundamental rights.

This supranational law or other constitutional provisions in “times of an emergency” can be used as a model when defining counter-terrorist strategies within any legal system. It is necessary to highlight the fundamental limits to State power in times of an emergency. This is the only way to ensure an effective and efficient protection of human rights and avoid abuses.

3. Thirdly, the rule of law constitutes another core lesson drawn from constitutionalism, which is of significance to fundamental rights. Any action concerning rights must be executed under the law. That implies that any counter-terrorism action impacting on civil rights has to be adopted in accordance with the law. A democratic State governed by the rule of law is required to evaluate the legitimacy of adopting certain measures when on the threat of terrorism exists and to exercise power respecting due rights’ guarantees and observing legal requirements (e. g. a judicial warrant when the law so requires).

The effectiveness of the rule of law is linked to the principle of accountability of public authorities (both judicial and political). Judicial accountability enables courts to check whether counter-terrorism actions observe the duty to respect human rights as ruled by law. Political accountability refers more to the obligation to explain the reasons behind a State’s actions and policies.

Both types of accountability are, sometimes, difficult to ensure as far



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as counter-terrorism issues are concerned due to the opacity of the actions of the intelligence services. The work of the intelligence services and the counter-terrorist instruments used require secrecy. Constitutions do not dictate that homeland security issues must be publicized. Secrecy allows certain sources, missions, events, or identities not to be disclosed to those who could make use of that information in order to act against the interests and safety of the State. The problem is that if we are not informed, it is difficult to supervise State activity and to require officials to be accountable. Finding a way to make these activities subject to normal democratic controls becomes a challenge. To solve this, key democratic principles such as transparency and accountability must be effectively put into action in order to secure human rights when policies are adopted in the case of threat (Cole et al. 2013).

In that context, one must remember the ECHR's decision on the *El-Masri* case quoted above, where the Court cautiously stated the right of the victim and of citizens to be informed of the abuses committed by governments in the field of national security. Such a ruling becomes a precedent for future cases setting human rights themselves as limits to governmental actions when dealing with counter-terrorism. It partially tears down the wall of impunity of unlawful arrest or the extraordinary measures adopted on behalf of the counter-terrorism fight.

4. Fourthly, civil rights impose obligations on the State, which are both negative and positive. The constitutional right to security entitles people to be protected by the State, since citizens are unable to provide this for themselves. Against the threat of terrorism, people may expect policies to be adopted which act to make them feel more secure. In responding to this duty, different counter-terrorism strategies have been



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adopted both at the national and supranational levels, as previously explained under point 4. However, here it should be stressed that security should not be attained at the expense of unjustified restraints on other freedoms. We should remain mindful of the fact that security means protecting people's freedom in such a way that everyone can enjoy life without feeling threatened, but also without the fear of being continuously subjected to constraints on civil rights, especially when counter-terrorism preventive measures may appear to be disproportionate.

With regard to this, many voices have called for a different security approach. Various expressions were coined to describe the types of actions States should deploy to mitigate global risks and to understand what security entails: cooperative security, collective security, sustainable security, human security or 3D security (that is, security through Defense, Diplomacy and Development). My point is that it would be necessary to add another "D" to this concept: "D" for "*Derechos*", "*Droits*", or "*Diritti*", or in English - "R" for "Rights", thereby adding respect for human rights to the concept of security in addition to other elements.

5. Finally, the fifth lesson of constitutionalism is as follows: as has been the case for quite some time now, the scope of fundamental rights is no longer an internal matter reserved to national sovereignty. Human rights reach beyond State borders and their protection constitutes a supranational issue.

As Garlicki (2008, 510) commented on human rights, «more and more rules, principles, and standards are incorporated in international law instruments and become universally binding all over the world». This dissertation comes down strongly in favour of this process. It appeals for a



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constitutionalization of rights in the global sphere, constitutionalization in the broadest sense⁵⁴, as a normative process in international society.

In the case of the terrorism risk, since this has become a global issue, a global response is required in the form of a supranational strategy of human rights promotion. Multilateral dialogues among different countries could form part of the solution, but what is especially desirable is the establishment of a "*ius commune*" or a "constitutionalism" of fundamental rights as a limit to governmental actions. In order to achieve this, international courts, —such as the ECHR or the ECJ—, or human rights monitoring bodies —for example the UNCHR— play a key role. This essay demonstrates how each of these, within its own field of competence, has taken steps aimed at protecting civil rights when counter-terrorism measures were adopted. A large number of cases have been quoted where such bodies set basic standards for rights, impose limits to authorities and strike a balance between rights and security. On initial inspection, their approaches to these issues seem to be parallel.

Therefore, it is essential to keep the human rights dimension firmly within the fight against terrorism and other global risks. There is no doubt that challenges remain in the development of human rights within the context of managing terrorist threats and in their supervision by courts (accountability). Human rights monitoring bodies and supranational courts are well placed to support rights and liberties when legitimate goals do not exist. They continue to review whether a particular in-

⁵⁴ This expression of *constitutionalization* in the wider sense is proposed by Thomas Müller (2014, 97).



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interference on personal freedoms is necessary and proportional to an alleged legitimate objective. In their case law they clarify the grounds by which the State may restrict rights when responding to the threat of terrorism.

The existing tension between national security policies and human rights interests will always remain. Nevertheless, a human rights-sensitive response to the risk of terrorism does not appear to be irreconcilable with the safeguarding of security.



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Abstract

The Impact of Counter-Terrorism Security Measures on Fundamental Rights: What Constitutionalism and Supranational Human Rights standards offer to respond to the terrorist threat?

Global risks have prompted many States to implement policies aimed at preserving national security, in particular to combat terrorism. However, these measures have systematically violated fundamental rights. The central theme of this essay is to highlight the need to establish supranational standards of human rights protection in order to limit preventive national security policies that would otherwise infringe such rights. In order to achieve this, international courts or human rights monitoring bodies would play a key role, and the core lessons drawn from constitutionalism would help shape the response to such risks, particularly when it comes to finding the right balance between rights and security.

Keywords: security, national security, surveillance, counter-terrorism, human rights, global risks.