

**Balance between measures to counter terrorism and protection of
human rights**

"A study in the jurisprudence of the European Court of Human Rights"

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Abstract

The fight against terrorism is at the top of both national and international agendas in several Western countries. Terrorism threatens the stability of nations, and compromises the freedoms that people are entitled to enjoy. The fight, therefore, has necessitated targeted security investigations and combative measures beyond the conventional approaches used in addressing crime. Nonetheless, it is crucial that this fight should remain within the limitations of the international law of human rights. From this perspective, states are prohibited from exercising *carte blanche* in interfering with the rights of individuals under the guise of counter-terrorism.

Over time, the European Court of Human Rights has had to respond to several situations regarding states' upholding of the terms of the 1953 European Convention on Human Rights (ECHR), particularly that which concerns the treatment of persons suspected or accused of terrorism. The Court's ruling has often reinforced the requirement that the state reconciles their actions in the fight against terrorism with the requirements surrounding respect for human rights. Therefore, the Court has often sought to prevent anti-terrorism efforts from escalating into power plays and breeding grounds for the violation of human rights. The Court ensures that state actions that invoke Article 15 of the ECHR are sufficiently justified. The Court has also reviewed multiple cases, determining the

possible violations of freedoms under Articles 8 and 10 of the ECHR relating to private life and expression, respectively. It also premises on the indisputable fact that states must take action to prevent disaster before its actual occurrence. In some instances, states' actions have amounted to blatant violation of rights, while other measures, such as GPS tracking of suspected terrorists, are evidence of the actions necessary for the acquisition of intelligence with the intention of preventing terrorism. These rulings provide a framework within which states may pursue their efforts against terror while strictly adhering to human rights as provided under the Convention.

This paper aims to discuss and analyse the work of the European Court regarding the case presented, searching for the criteria that the respective Court has drawn in balancing the necessity of fighting terrorism on one hand and of upholding respect for fundamental human rights on the other. A review of the case law of the Court is required in this matter.

In this paper, the topic will be considered in three main interrelated sections: Section One considers non-Derogable rights, which are of considerable concern in the fight against terrorism, Section Two seeks to ascertain the optimum balance between Ill-Treatment and human rights. Section Three will address the scope and

applicability of refoulement in the ECHR, and Section Four will discuss the standards of proof and real-risk tests that are applied by the Court.

Introduction

The European Court of Human Rights has been the forefront and consistent in prohibiting inhuman treatment, torture, absolute punishments, and other forms of degrading treatment against persons accused of terrorism, thus striking a balance between law and counter-terrorism. Based on the balancing principle, the Court prohibits the forceful expulsion and extradition of aliens under Article 3, on the grounds that the extradited individuals could suffer mistreatment in the receiving countries.¹ The Court has indeed established jurisprudence that disallows practices such as torture, despite the fact that it is not clearly defined, but is limited to the pronouncements and judgements made by the Court. However, the extent to which this balancing is successful, as far as the interpretation of Article 3 of the ECHR is concerned, including the prohibition of torture, derogation of fundamental human rights, and refoulement, remains obscure.²

Several European countries have come under attack from terrorist-sponsored acts in the recent past, as has been described in detail in relation to the Strasbourg

¹Mikael Rask Madsen. "From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics." *Law & Social Inquiry* 32, no. 1 (2007): 137-59. The article can be retrieved from the url: <http://www.jstor.org/stable/4490555>.

² de Weck, Fanny, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT*. Brill 2016.

case.¹The jurisprudential response that Europe established has been applied by the Council of Europe under the European Court of Human Rights, serving as a tool to advance and assist in the battle against terrorism. Moreover, the Convention has demonstrated a shared belief in libertarian and cultural values with the United States. Article 8 of the ECHR Convention provides for basic rights, including (in sub-article 1) the ‘right to respect for [one’s] private and family life’. Equally important is that the state shouldn’t interfere with the exercise of private rights, except in the interest of preventing occurrences such as crime, disorder, and terrorism.

The jurisprudence of the Court in terms of balancing human rights against combating terrorism has thus been defined in strict terms under Article 3. It has therefore been incumbent upon the European Court of Human Rights to consider the prohibition of recent refoulement claims as an extension of the prohibition of torture that Article 3 continues to promote. Extradition and expulsion under Article 3, therefore, have been the basis upon which the Court has set a precedent on a handful of cases. This paper asks how absolutely, and to what extent the ECHR Court has raised and applied the prohibition against human torture and

¹McInerney-Lankford, Siobhán. "Fragmentation of International Law Redux: The Case of Strasbourg." *Oxford Journal of Legal Studies* 32, no. 3 (2012): 609-32. The article can be retrieved from the source or URL: <http://www.jstor.org/stable/41682795>.

refoulement, particularly in the case of terrorist suspects.¹ Absolute rights must be handed down not only in rhetoric but, more importantly, in absolute terms, with practice and judgements that place the written rights in context.

In this paper, the topic will be dealt with in three main interrelated sections: Section One deals with non-Derogable rights, which are of considerable concern in fighting terrorism. Section Two seeks to ascertain the optimum balance between mistreatment and human rights. Section Three will be concerned with the scope and applicability of refoulement in the ECHR, and Section Four will discuss the standards of proof and real-risk tests that are applied by the Court.

First: Inalienable and Non-Degradable Rights

Article 3 of the European Convention of Human Rights provides that ‘No one shall be subjected to torture or to inhuman and degrading punishment or treatment’. This provision forms the backbone around which other human rights provisions must be applied, and is a relief to persons indicted of crimes against humanity and terrorism, and their sponsors. This is a fundamental balancing

¹Wouters, Cornelis Wolfram. "International Legal Standards For The Protection From Refoulement: A Legal Analysis Of The Prohibitions On Refoulement Contained In The Refugee Convention, The European Convention On Human Rights, The International Covenant On Civil And Political Rights And The Convention Against Torture." PhD diss., Intersentia, 2009.

provision that is unaffected by the encumbrances of restrictions, qualifications, exceptions, or even implied and overt guarantees. The jurisprudential argument of the Court is that the provision for the prohibition of refoulement, extradition, and torture is unqualified and must therefore be defined in detail and interpreted to the benefit of all parties affected, considering that it is a non-Derogable and inalienable provision for rights.

Article 3 of the ECHR is the only absolute provision that sets forthin clear terms the prohibition of all forms of degrading, inhuman treatment, and torture against any person, including those suspected of acts of terrorism. It is a fundamental provision that upholds the rights even of terrorist suspects, and is regarded as an absolute norm in Europe. In addition, the ECHR has considered it as a condition on the prohibition against refoulement, a provision which has been applied in recent times on the judicial level. The reason for setting such a precedent is based on the consideration that many people living in European countries were forced to leave their countries and seek refuge status in Europe; hence the paradox that many of them have been suspected of crimes of terrorism or of being considered terrorists by the authorities in their countries of origin. The ECHR balances the application of the International Refugee Law, even as it provides

asylum to victims of terrorism, thus diluting the tension between immigration control and the protection of fundamental human rights.¹

Article 15 of the ECHR provides another detailed provision that insists on the prohibition of torture even during times of emergency or war. Article 15 allows the application of general derogation for certain rights during periods of public emergency and times of war. The same freedom of derogation that is given to states in certain times is not provided for in Article 3. Nevertheless, the Court has consistently reaffirmed its juristic role as an institution that prohibits the torture of human beings. This was stated in the case *Ireland v. the United Kingdom*, in which the Court maintained that the Convention prohibits, in clear and absolute terms, degrading and inhuman treatment and torture, irrespective of the crimes of which a person has been accused, or their conduct.

Ill-treatment on grounds of terrorism therefore cannot be justified in light of Article 3 of the Convention, and cannot be used under the excuse of fighting or defeating terrorism. It is not only the law that can define which kinds of treatment amount to inhuman or degrading treatment: the Court must also derive and provide jurisprudence showing whether or not treatment of an accused person is in accordance with international human rights law. The European Court of Human

¹Avdan, Nazli. "Do Asylum Recognition Rates In Europe Respond To Transnational Terrorism? The Migration-Security Nexus Revisited." *European Union Politics* 15, no. 4 (2014): 445-471.

Rights in the *Saadi v. Italy* Case stated that the individual's humiliation or suffering should not exceed what the ECHR states to be a violation of Article 3. What is required is a relative, balanced, and logical interpretation of the punishments that may be applied. Ill-treatment should not be used in contempt of the terrorists' conduct, character, or manner in which they execute acts of terror.

Second: Attaining Balance from Ill-Treatment and Security Interests

The ECHR has been torn between setting a jurisprudence that balances the internal need for state security with that of the protection of the rights of individuals, as the case *Strasbourg v. the United Kingdom* shows.¹The central debate of this case was the determination of which act or acts could be considered treating to national security. This case highlights the balance that the ECHR must make between national security and public interests on one hand and private interests on the other. The principle, and an absolute requirement under Article 3 of the Convention, is to allow balancing and, hence, it would not be permissible or legal for torture to be used in any circumstances whatsoever. No court is allowed to exercise torture, oversee condemnation, expulsion, and ill-treatment of aliens within their jurisdictions.

¹McInerney-Lankford, Siobhán. "Fragmentation of International Law Redux: The Case of Strasbourg." *Oxford Journal of Legal Studies* 32, no. 3 (2012): 609-32.

In most cases where the suspected aliens are convicted of terrorism-related crimes, the interests of the state are will inevitably take precedence over the rights and freedoms of the individual. The ECHR had to address this question in the *Soering* case. In that case, balancing was applied as a means of finding the inherent purpose that the Convention served in striking a fair balance between individual rights, the rights of the community, and the fundamental principle of setting a precedent under the ECHR's jurisprudence.¹ The Court has also relied on this position in exceptional circumstances, wherein the national interest forces The limitations of the ECHR's Article 3 were elaborated in the *Chahal v. the United Kingdom Case*, in which the bone of contention was the validity of the expulsion and extradition of suspected terrorists.² In this case, the UK argued that the best interests of the state, in terms of security, would limit the applicability of Article 3. It further stated that when the public was at great risk for the same terrorism-related reasons, an individual could be deported, regardless of the suspected ill-treatment they were likely to receive in their destinations. The Court disagreed, however, with this assertion and reiterated that an individual cannot be discriminated against, regardless of how dangerous and undesirable they may

¹Cosentino, Chiara. "Safe And Legal Abortion: An Emerging Human Right? The Long-Lasting Dispute With State Sovereignty In ECHR Jurisprudence." *Human Rights Law Review* 15, no. 3 (2015): 569-589.

²Jones, Kate. "Deportations with Assurances: Addressing Key Criticisms." *The International and Comparative Law Quarterly* 57, no. 1 (2008): 183-94. The full contents of the article can be retrieved from <http://www.jstor.org/stable/20488195>.

appear in the eyes of the state. The Court is of the view that expulsion must be conducted on the basis of balance, as was provided for in the *Chahal Case*.¹

Despite the states' arguments of threats to national security, the ECHR has been consistent and persistent in prohibiting torture, perceiving it as contradictory to the upholding of the suspect's rights. The European Court finds that persons being held are likely to face substantial risks of inhuman and ill-treatment. No justification allows the Court's discretion to subject the accused persons to the risk of inhumane treatment. This, according to the Court, does not preclude other subtle and intelligent forms of balancing that could be applied as a means of managing real risks.

The *Saadi* case illustrated the UK and EU governments' perspectives on the nature of ill-treatment: they argue that it should be defined in relation to the threat that a suspect is likely to suffer. They further argue that in situations where a person poses a tremendous threat to the claiming state, he cannot be extradited there from another country and for fear that he might be subjected to treatment that lies slightly beyond the scope permitted by Article 3. The ECHR did not pronounce and address the argument by the UK government in the *Saadi* case, but

¹Jones, Kate. "Deportations with Assurances: Addressing Key Criticisms." *The International and Comparative Law Quarterly* 57, no. 1 (2008): 183-94. The full contents of the article can be retrieved from <http://www.jstor.org/stable/20488195>.

the Court partially agreed on the same arguments in the cases *Babar Ahmad & Others v. the United Kingdom*.¹

Third: Scope and Applicability of Refoulement Under the ECHR

Article 1 of the Convention states that ‘the high contracting parties shall secure to every person within their jurisdictions the rights and freedoms...’. This article, therefore, imposes a double-obligation on parties to ensure that there is no infringement on the inalienable non-Derogable rights of individuals. It further imposes on states the responsibility for upholding and respecting the rights of all, regardless of nationality. Refoulement, however, as read under the Convention, provides that there shall not be a right for asylum and, more importantly, there shall not be a prohibition on refoulement.² Restrictions to expulsions can only be drawn from Article 4, Protocol 4 of the ECHR, as well as Article 3, sub-article 1, which sets out in clear terms the prohibition on the expulsion of nationals or aliens.

¹John T. Parry. "Introductory Note To The European Court Of Human Rights: *Babar Ahmad And Others V. The United Kingdom*." *International Legal Materials* 52, no. 2 (2013): 440-95. doi:10.5305/intelegamate.52.2.0440.

²den Heijer, Maarten, Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights. Vol. 10, No. 3, *European Journal of Migration and Law*, 2008, p. 277–314. (den Heijer 2008)

Extradition of persons suspected of involvement with terrorism under the jurisdiction of the European Court of Human Rights was determined in the case *Soering v. the United Kingdom*,¹ and it was stated that it violates Article 3 of the Convention. Article 1 of the Convention further iterates the balance and threshold to which extradition maybe applied and, in that case, it sets a territorial limit on the extent to which states can effect extradition. Interpretation of the Convention, in terms of balancing rights with security, is based on its objectives of ensuring that the guaranteed safeguards and practical rights of individuals are upheld. Receiving states are also required to comply with the standards of treatment that the Convention stipulates, hence the centrality of Article 3 to safeguarding and guaranteeing the individual rights of suspects and terrorists.

In an attempt to elaborate and cite the actual and absolute character of Article 3, the Court argued for the prohibition of torture in the following terms:

“One of the fundamental values of a democratic society ... [it] would hardly be compatible with the underlying values of the Convention ... were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture.”

¹Lillich, Richard B. "The Soering Case." *American Journal of International Law* 85, no. 1 (1991): 128-149.

The argument in the above quotation shows the extent to which, and on what grounds, the requirements for protecting individual rights maybe applied. All extradition procedures and decisions must be within the scope of Article 3.23, such as was applied in the *Cruz Varas v. Sweden* case.¹ The Court went ahead and stated that the principles of extradition applied even to the expulsion of persons on grounds of national security and terrorism.² The liability of the Contracting State is based on the principles of safeguarded extradition and expulsion, which ensure that the individuals are not subjected to ill-treatment and suffering outside the jurisdiction and jurisprudence that the European Court of Human Rights has set forth.

Fourth: Standards of Proof and Real-Risk Tests

The ruling on expulsion and extradition is based on evidence that there is a potential violation of Article 3 of the ECHR. The Court will also seek clear proof that the extradited individual will suffer torture, ill-treatment, inhuman, and degrading treatment in the country of destination. According to some scholars of

¹Mowbray, Alastair. "A New Strasbourg Approach to the Legal Consequences of Interim Measures." *Human Rights Law Review* 5, no. 2 (2005): 377-386.

²Battjes, Hemme, In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed. Vol. 22, No. 3, *Leiden Journal of International Law*, 2009, p. 583–621.

ECHR, the jurisprudence has developed to the extent that a small belief or little doubt on the existence of ill-treatment in the destination leads to the immediate invocation of Article 3. The reasoning behind the view being to ensure that even the small number of individuals being extradited do not end up suffering inhuman and degrading treatment. The prohibition of torture, as balanced with internal interests for peace, is a logical conclusion as far as the desire to balance risks with suspects' rights is concerned. This is the basis on which the Convention has applied its protective scope when an individual is affected by real risks that may arise from extradition.

The real-risk standard remains largely undefined by the Court; neither has the examination of case law offered much variation on the proper application of the Convention's limitations. The limits that are clearly provided for in the jurisprudence state that, where the risks are higher than the possibility of finding an amicable position, then extradition will not suffice as an option for the state, for fear of ill-treatment and inhuman treatment. In the *Saadi v. Italy* case, the Court rejected the United Kingdom's argument that extradition should only be allowed where there was a high probability beyond reasonable doubt that the suspects would suffer ill-treatment in the countries to which they were sent.¹ In another

¹De Londras, Fiona. "Saadi V. Italy." *The American Journal of International Law* 102, no. 3 (2008): 616-22. doi:10.2307/20456649.

case, that of *Azimov v. Russia*,¹ the standard of proof that ill-treatment was likely to occur was quashed, since it did not meet the threshold defined in Article 3, which is that of ‘beyond reasonable doubt’. The Court held that that was a very high standard for something that was more than guaranteed to occur.

In cases such as *D v. the United Kingdom*, the balance for human rights versus the interests of the state was not achieved on the basis that the applicant could be tortured or subjected to ill-treatment, but rather on the basis that they could not receive medical care. The same had been the determination in Babar Ahmad’s case.² The Court broadened the applicability of Article 3 by stating that the article’s fundamental nature and the principle are aimed at the protection of people incarcerated on grounds of crime and even terrorism. Denying them that right may constitute a violation of the law and a clear denial of facts of law or provisions. It would also undermine the Court’s jurisprudence as a champion of human rights. The Court proceeded to state that, based on its role of balancing the rights and freedoms that the state provides, the denial of health care to extradited persons may contravene the provisions of the European Court of Human Rights,

¹Soliev, Nodirbek. "Terrorist Threat to the 2018 World Cup in Russia." *Counter Terrorist Trends and Analyses* 10, no. 6 (2018): 16-21. <http://www.jstor.org/stable/26435162>.

²John T. Parry. "Introductory Note To The European Court Of Human Rights: Ahmad And Others V. The United Kingdom." *International Legal Materials* 52, no. 2 (2013): 440-95. doi:10.5305/intelegamate.52.2.0440.

including Article 15, Article 3, and Article 4, Protocol 4.¹ Moreover, the balance is created on the grounds that no person shall be removed due to humanitarian grounds and, for that reason, deportation could amount to a violation of all articles in the ECHR.

The jurisprudence to be drawn from these positions is that the European Court of Human Rights applies the test of real-risk even as it attempts to investigate each case on its own merit. It is not only on a medical basis that terrorists are denied fundamental rights and freedoms. The threshold has not been so high, but based on the need to maintain and apply the rights, freedoms, and non-Derogable rights that the Convention has explicitly set forth. The applicant seeking protection of their rights must be given priority, but the Court ought not to overlook the consequences that its decisions will have on the state, including the possibility of ill-treatment, suffering, torture, and inhumane acts.

The Court requires that an applicant provides evidence, substantial grounds, and strong proof that there is a high chance that he or she will suffer ill-treatment. Evidence is required to substantiate any claim, ranging from allaying fears of ill-treatment and gross violation in the receiving country, given the general situation and circumstances of the country of destination. The applicant's personal

¹Gross, Oren, and FionnualaNíAoláin. "From Discretion To Scrutiny: Revisiting The Application Of The Margin Of Appreciation Doctrine In The Context Of Article 15 Of The European Convention On Human Rights." *Hum. Rts. Q.* 23 (2001): 625.

circumstances and the country's human rights climate will form the basis upon which the Court will grant a distinct stay within its jurisdiction. In the case of *Sufi & Elmi v. the United Kingdom*, the Court made the following clarification:

“[i]f the existence of such a risk is established, the applicant’s removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two.”¹

The above statement is a testament to the extent to which the Court considers the human rights conditions and the applicant's personal circumstances. It also considers the situation in the destination country with regard to elements relating to violence, risks, and health concerns. These standards are so high and only used in extreme cases to safeguard the rights and fundamental freedoms of individuals, as they also balance the interests of the state, meaning that neither the host country nor the applicant is exposed. When Article 3 of the Convention fails to satisfy the Court, the applicant must demonstrate that there is an exceptional reason that makes it highly probable that they will be ill-treated and inhumanely handled.

¹Lambert, Helene. "‘Safe Third Country’ in The European Union: An Evolving Concept In International Law And Implications For The UK." *the European Union: an evolving concept in international law and implications for the UK* (2012): 318-336.

Conclusion

The ECHR has proven that, regardless of the procedure used in balancing the interests of the applicant and those of the state, the risks attendant on the Court's considerations must be taken into account. It will also investigate the extent to which the state's resources will undergo strain. It is therefore paramount and the duty of the state alongside the applicant to have thorough information and evaluative evidence as to the circumstances to they will subject the individual suspected of terrorism. The issues for examination include the likelihood that the accused will suffer torture, forced confessions, ill-treatment, and inhumane acts. Scrutiny of the suspected terrorist must be rigorously followed by investigations that will guarantee the safeguarding of Article 3.¹

The European Court of Human Rights has therefore established a working jurisprudence as to the steps domestic authorities must take to curb terrorism even as they balance suspects' rights with those of the state. The investigations and assessments carried out by the Court must be executed along with a background reference to any information that the state may with regard to the suspects. There is no limit as to the information a state may hold on individuals, since they have a

¹Alleweldt, Ralf, Protection Against Expulsion Under Article 3 of the European Convention on Human Rights. Vol. 4, No. 1, European Journal of International Law, 1993, p. 360–376. (Alleweldt 1993)

right to information, just as the Court pronounced in the authority *F.G v. Sweden*.¹ The state has the power to discover all potential and relevant facts as to the circumstances that the state could not gather on its own initiative. The Court must take sufficient time to study the evidence as to the nature and possibility that suspects face ill-treatment and pronounce its reasons for denying extradition and expulsion on this basis.

While it is not always evident in judgements, particularly in cases pertaining to terrorists and their sympathisers, considerable balancing takes place in light of Article 3 of the European Court of Human Rights. The Court further applies the real-risk test, a standard that is used to determine the probability that terrorist suspects will suffer inhumane and ill-treatment, calling into question the need to enforce the prohibition of expulsion and extradition, as provided for under Article 15.² There can be, therefore, no apparent discrepancy or misunderstanding in the Court's application of Articles and 15 of the Convention. The Court's practice is to ignore floodgate arguments that may subject it to a situation where in it could ignore the express prohibitions provided in the articles of formation of the European Court of Human Rights.

¹Kaiser, Florian G., and Anders Biel. "Assessing General Ecological Behavior: A Cross-Cultural Comparison Between Switzerland And Sweden." *European Journal of Psychological Assessment* 16, no. 1 (2000): 44.

²Gross, Oren, and FionnualaNíAoláin. "From Discretion To Scrutiny: Revisiting The Application Of The Margin Of Appreciation Doctrine In The Context Of Article 15 Of The European Convention On Human Rights." *Hum. Rts. Q.* 23 (2001): 625.

The European Court of Human Rights has been an ardent champion in the fight for the prohibition of torture on the grounds that the right to be exempt from torture and human suffering is a non-Derogable right.¹ That is even more the case and particularly important in cases involving suspected terrorists. In the Soering case, the absolute characters and application of the prohibitions in Articles 3 and 15 were tested, even read in light of Article 1 of the Convention, which places a limit on the jurisdictional powers of the Court. There has, therefore, been no contradiction with regard to the Court's power in prohibiting refoulement and expulsion. Through acts of balancing, the ECHR has been able to promote and protect human rights in the face of strict political adherence that has subjected terrorists to inhumane and degrading treatment. It is incumbent upon the Court to exercise care in interpreting the articles on expulsion and extradition, and even in overlooking the inalienable rights against human torture, suffering, and degrading treatment.

¹ Treaty Convention for the Protection of Human Rights and Fundamental Freedoms 1950, opened for signature 4 November 1950, entered into force 3 September 1953.

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