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**Fundamental Rights and State Security: Inseparable Allies**

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 1.  I would like to begin by saying that I am very grateful to the Bar Council of England and Wales for this invitation. It is not only an honour but also a great pleasure to deliver the 10th International Rule of Law Lecture, especially in this prestigious venue which was of central importance to the drafting of the Magna Carta.

 2.  Today, for a variety of good and bad reasons, security issues have become or have again become pervasive at the national, European and international levels. This is obvious. But it is also clear that measures announced or adopted by Sates or organisations can raise unique and difficult questions in terms of respect of fundamental rights.

 3.  It seems to me more and more that the opposition between fundamental rights’ requirements and security requirements is an appearance, an appearance the main function of which is to classify the positions of the various parties considered as enemies in separate camps. Yet, the opposition between the realists and the idealists, between the pragmatists and the laxists, between the responsible and the irresponsible, is radically false. Seeking security while ensuring respect – and an informed respect – for human rights is a guarantee of efficiency; conversely, security at the expense of human rights is an illusion. Ultimately, counter-terrorism is not conducted against the law but with the law.

 4.  In this perspective, I think that we should favour complex thought and avoid the false simplicity of obvious concepts. I will try to show that the obligation to fight terrorism is certainly an obligation (**2**) but that this obligation is inseparable from the obligation to respect human rights (**3**). In fact we are faced with a double “categorical imperative, to borrow Immanuel Kant’s analysis. I will then present the conditions and methods for reconciling these obligations in the jurisprudence of the European Court of Human Rights (**4**). But, to understand the importance and the stakes at play in the relationships between terrorism and human rights, I think that they have to be seen in the context of the requirements of the rule of law (**1**) and I will start with that.

 **1. The rule of law**

 5.  In the current political debate, at least in continental Europe, the rule of law is repeatedly invoked, in very different contexts and situations, with the risk of becoming an “impossible” concept[[1]](#footnote-1), even a “catch-all” concept (*un concept fourre-tout*). But, at the same time, and this is fairly new, some do no longer hesitate today to assert that it is a “matter of legal quibbling” *(une “argutie juridique”*) and to criticize the rule of law is becoming an acceptable, even trendy, posture. As a professor of constitutional law at the University of Paris 1 Panthéon-Sorbonne says, the rule of law is becoming blamed for all our problems. “The multiplication of terrorist attacks? It is the rule of law’s fault! The insufficient action against terrorists? It is the rule of law’s fault! (…) The flow of political refugees to Europe? It is the rule of law’s fault! ...”[[2]](#footnote-2).

 6.  The r*ule of law*[[3]](#footnote-3), what is it basically about? Without going into the genealogy and the eventful history of the discourse on the rule of law[[4]](#footnote-4), I shall limit myself to recalling the *contours* / scope of the European model of the rule of law laid down in 1950 in the European Convention on Human Rights and enshrined in international[[5]](#footnote-5) as well as in European Union law[[6]](#footnote-6). This model is characterised by two features: the right to the Law (*droit au droit*) and the right to justice (*droit au juge*). From a substantive viewpoint, the rule of law implies both a denial and an obligation. A denial, that of arbitrary actions and the abuse of power. An obligation, that is respect of human rights by all State bodies and public authorities. From a procedural viewpoint, the right to justice expresses the need for a judicial intervention and remedy, before an independent and impartial judge, who must be the “guardian of promises”.

 7.  As the vice-president of the French *Conseil d’Etat* Jean-Marc Sauvé rightly analyses, there is “a descriptive and tautological conception of the rule of law based on the idea that any State where law is a part of the State is a rule-of-law State. In this regard, one could say that a dictatorial regime is a rule-of-law State”[[7]](#footnote-7). That is a misunderstanding. A rule-of-law State is a State which complies with rules of law inspired by / based on respect for human rights and public freedoms.

 8.  The rule of law (*l’Etat de droit*) is therefore an essential democratic guarantee, even and particularly in the context of terrorism. It is radically different from the police state, which allows the Executive to “dictate the law” and to enforce it without controls. In this respect, state of emergency laws or draft laws which, for instance, allow the administrative authorities to assign people to house arrest without a court having to approve it or even to place someone in detention subject only to judicial review *a posteriori*, are highly problematic[[8]](#footnote-8). To detain people is not the task of the political authorities but of the judiciary. In an opinion issued on 17 December 2015 the French *Conseil d’Etat* clearly stated that, within the present constitutional framework, it was not possible, under the precautionary principle, to deprive persons flagged with fiche “S” (*personnes fichées “S”*) of their liberty on the basis of a suspicious conduct (and not activity)[[9]](#footnote-9). “In a country that lives in a prolonged state of emergency, and in which police operations progressively replace judicial power, a rapid and irreversible degradation of public institutions must be expected”[[10]](#footnote-10). In an opinion of 2 February 2016, the French *Conseil d’Etat* also recalled that a state of emergency, which is a state of crisis, cannot be renewed indefinitely[[11]](#footnote-11).

 9.  Under the state of emergency introduced in Turkey following the failed *coup d’état* of 15 July 2016, large-scale purges are targeting all sectors of society (education, media, army, judiciary) and around 35,000 people have already been arrested according to the figures given by the ministry of Justice. The European Court of Human Rights has since then received a significant number of applications – more than 3,000 – lodged by persons subjected to such measures. However, a first case, *Mercan v. Turkey*, which concerned the pre-trial detention of a judge who was dismissed from office a few days before the state of emergency which was proclaimed on 21 July 2016, was declared inadmissible by the Court on 8 November 2016 for failure to exhaust domestic remedies[[12]](#footnote-12).

 10.  Let us now turn to my second and third points. The obligation to fight against terrorism and the obligation to respect human rights. In a seminal book that I am very indebted to, *Terrorism and the limitations of rights. The European Convention on Human Rights and the United States Constitution*[[13]](#footnote-13), Stefan Sottiaux develops the idea of the paradoxical relations between terrorism and human rights[[14]](#footnote-14). I fully agree with him. It is indeed a real paradox and not a contradiction. A contradiction is like a knot, we untie it. But, in the case of a paradox, an attempt must be made to come to terms with it, while being aware of the complexity of the ensuing consequences, and to clarify it in the light of the requisite balance between its component parts. “Human rights law not only serves as a primary source of the State’s responsibility to counter terrorism, but it also imposes the boundaries within which the State’s response to terrorism must unfold”[[15]](#footnote-15).

 **2. The obligation to fight against terrorism**

 11.  There are two reasons supporting this obligation[[16]](#footnote-16) and I will address them in turn. They emanate from the idea that the European Convention on Human Rights does not operate in a vacuum but in a given political and social context.

 ***The right to life***

 12.  In the European Convention on Human Rights, the right directly concerned with terrorism is the right to life enshrined in Article 2. “Everyone’s right to life shall be protected by the law”, says the text. This right is the primary source of the obligation, for the States, to protect against terrorist acts. In other words, the lawfulness of action to combat terrorism finds its justification in and is limited by the protection of the population’s right to life and thereby places it outside any abstraction such as the *raison d’état* or national security[[17]](#footnote-17).

 13.  The principle that States are required to take all reasonable steps to protect persons under their jurisdiction from life-endangering offences is a principle that is recognized in the European Court of Human Rights’ jurisprudence. The *Osman v. the United Kingdom* judgment of 28 October 1998 extends its scope: “It is common ground that the State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person … Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”[[18]](#footnote-18).

 14.  Therefore, when it comes to terrorism, the positive obligation for the States may be to put in place, in certain circumstances, effective prevention strategies. The Court will soon have to clarify the scope of the positive obligation of prevention in the case of *Tagayeva and Others v. Russia* which is currently pending and which concerns the hostage-taking at the Beslan school by a group of heavily armed terrorists arriving from neighbouring Ingushetia in September 2004. The applicants in this case complain of the lack of preventive measures in spite of the fact that intelligence services were aware of the risk of terrorist attacks and of the presence of terrorists within the area.

 15.  Furthermore, when counter-terrorism measures are justified, the State is required to organise them in such a way as to minimise the risk to life. The *Finogenov and Others v. Russia* judgment of 20 December 2011 which concerned the siege in October 2002 of the “Dubrovka” theatre in Moscow by Chechen separatists extends the *McCann and Others v. the United Kingdom* case-law[[19]](#footnote-19). The police had decided to overcome the terrorists and liberate the hostages using gas. The Court found that the use of gas against the terrorists during the theatre siege was justified and therefore held that there had been no substantive violation of the right to life concerning the decision to resolve the hostage crisis by force and use gas[[20]](#footnote-20). But it held that there had been a procedural violation of the right to life on account of the inadequate planning and implementation of the rescue operation as well as of the lack of medical assistance to hostages and the ineffectiveness of the investigation into the allegations of the authorities’ negligence[[21]](#footnote-21).

 16.  In contrast, in the Grand Chamber judgment *Armani da Silva v. the United Kingdom* of 30 March 2016 concerning the fatal shooting of a Brazilian national mistakenly identified by the police as a suicide bomber, the Court found, having regard to the proceedings as a whole, that the authorities had not failed in their obligation to conduct an effective investigation[[22]](#footnote-22).

 17.  Against this background, the assumption that the European Court of Human Rights prohibits democratic States from combating terrorism is deeply inaccurate. But, and this is quite another matter, States – and thus Governments – must take useful, appropriate and not illusory measures. Deprivation of nationality, which France wanted at some point to introduce in its Constitution, is to my mind a perfect counterexample. There is a case currently pending before the Court concerning deprivation of nationality for acts of terrorism, *A.S. v. France*, which was communicated to the Government on 5 October 2016 under Articles 3, 8, 14 and 34 of the Convention, as well as under Article 1 of Protocol No. 7 to the Convention[[23]](#footnote-23).

 ***Protection of the democratic system***

 18.  There is a second reason why States have the obligation, under the European Convention on Human Rights, to combat terrorism. It arises from the threat posed by terrorism to a country’s democratic system[[24]](#footnote-24). As the former President of the Supreme Court of Israel Aharon Barak puts it, “ [i]f we do not protect democracy, democracy will not protect us [[25]](#footnote-25). Terrorist acts do not only affect individual human rights but their objective often includes also the neutralisation, even the destruction, of the entire political system. Furthermore, when they aim at provoking change through violence, terrorist methods are directly opposed to the democratic principles of democracy, namely the peaceful resolution of political conflicts by dialogue[[26]](#footnote-26).

 19.  The Preamble to the European Convention on Human Rights is sendind out a strong message: “[F]undamental freedoms … are best maintained … by an effective political democracy …”. European human rights law – and indeed international law – accordingly obliges States to ensure protection and preservation of their democratic system of government. Yet, a way of undermining democratic institutions and values is precisely to encourage Governments to combat terrorist violence by employing counter-terrorism measures which put them at risk. Things are closely connected. In other words, and to quote a famous formula used by the European Court, one cannot “undermin[e] or even destroy […] democracy on the ground of defending it”[[27]](#footnote-27).

 **3. The obligation to respect human rights**

 20.  While States cannot fail to fulfil their obligation to adopt adequate and effective counter-terrorism measures, they cannot either fail to fulfil their obligation to respect human rights, which they undertook to observe when signing and ratifying the various European and international instruments for the protection of fundamental rights to which they are parties. Starting with the 1948 Universal Declaration of Human Rights and the 1950 European Convention on Human Rights up to the Charter of Fundamental Rights of the European Union adopted in 2000 and which became binding with the entry into force of the Lisbon Treaty in 2009.

 21.  The State’s obligation to respect human rights is based on two main reasons that share in common the need to ensure the legitimacy of interventions and thus their effectiveness.

 ***Abuse of power / authority***

 22.  Human rights provide guarantees against abuse of power, which directly undermines the legitimacy of the fight against terrorism. Yet, abuse of power, under the form of slippages or drifts, which constitute serious violations of human rights, are real and not imaginary. I shall take recent examples in cases lodged before the European Court of Human Rights in 2012, 2014 and 2016.

 23.  Following the 11 September 2001 attacks, several countries in Europe provided assistance to the United States for the rendition to and the secret detention by the CIA, on their territory, of terror suspects prior to their transfer to the US Naval Base in Guantanamo Bay, which enabled to subtract them from the rules of law. In the *El-Masri* Grand Chamber judgment of 13 December 2012, “the former Yugoslav Republic of Macedonia” had assisted the CIA in capturing a German citizen who was held in secret for several months in a hotel in Skopje. The Court found a violation of Article 3 of the Convention on account of the ill-treatment to which the applicant had been subjected while being held in the hotel and at Skopje Airport, which amounted to torture[[28]](#footnote-28). The Court also stressed – and this is important – that victims and the general public have a right to the truth[[29]](#footnote-29).

 24.  The same situation occurred in Poland, at a CIA “black site”, with so-called “enhanced interrogation techniques” and “unauthorised” interrogation methods including, among other things, mock executions, “waterboard technique”, stress positions, confinement in a box and threats of abuse against the applicants’ families. In the *Al Nashiri v. Poland* judgment of 24 July 2014 the Court held that there had been a violation of Article 2 and Article 3 of the Convention taken together with Article 1 of Protocol No. 6 concerning the abolition of the death penalty, finding that Poland had enabled the CIA to transfer the applicant to the jurisdiction of a military commission in Guantanamo and thus exposed him to a foreseeable serious risk that he could be subjected to the death penalty following his trial[[30]](#footnote-30).

 25.  Following the *Nasr and Ghali v. Italy* judgment of 23 February 2016, which concerned the abduction by CIA agents, with the cooperation of Italian officials, of a political refugee, and his subsequent transfer to Egypt where he was held in secret for several months in extreme conditions, where the Court also found a violation of Article 3 of the Convention[[31]](#footnote-31), cases are still pending before the Court today, involving Romania and Lithuania, in which the Court held hearings on 29 June 2016[[32]](#footnote-32). Both applications concern alleged renditions of persons suspected of terrorist acts to CIA secret detention sites at which, according to the applicants’ submissions, interrogation methods amounting to torture were used. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism was, among others, invited to submit written comments as a third party and to take part in the hearings.

 ***The risk of arbitrariness***

 26.  When the obligation to combat terrorism requires special prevention and prosecution strategies or measures, such measures must be carried out in a way fully in line with the principles of the rule of law in order to ensure control over the relevance and the necessity of the counter-terrorism measures and avoid the risk of arbitrariness.

 27.  What is arbitrariness? In a nutshell, arbitrariness is the ability to decide free from any rule. It targets decisions which are outside a normative framework and refers to a power without any control and accountability. The existence of a principle of legality– substantive legality and procedural legality – is the main guarantee against arbitrary government decisions[[33]](#footnote-33).

 28.  Numerous judgments of the European Court are eminently indicative of the pressing need for such a control. In the Grand Chamber judgment *Del Río Prada v. Spain* of 21 October 2013, the applicant, who was serving a prison sentence of 30 years for being a member of a terrorist organisation, alleged that what she considered to be the retroactive application of a departure from the case-law by the Supreme Court after she had been convicted, had extended her detention by almost nine years, in violation of Article 7 of the Convention. The Court recalled that “[t]he guarantee enshrined in Article 7 … should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment”[[34]](#footnote-34). In this respect, it noted “that the *Audiencia Nacional* used the new method of application of remissions of sentence for work done in detention introduced by the “Parot doctrine” rather than the method in use at the time of the commission of the offences and the applicant’s conviction, thus depriving her of any real prospect of benefiting from the remissions of sentence to which she was nevertheless entitled in accordance with the law. … This change in the system for applying remissions of sentence was the result of the Supreme Court’s departure from previous case-law, as opposed to a change in legislation”[[35]](#footnote-35). In this connection, “while the Court accepts that the States are free to determine their own criminal policy, for example by increasing the penalties applicable to criminal offences …, they must comply with the requirements of Article 7 in doing so … On this point, the Court reiterates that Article 7 of the Convention unconditionally prohibits the retrospective application of the criminal law where it is to an accused’s disadvantage …”[[36]](#footnote-36).

 29. Deprivations of liberty are the place *par excellence* where there is a risk of arbitrariness. The *Sher and Others v. the United Kingdom* judgment of 20 October 2015, which involved the right to liberty and security, however problematic to my mind, is nevertheless interesting in so far as it contextualises the guarantees against the risk of arbitrariness. The case concerned the arrest and detention of three Pakistani nationals in the context of a counterterrorism operation. The applicants were detained for 13 days, before ultimately being released without charge. During that period they were brought twice before a court with warrants for their further detention being granted. They were then taken into immigration detention and had since voluntarily returned to Pakistan. They complained in particular about the hearings on requests for prolongation of their detention. In this case the Court found no violation of Article 5 § 4 of the Convention[[37]](#footnote-37). Reiterating that terrorism fell into a special category, it held that this provision could not be used to prevent the use of a closed hearing or to place disproportionate difficulties in the way of police authorities in taking effective measures to counter terrorism. In the applicants’ case, the threat of an imminent terrorist attack and national security considerations had justified restrictions on the applicants’ right to adversarial proceedings concerning the warrants for their further detention. Moreover, there had been sufficient safeguards against the risk of arbitrariness in respect of the proceedings for warrants of further detention, in the form of a legal framework setting out clear and detailed procedural rules.

 **4. Reconciling the obligations**

 30.  For long, but especially since the years 2000, the European Court of Human Rights has been repeatedly called upon to decide cases involving counter-terrorism measures adopted by States[[38]](#footnote-38). The Court considers that the obligation of States to combat terrorism may, in certain circumstances and under certain conditions, justify restrictions on rights recognised in the Convention. But in accordance with the principles of necessity and proportionality, that is to say that such limitations must not go beyond what is strictly necessary in order to fulfil the obligation of protection and that the impossibility to resort to other, less harmful to the rights and freedoms and equally effective means, is established. However, the State’s positive obligation may not call into question the absolute nature of non-derogable right and, notably, the prohibition of torture and inhuman or degrading treatment.

 31.  Let us examine that more closely because here a careful analysis of the jurisprudence of the European Court of Human Rights, which goes beyond prejudices and slogans, is required.

 ***Absolute rights***

 32.  As we all know, the European Convention on Human Rights contains certain rights which are absolute, non-derogable, and which are not subject to exceptions, even in time of war or other public emergency threatening the life of the nation. As far as the prohibition of torture and inhuman or degrading treatment is concerned, despite pressure from the States Parties, the Court has always stood firm: “Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment”[[39]](#footnote-39). Why? It is quite simply the universal value of human dignity, which everyone is to enjoy respect for and which distinguishes us precisely from terrorist barbarity. Abandoning it or renouncing to it is simply a step backwards for civilisation (*recul de civilisation*).

 33.  In the *Saadi v. Italy* Grand Chamber judgment of 28 February 2008, the Court ruled against the expulsion of a terrorist suspect to Tunisia, where the applicant was likely to be subjected to torture or inhuman or degrading treatment[[40]](#footnote-40). The Court thereby confirmed the absolute nature of Article 3 of the Convention which entails, incidentally, a wider guarantee than the one laid down in Articles 32 and 33 of the 1951 United Nations Convention on the Status of Refugees. The Court noted in particular that “States face immense difficulties in modern times in protecting their communities from terrorist violence ... It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3 …”[[41]](#footnote-41).

 34.  This principled position was reiterated in the *A. and Others v. the United Kingdom* Grand Chamber judgment of 19 February 2009: “The Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence. This makes it all the more important to stress that Article 3 enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 notwithstanding the existence of a public emergency threatening the life of the nation. Even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment …”[[42]](#footnote-42). Let us note that in the present judgment, in which the European Court of Human Rights, like the House of Lords, found that the derogatory measures had been disproportionate in that they had discriminated unjustifiably between nationals and non-nationals[[43]](#footnote-43), is particularly interesting in so far as it provides an overview of the European Court’s case-law concerning the right of derogation under Article 15 of the Convention.

 35.  The *Trabelsi v. Belgium* judgment of 4 September 2014 concerns another situation. In this case the Court ruled against the extradition of the applicant to the United States where he was being prosecuted on charges of terrorist offences, for which he was liable to an irreducible life sentence, that is to say a sentence with no possibility of a review. The Court considered that in view of the gravity of the terrorist offences with which the applicant stood charged and the fact that a sentence could only be imposed after the trial court had taken into consideration all relevant mitigating and aggravating factors, a discretionary life sentence would not be grossly disproportionate[[44]](#footnote-44). It found, however, that the US authorities had at no point provided any concrete assurance that the applicant would be spared an irreducible life sentence. The Court also noted that, while US legislation provided various possibilities for reducing life sentences (including the Presidential pardon system), which gave the applicant some “prospect of release”, it did not lay down any procedure amounting to a mechanism for reviewing such sentences for the purposes of Article 3 of the Convention. Therefore, the life imprisonment to which the applicant might be sentenced could not be described as reducible, which meant that his extradition to the United States had amounted to a violation of Article 3[[45]](#footnote-45).

 36.  I know that there is resistance in the United Kingdom against the *Vinter and Others* Grand Chamber judgment of 9 July 2013 concerning whole-life sentences and the subsequent judgments in the cases of *Öcalan v. Turkey (no. 2)* of 18 March 2014 and *Murray v. the Netherlands* (Grand Chamber) of 26 April 2016. Soon we will see if in the case of *Hutchinson v. the United Kingdom,* currently pending before the Grand Chamber, the Court will confirm its case-law. Moreover, the Grand Chamber will be holding a hearing on 11 January 2017 in the case of *Harkins v. the United Kingdom*, which concerns an extradition order to the United States of America where the applicant is facing a mandatory life sentence in prison without parole.

37.  By contrast, the *Othman (Abu Qatada) v. the United Kingdom* judgment of 17 January 2012 reaches a different conclusion. With regard to Article 3 of the Convention, the Court noted that, in accordance with its well-established case-law, the applicant could not be deported to Jordan if there were a real risk that he would be tortured or subjected to inhuman or degrading treatment. Yet, the reports of United Nations bodies and human rights organisations showed that the Jordanian General Intelligence Directorate routinely used torture against suspected Islamist terrorists and that no protection against that was provided by the courts or any other body in Jordan. The Court therefore had to decide whether the diplomatic assurances obtained by the UK authorities from the Jordanian Government were sufficient to protect the applicant. The Court found that the agreement between the two Governments was specific and comprehensive. The assurances were given in good faith by a Government whose bilateral relations with the United Kingdom had, historically, been strong. In addition, the assurances would be monitored by an independent human rights organisation in Jordan, which would have full access to the applicant in prison. The Court therefore held that there would be no risk of ill-treatment and no violation of Article 3 if the applicant were deported to Jordan.

 ***Authorised limitations, restrictions or interferences***

 38.  All the other Convention rights may, under certain conditions, be subjected either to exceptions, limitations or restrictions, or to State interferences.

 39.  I will not address here Article 15 of the Convention which affords to the Governments of the States parties, in exceptional circumstances, that is to say in time of war or other public emergency threatening the life of the nation, the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention, to the extent strictly required by the exigencies of the situation. This provision which, in some way, puts the Convention rights “on the back burner” (*en veilleuse*), is governed by very strict procedural and substantive conditions, which are intended to prevent abuses. Its use is relatively limited since, as shown by Athanasia Petropoulou, the Convention system allows States sufficient flexibility to respond effectively to the terrorist threat without resorting to the derogation provided for by Article 15[[46]](#footnote-46). I shall therefore address two rights, among others, which are most likely to be affected by counter-terrorism measures: the right to a fair trial and the right to respect for private life.

 *The right to a fair trial*

 40.  Article 6 of the Convention guarantees the right to a fair trial. Counter-terrorism measures are a major test for many aspects of this right, such as for instance the right to silence[[47]](#footnote-47), the presumption of innocence or the rights of the defence[[48]](#footnote-48). In addition, the means employed, such as anonymous witness testimony, undercover techniques, the use of informers, special methods of investigation or trials held before special courts[[49]](#footnote-49) create as many situations where there is a risk. The search for immediate effectiveness – which is not easy matter – may pave the way for abuses and arbitrariness. This is the reason why the Convention emphasises the pre-eminence of the law and the role of the judge in the protection of human rights[[50]](#footnote-50).

41.  In the *Othman (Abu Qatada) v. the United Kingdom* judgment of 17 January 2012 which I have already mentioned earlier with regard to Article 3 of the Convention, the second question before the Court was that of whether the applicant would be at real risk of a flagrantly unfair trial if he were deported to Jordan, where he was wanted on terrorism charges. The European Court agreed with the Court of Appeal that the use of evidence obtained by torture during a criminal trial would amount to a flagrant denial of justice, in violation of Article 6 of the Convention[[51]](#footnote-51). Allowing a criminal court to rely on torture evidence would indeed legitimise the torture of witnesses and suspects pre-trial. Moreover, torture evidence was unreliable, because a person being tortured would say anything to make it stop. The Court also agreed with the UK Special Immigration Appeals Commission that there was a high probability that the incriminating evidence would be admitted at the applicant’s retrial and that it would be of considerable, perhaps decisive, importance. In the absence of any assurance by Jordan that the torture evidence would not be used against the applicant, the Court therefore concluded that his deportation to Jordan to be retried would give rise to a flagrant denial of justice in violation of Article 6.

42.  The *El Haski v. Belgium* judgment of 25 September 2012 concerned the Belgian courts refusal to exclude as evidence statements taken in Morocco where there was a real risk that they had been obtained by torture[[52]](#footnote-52). Moreover, on the basis of several reports issued by the United Nations and non-governmental organisations, the European Court noted that at the relevant time the Moroccan judicial system did not offer real guarantees of independent, impartial and serious examination of allegations of torture or inhuman or degrading treatment. Article 6 of the Convention – the right to a fair trial – therefore required the domestic courts not to admit them as evidence without first making sure they had not been obtained by torture. However, in rejecting the applicant’s request to exclude the statements, the Court of Appeal simply noted that he had provided no “concrete proof” capable of shedding “reasonable doubt” on the evidence, which was clearly insufficient.

43.  By contrast, in the *McKevitt and Campbell v. the United Kingdom* decision of 6 September 2016, the Court unanimously declared the application inadmissible under Article 6 §§ 1 et 3 (d) of the Convention. In regard to the evidence of an FBI agent who had not been made available in court for questioning, it found in particular that the judge had fully considered the need for appropriate safeguards given the witness’s absence, namely that the applicants had had an adequate opportunity to challenge the agent’s evidence with their own and that the judge had had due regard to the appropriate considerations when deciding what weight he could attach to the evidence of an absent witness. In light of this, the Court found that the national court’s findings could not be said to have been arbitrary or unreasonable[[53]](#footnote-53). The applicants had not demonstrated that their trial was unfair, and the Court dismissed their applications. This echoes the idea that procedural guarantees can, in certain cases, compensate for obstacles faced by the defence and prevent the risk of abuse.

44.  Lastly, the rights of the defence are an essential aspect of the right to a fair trial. For those who think that the European Court of Human Rights exercises a unilateral control or that is is naïve, laxist and cut-off from reality, the *Ibrahim and Others v. the United Kingdom* Grand Chamber judgment of 13 September 2016 constitutes another counterexample. It concerns delayed access to lawyers during police questioning of the 21st July 2005 London bombers. The Court accepted that the police had temporarily delayed access to a lawyer of those suspected, because there had been an exceptionally serious and imminent threat to public safety, namely the risk of a terrorist attacks[[54]](#footnote-54). We can certainly regret this judgment and I do. The Court’s reasoning must be read, in all its shades and waves. On the one hand, the Court recalled that “[t]he general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. There can be no question of watering down fair trial rights for the sole reason that the individuals in question are suspected of involvement in terrorism. In these challenging times, the Court considers that it is of the utmost importance that the Contracting Parties demonstrate their commitment to human rights and the rule of law by ensuring respect for, *inter alia*, the minimum guarantees of Article 6 of the Convention”[[55]](#footnote-55). On the other hand, “when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration … Moreover, Article 6 should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter terrorism or other serious crimes in discharge of their duty under Articles 2, 3 and 5 § 1 of the Convention to protect the right to life and the right to bodily security of members of the public”[[56]](#footnote-56). Finally, as a sort of concession, the Court admits that “public interest concerns cannot justify measures which extinguish the very essence of an applicant’s defence rights …”[[57]](#footnote-57).

45.  My main concern is the following one. Is the obligation of the police to discharge its duty under Articles 2, 3 and 5 § 1 of the Convention to protect the right to life and to bodily security of members of the public radically prevented by the presence of a lawyer? Can one infer that the assistance of a lawyer will put “disproportionate difficulties” in the way of the police authorities in taking effective measures to counter terrorism? “The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence …”[[58]](#footnote-58). Furthermore, what is “the very essence of an applicant’s defence rights” if it is not the assistance, in due time, of a lawyer?

 *The right to respect for private life*

46.  I shall now turn to the so-called rights with relative protection, where interferences in the exercise of the rights and freedoms are authorised under certain conditions. The right to thought, conscience and religion (Article 9 of the European Convention on Human Rights), freedom of expression (Article 10), freedom of assembly and association (Article 11) are rights that are very often involved in the case of terrorism. I am thinking, for example, to hate speech[[59]](#footnote-59) or apology of terrorism.

47.  I will however restrict myself to the right of respect for private and family life guaranteed by Article 8 of the Convention. We are facing the critical importance of intelligence activities in the fight against terrorism (identification and interception of communications, observation, a.s.o.) because the ability of States’ security services to prevent terrorist attacks quite often depends on the quality of information they have available. States’ interferences in the exercise of this right are subject to a three-fold condition (foreseen by the law, pursuing a legitimate aim and necessary in a democratic society) and, therefore, a rigorous methodology is necessary during the concrete examination of each case.

48.  In this respect, interferences must be provided for by the law, which corresponds to a basic democratic requirement. States cannot act on the basis of vague legal provisions. Under the guise of combating terrorism, no other forms of crime can be included. “Dead-weight effect” (*l’effet d’aubaine*) refers to this extension of the scope of counter-terrorism measures/strategies beyond their area of origin[[60]](#footnote-60). So, for instance, in the *Gillan and Quinton v. the United Kingdom* judgment of 12 January 2010, which concerned the police power under sections 44-47 of the Terrorism Act 2000 to stop and search individuals without reasonable suspicion of wrongdoing, the Court found that some provisions of the 2000 Act were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse, so that the interference with Article 8 of the Convention had not been in accordance with the law.[[61]](#footnote-61). The application in the case of *Sylvie Beghal v. the United Kingdom* which was lodged before the European Court of Human Rights on 14 January 2016 and communicated to the UK Government on 22 April 2016 raises the same question in the context of Schedule 7 to the Terrorism Act 2000 which, without prior authorisation, empowers police, immigration officers and designated customs officers to stop, examine and search passengers at ports, airports and international rail terminals.

49.  Interferences must also pursue a legitimate aim which, in the case of terrorism, will most often be national security and the protection of the rights and freedom of others. These aims must be clearly defined. However, the Court will rarely question the evaluation by the States, which are thus entitled a wide margin of appreciation as to the existence of a situation affecting national security.

50.  Lastly, interferences must be necessary in a democratic society to achieve the legitimate aims pursued. To this end, interferences will be considered to be necessary if they answer a pressing social need and if they are proportionate to the aims pursued. The reasons adduced by the national authorities to justify the interference are relevant and pertinent. So, for instance, in the *Blaj v. Romania* judgment of 8 April 2014, the tapping of the applicant’s telephone conversations had been ordered on account of suspicion of passive corruption and authorised by a court order[[62]](#footnote-62). Moreover, “for a measure to be regarded as proportionate and as necessary in a democratic society, the possibility of recourse to an alternative measure that would cause less damage to the fundamental right in issue whilst fulfilling the same aim must be ruled out …”[[63]](#footnote-63). Ultimately, interferences with the right to respect for private life enshrined in Article 8 of the Convention are, in some cases, accepted only on the grounds that the State compensated for the limitation on the applicant’s right in question[[64]](#footnote-64). In any event, if “the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention … [a] margin of appreciation must be left to the competent national authorities in this connection. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference …”[[65]](#footnote-65).

51.  Regarding intelligence issues, mass surveillance – which is sometimes referred to as general and not targeted surveillance – is a constant temptation for many States which view human rights as an obstacle to public safety[[66]](#footnote-66). I am aware that on 18 November 2016 the United Kingdom Parliament has passed the Investigatory Powers Bill which is the most extreme surveillance law in its history. However, some express concern that, by allowing indiscriminate surveillance of persons who are not suspected of terrorist activities, laws may aggravate social tensions because they are likely to create a dangerous environment in which all individuals are regarded as potential suspects. “The State is poisoning itself”, as Antoine Garapon puts it.

52.  This is the type of counter-terrorism measure that endangers fundamental rights and is counter-productive, diverting resources that might prevent terrorist attacks. Already in 2015, the Report of the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly noted that “[m]ass surveillance d[id] not appear to have contributed to the prevention of terrorist attacks, contrary to earlier assertions made by senior intelligence officials. Instead, resources that might prevent attacks are diverted to mass surveillance, leaving potentially dangerous persons free to act”. The Assembly therefore called for the collection and analysis of personal data (including so-called metadata) without consent only following “a court order granted on the basis of reasonable suspicion”. It also recommended for a better judicial and parliamentary control of intelligence services and for the adoption of an “intelligence codex” defining mutual obligations that secret services could opt into. It lastly called for “credible, effective protection” for whistle-blowers exposing unlawful surveillance[[67]](#footnote-67).

 53.  As far as surveillance is concerned, the law must be precise and clear as to the nature of the charged or suspected activities of persons who may be subjected to surveillance. It must set out strict limits on the duration of the operations, as well as rules on the use, storage and destruction of data obtained during those operations. Persons subjected to surveillance operations must have an effective remedy in order to contest the validity of the measures applied to them, as well as the decisions on the use and storage of the data concerning them. In addition, the law should also increase the accountability and transparency of the intelligence services, including vis-à-vis Parliament. Lastly, large-scale surveillance must also conform to the strict tests of necessity and proportionality in order to be compatible with Article 8 of the European Convention on Human Rights. This is the thrust of the *Szabo and Vissy v. Hungary* judgment of 12 January 2016[[68]](#footnote-68) which, on this point, draws inter alia on two recent judgments of the Court of Justice of the European Union[[69]](#footnote-69).

 **Conclusion**

 54.  International human rights law does not prevent States from taking measures in order to protect their citizens from the threat of terrorism. The European Convention on Human Rights is not a “suicidal” convention. But the Executive cannot be left in a position of power with no effective control. Restrictions on individual freedoms must be limited to what is absolutely necessary, they must be temporary and subject to a regular assessment process. They must be targeted with sufficient precision and must not encompass other phenomena, maybe even categories of undesirable persons.

 55.  I am thinking here of migrants and refugees. “Overly-restrictive migration policies introduced because of terrorism concerns are not justified and may in fact be damaging to State security,” warned the United Nations Special Rapporteur on counter-terrorism and human rights before the UN General Assembly on 21 October 2016. Presenting his last report on the impact of counter-terrorism on the human rights of migrants and refugees, Ben Emmerson showed that “while there is no evidence that migration leads to increased terrorist activity, migration policies that are restrictive or that violate human rights may in fact create conditions conducive to terrorism”[[70]](#footnote-70).

 56.  The rule of law cannot accept snap legislation and never can fear be a valid reason for violating fundamental human rights. While in Hobbes political philosophy the State is “that which effectively brings an end to fear”, in the Security State, “this schema is reversed: the State is durably grounded in fear and must, at all cost, maintain it, because it draws from it its essential function and its legitimacy”[[71]](#footnote-71). In this respect, I regret that the political authorities do not further play or do not longer play their prominent role of peacekeeper. Within a complex reality such as terrorism, Governments must play a pedagogical and not a demagogic role.

 57.  In a recent book, *The Crisis of the European Union: A Response*, Habermas expands on what he calls “the realistic utopia of human rights”[[72]](#footnote-72). “The origin of human rights in the moral notion of human dignity explains the explosive political force of a concrete utopia”[[73]](#footnote-73). Far from taking an idealistic but noncommittal stance or adopting the cynical pose of the so-called realists, human rights constitute a realistic utopia insofar as they anchor the ideal of a just society in the institutions of democratic States themselves. This utopia is very simply the right to think of the future and to think of it differently.

1. . M. Troper, “Le concept d’Etat de droit”, *Droits*, no. 15, 1992, pp. 51 et seq. [↑](#footnote-ref-1)
2. . D. Rousseau, “Mon plaidoyer pour l’Etat de droit”, Tribune, *Libération*, 17 August 2016. [↑](#footnote-ref-2)
3. . *The Principle of the Rule of Law*, Report of the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly (rapporteur: E. Jurgens), doc. 11343, 6 July 2007. See also T. Bingham, *The Rule of Law*, London, Penguin Book, 2011. [↑](#footnote-ref-3)
4. . See J. Chevalier, *L’Etat de droit*, Paris, Montchrestien, 4th edition, 2003; L. Heuschling, *L’Etat de droit, Rechstaat, Rule of Law*, Paris, Dalloz, 2002. [↑](#footnote-ref-4)
5. . See *L’Etat de droit en droit international*, Paris, Pedone, 2009. [↑](#footnote-ref-5)
6. . See D. Kochenov and L. Pech, “Renforcer le respect de l’Etat de droit dans l’UE: Regards critiques sur les nouveaux mécanismes proposés par la Commission et le Conseil”, *Fondation Robert Schuman / Questions d’Europe*, no. 356, 11 May 2015. [↑](#footnote-ref-6)
7. . J.-B. Jacquin, « Entretien avec J.-M. Sauvé », *Le Monde,* 18 novembre 2016. [↑](#footnote-ref-7)
8. . See, for instance, in France, Law No. 2016-731 of 3 July 2016 on organised crime and terrorism as well as Law no. 2016-987 of 21 July 2016 extending the state of emergency and strengthening counter-terrorism. [↑](#footnote-ref-8)
9. . *Avis sur la constitutionnalité et la compatibilité avec les engagements internationaux de la France de certaines mesures de prévention du risque de terrorisme*, adopted by the General Assembly of the Conseil d’Etat on 17 December 2015. [↑](#footnote-ref-9)
10. . G. Agamben, “De l’Etat de droit à l’Etat de sécurité” (“From the State of Law to the Security State”), *Le Monde*, 23 December 2015. [↑](#footnote-ref-10)
11. . *Avis sur un projet de loi prorogeant l’application de la loi n° 55-385 du 3 avril 1955 relative à l’état d’urgence*, adopted by the General Assembly of the Conseil d’Etat on 2 February 2016. [↑](#footnote-ref-11)
12. . ECtHR, *Mercan v. Turkey* decision of 8 November 2016. Since the applicant’s placement in pre-trial detention on 17 July was not a measure that had been adopted by legislative decree in the context of the state of emergency which was proclaimed on 21 July 2016, the Court considered that her argument that it was impossible for her to appeal against her placement in detention was unfounded. [↑](#footnote-ref-12)
13. S. Sottiaux, *Terrorism and the Limitations of Rights. The European Convention on Human Rights and the United States Constitution*, Hart Publishing, Oxford / Portland, 2008. [↑](#footnote-ref-13)
14. *Ibid.*, p. 2. [↑](#footnote-ref-14)
15. *Ibid.*, p. 6. [↑](#footnote-ref-15)
16. *Ibid.*, pp. 4-5. [↑](#footnote-ref-16)
17. . Fr. Bernard, “La Cour européenne des droits de l’homme et la lutte contre le terrorisme”, *Rev. trim. dr. h.*, 2016, p. 45. [↑](#footnote-ref-17)
18. . ECtHR, *Osman v. the United Kingdom* judgment of 28 October 1998, § 115. [↑](#footnote-ref-18)
19. . ECtHR, *McCann and Others v. the United Kingdom* du 27 septembre 1995, § 213. [↑](#footnote-ref-19)
20. . ECtHR, *Finogenov and Others v. Russia* judgment of 20 December 2011. [↑](#footnote-ref-20)
21. . *Ibid*. [↑](#footnote-ref-21)
22. . ECtHR (GC), *Armani da Silva v. the United Kingdom* judgment of 30 March 2016. [↑](#footnote-ref-22)
23. . Application no. 46240/15, *A.S. v. France*. [↑](#footnote-ref-23)
24. S. Sottiaux, *Terrorism and the Limitations of Rights. The European Convention on Human Rights and the United States Constitution*, *op. cit.*, p. 5. [↑](#footnote-ref-24)
25. . A. Barak, “Human rights in terror – A judicial point of view”, Seminar organised on the occasion of the opening of the judicial year of the European Court of Human Rights, Strasbourg, 29 January 2016. [↑](#footnote-ref-25)
26. . *Ibid.*, see ECtHR, *United Communist Party of Turkey and Others v. Turkey* judgment of 30 January 1998, § 57. [↑](#footnote-ref-26)
27. . ECtHR, *Klass and Others v. Germany* judgment of 6 September 1978, § 49. [↑](#footnote-ref-27)
28. . ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”* of 13 December 2012, § 223. [↑](#footnote-ref-28)
29. . *Ibid.*, § 191. [↑](#footnote-ref-29)
30. . ECtHR, *Al Nashiri v. Poland* judgment of 24 July 2014, §§ 578-579. [↑](#footnote-ref-30)
31. . ECtHR, *Nasr and Ghali v. Italy* judgment of 23 February 2016, §§ 284-291. [↑](#footnote-ref-31)
32. . Applications *Al Nashiri v. Romania* (no. 33234/12) and *Abu Zubaydah v. Lithuania* (no. 46454/11). [↑](#footnote-ref-32)
33. . See J. Portier, “La notion d'arbitraire dans la jurisprudence de la Cour européenne des droits de l'homme”, *Les cahiers de la justice*, no. 2016/3, pp. 521 et seq. [↑](#footnote-ref-33)
34. . ECtHR (GC), *Del Río Prada v. Spain* judgment of 21 October 2013, § 77. [↑](#footnote-ref-34)
35. . *Ibid.*, §§ 111-112. [↑](#footnote-ref-35)
36. . *Ibid.*, §§ 116-117. [↑](#footnote-ref-36)
37. . ECtHR, *Sher and Others v. the United Kingdom* judgment of 20 October 2015, §§ 150-157. [↑](#footnote-ref-37)
38. . Fr. Bernard, “La Cour européenne des droits de l’homme et la lutte contre le terrorisme”, *op. cit.* [↑](#footnote-ref-38)
39. . ECtHR (GC), *Selmouni v. France* judgment of 28 July 1999, § 95; ECtHR (GC), *Labita v. Italy* judgment of 6 April 2000, § 119; ECtHR (GC), *Ramirez Sanchez v. France* judgment of 4 July 2006, § 115. See also ECtHR (GC), *Gäfgen v. Germany* judgment of 1 June 2010, § 87. [↑](#footnote-ref-39)
40. . ECtHR (GC), *Saadi v. Italy* judgment of 28 February 2008, § 127. [↑](#footnote-ref-40)
41. . *Ibid*., § 137. [↑](#footnote-ref-41)
42. . ECtHR (GC), *A. and Others v. the United Kingdom* judgment of 19 February 2009, § 139. [↑](#footnote-ref-42)
43. . *Ibid.*, § 190. [↑](#footnote-ref-43)
44. . ECtHR, *Trabelsi v. Belgium* judgment of 4 September 2014, § 127. [↑](#footnote-ref-44)
45. . *Ibid.*, §§ 136-139. [↑](#footnote-ref-45)
46. . A. Petropoulou, *Liberté et sécurité: les mesures antiterroristes et la Cour européenne des droits de l’homme*, Paris, Pedone, 2014, p. 492. [↑](#footnote-ref-46)
47. . ECtHR, *Heaney and McGuinness v. Ireland* judgment of 21 December 2000. [↑](#footnote-ref-47)
48. . ECtHR (GC), *Salduz v. Turkey* judgment of 27 November 2008. [↑](#footnote-ref-48)
49. . ECtHR, *Incal v. Turkey* judgment of 9 June 1998. [↑](#footnote-ref-49)
50. . See Consultative Council of European Judges, *Opinion no.° (2006) Opinion No. 8 (2006) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on "the role of judges in the protection of the rule of law and human rights in the context of terrorism"*, doc. CCJE(2006)3, adopted by the CCJE at its 7th meeting, Strasbourg, 10 November 2006. [↑](#footnote-ref-50)
51. . ECtHR, *Othman (Abu Qatada) v. the United Kingdom* judgment of 17 January 2012, §§ 263-267. [↑](#footnote-ref-51)
52. . ECtHR, *El Haski v. Belgium* judgment of 25 September 2012. [↑](#footnote-ref-52)
53. . ECtHR, *Mc Kevitt and Campbell v. the United Kingdom* decision of 6 September 2016, § 68. [↑](#footnote-ref-53)
54. . ECtHR (GC), *Ibrahim and Others v. the United Kingdom* judgment of 13 September 2016. [↑](#footnote-ref-54)
55. . *Ibid.*, § 252. [↑](#footnote-ref-55)
56. . *Ibid.* [↑](#footnote-ref-56)
57. . *Ibid.* [↑](#footnote-ref-57)
58. . See the joint partly dissenting, partly concurring opinion of Judges Sajó and Laffranque annexed to the *Ibrahim and Others v. the United Kingdom* judgment, at § 21. [↑](#footnote-ref-58)
59. . See Fr. Tulkens, “When to say is to do. Freedom of expression and hate speech in the case-law of the European Court of Human Rights”, *Freedom of expression. Essays in Honour of Nicolas Bratza*, Oisterwijk, Wolf Legal Publishers, 2012, pp. 279- et seq. [↑](#footnote-ref-59)
60. . O. De Schutter, “La Convention européenne des droits de l’homme à l’épreuve de la lutte contre le terrorisme”, in E. Bribosia and A. Weyembergh (eds), *Lutte contre le terrorisme et droits fondamentaux*, Brussels, Bruylant, 2002, pp. 90 et seq. [↑](#footnote-ref-60)
61. . ECtHR, *Gillan and Quinton v. the United Kingdom* judgment of 12 January 2010, § 87. [↑](#footnote-ref-61)
62. . ECtHR, *Blaj v. Romania* judgment of 8 April 2014. [↑](#footnote-ref-62)
63. . ECtHR (GC), *Nada v. Switzerland* judgment of 12 September 2012, § 183. [↑](#footnote-ref-63)
64. . ECtHR, *Klass v. Germany* judgment of 6 September 1978, §§ 46 et s. [↑](#footnote-ref-64)
65. . ECtHR (GC), *Nada v. Switzerland* judgment of 12 September 2012, § 184. [↑](#footnote-ref-65)
66. . See Fr. Dubuisson, “La Cour européenne des droits de l’homme et la surveillance de masse”, *Rev. trim. dr. h.*, 2016, pp. 855 et seq. [↑](#footnote-ref-66)
67. . *Mass surveillance*, Report of the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly (rapporteur: P. Omtzigt), doc. 13734, 18 March 2015. [↑](#footnote-ref-67)
68. . ECtHR, *Szabo and Vissy v. Hungary* judgment of 12 January 2016, §§ 69-70. [↑](#footnote-ref-68)
69. . CJEU (GC), *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* judgment of 8 April 2014, joined cases C-293/12 et C-594/12; CJEU (GC), *Maximillian Schrems v. Data Protection Commissioner* judgment of 6 October 2015, case C-362/14. [↑](#footnote-ref-69)
70. . Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, doc. A/71/384, 13 September 2016. [↑](#footnote-ref-70)
71. . G. Agamben, “De l’Etat de droit à l’Etat de sécurité”, *op. cit.* [↑](#footnote-ref-71)
72. . J. Habermas, *The Crisis of the European Union: A Response*, Ciaran Cronin (tr.), Cambridge, Polity Press, 2012, pp. 71 et seq. [↑](#footnote-ref-72)
73. . *Ibid*. [↑](#footnote-ref-73)