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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE PROTECTION OF HUMAN RIGHTS
IN EMERGENCY SITUATIONS**

**Adopted by the Venice Commission
at its 66th Plenary Session
(Venice, 17-18 March 2006)**

On the basis of comments by

Mr Pieter van DIJK, (Member, Netherlands)
Ms Finola FLANAGAN, (Member, Ireland)
Mr Jeffrey JOWELL (Member, United Kingdom)

I. Introduction

1. *By a letter of 15 September 2005, the Secretary General of the Parliamentary Assembly of the Council of Europe requested, on behalf of the Bureau, an opinion of the Commission on the legal aspects raised by the protection of human rights in emergency situations.*

2. *The issue of the protection of human rights in emergency situations was raised in a Motion for a resolution dated 5 July 2005 (Doc. 10641) which had been presented by twelve members of the Parliamentary Assembly following, inter alia, the events which took place in Andijan in May 2005, during which Uzbekistan's special forces soldiers opened fire on hundreds of demonstrators.*

3. *The Motion aimed at clarifying the legal framework in which state security forces have to act in order to deal with difficult situations during mass demonstrations or similar events in an acceptable way. The question is particularly important as regards the use of force in dispersing demonstrations, a situation that may arise within or outside the scope of Article 15 ECHR.*

4. *Mr Pieter van Dijk, Ms Finola Flanagan and Mr Jeffrey Jowell were appointed as rapporteurs. The present opinion, drawn up on the basis of their comments, was adopted by the Commission at its 66th plenary session (Venice, 17-18 March 2006).*

II. Background

5. The security of the State and its democratic institutions, and the safety of its officials and its population, are vital public and private interests that deserve protection, if necessary at high costs. According to the Guidelines on Human Rights and the Fight against Terrorism, "*States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life*".¹ The protection of the right to life "*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*".² Some claim even that the right to safety and to effective protection constitutes an independent human right ("*freedom from fear*").

III. Limitations of human rights in the interest of national security and public safety

6. The measures of protection may also consist of, or amount to limitations of certain human rights or freedoms. This has also found recognition in the main human rights treaties. There it is stated that the protection of national interest and public safety may justify restrictions of the full enjoyment of certain human rights.³ Such restriction may also be justified for the protection of

¹ Article I of the Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe at its 804th meeting on 11 July 2002; the preamble of the Guidelines mentions under (f) "*the imperative duty of States to protect their populations against possible terrorist acts*".

² European Court of Human Rights (ECtHR), judgment of 28 October 1998, *Osman v. United Kingdom*, paragraph 115.

³ As regards the European Convention on Human Rights (ECHR), see for example the second paragraphs of Articles 8 ("*national security, public safety*"), Article 9 ("*public safety*"), Article 10 ("*national security ... or public safety*") and Article 11 ("*national security or public safety*").

the rights and freedoms of others.⁴ This means, *inter alia*, that certain rights of those who have committed, are suspected of having committed or are about to commit acts against public safety, may be restricted to protect the safety of the population as a whole. In fact, those who commit or plan terrorist acts often use their human rights and freedoms to do so. Article 17 ECHR provides in this respect: "*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*". It also means, however, that the rights and freedoms of anybody, even potential victims of terrorist acts, may be restricted in the interests of national security and public safety.

7. The justification of limitations depends on a number of factors. First, if the right or freedom concerned is formulated as an absolute right or freedom, which is for instance the case with the right to life and the prohibition of torture, no limitations are allowed. Secondly, one of the limitation grounds that are exhaustively listed in the ECHR or other applicable treaty must be at stake, such as the interests of national security and public safety. Thirdly, the limitations must be "*prescribed by law*" which requires their regulation in transparent and accessible legal provisions. And fourthly, the limitations must be "*necessary in a democratic society*". The latter requirement amounts, according to standing case-law of the ECtHR, to that of "*a pressing social need*" in addition to that of effectiveness and of proportionality of the scope and effects of the restriction in relation to the importance of the interests to be protected.⁵ This means that the protection of national security and public safety may justify restrictions of the enjoyment of certain human rights, but that such justification is subject to certain rather strict conditions. As the Committee of Ministers stressed, "*When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued*".⁶

8. The balance that has to be struck between national security and public safety, on the one hand, and the enjoyment of fundamental rights and freedoms, on the other hand, cannot be determined by use of any mathematical calculation or fixed scale. Strasbourg case-law provides that the ECHR has to be interpreted and applied as a "*living instrument*",⁷ which also implies that the criteria by which to make the balance, and the weight to be attributed to the various elements, may vary at different times and in different contexts. The assessment of the fairness and proportionality of the balancing of public and private interests has to be determined by the concrete situation and circumstances. This assessment is consequently by necessity dictated by the circumstances of the case, and may also have as a result that a specific situation or specific developments justify more far going restrictions. The bottom line, however, is that the right or freedom concerned may not be curtailed in its essence. This also holds true for the rights and freedoms of those who have committed, or are suspected of having committed, acts against State security or public safety.⁸

⁴ *Ibidem*.

⁵ See P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd edition (1998), pp. 80-95.

⁶ See Article III.2 of the *Guidelines on Human Rights and the Fight against Terrorism*, *supra* (note 1).

⁷ See ECtHR judgment of 25 April 1978, *Tyrer v. United Kingdom*, paragraph 31.

⁸ See ECtHR judgment of 15 November 1996, *Chahal v. United Kingdom*, paragraphs 79-81; see also Article 2, paragraph 2, of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984: "*No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture*".

IV. Derogation measures required by war or other public emergency

9. Under Article 15 ECHR it is also possible for the Contracting States to derogate from most of their obligations under the European Convention on Human Rights “*in time of war or other public emergency threatening the life of the nation*”. Some rights, however, are declared non-derogable by Article 15⁹. These are the so-called absolute rights: the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and of slavery, and the *nullum crimen, nulla poena* principle.¹⁰ This is important to emphasise, since State practice shows that (also) these rights may be under severe threat in situations of proclaimed state of emergency.

10. The test of “*public emergency threatening the life of the nation*” was set out by the former European Commission of Human Rights in a case where the Greek Government failed to persuade the Commission that a derogation under Article 15 was justified. On that occasion, the Commission set out the following characteristics of a situation that would justify such an emergency:¹¹

- (1) It must be actual or imminent;
- (2) Its effects must involve the whole nation;
- (3) The continuance of the organised life of the community must be threatened;
- (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate. In 1961 the ECtHR stressed that there must be a “*threat to the organised life of the community*”.¹²

11. When an emergency situation pertains and a Contracting State wishes to use its power of derogation, it is imperative for the State in question to make a formal derogation under Article 15 ECHR indicating the rights and the territory to which the derogation applies.¹³ Moreover, in case of such derogation, the third paragraph of Article 15 requires that the State concerned keep the Secretary General of the Council of Europe fully informed of the measures that it has taken and the reasons therefore, as well as of the moment these measures have ceased to operate.

⁹ See for example ECtHR judgement of 18 December 1996, *Aksoy v. Turkey*, paragraph 62.

¹⁰ Although the two categories may not be said to fully coincide, the rights and freedoms listed here may be said to be also obligations of an absolute character for States which are not parties to the respective treaties, as *ius cogens*; see Article 53 of the UN Convention on the Law of Treaties of 23 May 1969 (Vienna Convention).

¹¹ See Greek case, 12 YB 1, *Opinion of the Commission ad paragraph 53*.

¹² See ECtHR judgment of 1 July 1961, *Lawless v. Ireland*, No.3 / 1961, 1 EHRR 15, paragraph 28. In a recent UK case, the House of Lords applied that test in relation to measures introduced in response to perceived threats from Al-Qaeda after 11 September 2001. See *A. v. Secretary of State for the Home Department*/ [2004] UKHL 5. The majority held that the existence of such an emergency and threat to the life of the nation was largely a matter for the government to determine. However, in a dissent, Lord Hoffmann focused on the notion of a threat to the ‘organised life of the community’ to include not merely a threat to the physical safety of the nation, but also to its fundamental values. He said: “The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these”.

¹³ See ECtHR judgment of 24 February 2005, *Isayeva v. Russian Federation*, paragraph 191. See also General Comment No. 29/2001 of the UN Human Rights Committee concerning States of Emergency (Article 4 ICCPR), CCPR/C/21/Rev.1/Add.11, paragraphs 2 and 4. See also the International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion of 9 July 2004, para. 127: “The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory”.

Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) is expressed in terms very similar to those of article 15(1) ECHR.¹⁴ This has particular relevance for those States that are not member of the Council of Europe. Under Articles 40 and 41 of the Covenant the Human Rights Committee has a supervisory task in relation to fulfilment of their obligations by the States parties. In its General Comment no 29/2001 on Article 4 ICCPR, the Committee observes that *"On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation, in situations not covered by article 4."*¹⁵

12. Derogations may only last for as long as, and may only have a scope that is *"strictly required by the exigencies of the situation"*. Their necessity and proportionality must be subject to domestic and international supervision. That supervision is of primary importance, since State Practice shows that the gravest violations of human rights tend to occur in the context of states of emergency and that States may be inclined, under the pretext of a state of emergency, to use their power of derogation for other purposes or to a larger extent than is justified by the exigency of the situation.¹⁶

13. Even in genuine cases of emergency situations the rule of law must prevail.¹⁷ Indeed, as long as the derogation measures taken do not extend to the right of access to court (Article 6 ECHR) and/or the right to an effective remedy (Article 13 ECHR), or extend in that respect beyond what is strictly required, a domestic supervisory mechanism must remain operational *"whereby, subject to the inherent limitations of the context, the individual can secure compliance with the relevant laws"*.¹⁸ The requirement of independent supervision has also been emphasised by the Committee of Ministers¹⁹. The UN Human Rights Committee states in its General Comment No. 29/2001: *"Even if a State party, during a state of emergency, and to the extent*

¹⁴ Article 4(1) ICCPR has led to the formulation by the United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, of the so-called Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984). In paragraphs 39-40, under the heading "Public Emergency which Threatens the Life of the Nation", it is said: "39. A State party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant. 40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4".

¹⁵ *Supra* (note 13), paragraph 3.

¹⁶ See European Commission for Democracy through Law, *Emergency powers, Collection Science and technique of democracy No. 12* (1995), p. 4; *idem*, *Human rights and the functioning of the democratic institutions in emergency situations, Collection Science and technique of democracy No. 17* (1996), p. 143. On State practice concerning states of emergency, see the 1955 report of the UN Special Rapporteur on States of Emergency and Human Rights, E/CN.4.Sub.2/1955/20.

¹⁷ See the third paragraph of the Preamble of the UN Universal Declaration of Human Rights of 10 December 1948.

¹⁸ See ECtHR judgment of 26 March 1987, *Leander v. Sweden*, paragraph 79.

¹⁹ See Article V and VI of the Guidelines on Human Rights and the Fight against Terrorism, *supra* (note 1); see also European Commission for Democracy through Law, *Emergency powers, Collection Science and technique of democracy No. 12* (1995), pp. 19-22.

*that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under Article 2, paragraph 3, of the Covenant to provide a remedy that is effective”.*²⁰

V. Use of Force in Dispersing Demonstrations

14. The right to demonstrate is an aspect of the right to freedom of peaceful assembly and is closely connected to the right of freedom of expression. The international and regional standards governing freedom of assembly are contained in particular in Article 21 ICCPR and in Article 11 ECHR.

Article 11 ECHR provides:

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

15. Article 11 protects both freedom of peaceful assembly and freedom of association. The latter freedom includes the right to form and join political parties and other politically orientated groups, but also, for instance, the right to form and join trade unions; such associations would then also be entitled to the right to freedom of peaceful assembly. The Venice Commission has previously examined laws of member States in relation to the freedom of assembly.²¹

16. The issue of the use of force in dispersing demonstrations could present itself as a measure under a derogation pursuant to Article 15 ECHR “*in time of war or other public emergency threatening the life of the nation*”. However, control of demonstrations and the use of force in dispersing demonstrations might present itself also as a limitation measure pursuant to Article 11 paragraph 2, *inter alia* in the interests of national security or public safety, and for the prevention of disorder. It is the latter context that will be considered under this heading.

²⁰ *"Supra (note 13), paragraph 14.*

²¹ *See CDL Opinion 290/2004 on the Law on conducting gatherings, meetings, rallies and demonstrations in the Republic of Armenia (CDL-AD)2005(040)); see also opinion on OSCE/ODHIR Guidelines for Drafting Laws pertaining to Freedom of Assembly (CDL-AD(2002)27)) and opinion on the Law on Assemblies of the Republic of Moldova (CDL-AD(2002)027)).*

17. The Venice Commission already described the broad parameters of the European standards on the right of freedom of assembly so as to set the context in which limitations on the exercise of that right may be created and enforced.²²

“8. The freedom of assembly is a fundamental right in a democracy and should not therefore be interpreted restrictively.

9. The right of assembly covers all types of gathering including assemblies and meetings, demonstrations, marches and processions, whether public or private provided they are “peaceful”. Where organizers or participants have violent intentions likely to result in violence or disorder there is no right to freedom of assembly. However, incidental or sporadic violence or criminal acts committed by others in the assembly will not remove protection from an individual nor will the violent response of counter-demonstrators to an otherwise peaceful assembly.

10. Article 11 ECHR is a “qualified” right and the state is therefore entitled to justify what is a prima facie interference with the right. Article 11 paragraph 2 ECHR expressly permits limitations on assemblies provided they are “such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others”. Therefore restrictions may be allowed for the regulation of public order as a legitimate aim and the State is given a wide margin of appreciation in order to deal with disorder or crime or to protect the rights and freedoms of others.

11. The right of assembly can be regulated in its exercise and a regime of prior authorisation of peaceful assemblies is not necessarily an infringement of the right. A system of permits and its application, however, must not affect the right of assembly as such: prohibition of an assembly must always be capable of justification having regard to the express terms of Article 11(2) ECHR as interpreted by the case law of the European Court of Human Rights.

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14. The exercise of fundamental rights and freedoms is a constitutional matter par excellence and, as such, should be governed in principle primarily by the Constitution (see, mutatis mutandis, Opinion on the draft law on freedom of conscience and religious entities of Georgia, [CDL-AD\(2003\) 20](#), § 4) and by the Convention.

15. Fundamental rights should, insofar as possible, be allowed to be exercised without regulation, except where their exercise would pose a threat to public order and where necessity would demand state intervention. A legislative basis for any interference with fundamental rights such as the right of peaceful assembly is indeed required by the Convention. The relevant regulation, in other words, should focus on what is forbidden rather than on what is allowed: it should be clear that all that is not forbidden is permissible, and not vice-versa”.

²² See CDL Opinion 290/2004 on the Law on conducting gatherings, meetings, rallies and demonstrations in the Republic of Armenia (CDL-AD)2005(040)).

18. As will be seen from the extract quoted above, it is only in respect of “*peaceful*” assembly that a right of assembly exists. Where assembly is peaceful the only restrictions that may be placed on the exercise of the freedom are those that are “*prescribed by law*” and “*necessary in a democratic society for the specific and limited purposes set out in [the] sub-article*”. The ECtHR has rejected the argument that qualified rights are subject to implied limitations. So the only limitations applicable to the right of assembly are those that can be justified in the terms contained in Article 11 paragraph 2 ECHR.²³

19. Nonetheless, Contracting States are allowed a “*margin of appreciation*” being the latitude or discretion allowed to a State in its laws and how it enforces them.²⁴ This margin of appreciation extends to the choice of means to be used by the authorities to ensure that lawful demonstrations take place peacefully and to what extent interference is necessary. However this is subject to supervision of the ECtHR. So, in order to ensure that a lawful manifestation is allowed to pass off peacefully, the authorities may be entitled to arrest and detain an individual conducting himself in a manner likely to cause a disturbance where such a response was proportionate to the interests to be protected, provided that this is prescribed by law. This would be the case particularly where the person arrested ought to have realized that his conduct was likely to lead to a disturbance requiring measures of restraint.²⁵

20. The essential obligation of a Contracting State remains in the first place the obligation to “*...secure to everyone within their jurisdiction the rights and freedoms...of the Convention*” as required by Article 1 ECHR. Not only must the State refrain from unjustifiable interference with the exercise of the right of assembly, it has a positive duty to ensure that lawful assemblies may proceed peacefully and it must protect those exercising their lawful rights from violence by other demonstrators.²⁶ It follows, that as the Contracting State has a positive duty to protect the right of assembly, it must, *a fortiori*, do nothing to impede lawful assemblies.

21. The State authorities must not go beyond what is necessary or proportionate in restricting the individual’s right of assembly. This was illustrated in a recent case in the United Kingdom, where the English Court of Appeal considered the lawfulness of police actions designed to prevent a breach of the peace occurring at a demonstration at a Royal Air Force airbase.²⁷ There was a clear prospect of serious disturbance at the demonstration. A coach carrying demonstrators to the base was lawfully stopped and searched, a large number of items were seized and the police officer in charge formed the view that some of the occupants were likely to cause a breach of the peace at the base. The police officer ordered the buses and their passengers be escorted non-stop back to London – a journey which lasted 2½ hours. The Court of Appeal found that because of their own behaviour “*it was not practical to identify the potential troublemakers and to distinguish them from those who were intending to protest peacefully*”. The Court found that if the police had only directed the bus driver not to drive the passengers to the bases that would have been a necessary and proportionate response. “*To have delayed the action until the coach passengers reached the airbase could have provoked the very disturbance which the preventative action was intended to avoid.*” However since there was no evidence that the drivers would have disobeyed this order it was disproportionate to order the coach to return

²³ See ECtHR judgment *Golder v United Kingdom* (1975) 1 EHRR 524, paragraph 44. *De Wilde, Ooms and Versyp v Belgium* (No. 1) (1971) 1 EHRR 373, paragraph 93.

²⁴ See ECtHR judgment *Handyside –v- United Kingdom* (1976) 1 EHRR 737.

²⁵ See ECtHR judgment *Chorherr v Austria* (1994) 17 EHRR 358.

²⁶ See ECtHR judgment *Plattform ‘Artze fur das Leben’ v Austria* (1988) 13 EHRR 204.

²⁷ See *Laporte –v- Chief Constable Gloucestershire Constabulary* [2004] EWCA Civ 1639.

to London non-stop under police escort since if the order not to proceed to the base had been disobeyed, the individuals concerned could have been arrested and this would have been a less intrusive measure.

22. The circumstances of each case have to be assessed individually in order to decide what preventive action is necessary and proportionate. Where real risk of disturbance is honestly and reasonably anticipated this may justify police interference.²⁸ The more time is available and the more physical distance is involved, the more restrained and less intrusive the preventive action should be. Conversely, the more imminent the unlawful disturbance and the greater the degree of disturbance, the greater and more immediate is the preventive action that may be warranted.

23. In addition to the issue of the restriction of the right of assembly itself, the methods of control used must be proportionate and appropriate. The UN Human Rights Committee expressed concern with certain crowd control methods against participants in various demonstrations or gatherings employed by the police, including the use of dogs, which have resulted in serious injuries to persons in the crowd, including bystanders.²⁹

24. Detention of demonstrators (and indeed others by chance caught up in the demonstration) in circumstances where the assembly was lawful or where the control response by the security forces was disproportionate, might amount to a violation of the right to liberty guaranteed by Article 5 ECHR.³⁰ Though a short temporary detention, including of non-demonstrating passers-by, might be justified in order to prevent a breakdown of law and order³¹.

25. Article 2 ECHR, which protects the right to life, provides as follows in its paragraph 2:

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:...

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

26. Whilst the use of force may be justified in the context of assemblies pursuant to Article 2 paragraph 2 (c) a balance must be struck between the aim pursued and the means employed to achieve it and force used to disperse demonstrators must be “*no more than is absolutely necessary*”. In a Turkish case involving a young boy shot and killed by gendarmes seeking to disperse a demonstration, the ECtHR found that “*the demonstration in question was far from peaceful, as was evidenced by the damage to moveable and immoveable property in the town and the injuries sustained by some gendarmes*”³². Nonetheless, the Court unanimously found there to have been a violation of Article 2 because it considered that in the circumstances of the case the force used to disperse the demonstrators, which caused the death of [the young boy] was not “*no more than absolutely necessary*” within the meaning of Article 2. A significant factor in the case was that “[the] gendarmes used a very powerful weapon because

²⁸ See *Moss –v- McLachlan* [1985] IRLR 76.

²⁹ See the observations of the UN Human Rights Committee on the third periodic report from Denmark under Article 40 of the ICCPR; see also ECtHR judgment of 27 July 1998, *Güleç v Turkey*, paragraph 70.

³⁰ See *Laporte –v- Chief Constable of Gloucestershire Constabulary* [2004] EWHC 253; [2004] 2 All E.R. 874; [2004] U.K.H.R.R. 484; (2004) 154 N.L.J. 308.

³¹ See *Austin –v- Commissioner of Police of the Metropolis* [2005] EWHC 480; [2005] H.R.L.R. 20; [2005] U.K.H.R.R. 1039.

³² See ECtHR judgment of 27 July 1998, *Güleç v Turkey*, paragraph 70.

they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas.” This lack was considered “incomprehensible and unacceptable because the province [in question was] a region in which a state of emergency [had] been declared, where at the material time disorder could have been expected.”³³ The Commission, whose findings of fact the Court accepted, did not believe that the weapon had been used to kill demonstrators intentionally but expressed the view that the use of such a weapon for the purposes of restoring order could not be regarded as proportionate. The State is also obliged to ensure that sufficient precautions are taken to protect the lives of the civilian population in its operations against terrorists³⁴.

27. The “*no more than absolutely necessary*” test is stricter than normally required when determining whether the measures concerned are “*necessary in a democratic society*”, and implies the obligation to plan and implement any measures in such a way as to avoid or minimize, to the greatest extent possible, risks of loss of lives, both of the persons to whom the measures are directed and of “*civilians*”. In another illustrative case concerning the United Kingdom, three suspects were shot dead by security forces. Having regard to the fact that the suspects were not prevented from travelling into Gibraltar and the option to arrest them had not been used, and that the authorities had failed to make sufficient allowance for the possibility that their intelligence assessments might be erroneous and their automatic recourse to lethal force, the Court by majority was not persuaded that the killing constituted the use of force which was no more than absolutely necessary, and held that there had therefore been a breach of Article 2.³⁵ The obligation to avoid or minimize the risk of losses of lives not only applies to security forces in planning and executing an operation, but also to the executive authorities and the legislature, who have to put into place an adequate administrative and legislative framework to regulate the use of force.³⁶

VI. Fight against terrorism and respect for human rights

28. The democratic institutions are bound to take effective steps to fight terrorism, even at the detriment of full enjoyment of human rights, while the human-rights element of the rule of law requires that the rights of everyone, also of (alleged) terrorists, are respected within the limits of national and international standards.³⁷ It is the primordial role of domestic and international judicial review to control and impose a proportional weighting. That weighting may differ from case to case and from issue to issue, and ultimately requires an impartial judgment after a public and fair procedure. As Justice Barak, President of the Supreme Court of Israel, rightly stressed:

“Every balance that is made between security and freedom will impose certain limitations both on security and on freedom. A proper balance will not be achieved when human

³³ See ECtHR judgment of 27 July 1998, *Güleç v. Turkey*, paragraph 71.

³⁴ See ECtHR Judgment of 28 July 1998, *Ergi v Turkey*, paragraphs 79-81.

³⁵ See ECtHR Judgment of 27 September 1995, *McCann v UK* (1995) 21 EHRR 97, paragraphs 193, 205, 210 and 212; see also ECtHR judgment of 9 October 1997, *Andronicou and Constantinou v Cyprus*; ECtHR Judgment of 28 July 1998, *Ergi v Turkey*; ECtHR judgment of 20 May 1999, *Ogur v Turkey*.

³⁶ See ECtHR Judgment of 20 December 2004, *Makaratzis v Greece*, paragraph 62; ECtHR Judgment of 6 July 2005, *Nachova and Others v Bulgaria*, paragraphs 96-97.

³⁷ In its Resolution 1271, adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe resolved (paragraph 9) that: “In their fight against terrorism, Council of Europe members should not provide for any derogations to the ECHR.” It also called on all member States (para 12) to “refrain from using Article 15 to limit the rights and liberties guaranteed under its Article 5.”

*rights are fully respected, as if there were no terrorism. Similarly a proper balance will not be achieved when national security is afforded full protection, as if there were no human rights. The balance and compromise are the price of democracy. Only a strong, safe and stable democracy may afford and protect human rights, and only a democracy built on the foundations of human rights can exist with security”.*³⁸

29. It follows that the best way to fight those who threaten State security and public safety is not primarily and in all situations to give more powers to the executive authorities and restrict personal rights and freedoms, but to strengthen democracy and the rule of law, which are precisely meant to protect the individual against arbitrary and disproportionate restrictions of his human rights and freedoms by the authorities.³⁹

30. In the era of “*global terrorism*” it has been put to debate whether fundamental human rights or the extent of possible derogations from them should be reinterpreted. Recent decisions by several domestic courts in Europe and beyond, however, have confirmed that the existing rights and standards are, in principle, appropriate for the current situation of the fight against global terror.⁴⁰ It is also the Commission’s opinion that no such reinterpretation is necessary or warranted.⁴¹

31. Democracy and the rule of law, by definition, imply political rights and personal freedoms, as well as an effective system of checks and balances. Indeed, States not only have the duty to protect State security and the individual and collective safety of its inhabitants,⁴² they also have the duty to protect the rights and freedoms of those inhabitants. State security and fundamental rights are not competitive values; they are each other's precondition.⁴³ In this context, the UN Secretary General emphasised that “*Respect for human rights should be seen as an essential part of the effective counter-terrorism strategy, not an impediment to it*”.⁴⁴ Recent State practice

³⁸ Aharon Barak, “*The Role of a Supreme Court in a Democracy, and the Fight against Terrorism*”, 58 *University of Miami Law Review*, October 2003, p. 133.

³⁹ See the third paragraph of the Preamble of the UN Universal Declaration of Human Rights of 10 December 1948.

⁴⁰ See, e.g., House of Lords, *Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004)A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals)*, [2005] UKHL 71; House of Lords, *Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56; Bundesverfassungsgericht, *Aviation Security Act*, 1 BvR 357/05; Israeli Supreme Court, *Public Committee Against Torture in Israel v. The State of Israel et al.*, Case [HCJ 5100/94](#); Israeli Supreme Court, *The Center for the Defense of the Individual v. The Commander of IDF Forces in the West Bank*, Case HCJ 3278/02; Israeli Supreme Court, *Marab v. The Commander of IDF Forces in the West Bank*, Case HCJ 3239/02; see also US Supreme Court, *Rasul v. Bush*, Case No. 03-334, 542 US 466 (2004) 321 F.3d 1134.

⁴¹ See Opinion n° 363/2005 of the Venice Commission on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners, CDL-AD(2006)009, paragraph 77.

⁴² See Resolution 1373(2001) of the UN Security Council.

⁴³ See the eighth paragraph of the Preamble of the Council of Europe Convention on the Prevention of Terrorism: “*Recalling the need to strengthen the fight against terrorism and reaffirming that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms as well as other provisions of international law, including, where applicable, international humanitarian law*”. See also Article 3, paragraph 1, of the same Convention.

⁴⁴ Report of the Secretary General of 8 August 2003, *Protection of Human Rights and Fundamental Freedoms while countering Terrorism*, paragraph 55.

shows that measures to fight terrorism may result in illegitimate or disproportionate limitations of fundamental human rights.⁴⁵

32. Freedom of expression is an example at point, here. Although Article 10 ECHR provides that this freedom, "*since it carries with it duties and responsibilities*", *may be restricted on certain grounds, including national security and public safety, it constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment*".⁴⁶ For that reason, freedom of expression "*is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'*".⁴⁷ Indeed, freedom of opinion, and for that matter freedom of religion, do not include freedom from criticism.

Maintenance and enhancement of democracy and the rule of law

33. It is important to recognise that, in addition to the impact that legislative and administrative measures to protect national security and public safety may have on the full enjoyment of human rights, they may put pressure upon democratic processes and the basic elements of the rule of law. In the short run, certain concessions to that effect may be necessary under very special circumstances and conditions. In the long run, however, only a strong democracy and a fully guaranteed rule of law constitute a legal, political and social climate in which State security and public safety may be secured. Indeed, those who threaten security and safety in fact (also) attack democracy and the rule of law. As the Committee of Ministers stressed, "*Terrorism seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society*".⁴⁸

34. The rule of law consists of several aspects which are all of eminent importance and have to be maintained in an integral way. These elements are the legality principle, separation of powers, division of powers, human rights, the State monopoly of force, public and independent administration of justice, protection of privacy, right to vote, freedom of access to political power, democratic participation in and supervision on public decision making, transparency of government, freedom of expression, association and assembly, rights of minorities as well as the majority rule in political decision making.⁴⁹ Terrorists may create, and precisely intend to create, tension between the different elements of the rule of law. While they claim full respect of their rights and freedoms, they intend to undermine the rights and freedoms of others. For these others, in principle, these rights and freedoms have to be protected against, and not be restricted in view of such intention. This is the background of provisions like Article 17 ECHR.

⁴⁵ See the observations of the UN High Commissioner on Human Rights, UN Doc.E/CN.4/2002/18, § 31.

⁴⁶ See ECtHR judgment of 7 December 1976, *Handyside v. United Kingdom*, paragraph 41.

⁴⁷ *Ibidem*.

⁴⁸ See preamble of the Guidelines on Human Rights and the Fight against Terrorism, *supra* (note 1), under (a).

⁴⁹ *Van dawa tot jihad. De diverse dreigingen van de radicale islam tegen de democratische rechtorde [From dawa to jihad. Several threats [of radical islam to the democratic legal order], Dutch Ministry of Internal Affairs and Relations within the Kingdom, December 2004, p. 13.*

VII. CONCLUSIONS

35. The protection of national security and public safety may justify restrictions of the full enjoyment of certain human rights, and even derogations from certain human rights obligations. Restrictions of human rights and freedoms, and derogations must, however, be regulated by law and preferably have a foundation in the Constitution. This constitutes a vital guarantee of the maintenance of democracy and the rule of law. The law must indicate in which cases limitations may be justified and preferably should define the states of emergency that may justify derogating measures, in order to create guarantees against abuse of the power to take restricting or derogating measures for other aims or to a larger extent than is allowed under domestic law and the ECHR.

36. A balance has to be found between national security, public safety and public order, on the one hand, and the enjoyment of fundamental rights and freedoms, on the other hand. The assessment of the fairness and proportionality of the balancing of public and private interests has to be determined by the concrete situation and circumstances. The bottom line, however, is that the right or freedom concerned may not be curtailed in its essence. The domestic courts must have full jurisdiction to review measures of restriction and derogation for their legality and justification, and for their conformity with the relevant provisions of the ECHR.

37. The need to preserve national security, public safety and public order may particularly be at stake in the context of mass demonstrations and other similar events. The use of force in dispersing such demonstrations could arise under a derogation pursuant to Article 15 ECHR. Alternatively, it might be employed as a limitation to the freedom of association and assembly pursuant to Article 11 paragraph 2 ECHR. In these situations the condition applies that the use of force is “*strictly required by the exigencies of the situation*” and “*no more than absolutely necessary*”, respectively.

38. Derogations for the purpose of Article 15 ECHR are admissible only “*in time of war or other public emergency threatening the life of the nation*”, which implies the existence of a situation exceptional in its nature; the holding of a peaceful demonstration can not meet that criterion. Even in the presence of such a situation, some rights among those under severe threat in such circumstances remain non-derogable. These are the so-called absolute rights, namely the right to life, the prohibition of torture and inhuman or degrading treatment and of slavery and the *nullum crimen, nulla poena* principle. Furthermore, it is imperative for the State in question to make a formal derogation and to keep the Secretary General of the Council of Europe fully informed of the measures that it has taken and the reasons therefore. The International Covenant on Civil and Political Rights (ICCPR) provides for a similar system of derogations in its Article 4, paragraph 1, which has particular relevance for those States not members of the Council of Europe.

39. Outside the scope of Article 15 ECHR and Article 4 paragraph 1 ICCPR, qualified human rights and fundamental freedoms cannot be subject to implied limitations. Hence the only limitations applicable to these rights and freedoms, among which freedom of assembly, are those that can be justified in the terms contained in the relevant provisions of the ECHR, like Article 11 paragraph 2, and in the relevant provisions of the ICCPR, like Article 21. Although the state authorities enjoy a margin of appreciation, they must not go beyond what is necessary or proportionate in restricting the individual's right of assembly. Where real risk of disturbance is honestly and reasonably anticipated this may justify interference by the competent authorities. The more time is available to take less interfering measures in good consultation, and the more physical distance is involved, the more restrained and less intrusive the preventive action should be. Conversely, the more imminent the disturbance and the greater the degree of disturbance, the greater and more immediate is the preventive action that may be warranted.