PRE-TRIAL DETENTION OF TERRORISM SUSPECTS: THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

DETENÇÃO PRÉ-JULGAMENTO DE SUSPEITOS DE TERRORISMO: a aplicação da Convenção Europeia

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RESUMO: O presente artigo faz uma reflexão acerca das violações de direitos humanos em detenções de suspeitos de terrorismo antes do julgamento. O trabalho foca no sistema de direitos humanos na Europa e na aplicabilidade da Convenção Europeia de Direitos Humanos. Nessa linha, primeiro será entendido o conceito de terrorismo para o ordenamento jurídico europeu e quais são as situações nas quais um indivíduo pode ser detido. Posteriormente, será abordado rapidamente o conceito de detenção pré-julgamento e a sua aplicação nos casos envolvendo prática de terrorismo. Após a definição dos conceitos de terrorismo e detenção pré-julgamento, será entendido como se dá a proteção dos direitos humanos na Europa, com foco na Convenção Europeia de Direitos humanos e o papel fundamental da Corte Europeia de Direitos Humanos na identificação das violações dos preceitos contidos na Convenção. A seguir, serão destacados os principais direitos contidos na Convenção aplicáveis aos detentos, sendo eles a proibição da tortura e o direito à liberdade e segurança pessoal. Desse modo, será explicitada jurisprudência da Corte que versa sobre violações de tais direitos em casos de terrorismo. Por fim, será exposta a necessidade do respeito à preceitos

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fundamentais mesmo em situações de insegurança e ameaça à paz nacional dos Estados europeus.

Palavras-chave: Terrorismo, Direitos Humanos, Detenção, Europa.

ABSTRACT: The present article makes a reflection about the violations of human rights in detentions of suspects of terrorism prior the trial. The works focuses on the system of human rights in Europe and the applicability of the European Convention on Human Rights provisions. In this line, first it will be understood the concept of terrorism to the European law and what are the situations in which an individual can be detained. After, we will quickly approach the definition of pre-trial detention and its applicability in cases involving terrorism acts. After the definition of terrorism and pre-trial detention concepts, how the protection of human rights is executed in Europe will be explained, focusing on the European Convention on Human Rights and in the fundamental role of the European Court of Human Rights in identifying violations of the Convention provisions. Following, it will be featured the rights contained in the Convention applicable to detainees, those being the prohibition of torture and the right to liberty and personal security. Thus, it will be outlined jurisprudence of the Court which deals with violations of these rights in cases of terrorism. Finally, it will be exposed the need to respect the fundamental precepts even in situations of insecurity and threat to national peace of European states.

Keywords: Terrorism, Human Rights, Detention, Europe.

Prohibition of torture; 4.2. Article 5: Right to liberty and security; 4.*2.1. (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law; 4.2.2. (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him; 4.2.3 (3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial; 4.2.4. (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful;* Conclusion; Bibliography.

INTRODUÇÃO

At the day of 11 September 2001, the United States suffered a series of suicide attacks that occasioned the death of almost 3000 people, mostly civilians. After these attacks, the world turned its attention to what would become one of the biggest concerns of the 21st century: terrorism. Although terrorism is not a new phenomenon in the history of humanity, the last 10 years have been marked by the increasing of extremists groups, the spread of terror and lack of tolerance between people.

Along with the increase of terrorism, the measures to detain it also has grown. Since 1984 the United Nations General Assembly has adopted several resolutions on the matter and, after 9/11, the Security Council passed the Resolution 1373 that binds all Member-States to

take steps to prevent terrorism. However, there is no international legal source that says how this prevention must happen. The Resolution is abstract and general, therefore each country is entitled to rule on the matter according to its own national understanding, fact that can lead to abuses and violations of fundamental rights.

In view of the disrespect to human rights in the battle against terrorism, the present work has the objective to analyze the context of pre-trial detention of groups or individuals acting under suspicion of terrorism in European States. In a regional perspective, the human rights are protected by the European Convention on Human Rights, named Convention for the Protection of Human Rights and Fundamental Freedoms, signed by 47 States. One of the main instruments for the protection of such rights is the European Court of Human Rights, which, for decades, has been ruling against abuses and violation of the Convention.

The fight against terrorism cannot surpass rights that are essential for the maintenance of peace and security, nor close its eyes for violations of international law.

1 CONCEPT OF TERRORISM IN INTERNATIONAL LAW

Among the national legal orders worldwide there seems not to be a consensus when defining an unitary concept of terrorism. Regarding the literature, there is a plenty of definitions, with some focusing on the perpetrators, others on their purposes, and still others on their techniques (STERN, 1999 *apud* LAWLESS, 2008, p.32). However, there are a number of specific treaties that prohibit acts that are of a type that would generally be considered terrorist (LAWLESS, 2008, p.32). Thus, in order to ascertain what a terrorist act is, one must resort to international conventions and States' national legal orders. In this line, EU has outlined on its Framework Decision of 13 June 2002 on Combating Terrorism a clear definition of terrorism to be applied on among its member-States:

> Article 1: 1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: — seriously intimidating a population, or — unduly compelling a Government or international organisation to perform or abstain from performing any act, or — seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; (i) threatening to commit any of the acts listed in (a) to (h).

Two of the most acceded treaties regarding terrorism are the 1997 International Convention on the Suppression of Terrorist Bombings, ratified by 168 countries, and the 1999 International Convention for the Suppression of the Financing of terrorism, ratified by 187 countries. Both are United Nations treaties, and both carry almost the same text in their Article 4:

> Each State Party shall adopt such measures as may be necessary:
>
> a. To establish as criminal offences under its domestic law the offences set forth in article 2;

> b. To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

Thus, on those conventions there is a mandatory norm for the signatories to establish rules of municipal law punishing the conducts covered by the treaties. Thus, both instruments of international law safeguard the criminal law principle of *nullum crimen nulla poena sine lege.*

Henceforth, by analyzing the definitions of terrorism in different legal instruments, one may perceive that there are common elements among them:

> The main elements of the definition used in national and international law may be summarised as follows: Terrorism requires an objective and a subjective element. The objective element is a criminal offence of a certain gravity, mainly the use of physical violence against persons. The possible offences have increasingly been stretched to include the destruction or serious damage to public (or sometimes even private) property, including infrastructure facilities. The subjective element requires, alternatively, the intention to create a climate of terror and fear within the population, or the intention to coerce (in different degrees according to the different definitions) a government or an international organisation. (WALTER, 2003, p. 42)

2 PRE-TRIAL DETENTION

Since the States can rule on terrorism according to its own understanding, they can also decide when an individual may be deprived of his liberty when there is a suspicion with terrorism acting or planning. It is important to clarify that this work deals only with detention in situation of peace, therefore, armed conflicts and war detentions will not be object of our analysis. Under international law, the pre-trial detention occurs when a government perceives the

necessity to keep a suspect under its watch for security reasons, before a competent tribunal decides whether he is considered guilty or not.

> Detention has been the main modern measure of choice. When effected in pursuance of the administration of criminal justice, it is generally considered to be legitimate. (...) The same is true for pre-trial detention ordered by a court for such purposes as avoidance of further crime, prevention of interference with the evidence or witnesses, or simply to secure appearance of the defendant at trial. (RODLEY, 2012, p. 457)

There are four relevant reasons recognized by the ECtHR[1] in which the State can continue the detention of a suspect of committing an offence: the risk of flight; the risk of an interference with the course of justice; the need to prevent crime; the need to preserve public order. However, the national law and enforcement measures must not disrespect international rules, most important those about fundamental human rights.

3 THE HUMAN RIGHTS SYSTEM IN EUROPE

It must be ascertained that it is generally accepted that the fundamental principles of human rights form part of customary International Law (CRAWFORD, 2012, p. 646), and thus must be respected by States worldwide, since article 38(1) of the International Court of Justice (ICJ) statute sets forth custom as one of the primary sources of International Law[2]. Also, the protection of such rights must

[1] See Kemmache v. France (Nos. 1 and 2), 27 November 1991, Mansur v. Turkey and Yağcı and Sargın v. Turkey, 8 June 1995.

[2] The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

not only be practiced within the framework of a State's national system of protection of human rights, but it exceeds the state's jurisdiction, becoming an object of protection by Public International Law (MAZZUOLI, 2013, p. 802).

In order to guarantee the preservation of human rights to individuals, it was established a regional human rights system in Europe, which is constituted of three levels of protection (MAZZUOLI, 2013). The first level is constituted of national tribunals and legislature must protect and apply human rights in its decisions and norms. Regarding this, it must be highlighted that an individual who had his rights violated must first seek a solution within the national judiciary system of the state which has jurisdiction to judge his claim. This rule is known as exhaustion of domestic remedies principle, which is a principle of international law embodied in Article 35(1) of the European Convention of Human Rights (ECHR).

A second level of protection is exercised by the European Union (EU) through the Charter of Fundamental Rights of the European Union. The Charter was adopted under the 2009 Treaty of Lisbon, when it was elevated to the level of International Law Treaties, and aims to protect the Fundamental Rights of the individuals. According to Judge Marek Safjan, the role of the Fundamental Rights enunciated in the Charter is to:

> [...] influence the process of interpretation, of determination of the very content of particular norms, their extent and legal consequences, and thus they provide for the enlargement of the field of application of the European rules in the national legal orders. (SAFJAN, 2014 *apud* CARMONA and FERRARO, 2015, p. 10)

The Charter is a reference to the European Court of Justice (ECJ) and to EU law-making institutions. It also imposed the

obligation to EU's member-states to ratify the ECHR [3]. This complimented EU's system of protection of fundamental rights by conferring competence on the European Court of Human Rights (ECtHR) to review EU measures while taking account of the Union's specific legal order (CARMONA and FERRARO, 2015, p. 4). It shall be regarded that, since all members joining the Council of Europe must become a party to ECHR[4], and no country has ever joined EU without first belonging to the Council of Europe[5], all state-members to EU had already ratified such Convention.

As aforementioned, this paper will focus on the third level of protection of human rights in Europe: the European Convention of Human Rights, which is the most important European catalogue of rights (MAZZUOLI, 2013, p. 905). Thus, such instrument of International Law will be better explained in its own section.

The European Convention on Human Rights was signed in Rome on 4 November 1950 by the members of the Council of Europe, and came into force on 3 May 1953 and it was the first of the comprehensive regional human rights conventions, dated of 1950. Hence, it was one of the first instruments of International Law to regard human rights and "the first of the comprehensive regional human rights conventions" (CRAWFORD, 2012, p. 640). It scope of protection is vast, since it encompasses a myriad of such rights:

[3] Treaty of Lisbon, Article 6(2) amends the Treaty of the European Union, Article 6, with the following text: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'.

[4] As established in Resolution 1031 (1994) of the Council of Europe ('on the honouring of commitments entered into by member states when joining the Council of Europe').

[5] Information available at: <http://www.coe.int/en/web/about-us/do-not-get-confused>, accessed 05/05/2016, 00:29.

> The convention imposes upon the parties the obligation to secure within their jurisdiction the rights and freedoms defined in section I. [...]These include the right to life; prohibition of torture or inhuman or degrading treatment or punishment; the prohibition slavery, servitude, or forced or compulsory labour; the right to liberty and security of person, to fair and public hearing and other safeguards in civil and criminal trials, a respect of private and family life, home and correspondence, freedom of thought, conscience and religion, freedom of expression, freedom of peaceful assembly and association, the right to marry and found a family according to the nationals laws governing the exercise of that right, and the right to an effective remedy before a national authority in respect of violation of the rights protected by the Convention 'notwithstanding that the violation has been committed by persons acting in an official capacity' (JENNINGS and WATTS, 2008, pp. 1022-1023).

The reach of the Convention was later expanded as it was amended by Additional Protocols 1, 4, 6 and 7, since they extended protection for peaceful enjoyment of possessions, education, free elections, non-imprisonment for breach of contract, entry into, movement within and departure from the territory of a party, abolition of the death penalty, procedures regarding the expulsion of aliens, certain additional rights regarding criminal trials, and nondiscrimination between spouses in relation to their children (JENNINGS and WATTS, 2008. P. 1023). Article 14 also sets forth a general prohibition of discrimination, thus granting everyone the enjoyment of those rights and freedoms[6].

Originally, the Convention provided the creation of two organs in order to guarantee the protection of human rights in the region: the European Court of Human Rights, the European

[6] 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Commission of Human Rights. A third organ, the Committee of Ministers, already existed under the scope of the Council of Europe; ECHR merely invested it in a role of supervision under the Convention's system. Such structure was later changed when Additional Protocol 11 entered into force, as of 11 November 1998[7]. Before that protocol, The European Commission's foremost function was to analyze interstate or individual claims about human rights violations (MAZZUOLI, 2013, p. 907). It also served as an organ of admissibility for applications before the Court, order preliminary measures of protection, provide reports to the Committee, among other functions. The ECtHR role was to judge the cases put forward by the Commission.

However, with the entry into force of Additional Protocol 11, the Commission was extinguished and the Court became responsible to judge the admissibility of the applications. Conversely, the functions of the Committee was only altered on what concerns its duty to decide if there was or there was not a violation of the Convention in cases which a report was submitted by the Commission, thus remaining its ability to supervise the Court's decisions.

The ECtHR, in its turn, was and still is the main organ to redress any eventual violation of human rights. Malcolm Shaw best summarizes how it structure works nowadays:

> [...]The new Court consists of a number of judges equal to that of the contracting parties to the Convention. Judges are elected by the Parliamentary Assembly of the Council of Europe for six-year terms. To consider cases before it, the Court may sit in Committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Rules of Court provide for the establishment of at least four Sections, the compositions of which are to be geographically and gender-balanced and reflective of the different legal systems among the contracting states. The

[7] Information available at: <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/results/subject/3>, accessed 09/05/2016, 08:00

> Chambers of seven judges provided for in the amended Convention are constituted from the Sections, as are the Committees of three judges. [...]In ascertaining whether an application is admissible, the President of the Chamber to which it has been assigned will appoint a judge as Judge Rapporteur to examine the application and decide whether it should be considered by a Committee of three or a Chamber. A Committee, acting unanimously, may decide to declare the application inadmissible or strike it out of the list. That decision is final. In other cases, the application will be considered by a Chamber on the basis of the Judge Rapporteur's report. [...]Once an application is declared admissible, the Chamber may invite the parties to submit further evidence and written observations and a hearing on the merits may be held if the Chamber decides or one of the parties so requests. At this point the respondent government is usually contacted for written observations. Where a serious question affecting the interpretation of the Convention or its Protocols is raised in a case, or where the resolution of a question might lead to a result inconsistent with earlier case-law, the Chamber may, unless one of the parties to the case objects, relinquish jurisdiction in favour of the Grand Chamber. (SHAW, 2008, pp. 351-352)

The Convention also establishes a series of hypothesis in which a judgement by the Court is final, and determines that the judgement shall be published[8] and transmitted to the Committee of Ministers, which shall supervise its execution[9]. The Court may also give advisory opinions on legal questions regarding the interpretation of ECHR and its Protocols if the Committee requests so. It must be noted that the opinion must not refer to matters related to the content or scope of rights and freedoms on section I.

[8] Article 44: 1. The judgment of the Grand Chamber shall be final. 2. The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43. 3. The final judgment shall be published.
[9] Article 46(2).

3.1. Responsibility for human rights violations

An important issue on the theme is clarifying the boundaries of a state-member's responsibility for an eventual violation of an individual's human rights under ECHR's system. However, before approaching this matter, it must be explained the concept of responsibility. In order to assess such concept one shall resort to International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA), as they are a set of articles drafted by International Law Commission (ILC) with the aims to encode the existent rules of international law concerning state responsibility for wrongful acts, and thus, they have acquired increasing authority as the expression of the customary law of state responsibility (CRAWFORD, 2012, p. 540). According to those articles, a State has responsibility for every wrongful acts it commits[10]. Also, according to Article 2 of ARSIWA, an wrongful act is a action or omission that constitutes a breach of an international obligation of the State and is attributable to it[11]. Therewith, the breach of an obligation to respect human rights attributable to a State may entail responsibility for that State.

In this sense, Article 1 of ECHR sets forth that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Thus a State which does not provide safeguard to the human rights catalogued in the Convention within its jurisdiction will be committing a wrongful act, hence becoming responsible for that breach and for the reparation of the injury caused. Eventually, such reparation may be demanded by individuals or other State-parties before ECtHR.

[10] Article 1: Every internationally wrongful act of a State entails the international responsibility of that State.

[11] Article 2: There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

The text of Article 1 makes it clear that a State has no responsibility for violations occurred outside its jurisdiction. Henceforth, the problem when assessing the responsibility of a member-State for a breach of the Convention is precisely the definition of the term "jurisdiction". In this sense, ECtHR has recognized in *Bankovic v Belgium* that the term should be interpreted in its ordinary meaning and that Article 1 reflects the territorial notion of jurisdiction, although it did not exclude the possibility of extra-territorial application of the Convention, as the Court rendered its application exceptional. Regarding such cases the Court sets forth responsibility of a contracting State by violating human rights during the extradition or expulsion of an individual [12] and by any act committed by its authorities, whether performed within or outside national boundaries, which produce effects outside their own territory[13]. The Court also adopted the effective test doctrine in the 2001 judgment *Loizidou v Turkey:*

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration. (Loizidou v. Turkey, preliminary objections, (15318/89) [1989] ECtHR (23 March 1995) para 62)

[12] See Soering v the United Kingdom judgment of 7 July 1989, Series A no. 161, pp. 35-36, para. 91; Cruz Varas and Others v Sweden judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69 and 7, and Vilvarajah and Others v the United Kingdom Judgment of 30 October 1991, Series A no. 215, p. 34, para. 103.

[13] Drozd and Janousek v France and Spain Judgment of 26 June 1992, Series A no. 240, p. 29, para. 91.

In conformity, there is a profuse jurisprudence of the Court applying such understanding[14].

4 RIGHTS OF THE DETAINEE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Even in difficult circumstances such as the threat of national security, the nations that ratified the European Convention on Human Rights (ECHR) are bound to a duty to ensure and apply the fundamental rights contained in the treaty. The importance of those rights is shown on article 15[15], which allows their derogation by the States only in extreme and exceptional situations, with the reservation that some of the provisions cannot be derogated in any circumstance[16]. The Convention does not refers explicitly to situations of counter-terrorism, but we understand that the document is applicable in such occasions and the fight against terrorism "cannot justify neglecting the demands laid down in the Convention as such" (MYJER, 2012, p. 784).

4.1 Article 3: Prohibition of torture

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The words of the Convention make clear the importance of Article 3. While Article 15 of the Convention allows states to derogate great part of the provisions, a derogation from Article 3 is

[14] See Ilaşcu and Others v Moldova and Russia, application no. 48787/99 Judgement of 8 July 2004; Markovic and Others v Italy, application no. 1398/03 Judgement of 14 December 2006 and Manitaras and Others v Turkey, application no. 54591/00 Judgement of 3 June 2008.

[15] 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

[16] 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

not permitted under the Convention. Aisling Reidy[17] states that the legal implications for the terms prescribed by Article 3 can be divided into five elements: torture, inhuman, degrading, treatment and punishment. The responsible organ of detecting violations to prohibition of torture in 47 States in Europe, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[18], has made several reports that indicates breaches of Article 3 of ECHR. In *Aksoy v Turkey*, the applicant, a suspect terrorist, affirmed that he was stripped naked, his hands were tied behind his back and he was strung up by his arms in the form of torture known as "Palestinian hanging". While he was hanging, the police connected electrodes to his genitals and threw water over him while they electrocuted him. He was kept blindfolded during this torture. The European Court of Human Rights judged, for the first time that somebody was torture by State authorities, finding that the condition of the applicant was consistent with the form of ill-treatment known as "Palestinian hanging".

But not only situations of explicit physical violence represent a violation of Article 3. The Court has found, in *Ireland v United Kingdom*, that severe methods of interrogation fall in the concept of inhuman treatment:

> The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the

[17] Aisling Reidy is a senior legal advisor at Human Rights Watch since 2006, focusing on Europe and Central Asia, the Americas, and African states. She is a professor of international humanitarian law and human rights law.

[18] Council of Europe's CPT 'Report to the Government of "the former Yugoslav Republic of Macedonia" on the visit to "the former Yugoslav Republic of Macedonia" carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 to 27 November 2002' (9 September 2004) CPT/Inf (2004) 29 paras 8–11 (Report to the Government of 'the former Yugoslav Republic of Macedonia' CPT/inf (2004)); Council of Europe's CPT 'Public Statement concerning the Chechen Republic of the Russian Federation' (10 July 2003) CPT/Inf (2003) 33 para 4; Council of Europe's CPT 'The CPT Standards: "Substantive" Sections of the CPT's General Reports' (CoE 2006) CPT/Inf/E (2002) 1-Rev.2006 para 15 speaks of 'the risk of intimidation or physical ill-treatment.

> persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. (Ireland v. United Kingdom, (5310/71) [1978] ECHR 1 (18 January 1978) para 167).

While the States can be more flexible in the application of other procedures in situations of extreme necessity, the ECtHR has already stated, in *Tomasi v. France*, that the prohibition on resort to ill-treatment during interrogations and interviews, together with the prohibition on use of any evidence obtained by resort to such behavior, remains absolute.

4.2 Article 5: Right to liberty and security

4.2.1. (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law

The right to liberty and security of person is the most important clause against arbitrary detention and it is present in the most important human rights treaties[19]. The ECHR, in its articles 5

[19] Besides the ECHR, this right is ensured in the International Covenant on Civil and Political Rights, Article 9(1) *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*; American Convention on Human Rights, Article 7*(1) Every person has the right to personal liberty and security. (2) No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto*; African Charter on Human Rights, Article 6 *Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.*

paragraph 1, has an exhaustive list that imposes conditions to be followed in order to guarantee the lawfulness of a detention.

> (a) the lawful detention of a person after conviction by a competent court; [...] (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so [...]

The ECtHR explained that, when the Convention says 'a procedure prescribed by law', it refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law[20]. In this sense, if the deprivation of liberty is carried out in a way that is not respectful of national law, this will be automatically in breach of the provision requiring respect for the right of liberty and security of person (DOSWALD-BECK, 2011, p. 256). However, if a deprivation of liberty is legal under the national law but disrespects the grounds set forth in Article 5, it will be violating the Convention likewise.

4.2.2. (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him

The obligation to present the motivation for the deprivation of liberty is an important tool against abuses by the enforcement power. The Convention brings the word 'arrested' but the provision can be interpret as applicable to any form of deprivation of liberty, once a person cannot exercise the right to challenge the lawfulness of any and every deprivation of liberty without being aware of the reasons for it (MACOVEI, 2002, p. 46). In Fox, Campbell and Hartley the Court explained that the information demanded on article 5 must offer the person concerned the essential legal and factual grounds for the

[20] ECtHR, Saadi v United Kingdom Judgment, 29 January 2008, para 67.

deprivation of liberty which would then allow the person to apply to a court in order to challenge the lawfulness of the arrest or detention.

4.2.3 (3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial

The third paragraph of article 5 refers exclusively to the situation prescribed in the first paragraph, about the possibility of detain a person when she or he needs to be brought before the authorities regarding the commitment of an offence. According to the Convention, those who fit that situation are entitled to question the length of the detention without a trial, including the detainees under terrorism suspicion. The ECtHR had considered the meaning of the word 'promptly' in the case of Brogan and others v United Kingdom. This case concerned the adoption of legislation that allowed the extension of the period before the detainees were brought before a judicial officer. The Court understood that, the four days and six hours that the applicant spent in police custody, "falls outside the strict constraints as to time permitted by the first part of Article 5 para. 3". It was also recognized that a long period without access to legal assistance can incur in a violation of the provision[21].

4.2.4. (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful

[21] In Aksoy v Turkey, the Court found the violation in respect of a 15-day detention where there was no access to the judiciary or a lawyer. Remarkably it did so despite the fact that Turkey had derogated from Article 5(3). In essence, the Court was apparently saying that prolonged incommunicado detention, that is detention without access to the outside world and external control, would never be justified as a necessary and proportionate measure required by the exigencies of the situation.

The provision in the fourth paragraph entitles the detainee to question the lawfulness of his detention with a quick response. If the detention proves to be unlawful, it shall be suspended immediately. The elements of the obligation in this provision considered to be crucial are: the supervision must be by a court, must entail an oral hearing with legal assistance in adversarial proceedings, must address the legality of the detention in the widest sense, and must take place speedily (MACOVEI, 2002 p. 60). In the case of *Istratii and others v Moldova* the Court found a violation of Article 5, paragraph 4. The detainee was separated from his lawyer by a glass wall, with the result that they had to shout to each other in order to be heard. The Court understood that, in order to be implemented correctly, this provision needs the assistance of a lawyer.

Article 5 is also a clause against indefinite detentions. If one cannot challenge the legality of his detention, it is possible that he stay deprived of his liberty longer the necessary. In 2002, 2004, and 2005 the CPT examined the situation of foreign nationals detained under anti-terrorism legislation in England pending being sent back to their countries of origin. The CPT found that the indefinite nature of the detention with no effective means of challenging the concrete evidence led to the indefinite detention of the suspects.

CONCLUSION

It is clear that there is a concrete catalogue of Human Rights embodied in the European Convention on Human Rights, which was one of the first treaties on the theme and is well accepted among European States. Thus, theoretically, the safeguard of human rights in Europe would be guaranteed.

However, by the reasons presented through this paper, it became evident that those human rights are being violated. Due to the fear and violence spread by the recent terrorist attacks during the last fifteen years and the increasing in the number of refugees seeking

shelter on the region, the public opinion has grown in the sense of a strengthening of national security and reinforcement of the war on terror. Consequently, public institutions are taking unjust and degrading measures, sometimes unlawful, on the purpose of preventing terrorist attacks and evading the loss and suffering of innocent lives. The consequence of such acts are rampant breaches of the Convention and the disproportional suffering of other lives.

Hence, there is a necessity for an adequate protection to suspects of terrorism. Although there is a legal order protecting these individuals, some institutions disrespect it. It can be alleged that the European Court of Human Rights can redress any violation. However, the Court must be requested first in order to address any measures, and even if its judgement is prompt and a just compensation is achieved, it would be better if the violation could be prevented.

In this sense, the creation of an organ responsible for the monitoring of human rights in Europe would be adequate to prevent any breach to the Convention. Such organ would act under the direct supervision of the Court or the Committee of Ministers, and would act *in loco*, with its representatives and employees observing directly procedures on the performance of pre-trial detentions and police operations.

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