

**Safeguarding Human Rights of the Accused in  
Counter-Terrorism Measures:  
Reconciling National Security with Civil Liberties  
(Original Research)**

**Elham Janfada \***  
**Mohammad Ali Taheri Bojd \*\***  
**Seyed Hasan Hashemi \*\*\***

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**Abstract**

Following the events of September 11, 2001, the international community has confronted the emergence of a novel paradigm known as the "Global War on Terrorism." This framework has disrupted the equilibrium between human rights and national security, resulting in significant ramifications: it has not only compromised the fundamental rights of citizens but also adversely affected the basic rights of individuals suspected or accused of terrorist offenses. Governments engaged in counter-terrorism efforts bear the responsibility of maintaining a delicate balance between effective law enforcement and the safeguarding of civil liberties. While the existence of terrorism as a formidable threat is widely acknowledged, the protection of human rights - particularly the rights of the accused in anti-terrorism operations - remains paramount. There exists a consensus that, in the pursuit of counter-terrorism, all lawful means should be employed to prevent such crimes, with efforts to neutralize threats supporting the tenets of human rights. However, the central issue pertains to the precision and legality of these measures. This study aims to examine the challenges inherent in reconciling the respect for and protection of human rights with the imperative to combat terrorism, with a specific focus on the rights of the accused. The findings indicate that responses to terrorism must uphold the rule of law; neglecting human rights in the fight against terrorism risks creating an environment conducive to the proliferation of terrorism.

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\* PhD Student in Criminal Law and Criminology, Islamic Azad University, Birjand, Iran; e.janfadaa@gmail.com

\*\* Corresponding Author, Assistant Professor, Department of Law, Islamic Azad University, Birjand, Iran; mtaheri@birjand.ac.ir

\*\*\* Assistant Professor, Department of Law, Islamic Azad University, Birjand, Iran; hashemi@iaubir.ac.ir



### **Keywords**

Human Rights, Terrorist Crimes, Anti-Terrorist Strategies, Order and Security, Freedoms.

### **1. Introduction**

Terrorism, while not a novel phenomenon, has emerged as one of the most significant security challenges confronting nations today. The term "terrorism" traces its origins to the French Revolution in 1789.<sup>1</sup> Terrorist crimes encompass acts of violence, intimidation, or coercion perpetrated by individuals or groups with the intent to advance a political, ideological, or religious agenda through instilling fear. Such acts are typically directed at civilian populations or non-combatant targets, aiming to engender widespread panic, disrupt societal order, and garner public attention for their causes.

Terrorist activities manifest in various forms, including bombings, assassinations, kidnappings, hijackings, and armed assaults. The targets of these acts may include government buildings, public transportation systems, religious institutions, marketplaces, or any location characterized by a significant concentration of individuals. Perpetrators often employ methods designed to maximize casualties and exert a pronounced impact on society.

A primary challenge associated with this concept is the absence of a universally accepted definition of terrorism. Such acts foster an atmosphere of fear and undermine societal peace and stability through violent methods directed against civilians. Beyond the infringement of individual rights and freedoms, these actions compromise the security and social and political stability of a community, effectively depriving individuals of their right to security - a violation of human rights and fundamental freedoms.

The protection of individual rights and freedoms is a cornerstone of the rule of law, necessitating rigorous adherence within a democratic society. Criminal law delineates the boundaries between individual rights and freedoms and prohibited conduct. However, in addressing emerging threats arising from political, economic, social, and technological changes, including terrorist crimes, criminal law encounters significant challenges. Given that terrorist actions disrupt societal security, the approach of criminal law towards terrorism presents a tension between security imperatives and individual liberties.

This tension manifests in varying degrees, contingent upon governmental policies, which may result in the limitation or violation of both the rights and freedoms of citizens and those accused of such crimes. The conflict between individual rights and societal interests is particularly pronounced in the context of terrorism. Indeed, terrorism directly impacts human rights, affecting the life, dignity, freedom, social order, and security of its victims.

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1. Ishrat Abbasi, and Mukesh Kumar Khatwani, "An overview of the political theories of terrorism." *IOSR Journal of Humanities and Social Science* 19, 8 (2014) 104.

Moreover, the indirect consequences of terrorism arise from governmental interventions and counter-terrorism measures.

In combating terrorism, governments bear the responsibility of balancing effective law enforcement with the respect for civil liberties. This obligation is underscored by the tendency for terrorist actions to provoke extreme governmental responses that may entail significant violations of human rights and freedoms. There exists a consensus that, in countering terrorism, all lawful means should be utilized to prevent such grievous crimes, and efforts to thwart them must uphold human rights. However, the challenge lies in the precision and, at times, the legality of the measures employed.

## **2. The Relationship Between Human Rights and Terrorism**

Human rights are defined as inalienable entitlements inherent to all individuals, derived from their humanity. These rights exhibit characteristics of universality, inalienability, indivisibility, non-discrimination, interconnectedness, and interdependence.<sup>2</sup> They are accorded to all human beings, irrespective of race, ethnicity, religion, gender, or nationality.<sup>3</sup> In essence, human rights represent universal values and legal guarantees designed to protect individuals and groups from governmental actions or omissions that infringe upon fundamental freedoms and the right to human dignity.<sup>4</sup>

Terrorist acts, through the use of violence against civilians, cultivate an atmosphere of fear and fundamentally undermine societal peace and stability. Such actions not only violate the rights and freedoms of individuals but also disrupt the security and social and political stability of society, thereby creating a conducive environment for further human rights violations and the erosion of basic freedoms that are contingent upon security and stability.

While human rights and the rights of the accused often align in their objectives, they also possess distinct characteristics. Human rights tend to encompass broader moral and ethical dimensions, whereas the rights of the accused are framed within judicial and legal contexts. Furthermore, human rights primarily emphasize individual entitlements, while the rights of the accused encompass both individual and sovereign rights. The obligation of governments to safeguard citizens from internal and external threats can sometimes conflict with the protection of human rights and the rights of the accused.

Individuals accused of crimes, including terrorism, possess fundamental rights that must be upheld. National security and the rights of the accused

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2. Mahdi Mousazadeh, "Human rights challenges in the light of security theories of criminology," *Quarterly of Law, Science and Advocacy* 1, 1 (2017) 236.

3. The first line of the Preamble to the Universal Declaration of Human Rights stipulates: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..."

4. Gholam Ali Ghasemi, and Sajad Bagherzadeh, "The Status of Human Rights in the Fight against Cyber-Terrorism," *International Law Review* 32, 52 (2014) 235.

represent two critical and interrelated concerns that necessitate meticulous attention and balance. The tension between national security interests and human rights can have detrimental effects on civil society, eroding public trust and potentially precipitating political and social unrest, as well as exacerbating criminal activities related to terrorism. Thus, it is imperative to maintain a balance that guarantees the rights of citizens, particularly the rights of the accused, while ensuring national security.

Terrorism impacts human rights both directly and indirectly. Directly, terrorism affects the life, physical integrity, dignity, freedom, social order, and security of its victims. By instigating instability, terrorist acts compromise societal peace, security, territorial integrity, and economic and social development. Additionally, the nexus between terrorist activities and organized or transnational crime further undermines the rule of law. This concern was articulated for the first time in the Vienna Declaration and Programme of Action of 1993, which highlighted the dangers posed by terrorism to fundamental human rights.<sup>5</sup>

The indirect effects of terrorism often manifest through governmental counter-terrorism measures. In response to terrorist threats, governments may adopt extreme measures that result in significant violations of human rights and civil liberties. While it is the duty of states to protect their citizens from terrorist acts, it is equally crucial to ensure that innocent individuals are not adversely affected by counter-terrorism strategies. The manner in which governments respond to terrorism has the potential to restrict, coerce, and, in some instances, violate human rights, presenting a challenge to comply with international human rights standards.<sup>6</sup>

It is essential that states exercise their legitimate rights to combat terrorism while adhering to their international obligations to uphold human rights and fundamental freedoms. International human rights law provides essential safeguards for individuals accused of terrorist crimes, including the presumption of innocence, the right to a fair trial, and the prohibition of torture or inhumane treatment. These protections ensure that even those accused of terrorism are afforded their human rights and treated in accordance with the law. Striking a balance between counter-terrorism measures and the respect for the fundamental rights of those suspected of such acts remains a critical challenge for governments.

### **3. Government Policies Against Terrorist Crimes**

Government policies addressing terrorist crimes exhibit significant variation across countries, yet they generally share the common objectives of

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<sup>5</sup> Bahram Mostaghimi, and Ruhallah Ghaderi Kangavari, "The Violation of Human Rights and Expansion of Terrorism," *Political Quarterly* 41, 1 (2011) 258.

<sup>6</sup> According to Article 40 of the ICCPR, governments are required to submit periodic reports on the implementation of the rights contained in this Covenant to the Human Rights Council. This report should include actions that governments take in implementing the provisions of this Covenant.

preventing, detecting, and responding to acts of terrorism. These policies are formulated to safeguard the safety and security of citizens, maintain public order, and uphold national sovereignty. The following outlines several key elements commonly found in government policies aimed at combating terrorist crimes:

**1. Counterterrorism Legislation:** Governments enact specific laws and regulations that define terrorism, establish penalties for terrorist acts, and grant authorities the power to investigate and prosecute individuals involved in terrorism. These laws may also include provisions for intelligence gathering, surveillance, and the freezing of terrorist assets.

**2. Intelligence and Information Sharing:** Governments prioritize intelligence gathering and information sharing between domestic and international security agencies to identify potential terrorist threats, track the movements of terrorist organizations, and disrupt their activities. This collaboration involves sharing information on individuals, organizations, financing, and planned attacks.

**3. Border Security and Immigration Controls:** Governments implement stringent border security measures to prevent the entry of terrorists and disrupt their networks. These measures include visa screening, watchlist checks, enhanced passport controls, and cooperation with international partners to exchange information on suspicious individuals.<sup>7</sup>

**4. Financial Measures:** Governments impose strict financial regulations to disrupt terrorist financing. These measures involve tracking and freezing assets, monitoring financial transactions, and implementing regulations to prevent money laundering and the use of financial systems for illicit activities.

**5. Law Enforcement and Security Forces:** Governments provide specialized training, resources, and equipment to law enforcement and security agencies to enhance their capacity to respond to terrorist threats effectively. This includes establishing dedicated counterterrorism units, improving intelligence analysis capabilities, and conducting joint operations with international partners.

**6. International Cooperation:** Governments engage in international cooperation and coordination to combat terrorism collectively. This involves sharing intelligence, coordinating efforts to disrupt terrorist networks, exchanging best practices, and providing mutual legal assistance in investigations and prosecutions.

**7. Rehabilitation and Reintegration:** Some governments implement programs aimed at rehabilitating individuals who have been involved in terrorism or radicalization. These programs focus on addressing the underlying causes of radicalization, providing psychological support, and assisting with reintegration into society.

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7. Huseyin Cinoglu, "Terrorism, international migration and border control," *European Scientific Journal* 20 (2013) 104-105.

**8. Public Awareness and Counter-Narratives:** Governments launch public awareness campaigns to educate citizens about the dangers of terrorism, promote resilience, and encourage reporting suspicious activities. They also develop counter-narratives to challenge extremist ideologies and prevent the radicalization of individuals.

Governments often invoke the binding resolutions of the United Nations Security Council regarding the imperative to combat terrorism as a justification for implementing measures that enhance societal control and expand state authority by restricting individual rights. By adopting a broad interpretation of counter-terrorism, governments exploit existing legal loopholes to label dissenters as terrorists, thereby justifying the imposition of strict policies that exert pressure on these individuals.<sup>8</sup> Neglecting to uphold human rights in the context of those accused of terrorist crimes can significantly contribute to the perpetuation of terrorism itself.

In addressing terrorism, three distinct models can be conceptualized: the military model, the law enforcement model, and the human rights model.

**Military Model:** This model encompasses military interventions in response to terrorist acts or imminent threats, grounded in Article 51 of the United Nations Charter. It includes tasks such as maintaining peace, deterring state support for terrorism through the threat of military action, enhancing the state's preventive capabilities via military assistance, and ensuring the regular distribution of humanitarian aid.

**Law Enforcement Model:** Rooted in international criminal law and existing anti-terrorism conventions, this model distinguishes itself from the military approach by primarily engaging civilian authorities and treating terrorism as a serious criminal matter rather than a military issue. Under this model, obligations concerning human rights are imposed solely on governments, which are the entities capable of committing human rights violations. Consequently, terrorist acts are classified as criminal offenses.

**Human Rights Model:** This model emphasizes preventive measures and is grounded in applicable international and humanitarian laws, as well as human rights conventions and jurisprudence. By addressing the root causes of terrorism and employing human rights strategies in the prosecution of perpetrators, this model seeks to dissuade individuals from resorting to terrorist tactics. It focuses on preventive action prior to the occurrence of

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<sup>8</sup>. In this context, reference can be made to the case of *Nada v. Switzerland*. In this case, the European Court of Human Rights (ECHR) stated: "In the light of the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms, the Court finds that the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation." See: ECtHR, *Nada v. Switzerland*, Merits, Application No. 10593/08, Judgment of September 12, 2012, para. 196.

terrorist crimes.<sup>9</sup>

Under the law enforcement model, a central question arises: How can governments combat terrorism without infringing upon civil liberties? In other words, how can the rights of the accused be protected against governmental overreach while simultaneously addressing national and international security concerns? Achieving a balance between legitimate counter-terrorism measures and the protection of human rights is a delicate endeavor. If societies permit violations of human rights in the name of combating terrorism, they jeopardize the very values they seek to protect.<sup>10</sup> Thus, anti-terrorism efforts and human rights protections must proceed in parallel.

The significance of this issue lies in the fact that human rights violations can serve as a catalyst for terrorism. Individuals who have experienced rights violations, either personally or through their families, may be more susceptible to joining terrorist groups. Following the adoption of the United Nations Global Counter-Terrorism Strategy by the General Assembly in Resolution 60/288, the international community has initiated measures to safeguard human rights in the context of counter-terrorism efforts. Among the key tenets of this resolution is the commitment to ensuring respect for human rights and the rule of law in the fight against terrorism, obligating states to align their actions with their broader international legal obligations.

This theme was further reinforced following the World Summit in 2005, where a focus on human rights in counter-terrorism—particularly concerning refugee law, international criminal law, and international humanitarian law—was emphasized. For instance, Sergio Vieira de Mello, the High Commissioner for Human Rights, articulated to the Counter-Terrorism Committee of the Security Council that "human rights violations create a ripe environment for terrorism." He asserted that addressing fundamental grievances rooted in the denial of human rights and basic justice is crucial to preventing terrorist groups from cloaking their acts in a veneer of justification. He contended that the most effective strategy to isolate and defeat terrorism involves respecting human rights, fostering social justice, enhancing democracy, and upholding the rule of law. Furthermore, he asserted that states not only have the right but also the duty to protect their citizens from terrorism, emphasizing that human rights discourse provides critical guidance on lawful counter-terrorism

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9. Mark D. Kielsgard, "A Human Rights Approach to Counterterrorism," *California Western International Law Journal* 36 (2006) 254-255.

10. Secretary-General Kofi Annan, at the extraordinary meeting of the Security Council's Counter-Terrorism Committee stated: "Terrorist acts... constitute grave violations of human rights. Our responses to terrorism, as well as our efforts to thwart it and prevent it should uphold the human rights that terrorists aim to destroy. Human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism -not privileges to be sacrificed at a time of tension." See: U.N. Doc.SG/SM/8624-SC/7680 (Mar 6, 2003) available on: <http://www.un.org/News/Press/docs/2003/sgsm8624.doc.htm>, last accessed on August 20, 2024.

strategies.<sup>11</sup>

Consequently, the relationship between terrorism and human rights can be understood through two lenses. First, the perpetration of terrorist acts results in the violation of numerous human rights by instilling terror through violence. Second, this relationship is evident in the implementation of government anti-terrorism policies. The interplay between criminal law and these two dimensions warrants careful consideration; while criminal law serves a positive function in preventing government infringement on individual freedoms, it also possesses a negative aspect that legitimizes governmental use of coercive measures and promotes strict policies in the name of national security.

#### **4. Human Rights Challenges in Countering Terrorist Crimes**

The enactment of anti-terrorism laws, along with the associated methodologies for addressing terrorism, often adopts a stringent approach toward individuals accused or convicted of terrorist offenses. This strictness presents various human rights challenges in the context of counter-terrorism efforts. Some of the most significant challenges include:

##### **4-1. The Principle of Legality of Crimes**

The legal principle of *nullum crimen sine lege* (no crime without law)<sup>12</sup> underpins the necessity for criminal acts to be explicitly defined by law in a precise and unambiguous manner. However, the definitions of terrorist crimes within the criminal statutes of many jurisdictions are frequently ambiguous, leading to uncertainty regarding what constitutes a terrorist act. In some instances, the scope of such definitions is so expansive that they encompass actions that do not align with the characteristics of terrorism. This ambiguity undermines the principle of legality and fosters the arbitrary application of the law, whereby certain actions may be classified as terrorist acts without sufficient justification. Such mischaracterizations can serve as a pretext for repressive regimes to suppress political dissent or impose emergency measures that would not be acceptable under normal circumstances. Moreover, the lack of consensus among governments regarding the elements that define terrorist acts complicates this issue, as specifying examples may inadvertently legitimize the actions of political opponents.<sup>13</sup>

##### **4-2. The Right to Life**

The right to life is a fundamental tenet of human rights, serving as the foundation for the protection of all other rights. It acts as a safeguard against

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**11.** Statement addressed by Sergio Vieira de Mello, The High Commissioner for Human Rights to the Counter-Terrorism Committee of the Security Council on 21 October 2002, retrieved from <https://www.Ohchr.Org/en/statements/2009/10/statement>, last accessed on August 20, 2024.

**12.** Aleksandar Marsavelski, "The crime of terrorism and the right of revolution in international law." *Conn. J. Int'l L.* 28 (2012) 253.

**13.** Sandoz Yves, "Lutte contre le terrorisme et droit international: risques et opportunités," A Trans. Hassan Savari, *Quarterly of International Law Review* 20, 29 (2003) 400.

arbitrary deprivation of life by both state and non-state actors. Upholding this right requires robust legal frameworks, effective law enforcement, and accountability mechanisms to prevent and investigate unlawful killings. While human rights violations often occur during terrorist acts, it is also governments that may perpetrate violations in the name of counter-terrorism. States may resort to armed conflict or targeted killings<sup>14</sup> as alternatives to arresting and prosecuting suspected terrorists, thereby violating the right to life. According to Article 4 of the International Covenant on Civil and Political Rights (ICCPR), the right to life is a non-derogable right that must be respected under all circumstances. The Inter-American Commission on Human Rights, in the case of *Peru v. Colombia*, affirmed that "no one shall be arbitrarily deprived of his life," emphasizing that only lawful proceedings can justify deprivation of life.<sup>15</sup> Consequently, counter-terrorism strategies must prioritize measures that minimally impact the right to life.

#### **4-3. The Right to Prohibit Torture and Inhumane Treatment**

In criminal proceedings, the methods employed to obtain evidence are as crucial as the evidence itself. Evidence acquisition must occur through lawful and legitimate means, ensuring that rights are upheld and the credibility of law enforcement agencies is maintained. Torture, defined in Article 1(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, constitutes a severe violation of human rights. According to this definition, torture involves the intentional infliction of severe physical or mental pain for purposes such as coercion, punishment, or intimidation. Such practices are strictly prohibited by international law, including in scenarios of armed conflict or national emergency. Governments may be tempted to justify the use of torture for information extraction from terrorist suspects, especially when such suspects refuse to provide information. However, this rationale overlooks the potential for widespread abuse and humiliation of innocent individuals under the pretext of preventing future terrorist acts.<sup>16</sup>

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**14.** Targeted killing constitutes the conscious and deliberate use of lethal force with prior planning to kill a person who has not been tried in advance. In this type of murder, the perpetrators are either government agents or organized armed groups. For more studies see: Abbas Kadkhodai, and Ehsan Shahsavari, "Analysis of the content of the Zionist regime policy of targeted killings in the light of fundamental principles of international humanitarian law," *Journal of Contemporary Comparative Law Studies, Jurisprudence and Islamic Law* 8, 14 (2016) 136.

**15.** Inter-American Commission on Human Rights, *Neira Alegria et al. v. Peru* Case. Series C, No. 20 (1995) IACHR. (January 19, 1995), paras. 74-75. Retrieved from <http://www.wordlii.org/int/cases/IACHR/1995/3.html>, last accessed on August 20, 2024.

**16.** The ECHR has stated in this regard: "Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 makes no provision for exceptions and no derogation from it is permissible under Article

#### 4-4. The Right to Freedom

Government actions in counter-terrorism, such as the arbitrary detention of suspects and non-compliance with established detention regulations, constitute violations of the right to freedom, a fundamental human right. Counter-terrorism measures can lead to arbitrary detention, where individuals are held without appropriate legal justification and without being promptly informed of the reasons for their detention or given access to legal representation. Authorities may detain individuals suspected of terrorism-related offenses for extended periods or indefinitely, often without charge or trial. Such prolonged or indefinite detention without adequate legal recourse violates the right to a fair trial and the prohibition against arbitrary detention. Furthermore, individuals may be subjected to secret detention in undisclosed facilities, commonly referred to as "black sites," where their detention lacks transparency and independent oversight. This subverts due process and undermines the right to liberty and security. As articulated by the European Court of Human Rights (ECHR) in *Al-Nashif v. Bulgaria*, the state does not possess unlimited powers during a state of emergency and cannot bypass judicial review of detention legality under the guise of national security. There must always be mechanisms in place for independent institutions to assess the legitimacy of detention, particularly in circumstances where the rationale for detention lacks a reasonable basis or where the concept of national security is excessively broadened.<sup>17</sup>

#### 4-5. The Right to a Fair Trial

The right to a fair trial is a fundamental human right that assumes particular significance in the context of counter-terrorism, where individuals may face serious accusations. However, there exists a substantial risk that this right may be compromised in counter-terrorism efforts. Upholding human rights is essential for all individuals, including those accused of terrorist crimes. While governments possess broad powers related to investigation, prosecution, trial, and sentencing, it is imperative that these powers be exercised in accordance with established criteria that respect the dignity and autonomy of each individual.

According to Article 14 of the ICCPR, the right to a fair trial encompasses several critical elements, including the right to a hearing by an independent and impartial tribunal, the right to a trial conducted within a reasonable time frame, and the right to have proceedings held in public.<sup>18</sup> Furthermore,

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<sup>15</sup> even in the event of a public emergency threatening the life of the nation". See: ECHR, *Chahal v. The United Kingdom*, November 15, 1996, para.79.

<sup>17</sup> ECHR, *Al-Nashif v. Bulgaria*, June 20, 2002, paras.123-124.

<sup>18</sup> For instance, in the case of *Abdullah Gunay v. Turkey*, the accused was arrested on charges of working for the Kurdistan Workers' Party with the aim of secession from a part of Turkey. His trial lasted from April 24, 1999, to May 7, 2009, and he was detained in a security prison during this time. The ECHR also

accused individuals must be afforded the necessary resources to prepare an adequate defense. To safeguard the right to a fair trial in countering terrorism, it is essential to uphold principles of due process, transparency, and judicial independence. Governments should ensure that accused individuals receive timely and detailed information regarding the charges against them, provide unrestricted access to legal representation, and prohibit the use of torture or coerced confessions. Public trials should be the standard, allowing for meaningful scrutiny and oversight by impartial judges.

Nevertheless, several factors may undermine the right to a fair trial in counter-terrorism contexts:

**1. Pretrial Detention:** Individuals accused of terrorism-related offenses may be subjected to prolonged or indefinite pretrial detention without sufficient justification. Such excessive pretrial detention denies individuals their right to be presumed innocent and can result in lengthy periods of unjust deprivation of liberty.

**2. Lack of Prompt and Detailed Information:** Accused individuals have the right to be promptly informed of the charges against them in a language they understand. However, counter-terrorism operations may sometimes lack transparency, failing to provide adequate information regarding the charges, evidence, and legal grounds for the accusations. This inadequacy undermines the accused's ability to prepare an effective defense.

**3. Restricted Access to Legal Representation:** The right to a fair trial includes access to legal counsel. In counter-terrorism efforts, however, restrictions may be imposed on this access, including undue delays in allowing access to lawyers or monitoring and limiting confidential communications between the accused and their legal representatives.

**4. Secret or Closed Trials:** In exceptional circumstances, counter-terrorism efforts may involve the use of secret or closed trials where proceedings are not open to the public or even to the accused's legal counsel. Secret trials can prevent proper scrutiny, transparency, and accountability, depriving the accused of the opportunity to present their case and undermining the right to a fair trial.

**5. Use of Classified or Secret Evidence:** The use of classified or secret evidence in court proceedings can significantly compromise the right to a fair trial. When evidence is withheld from the defense, it hampers the accused's ability to challenge the evidence and violates the principle of equality of arms.

**6. Lack of Impartial and Independent Judiciary:** The right to a fair trial requires that the judiciary be impartial and independent. However, in some instances, the judiciary may lack the requisite independence, with judges may face pressure or interference from executive or security authorities, thereby compromising the fairness of the proceedings.

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criticized the failure to comply with the proceedings within a reasonable time. See: ECtHR, *Gunay v. Turkey*, Merits, Application No. 31596/07, Judgment of February 17, 2015.

**7. Restricted Appellate Review:** The right to a fair trial encompasses the right to an effective and meaningful appeal. However, counter-terrorism measures may restrict or limit the scope of appellate review, denying individuals the opportunity for proper review of their cases by higher judicial authorities.

#### **4-6. The Right to Privacy**

Protection of privacy is a fundamental aspect of safeguarding civil liberties and human rights, even within the context of counter-terrorism. While national security efforts aim to prevent and respond to acts of terrorism, it is crucial to strike a balance that respects individual privacy rights. Article 17 of the ICCPR obligates governments to protect the privacy of their citizens in its various stages. However, strategies employed to combat terrorism are sometimes in conflict with this right, particularly when actions are taken against individuals suspected of terrorist activities. In many cases, these actions are considered as methods of obtaining evidence, which can lead to premeditated violations of privacy.

Mass surveillance, warrantless wiretapping, or indiscriminate data collection without adequate safeguards may violate individuals' privacy rights.<sup>19</sup> Protecting privacy in countering terrorist crimes is essential to maintain a democratic society that respects human rights. By establishing robust legal frameworks, ensuring judicial oversight, employing targeted and minimization techniques, and promoting transparency and accountability, governments can mitigate privacy risks while effectively addressing security challenges.

Governments should establish clear and specific legal frameworks that define the scope of surveillance and intelligence-gathering powers. Laws must outline the circumstances under which privacy intrusions are permissible, ensuring that such measures are necessary, proportionate, and subject to judicial oversight. These frameworks provide essential safeguards against arbitrary surveillance and protect individual privacy.

Independent judicial oversight is crucial in ensuring that privacy rights are upheld. Courts should review surveillance measures, intelligence collection activities, and other counter-terrorism actions to assess their legality and compliance with constitutional and legal standards. Such oversight helps prevent abuses of power and ensures that privacy intrusions are warranted and justified.

Governments should establish regulations on data protection and retention. These regulations should specify the types of data that may be collected, the purpose of data collection, the duration of data retention, and the security measures in place to protect this data. Limiting retention periods helps

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<sup>19</sup> Verena Zöller, "Liberty dies by inches: German counter-terrorism measures and human rights," *German Law Journal* 5, 5 (2004) 482-485.

minimize the risk of unwarranted intrusions into individuals' privacy. Special attention should be given to protecting sensitive personal information obtained during counter-terrorism investigations. Strict protocols and safeguards should be implemented to ensure that such information is handled appropriately, shared only with authorized entities, and protected against unauthorized access or misuse.

#### **4-7. Political, Economic, Social and Cultural Rights<sup>20</sup>**

Government-imposed restrictions on individuals suspected of involvement in terrorist activities can significantly violate political, economic, social, and cultural rights. Examples of such violations include financial controls, asset freezes,<sup>21</sup> restrictions on communication devices, travel limitations, prohibitions on socializing with certain individuals, and constraints on access to specific locations. Additionally, restrictions may extend to employment opportunities and depriving individuals of social support services, such as health care and education. Conducting extensive surveillance and detailed inspections of the accused and their associates, as well as imposing limitations on religious or cultural practices for specific ethnic or religious groups, further exacerbate these violations.

Counter-terrorism measures can disproportionately affect refugees and migrants,<sup>22</sup> leading to arbitrary detention and deportation to countries where they face persecution or denial of access to asylum procedures. Such actions violate their rights to seek and enjoy asylum and protection from refoulement.<sup>23</sup>

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**20.** It should be noted that this group of rights has been recognized as human rights in many international documents. For example, Article 17 of the Universal Declaration of Human Rights (UDHR) and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognize the right to own property and participate in economic affairs, or Article 23 of the Universal Declaration of Human Rights recognizes the right to employment. According to Article 8 of the European Convention on Human Rights (ECHR), the right to privacy and communication of individuals is respected. Nevertheless, in the resolutions of the seventh chapter of the Security Council and the conventions related to countering terrorism and banning their financing, restrictions have been established in relation to these rights. For this reason, this category of rights is mentioned along with other rights of the accused.

**21.** In the case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. European Council and Commission*, based on the resolutions of the UN Security Council regarding the blocking of the assets of individuals determined by the Sanctions Committee of the Security Council and Regulation No. 881/2002 of the European Council, blocked the plaintiff's property due to its connection with Al-Qaeda. After the plaintiff's complaint, the court dismissed the claim with the argument that the provisions of the UN Charter are binding on states parties. In its decision, the ECHR acknowledged the necessity of absolute respect for fundamental rights and the impossibility of proving the justification of the Union's actions against the plaintiff. See: *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, Judgment of September 3, 2008.

**22.** A relevant prominent case is the *Haneef* case, which led to the cancellation of Haneef's work visa on the grounds that he failed the character test of the Migration Act 1958. See: Mark Rix, "Counter-terrorism and information: The NSI Act, fair trials, and open, accountable government." *Continuum: Journal of Media & Cultural Studies* 25, 2 (2011) 290-292.

**23.** Nicholas Sitaropoulos, "The role and limits of the European Court of Human Rights in supervising State security and anti-terrorism measures affecting aliens' rights." *Terrorism and the Foreigner*, (Brill Nijhoff, 2007) 12.

A notable case exemplifying these issues is *El-Masri v. the Former Yugoslav Republic of Macedonia*, which centers on the controversial anti-terrorism practice known as "extraordinary rendition," employed by the United States government post-9/11. In this case, Khalid El-Masri was arrested by Macedonian authorities as a terrorist suspect and unlawfully detained for 23 days. On January 23, 2004, Macedonian authorities transferred El-Masri to CIA agents, who secretly transported him to Afghanistan for interrogation, where he was subjected to torture until the U.S. government concluded that he was not involved in any terrorist activities.

Subsequently, El-Masri filed a lawsuit in U.S. federal courts seeking damages; however, his complaint was dismissed at the request of the U.S. government, citing concerns over the disclosure of state secrets. Regarding Macedonia's role in his arrest and transfer, El-Masri lodged a complaint with the ECHR. The Court unanimously decided that Macedonia violated Articles 3, 5, 8, and 13 of the European Convention on Human Rights, concluding that El-Masri's arrest constituted inhumane and degrading treatment under Article 3. Furthermore, the Court held Macedonia accountable for transferring El-Masri to the United States despite the known risk of further ill-treatment, as outlined in Article 3.

The Court found that Macedonia's actions, including the arbitrary detention of El-Masri and the failure of its judicial authorities to conduct effective investigations, violated Articles 5, 8, and 13 of the ECHR. The Court emphasized that the fight against terrorism cannot justify the disregard for human rights, expressing concern that the concept of "state secrets" has frequently been invoked to obstruct accountability in such matters.<sup>24</sup>

### **5. Striking a Balance Between National Security and Upholding Civil Liberties**

The protection of human rights encompasses a wide range of considerations, including the rights of the accused. Thus, the discourse on balancing national security with the human rights of citizens must include the rights of individuals facing accusations, particularly given that governmental neglect of these rights can create conditions conducive to involvement in terrorism. This section discusses potential solutions for reconciling national security interests with the protection of human rights.

The pursuit of effective counter-terrorism measures while upholding human rights presents a multifaceted challenge for governments and the international community. Achieving the right balance between national security and civil liberties is not only a legal and ethical imperative but also a practical necessity. Such a balance ensures that counter-terrorism efforts are

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24. Federico Fabbrini, "The European court of human rights, extraordinary renditions and the right to the truth: Ensuring accountability for gross human rights violations committed in the fight against terrorism," *Human Rights Law Review* (2013) 3-18.

effective, sustainable, and aligned with the values that underpin democratic societies. Respecting civil liberties, even in the face of security threats, reinforces the integrity of democratic institutions and upholds the principles of freedom, equality, and justice.

A balanced approach to counter-terrorism that respects civil liberties fosters public trust and cooperation, thereby enhancing the effectiveness of counter-terrorism initiatives. Additionally, it protects individuals from unjust and arbitrary state actions, such as excessive use of force and arbitrary detention. When governments prioritize human rights, they demonstrate their commitment to the dignity and well-being of all individuals, which is essential for maintaining public trust and confidence in their actions. Such trust is crucial for effective counter-terrorism efforts; without it, measures may alienate communities and hinder intelligence-gathering efforts, ultimately undermining security objectives.

Nonetheless, ensuring human rights in counter-terrorism efforts encounters various challenges. The complex and evolving nature of terrorism presents a significant security threat, compelling governments to adopt robust measures to protect their citizens. The urgency to address potential threats often results in calls for exceptional measures that may infringe upon individual rights. As the nature of terrorism evolves, so too must counter-terrorism strategies, requiring constant adaptation and evaluation.

Rapidly evolving tactics and technologies employed by terrorists pose significant obstacles to maintaining effective counter-terrorism measures while adhering to human rights standards. Issues such as encryption, online radicalization, and the use of emerging technologies complicate investigations and intelligence-gathering efforts.

Counter-terrorism often involves preemptive measures to prevent attacks before they occur, which can involve intelligence gathering, surveillance, and monitoring. Balancing these proactive measures with protecting privacy rights requires careful oversight, clear legal frameworks, and robust accountability mechanisms. The need for swift decision-making in counter-terrorism can create pressures to prioritize security over civil liberties, particularly in politically charged environments where public opinion may influence government actions. Resource constraints, limited capacities, and the complexities of legal and operational environments further impede the implementation of human rights-compliant counter-terrorism strategies.

International organizations also face challenges in promoting a rights-based approach to counter-terrorism, including differing national priorities, lack of political will, and resistance from states concerned about sovereignty. Addressing these challenges requires a comprehensive and multidimensional approach, including careful consideration of various factors and the implementation of appropriate safeguards.

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## 5-1. Potential Strategies for Balancing National Security and Civil Liberties

**1. Legal Frameworks:** Robust legal frameworks are essential for defining the boundaries of government powers, particularly those related to national security and counter-terrorism. Laws should be clear, necessary, proportionate, and subject to judicial oversight to prevent arbitrary use of power and to hold authorities accountable. Establishing such frameworks can provide a foundation for the responsible exercise of governmental powers.<sup>25</sup>

**2. Judicial Oversight:** The judiciary plays a critical role in scrutinizing the actions of the executive and legislative branches to ensure compliance with the law and the protection of individual rights. Establishing robust judicial oversight mechanisms is crucial for ensuring that counter-terrorism measures are lawful, proportionate, and respectful of human rights. Independent courts, oversight bodies, and human rights commissions are vital in monitoring security agencies to prevent abuse and safeguard civil liberties.<sup>26</sup>

Judicial review of surveillance measures, intelligence-gathering activities, and other counter-terrorism actions is essential. This oversight helps prevent power abuses and ensures compliance with constitutional and legal standards. The judiciary can assess the legality and proportionality of executive actions, providing remedies when violations occur. Courts may issue injunctions to halt unlawful actions, grant compensation to victims, or order the release of individuals unlawfully detained. Through judicial interpretation, courts clarify the scope of fundamental rights and the limits of government power, guiding executive and legislative actions and maintaining a balance between national security and individual rights.

Judicial independence, impartiality, and adherence to legal principles are crucial for maintaining an effective system of checks and balances within any democratic society. Such oversight not only serves to protect individual rights but also reinforces the legitimacy of counter-terrorism efforts within the context of democratic governance.

**3. Transparency and Accountability:** Transparency and accountability are fundamental principles of governance that promote openness, public scrutiny, and responsible decision-making. These principles are essential for balancing national security with the protection of civil liberties and human rights. Transparency involves the accessibility and openness of information regarding government activities, policies, and decisions, allowing citizens to understand and evaluate governmental actions. Accountability refers to the mechanisms through which governments are held responsible for their

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<sup>25</sup>. United Nations Fact Sheet No. 32: Terrorism and Counter-Terrorism, July 1, 2008, p. 21. Retrieved from: <https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-32-terrorism-and-counter-terrorism>, last accessed on August 20, 2024.

<sup>26</sup>. OHCHR Toolkit on Strengthening Human Rights in Counter-Terrorism Strategy and Policy Published, (May 30, 2024) pp. 25-26. Retrieved from: <https://www.ohchr.org/en/documents/tools-and-resources/ohchr-toolkit-strengthening-human-rights-counter-terrorism-strategy>, last accessed on August 20, 24.

actions, ensuring that those in power are answerable to the public and liable for any abuses or violations.

Governments can enhance transparency by clearly communicating their counter-terrorism policies and practices, within the constraints imposed by national security considerations. Establishing mechanisms for public oversight and accountability, such as parliamentary committees or independent review bodies, is vital for ensuring that government actions undergo rigorous scrutiny. Ensuring access to information, establishing the right of citizens to obtain government data, promoting public reporting, and creating protections for whistleblowers who disclose wrongdoing or abuses of power are critical components of transparency and accountability.

These mechanisms help ensure that government actions are executed in the public interest and with respect for civil liberties and human rights. By fostering transparency and accountability, governments can effectively balance national security imperatives with the protection of individual rights, thereby promoting trust, legitimacy, and the effective functioning of democratic governance.

**4. Targeted and Intelligence-Driven Approaches:** Targeted and intelligence-driven approaches refer to strategies employed by governments to focus their counter-terrorism efforts on specific individuals, groups, or activities that pose a genuine threat to national security. These approaches prioritize the collection and analysis of relevant intelligence to identify and mitigate potential risks while minimizing unnecessary intrusions into the lives of the general population. Counter-terrorism efforts should be based on credible intelligence rather than adopting broad, indiscriminate measures, thereby reducing the risk of violating civil liberties and minimizing the impact on innocent individuals.

Governments can implement targeted strategies by conducting comprehensive risk assessments that identify and prioritize potential threats based on intelligence, analysis, and historical data. This assessment involves evaluating factors such as the credibility and severity of threats, the capabilities and intentions of terrorist groups, and the vulnerabilities of specific targets or sectors. Targeted approaches may include lawful surveillance and monitoring of individuals or groups identified as potential threats. Techniques such as wiretapping and electronic or physical surveillance can be utilized to gather evidence and intelligence on suspicious activities, enabling proactive investigations and operations to disrupt terrorist activities.

This approach allows law enforcement agencies to identify, track, and apprehend individuals involved in terrorist planning or activities, thereby preventing potential attacks and dismantling terrorist networks. By adopting targeted and intelligence-driven strategies, governments can allocate resources effectively and focus on identified threats while minimizing adverse impacts on innocent individuals. Enhancing intelligence capabilities through

investment in infrastructure, technology, and international cooperation can further improve the effectiveness of counter-terrorism efforts. It is imperative, however, that these approaches be implemented within a robust legal framework, subject to appropriate oversight, and conducted in accordance with due process and the rule of law.

**5. Engaging Civil Society and Human Rights Organizations:** Governments should actively foster dialogue and collaboration with civil society organizations and human rights groups. These entities can provide valuable insights, monitor government actions, and offer expertise in ensuring the protection of civil liberties and human rights while addressing security concerns. Meaningful, inclusive, and safe engagement with civil society can enhance the effectiveness, legitimacy, and transparency of counter-terrorism laws, strategies, policies, and operations.<sup>27</sup>

In light of evolving threats, changing circumstances, and lessons learned, governments should regularly review and evaluate their counter-terrorism policies and practices. Such assessments are essential for determining effectiveness and understanding impacts on civil liberties and human rights. Continuous evaluation helps identify areas for improvement and ensures that policies remain balanced and proportionate.

**6. Education and Prevention:** Emphasizing education, early intervention, and prevention strategies can help address the root causes of terrorism, reducing the need for heavy-handed security measures. By addressing social, economic, and political factors that contribute to radicalization, societies can strike a balance between security and civil liberties. Promoting awareness and understanding of human rights, diversity, and pluralism can help prevent radicalization and promote tolerance.

Education initiatives can empower individuals to critically evaluate extremist ideologies and engage in constructive dialogue to address grievances and conflicts. Furthermore, international organizations also can provide technical assistance, training, and capacity-building support to governments in developing and implementing counterterrorism measures that align with human rights standards. This can include assistance in drafting legislation, strengthening law enforcement and judicial systems, enhancing intelligence gathering capabilities, and promoting best practices in investigating and prosecuting terrorism cases while respecting human rights.

## **6. Conclusion**

Terrorism constitutes a profound violation of universal human values. Unlike other crimes, which often exhibit relatively clear and static characteristics, terrorist acts are constantly expanding and evolving. These acts pose significant threats to civilized society, necessitating a comprehensive response

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27. *Ibid.*, 49.

from governments that utilizes a wide range of existing legal mechanisms. The characteristics of terrorist crimes - such as their organizational complexity, difficulty of detection, and transnational nature - have compelled countries to adopt new approaches which prioritize preemptive measures over punitive responses that typically follow crime commission.

Consequently, the focus of law enforcement has shifted from a "post-crime" approach, predominant in traditional criminal justice, to a "pre-crime" paradigm. This shift influences criminal law intervention, centering on restrictions of individual freedoms to mitigate the risks associated with terrorist activities.

Despite the failure of states to reach an agreement on what constitutes "terrorism," a customary rule has emerged mandating that states respect human rights within their counter-terrorism measures. This rule is grounded in various resolutions of the UN General Assembly and the Security Council. Failure to effectively address terrorism not only jeopardizes national security but also threatens the foundations of democratic governance.

The interplay between terrorist crimes and human rights law revolves around the protection of human rights, the establishment of legal safeguards, and the framework for counter-terrorism efforts. Human rights are at the core of democratic societies, and upholding them, even in times of crisis, demonstrates a commitment to democratic principles such as the rule of law, equality, and individual freedoms. Human rights law aims to ensure that responses to terrorism remain within legal boundaries, uphold fundamental rights, and provide avenues for justice and accountability for both victims and perpetrators.

It is imperative to respect individual rights and freedoms in countering terrorism; the fight against terrorism does not require violating the rights of those accused of such crimes. Terrorist perpetrators, as human beings, retain their entitlement to human rights, which are universal and inalienable. Preemptive measures must be grounded in legal criteria, adhering to the principles of necessity and proportionality, and should never serve as a pretext for infringing upon human rights. Rather, the observance of human rights standards should act as a boundary for state actions, ensuring that fundamental rights of individuals are not overshadowed by security concerns.

Moreover, neglecting human rights in counter-terrorism initiatives can inadvertently foster environments conducive to terrorism. This neglect can provide terrorist organizations with opportunities to recruit from populations deprived of their rights, as well as those who have experienced rights violations, ultimately eroding public support crucial for effective counter-terrorism efforts. Governments must avoid the fallacy that justifies harmful means by the importance of the end goal; such reasoning may inadvertently encourage terrorism rather than prevent it. As former UN Secretary-General Kofi Annan stated, "We cannot achieve security by sacrificing human rights."

To try and do so would hand the terrorists a victory beyond their dreams. Greater respect for human rights, along with democracy and social justice, will in the long term prove the only effective prophylactic against terror.”

Therefore, human rights do not conflict with counter-terrorism efforts; rather, they enhance the effectiveness of such endeavors. Effective responses to security threats must be firmly rooted in legal principles. In defending the rule of law, governments must remain bound by law. This commitment does not diminish states’ responsibilities to prosecute and punish terrorist acts committed within their jurisdiction; instead, it strengthens their capacity to do so.

International organizations can play a pivotal role in assisting governments to balance security concerns with human rights in counter-terrorism initiatives. By establishing and promoting international standards and guidelines that respect human rights, these organizations provide a framework for governments to align their actions with human rights obligations. To address human rights violations in the fight against terrorism, drafting an international convention focused on individual rights is essential. Such a convention should define the scope of government powers in national security and counter-terrorism approaches, enhance intelligence-gathering capabilities, and promote best practices in investigating and prosecuting terrorism cases while respecting human rights. Furthermore, it should include mechanisms for implementation that require governments to coordinate their domestic laws with the convention, supported by the active involvement of human rights organizations. This comprehensive approach can serve as a viable solution to the challenges posed by terrorism while upholding the fundamental rights of all individuals.

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