



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FAIR TRIAL RIGHTS AND TERRORISM: BRIGHT-LINE RULES OR FLEXIBLE PROCEDURAL SAFEGUARDS?

Judge Robert Spano
European Court of Human Rights

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Preliminary remarks

1. Ladies and gentlemen, it is a great pleasure and honour to have the opportunity to participate in this dialogue on the occasion of the opening of the judicial year and, in particular, to share the stage with my distinguished colleague Chief Justice Barak and my fellow judges and friends Ganna Yudkivska and Iulia Motoc.

2. Let me begin by submitting that the fight against terrorism is one of the defining challenges of modern times, a claim which recent events have brought into stark relief as we all know. Although Europe has had to deal with terrorism before, the nature and scope of the current threat presents challenges which have important consequences for the work of national courts as well as for the Strasbourg Court.

3. Judges, whether national or international, must be realistic and sensitive to the overriding public interest underlying the State's positive obligations to protect life but must at the same time remain steadfast in protecting those fundamental guarantees that are essential for the preservation of the right to a fair trial, my topic here today, which is one of the hallmarks of a democratic society based on the rule of law.

4. Fair trial guarantees must be interpreted and adapted to take account of realities on the ground, as public-interest considerations become imperative in the face of mass-casualty terrorist acts. However, judges must not accept that the ends justify the means in the fight against terrorism. As Chief Justice Barak has poignantly and eloquently reminded us in his comprehensive remarks, the "struggle against terrorism is not conducted outside the law, but within the law". These sentiments echo Justice Kennedy's words in his opinion for the majority of the US Supreme Court in one of its most important war-on-terror cases, *Boumediene v. Bush*, where he said, and I quote: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the law."

5. In my brief intervention I want to attempt to develop the arguments for and against the following claim:

The role of the Strasbourg court, as an international court, in terrorist-related fair-trial cases is not to adopt bright-line rules, although these are particularly effective to protect the rights of the defence, but rather to continue to formulate flexible, yet effective, procedural safeguards that enable the national judge to adequately balance the conflicting interests concerned.

6. To this end, I will proceed in two brief parts. Firstly, I will explain what I mean by bright-line rules and flexible procedural safeguards, arguing that the Strasbourg Court has historically developed its jurisprudence under the fair-trial provision of Article 6 so as to favour a reading which adopts a holistic assessment of procedural fairness rather than bright-line rules enforcing minimum procedural rights. Secondly, I will attempt to articulate why I consider that this approach by the Court is well suited to deal with the very difficult tensions between individual rights and the public interest that arise in terrorist cases, and then, perhaps surprisingly to some of you, make the claim that the choice by the Strasbourg Court between bright-line rules and flexible procedural safeguards under Article 6 involves values that may be said to originate from the principle of subsidiarity.

Bright-line rules and flexible procedural safeguards

7. I now turn to my first part.

8. Fair-trial or due process rights are a manifestation by civilised peoples of their wish to impose fair play on the relationship between the accused and the all-empowering State, an attempt to ensure that a balance is struck between individual rights – the liberty of the person – and the security of the masses – the life and limb of the innocent.

9. The level of protection that fair-trial rights grant the accused is relative to the scope of the accused's defence rights as interpreted and applied by an independent and impartial judge, the primary guarantor under the rule of law. The judge can maximise the protective force of defence rights by interpreting them as minimum rights, blanket proscriptions of government conduct, in other words by articulating bright-line rules that cannot be transgressed without a finding that the accused's defence rights have been violated. For example, such an approach considers the right to legal assistance to be absolute or to allow only very limited exceptions, even though the rights of the defence as applied in this way will almost certainly restrict the margin of manoeuvre for law-enforcement authorities. The same applies if, owing to considerations relating to the individual human rights of the accused, the State is forbidden to restrict the disclosure of evidence in a criminal trial on security grounds.

10. Interestingly, when one reads Article 6 of the Convention, one might at first glance think that the plain reading of the text supports this bright-line/minimum-rights approach. Although paragraph 1 requires a person charged with a criminal offence to be afforded a fair hearing, paragraph 3 is separate and explicitly sets down "minimum rights", such as the right of the accused to legal assistance, to adequate time and facilities to prepare his defence and to cross-examine witnesses.

11. But this is not the way the Strasbourg Court has interpreted and applied Article 6 in the context of criminal proceedings. The case-law has not always been developed in a perfectly consistent and linear fashion. However, Grand Chamber judgments of the Strasbourg Court in the last decade, such as *Salduz v. Turkey* of 2008, *Al-Khawaja and Tahery v. the United Kingdom* of 2011, and, very recently, *Dvorski v. Croatia* of 2015 and *Schatschaschwili v. Germany*, also of last year, reject in my view an absolutist minimum-rights reading of paragraph 3 of Article 6. The Court has instead interpreted the paragraph 3 rights as providing for constituent elements of the general principle of a fair trial under paragraph 1. In this way the Court has acknowledged that States may under certain circumstances restrict the rights of the defence so long as the accused has been afforded a fair trial on the basis of an overall assessment.

12. Of course, there have been attempts by applicants to invite the Court to move towards an absolutist minimum-rights approach, and certain judges of the Court have in forcefully argued separate opinions expressed the view that such an approach would be more in line with the structure of Article 6 and the individual human rights character of the Convention. However, a majority of the Court have consistently rejected such attempts.

Flexible procedural safeguards, terrorism and the principle of subsidiarity

13. On this basis, let me then turn to my second part, where I will argue that the Strasbourg Court has been justified in adopting the more flexible, holistic fairness approach, and then reflect on the practical effects of this approach on the manner in which terrorist trials are conducted at national level for the purposes of Article 6 of the Convention.

I would make two points here.

14. Firstly, I would submit that one of the main reasons why the Strasbourg Court has rejected the invitation to apply paragraphs 1 and 3 of Article 6 as distinct although related provisions is that such an approach would not be easily reconcilable with the nature and character of the Convention as an international treaty. The Court has been mindful that the Convention is not meant to harmonise domestic rules of criminal procedure but allows States to retain their discretion in fashioning such rules as are consistent with their respective legal and historical traditions. In other words, whilst the Convention imposes on States the duty to afford all persons accused of criminal offences a fair trial, States have latitude in deciding the way in which they go about prosecuting criminal cases while conforming to the general principle of fairness. The Strasbourg Court, in pursuing this approach, will look at the end result, but will not necessarily focus its examination on whether mistakes were made along the way, so long as the overall outcome is acceptable. The “overall fairness” approach of the Court attempts to preserve the primary role of national criminal judges under Article 6, allowing them flexibility in the conduct of proceedings, in line with the institutional divisions of power between national courts and the Strasbourg Court as manifested in the principle of subsidiarity.

15. Having said that, let me be clear. When an application is lodged at Strasbourg, the Court, as a human rights court, examines carefully whether the end result fulfils the Convention requirement of fairness. Although it is not determinative if mistakes have been made along the way, the Strasbourg Court must in my opinion take into account the existence of grave procedural errors in the domestic proceedings that have had detrimental effects on defence rights, by applying strong presumptions of unfairness requiring strict scrutiny by the international court in its assessment, particularly if the procedural error is manifest or deliberate.

16. My second, and last point, relates to the way in which this “overall fairness” approach under Article 6 is better suited to take account of the apparently irreconcilable interests at stake in proceedings dealing with the most serious of crimes, such as terrorism, where the duty of the State to protect life under Article 2 is overriding.

17. It is unrealistic to interpret and apply fair-trial guarantees in a vacuum by adopting bright-line rules that do not allow the requisite balancing exercise between conflicting interests along a spectrum of weak to very strong public interests in fighting crime. It is axiomatic that the public interest is at its apogee in mass-casualty terrorist cases.

18. It is true that it is exactly in such cases, when emotions run high, that judges need to be vigilant in effectively protecting core procedural guarantees. As I said at the outset, in a democratic State under the rule of law the ends can never justify the means, even in the fight against terrorism, unless we unwisely reject Benjamin Franklin’s view that, and I quote, “he who would put security before liberty deserves neither”. However, the Strasbourg Court has recognised that Article 6 must allow judges the necessary flexibility in taking the State’s positive obligation to protect life under Article 2 effectively into account in making procedural determinations that may necessitate limiting defence rights for the public good. As the fight against terrorism invariably has the consequence that States often deem it necessary to take drastic measures to curtail defence rights, the Strasbourg Court may have to develop further its case-law in this area in the coming years, so as to maintain the appropriate balance between effective fair-trial rights and the public interest in protecting life.