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Fasc. 2/2016

13 Giugno 2016

The inhuman treatment of a terrorist: Reflections on the Norwegian *Breivik* case

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ABSTRACT: *Oslo District Court has found that the terrorist Anders Behring Breivik has been subject to inhuman and degrading treatment in violation of Article 3 of the European Convention on Human Rights. The author considers that the judgment is legally incorrect and that is unwise. This article argues that the judgment is legally incorrect because it applies an incorrect standard for the «minimum level of severity» which is required to render Article 3 applicable, and that it is unwise because it develops the standards under Article 3 beyond what the European Court of Human Rights has indicated, in a case where public opinion, national interests, etc., would suggest a more cautious approach.*

1. *Factual background*

On 22 July 2011, 32-year old Norwegian right-wing extremist Anders Behring Breivik murdered 77 people in two separate terrorist attacks: first, through a car bomb explosion outside a governmental building that killed 8 people, and secondly, through a shooting spree at the social democratic party's youth camp at the island Utøya, killing 69 people, mainly youths. He was captured alive the same day, and was immediately placed in solitary confinement pending trial. He was subsequently put on trial in Oslo District Court. After a high publicity trial that ran from 16 April to 22 June 2012, he was sentenced on 24 August 2012 to 21 years of so-called «forvaring», which is a preventive, custodial detention that can be extended indefinitely in five year increments, as long as the detainee is considered to be a threat to society at the expiry of the detention period. The verdict was not appealed.

Breivik's trial presented the Norwegian legal system with a test that few European countries had faced by then. Could the courts provide a terrorist with a fair trial despite the massive public condemnation? Would our ordinary criminal procedures suffice? Would we succeed as a society to prove ourselves as a true defender of the rule of law? However, there was a dominant public opinion that an extremist could not be allowed to destroy our shared democratic values, that by failing to respect his rights Norway would let him win. The general impression during and after the trial was that Oslo City Court succeeded very well in this, by respecting Mr. Breivik's human rights

• Lavoro referato dalla Direzione della Rivista.

while still protecting the interests of the victims and of society as a whole. Academic studies have also confirmed this impression.[1]

The same test for society was considered to arise with regard to the conditions of his prison sentence. Would the Norwegian Correctional Service succeed in treating Mr. Breivik like other inmates? Would ideas of revenge come into play? Would he be mistreated or even tortured simply «because he deserves it»? On 1 July 2015, Mr. Breivik brought a lawsuit against the government, claiming that his prison conditions were in violation of Articles 3 and 8 of the European Convention on Human Rights (ECHR), giving Oslo District Court the possibility to consider whether Norway still passes the test of respecting human rights and upholding the rule of law even when faced with a brutal and merciless terrorist that opposes those precise values.

2. *Oslo District Court's judgment of 20 April 2016*

2.1. *The starting point*

On 20 April 2016 Oslo District Court ruled that Mr. Breivik was subject to inhuman and degrading treatment in violation of Article 3 ECHR.[2] There was not found any violation of Article 8 ECHR. While the District Court's conclusion on the latter aspect hasn't caused much debate, the conclusion on the former issue has proven to be very controversial. How can a terrorist, who has committed so inhuman acts, be said to be treated inhumanely?

Article 3 ECHR reads: «No one shall be subjected to torture or to inhuman or degrading treatment or punishment.» The key question in the case was accordingly whether Mr. Breivik's prison conditions constitute inhuman or degrading treatment. The prohibition against torture was not invoked. This is not an unusual question in itself; prison conditions is rather one of the classic issues with regard to Article 3. The unusual aspect of Mr. Breivik's case is that it concerns the prison conditions of a terrorist.

By way of introduction, let us recall what the European Court of Human Rights (ECtHR) said in a comparable case, the case of «the Jackal», Ilich Ramirez Sanchez:[3]

> In the modern world, States face very real difficulties in protecting their populations from terrorist violence. However, unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation … The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of

[1] B. de Graaf, L. van der Heide, S. Wanmaker and D. Weggemans, «The Anders Behring Breivik Trial: Performing Justice, Defending Democracy», ICCT Research Paper (2013), available at dspace.library.uu.nl/handle/1874/306123

[2] Oslo City Court, case no. 15-107496TVI-OTIR/02, 20 April 2016. (Hereinafter: «the judgment».) Available in an English translation here: www.domstol.no/contentassets/cd518ea4a48d4f8fa2173db1b7a4bd20/dom-i-saken-om-soningsforhold---15-107496tvi-otir---abb---staten-eng.pdf

[3] ECtHR, appl. no 59450/00, Ramirez Sanchez v. France (judgment, Grand Chamber, 4 July 2006), para. 116.

> the person concerned … The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 …

This is an important premise for an analysis of the judgment. The State has a legitimate interest in protecting national security and protecting its population against terrorism, but this needs to be balanced against the terrorist's absolute and non-derogable right not to be subjected to inhuman treatment. Herein lies the test, how can courts protect the human rights of terrorists without being influenced by the acts that they have committed?

Prior to the trial, one of the larger newspapers in Norway commissioned me to write an analysis of the legal issues that would arise.[4] In that analysis, I underlined that even though Article 3 is absolute, it is still relative in the sense that there is room for a proportionality assessment in the determination of whether the lower threshold for the application of the article has been met. It is perfectly possible and legitimate for a court to conclude that the human rights of a terrorist have not been violated without being influenced by the heinous acts that were committed. To discuss this further, I will first summarize the relevant case law from the ECtHR to identify the applicable standard under Article 3 ECHR, before I discuss the facts of Mr. Breivik's case[5] and the District Court's assessment of those facts.

2.2. *Relevant case law*

As I will return to below, the essence of the case was whether the solitary confinement of Mr. Breivik amounted to inhuman treatment in violation of Article 3. A relevant challenge in this regard is that there exists limited case law relating to similar cases before the European Court of Human Rights. There are, however, some relevant starting points for the District Court's assessment.

A general starting point, of course, is that not every kind of ill-treatment amounts to a violation of Article 3 ECHR:[6]

> Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim …

With regard to deprivation of liberty, the ECtHR has underlined that

[4] K.M. Larsen, "Blir Anders Behring Breivik umenneskelig behandlet?", Aftenposten, 13 February 2016, www.aftenposten.no/meninger/kronikk/Kronikk-Blir-Anders-Behring-Breivik-umenneskelig-behandlet--Kjetil-Mujezinovi-Larsen-9060b.html.

[5] This will be based on the Court's own rehearsal of the facts. I know that this rehearsal of the facts is debatable in some regards.

[6] E.g., Ramirez Sanchez, ibid. fn. 3, para. 117.

> … Article 3 requires the State to ensure that prisoners are detained in conditions that are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured … Further, when assessing conditions of detention, account has to be taken of the cumulative effects of those conditions …[7]

With specific regard to solitary confinement during deprivation of liberty, the ECtHR has developed a number of general criteria to consider whether the solitary confinement represents treatment in violation of Article 3: regard must be had to the particular conditions in each case, including the physical conditions of detention, the stringency of the measure (ie. the degree of sensory and social isolation), its duration, the objective pursued and its effects on the person concerned. Complete sensory and social isolation cannot be justified by security reasons, but the prohibition of contacts with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment. If the measure has negative effects on the physical or mental health of the person concerned, adequate remedies must be available.[8]

The reason for using the *Ramirez Sanchez* case as a reference here is that this case in my view is the case with the closest resemblance with Mr. Breivik's case. The Jackal had been involved in several terrorist attacks in the 1970s, and he was taken into custody on 15 August 1994 and remained in solitary confinement until 17 October 2002, ie. for a period of 8 years and 2 months, compared to the 4 years and 9 months that Mr. Breivik's has currently served. The physical conditions during his detention were much inferior to those of Mr. Breivik, and the same applies for recreational activities. He received frequent visit from lawyers, a doctor and a priest, including 640 visits between 1997 and 2002 from the lawyer who became his wife under Islamic law, but apart from that he received no other visits. In that case, the Court considered that

> … having regard to the physical conditions of the applicant's detention, the fact that his isolation is "relative", the authorities' willingness to hold him under the ordinary regime, his character and the danger he poses, the conditions in which the applicant was being held during the period under consideration have not reached the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3 of the Convention.[9]

There are a number of other cases that also inform the greater picture, and the judgment does a commendable effort of going through these, such as the *Kashavelov* case, where the applicant had

[7] Ibid., para. 119.
[8] For a summary, see ibid., paras. 120-124.
[9] Ibid., para. 150.

been in solitary confinement for 13 years,[10] or the *Öcalan* case, where the applicant had been in solitary confinement in far worse conditions for a longer duration without there being a violation of Article 3.[11] These cases, and others, are summarized in the District Court's judgment.

2.3. *The facts of the case and the District Court's assessment*

Mr. Breivik serves his sentence in a separate unit in prison, characterized as a unit of a particularly high level of security («særlig høyt sikkerhetsnivå», SHS). He has served at SHS in two different Norwegian prisons, Ila (from 27 July 2011 to 23 July 2012 and from 28 September 2012 to 9 September 2013) and Telemark (other periods). The judgment underlines that the physical conditions in prison were good in both prisons. In both prisons, Mr. Breivik had access to three cells, one for living, one for working, and one for exercising. There were entertainment facilities (such as a Playstation), he got fresh air daily in a prison yard, he was permitted to pursue university courses and take exams, he had access to a computer (albeit without internet access), etc. The judgment explicitly says that this is not the problem in the case; the key issue for the court was rather whether the degree of social isolation was acceptable. The District Court places strong emphasis on the very limited scope of personal interaction between Mr. Breivik and others. He only meets professional staff, and has no interaction with other inmates. He is permitted to receive visitors, but he has chosen not to do so. The main reason for this is that he only wants to receive visits from like-minded persons, and this is not permitted him. The District Court estimated that Mr. Brevik is alone between 22 and 23 hours each day.

With that as a premise, the subsequent question for the court was whether this degree of social isolation was strictly required. In this assessment, the court observed that very few people are detained at SHS units in Norwegian prisons – a total of 6 people in the last 10 years. In Mr. Breivik's unit, there has occasionally been another inmate, but in those cases there has been no interaction between them. The court stated that it could not see that the justification for keeping Mr. Breivik in an SHS unit would also justify keeping him separated from other inmates, in light of the high security measures that already apply. The court also argued that the prison authorities had to strive to bring other inmates into the same unit in order to facilitate a social community, to avoid making detention in an SHS unit a greater burden for the inmate than necessary.

A key issue for the District Court was that Mr. Breivik doesn't receive any visits from anyone, even his lawyer, without a glass wall as a barrier between them, or without being subject to visual monitoring by prison staff. As all other measures that are taken towards Mr. Breivik, this measure is based on security considerations, such as the risk of hostage-taking. The District Court was, however, unimpressed by this. In the court's view, communication with microphone through a glass wall creates a sense of distance. If a person is already isolated from others, it argued, such communication may increase the sensation of loneliness. Consequently, the District Court considered that it must be possible for the prison authorities to monitor visits in other ways to

[10] ECtHR, appl. no. 891/05, Kashavelov v. Bulgaria (judgment, 20 January 2011).
[11] ECtHR, appl. no. 46221/99, Öcalan v. Turkey (judgment, Grand Chamber, 12 May 2005).

achieve the same security purpose. The court did, however, refer to a letter Mr. Breivik has written which contained a description of how he could attack or neutralize prison guards if he wanted to, and of how he could manufacture lethal weapons with materials that are available to him in his cells. The court considered that such letters cannot be decisive, and that it must be his actual conduct that counts, not his words. It is not disputed that Mr. Breivik's conduct in prison has been good.

The next element in the court's assessment concerned Mr. Breivik's health, and how it is being affected by the solitary confinement. The starting point for the court is that Mr. Breivik «does not appear to have experienced any demonstrable damage from his detention conditions». There were, however, reports about possible effects of the isolation, such as Mr. Breivik becoming more forgetful, more nitpicking, disoriented, having headaches and anxiety, etc. These reports need to be contrasted with Mr. Breivik's own accounts of being healthy and happy. In the court's view, it is more probable that he is underreporting problems than that he is lying about symptoms. In the court's view, Mr. Breivik wants to be portrayed as healthy, as a leader. The court does, however, recognize that any issue relating to Mr. Breivik's mental health is difficult. Even if he was considered sane and criminally responsible during his trial, he was diagnosed with narcissistic personality disorder and dyssocial personality disorder, and it is evident that he suffers from a mental illness. The court accepted the argument of Mr. Breivik's council that he had to be viewed as a mentally vulnerable person, and that this is something that needs to be taken into consideration during his detention. The court's subsequent analysis was that his mental health means that one should be cautious in subjecting him to long-lasting solitary confinement, even if he appears to handle it well.

It is useful to provide a full translation of the court's conclusion:

> The Norwegian Correctional Services face considerable challenges in dealing with Breivik and the conditions of his detention. Enormous resources and considerable efforts have been used. There is no reason to question the authorities' motives for the restrictions, there is nothing that indicates that irrelevant considerations have influenced the assessments. However, in the court's view, security considerations have received excessive attention in the determination of Breivik's detention regime.
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> Breivik is a dangerous person, who probably will spend the rest of his life in prison. It is necessary to prevent him from establishing contact with like-minded people to avoid him inspiring other individuals … Inside the prison's high security unit, however, the court fails to see a basis for considering that he represents an equally extreme risk. In the court's view there is an incoherence between the risk assessments that have been made of him, his good conduct in prison since his arrest, and the strict regime under which he serves.
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> After a total assessment of the facts of the case, the court concludes that the conditions during detention represents inhuman treatment of Breivik, the minimum level of severity has been reached. … The most important factors in this regard are the long duration of the solitary confinement, an insufficient justification for whether solitary confinement is

> strictly necessary, and the insufficient administrative appeal mechanisms. Further, the prison authorities have not initiated sufficient compensatory measures, and the court cannot see that sufficient regard has been had of his mental health when the detention conditions have been determined.

Finally, the court also considered that the scope of physical control mechanisms that were applied to Mr. Breivik during his detention at Ila prison represented degrading treatment in itself. He was subjected to a regime where he was handcuffed every time he moved, even between cells, he was regularly examined by a metal detector, he was subjected to naked examinations every time he went out of or in to the prison, either to go to questioning, to court, or even to the prison yard. In total, he was examined naked several hundred times, occasionally also with female prison guards present. The court considered that this went further than what was necessary, and that this represented an independent violation of Article 3 ECHR.

3. *Is the judgment brave? …or wise? …or correct?*

As was only to be expected, the judgment was met with considerable debate in Norway. There was significant surprise, since many commentators – myself included – had stated publicly in advance that it was very unlikely that Mr. Breivik would win. Other reactions varied greatly. There was anger over the fact that a man who has done so much damage could get so much publicity, and even more that he could win such a case. There was also satisfaction, almost pride, that the court demonstrated that the Norwegian legal system is capable of protecting the human rights of everyone, regardless of what they have done. Two of the largest newspapers in Norway took diametrically opposite positions in their editorials: VG described it as «a wrong judgment»,[12] while Dagbladet wrote that the judgment «is not only brave, it is also wise».[13] Legal commentators were generally quite positive, arguing that the judgment was brave, correct, convincing and well-argued.

However, I am among those who consider that the judgment is neither good nor convincing nor wise. My reasons for this are threefold.

Firstly, I simply disagree with the court's assessment of the facts of the case when these are seen in light of the relevant standards as developed by the European Court of Human Rights. In my opinion, the facts of the case, as they are described by the District Court, fail by quite some margin to reach the «minimum level of severity» required for Article 3 ECHR to be applicable. The duration of the solitary confinement has been significant, but much shorter than what the ECtHR has previously accepted in comparable cases. The degree of isolation is severe, but – again – not worse than what the ECtHR has previously accepted. The physical conditions of his detention are excellent, and far superior to conditions that the ECtHR has also accepted. There have been very

[12] VG editorial, "En gal dom", 20 April 2016, www.vg.no/nyheter/meninger/anders-behring-breivik-soeksmaalet/en-gal-dom/a/23663458/.

[13] Dagbladet editorial, "En dom til ettertanke", 22 April 2016, www.dagbladet.no/2016/04/22/kultur/meninger/leder1/dbmener/breivik/43967161/.

limited – if any – negative effects for his mental health, and there have been no negative effects for his physical health. The prison authorities also perform compensating measures to counter any negative effects for his mental health. In my view the District Court uses a too low standard for considering negative health effects as relevant, while simultaneously requiring too much of the compensating measures. Finally, in my opinion the authorities have an adequate justification for the measures through the security risk Mr. Breivik and like-minded persons represent, comparable to justifications that the ECtHR has previously considered as sufficient for similar treatment. The District Court places a surprisingly large emphasis on the use of a glass wall for all visits, but I fail to see that this is decisive. I also consider that the court used arguments that are irrelevant for the assessment of whether someone is subjected to inhuman treatment, such as whether there exists adequate administrative appeal procedures.

There are, clearly, elements in the case that are questionable. One may certain discuss the extensive use of naked examinations, which seems excessive. It seems fair to characterize this practice as degrading. This practice has, however, ended, so this is an historical discussion. The judgment also shows that this was not a part of the court's discussion of whether the current detention regime constitutes inhuman treatment.

Secondly, the judgment received positive comments because it draws attention to the extensive use of solitary confinement in Norwegian prisons and other detention centres. This is one the most pressing human rights challenges in Norway. Norway uses solitary confinement disproportionately much compared to other European countries, with considerable detrimental effect for the mental or even physical health of many of the persons that are affected. Statistics show, for example, that 75 % of suicides in Norwegian prisons are committed by persons detained in solitary confinement. A judgment concluding that a person in solitary confinement is subject to inhuman treatment is, therefore, positive if it can lead to higher awareness of this problem and subsequently to an improvement of the situation. I agree completely with this general argument, but I have sincere doubts with regard to whether the premise holds true. Mr. Breivik's case is exceptional, and the outcome of exceptional cases rarely provide substantial guidance for other more ordinary cases. I don't think the everyday use of solitary confinement in ordinary cases will be influenced by the judgment, and therefore this argument is insufficient to characterize the judgment as good or wise.

Thirdly, I question whether the judgment is wise. This judgment finds it place in a reality where human rights are under pressure both domestically and internationally. Human rights are under pressure on the one hand from actors who argue that the protection of human rights has gone too far, that human rights interfere too much with the political scope of action of national authorities, at the expense of other legitimate societal considerations. The protection of national security, or the duty of a State to protect its citizens from crime, are such considerations. On the other hand, human rights are under pressure from actors who always push human rights as far as possible, to the breaking point, because that creates a reaction, a counter-push, that may harm human rights in the long run. This applies to movements that call for the recognition of ever new values and interests as human rights, because if too many interests are recognized as rights, the special status and the symbloic value of human rights may suffer. But it also applies to attempts to interpret existing

human rights ever more extensively. The dynamic (or evolutive) interpretation of human rights treaties is a fundamental principle of interpretation of such treaties, and it is also inherent in international human rights provisions that States have an obligation for progressively better realization of the rights. Nevertheless, if the evolution goes too fast or too far, this may again cause a reaction, with States fighting back – such as what we now see with genuine discussions in the United Kingdom as to whether it should denounce the ECHR. To qualify as «wise», a judgment needs to find its place in this reality, and contribute to a strengthened protection of human rights in the long run. Judgments that blatantly disregard what the public considers human rights to be, may reduce the respect for human rights. Judgments that result in public ridicule over the concept of human rights,[14] may reduce the respect for human rights. Such systemic considerations are clearly irrelevant to a court in a concrete case, but they do affect the assessment of whether a concrete judgment can be considered as wise. This reality suggests, at least to me, that it is not «wise» to interpret human rights provisions as extensively as possible in all cases. The Breivik judgment has been met with domestic and international amazement and partial ridicule, and it will be interesting to see over time how the judgment affects the respect that the public and the authorities have for human rights as a fundamental concept for the protection of individuals against abuse from the State.

In Norway, the Supreme Court has expressly stated that national courts and other legal interpreters «shall, when interpreting the ECHR, apply the same method as the ECtHR, but with the modification that it is primarily up to the ECtHR to develop the Convention further».[15] In my view, the District Court provided an evolutive interpretation of Article 3 ECHR that goes beyond what the ECtHR has given guidance for, and I believe that the court did so in a case where systemic considerations suggest that it was not wise to do so.

4. *The judgment has been appealed*

On 26 April, the Ministry of Justice instructed the Attorney-General to appeal the judgment, and the appeal was submitted on 20 May. In the appeal, the Attorney-General opposes the court's assessment of the facts as well as the application of the law. The next step is then that the Borgarting Court of Appeal will consider the case. It is not yet known when this will happen.

The question of whether the State should appeal was also a matter of public debate. Initially, I believed that it was obvious that the State should appeal, since it isn't appropriate that a first instance court decides on a human rights violation in a case of such national importance. Upon closer reflection, I became less certain. The judgment as it stands would not have dramatic consequences. The prison authorities would need to let Mr. Breivik meet his lawyer without a glass wall between them, and perhaps even be allowed social interaction when other inmates are placed in the same unit, but apart from that it's not really clear what the consequences would be. The

[14] "Court rules in favor of Norwegian terrorist Breivik in 'Playstation 2 is torture' trial", www.rt.com/news/340356-breivik-verdict-playstation-torture.

[15] Bøhler v. Ministry of Finance, Supreme Court judgment 23 June 2000, case no. HR-2000-30-B, Rt. 2000 s. 996.

judgment also rules that the State should pay Mr. Breivik's legal costs, approximately 330,000 Norwegian kroner (36,000 euros), but this sum is miniscule compared to the annual costs Mr. Breivik's detention entails in any case. The State would have had to accept that it had been found to violate Article 3 ECHR, but that's not dramatic in itself – after all, it is a relatively common occurrence that a domestic court finds that national authorities have acted in violation of its human rights obligations. Consequently, it wouldn't be dramatic in a legal sense if the judgment were to stand, even if one considers – as I do – that it is legally incorrect. On the other hand, appealing the judgment means giving Mr. Breivik yet another forum to present his case and to dominate the media scene, it means creating yet another occasion for reopening the wounds that Mr. Breivik inflicted to his victims and to the society. And if Mr. Breivik loses in the Appeals Court, he may appeal to the Supreme Court, and perhaps eventually bring a case to the European Court of Human Rights. Wouldn't it be better for the society to accept the judgment, make minor adjustments in his detention conditions, and then don't give him more publicity? I can only assume that the Norwegian Ministry of Justice considered these aspects before deciding to appeal. My prediction is that the Court of Appeal and eventual later instances will rule in favour of the State. If this can be done in a manner which simultaneously creates increased attention on the problematic use of solitary confinement in Norwegian prisons, then it may still turn out that the case has been positive for Norway as a society and for the protection of human rights.