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The European Convention on Human Rights and Counter-Terrorism

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Abstract

No part of the world has more experience with terrorism than Europe. The response of the Council of Europe through the jurisprudence of the European Court of Human Rights to its experience of terrorism may therefore assist in the ongoing battle against terrorism. The European Convention reflects in many ways libertarian political and cultural values shared with the United States. Its interpretation by the Court in the light of counter-terrorist measures by concerned governments may therefore have some relevance in the United States.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND COUNTER-TERRORISM

*John Hedigan**

If the power of thought is universal among mankind, so likewise is the possession of reason, making us rational creatures. It follows, therefore, that this reason speaks no less universally to us all with its "thou shalt" or "thou shalt not." So then there is a world-law; which in turn means that we are all fellow-citizens and share a common citizenship, and that the world is a single city.

Marcus Aurelius¹

I. THE WORLD IN WHICH WE LIVE

So wrote the Emperor toward the end of his nineteen-year reign over the Roman empire at the pinnacle of its power and prestige.² Even then, in the second century A.D., the world to him seemed as one. Today with global communications permitting us to communicate almost instantly with practically every part of the world and to know and see what happens in its most far away places, our world surely remains no less small than the Roman Emperor perceived it over 1,800 years ago.

In so many ways, this world of ours today is potentially the best there has ever been. With all its disasters and famines, its starving and excluded millions, its savage terrorism and brutal repression, never before has mankind had such an ability to put the world to right. Were we able to harness the technical and commercial skills of the developed world to help lift the underdeveloped world up to a global standard of living, we could surely solve so many of the current world problems that at times seem likely to overwhelm so much that those of us in the developed world value and cherish. Even were we not able to solve most, or even many of the world's problems, were we to try on a global scale, we could certainly improve the world we bequeath to those who come after us. Yet, little seems to progress in the

* Judge John Hedigan (Irish) has been on the European Court of Human Rights since November 1, 1998.

1. MARCUS AURELIUS, *MEDITATIONS* 65 (Maxwell Staniforth trans., 2002).

2. See North Park University, The Emperor Marcus Aurelius, *available at* <http://campus.northpark.edu/history/WebChron/Mediterranean/MAurelius.html> (last visited Jan. 22, 2005).

task of addressing the problem of starvation, economic hardship, and social unrest around the world. These surely breed much of the fanaticism and hatred which nurtures terrorism. We seek, apparently in vain, for some credible long-term plan conceived on a global scale that might give some hope to those deprived and to ourselves that the world genuinely embarks upon a clear path to some measure of global equality, that it really is "a single city."

Disbelief, doubt, even despair seem, however, to afflict us when we perceive the savagery of terrorism tearing at the fabric of civilization. Our hope for the future flounders as we see the response to terror eat away at the very pillars of democracy and the rule of law. We fear the terrorists, but we also fear the damage that desperate government efforts to defend their citizens against attack may cause. We fear the damage that may result to the human rights protective system from the efforts of governments to defend their people. We fear that ill-considered, counter-terrorism measures taken in the agony of the moment may undo the achievements of much effort over a very long time. At the same time we see, with growing apprehension, efforts by some governments to justify long-standing human rights violations by reference to new terrorist threats.

While we need to respond to immediate danger with immediate action, we also need to address with some long-term thinking and planning what we can do to tackle the real causes of terrorism. Yet, all too often, political decisions remain based upon short-term considerations. In security matters, when faced with immediate threats, *ad hoc* decisions which people assume do not create a precedent for the future seem acceptable. Yet when it comes to questions so basic to our civilization and to our sense of ourselves as secret imprisonment, torture or inhuman treatment, unreviewable forms of detention or the right to a fair trial among other things, short-term solutions may cause long-term damage to standards painfully achieved over many years. Yet all too often, as our experience shows, the public response to acts of terror call for harsh and repressive measures that frequently do pressure the legal framework designed to protect against abusive treatment of prisoners. We can safely assume that this chorus includes many who always support repressive authoritarianism. Many who value our libertarian values, however, become tempted in this direction. It takes a very strong and wise body

politic to keep its head in such circumstances. Against the call for so-called “tough measures,” few political leaders can find the strength and wisdom or indeed the support to fight terrorism while preserving the established human rights protective system. Repressive sirens will always call for “new” harsh measures to meet these “new” challenges from terrorism and few leaders have the toughness to “hold the fort” in such circumstances.

Yet terrorism is not a new phenomenon.³ Today, the horror of the World Trade Center,⁴ Bali,⁵ the Madrid bombing,⁶ and more recently, the school at Beslan transfix us.⁷ Terrorism however, has lived for a very long time.⁸ Moreover, atrocities from the biblical slaughter of the innocents to the Nazi transportation of thousands of Jewish children to their deaths in concentration camps, do not spare the young.⁹ The last half-century has seen Europe assailed by terrorism in almost all the forms we see today, albeit now on a more global scale.

II. RECENT EUROPEAN EXPERIENCE OF TERRORISM

In the course of the last half-century, Europe has faced terrorist attacks in many countries; Germany, Ireland, Italy, the Netherlands, Spain, and the United Kingdom to name some.¹⁰ In a sense, the entire continent suffered from the State-sponsored terrorism of Nazism, Fascism, and Stalinism, during the

3. See Mark Burgess, *A Brief History of Terrorism*, available at <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1502> (last visited Jan. 22, 2004).

4. See *Investigators Chased Leads as the U.S. Weighed Military Retaliation*, WALL ST. J., Sept. 13, 2001, at A1.

5. See *Terror in Bali*, WALL ST. J., Oct. 14, 2002, at A16.

6. See Matthew Kaminski, *Terror in Madrid*, WALL ST. J., Mar. 12, 2004, at A14.

7. See George Melloan, *Beslan's Message: Terrorists Don't Have Souls*, WALL ST. J., Sept. 7, 2004, at A21.

8. See Burgess, *supra* note 3.

9. See, e.g., Children and the Holocaust, available at <http://www.mtsu.edu/~baustin/children.html> (last visited Jan. 22, 2005).

10. See, e.g., John Tabliabue, *2 Killed, 155 Hurt in Bomb Explosion at Club in Berlin*, N.Y. TIMES, Apr. 6, 1986, § 1, at 1; William E. Schmidt, *Violence Escalates in Northern Ireland*, N.Y. TIMES, Aug. 18, 1991, § 1, at 3; Alan Cowell, *More Bombings: Italy's Religious Heritage Under Attack*, N.Y. TIMES, Aug. 1, 1993, § 4, at 2; Howell Raines, *3 British Servicemen Are Killed in I.R.A. Attacks in Netherlands*, N.Y. TIMES, May 2, 1988, at A1; Renwick McLean, *Madrid Car Bomb Wounds 40*, N.Y. TIMES, Feb. 10, 2005, at A12; William E. Schmidt, *4 Hurt as 2 I.R.A Bombs Go Off On Busy London Shopping Street*, N.Y. TIMES, Dec. 17, 1992, A5.

1930s and 1940s.¹¹ One may state, therefore, that no part of the world has more experience with terrorism than Europe. Certainly, no Nation is alone as a victim of terror.

The Member States of the Council of Europe have, as a body, a very broad range of experience in battling terrorism. Since the Second World War, this experience has evolved at the same time as the development of the European Convention on Human Rights ("European Convention") and its protective system.¹² It is of interest to see how this reflected in the European Convention itself in the first place and the case law of the European Court of Human Rights ("Court of Human Rights") in the second. The message to derive from this story is that not only can the law of human rights fight terrorism, but it has. To examine how, one needs to go back to the beginning.

III. THE ORIGINS OF THE CONVENTION SYSTEM

Both the European experience of fascism and the Second World War seem to have inspired the European Convention system of collective State responsibility.¹³ The abuse of human rights that occurred during this period was of such a gross nature that it was clear that leaving individual rights to the mercy of individual States was a recipe for disaster. The South African experience towards the end of the 1940s seems to have confirmed this view.¹⁴ As that country ignored world opinion and introduced the apartheid system, the world community stood by powerless to act.¹⁵ Something had to be done.

In answer to this and in the light of their recent experience, a number of the countries of Europe formed the view that the best way forward comprised a form of collective State responsi-

11. See Marijan Pavcnik & Louis E. Wolcher, *A Dialogue on Legal Theory Between a European Legal Philosopher and His American Friend*, 35 TEX. INT'L L.J. 335, 381 (2000).

12. See Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, Nov. 4, 1950, effective Sept. 3, 1953, 213 U.N.T.S. 222, as amended by Protocol No. 11, ETS No. 155, entered into force Nov. 1, 1998, *reprinted in EUROPEAN UNION LAW: SELECTED DOCUMENTS* 255 (George A. Bermann et al. eds., 2002) [hereinafter *European Convention*].

13. See Victor Ferreres Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705, 1711-12 (2004).

14. See generally Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745 (1991).

15. See *id.*

bility.¹⁶ They decided to bind themselves by agreement to secure to their people certain minimum rights.¹⁷ Inspired by their own heritage of libertarian values, they set about drafting a code that would both establish those rights formally on an international level and create a judicial structure whereby they could insure the identification and security of those rights.¹⁸ They would do this on the basis of collective responsibility for each others' obligations in this regard.¹⁹

During 1949 and 1950, European Nations drafted the European Convention.²⁰ These Nations adopted and opened the European Convention for signature on November 4, 1950, and it came into force on September 3, 1953, upon ratification by eight of the fourteen signatory States.²¹ At the time of this writing, this has increased to forty-six States.²² The original eight States were Denmark, Federal Republic of Germany, Iceland, Ireland, Luxembourg, Norway, Sweden, and the United Kingdom.²³ Few could have foreseen then what this relatively small beginning would grow to over the following fifty years. During that time, the European Convention has inspired similar conventions in the Americas,²⁴ in Africa,²⁵ and elsewhere.²⁶ Many other such conventions and bills of rights within the constitutions of a number of States have the European Convention as their model.²⁷

16. See European Convention, *supra* note 12, pmbli.; see also 2 BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 30 (1980); Daniel B. Pickard, *Security Council Resolution 808: A Step Toward a Permanent International Court for the Prosecution of International Crimes and Human Rights Violations*, 25 GOLDEN GATE U. L. REV. 435, 456 (1995).

17. See Pickard, *supra* note 16, at 456.

18. See FERENCZ, *supra* note 16, at 30; see also Pickard, *supra* note 16, at 456-57.

19. See Pickard, *supra* note 16, at 456-57.

20. See FERENCZ, *supra* note 16, at 30; see also Pickard, *supra* note 16, at 456.

21. See MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 3 (1995).

22. See Council of Europe, *Member States of The Council of Europe*, available at <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (last visited Feb. 23, 2005) (noting that there are 46 signatories but only 45 States ratified the convention).

23. See JANIS ET AL., *supra* note 21, at 3.

24. See American Convention on Human Rights, July 18, 1978, OEA/Ser. L.V./II.82, 1144 U.N.T.S. 123.

25. See African Charter on Human and Peoples' Rights, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5 (1981).

26. See, e.g., Council of the League of Arab States, The Arab Charter on Human Rights, Sept. 15, 1995, reprinted in 18 HUM. RTS. L.J. 151 (1997).

27. See, e.g., Yash Ghai, *Universal Rights and Cultural Pluralism: Universalism and Rela-*

IV. THE COURT COMMISSION AND THE COMMITTEE OF MINISTERS

Although the European Convention came into force in 1953, 1959 saw the structure for overseeing the implementation completed. It consisted of the Commission of Human Rights, the Court of Human Rights, and the Committee of Ministers (Foreign) of the Council of Europe.²⁸

Persons, groups, or States initially made complaints at the Commission of Human Rights.²⁹ The Commission decided on the admissibility of complaints.³⁰ It could hear submissions from the parties, orally or written.³¹ If it found a complaint admissible, it attempted to secure a friendly settlement of the matter between the parties.³² If the Commission could not achieve friendly settlement, then the Commission drew up a report on the facts of the case and stated its opinion as to whether the facts found disclosed a breach by the State concerned of its obligations under the European Convention.³³ The Commission made a report, but did not make binding decisions on the interpretation and application of the European Convention.³⁴ The Commission might then refer the case either to the Court or in certain circumstances to the Committee of Ministers.³⁵

Secondly, the Court of Human Rights delivered judgments binding in international law on the interpretation and applica-

tivism: Human Rights as a Framework for Negotiating Interethnic Claims, 21 CARDOZO L. REV. 1095, 1029-30 (2000) (reporting that the Fiji Constitution of 1970 contained a Bill of Rights based on the European Convention); Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 531 (1991) (noting that the Czech Bill of Rights incorporates principles of the European Convention); Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963, 1965 (2004) (explaining that the United Kingdom's Human Rights Act incorporates the European Convention).

28. See Jonathan L. Black-Branch, *Observing and Enforcing Human Rights Under the Council of Europe: The Creation of a Permanent European Court of Human Rights*, 3 BUFF. J. INT'L L. 1, 7 (1996).

29. See European Convention, *supra* note 12, art. 34; see also Black-Branch, *supra* note 28, at 19.

30. See European Convention, *supra* note 12, art. 29; see also Black-Branch, *supra* note 28, at 19.

31. See European Convention, *supra* note 12, art. 31.

32. See *id.* arts. 38-39.

33. See *id.* art. 41.

34. See *id.*

35. See *id.* art. 46.

tion of the European Convention.³⁶ The Court could also award damages or “just satisfaction” as referred to in Article 41 of the Convention.³⁷ Its function was to determine if States had breached the European Convention.³⁸ If they had, the Court’s judgment did not strike down the act which gave rise to the breach by making it unlawful or unconstitutional.³⁹ It declared the State to be in breach of the Convention.⁴⁰ The State concerned was under an obligation to comply with the judgment and the Committee of Ministers supervised the execution of the judgment.⁴¹ In many cases, this required Contracting States to change their laws or procedures to bring them into line with the European Convention.⁴²

Thirdly, the Committee of Ministers of the Council of Europe could decide a Contracting State had breached the European Convention under Article 32 in a case never referred to the Court.⁴³ As in the case of a judgment of the Court, the Committee of Ministers could award just satisfaction.⁴⁴ Its decisions were final and obliged the State concerned to comply with the decision.⁴⁵

This former three-headed system operated for almost forty years.⁴⁶ The structure was, at least in the case of the Court and Commission, part-time.⁴⁷ Although at the beginning both were under-utilized,⁴⁸ by its end in 1998, the Court sat for approximately one week each month and the Commission by its end in 1999 for approximately two weeks in every month. In 1975, 335 applications were registered with the Commission.⁴⁹ In 1998,

36. *See id.* art. 46.

37. *See id.* art. 41.

38. *See id.* art. 46.

39. *See id.*

40. *See id.*

41. *See id.* art. 54.

42. *See id.* art. 53.

43. *See id.* art. 32.

44. *See id.* art. 46.

45. *See id.*

46. *See* Project on International Courts and Tribunals, *European Court of Human Rights*, available at <http://www.pict-pcti.org/courts/ECHR.html> (last visited Jan. 22, 2005).

47. *See* European Convention, *supra* note 12, art. 42

48. *See* Project on International Courts and Tribunals, *supra* note 46.

49. *See* 472 DAIL DEB. col. 816 (Dec. 4, 1996) (Convention for the Protection of Human Rights and Fundamental Freedoms: Motion).

5,979 were registered.⁵⁰

The Court's workload also reflected this development.⁵¹ In its early years, the Court had very few cases with which to deal.⁵² A number of countries delayed some time before they accepted the right of individuals to seek redress under the European Convention⁵³ and this also inhibited the growth of the system's activity. Gradually, however, that activity grew. In its first thirty years, the Court delivered thirty-six judgments.⁵⁴ By 1998 (when it came to an end), it had delivered 837 judgments.⁵⁵ By its end, the Court had reached a position of preeminence in the protection of human rights in Europe no one could have imagined when the European Convention was signed in 1950.⁵⁶

V. THE CURRENT POST-1998 STRUCTURE

Overhauling the system became necessary due to the massive increase in its case load,⁵⁷ and this was achieved in 1998.⁵⁸ The former Court and the Commission were abolished and their joint functions given to a new, full-time, permanent Court of Human Rights.⁵⁹ This Court, like its predecessor, has one judge from each member country.⁶⁰ There are currently forty-six member countries.⁶¹ Judges are elected to a six-year term by the Parliamentary Assembly of the Council of Europe.⁶² This body consists of Parliamentarians from each of the Parliaments of the Council of Europe.⁶³ The Parliamentary Assembly elects one judge from each country from a list of three proposed by its gov-

50. See Registrar of the European Court of Human Rights, *European Court of Human Rights: Historical Background, Organisation and Procedure*, available at <http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm> (last visited Jan. 22, 2005).

51. See *id.*

52. See *id.*

53. See European Convention, *Dates of Entry Into Force*, available at <http://www.echr.coe.int/Eng/EDocs/DatesOfRatifications.html> (last visited Jan. 22, 2005).

54. See, e.g., JANIS ET AL., *supra* note 21, at 28.

55. See Project on International Courts and Tribunals, *supra* note 46.

56. See generally Leo F. Zwaak & Therese Cachia, *The European Court of Human Rights: A Success Story?*, 11(3) HUM. RTS. BRIEF 32 (2004).

57. See *id.* at 33.

58. See *id.*

59. See Registrar of the European Court of Human Rights, *supra* note 50.

60. See European Convention, *supra* note 12, at art. 38.

61. See *Dates of Entry Into Force*, *supra* note 53.

62. See Registrar of the European Court of Human Rights, *supra* note 50.

63. See *id.*

ernment.⁶⁴ It is proposed to change this to a single non-renewable term of nine years.⁶⁵

The Court sits in Committees of three judges⁶⁶ which may, acting unanimously, strike out clearly inadmissible cases, in four Chambers of seven judges, or in two Grand Chambers of seventeen judges.⁶⁷

Cases come to the Court as applications from individuals.⁶⁸ Other than a Committee striking an application as above, an application will be referred to a Chamber of seven which may decide to communicate it to the government.⁶⁹ Following submissions from the government and replies thereto by the applicant, the Chamber decides on admissibility with sometimes a provisional vote on the merits of the case, i.e., as to whether a State has committed a violation.⁷⁰ There follows an attempt to settle the case on a friendly basis.⁷¹ If not settled thus, the Chamber proceeds to a decision on the merits as to whether a State has violated the European Convention.⁷²

The decision thus reached does not become final until three months later,⁷³ unless during this time the parties agree not to refer the case to the Grand Chamber.⁷⁴ If either of the parties do refer it, a panel of the Grand Chamber decides whether it will accept the case for referral.⁷⁵ The Grand Chamber accepts very few cases for referral. If it does accept a case,

64. European Convention, *supra* note 12, at art. 38.

65. See Press Release, Registrar of the European Court of Human Rights, President Calls for Speedy Ratification of New Protocol (Jan. 25, 2005), available at <http://www.echr.coe.int/eng/press/2005/jan/annualpressconferencejanuary%202005.htm> ("Protocol No. 14, which amends the Convention system, is intended to guarantee the Court's long-term effectiveness by optimising the screening and processing of applications. Opened for signature on 13 May 2004, it has so far been signed by 32 countries and ratified by six of those. It will enter into force once ratified by all the States party to the Convention.")

66. See Registrar of the European Court of Human Rights, *supra* note 50.

67. See *id.*

68. See European Court of Human Rights, *Application*, available at <http://www.echr.coe.int/Application%20forms/FormulaireBILINGUE.pdf> (last visited Dec. 24, 2004); see also Registrar of the European Court of Human Rights, *supra* note 50.

69. See Registrar of the European Court of Human Rights, *supra* note 50, ¶ 3.

70. See *id.* (noting that the complaints were first the subject of a preliminary examination by the Commission, which determined their admissibility).

71. See *id.*

72. See *id.*

73. See *id.* ¶ 28.

74. See *id.* ¶ 27.

75. See *id.*

then the Chamber decision is set aside and the Grand Chamber decides on the case. The Chamber level hears few cases by way of public oral hearings. At the Grand Chamber level, all cases dealt with to date have received a public oral hearing.

VI. *THE REACH OF THE CONVENTION TODAY*

From its small beginnings, the European Convention's reach has spread three quarters of the way around the globe. Today the Court's jurisdiction stretches from Iceland to the Pacific coast of the Russian Federation.⁷⁶ Forty-six States encompassing over 800 million Europeans now have bound themselves by this more than half-century old Charter.⁷⁷ Persons within the jurisdiction of each of them now have the right of individual petition directly to the Court of Human Rights once they have exhausted their domestic remedies. Each of the countries, in the words of the European Convention Article 1, have undertaken to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."⁷⁸

They also may have responsibility, in certain circumstances, with respect to acts that occur outside their territorial jurisdiction.⁷⁹ The most recent example of this occurred when the European Court found Russia responsible for the acts of its agents in the Moldovan breakaway province of Transdnistria.⁸⁰ The military, political, and economic support of the separatist regime by the Russian Federation was such that the Court held it responsible for violations of human rights although committed in the breakaway province which was beyond Russian territory.⁸¹

The Court based its opinion on the European Convention Paragraphs 310 through 319. In the Court's judgment, while jurisdiction remains a necessary condition for the State's responsi-

76. See European Court of Human Rights, *Composition of the Court*, available at <http://echr.coe.int/BilingualDocuments/LISTEDEPRESEANCE.htm> (last visited Dec. 24, 2004).

77. See *id.*

78. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, Eur. T.S. No. 155, 33 I.L.M. 960, art. 1 (1994).

79. See *Ilascu v. Moldova*, App. No. 48787/99 (Eur. Ct. H.R. July 8, 2004) (not yet reported), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=6&portal=hbk&action=html&highlight=ilascu&sessionId=1319768&skin=hudoc-en>.

80. See *id.* ¶ 382.

81. See *id.* ¶¶ 383-85.

bility, circumstances may occur where that jurisdiction is not necessarily restricted to the national territory of the high contracting party.⁸² Acts of the States performed outside their territory or producing effects there may amount to the exercise by them of their jurisdiction within the meaning of Article 1.⁸³ A State's responsibility may engage where, by means of military action, it in effect exercises control over an area beyond its territory.⁸⁴ By virtue of that control, and pursuant to Article 1, they are obliged to secure to those within their area of control, the rights guaranteed by the European Convention.⁸⁵ This obligation arises where it exercises control through its armed forces directly or through a subordinate local administration.⁸⁶

It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory since overall control alone of the area may engage the responsibility of the Contracting Party concerned.⁸⁷ Responsibility extends not just to the acts of soldiers or officials, but also to acts of the local administration which survives by virtue of its military and other support.⁸⁸ Moreover, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals within its jurisdiction may engage the State's responsibility under the Convention where they act *ultra vires* or contrary to instructions.⁸⁹ The European Convention does, however, have limits.⁹⁰

The Court has held that the European Convention operates in a regional context notably in the legal space of the Contracting States.⁹¹ It is not designed to apply throughout the world even in respect of the conduct of Contracting States.⁹²

82. *See id.* ¶ 330.

83. *See id.* (explaining that such jurisdiction is still subject to Article I constraints); *see also id.* ¶¶ 383-85.

84. *See id.* ¶¶ 330, 383-85.

85. *See id.* ¶¶ 387-94.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.* ¶ 319.

90. *See id.* ¶ 312 (holding that from the standpoint of public international law, the words "within their jurisdiction" in Article 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily territorial).

91. *See id.*

92. *See id.*

The Court recognized to date such extraterritorial jurisdiction only in respect of territory which the European Convention would normally cover, as in the cases of Cyprus and Transdnies-
tria, but not in the Federal Republic of Yugoslavia.⁹³

VII. *COUNTER-TERRORISM AND THE COURT'S RESPONSE: THE GENERAL APPROACH*

As noted above, no part of the world has more experience with terrorism than Europe. The response of the Council of Europe through the jurisprudence of the European Court of Human Rights to its experience of terrorism may therefore assist in the ongoing battle against terrorism.⁹⁴ The European Convention reflects in many ways libertarian political and cultural values shared with the United States. Its interpretation by the Court in the light of counter-terrorist measures by concerned governments may therefore have some relevance in the United States.⁹⁵

Terrorism, in its essence, is an attempt to undermine democracy and the rule of law by acts so outrageous that democratic society is driven from the moderate center from where it normally governs itself to the extreme right or left from where it may develop authoritarian measures to defend itself.⁹⁶ Terrorism seeks to impose upon the majority the views of a minority, because it stops at nothing in pursuit of its aims.⁹⁷ Terrorists aim, presumably, to either terrorize the majority into meeting the demand of the fanatical few or drive it to abandon moderate democracy for authoritarianism in the hope of thereby collaps-

93. Compare *Cyprus v. Turkey*, [2002] 35 Eur. H.R. Rep. 30, with *Bankovic & Others v. Belgium & 16 Other Contracting States*, Application No. 52207/99, 11 B.H.R.C. 435 (Grand Chamber, Dec. 12, 2001).

94. See Fionnuala Ni Aolain, *Looking Ahead: Strategic Priorities and Challenges for the United Nations High Commissioner for Human Rights*, 35 COLUM. HUM. RTS. L. REV. 469, 488-89 (2004) (noting that the Council of Europe has issued Recommendation 1550 for combating terrorism).

95. See Jeremie J. Wattellier, *Comparative Legal Responses to Terrorism: Lessons from Europe*, 27 HASTINGS INT'L & COMP. L. REV. 397 (2004) (noting that European legal responses to its terrorist attacks can be used to ascertain the prudence of American legal responses to terrorism).

96. See Luzius Wildhaber, *Balancing Necessity and Human Rights in Response to Terrorism*, available at http://www.coe.int/T/E/Com/Files/Ministerial-Conferences/2002-judicial/Panel3_LuziusWildhaber.asp#TopOfPage (last visited Dec. 31, 2004).

97. See *id.*

ing democratic society.⁹⁸ In either event, terrorism attacks the pillars of democracy and the rule of law upon which the human rights structure rests.⁹⁹ Democratic Nations must defend against this assault, and human rights law must accommodate that need.¹⁰⁰ The President of the European Court of Human Rights, Judge Luzius Wildhaber,¹⁰¹ speaking at the Tenth Annual International Judicial Conference in Strasbourg, May 22-24, 2002, on balancing necessity and human rights in response to terrorism observed:

the European Convention should not be applied in such a way as to prevent States from taking reasonable and proportionate action to defend democracy and the rule of law. Moreover, as the European Court of Human Rights has held, Convention States have a duty under Article 2 of the Convention to take appropriate steps to safeguard the lives of those within their jurisdiction.¹⁰²

If democratic States are not going to give terrorism its victory by driving them to extreme counter-measures, then those societies must always take care to ensure that while their response to terrorism remains a strong and effective one, it is also a careful and proportionate one.¹⁰³ Wendell Phillips said that "the price of liberty is eternal vigilance."¹⁰⁴ That vigilance must be not just against the enemy without, but also against the insidious attempt which lies at the heart of terrorism to lead democratic society to subvert itself from within.¹⁰⁵ The need for this careful balance between a strong and effective response to terrorism on the one hand and preserving our democratic human rights on the other has motivated the jurisprudence of the Court over the near half century of its existence where it has addressed the problems raised by terrorism.

The Court has frequently been called upon since its very first case of *Lawless v. Ireland* in 1959 to deal with complaints arising from counter-terrorist measures taken by Contracting

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. Wendell Phillips, *Speech Before the Massachusetts Antislavery Society (1852)*, in *THE DICTIONARY OF QUOTATIONS* (Bergen Evans ed., 1968).

105. *See Wildhaber, supra* note 96.

States.¹⁰⁶ Following are some examples of how the Court has applied some of those principles since that time. Referring to some European Convention Articles that have arisen in these cases will conveniently achieve this.

A. *Article 1 — Obligation to Respect Human Rights*

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.¹⁰⁷

This Article requires that the High Contracting Parties secure to everyone within their jurisdiction the rights and freedoms defined in the European Convention.¹⁰⁸ The Court has recognized that there may be no time when those rights are more under threat, or when they are more needed, than when the State is faced with terrorist attack.¹⁰⁹ Therefore, such times as these require the closest and most careful supervision by the Court.¹¹⁰ Yet the Court has found that interference with rights may be necessary and acceptable subject to the Court's supervision.¹¹¹ Moreover, derogation from certain articles of the European Convention may be permissible subject to the Court's supervisory jurisdiction.¹¹² Interference or derogation must be justified and is under the close supervision of the Court.¹¹³ The Court may permit a margin of tolerance or a margin of appreciation, as known in the jurisprudence of the Court, in relation to

106. *Lawless v. Ireland*, [1960] 1 Eur. H.R. Rep. 1.

107. European Convention, *supra* note 12, art. 1.

108. *See id.*

109. *See, e.g., İlhan v. Turkey*, [2002] 34 Eur. H.R. Rep. 36 (reporting that the plaintiff was injured in a situation where he was thought to be a dangerous, escaping terrorist).

110. *See id.* (laying down the requirement of an official investigation into facts surrounding the deaths instituted by officials without waiting for an individual complaint).

111. *See Hatton & Others v. United Kingdom*, [2003] 37 Eur. H.R. Rep. 611 (recognizing that States could interfere with Convention Rights, although they had to minimize that interference as far as possible).

112. *See Ireland v. United Kingdom*, [1980] 2 Eur. H.R. Rep. 25, ¶ 207 (noting that States do not enjoy unlimited power).

113. *See id.* (noting that while the State has a wide margin of appreciation to determine whether the life of the Nation is threatened by a public emergency and, if so, how far it might go in attempting to overcome it, the Court is empowered to rule on whether the State has gone beyond the "extent strictly required by the exigencies" of the crisis in derogating from the Convention).

such interference or derogation.¹¹⁴ The 1978 case of *Klass v. Germany*, displays an early but still classical (and topical) exposition of this.¹¹⁵ Dealing with powers of secret surveillance of its citizens, the Court observed at Paragraph 42 that “[p]owers of secret surveillance of citizens characterising as they do the police [S]tate, are tolerable under [the European Convention] only insofar as strictly necessary for safeguarding the democratic institutions.”¹¹⁶ Paragraph 48 further states:

Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime.¹¹⁷

Further at Paragraph 49, the Court observed:

Nevertheless the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that a Contracting State may not in the name of the struggle against espionage and terrorism adopt whatever measures they deem appropriate.¹¹⁸

So, while a margin of appreciation remains available to States, ultimately the Court determines how far a State may go in combating terrorism and thereby to supervise the manner in which they do so.¹¹⁹

114. See *Hatton*, [2003] 37 Eur. H.R. Rep. at 631 (noting that the State enjoyed a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention).

115. [1978] 28 Eur. Ct. H.R. (ser. A) at 4, [1979-1980] 2 Eur. H.R. Rep. 214.

116. See *id.* at 231, ¶ 42.

117. See *id.* at 232, ¶ 48.

118. See *id.* at 232, ¶ 49.

119. See *id.* (stating that the Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse).

B. Article 2 — Right to Life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.¹²⁰

This Article protects the right to life. Heretofore, this has been taken to refer to "lives in being."¹²¹ The Article sets out exceptions where deprivation of life results from the use of force which is no more than absolutely necessary, and any one of the three exceptions might well be involved in the context of terrorist violence.¹²²

In *McCann v. the United Kingdom*, the Court dealt with the case where a security forces operation killed a number of terrorist suspects.¹²³ The United Kingdom alleged that the suspects were involved in planting a bomb in Gibraltar which is, among other things, a British military base.¹²⁴ A shootout killed the deceased.¹²⁵ The operation by the authorities was planned in such a way that it seemed inevitable that any force used would be lethal.¹²⁶ The suspects were neither armed nor was there in fact a bomb in Gibraltar which they could have detonated.¹²⁷ It was however, apparently their plan.¹²⁸ The authorities planned the operation in such a way as to ensure that authorities could gather evidence for a later trial. The Court found that this aim could not justify the unnecessary risk of death to either the vic-

120. European Convention, *supra* note 12, art. 2.

121. *See id.*

122. *See McCann & Others v. United Kingdom*, [1996] 21 Eur. H.R. Rep. 97.

123. *See id.* at 123, ¶ 103.

124. *See id.* at 118, ¶ 78.

125. *See id.* at 114-19, ¶¶ 59-81.

126. *See id.* at 112-13, ¶¶ 48-53.

127. *See id.* at 121, ¶ 93.

128. *See id.* at 122, ¶¶ 98-100.

tims or to innocent parties.¹²⁹ It seems clear that part of the rationale for this decision was the difficulty of requiring soldiers in a shootout situation to make snap decisions as to what is or is not necessary. At Paragraph 213, the Court summarized its decision:

In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respect at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists, constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2(2) (a) of the Convention.¹³⁰

It seems clear that the Court based its finding in *McCann* upon a finding of inadequate planning by the authorities.¹³¹ The requirement by the Court seems to put upon the State the burden of arranging matters so that a minimum risk to life occurs in any anti-terrorist activities that it carries out.¹³² The problems raised in relation to evidence in this kind of situation are obviously quite considerable.¹³³ The Court requires that anti-terrorist activities by the State must ensure minimum risk to life.¹³⁴

In a powerful dissenting judgement by nine of the judges of the Court (led by the then President of the Court), the minority considered that the government did not lack appropriate care in the control and organization of the arrest operation, and that the use of lethal force, however regrettable, did not exceed such as was “absolutely necessary.” The dissenters did, however, emphasize the utmost seriousness of the obligation on the State to protect the right to life. The difficulties of everyone involved in such extraordinary circumstances are very clearly demonstrated by this division in the Court. The unanimous Court found that a

129. *See id.* at 173, ¶ 230.

130. *Id.* at 176-77, ¶ 213.

131. *See id.*

132. *See id.*

133. *See* Civil Evidence Act, 1968, 64(11) (Eng.) (noting that the government has to get evidence before the government can convict someone).

134. *See* Oneryildiz v. Turkey, [2004] 39 Eur. H.R. Rep 12 (referring to a State’s duty to take all necessary measures to prevent lives in being from being unnecessarily exposed to danger and, ultimately, from being lost).

heavy burden of responsibility lay on the State in conducting anti-terrorist operations to ensure that only such lethal force as was absolutely necessary was in fact used.

Under Article 2, the Court has also established the need for proper investigation into unexplained or suspicious deaths.¹³⁵ The significance of this in counter-terrorist operations must be crucial since frequently the authorities will have in their custody those who are regarded as their deadly enemies and as being prepared themselves to stop at nothing.¹³⁶ Unexplained deaths in such custody situations must therefore always give rise to the gravest of suspicions.¹³⁷ In such circumstances, the Court has established the following obligations:

- a) there must be an official investigation into the facts surrounding the deaths instituted by officials without waiting for an individual complaint;¹³⁸
- b) the form of the investigation may vary with the circumstances but must be characterised by the independence of the investigators who should be independent of those who are the subject of the investigation;¹³⁹
- c) the investigator should have the power to examine witnesses and to have carried out for him effective autopsies and must carry out his inquiry in good time;¹⁴⁰
- d) the investigation must be capable of reaching a definitive conclusion about whether the force used was lawful;¹⁴¹
- e) even if the investigation is not public, interested parties should have the opportunity to participate and be informed of the result of the inquiry;¹⁴²
- f) if the inquiry concludes that death was the result of the use of unlawful force its report must be considered by the prosecution authorities and where relevant the relatives of the victim given the reasons why a prosecution is not going ahead.¹⁴³

135. See *Ilhan v. Turkey*, [2002] 34 Eur. H.R. Rep. 36.

136. See *id.* ¶ 880. In the facts of that case, the plaintiff was put into custody. See *id.*

137. See *id.* ¶ 913 (noting that investigations into such deaths have frequently been superficial and inadequate).

138. See *id.* ¶ 908.

139. *Gulec v. Turkey*, [1999] 28 Eur. H.R. Rep. 121.

140. *Kaya v. Turkey*, [1998] 27 Eur. H.R. Rep. 1.

141. See *id.* ¶¶ 23, 27 (noting that the contents of the autopsy report were rather imprecise and that the Court considers that to have been one of the major deficiencies in the investigation).

142. *Ogur v. Turkey*, [2001] 31 Eur. H.R. Rep. 40.

143. See *id.*

Through the above requirements, the Court attempts to ensure that in circumstances where it remains difficult for applicants to obtain any information as to what has occurred,¹⁴⁴ the authorities who have the ability to do so are required to provide proper, effective, thorough investigation of unexplained deaths.¹⁴⁵

C. Article 3 — Prohibition of Torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.¹⁴⁶

The prohibition on torture and inhuman or degrading treatment or punishment is absolute. No derogation is permissible in respect of Article 3. The State remains responsible for the safety and well-being of those in its custody no matter what the circumstances.

Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulty 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 victims' conduct.¹⁴⁷

The Article deals with torture as one head and with inhuman or degrading treatment or punishment as another.¹⁴⁸ However, the countries concerned must find a violation under either head as shameful and humiliating. The U.N. General Assembly in 1975 declared that “[t]orture constitutes an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment.”¹⁴⁹ Amnesty International in its worldwide campaign against torture once had as its motto: “Torture – as unthinkable as slavery.”¹⁵⁰

144. See, e.g., *Kaya*, [1999] 27 Eur. H.R. Rep. 1, ¶ 7 (noting that the body of the deceased was only discovered some months after the incident that caused his death).

145. See *id.* ¶¶ 23-24 (listing things that were wrong the authorities' investigation and that needed to be improved.).

146. European Convention, *supra* note 12, art. 3.

147. *Chahal v. United Kingdom*, [1997] 23 Eur. H.R. Rep. 413.

148. See *Selmouni v. France*, [1999] 29 Eur. H.R. Rep. 403, ¶ 96.

149. European Convention, *supra* note 12, art. 1.

150. See, e.g., *Amnesty for the Defense*, TIME, July 9, 1973, available at http://www.time.com/time/archive/preview/0,10987,907502,00.html#anch_ofie (“The report is an-

The Court has dealt all too frequently with claims under Article 3.¹⁵¹ It has been forced on occasion to make distinctions between what constitutes torture and what constitutes inhuman or degrading treatment or punishment.¹⁵² While emphasizing that the finding of a violation under either provision of Article 3 is a very serious matter, the Court has nonetheless reserved the description of "torture" for the most serious and deliberate instances.¹⁵³ The Court has stated that:

It was the intention that the Convention with its distinction between torture and inhuman treatment should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.¹⁵⁴

In that case, the British authorities in Northern Ireland had subjected persons in their custody to forms of interrogation including the five techniques in question, including covering their heads with hoods (sensory deprivation), obliging them to stand for long periods against a wall with their limbs outstretched, subjecting them to intense noise, depriving them of sleep and feeding them on a diet of bread and water.¹⁵⁵

The Commission found these techniques amounted to torture in violation of Article 3.¹⁵⁶ In a judgment still regarded today with considerable reservation, the Court characterised them as "inhuman and degrading treatment."¹⁵⁷ The Court still however found a violation of Article 3.¹⁵⁸

In *Aksoy v. Turkey*, the Court for the first time found a State guilty of torture.¹⁵⁹ Authorities stripped the applicant naked and with his arms tied behind his back, suspended him by his arms.¹⁶⁰ In the Court's view, authorities deliberately inflicted

other step in [Amnesty International]'s newly launched campaign to 'raise a public outcry throughout the world until torture becomes as unthinkable as slavery.'").

151. See, e.g., *Ireland v. United Kingdom*, [1980] 2 Eur. H.R. Rep. 25; *Selmouni*, [1999] 29 Eur. H.R. Rep. 403.

152. See, e.g., *Selmouni*, [1999] 29 Eur. H.R. Rep. 403, ¶¶ 100-01, 105; *Aksoy v. Turkey*, [1997] 23 Eur. H.R. Rep. 553, ¶ 63; *Ireland*, [1980] 2 Eur. H.R. Rep. 25, ¶¶ 164-65.

153. See, e.g., *Selmouni*, [1999] 29 Eur. H.R. Rep. 403, ¶¶ 105-06; *Aksoy*, [1997] 23 Eur. H.R. Rep. 553, ¶ 64; *Ireland*, [1980] 2 Eur. H.R. Rep. 25, ¶ 167.

154. *Ireland*, [1980] 2 Eur. H.R. Rep. 25, ¶ 167.

155. See *id.* ¶ 96.

156. See *id.* ¶ 167.

157. See *id.* ¶¶ 164-67.

158. See *id.* ¶ 167.

159. [1997] 23 Eur. H.R. Rep. 553.

160. See *id.* ¶ 64.

this and of so serious and cruel a nature that the Court could only describe it as torture.¹⁶¹

The observer may wonder at the distinction in the Court's characterisation of torture in these two cases. It remains worthy of notice however that, as observed above, any finding of a violation of Article 3 for whatever reason must always shockingly indict the relevant leadership.

Evolving standards in relation to such behavior may explain the distinction made in the two above cases.¹⁶² The Court in *Selmouni v. France* found that the exposure of the applicant, a prisoner suspected of drug smuggling, to severe beatings, to running the gauntlet of police officers trying to trip him up, being urinated upon, threatened with a blow lamp and threats of sexual assault amounted to torture.¹⁶³ The Court considered that certain acts which in the past might have been classified as "inhuman or degrading treatment" as opposed to "torture" could be classified differently in the future.¹⁶⁴ It took the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.¹⁶⁵

The pressure to ill treat or torture persons within their custody is, of course, greater the greater the perceived threat to society.¹⁶⁶ The usual question posed remains the "ticking bomb" situation where the prisoner "definitely" knows the location of a bomb in the city. One must wonder at how "definite" the knowledge must be before torture is supposedly justified.¹⁶⁷ Where a suspect "surely must know" is a point of departure easily reached – then where he "probably knows," then where he "might possibly know."¹⁶⁸

In truth, once the government crosses the line, everything rapidly becomes not only permissible, but probably obligatory.¹⁶⁹

161. *See id.*

162. *Selmouni v. France*, [1999] 29 Eur. H.R. Rep. 403.

163. *See id.* ¶¶ 103-06.

164. *See id.* ¶ 101.

165. *See id.*

166. *See* H.C. 5100/94, Pub. Comm. Against Torture in *Isr. v. Gov't of Israel*, (53(4) P.D. 817.

167. *See id.* ¶ 37.

168. *See id.*

169. *See id.*

Security authorities ready and permitted to torture one suspect would need good excuse as to why they did not torture another when a bomb actually did go off or some other outrage actually occurred. Thus, may the possibly permissible in extreme circumstances easily become an obligatory part of the interrogation procedures in nearly all cases. The door back to medievalism and barbarism opens all too readily.

In considering this matter the President of the Supreme Court of Israel rendering the Court's decision of September 1999 that physical interrogation techniques were unlawful even in ticking bomb situations noted:

We are aware that this decision does not ease dealing with the harsh reality. This is the destiny of democracy, as not all means are acceptable to it and not all practices are open to it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and allow it to overcome its difficulties.¹⁷⁰

In the same vein, Judge Anand, now Chief Justice of the Supreme Court of India, when confronted with the deaths and torture of alleged terrorists in police custody, had this to say:

(The) challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to 'terrorism'. That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves.¹⁷¹

D. *Article 5 — Right to Liberty and Security*

Article 5 of the Convention reads as follows:

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

170. *See id.*

171. *Shri D.K. Basu v. State of West Bengal*, [1997] 1 S.C.C. 216.

- a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition;
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.¹⁷²

This Article provides for the right to liberty and security of per-

172. See European Convention, *supra* note 12, art. 5.

son. It precludes deprivation of liberty save for: serving a sentence;¹⁷³ where a person is in violation of a Court order;¹⁷⁴ arrest or detention in the course of legal proceedings to bring before the legal authorities or pending trial where it is feared he might flee or commit another offense;¹⁷⁵ and other exceptions not directly relevant here.¹⁷⁶

A government must promptly bring a person so detained under Article 5(1)(c) before a judicial body.¹⁷⁷ This remains a vital ingredient in the protection against ill-treatment of prisoners. There should never be the possibility that the battered and bloodied body of the mistreated may be hidden away from judicial scrutiny. They must further be able to take proceedings by which the lawfulness of their detention shall be decided speedily by a Court.

The case law of the Court recognizes the difficulty of the States in fighting terrorism as can be seen here.¹⁷⁸ Nonetheless, the right to liberty remains so central to the personal rights of the individual, the danger of violation of those rights during forms of unsupervised detention so great, it does not allow “free rein” to the States. Subject to the derogation provisions of Article 15, the case law shows that the exceptions set out in Paragraph 1 of Article 5 are exhaustive and to be interpreted narrowly. The Court has referred to “the text of Article 5 § 1 which sets out an exhaustive list . . . for a narrow interpretation”¹⁷⁹

In *Ilascu & Others v. Moldova & Russia*, the Court examined the alleged violation of Article 5.¹⁸⁰ Between June 2, 1992, and June 4, 1992, the applicants had been arrested at their homes in Tiraspol by a number of people, some of whom were wearing uniforms bearing the insignia of the former USSR’s Fourteenth Army.¹⁸¹ The government accused the applicants of anti-Soviet

173. See *id.* art. 5(1)(a).

174. See *id.* art. 5(1)(b).

175. See *id.* art. 5(1)(c).

176. See *id.* art. 5(1)(d)-(f).

177. See *id.* art. 5(3); see also *Ireland v. United Kingdom*, [1980] Eur. H.R. Rep. 25.

178. See *id.* ¶ 212.

179. *Winterwerp v. Netherlands*, [1979] Eur. Ct. H.R. (ser. A) at 4, ¶ 37, [1980] 2 Eur. H.R. Rep. 387, ¶ 37.

180. App. No. 48787/99 (Eur. Ct. H.R. July 8, 2004) (not yet reported), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=6&portal=hbkm&action=html&highlight=ilascu&sessionId=1319768&skin=hudoc-en>.

181. See *id.*

activities and illegally combating the legitimate government of the State of Transdniestria, under the direction of the Moldovan Popular Front and Romania.¹⁸² The government also charged the petitioners with a number of offenses, which included two murders.¹⁸³ On December 9, 1993, the "Supreme Court of the MRT" sentenced Mr. Ilascu to death and ordered the confiscation of his property.¹⁸⁴ The same court sentenced the other applicants to terms of twelve to fifteen years' imprisonment, and ordered the confiscation of their property.¹⁸⁵ It inquired as to whether the government detained the applicants "lawfully," "in accordance with a procedure prescribed by law," and "after conviction by a competent court."¹⁸⁶ It questioned whether the "court" which had convicted the applicants met the requirements of impartiality and independence, whether it was established by law, and whether it guaranteed a judicial procedure.¹⁸⁷

The Court noted that the requirement of lawfulness in Article 5, Section 1(a) is not satisfied by compliance with the relevant domestic law; compliance must be with convention principles, particularly the rule of law.¹⁸⁸ This embodies the notion of fair and proper procedure, which should not be arbitrary.¹⁸⁹ In this regard, a "conviction" cannot result from a flagrant denial of justice.¹⁹⁰ The "Supreme Court of the MRT," which had passed sentence on Mr. Ilascu, failed all of these tests.¹⁹¹ The MRT was the breakaway province of Moldova. The Court had therefore been established by an entity illegal in international law and unrecognised by the international community. That "court" belonged to a system which could hardly function on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention.¹⁹² The arbitrary nature of the circumstances in which it tried and convicted applicants, as they had described them in an account which other parties (and as de-

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.*

188. *See* Winterwerp v. Netherlands, [1979] Eur. Ct. H.R. (ser. A) at 4, ¶ 37.

189. *See id.*

190. *See id.*

191. *See id.*

192. *See id.*

scribed and analyzed by the institutions of the OSCE) did not dispute evidenced this.¹⁹³ The Court found that the applicants had not been convicted by a “court,” and that the sentence passed could not be regarded as “lawful detention” ordered “in accordance with a procedure prescribed by law.”¹⁹⁴

E. Article 6 — Right to a Fair Trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.¹⁹⁵

193. *See id.*

194. *See id.*

195. *See* European Convention, *supra* note 12, art. 6.

This Article provides for the right to a fair trial, and, *inter alia*, for a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.¹⁹⁶ Judgments should be pronounced publicly, but the press and public may be excluded from all or part of the trial where the interests of national security in a democratic society require it.¹⁹⁷

The Article provides that every one charged with a criminal offense shall be presumed innocent until proved guilty according to law.¹⁹⁸ At the heart of Article 6 — and indeed in its very heading as inserted by Protocol No. 11 — is the concept of fairness.¹⁹⁹ The Court approaches the Article on the principle that the overall fairness of the trial must be looked at based on its entirety, rather than based on the specific details.²⁰⁰

In the course of battling terrorism, States have created special courts in order to deal with the problems brought about by terrorism.²⁰¹ The two main common law systems of the Council of Europe, i.e., the British and the Irish, have developed special non-jury courts for the trials of specified offenses.²⁰² The Convention does not provide for a right to a trial by jury.²⁰³ Many of the forty-six Council of Europe countries do not provide for the right to a trial by jury as we understand them in the common law world, so non-jury courts are not *per se* in violation of Article 6.²⁰⁴ However, in the case law of the Court, such special courts, like all courts, must be independent and impartial in the sense of Article 6.²⁰⁵ In the case of *Incal v. Turkey*,²⁰⁶ the Court found that the national security courts in Turkey failed to satisfy the standard of independent and objective impartiality required due to the presence of a military legal officer on the Court. The Turkish government argued that the military experience of such judges would assist their militarily inexperienced civil counterparts in dealing with cases involving armed action directed

196. *See id.*

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.*

201. *See, e.g.,* Alex Carlile, *We Need New Terror Laws*, *GUARDIAN*, Dec. 21, 2004, at 14.

202. *See id.*

203. *See* European Convention, *supra* note 12, art. 6.

204. *See id.*

205. *See id.*

206. [1998] 29 Eur. H.R. Rep. 449, ¶¶ 65-73.

against the State.²⁰⁷ The Court, however, took the view that there was a reasonable suspicion or appearance that such a military judge who remained in the army and who depended for his future career prospects upon his military superiors might not have the required degree of independence or appearance thereof.²⁰⁸ A long line of judgements against Turkey followed, which have condemned such courts.²⁰⁹

More recently, in the case of *Gencel v. Turkey*, the Court (Third Section), in dealing with the consequences of a violation under Article 6 in relation to State security courts, took the view that it was necessary to include a statement to the effect that the most appropriate form of relief would be to retry the applicant.²¹⁰ The Court took the view that this recommendation should be strictly limited to violations of Article 6, particularly in relation to the lack of a fair hearing by an independent and impartial tribunal on account of the presence of a military judge on the bench of the State's security court.²¹¹ The Court takes the view that such a court, failing to fulfil the competency requirement due to its lack of independence and impartiality, cannot provide the authority for a lawful prison sentence.²¹² The Court considered that this coincided with a general trend among Convention States to provide for some sort of reopening of proceedings following a judgment of the Court in a case involving an Article 6 violation.²¹³ As a result, it added the following paragraph in some fifty cases involving violations relating to State security courts in Turkey:

When the Court finds that an applicant has been convicted by a tribunal which is not independent and impartial within the meaning of Article 6, paragraph 1, it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant is granted in due course a retrial by an independent and impartial tribunal.²¹⁴

The Court has also considered the right to remain silent

207. *See id.*

208. *See id.*

209. *See id.*

210. [2003] 23 Eur. H.R. Rep. 536.

211. *See id.*

212. *See id.*

213. *See id.*

214. *See id.*

under Article 6.²¹⁵ It has decided that, although not specifically mentioned in Article 6 of the Convention, this right, and the right not to incriminate one's self, are generally recognised international standards at the heart of the notion of a fair procedure under Article 6.²¹⁶ These rights are closely linked to the presumption of innocence contained in Article 6(2) of the European Convention.²¹⁷ The Court has upheld these rights in the case of *Heaney & McGuinness v. Ireland*.²¹⁸ In *Heany*, the government arrested the appellants on suspicion of a series of terrorist offenses.²¹⁹ Under Section 52 of the offenses against the State Act 1939, brought into effect in 1972 by proclamation following certain terrorist incidents, the government required the appellants to give an account of their movements, convicted and sentenced them for failing to answer.²²⁰ The Court held, based on Paragraph 58, that the security and public order concerns relied on by the government could not justify a provision which extinguished the very essence of the right to remain silent and the right against self-incrimination guaranteed by Article 6(1) of the European Convention.²²¹ Because of the close link, in this context, between those rights and the presumption of innocence guaranteed explicitly by Article 6(2), the Court also concluded the government violated that provision.²²²

F. Article 7 — No Punishment Without Law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised na-

215. *See id.*

216. *See* Saunders v. United Kingdom, [1997] 23 Eur. H.R. Rep. 313, ¶ 59.

217. *See* European Convention, *supra* note 12, art. 6.

218. [2001] 33 Eur. H.R. Rep. 12, ¶ 40.

219. *See id.*

220. *See id.*

221. *See id.*

222. *See id.*

tions.²²³

This Article protects against retrospective criminalization. In the case of *Ecer & Zeyrek v. Turkey*,²²⁴ the government charged the applicants with aiding and sheltering alleged terrorists. The Court was satisfied that these offenses had been committed in 1988 and 1989.²²⁵ The applicants were sentenced pursuant to the Prevention of Terrorism Act 1991 which imposed a 50% tariff on punishment for offenses in connection with terrorism.²²⁶ As a result, they were given a higher sentence than that provided by law at the time of the commission of the offenses.²²⁷ Given this, the Court therefore found a violation of Article 7.²²⁸ The Court held:

the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.²²⁹

G. Article 8 — Right to Respect for Private and Family Life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²³⁰

223. European Convention, *supra* note 12, art. 7.

224. [2002] 35 Eur. H.R. Rep. 26, ¶ 13.

225. *See id.* ¶ 15.

226. *See id.*

227. *See id.* ¶ 36.

228. *See id.* ¶ 37.

229. *See id.* ¶ 29.

230. *See* European Convention, *supra* note 12, art. 8.

As noted above in *Klass v. Germany*,²³¹ interference with the right to respect for private and family life is permissible only when such interference is: in accordance with law, necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.²³² Although the requirements for provision by law and the legitimate aims have not normally given rise to problems in regard to attempts to deal with terrorism, the requirement that the infringement be "necessary" has frequently given rise to such difficulties. In *Silver v. United Kingdom*, the Court set out a classic exposition of the principles of the "necessary" requirement:

- a) Necessary is not synonymous with "indispensable" nor has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".
- b) The contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention.
- c) The phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a "pressing social need" and be "proportionate to the limited aim pursued."
- d) Those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted.²³³

In order to measure whether an action is "proportionate to the limited aim pursued," the Court has evolved a proportionality test which is applied widely throughout European Convention articles.²³⁴ This test requires a reasonable relationship of proportionality between the means employed and the aim sought to be realised.²³⁵ The demands of the general interest of the community and the requirements of the protection of the

231. [1978] 28 Eur. Ct. H.R. (ser. A) 4, [1979-1980] 2 Eur. H.R. Rep. 214.

232. See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, Eur. T.S. No. 155, art. 8(2).

233. *Silver v. United Kingdom*, [1981] 3 Eur. H.R. Rep. 475, ¶ 97.

234. *James v. United Kingdom*, [1986] 8 Eur. H.R. Rep. 123, ¶ 50.

235. See *id.* ¶ 50.

individual's fundamental rights must strike a fair balance.²³⁶ Thus, any interference with such a right must minimize the possible inconsistencies with the achievement of the legitimate goal sought and it is for the Court to determine if that balance has been achieved.²³⁷

H. Article 10 — Freedom of Expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²³⁸

As stated by the Court, this Article “constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.”²³⁹ Restrictions to such freedom of expression are permissible, however, under the second paragraph of the Article which allows such restrictions where required by national security, territorial integrity or public safety or for the prevention of disorder or crime.²⁴⁰ In the struggle against terrorism and the development of the European Convention jurisprudence, two issues that have arisen related to Article 10 include: (a) “hate speech” and speech inciting violence and (b) broadcasting.

The Court addressed the issue of “hate speech” in *Surek v.*

236. *See id.*

237. *See id.*

238. European Convention, *supra* note 12, art. 10.

239. *Thoma v. Luxembourg*, [2003] 36 Eur. H.R. Rep. 21, ¶ 43.

240. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, Eur. T.S. No. 155, art. 10(2).

Turkey.²⁴¹ This case arose from the publication of two letters in a weekly review that accused the State of brutalities, massacres and murders in "Kurdistan."²⁴² The applicant, a major shareholder, was fined and convicted of disseminating propaganda against the "indivisibility" of the State.²⁴³ The Court held that the European Convention allowed such a restriction of the freedom of speech under Article 10(2) because it had involved an interference with the right to freedom of expression,²⁴⁴ it was prescribed by law²⁴⁵ and had a legitimate purpose.²⁴⁶ The final question, however, remained whether such a restriction was a necessary measure.²⁴⁷ The Court addressed the issue by noting that the exceptions provided in Article 10 must be strictly interpreted.²⁴⁸ A margin of appreciation is allowed but goes hand in hand with a European supervision that embraces not just the national legislation but the decision of national courts applying it.²⁴⁹ The Court also noted the responsibility of the media not to overstep the bounds set to protect the State against threats of violence and of national security.²⁵⁰ It recognized, however, that the press must also impart information and ideas on political issues including divisive ones.²⁵¹ Not only does the press have the duty to impart such information and ideas, the public has a right to receive them.²⁵² The Court found that the letters in this case were likely to stir up hatred and violence²⁵³ and, in a split vote of eleven votes to six, ruled that the State had not overstepped the mark and therefore there was no violation.²⁵⁴

The Court addressed the issue of restrictions on broadcasting in *Purcell v. Ireland* where the former Commission of Human Rights upheld a broadcasting ban on Republican parties both in Ireland and Northern Ireland on the basis that it was propor-

241. [1999] 7 Eur. H.R. Rep. 339.

242. *See id.* ¶ 10.

243. *See id.* ¶¶ 9, 14.

244. *See id.* ¶ 43.

245. *See id.* ¶ 48.

246. *See id.* ¶ 52.

247. *See id.* ¶¶ 53-65.

248. *See id.* ¶ 58(i).

249. *See id.* ¶ 58(ii).

250. *See id.* ¶ 59.

251. *See id.*

252. *See id.*

253. *See id.* ¶ 62.

254. *See id.*

tionate to the need to protect national security and prevent disorder and crime in the context of battling against terrorism.²⁵⁵ As the Court had done on several occasions, the Commission emphasised that freedom of expression constituted one of the essential foundations of a democratic society.²⁵⁶ The exercise of that freedom “carries with it duties and responsibilities” and that the defeat of terrorism remains a public interest of the first importance in a democratic society.²⁵⁷ In a situation where politically motivated violence poses a constant threat to the lives and security of the population and where the advocates of this violence seek access to the mass media for publicity purposes, it is particularly difficult to strike a fair balance between the requirements of protecting freedom of information and the imperatives of protecting the State and the public against armed conspiracies seeking to overthrow the democratic order which guarantees this freedom and other human rights.²⁵⁸ The Irish Government subsequently lifted the ban.²⁵⁹

I. *First Protocol: Article 1 — The Right to Property*

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.²⁶⁰

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.²⁶¹

This Article protects the right to the peaceful enjoyment of possessions, subject to the public interest and as provided by law and by the general principles of international law.²⁶² One of the possible ways by which the States may fight terrorism seems to

255. App. No. 15404/89, [1991] 70 Eur. Comm'n H.R. Dec. & Rep. 262, in 1991 Y.B. EUR. CONV. H.R. 90, 99 (Eur. Comm'n on H.R. 1991).

256. *See id.*

257. *See id.*

258. *See id.*

259. *See id.*

260. *See* European Convention, *supra* note 12, art. 1 (as amended by Protocol 1).

261. *Id.*

262. *See id.*

have been signalled by the Court in *Phillips v. United Kingdom*.²⁶³ The Court in this case considered the provisions of the British Drug Trafficking Act of 1994, which provided for a confiscation order in respect of assets following conviction of drugs offenses.²⁶⁴ It held that the government could confiscate the property in question where it was deemed to be the proceeds of drug trafficking.²⁶⁵ This created a presumption that any property, appearing to have been held by the defendant at any time since his conviction or during the period of six years before the date of commencement of the criminal proceedings, had been received as a payment or reward in connection with drug trafficking and any expenditure incurred by him during the same period were paid for out of the proceeds of drug trafficking.²⁶⁶ This presumption was rebuttable.²⁶⁷ The sum payable corresponded to the amount, which the trial judge found the applicant to have benefited from through drug trafficking over the preceding six years and which he was able to realize from assets within his possession for which he had been unable to produce an explanation sufficient to overturn the statutory presumption.²⁶⁸ The burden of proof lay upon the convict and was to the balance of probabilities.²⁶⁹

The Court considered that this did amount to an “interference” with the right of peaceful possession of property under Article 1 of Protocol 11.²⁷⁰ The Court further held that the statutory provision “must be construed in the light of the general principle set out in the first sentence of the first paragraph and there must, therefore, exist a reasonable relationship of proportionality between the means employed and the aim sought.”²⁷¹ The aim pursued by the confiscation order procedure conferred upon the courts a further “weapon in the fight against the scourge of drug trafficking.”²⁷² It would act as a deterrent to

263. [2001] Eur. H.R. Rep. 433.

264. See Drug Trafficking Act, 1994, c. 37, §§ 2, 4 (Eng.) (superseding the Drug Trafficking Offenses Act, 1986).

265. See *Phillips*, [2001] Eur. H.R. Rep. 433, ¶¶ 52-54.

266. See *id.* ¶¶ 33, 41.

267. See *id.* ¶ 43.

268. See *id.* ¶ 44.

269. See *id.* ¶¶ 33, 43.

270. See *id.* ¶ 50.

271. See *id.* ¶ 51.

272. See *id.* ¶ 52.

those hoping to make large profits.²⁷³ It would also act to deprive a person of profits actually made and would also remove the value of such proceeds from future investment in the drugs trade.²⁷⁴ The Court found the procedure fair.²⁷⁵ In Paragraph 54, the Court held that “[a]gainst this background and given the importance of the aim pursued,” the interference suffered by the applicant was not disproportionate and therefore there was no violation.²⁷⁶

The Court’s based its reasoning upon the importance of battling the drugs trade with every available weapon.²⁷⁷ In this case, the weapon was a financial one of seizing financial assets. It is not difficult to imagine that similar provisions made in the struggle against terrorism would meet the same approach by the Court, subject to the same levels of fairness in the procedures.

J. Article 15 — Derogation in Time of Emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.²⁷⁸
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.²⁷⁹
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.²⁸⁰

In cases that arose out of the fight against terrorism in Eu-

273. *See id.*

274. *See id.*

275. *See id.* ¶ 53.

276. *See id.* ¶ 54.

277. *See id.* ¶ 52.

278. European Convention, *supra* note 12, art. 15(1).

279. *See id.* art. 15(2).

280. *See id.* art. 15(3).

rope, the Court has examined convention provisions allowing derogation from these and other derogable rights. Article 15 specifically provides derogation "in time of war or other public emergency threatening the life of the nation."²⁸¹

This derogation provision was considered in the very first case the Court ever dealt with which was then called the "Lawless" case.²⁸² It is now more normally referred to as *Lawless v. Ireland*. It is interesting to read the case, as it shows a new international court deciding on various aspects of its procedures for the first time in a case before it. The petitioner, Lawless, complained that he was detained without trial in contravention of Articles 5, 6, and 7.²⁸³ In an effort to deal with IRA activities in the border areas between Northern Ireland and Ireland, the Irish Government had introduced detention without trial in 1957.²⁸⁴ The Government, also by letter to the Secretary General of the Council of Europe, notified its intention to do so.²⁸⁵ The Court proceeded to consider the power of derogation under Article 15 at Paragraph 22 of the judgement of the July 1, 1961.²⁸⁶ It held that the Court determines whether the conditions laid down in Article 15 had been fulfilled.²⁸⁷ It then went on to examine the existence of "a public emergency threatening the life of the [N]ation" and as to whether the measures taken in derogation from obligations under the European Convention "strictly required [] the exigencies of the situation."²⁸⁸ The Court requires these for a valid derogation.²⁸⁹

The Court proceeded to a minute examination of each aspect of these criteria.²⁹⁰ It also examined whether the notification procedure had been correct and whether the derogating measures were "inconsistent with . . . other obligations under international law."²⁹¹ In Paragraph 28, the Court noted that "the emergency" referred to meant "an exceptional situation of

281. *See id.* art. 15(1).

282. *See* *Lawless v. Ireland*, [1960] 1 Eur. H.R. Rep. 1, ¶1.

283. *See id.* ¶ 15.

284. *See id.* ¶¶ 18, 31.

285. *See id.* ¶¶ 19, 31.

286. *See id.* ¶ 30.

287. *See id.*

288. *See id.*

289. *See id.*

290. *See id.* ¶¶ 31-34.

291. *See id.* ¶¶ 30, 36-37.

crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”²⁹² In the same paragraph, the Court noted that the combination of factors that reasonably led the Government to deduce such an emergency: 1) the existence in the country’s territory of a secret army using violence to attain its ends; 2) the fact that this secret army was operating outside the State thereby seriously jeopardising Ireland’s relations with its neighbour; and 3) the steady and alarming increase in terrorist activities from the Autumn of 1956 and throughout the first half of 1957.²⁹³ The Court upheld the Irish Government’s derogation.

The Court in its jurisprudence acknowledges a wide margin of appreciation to the States in determining the existence of an emergency and the exigency of the measures taken. Nonetheless, it is not *carte blanche*. The Court will examine every aspect of the provisions of Article 15 in a case where the government relies upon its derogation under that Article. The *Lawless* case demonstrates the searching investigation that the Court undertakes to determine if the derogation remains valid.

In the subsequent case of *Brannigan & McBride v. United Kingdom*, the Court further considered its approach in relation to derogation under Article 15 and actions taken thereunder.²⁹⁴ The Court found that while the question of whether an emergency threatened the life of the nation and what measures required dealing with it was better left with the State in question, the State did not enjoy an unlimited margin of appreciation.²⁹⁵

It is for the Court to rule on whether, *inter alia*, the States have gone beyond the “extent strictly required by the exigencies of the crisis.”²⁹⁶ The domestic margin of appreciation is thus accompanied by a European supervision.²⁹⁷ At the same time, in exercising its supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to the dero-

292. *See id.* ¶ 31.

293. *See id.* ¶¶ 31-32.

294. [1994] 17 Eur. H.R. Rep. 539.

295. *See id.* at Opinion, ¶ 44.

296. *See id.*

297. *See id.*

gation, and the duration of the emergency situation.²⁹⁸

A more recent exposition of the Court's view on this matter, which reflects the intervening case law, is to be found in *Aksoy v. Turkey*:

The Court recalls that it falls to each contracting State, with its responsibility for "the life of [its] nation" to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter, a wide margin of appreciation should be left to the national authorities.

Nonetheless, contracting parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation.²⁹⁹

CONCLUSION

The above examples demonstrate the way in which the European Convention has developed its jurisprudence to meet the requirements of the battle against terrorism. The Court has clearly expressed the view that it remains the duty of governments to fight terrorism because it is fundamentally an attack on democracy and the rule of law, the very pillars on which rest the human rights protective system. As the case law shows, the Court has dealt with terrorism problems that have arisen since 1956. This near half-century of experience may, therefore, assist those who have had more recent experience of terrorism. States must have the ability to protect themselves effectively against terrorism, and human rights law must accommodate this need.

The European Convention must be applied in such a way as

298. *See id.* at Judgment, ¶ 43.

299. *Aksoy v. Turkey*, [1997] 23 Eur. H.R. Rep. 553, ¶ 68.

to allow States to take reasonable and proportionate action to defend democracy and the rule of law. The European Convention is not, to coin a phrase, “a mutual suicide pact.” The role of the European Court of Human Rights in this regard strikes the correct balance between the necessity to take all appropriate protective measures and the duty of all to avoid subverting the rights and freedoms which lie at the heart of and are the “*sine qua non*” of democracy. In the cases cited above, which involve Article 1 and the requirement on governments to secure the rights contained in the Convention, Article 2 and the duty to safeguard life where resorting to force, Article 3 and the condemnation of torture and inhuman treatment, Article 5 and the right to liberty, Article 6 and the right to a fair trial, Article 7 and the guarantee of no punishment without law, Article 8 and State surveillance of its citizens, Article 10 and freedom of expression, Article 1 of Protocol Number One and the confiscation of assets, and finally Article 15 and the Court’s supervision of the power of derogation, the Court has shown that it remains possible to fight terrorism with success while at the same time protecting those rights which characterize our countries as democracies. It is more than possible; for almost fifty years governments have done it.