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**Fighting Terrorism and Respecting
Human Rights. A Case Study of
International Human Rights
Jurisprudence.**

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Abbreviations

CERD	Committee on the Elimination of Racial Discrimination
COE	Council of Europe
CTC	Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism, Counter-Terrorism Committee
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GA	United Nations General Assembly
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IHL	International Humanitarian Law
OAS	Organization of American States
OAU	Organization of African Unity
OSCE	Organization for Security and Co-Operation in Europe
SAARC	South Asian Association for Regional Cooperation
SC	United Nations Security Council

UK	United Kingdom
UN	United Nations
U.N.T.S.	United Nations, Treaty Series

1 Introduction

1.1 Background

“While we recognize that the threat of terrorism may require specific measures, we call on all governments to refrain from any excessive steps, which could violate fundamental freedoms and undermine legitimate dissent”

Extract from *Human Rights and Terrorism*, a joint statement by Mary Robinson, United Nations High Commissioner for Human Rights, Walter Shwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights, on 29 November 2001.

This was the first time that these three high representatives made a common statement, which came in response to the events of 11 September 2001 and the United Nations Security Council resolution 1373 of 28 September 2001. All three representatives requested the need to balance the fight against terrorism with the respect of human rights.

1.2 Objectives

The United Nations’ Special Rapporteur on the subject of terrorism and human rights, Kalliopi Koufa, observed that “there are several questions and issues that are pertinent to a study on ‘Terrorism and human rights’ ... including what acts or violence constitutes terrorism ... [and] how to strike the balance in accommodating the control of terrorism with the protection of human rights”.¹

As for the first question, I will first address it through an analysis of universal and regional instruments on terrorism to set the framework surrounding the concept of terrorism in international law (2. Concept of Terrorism). Secondly,

¹ Kalliopi Koufa, “Human Rights and Terrorism in the United Nations”, in *Justice Pending: Indigenous Peoples and Other Good Causes*, eds. Gudmundur Alfredsson and M. Stavropoulou, (The Hague: Kluwer, 2002), p. 215. See also, *Report of the Policy Working Group on the United Nations and Terrorism*, UN GA, A/57/273 - S/2002/875, 6 August 2002, Annex, p.14, Recommendation 5, recommending the publication by the United Nations of “a digest of the core jurisprudence of international and regional human rights bodies on the protection of human rights in the struggle against terrorism. Governments and human rights organizations could find such a compilation of direct use in the development of counter-terrorism policies.”

my main objective with this thesis is to ascertain the international legal framework of this question of “balance”, mainly by conducting a case study of the international jurisprudence on terrorism of the European Court of Human Rights (3. Case Law on Terrorism in the European Commission and Court of Human Rights) and of the UN Human Rights Committee (4. Case Law on Terrorism in the United Nations Human Rights Committee). Finally, I will present my analysis and final comments on the concept of terrorism and the international human rights jurisprudence (5. Analysis and Final Remarks).

2 Concept of terrorism

2.1 Problem of Definition

The United Nations Member States have yet to agree on a universal definition of terrorism, something that unquestionably would be helpful for the drafting of a comprehensive convention on terrorism. However, terrorism is not the sole concept to exist in international law without a definition. The term “minorities” is widespread in international human rights instruments and case law, although there is no universally accepted definition for the term. One can also refer to the legal concept of “persecution” and its role in refugee law, since neither the 1951 Convention, nor the 1967 Protocol, provide for a definition of “persecution”. Undoubtedly, even in the absence of legal definitions, an international legal regime exists applicable to “minorities”, to “persecution”, and likewise to terrorism.

To add to the legal problematic, terrorism constitutes a mutating concept and its history has forced us to challenge our conventional knowledge regarding the concept. September 11th 2001 constitutes a cornerstone in changing the conventional approach to terrorism and it is the reason why particular attention will be devoted upon this point in time in each chapter of this thesis.

At the international level, the initial major failure in attempting to set a legal definition of terrorism dates back to 1937 and the League of Nations. An attempt to establish the International Convention for the Prevention and Punishment of Terrorism was aborted. The proposed definition was as follows: “All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public”.

Since 1937, the international legal approach to terrorism has been limited to a case-by-case or issue-by-issue methodology rather than encompassing a more comprehensive approach. In subsequent sections of this chapter, I shall survey the international law to establish what legal regime is applicable to terrorism and underline what can be included as part of the concept of terrorism (2.2 The international legal regime applicable to the prevention and suppression of terrorism). I will review each universal (2.2.1 Review of the universal instruments on terrorism) and regional instruments (2.2.2 Review of the regional instruments on terrorism) related to the prevention and suppression of international terrorism, and some UN declarations and resolutions (2.2.3 Review of United Nations declarations and resolutions). Finally, I shall approach the aspects of terrorism in international humanitarian law and international criminal law (2.2.4 The international humanitarian law and international criminal law aspects of

terrorism), prior to the presentation of my analysis and conclusions (Concluding remarks on the concept of terrorism).

2.2 The International Legal Regime Applicable to the Prevention and Suppression of Terrorism

2.2.1 Review of the Universal Instruments on Terrorism

The twelve existing universal conventions on terrorism are not of a comprehensive nature and are aimed at preventing and suppressing the commitment of specific acts of a grave nature. Historically, the universal conventions emerged in response to new forms of terrorism, such as hijacking, hostage taking, safety of maritime navigation and platforms, threats linked with nuclear material or explosives, public bombings and the financing of terrorism. There is an obligation frequently imposed on Contracting States to make such offences punishable by severe penalties, namely, treaty law establishing the extra severity of terrorist acts. Most of them listing offences also includes the well-known principle of *aut dedere aut judicare*, which is an obligation imposed on States to extradite the offender or submit him to prosecution, if he is present in its territory to counter “safe haven” possibilities of offenders. Hence, the treaties provide a significant extension of State jurisdiction. From these treaties it is possible to list a number of offences that can be legally considered as terrorism, although this list is certainly not exhaustive when it comes to the concept of terrorism.

First of all, civil aviation has been a continuous target for terrorists and this has led to the elaboration of four universal treaties: the 1963 *Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft*, the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, the 1971 *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, and the 1988 *Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*. As in the case with many of the earlier instruments these conventions do not employ the term “terrorism”, but they are nevertheless acknowledged as being interrelated with various aspects of the problem of international terrorism.² The acts to be recognized, as within the

² These Conventions, the 1973 *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, and the 1980 *Convention on the Physical Protection of Nuclear Material* do not refer directly to the term terrorism but are recognized by different instruments as being related to various aspects of the problem of international terrorism, such as in the 1994 *Declaration on Measures to Eliminate International Terrorism*’s Preamble.

concept of terrorism, are the acts that represent risks for the safety of aircrafts, like sabotage, violence on board the aircraft or “hijacking”. According to the *Convention for the Suppression of Unlawful Seizure of Aircraft*, the offence of “hijacking” is performed by any person on board an aircraft in flight who “unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act” or “is an accomplice of a person who performs or attempts to perform any such act”.³ Moreover, acts of violence at airports can also amount to terrorism if they are to cause serious injury or death. This is also the case for attacks on facilities of an airport serving civil aviation or aircraft not in service located thereon or disrupting the services of the airport. None of these treaties are applicable to aircrafts of military, police or customs use.

Furthermore, pursuant to the 1973 New York *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, the concept of terrorism includes attacks on the person or liberty of an internationally protected person and also attacks on the official premises, accommodation or means of transportation of such a person. Also, this convention is the first of the universal treaties on terrorism to refer to the maintenance of international peace.

The first of the twelve treaties to use the term “international terrorism” was the 1979 New York *International Convention against the Taking of Hostages*. In the Preamble, paragraph 5 stresses that all acts of taking of hostages are to be considered as manifestations of international terrorism. This could seem to encompass all acts of hostage-taking offences under international humanitarian law, however Article 12 provides that this convention will not be applicable to acts of hostage-taking committed in armed conflict under the Geneva Conventions of 1949 and the Protocols of 1977. Under this treaty, hostage-taking is defined as any person who seizes or detains and threatens to kill, to injure or to continue to detain another person in order to force a third party, namely a State, an international organization, a natural or judicial person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.⁴ The attempt to commit such an act or the participation, as an accomplice of anyone who commits or attempts to commit an act of hostage taking will also constitute an offence under this convention.⁵ Notwithstanding, this treaty is only applicable to hostage-taking situations that are of an international character.⁶

³ *Convention for the Suppression of Unlawful Seizure of Aircraft*, Art.1.

⁴ Art.1(1) *International Convention against the Taking of Hostages*, Art.1(1).

⁵ *Ibid.* Art.1(2).

⁶ *Ibid.* Art.13, that is when the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.

Several unauthorized acts related to the use, transport or storage of nuclear material could be classified as terrorism.⁷ The 1980 Vienna *Convention on the Physical Protection of Nuclear Material* has two primary objectives. The first objective is to establish levels of physical protection required to be applied to nuclear material used only for peaceful purposes while in international transport. The peaceful purposes aspect results in the exclusion of nuclear material of military use and the non-application of this treaty to international humanitarian law. The second objective is the provision of measures against unlawful acts with respect to such material while in international nuclear transport, also in domestic use, storage and transport.

The safety of maritime navigation and fixed platforms on the Continental Shelf against terrorist acts was an international concern that led to the 1988 Rome *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* and *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*. Both treaties include a list of offences that can be considered as terrorism, such as, unlawful and intentional acts that endanger the safe navigation of ships or the safety of the fixed platform such as threats, violence, attacks, and the placing of dangerous devices.⁸ Notwithstanding, warships, ships owned or operated by States when being used as a naval auxiliary or for customs or police purposes, or a ship withdrawn from navigation or laid up, are out of the scope of application of the first Convention.⁹

The 1991 Montreal *Convention on the Marking of Plastic Explosives for the Purpose of Detection* mirrors advances in international law in stating in its preamble that States are conscious of the implications of acts of terrorism for international security. The third and fourth paragraphs of this Preamble stress the fact that plastic explosives have been used for terrorist acts and that the marking of such explosives for the purpose of detection would contribute to the prevention of terrorism. This Convention does not establish any offence of a terrorist nature, but is meant strictly to facilitate the prevention of terrorism. States Parties are required to prohibit and prevent the manufacture of unmarked explosives in their territories, as well as the movement into or out of their territories of unmarked explosives.¹⁰ Furthermore, States must exercise strict

⁷ *Convention on the Physical Protection of Nuclear Material*, Art.7, which includes: the manipulation without lawful authority that is likely to cause death or serious injury or damage to property; the theft or robbery of nuclear material; a threat to use nuclear material to cause death or serious injury or damage to property; a threat of theft or robbery of nuclear material in order to compel a natural or legal person, international organization or State to do or refrain from doing any act

⁸ Art.3 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*.

⁹ *Ibid.* Art.2, and *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, Art.2(1).

¹⁰ *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, Art.II and III.

and effective control over the possession of any existing stocks of unmarked explosives.¹¹

On the 15th of December 1997, the General Assembly of the United Nations adopted the *International Convention for the Suppression of Terrorist Bombings*. The main offence to be considered a “terrorist act” from the scope of this Convention is the unlawful and intentional delivery, placing, discharging or detonating of an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility.¹² In any case, the act or acts must have been committed in conjunction with either of the following legal conditions: a) the intent to cause death or serious bodily injury; or b) the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

Also considered an offence under this treaty, the attempt to commit such an act, the participation as an accomplice in the act or the attempt, and the organization or direction of others to commit the act or attempt to commit it.¹³ Moreover, it is an offence to contribute in any other way to the commission of the act or the attempt to commit it by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.¹⁴

Furthermore, there is a requirement for States Parties to make the offences punishable in respect of their grave nature and to make them criminal.¹⁵ Such criminal acts shall be under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.¹⁶ This Convention does not apply to situations without an international character.¹⁷ Additionally, it excludes activities of armed and military forces of States, which are governed by international humanitarian law.¹⁸

The General Assembly of the United Nations adopted, the 9th of December 1999, the *International Convention for the Suppression of the Financing of Terrorism*. Under this treaty, an offence results from the action of any person, who by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or with the

¹¹ *Ibid.* Art.IV.

¹² *International Convention for the Suppression of Terrorist Bombings*, Art.2(1).

¹³ *Ibid.* Art.2(2), (3)a and b). .

¹⁴ *Ibid.* Art.2(3)c).

¹⁵ *Ibid.* Art.4.

¹⁶ *Ibid.* Art.5.

¹⁷ *Ibid.* Art.3.

¹⁸ *Ibid.* Art. 19 and last paragraph of the Preamble,

knowledge that they are to be used, in full or in part, in order to carry out one of the following acts.¹⁹

The first act is an offence under the treaties listed in the annex of this Convention.²⁰ The second one is legally very interesting. Although this Convention does not provide for a definition of terrorism, Article 2(1)b) refers to “any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”.

Once again, as mentioned previously, those acts are to be made criminal and punishable by appropriate penalties considering their grave nature.²¹ They are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.²²

None of the offences in this Convention are to be considered as fiscal or political offences.²³

2.2.2 Review of the Regional Instruments on Terrorism

There are seven relevant conventions on terrorism emanating from regional organizations, namely: the 1971 *OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance*, the 1977 *European Convention on the Suppression of Terrorism*, the 1987 *SAARC Regional Convention on Suppression of Terrorism*, the 1988 *Arab Convention on the Suppression of Terrorism*, the 1999 *Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism*, the 1999 *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*, and the 1999 *OAU Convention on the Prevention and Combating of Terrorism*, 14 July 1999.

The first striking difference between the regional and the universal conventions is that, with the exception of the 1977 European Convention, all of the regional conventions on terrorism have established a definition of terrorism or at least a list of offences to be regarded explicitly as terrorism. Furthermore, some of the conventions go further than the universal treaties by explicitly prohibiting

¹⁹ *International Convention for the Suppression of the Financing of terrorism*, Art.2(1).

²⁰ Includes all the previous universal treaties on terrorism, except the 1963 Tokyo Convention and the 1991 *Convention on the Marking of Plastic Explosives for the Purpose of Detection*.

²¹ *International Convention for the Suppression of the Financing of Terrorism*, Art.4.

²² *Ibid.* Art.6.

²³ *Ibid.* Art.13 and 14.

State terrorism or State sponsored terrorism.²⁴ Moreover, new concepts of terrorism emerge, like environmental terrorism²⁵ and technological terrorism.²⁶

Notwithstanding, there is a stunning difference between the “North and South” regional treaties. In the Arab, Islamic and OAU conventions, the people’s struggle against foreign occupation, aggression, colonialism and hegemony, aimed at the liberation and self-determination in accordance with international law are not to be considered as terrorism.²⁷ This legal position seems to rely partly on Article 1(4) of the 1977 Additional Protocol I to the 1949 Geneva Conventions²⁸ in International Humanitarian Law. Under this provision, the scope of international armed conflicts will encompass the “... armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations ...”.

This approach has been criticized as legitimizing terrorism. However, as it will be discussed below, terrorism is strictly forbidden under international humanitarian law and under this provision, one must clearly see the difference between “who may lawfully engage in hostilities with the quite different question of what methods of warfare they may employ when they do so engage”.²⁹

As such, this approach remains highly controversial given the universal stand on terrorism is that there is absolutely no justification under any circumstances to resort to terrorism.³⁰

²⁴ See *Arab Convention on the Suppression of Terrorism*, Art.3; *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*, Art.3; *OAU Convention on the Prevention and Combating of Terrorism*, Art.4.

²⁵ See e.g. the definition of terrorism in Art.1 of *The Arab Convention on the Suppression of Terrorism*: “any act or threat of violence, whatever its motives or purposes, that occurs for the advancement of an individual or collective criminal agenda, causing terror among people, causing fear by harming them, or placing their lives, liberty or security in danger, or aiming to cause damage to the environment or to public or private installations or property or to occupy or seize them, or aiming to jeopardize a natural resource”.

²⁶ See *Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism*, Art.1: “technological terrorism” can be defined to be the use or threat to use of nuclear, radiological, chemical or bacteriological weapons with the purpose to undermine public safety, terrorizing the population or influencing the decisions of the authorities.

²⁷ See *Arab Convention on the Suppression of Terrorism*, Art.2(a); *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*, Art.2(a); *OAU Convention on the Prevention and Combating of Terrorism*, Art.3(1).

²⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 [hereinafter *Protocol I 1977*].

²⁹ Christopher Greenwood, “A Critique of the Additional Protocols to the Geneva Conventions of 1949”, eds. Helen Durham and Timothy L.H. McCormak, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, (The Hague: Kluwer, 1999), p.18.

³⁰ See e.g. 1994 UN *Declaration on Measures to Eliminate International Terrorism*, Art.1; *International Convention for the Suppression of Terrorist Bombings*, Art.5; *International Convention for the Suppression of the Financing of terrorism*, Art.6.

2.2.3 Review of United Nations Declarations and Resolutions

2.2.3.1 1994 Declaration on Measures to Eliminate International Terrorism, and 1996 Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism

The 1994 *Declaration on Measures to Eliminate International Terrorism*³¹'s Preamble raises the concern over intolerance and extremism as causes of terrorism. It also stresses the involvement of States in terrorist activities and recalls all the above-mentioned universal instruments adopted before 1994 as related to various aspects of terrorism. Moreover, this Declaration affirms that all acts, methods or practices of terrorism are criminal and unjustifiable, wherever and by whomever committed, including those that jeopardize the friendly relations among States and peoples.³² Those acts constitute a grave violation of the purposes and principles of the United Nations and they aim at the destruction of human rights, fundamental freedoms and the democratic basis of society.³³

The 1994 Declaration does not define terrorism, but it does stress that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable".³⁴

As for the 1996 *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*,³⁵ it mainly adds provisions with reference to international refugee law; calling for States to make sure the asylum-seeker did not participate in terrorist acts before granting them refugee status. In doing so, they are required to conform to international human rights standards.³⁶ Article 5 of the Supplement concerns the cooperation of States in preventing, combating and eliminating terrorism, which has to be done in conformity with international human rights standards. Under Article 6, terrorism should not be regarded as a political offence for extradition purposes.

2.2.3.2 UN Security Council Resolutions on Terrorism

The approach of the Security Council to terrorism evolved mainly since the events that surrounded the 1991 Gulf War. In 1991, the Security

³¹ General Assembly resolution 49/60 of 9 December 1994, Annex.

³² *1994 Declaration on Measures to Eliminate International Terrorism*, Art.1.

³³ *Ibid.* Art.2.

³⁴ *Ibid.* Art.3.

³⁵ General Assembly resolution 51/210 of 17 December 1996, Annex.

³⁶ *1996 Declaration to the 1994 Declaration on Measures to Eliminate International Terrorism*, Arts.3 and 4.

Council deplored the threats made by Iraq during the conflict to resort to terrorism.³⁷ The following year, the SC affirmed the right of all States “in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from acts of international terrorism that constitute threats to international peace and security”.³⁸ It also affirmed that according to Article 2(4) of the Charter of the United Nations, all States must not organize, instigate, assist or participate in terrorism actions against another State or allow that its territory be used for the preparation of such acts when they involve a threat or use of force.³⁹ Later, the Security Council emphasized in its Resolution 1269 the need to strengthen the fight against terrorism and that it should be done in the respect of international human rights and humanitarian law.⁴⁰ The Security Council’s position on terrorism is that it “unequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security”.⁴¹

Apart from establishing those principles, the Security Council also started acting under Chapter VII of the UN Charter against States “supporting” terrorism. First, Libya was sanctioned for its activities regarding terrorist acts against Pan Am flight 103 and Union de transports aériens flight 772.⁴² Sudan was later sanctioned for not complying with a resolution requesting the extradition of suspects in the terrorist assassination attempt on the Egyptian president.⁴³

Since 1998, the terrorism situation in Afghanistan became a major concern for the Security Council. The Taliban regime in Afghanistan allowed the territory under its control to be used for the sheltering, training of terrorists and the planning of terrorist acts. Acting under Chapter VII of the UN Charter, the Security Council took measures against the Taliban and insisted on the cessation of the sheltering and training of terrorists,⁴⁴ demanded that Usama bin Laden be turned over immediately to a country where he will be arrested and brought to justice,⁴⁵ and required that all terrorist training camps be closed.⁴⁶

After the events of September 11th 2001, two resolutions of the Security Council established a new dimension to the problems of terrorism by “Recognizing the inherent right of individual or collective self-defence in

³⁷ S/RES/687 (1991), Preamble.

³⁸ S/RES/731 (1992), Preamble.

³⁹ S/RES/748 (1992), Preamble.

⁴⁰ S/RES/1269 (1999), Preamble.

⁴¹ *Ibid.* §1.

⁴² S/RES/748 (1992).

⁴³ S/RES/1054 (1996).

⁴⁴ S/RES/1267 (1999), §1; S/RES/1333 (2000), §1.

⁴⁵ S/RES/1267 (1999), §2; S/RES/1333 (2000), §2.

⁴⁶ S/RES/1333 (2000), §3.

accordance with the Charter”.⁴⁷ Prior to those events, terrorism was considered a threat to international peace and security, but it was the first time that terrorist acts resulted in the invocation of Article 51 of the UN Charter by the Security Council. As to this point, terrorist acts with a background comparable to those that took place on the 11th of September 2001 can arguably constitute armed attacks against a State within international law. Also, pursuant to Resolution 1368, States responsible for aiding, supporting or harbouring terrorists are not only condemned but also accountable for the perpetration of terrorist acts. Furthermore, Resolution 1373 establishes a Counter-Terrorism Committee that will review the implementation of this resolution by States. Among the measures made mandatory by this resolution under Chapter VII of the Charter of the United Nations, States have to act against the financing of terrorist acts, not support terrorism in any way, cooperate in the fight against terrorism, become parties as soon as possible to the relevant international instruments relating to terrorism, and prevent the abuse of refugee status by possible terrorists. The last one mentioned is the only measure in which the Security Council calls upon States to respect international standards of human rights.

The 1373 resolution goes further and “declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations”.⁴⁸ This has a direct impact on the application of Article 1F(c) of the 1951 UN Refugee Convention on the ground that those involved in such acts are excluded from the application of this Convention.

Subsequent to the events of September 19th 2002, when the Israeli forces occupied the headquarters of the President of the Palestinian Authority in Ramallah, the Security Council reacted by once again condemning all terrorist attacks against civilians and insisted on the respect of international humanitarian law, particularly the Fourth Geneva Convention of 1949.⁴⁹ However, the SC went further and demanded the cessation of the anti-terrorism operation by Israel.⁵⁰ This was the first time after September 11th 2001 that the Security Council intervened in regards to a counter-terrorism measure and requested that it be stopped.

The SC adopted two other resolutions in relation to terrorism in 2002 concerning the bomb attack in Bali, Indonesia, on October 12th 2002 and the hostage-taking situation in Moscow on October 23rd 2002. Both resolutions reaffirmed in particular resolution 1373 (2001) and the “need to combat by all

⁴⁷ Preamble of S/RES/1368 (2001) and S/RES/1373 (2001).

⁴⁸ S/RES/1373 (2001), §6.

⁴⁹ *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949, Art.33 [hereinafter Fourth 1949 Geneva Convention], see sub-paragraph 2.2.4.1

⁵⁰ S/RES/1435 (2002), §2.

means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts”.⁵¹ The SC urged all States, “in accordance with their obligations under resolution 1373 (2001)” to cooperate with the Indonesian and Russian authorities so that those responsible for these terrorist acts be brought to justice.⁵²

2.2.3.3 UN General Assembly Resolutions on Terrorism

The resolutions adopted by the UN General Assembly on the subject of terrorism have the particularity that five of them are specifically in relation to human rights and terrorism. On numerous occasions, the General Assembly condemned “acts, methods and practices of terrorism in all its forms and manifestations, as activities aimed at the destruction of human rights, fundamental freedoms and democracy ...”.⁵³ In particular, the GA referred to terrorism as a violation of the right to live free from fear and of the right to life, liberty and security.⁵⁴

Prior to and subsequent to September 11th 2001, the General Assembly has been constantly requiring States to eliminate terrorism and strengthen cooperation in the fight against it, while respecting international human rights standards.⁵⁵

Furthermore, considering that this thesis includes a case-study of the Human Rights Committee, it is interesting to note that the GA has encouraged the UN treaty bodies to take into account “the consequences of the acts, methods and practices of terrorist groups”.⁵⁶

2.2.4 The International Humanitarian Law and International Criminal Law Aspects of Terrorism

International humanitarian law has sometimes been used by scholars to define terrorism as “all acts, committed in time of war or peace, which would be prohibited, by the rules of international humanitarian law protecting the civilians, even combatants in time of war”.⁵⁷ Even if no definition of terrorism has

⁵¹ S/RES/1438 (2002), Preamble; S/RES/1440 (2002), Preamble.

⁵² S/RES/1438 (2002), §3; S/RES/1440 (2002), §4.

⁵³ See e.g. A/RES/54/164, §3.

⁵⁴ A/RES/52/133, §2.

⁵⁵ See e.g. A/RES/55/158, §3.

⁵⁶ A/RES/49/185, §6; A/RES/50/186, §8.

⁵⁷ See Sassòli, M., *La “guerre contre le terrorisme”, le droit international humanitaire et le statut de prisonnier de guerre*, p.11, to be published in *Canadian Yearbook of International Law*, excerpt of this text furnished by Quebec Division of the Canadian Red-Cross to the author.

been agreed on, international humanitarian law remains relevant here as terrorist acts committed in time of war are dealt with by a different legal regime. For there to be a violation of this body of law, an armed conflict must be in existence.⁵⁸ It is not the purpose of this thesis to go into a deep analysis of the international humanitarian law aspects of terrorism, however it is essential to elaborate partly on the area in order to undertake a comprehensive study of the concept of terrorism to be done. The four 1949 Geneva Conventions⁵⁹ and the two Protocols of 1977⁶⁰ are the main sources of IHL, along with some references to humanitarian law included in the universal instruments outlined above.

One has to realize the limit of international humanitarian law in the fight against terrorism. Often it has been proven and mentioned that terrorism can emerge from situations where human rights are massively abused, therefore international humanitarian law is not the solution to prevent terrorism, and it is only an additional legal regime banning the use of terrorism in specific armed conflicts situations.

2.2.4.1 Terrorism in International Armed Conflicts

Under international armed conflicts, the Fourth Geneva Convention of 1949 explicitly uses the term “terrorism”. Article 33 prohibits “all measures of intimidation or of terrorism” against protected persons. The International Committee of the Red Cross has commented on this Article and described the belligerents committing terrorism as individuals opposed to all principles of humanity and justice, who strike at both innocent and guilty.⁶¹ Article 35 of Protocol I establishes the basic rule that parties to an armed conflict do not have an unlimited right to choose their methods and means of warfare. Concerning the protection of the civilian population, Article 51(2) of the first Protocol stipulates that “acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. The ICRC commented that this

⁵⁸ See *The Prosecutor v. Tadic*, United Nations, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [hereinafter ICTY], Case No. IT-94-1-AR72, October 2, 1995, par.67.

⁵⁹ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*. Geneva, 12 August 1949; *Convention (III) relative to the Treatment of Prisoners of War*. Geneva, 12 August 1949; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949.

⁶⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977.

⁶¹ ICRC, Commentary Art.33 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

“spread of terror” constituted a special type of terrorism,⁶² therefore it was the object of specific provisions. Also, Article 75(2)c) prohibits the taking of hostages.

2.2.4.2 Terrorism in Non-International Armed Conflicts

When it comes to non-international armed conflicts, the common Article 3(1)b) of all four 1949 Geneva Conventions prohibits the taking of hostage and so does Article 4(2)c) of Protocol II. Article 4(2)d) of this Protocol II directly forbids “acts of terrorism”, consequently being the second only humanitarian law treaty to ever refer explicitly to the term “terrorism”. In addition, Article 13(2) stipulates that “acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”, this provision has the exact content of Article 51(2) of Protocol I.

2.2.4.3 International Criminal Tribunals and Court

The Statute of the International Criminal Tribunal for Rwanda gives explicit jurisdiction to this International Tribunal for prosecuting persons committing or ordering to be committed “acts of terrorism”,⁶³ as Additional Protocol II of 1977 should understand it. At this point, no case law of the ICTR has yet addressed this provision. No doubt, such jurisprudence would be helpful to an understanding of the IHL concept of terrorism.

Neither the Statute of the International Criminal Tribunal for the Former Yugoslavia⁶⁴ nor the Statute of the International Criminal Court⁶⁵ provides such explicit competence to those other jurisdictions; nonetheless it could be argued that terrorism is not explicitly or clearly excluded from their jurisdiction either.

For instance, the ICTY Statute provides jurisdiction of the Tribunal for prosecuting persons committing or ordering to be committed the act of “taking civilians as hostages”.⁶⁶ Furthermore in the *Martić* case, the Trial Chamber I of the ICTY stated that the International Tribunal had jurisdiction, under Article 3 of its Statute that concerns violation of the law or customs of war, over violations of

⁶² ICRC, Commentary Art.4(2)d) Additional Protocol II, p.1375; also “Terrorism” and spreading “terror among the civilian population” under IHL were linked together in the case of *Ahmad v. Wigen*, United States District Court for the Eastern District of New York, No.89-CV-715, 726 F. Supp. 389 (1989), September 26, 1989.

⁶³ *Statute of the International Tribunal for Rwanda*, S/RES/955 (1994), Annex, Art.4(d).

⁶⁴ *Statute of the International Criminal Tribunal for Former Yugoslavia*, S/RES/827, Annex.

⁶⁵ *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1998).

⁶⁶ *Statute of the International Criminal Tribunal for Former Yugoslavia*, S/RES/827, Annex, Art.2(h).

Article 51(2) of Additional Protocol I, mentioned above as prohibiting “acts or threats of violence, the primary purpose of which is to spread terror among the civilian population”. It came to the similar conclusion in regard to Article 13(2) of Additional Protocol II, which has the same content.⁶⁷ Concerning the facts of this case, two different attacks occurred (2nd and 3rd of May 1995) with a total of five rockets striking the centre of the city of Zagreb (Croatia) and six others on other civilian zones, killing seven people and wounding more than two hundred. No military targets were around those attacks and even the choice of Organ Rockets would not have been appropriate to attack military installations, given their inaccuracy and low striking force. The Trial Chamber reasonably believed that Milan Martić, who was then the president of the self-proclaimed Republic of Serbian Krajina, ordered the attack. It followed by saying “the use of Organ Rockets in this case was not designed to hit military targets but to terrorise the civilians of Zagreb. These attacks are therefore contrary to the rules of customary and conventional international law ... and fall within the jurisdiction of the Tribunal pursuant to Article 3 of the Statute”.⁶⁸ It is important to note though that this was a Rule 61 procedure, which is not a trial *in absentia* and that there is no finding of guilt. Rather, this was only a determination as to whether reasonable grounds exist for believing that the accused committed the crimes.

In the *Rajic* Case, the ICTY Trial Chamber repeated its jurisdiction on such attacks meant to terrorise civilians. Ivica Rajić was accused of ordering an attack on the village of Stupni Do (Republic of Bosnia-Herzegovina). The acts committed in this attack were mostly of a terrorist nature. The evidence showed that “On finding the villagers (...) the HVO forced them out of the shelters and terrorised them (...) they stabbed, shot, raped, and threaten to kill the unarmed civilians they encountered”. It was also reported that the HVO soldiers “attempted to burn approximately twelve civilians alive by locking them in a house and setting the house on fire”.⁶⁹ There was no proof that the village contained any military installation or legitimate target. The Trial Chamber ruled that it had reasonable grounds for believing that the accused committed the crimes charged against him.

The question as to whether terrorism can reach the level of being a crime against humanity has well been addressed and formulated since the attacks of September 11th 2001.⁷⁰ If terrorism can be defined in this way, then Articles

⁶⁷ *The Prosecutor v. Milan Martić*, ICTY, Rule 61 Decision, Case No. IT-95-11-1, March 8, 1996, §8.

⁶⁸ *Ibid.* §31.

⁶⁹ *Prosecutor v. Ivica Rajić*, UN, ICTY, Rule 61 Decision, Case No. IT-95-12-R61, September 13, 1996, §52.

⁷⁰ The events of 11 September 2001 were considered crimes against humanity in the joint statement *Human Rights and Terrorism*, by Mary Robinson, UN High Commissioner for Human Rights, Walter Shwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights, on 29 November 2001.

5(b) and 7(k) of the ICC Statute⁷¹ could include such terrorist acts.⁷² However, these acts would be addressed solely under the concept of crime against humanity and the specific aspects of terrorism would not be relevant.⁷³

2.3 Concluding Remarks on the Concept of Terrorism

At the moment, the universal stance on the concept of terrorism incorporates hijacking, hostage taking, safety of maritime navigation and platforms, threats linked with nuclear material or explosives, public bombings and the financing of terrorism. The States Parties to the different universal instruments have the positive obligation to take all practical measures to prevent these acts and the Security Council Resolution 1373 (2001) lists mandatory counter-terrorism measures to be applied by all UN member States. The recent universal conventions have recognized terrorism as a threat to international peace and security. Terrorism is never justified under any circumstances and must be punishable at the domestic level by appropriate penalties considering the grave nature of the acts.

Thus, while it remains the case that no universally accepted definition of terrorism exists, terrorism can nonetheless give rise to action under international law, namely the application of sanctions under the UN Charter by the Security Council or the International Court of Justice. During the 56th session of the General Assembly in 2001, the Sixth Committee was given the task of drafting a comprehensive convention on international terrorism, which would include a universal definition. The Sixth Committee allocated part of this task to a Working Group. Concerning the definition, the main disagreements that prevented any compromise among the States, were two controversial exclusions: “whether the definition of terrorism should exclude (1) the activities carried out in the people’s struggle for self-determination, and (2) the acts of armed forces during an armed conflict”.⁷⁴ These differences of opinion are well reflected in the regional instruments on terrorism. One State’s representative on the Sixth Committee at that time acknowledged that “it would have been possible to finalize the draft comprehensive convention during the 56th session of the General Assembly if both

⁷¹ *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1998).

⁷² See e.g. Robert F. Drinan, *The Mobilization of Shame*, (New Haven: Yale University Press, 2001), p.78.

⁷³ Antonio Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of international Law”, in *European Journal of International Law* (2001, Vol.12 no. 5, 994-995), online: <<http://www3.oup.co.uk/ejilaw>> (date accessed: 01 December 2002).

⁷⁴ Surya P. Subedi, “The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law”, in *International Law FORUM du droit international* 4, (Kluwer, 2002), p. 164.

of the exclusions had not been included in the draft text”.⁷⁵ One of the major problems with the two proposed exclusions is that they are already covered by other international law instruments. As discussed above, terrorism by armed forces is prohibited under international humanitarian law and it is also prohibited in the peoples’ struggle for self-determination as one must clearly see the difference between “who may lawfully engage in hostilities with the quite different question of what methods of warfare they may employ when they do so engage”.⁷⁶

Universal instruments recognize the need for a comprehensive convention on terrorism,⁷⁷ although this need should not include the task of defining terrorism as an absolute necessity. As discussed in the introduction to this chapter, terrorism is a changeable, evolving concept and its history has forced us to challenge our conventional knowledge regarding terrorism. For this reason, the case-by-case approach of the universal treaties on terrorism remains the best solution to address the problem of terrorism in international law. As for today, the twelve existing universal instruments on terrorism are not sufficient to cover all aspects of terrorism. For instance, terrorist poison gas attacks are not covered as illegal by any of those conventions, except for the financing of such attacks. From the list of offences included in those instruments none of them would cover the sarin gas attack that occurred in the subway of Tokyo in 1998 where five to six thousands individuals were exposed, among which twelve were killed and three thousands were sent to hospitals.

However, the real need is for proper mechanisms to deal with the acts within the concept of terrorism and the counter-terrorism measures adopted by States. The Security Council Counter-Terrorism Committee has the responsibility to “... monitor the application of this resolution, with the assistance of appropriate expertise...”⁷⁸ However, this mechanism lacks one major aspect for it to be a proper international law monitoring mechanism: the presence of a human rights expert. Resolution 1373 (2001) makes it mandatory for States to take measures in order to combat terrorism and to report on those measures to the CTC, but without any notable mention to the obligation of respecting human rights. Terrorism is aimed at the “destruction of human rights, fundamental freedoms and democracy...”⁷⁹ and if States were to act in the same way without any efficient international legal mechanism to monitor their actions, then there

⁷⁵ *Ibid.* p. 165.

⁷⁶ Christopher Greenwood, “A Critique of the Additional Protocols to the Geneva Conventions of 1949”, p.18, eds. Helen Durham and Timothy L.H. McCormak, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, (The Hague: Kluwer, 1999).

⁷⁷ See e.g. 1994 *Declaration on Measures to Eliminate International Terrorism*, Art.7; *International Convention for the Suppression of Terrorist Bombings*, Preamble; *International Convention for the Suppression of the Financing of terrorism*, Preamble.

⁷⁸ S/RES/1373 (2001), §6.

⁷⁹ 1993 *Vienna Declaration and Programme of Action*, adopted at the 1993 World Conference on Human Rights, A/CONF.157/23, Art.17.

would be no one left to protect the individual from terrorism and intimidation. Thus, given the lack of a proper international mechanism to monitor the application of counter- terrorism measures in full respect of international law, then international human rights supervision becomes even more essential for the protection of individuals.

3 Case Law on Terrorism in the European Commission and Court of Human Rights

The European Commission and Court of Human rights have produced an impressive jurisprudence regarding the “balance” of fighting terrorism and respecting human rights. When examining complaints, the Court will “take into account the special nature of terrorist crime and the exigencies of dealing with it, as far as is compatible with the applicable provisions of the Convention in the light of their particular wording and its overall object and purpose”.⁸⁰ In the fight against terrorism, the role of the European Court is essential in interpreting and applying the European Convention of Human Rights, as States must not destroy democracy on the grounds of defending it.⁸¹

Under its case law, the European human rights supervision has established legal principles to be applied in cases concerning terrorism and counter-terrorism, including the protection of “absolute” rights (3.1 Non-derogable rights), the acceptance that some rights can be restricted in order to fight terrorism (3.2 Rights that can be restricted), and the application of the prohibition of discrimination, the possibility of derogation and the prohibition to use the convention in order to justify acts that are contrary to it (3.3 Provisions of the convention regarding the enjoyment of rights and freedoms and their restriction). After establishing how the European convention of Human Rights sets up obligation to States to protect the population against terrorism and the framework in which it can be done, this Chapter shall end with some concluding observations (3.4 Concluding Remarks on the ECtHR Case Law about Terrorism).

3.1 Non-Derogable Rights: Case Law on Articles 2, 3 and 7

3.1.1 The Right to Life, Article 2

The duty of States to protect the right to life is of the utmost importance in the Convention system. Article 2 should be interpreted as including an obligation for States to protect their population against terrorism. Although, in

⁸⁰ *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, §28.

⁸¹ *Klass v. FRG*, 6 September 1978, §49.

the decision of *Mrs W. v. the United Kingdom*,⁸² the Commission decided that this provision does include the positive obligation for States to stop any possible violence and it is not the task of European human rights monitoring to examine in detail if the measures taken by a State to combat terrorism are appropriate and sufficient.⁸³ Thus, the protection of Article 2 goes further as it also protects the life of terrorists or suspected terrorists, since the States cannot resort to the use of force that might result in the deprivation of life, except in very specific circumstances.

The attempt to prevent a terrorist act was at the centre of the case of *McCann and Others v. the United-Kingdom*.⁸⁴ This case dealt with the killing by British soldiers of three IRA members suspected of preparing a bomb explosion in Gibraltar. The British, Spanish and Gibraltar authorities knew about the terrorist plan, but decided to intervene only when the three suspects would have driven the car in Gibraltar. However, they considered the IRA members to be dangerous terrorists who would be probably armed and, if they had to encounter the security forces, would be ready to use their weapons or detonate the bomb.

On March 6th 1988, one of the suspects parked a car in Gibraltar and later he was seen with the two other suspects observing the space where the car had been parked. At that moment the security forces intervened to arrest the individuals, but the three IRA members made “threatening moves” and were shot to death by the soldiers who thought that one or the other suspects could push a button or a remote control, thereby provoking the car explosion. McCann received five bullets, Mrs Farrell eight and Mr Savage 16. All four soldiers admitted that they shot to kill the individuals.⁸⁵

No weapon or detonator was found on the suspects’ bodies. The car in place did not contain any explosive or bomb. However, the Spanish Police later found a car containing an explosive device in Marbella that had been rented to Mrs. Farrell under a false name.

The Court observed in its decision the difficult dilemma of balancing the necessity to fight terrorism and the need to respect human rights. Here, the authorities knew about the terrorist attack and had to protect the population of Gibraltar, while having minimum resort to lethal force against the suspected terrorists. Moreover, the authorities were dealing with IRA members who had been convicted for bombing offences, as well as one explosive expert. The Court also raised the past history of the IRA and its disrespect towards human lives, even those of its members.⁸⁶

The Court concluded that a violation of paragraph two of Article 2 ECHR (ten votes to nine, the Commission had found no violation), had occurred

⁸² *Mrs W. v. the United Kingdom*, Comm. Dec. 28 Feb. 1983, DR 32, pp.190-210.

⁸³ *Ibid.* p. 200, §14.

⁸⁴ *McCann and Others v. UK*, 27 September 1995.

⁸⁵ *Ibid.* §199.

⁸⁶ *Ibid.* §193.

as regard to the conduct and planning of the operation. The violation was the sum of the fact that the suspects were not arrested at the border before their entry in Gibraltar (the danger to the population in not preventing the entry of the suspects outweigh the Government's argument that it might have had insufficient evidence to detain or prosecute them), the omission that the information might have been erroneous and the automatic shooting to kill recourse.⁸⁷ Also, even though there was a violation of the right to life under Article 2 ECHR, the Court rejected the applicants' claims for damages under Article 50 of the ECHR, because the three suspects who were killed had the intention to plant a bomb in Gibraltar.

Similarly in the *Ergi v. Turkey* case,⁸⁸ the Court emphasized that an ambush on terrorists has to be planned and executed to avoid as much as possible risks on civilians, including possible counter-fire by the terrorists.⁸⁹ Thus in this case, the planning of the ambush proved to be inadequate and in violation of Article 2.

The development of the case law in this area includes numerous cases in relation to terrorism and the procedural obligations of Article 2. In the *McCann* case, the Court established that Article 2 in conjunction with Article 1 required from States "by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State".⁹⁰ Thus, this obligation was respected in this case. Following the case of *Kaya v. Turkey*,⁹¹ numerous cases in the context of the terrorism situation in Turkey have produced a series of findings of failures by the authorities to investigate allegations of wrongdoing by the security forces, both in the context of the procedural obligations under Article 2 of the Convention and the requirement for effective remedies imposed by Article 13 of the Convention.⁹²

In all of these cases, a finding was made that the public prosecutor had failed to pursue complaints by individuals claiming that the security forces were involved in an unlawful act, like not interviewing or taking statements from members of the security forces implicated, accepting at face-value the reports of

⁸⁷ *Ibid.* §213.

⁸⁸ *Ergi v. Turkey*, 28 July 1998.

⁸⁹ *Ibid.* §79-81,

⁹⁰ *McCann and Others v. UK*, §161.

⁹¹ *Kaya v. Turkey*, 19 February 1998.

⁹² *Ergi v. Turkey*, *supra* note 85; *Yasa v. Turkey*, 2 September 1998; *Çakici v. Turkey*, 8 July 1999; *Tanrikulu v. Turkey*, 8 July 1999; *Mahmut Kaya v. Turkey*, 28 March 2000; *Kiliç v. Turkey*, 28 March 2000; *Ertak v. Turkey*, 9 May 2000; *Timurtas v. Turkey*, 13 June 2000; *Tas v. Turkey*, 14 November 2000; *Çicek v. Turkey*, 27 February 2001; *Avsar v. Turkey*, 10 July 2001; *Ifra Bilgin v. Turkey*, 17 July 2001; *Semse Onen v. Turkey*, 14 May 2002; *Orhan v. Turkey*, 18 June 2002; and concerning Article 13 of the Convention, see *Aksoy v. Turkey*, 18 December 1996; *Aydin v. Turkey*, 25 September 1997; *Mentes and others v. Turkey*, 28 November 1997; *Selçuk and Asker v. Turkey*, 24 April 1998; *Kurt v. Turkey*, 25 May 1998; and *Tekin v. Turkey*, 9 June 1998.

incidents submitted by members of the security forces and attributing incidents to the PKK on the basis of minimal or no evidence.

Furthermore, in May 2001 the Court released four judgments concerning the United Kingdom investigation procedure in the killing of suspected terrorists by either security forces or loyalist paramilitaries: the *Mckerr*,⁹³ *Kelly and Others*,⁹⁴ *Shanaghan*,⁹⁵ and *Hugh Jordan*⁹⁶ judgments. In all four cases, contrary to the *McCann* decision, the Court found that the UK Government had violated Article 2 ECHR in respect of failings in the investigative procedures concerning the deaths of the individuals. Consequently, the Court has shown a stricter approach since the *McCann* case.

Cases regarding disappearances and unacknowledged detention of suspected terrorists were brought before the Court in respect of the terrorism context in Turkey. First, in *Kurt v. Turkey*, under Article 2 the Court found no concrete evidence that the missing person could have been killed by the security forces and decided that the duty to protect the son's life would be considered under Article 5. However, in the cases of *Çakici v. Turkey*, *Tas v. Turkey*, *Akdeniz and Others v. Turkey*,⁹⁷ and *Orhan v. Turkey*, the Court observed that very strong inferences might be drawn from the government's claims and the Court considered that it had sufficient evidence to conclude beyond reasonable doubt that the suspected terrorists had died following their detention and apprehension by security forces. The Court found a violation of Article 2 for responsibility of the State in the death.

Subsequent to the recent hostage-taking situation that took place in Moscow on the 23rd of October 2002⁹⁸ and the fact that Russia is subjected to the European Court's supervision, special attention should be given to this specific form of terrorism. The *International Convention against the Taking of Hostages* of 1979 considers "all acts of taking of hostages as manifestations of international terrorism".⁹⁹ This Convention imposes a positive obligation upon States, as it requires that a State Party on which territory a hostage situation is taking place "shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release ...".¹⁰⁰ In the case of *Andronicou and Constantinou v. Cyprus*,¹⁰¹ the Court clearly stated that this case did not involve terrorism, since it implicated one man holding his fiancé hostage. Nevertheless, this case is still relevant in analyzing the role of authorities in a hostage situation under the ECHR. The facts concerned a domestic fight that

⁹³ *Mckerr v. the United Kingdom*, 4 May 2001.

⁹⁴ *Kelly and Others v. the United Kingdom*, 4 May 2001.

⁹⁵ *Shanaghan v. the United Kingdom*, 4 May 2001.

⁹⁶ *Hugh Jordan v. the United Kingdom*, 4 May 2001.

⁹⁷ *Akdeniz and Others v. Turkey*, 31 May 2001.

⁹⁸ See e.g. Security Council Resolution, S/RES/1440 (2002).

⁹⁹ *International Convention against the Taking of Hostages*, Preamble.

¹⁰⁰ *Ibid.* Art.3(1).

¹⁰¹ *Andronicou and Constantinou v. Cyprus*, 9 October 1997.

turned into a hostage situation, which ended with the killing of both the hostage-taker and the hostage herself by a special police unit that used machine guns during the rescue operation. The Commission expressed the opinion that there had been a violation of Article 2 of the Convention. The Court did not agree and found no violation in a five votes to four decision. The main factors were, first, that the planning and control of the rescue operation, even if machine guns were involved, was reasonable if any risk to life existed. Second, although it was regrettable that such a level of firepower was employed, the Court cannot substitute its own assessment for that of the officers present at the scene of the situation and the use of force was ruled not to exceed what was absolutely necessary to save lives. Judge Jungweirt issued an opinion, dissenting in part, raising the questioning of “using machine guns in a small confined space without proper lightning and knowing that the very person to be rescued was next to or in front of the person being aimed at... seems to me more than irresponsible”.¹⁰²

Moreover, the Constitutional Court of Germany has delivered a decision in which it states that Article 2 of the ECHR cannot be interpreted to force States to free detained terrorists in order to save the life of a hostage held by accomplices.¹⁰³

On this matter of individual protection against terrorism, in the 1983 decision of *Mrs. W v. the United Kingdom*, the Commission had decided that there is no obligation on the State to offer individual protection against terrorism. However, the Court revised this general legal principle in 2000 in the judgment of *Akkoç v. Turkey*.¹⁰⁴ In this case, an “unknown killer” killed the applicant’s husband and it was argued that, prior to the killing, the applicant and her husband faced terrorist threats by the PKK. The facts revealed that she and her husband were threatened either by security forces or terrorists (also referred to as counter-guerrillas in this case). The main question was to determine if the authorities failed to protect her husband from a known danger to his life. First, the Court recalled the general rules that Article 2 (1) requires States to take appropriate steps to safeguard the lives of those within its jurisdiction.¹⁰⁵ This results in an obligation on States to protect the right to life by establishing efficient provisions of criminal law “to deter the commission of offences against the person backed by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual”.¹⁰⁶ The Court observed that not every alleged risk to life would legally oblige the State to take preventive measures. Consequently, “for a positive obligation to arise, it must be established that the

¹⁰² *Ibid.* p.60.

¹⁰³ Decision of October 16 1977, *Europäische Grundrechtszeitschrift*, 1977, p.426.

¹⁰⁴ *Akkoç v. Turkey*, 10 October 2000.

¹⁰⁵ *Ibid.* §77; see e.g. *L.C.B. v. the United Kingdom*, 9 June 1998, §36.

¹⁰⁶ *Akkoç v. Turkey*, §77; see e.g. *Osman v. the United Kingdom*, 28 October 1998, §115.

authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”.¹⁰⁷ In the given case, the Court determined that the Turkish authorities were aware of the risk to life of the victim.

Furthermore, the Court considered a series of cases concerning the Southeast region of Turkey revealing that the Turkish authorities had failed on numerous occasions to respect the procedural obligations under Article 2 and the need for effective remedies under Article 13. For the Court, these defects “undermined the effectiveness of criminal law protection in the south-east region during the period relevant to this case ... this permitted or fostered a lack of accountability of members of the security forces for their actions which ... was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention”.¹⁰⁸ As a result, these defects deprived the victim of the protection to be received by law.

The Turkish Government argued that they could not have effectively protected the victim from the attacks to his life. The Court rejected this argument as the Government had several measures at its disposal and, furthermore, it did not take any steps to investigate, even when the victim and the applicant alerted the authorities of the threats they received.

In the end, the Court decided that the Turkish authorities violated Article 2 ECHR by failing to take “reasonable measures available to them to prevent a real and immediate risk to the life” of the applicant’s husband.¹⁰⁹

In sum, the case law is firm the right to life includes the duty of the State to protect the life of the population, of individuals and also of terrorists. As the Court stated in the *McCann* judgment: “It must also be borne in mind that ... Article 2 (art. 2) ranks as one of the most fundamental provisions in the Convention ... Together with Article 3 ... of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe”.¹¹⁰ Thus, infringing this basic value would contribute to the purpose of terrorists to attack and destabilize the foundations of democratic societies.

3.1.2 The Prohibition of Torture, Inhumane or Degrading Treatment or Punishment, Article 3

As Article 3 “enshrines one of the most fundamental values of democratic societies”,¹¹¹ the Court emphasized the absolute prohibition under

¹⁰⁷ *Akkoç v. Turkey*, §78; see e.g. *Osman v. the United Kingdom*, §116.

¹⁰⁸ *Akkoç v. Turkey*, §91.

¹⁰⁹ *Ibid.* §94.

¹¹⁰ *McCann and Others v. UK*, §147.

¹¹¹ See e.g. *Chahal v. the United Kingdom*, 15 November 1996, §79; *Labita v. Italy*, 6 April 2000, §119; *Aksoy v. Turkey*, §62; *Aydin v. Turkey*, §81.

Article 3 to resolve to torture or inhuman or degrading treatment or punishment in numerous cases regarding terrorism. The Court is fully aware of the huge difficulties faced by States when fighting terrorist-related violence, but even in terrorism-related circumstances, the ECHR absolutely prohibits torture or inhumane or degrading treatment or punishment, irrespective of the victim's conduct.¹¹² Furthermore, the Court adds that "Article 3 admits of no exceptions to this fundamental value and no derogation from it is permissible under Article 15 even having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities".¹¹³

In the early case law, the European monitoring was firm on the principle of the absolute prohibition under Article 3 in cases relating to terrorism. However, the threshold appeared to be stricter for there to be a treatment amounting to a breach of Article 3, as was the case in two of the Commission's early decisions. The decision of *G.Ensslin, A.Baader & J.Raspe v. FRG*¹¹⁴ was a Red Army Fraction case where exceptional circumstances occurred and had to be taken into account by the Commission. All three applicants died in prison prior to the decision, apparently by suicide. They were convicted and given life sentences and subjected to restrictive measures in custody including some intense social isolation. The conditions were tightened when different "terrorist acts" occurred in Europe. This social isolation, together with the other restrictive conditions and the possibility that they might have lead to the suicide of the applicants was not found to amount to a violation of Article 3 of the Convention. However the Commission gave the warning that complete sensory and social isolation cannot be justified by security reasons as it destroys the personality and would be a breach of Article 3 of the ECHR.¹¹⁵

In *G.Kröcher and C.Möller v. Switzerland*,¹¹⁶ again strict conditions were imposed on the applicants in custody, but they were relaxed during the detention on remand. The conditions included some strong form of social isolation, constant artificial lightning and the strict control of visits from lawyers. The Government justified those measures partly based on evidence that the applicants were terrorists. The Commission granted that the terrorism situation in the autumn of 1977 had to be highlighted and it recalled the fatal fate of G.Ensslin, A.Baader and J.Raspe with the controversy that it created and the attempt by the Swiss authorities to prevent such a situation from recurring.¹¹⁷ The sole objective of these conditions was security and not punishment.¹¹⁸ The Commission expressed "serious concerns with the need for such measures, their

¹¹² *Chahal v. UK*, §79. See also *Ireland v. UK*, §163; *Tomasi v. France*, §115; *Aksoy v. Turkey*, §62; *Aydin v. Turkey*, §81.

¹¹³ *Aydin v. Turkey*, §81.

¹¹⁴ *G.Ensslin, A.Baader & J.Raspe v. FRG*, Comm. Dec. 8 Jun. 1978, DR 14, pp.64-116.

¹¹⁵ *Ibid.* pp.109-110, §5.

¹¹⁶ *G.Kröcher and C.Möller v. Switzerland*, Comm. Rep. 16 Dec. 1982, DR 34, pp.24-59.

¹¹⁷ *Ibid.* p.54, §63.

¹¹⁸ *Ibid.* p.56, §73.

usefulness and their compatibility with Article 3 ...”, and yet it found no violation of Article 3 of the ECHR since it considered that the minimum level of severity to involve a breach of this provision was not reached.¹¹⁹

Thus, the first major decision as regards the prohibition of Article 3 and terrorism was the second judgment regarding IRA terrorism and the long-standing crisis in Northern Ireland in the interstate complaint of *Ireland v. United-Kingdom*.¹²⁰ The Irish government complained that the UK had violated the ECHR in Northern Ireland by ill treating individuals detained under its special measures, that those special measures themselves were in breach of the ECHR, and that their application constituted a discrimination based on political opinion. By March 1975, it was reported that over 1,100 people had been killed, over 11,500 injured and more than £140,000,000 worth of property had been destroyed because of the recent violence in Northern Ireland, in part by terrorism. The Court referred to the Government’s definition of terrorism as “organized violence for political ends”.¹²¹ When taking into account the facts, the ECtHR did a comprehensive study of what was the IRA and Loyalist terrorism, often comparing both their activities. It also stressed reasons why violence and terrorism emerged in the region and why terrorist groups even received support at some time by parts of the population, mostly due to human rights violations.¹²²

The Court considered four issues in regard to the allegations of ill treatment. The first one was the unidentified interrogation centre or centres and the “five techniques” used to aid interrogation. Those techniques included the combined application of: wall standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink. The Court found that those “five techniques” were a breach of Article 3 and constituted inhumane and degrading treatment. In the second issue, Place Barracks, the Court found that the repeated violence used on individuals held in custody in order to extract confessions, names of others or information was inhuman and degrading treatment and violated Art. 3 ECHR. In the third issue, referred to as “the other places” by the Court, despite the fact that the Court described the practice followed as discreditable and reprehensible, no violation of Art.3 was found in the treatment of those detainees who had experienced detention in extreme discomfort and were forced to perform irksome and painful exercises.¹²³ As for the fourth issue, the Irish government was asking the Court to address a consequential order to the UK,

¹¹⁹ *Ibid.* p.57, §§75-77.

¹²⁰ *Ireland v. the United Kingdom*, 18 January 1978.

¹²¹ *Ibid.* § 12.

¹²² For instance, in March 1966, shortly after the beginning of a campaign for “civil rights” by the Catholic Community in order to eliminate the discrimination it faced, several petrol bombs were thrown at Catholic schools and property. In May of the same year, Catholics were murdered or wounded. Then in August 1969, lots of houses and licensed premises mostly owned by Catholics were burned, destroyed or damaged.

¹²³ It can be argued that under the ICCPR, this would have constituted a violation of Art. 10 ICCPR, however the ECHR does not provide the same protection of dignity for detained persons.

including prosecuting the members of security forces who had committed, condoned or tolerated acts contrary to Article 3. The Court denied this request.

The position of the Court against the use of ill treatment on suspected terrorists was strengthened in 1992 with the *Tomasi v. France* judgment. In this case, the French Government attempted to convince the Court that the terrorism circumstances of the case should be taken into account when interpreting Article 3. The Court rejected this approach and insisted that the “undeniable difficulties inherent in the fight against ... terrorism ...” could not create the imposition of limits on the Convention’s protection of the physical integrity of persons.¹²⁴ Therefore, Article 3 had been violated.

In *Dikme v. Turkey*,¹²⁵ the first applicant was detained under the suspicion of being a member of the terrorist organisation *Devrimci Sol*.¹²⁶ He alleged that he was subjected to blows causing both physical and mental pain or suffering, all aggravated by the fact that he was in total isolation and blindfolded. The Court stressed that “the requirements of an investigation and the undeniable difficulties inherent in the fight against terrorist crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals”.¹²⁷ Then, the Court reaffirmed that the victim’s conduct or, in the case of detainees, the nature of the offence, is irrespective to the absolute prohibition of Article 3.¹²⁸ The Court took the important step of referring to the *Selmouni* case and recalled that the Convention is a “living instrument which must be interpreted in the light of present-day conditions”, thus “certain acts which had previously been classified as “inhuman and degrading treatment” as opposed to “torture” might be classified differently in future”.¹²⁹ Therefore, the Court continued its determination and concluded that the treatment inflicted amounted to torture in violation of Article 3. Also, the Court found that there was a lack of a thorough and effective investigation in the allegations of ill treatment, which resulted in a violation of Article 3 on that count as well.

Concerning the specific component of torture in Article 3, *Aksoy v. Turkey*¹³⁰ was the first judgment regarding terrorism in which the Court concluded that the alleged ill treatment amounted to torture. In this judgment, a man was detained for 14 days during which he was subjected to ‘Palestinian hanging’,¹³¹ following his arrest in Turkey on suspicion of terrorism. The Court

¹²⁴ *Tomasi v. France*, 27 August 1992, §115.

¹²⁵ *Dikme v. Turkey*, 11 July 2000.

¹²⁶ Name commonly used to refer to the extreme left-wing armed movement “*Türkiye Halk Kurtulus Partisi/Cephesi-Devrimci Sol*”.

¹²⁷ *Dikme v. Turkey*, §90.

¹²⁸ *Ibid.* §90.

¹²⁹ *Ibid.* §92; see especially *Selmouni v. France* judgment of 28 July 1999, §101.

¹³⁰ *Aksoy v. Turkey*, 18 December 1996.

¹³¹ “Palestinian hanging” is a torture technique in which the person has her arms behind her back and is then suspended by her arms.

once more observed that “even in the most difficult circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment”.¹³² In the end, the Court concluded that the use of the “Palestinian hanging” could only be described as torture in violation of Article 3 ECHR.¹³³

In 2001, the treatment of suspected terrorists was again a question in the case of *Akdeniz and Others v. Turkey*. The facts accepted by the Court stressed that “the applicants were detained in the open at Kepir for a period of at least a week and that during this time, they suffered significant privation, including, save in the case of Mehmet Salih Akdeniz, being bound. Some beatings occurred, e.g. Behcet Tutus, while Abdo Yamuk suffered an injury to his leg. The evidence showed that they suffered not only from cold but from fear and anguish as to what might happen to them.”¹³⁴ The threshold of inhuman and degrading treatment was reached and Article 3 of the Convention was violated, therefore marking an evolution in the appreciation of that threshold since the early commission cases of *G.Ensslin, A.Baader & J.Raspe v. FRG* and *G.Kröcher and C.Möller v. Switzerland*.

As for the question if a State could expel an alleged terrorist to a country in which there was a risk that he would face ill treatment, the leading judgment is the case of *Chahal v. the United Kingdom*. The background of this case was the conflict in Punjab, India. The main applicant was suspected by the government of being involved in Sikh terrorism, which had as its goal the separation of Punjab. A decision had been taken to deport Mr Chahal for security reasons, including the international fight against terrorism. In response to that decision, the applicant made an application for asylum based on a well-founded fear of persecution within the meaning of the United Nations 1951 Convention on the Status of Refugees. One of the Government’s argument relied partly on Article 33(2) of the 1951 UN Refugee Convention. The argument was that there should be a balance between the risk of an individual to be subjected to torture if expelled to another country and the risk of the host state’s security if it was to allow that person to remain. The Court rejected this in a 13 to 7 vote.

The Court recalled the right of States under international law and their treaty obligations to control the entry, residence and expulsion of aliens.¹³⁵ Nevertheless, the case law of the Court establishes that an expulsion may be in contradiction with Article 3 of the ECHR and engage the responsibility of the expelling State if there exists a real risk of ill treatment in the receiving State.¹³⁶ The Court made a statement that it is aware of the huge difficulties faced by States when fighting terrorist violence, but even in terrorism circumstances, the ECHR absolutely prohibits torture or inhuman or degrading treatment or

¹³² *Askoy v. Turkey*, §62.

¹³³ *Ibid.* §64.

¹³⁴ *Akdeniz and Others v. Turkey*, §98.

¹³⁵ *Chahal v. UK*, §73.

¹³⁶ *Ibid.* §74.

punishment, irrespective of the victim's conduct.¹³⁷ The fact that a person is perceived as a terrorist is not a material consideration for assessing whether there exists a real risk of treatment in breach of Article 3 in expulsion cases. The protection offered by Article 3 ECHR is therefore wider than that of Articles 32 and 33 of the 1951 Geneva Convention.¹³⁸ In this case, the Court concluded that the execution of the order to deport to India would be a violation to Article 3 ECHR.

The judgments of *Selçuk and Asker v. Turkey*, *Bilgin v. Turkey*,¹³⁹ and *Dulas v. Turkey*¹⁴⁰ established that the destruction of homes and property carried out during an anti terrorism operation in a brutal manner and leading to a suffering of a sufficient intensity can be interpreted as inhuman treatment and can engage State responsibility under Article 3. Even if such destruction had been to prevent terrorists from using those homes or to discourage others, this would still not justify the ill treatment.¹⁴¹

In *Kurt v. Turkey*, the facts concerned the disappearance of the applicant's son whom the Government argued had been kidnapped by a terrorist organization. Most interesting is the finding of a violation of Article 3, under the circumstances of this case, in relation to the applicant herself. The Court observed that the authorities gave no serious consideration to the applicant's complaint, even though she had faced anguish and distress. Her suffering was endured over a prolonged period of time and therefore was categorised as ill treatment under Article 3.¹⁴² However, in another disappearance case linked to the terrorism background in Turkey, the Court insisted that the *Kurt* case does not establish any general principle that a family member of a "disappeared person" is thereby a victim of treatment contrary to Article 3.¹⁴³ The circumstances of the case and the attitude of the authorities towards the family member are very relevant. In *Tas v. Turkey*, the Court once more found a violation of Article 3 concerning a family member in a disappearance case with terrorism background because of "the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation".¹⁴⁴

The *Sevtap Veznedaroglu v. Turkey*¹⁴⁵ judgment is particularly relevant as for the procedural aspects of Article 3 in regards to suspected terrorists, The applicant was a research student in public law and married to a

¹³⁷ *Ibid.* §79.

¹³⁸ *Chahal v. UK*, §80.

¹³⁹ *Bilgin v. Turkey*, 16 November 2000.

¹⁴⁰ *Dulas v. Turkey*, 30 January 2001.

¹⁴¹ *Selçuk and Asker v. Turkey*, §79.

¹⁴² *Kurt v. Turkey*, 133-134.

¹⁴³ *Çakici v. Turkey*, §98.

¹⁴⁴ *Tas v. Turkey*, §79.

¹⁴⁵ *Sevtap Veznedaroglu v. Turkey*, 11 April 2000.

lawyer who had been the provincial president of the Diyarbakir Human Rights Association in 1990. The applicant argued that the police constantly followed her on account of her husband's position. She was arrested at her home on suspicion of membership of the Kurdistan Workers Party ("PKK"). In her application, she claimed that she was submitted to torture and that "the interrogators, while threatening her with death and rape, told her not to work on human rights matters".¹⁴⁶ Although the Court could not establish if the applicant was tortured as claimed, it considered that in the circumstances the applicant had an arguable claim that she had been tortured and that the authorities failed to investigate the torture complaint as the procedural obligations under Article 3 require.¹⁴⁷

To sum up, the Court has emphasized that Article 3 "enshrines one of the most fundamental values of democratic societies".¹⁴⁸ If States were to attack their own fundamental values in fighting terrorism, when terrorism itself is aimed at seriously threatening democracies and attacking their fundamental values, then obviously the actions of the State could amount to a form of State terrorism. This is a strong reason why the European monitoring is essential in the fight against terrorism, because otherwise there is no one left to protect the individuals and democracy from terrorism and State intimidation. As of today, the Court has fully assumed its role in protecting the democratic heritage of the Council of Europe's States by firmly standing by its position that "Even in the most difficult circumstances, such as the fight against terrorism ... the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment".¹⁴⁹

3.1.3 Freedom from Retroactive Criminal Legislation, Article 7

The principle of Article 7 is a significant element of the rule of law, which is, pursuant to the Preamble of the Convention, part of the common heritage of European States. Only one case in relation to terrorism concerned in depth Article 7 of the ECHR and the general principle is that special counter-terrorism legislation cannot be applied retroactively. In the judgment of *Ecer and Zeyrek v. Turkey*,¹⁵⁰ the applicants alleged a violation of Article 7 as the Terrorism Prevention Act 1991 was applied to them for acts that occurred in 1988 and 1989. First, the Court recalled that no derogation is possible from Article 7 under Article 15. Then, relying on its case law, the Court recalled that Article 7 of the Convention consists of the general principle that "only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and prohibits in particular the retrospective application of the criminal law where it

¹⁴⁶ *Ibid.* §12.

¹⁴⁷ *Ibid.* §35.

¹⁴⁸ See e.g. *Chahal v. UK*, §79; *Labita v. Italy*, §119; *Aksoy v. Turkey*, §62; *Aydin v. Turkey*, §81.

¹⁴⁹ *Labita v. Italy*, §119.

¹⁵⁰ *Ecer and Zeyrek v. Turkey*, 27 February 2001.

is to an accused's detriment".¹⁵¹ The indictment referred to acts in 1988 and 1989 only and the government's argument that the applicant continued to be involved in the PKK until 1993 did not reverse that fact. Therefore, the Court concluded that a violation of Article 7(1) ECHR had occurred.

3.2 Other Substantial Rights under the Convention in Cases Regarding Terrorism : Articles 5, 6, 8, 10, 11, 13 and Protocol 1 Article 1

3.2.1 Right to Liberty and Security of the Person, Article 5

In its case law regarding terrorism, the Court has emphasized the importance of Article 5 "for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is precisely for that reason that the Court has repeatedly stressed in its case law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness..."¹⁵²

One of the difficulties of not having a definition of terrorism is that a State's definition can be alleged to be too unspecific to constitute an offence under Article 5(1) of the ECHR. The applicants in the *Brogan and Others v. the United-Kingdom*¹⁵³ judgment presented such an argument. Under section 12 of the UK's Prevention of Terrorism Act 1984, terrorism was defined as "the use of violence for political ends", which includes "the use of violence for the purpose of putting the public or any section of the public in fear". The Court excluded this claim as it already had recognized in its case law the same domestic definition of terrorism to be "well in keeping with the idea of an offence".¹⁵⁴

Also, one of the fundamental issues in the detention of suspected terrorists is the matter of "reasonableness of suspicion" under Article 5(1). In the judgment of *Fox, Campbell and Hartley v. the United Kingdom*, the applicants complained as regards their arrest and detention under legislation aimed at countering terrorism. They argued that their arrest and detention was aimed at information gathering, rather than for the purpose of charging them. The main disputed alleged violation concerned Article 5(1) of the ECHR and the "reasonableness" of the suspicions. Two of the applicants had been convicted in the past for explosives offences; one of them had also been convicted of

¹⁵¹ *Ecer and Zeyrek v. Turkey*, §30; see e.g. *Kokkinakis v. Greece* judgment of 25 May 1993, §52.

¹⁵² *Kurt v. Turkey*, §122. See also *Çakici v. Turkey*, §104; *Timurtas v. Turkey*, §103; *Çiçek v. Turkey*, §162; *Orhan v. Turkey*, §367.

¹⁵³ *Brogan and Others v. the United Kingdom*, 29 November 1988.

¹⁵⁴ *Ibid.* §51; see *Ireland v. UK*, §196.

belonging to the IRA. The Court confirmed the legal need, which it had established in the *Brogan* and *Klass* cases, to balance the defence of institutions of democracy in the common interest and the protection of individual rights.¹⁵⁵ It also gave the methodology in examining complaints related to terrorism, indeed the Court will “take into account the special nature of terrorist crime and the exigencies of dealing with it, as far as is compatible with the applicable provisions of the Convention in the light of their particular wording and its overall object and purpose”.¹⁵⁶

When addressing the question of Article 5(1) of the ECHR and the “reasonableness” of a suspicion, the Court observed that a terrorist crime belongs to a special category. The first reason for special category classification involves the risk to life and human suffering and, secondly, the difficulty of revelation of information without endangering the source of the information.¹⁵⁷ However, there is no justification to stretch the “reasonableness” in such a way as to impair the safeguard of Article 5(1) ECHR.¹⁵⁸

Still, the Court acknowledged that Article 5(1) should not be interpreted in such a way as to make it impossible for the governments to counter-terrorism. Therefore, States do not have to prove their reasonable suspicion by “disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity.”¹⁵⁹ Nonetheless, the Court has to approve if Article 5(1) is respected in terrorism situations with at least some facts or information which will satisfy the Court that the arrest was done under a reasonable suspicion.¹⁶⁰ Consequently, some objective evidence has to back up the subjective suspicion of terrorism.

In regards to the facts of the case, the Court conceded that the arrest of Mr Campbell and Mrs Campbell was based on a bona fide suspicion that they were terrorists. Nevertheless, the ECtHR affirmed the legal principle that the sole fact that individuals had previous convictions of terrorist acts is not enough to justify a suspicion. Neither is the fact that the interrogations were on the subject of specific terrorist acts.¹⁶¹ In conclusion, the Court found a breach of Article 5(1) ECHR.

A similar complaint was at the centre of *Murray v. the United Kingdom*.¹⁶² The facts mainly concerned Mrs. Murray who was arrested, questioned and released without charge, while personal information concerning her and her family was kept on record. Before the arrest, two of Mrs Murray’s

¹⁵⁵ *Fox, Campbell and Hartley v. the United Kingdom*, §28; see also *Brogan*, §48; *Klass v. FRG*, §§48-49 and 59.

¹⁵⁶ *Fox, Campbell and Hartley v. the United Kingdom*, §28.

¹⁵⁷ *Ibid.* §32.

¹⁵⁸ *Ibid.* §32; see also *Brogan* §59

¹⁵⁹ *Fox, Campbell and Hartley v. the United Kingdom*, §34.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.* §35.

¹⁶² *Murray v. the United Kingdom*, 28 October 1994.

brothers were convicted in the United States for offences of purchasing arms for the Provisional IRA.

The Court began by stating that “for the purposes of interpreting and applying the relevant provisions of the Convention, due account will be taken of the special nature of terrorist crime, the threat it poses to democratic society and the exigencies of dealing with it”.¹⁶³ Regarding Article 5 ECHR, the Court reiterated the principle that the “use of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives of citizens and to democratic society as a whole”.¹⁶⁴ Nonetheless, this will not leave the authorities with carte blanche under Article 5 ECHR simply because they assert the possible involvement of terrorism.¹⁶⁵ In contrast to the *Fox, Campbell and Hartley* case, the Court was satisfied with the evidence provided that a reasonable suspicion existed.

Once more, an applicant raised the issue of the reasonableness of the suspicion under Article 5(1)c) ECHR in the case of *O’Hara v. the United Kingdom*.¹⁶⁶ The applicant was arrested in relation to a murder, which the Provisional IRA had claimed responsibility for. The arrest of the applicant was the result of the receipt of intelligence. The Court recalled the test of the objective observer established in the *Fox, Campbell and Hartley* case and added that the terrorist crime causes special problems, especially with regard to the safety of the informant.¹⁶⁷ No confidential sources of information are to be disclosed by Contracting States when it comes to establishing the reasonable suspicion of a suspected terrorist, but such requirements related to terrorism do not justify the notion of reasonableness and cannot be stretch to the point of impairing Article 5(1)c) ECHR. Even then, some facts or information have to be furnished in order to satisfy the Court of the reasonable suspicion.¹⁶⁸ The standard of suspicion from the domestic law in this case was honest suspicion on reasonable grounds, therefore it was different from the one in the *Fox, Campbell and Hartley* and *Murray* cases in which only an honest suspicion was required.¹⁶⁹ In the end, no breach of Article 5(1)c) ECHR was found.

As for how long a suspected terrorist can be detained without judicial control in respect of the protection of Article 5(3), the *Brogan and Others v. the United-Kingdom* judgment is the leading authority in the application of this provision in cases regarding terrorism. The case dealt with the arrest and detention of four individuals suspected of terrorism. The periods of detention were six days and sixteen hours and a half, five days and eleven hours,

¹⁶³ *Murray v. UK*, §47; see e.g. *Fox, Campbell and Hartley v. UK*, §28, citing the *Brogan* case §48.

¹⁶⁴ *Murray v. UK*, §58; see also *Klass and Others*, §48.

¹⁶⁵ *Ibid.*; *Ibid.*

¹⁶⁶ *O’Hara v. the United Kingdom*, 16 October 2001.

¹⁶⁷ *Ibid.* §§34 and 35; see also *Fox, Campbell and Hartley*, §32.

¹⁶⁸ *O’Hara v. the United Kingdom*, §35.

¹⁶⁹ *Ibid.* §38.

four days and eleven hours, and four days and six hours. None of the suspects was brought before a judge or another official authorized to exercise judicial power, nor were any charges held against them after their release.

The Court took into account the growth of terrorism and recognised the “need, inherent to the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights”, here then echoing its principle from the *Klass and Others* judgment.¹⁷⁰ It should be noted that the Government had withdrawn their derogation of Article 15 in 1984. So this case would be decided with the full application of the Convention, nevertheless the terrorism background was to be taken into account.

On the alleged violation of Article 5(3), the ECtHR first accepted the fact that terrorism brought special problems for investigation of such acts and that the “context of terrorism in Northern Ireland has the effect of prolonging the period ...” during which the Government may detain a suspected terrorist without violating Article 5(3).¹⁷¹ However, to attach too much importance to the terrorism features as a justification for such a length of detention without judicial control would be a disrespectful interpretation of the word “promptly”.¹⁷² The sole legitimate aim of protecting the population from terrorism is not enough for Article 5(3) to be respected. Therefore, there was a violation of this provision regarding all four applicants.

The Court and the Commission had different views on this case. Under Article 5(3), the Commission granted a longer period of detention in the given context than in normal cases, allowing both detentions of four days, but not the ones of five days or more.¹⁷³ The Commission flexible approach resembled the one of the Court’s in the *Klass and Others* judgment were it had applied Article 8 flexibly in the context of terrorism. However, in this *Brogan* case the Court blocked this extensive approach towards Article 5, which did not contend “claw back clauses” like Article 8, in this way establishing the legal framework to which States must adjust to combat terrorism or otherwise introduce judicial control of detention or resort to Article 15.¹⁷⁴

Following the *Brogan* judgment, a series of cases in relation to suspected terrorists detained over the *Brogan* limit of four days resulted in a violation of Article 5(3), as it can be found in the cases of *Sakik and Others v. Turkey*,¹⁷⁵ *Dikme v. Turkey*, *O’Hara v. the United Kingdom*, *Igdeli v. Turkey*,¹⁷⁶ and *Filiz and Kalkan v. Turkey*.¹⁷⁷

¹⁷⁰ *Brogan and Others v. UK*, §48.

¹⁷¹ *Ibid.* §61.

¹⁷² *Ibid.* §62.

¹⁷³ *Ibid.* §57.

¹⁷⁴ Tanca, A., *Human Rights, Terrorism and Police Custody : The Brogan Case*, online: <<http://www.eijl.org/journal/Vol1/No1/art16.html>>, (date accessed: 2002-03-26).

¹⁷⁵ *Sakik and Others v. Turkey*, 26 November 1997. The applicant argued that the dissemination of separatist views did not constitute “terrorism” and the Court seemed to agree with them as it concluded by saying in §45 of the case: “even supposing the activities

Furthermore, the case law also extends to the aspects of Article 5(3) and the detention on remand of suspected terrorists or its prolongation. First, the Commission decision of *Ferrari-Bravo v. Italy*¹⁷⁸ was a case related to the assassination of Aldo Moro by the Red Brigade. The applicant was university professor detained on remand for four years and eleven months under the suspicion of having helped to bring into being and direct a terrorist organisation. The Commission conceded that the provisional release of the applicant was not possible because of the special feature of the case. It found the danger of the applicant absconding to be inherent to the terrorist offences that he was accused of, which were “part of an overall plan to provoke civil war and armed insurrection against the authority of the State”.¹⁷⁹ Also, the Commission considered the strong possibility that the applicant would leave the country if released and the specific problem link to extradition and terrorism offences: “many countries refuse to extradite persons accused of them- and this has happened in the case of some of the applicant’s co-accused”.¹⁸⁰ In the end, the case was declared inadmissible.

Then, the European supervision appeared stricter in the case of *Tomasi v. France*. The applicant was arrested and detained on remand for five years and seven months, thus claiming a violation of Article 5(3) ECHR, which the Court granted since the seriousness of terrorism cannot forever justify detention without trial. The Court found that even if there might have existed a risk for public order justifying the detention at first, “it must have disappeared after a certain time.”¹⁸¹

This interpretation was confirmed in the case of *Debboub alias Hussein Ali v. France*.¹⁸² The ECtHR reaffirmed that the maintenance of reasonable grounds of suspicion was a condition *sine qua non* for the detention to continue.¹⁸³ As for the terrorism and public order reason, the Court agrees that it constituted a reasonable factor; nonetheless it did not alone justify such a long length of detention. In conclusion the Court found a violation of Article 5(3), more convincing justifications should have justify the length of the present detention, since the initial motives lost their pertinence after a period of time.¹⁸⁴ This stricter application was also reaffirmed in *Erdem v. Germany*.¹⁸⁵ The

of which the applicants stood accused were linked to a terrorist threat ...” it was not necessary to detain them for twelve or fourteen days without judicial supervision.

¹⁷⁶ *Igdeli v. Turkey*, 20 June 2002.

¹⁷⁷ *Filiz and Kalkan v. Turkey*, 20 June 2002.

¹⁷⁸ *Ferrari-Bravo v. Italy*, Comm. Dec. 14 March 1984, DR 37, pp.15-41.

¹⁷⁹ *Ibid.* p. 39, §14.

¹⁸⁰ *Ibid.* p.39, §15.

¹⁸¹ *Tomasi v. France*, §91.

¹⁸² *Debboub alias Hussein Ali v. France*, 9 November 1999.

¹⁸³ *Ibid.* §39.

¹⁸⁴ *Ibid.* §47.

¹⁸⁵ *Erdem v. Germany*, July 5 2001.

applicant had refugee status in France and was arrested at the German border under suspicion of belonging to a terrorist organisation. He was then prosecuted among other alleged PKK members on the grounds of six murders and six sequestrations also on the structure of the terrorist organisation and five other murders within this organisation. The detention on remand lasted five years and eleven months. The Court agreed that there existed risk that the applicant would escape, but this argument alone was no longer sufficient after such a long period of time. Consideration was given to the fact that the decisions only repeated what the previous ones had said without stressing any new element. Without undermining the difficulties linked to a trial on the ramification of the PKK terrorism in Europe, the Court considered the length of the detention not to be justified by the complexity of the case, the number of people involved or the conduct of the defence.¹⁸⁶ More convincing justifications should have been brought to avoid a violation of Article 5(3).

As for Article 5(4) in cases regarding terrorism, an evolution concerning the *habeas corpus* and the UK counter-terrorism measures can be demonstrated from the Commission decision of *McVeigh and Others. v. the United Kingdom*¹⁸⁷ and the *Chahal* case. In the *McVeigh* decision, the Commission found that in the case of arrest under counter-terrorism legislation the *habeas corpus* constituted an effective remedy.¹⁸⁸ Then, in the *Chahal* case, the Court took a different stance. First, it observed that because of the involvement of national security, e.g. terrorism, domestic jurisdictions were not in a position to review the decision to detain the applicant and to keep him in detention in accordance with Article 5(4) the detention.¹⁸⁹ The Court once more recognized that special measures might be necessary with national security issues, nonetheless it recalled its case law principles that “This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved”.¹⁹⁰ The Court used a ‘less restrictive means’ test and comparative law to illustrate how the UK measures failed to respect Article 5(4), particularly by according “significance to the fact that ... in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns regarding the nature and sources of intelligence

¹⁸⁶ *Ibid.* §46.

¹⁸⁷ *McVeigh and Others. v. the United Kingdom*, Comm.Dec. 18 march 1981, D.R.25, pp.15-59.

¹⁸⁸ *Ibid.* pp.47-48, §§217-218.

¹⁸⁹ “Although the procedure before the advisory panel undoubtedly provided some degree of control, bearing in mind that Mr Chahal was not entitled to legal representation before the panel, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed ... the panel could not be considered as a “court” within the meaning of Article 5 para. 4”, *Chahal v. UK*, §130.

¹⁹⁰ *Chahal v. UK*, §131. See *Fox, Campbell and Hartley v. UK*, §34 and *Murray v. UK*, §58.

information and yet accord the individual a substantial measure of procedural justice”.¹⁹¹ Considering all this and the serious length of detention, the habeas corpus, the domestic judicial review of the detention decision and the advisory panel procedure did not meet the requirements of Article 5 (4).

Moreover, the *G.B. v. Switzerland*¹⁹² and *M.B. v. Switzerland*¹⁹³ cases concerned more than 30 days of detention on remand of the applicants who were under urgent suspicion of having participated with the “Carlos” terrorist group in different attacks. In the alleged violation of Article 5(4) of the European Convention, the Court noted the terrorism circumstances of the cases, thus it also observed that none of the parties argued that the cases revealed features of complexity.¹⁹⁴ The conclusion was an infringement of Article 5(4), since the proceedings were not done “speedily” according to this provision. Also, in *Igdeli v. Turkey*, the Court considered that “where a detained person has to wait for a period to challenge the lawfulness of his custody, there may be a breach of Article 5 § 4 ... the period in question [up to 15 days] sits ill with the notion of “speedily” under Article 5 § 4 of the Convention”.¹⁹⁵

A number of disappearance and unacknowledged detention cases connected to the terrorism situation in Turkey were brought up to the Court in connection with Article 5. From the first case on this matter, *Kurt v. Turkey*, the Court’s position has been firm that the unacknowledged detention of suspected terrorists is “in the complete absence of the safeguards contained in Article 5 and ... a particularly grave violation of the right to liberty and security of person guaranteed under that provision”.¹⁹⁶

To sum up, the case law on Article 5 has shown that the Court will take into account the grave nature of the terrorist crime when interpreting and applying Article 5 of the Convention, but not to the extent of impairing the protection guaranteed by it. As it will be described in sub-paragraph 3.3.2, even when a State derogates from Article 5 there are limits to the measures that can be adopted. Therefore, the protection against arbitrary and excessive arrest and detention remains strictly supervised even in a terrorism context.

3.2.2 Right to a Fair Trial, Article 6

The right to a fair trial is an essential element to the European Convention system and to the rule of law, which is part of the common heritage

¹⁹¹ *Chahal v. UK*, 131.

¹⁹² *G.B. v. Switzerland*, 30 November 2000.

¹⁹³ *M.B. v. Switzerland*, 30 November 2000.

¹⁹⁴ *G.B. v. Switzerland*, §34.

¹⁹⁵ *Igdeli v. Turkey*, §34.

¹⁹⁶ *Kurt v. Turkey*, §128. See also, *Çakici v. Turkey*, §107; *Timurtas v. Turkey*, §106; *Tas v. Turkey*, 87; *Çiçek v. Turkey*, §168; *Akdeniz and Others v. Turkey*, 108 ; *Orhan v. Turkey*, §374.

according to the Preamble of the Convention. Thus, it remains that terrorism and counter-terrorism measures have led to significant challenges on this important provision, mainly with the issues of presumption of innocence, special courts, length of proceedings and restrictions on the correspondence between a terrorist suspect and his legal representative.

The debate in relation to media coverage of some terrorists belonging to Red Army Fraction and the presumption of innocence was one of the central issues of the Commission decision in *G.Ensslin, A.Baader & J.Raspe v. FRG*. The applicants were complaining of the virulent press campaign describing them as grave criminals, which in their opinion affected the fairness of the trial and their presumption of innocence protected under Article 6 ECHR. The Commission observed that even if a press campaign can affect the fairness of a trial, the press and the authorities “cannot be expected to refrain from all statements, not about the guilt of the accused persons but about their dangerous character where uncontested information is available to them” like previous convictions or the use of firearms on arrest.¹⁹⁷ Also, they complained not to be represented by all the lawyers of their choice. On this matter, the Commission mentioned that the lawyers excluded were strongly suspected of supporting the criminal association and that this did not affect the effective defence since the applicants were still represented on average by ten defence counsel, some even chosen by them. In the end, no violation of Article 6 ECHR was found.

It is not the task of the Court to decide if special courts are necessary in fighting terrorism. However, it is the task of the court to ascertain if the manner a special court functions infringes the right to a fair trial. The Court dealt with this issue in the *Barbèra, Messegue and Jabardo v. Spain*¹⁹⁸ case. The facts of this case concerned Mr Bultó, a 77-year-old Catalan businessman who was assailed in his family home by a group of men who tied a bomb to Mr Bultó’s chest. The men demanded a ransom within twenty-five days, otherwise the bomb would explode. They released him, but the bomb exploded in the same night, killing him instantly. The murder was considered a terrorist act by the Spanish authorities and, in Spain, the Audiencia Nacional was given jurisdiction in terrorist cases since 1977. The applicants were transferred from Barcelona to Madrid, a 600 kilometres ride, the night before the hearing. In addition, there was an unexpected change in the court’s membership just before the hearing with no notification to the applicants. The new presiding judge had to rule within three days over this complex case, so the briefness of the trial was a factor for the Court, but most significantly the very important pieces of evidence were not adduced and discussed in an adequate manner at the trial. In its conclusions, the Court found a violation of Article 6(1) ECHR.

¹⁹⁷ *G.Ensslin, A.Baader & J.Raspe v. FRG*, Comm. Dec. 8 Jun. 1978, DR 14, pp.112-113, §15.

¹⁹⁸ *Barbèra, Messegue and Jabardo v. Spain*, 6 December 1988.

In the case of *Incal v. Turkey*,¹⁹⁹ the applicant, a member of the opposition party, was convicted by a National Security Court for his participation in the preparation of a leaflet containing virulent remarks on the Turkish government and a call for Kurds to unite in their political demands. A violation of Article 6 was established in relation to the presence of a military judge on the bench of the national security court. The argument for such a presence was the expertise of the military in dealing with terrorist crimes. In this case like in a series of others, the Court found that the applicant could reasonably fear a lack of independence from the judge and an appeal to the Court of Cassation could not solve this problem, since it had only a limited jurisdiction in such appeals.²⁰⁰

The case of *Zana v. Turkey*²⁰¹ was mostly on the subject of freedom of expression in terrorism background, but the applicant also complained about being unable to appear to the hearing and of the length of the proceedings (two years and five months). First, “In view of what was at stake for Mr Zana, who had been sentenced to twelve months’ imprisonment, the National Security Court could not, if the trial was to be fair, give judgment without a direct assessment of the applicant’s evidence given in person”.²⁰² Therefore, the Court found a violation Article 6(1) and 6(3)c) since “such an interference with the rights of the defence cannot be justified, regard being had to the prominent place held in a democratic society by the right to a fair trial within the meaning of the Convention”.²⁰³ Then, the Court found a violation of Article 6(1) on the account of the length of proceedings, particularly because there were no complex issues at stake.

The lengths of proceedings of five years and ten months were also disputed in the case of *Tomasi v. France*. The Court found a violation of Article 6(1) as there was no complexity in the case and the delays were only attributable to the judicial authorities.

Concerning the right to silence of suspected terrorists, in *John Murray v. the United Kingdom*,²⁰⁴ the applicant was arrested in the house where it was suspected that an alleged informer was being threatened by the IRA. The applicant never explained his presence in the house. According to the Criminal Evidence (Northern Ireland) Order 1988, it was allowed to make inferences from the applicant failure to answer some question. First of all, the

¹⁹⁹ *Incal v. Turkey*, 9 June 1998.

²⁰⁰ The same conclusion about a lack of independence was found in following Turkish cases: *Çiraklar*, 28 October 1998 ; and all these cases of 8 July 1999, *Gerger*, *Karatas*, *Baskaya* and *Okçuoglu*, *Sürek* (No.1), *Sürek* (No.2), *Sürek* (No.3), *Sürek* (No.4), *Sürek* and *Özdemir*. In June 1999, legislation was passed by the Turkish parliament to remove the military representation on National Security Courts.

²⁰¹ *Zana v. Turkey*, 25 November 1997.

²⁰² *Ibid.* §71.

²⁰³ *Ibid.* §73.

²⁰⁴ *John Murray v. the United Kingdom*, 8 February 1996.

Court accepts that the right to silence and not to incriminate oneself guaranteed by Article 6 § 1 are not absolute rights.²⁰⁵ In the Court's decision, "having regard to the weight of the evidence against the applicant ... the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances".²⁰⁶ Therefore, the Court found no violation of 6(1) on that point. However, a violation of 6(1) in conjunction with 6(3)c) was found for the denial of access to a lawyer within the first forty-eight hours of detention.

Furthermore, the right to silence of suspected IRA members was once more an issue in both cases of *Heany and McGuinness v. Ireland*²⁰⁷ and *Quinn v. Ireland*.²⁰⁸ The two cases had in common the fact that during their questioning, all applicants refused to answer some questions. Section 52 of the Offences Against the State Act 1939 was read to them, according to this 1939 Act either the suspect provided the information requested or he would face about six months of imprisonment. All applicants still refused to answer and were later convicted. The Court decided that the "security and public order concerns of the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention".²⁰⁹ In this way, there was a violation of Article 6(1) and also of Article 6(2), which guarantees the presumption of innocence because of the close link between the two provisions.

As regards to, the monitoring and censorship of a suspected terrorist's correspondence while in custody, in the *Domenichini v. Italy*²¹⁰ case, the applicant had been in custody for suspicion of having been active within the "Prima linea" terrorist organisation. The monitoring of the correspondence towards the applicant's lawyers was a breach of his defence's rights in Article 6(3)b) ECHR, because the applicant had ten days to submit grounds of appeal to a decision and the authorities only sent the correspondence to his lawyer after this delay.

On another aspect of Article 6, the *Brennan v. the United Kingdom*²¹¹ case focused on the question of if a police officer within hearing can be present during a suspected terrorist first consultation with his solicitor without violating Article 6 ECHR. Before this, the applicant alleged a violation of Article 6 because of the deferral of access to his solicitor. The Court found the 24 hour period of deferral to be reasonable under the circumstances and that the fact that

²⁰⁵ *Ibid.* 47.

²⁰⁶ *Ibid.* §54.

²⁰⁷ *Heany and McGuinness v. Ireland*, 21 December 2000.

²⁰⁸ *Quinn v. Ireland*, 21 November 2000.

²⁰⁹ *Heany and McGuinness v. Ireland*, §58; *Quinn v. Ireland*, §59.

²¹⁰ *Domenichini v. Italy*, 15 November 1996.

²¹¹ *Brennan v. the United Kingdom*, 16 October 2001.

the solicitor did not arrive before an additional 24 hours was not attributable to the authorities. The applicant made incriminating admissions of terrorist activities only after the 24 hour deferral, when he was allowed access to a solicitor. For this, no violation of Article 6(1) or 6(3)c) was found. However, the Court did find a violation of Article 6(3)c) read in conjunction with Article 6(1) ECHR regarding the presence of the police officer within hearing during the first consultation between the applicant and his solicitor, which affected his right to an effective exercise of his defence rights.

To conclude on this part, the case *Papon v. France*²¹² demonstrates the weight of Article 6 ECHR as a central element in the rule of law and common heritage of the European States. Maurice Papon was prosecuted and convicted for complicity in crimes against humanity for his participation in the illegal arrest and arbitrary sequestration of Jews deported to the Auschwitz camp in 1942 and 1944. Nonetheless, the Court still found a violation of Article 6(1) ECHR, because of the application of a criminal procedural provision, which was excessive. What is important in the case of *Papon v. France* is the statement by the Court that, even if it recognized the extreme seriousness of the applicants' actions, the fact that the applicant was prosecuted and convicted for complicity in crimes against humanity does not deprive him of the protection of the rights and freedoms of the Convention.²¹³

3.2.3 Right to a Private Life and Family, Article 8

The right to private life is mostly at risk of suffering from some interference by the State when it comes to fighting terrorism. Especially, since the Court recognized in the *Klass and Others v. FRG*, judgment that democratic societies were confronted by sophisticated terrorism requiring the use of secret surveillance as a counter-measure in the interest of national security and crime prevention. However, the Court continued and added that States cannot “in the name of the struggle against ... terrorism, adopt whatever measures they deem appropriate”.²¹⁴ Legally, the Court must be satisfied with the existence of “adequate and effective guarantees against abuse.”²¹⁵

This question of special measures to gather information was addressed in the Commission decision of *McVeigh and Others v. the United Kingdom*, the Commission considered necessary for public safety the questioning, searching, fingerprinting and photography, and the retention of such record after a counter-terrorism check-up at the border. However, the fact that during detention the authorities refused that the detained persons could contact

²¹² *Papon v. France*, 25 July 2002.

²¹³ *Ibid.* §98.

²¹⁴ *Klass and Others v. FRG*, §49

²¹⁵ *Ibid.* §50

their wife was considered an interference not necessary pursuant to Article 8(2).²¹⁶

Similar special measures of information gathering were disputed in Court's judgment of *Murray v. the United Kingdom*.²¹⁷ Mrs Murray, who was arrested, questioned and released without charges, while personal information concerning her and her family were kept on record. When analyzing the complaint under Article 8 ECHR, the Court echoed once more the obligation of States to prevent terrorism and the special problems link to the arrest and detention of suspected terrorists. These two factors do affect the fair balance to establish between the individual rights protected under paragraph 1 of Article 8 ECHR and the necessity under the second paragraph of the same article to effectively prevent terrorism.²¹⁸ Under the circumstances and background of this case (before the arrest, two of Mrs Murray's brothers were convicted in the United States for offences of purchasing arms for the Provisional IRA.), the entry and search of the applicants' home were legitimate and proportionate, so was the gathering of personal information of the arrested person or the other ones present at the time and place of the arrest.

Restrictive measures to the private life of suspected terrorists in custody lead to the Commission decision of *Baader and Others v. FRG*.²¹⁹ The four applicants were suspected of belonging to the Red Army Fraction (also referred to as the Baader-Meinhof Group) and were detained under restrictive measures, which included censorship of the correspondence and limited visits. The applicants were claiming to be "political prisoners" and for this reason to have been subjected to the torture of isolation and difficulties related to a fair defence. The Commission denied the allegation that the applicants were "political prisoners" relying on the facts that they were charged of grave offences dangerous to the community and therefore not in custody because of their political opinions.²²⁰ The Commission considered that the applicants were particularly dangerous, so the restrictive measures were permissible under Articles 8 and 10 ECHR, especially since the tough conditions had been relaxed. In the end, it declared the application inadmissible.

As regards to, the monitoring and censorship of a suspected terrorist's correspondence while in custody, in the *Domenichini v. Italy* case, the applicant had been in custody for suspicion of having been active within the "Prima linea" terrorist organisation. His correspondence, as well as the one of other prisoners in a special unit of a prison, was censored for six months. The purposes given were, first the discovery of differences of opinion among the

²¹⁶ *McVeigh and Others. v. the United Kingdom*, Comm.Dec. 18 march 1981, D.R.25, pp.52-52, §§234-239.

²¹⁷ *Murray v. UK*, 28 October 1994.

²¹⁸ *Murray v. UK*, §91; see *Klass and others*, §59.

²¹⁹ *Baader and Others v. FRG*, Comm. Dec. 30 May 1975, DR 2, pp.58-67.

²²⁰ *Ibid.* p.62.

former terrorists, and second, the danger of using the correspondence against public order or safety. However, it was not contested that two letters addressed to his lawyer had been inspected. The Court found a breach of Article 8 in that the Italian law was not clear enough in its scope and the way discretion was granted to the authorities, in other words the applicant did not enjoy the “minimum degree of protection which are entitled under the rule of law in a democratic society”.²²¹

In *Erdem v. Germany*, the correspondence of a suspected terrorist was once more submitted to strict restrictions. A judge had controlled the correspondence between the applicant and his lawyer. In regard to the terrorist menace in all its forms, the safeguards surrounding the present interference and the margin of appreciation of the Contracting States, which was not disproportionate, the Court found no violation of Article 8.²²²

On another aspect, the unjustified destruction of property during anti-terrorism operation by Turkish forces was declared in violation of Article 8 ECHR in the cases of *Akdivar and Others v. Turkey*,²²³ *Mentes and Others v. Turkey*, *Selçuk and Asker v. Turkey*, *Bilgin v. Turkey*, *Dulas v. Turkey*, *Orhan v. Turkey*.

To finish, the case law on Article 8 of the Convention emphasized the need to balance the fight against terrorism and the respect for human rights, especially that paragraph 2 of Article 8 explicitly allows restrictions in order to protect the democratic society. Terrorism can develop the need for more measures of protection, therefore leaving a wide margin of appreciation to the State and a wide interpretation of the concept of private life. Thus, it remains that even if the Court has recognized special measures such as secret surveillance as essential in the fight against terrorism, safeguards must exist.

3.2.4 Freedom of Expression, Article 10

The first case of freedom of expression with a terrorism background was the judgment of *Zana v. Turkey*, in which the applicant made the following statement to a journalist: “I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake ...”.²²⁴ For his words, the applicants received a prison sentence imposed by a National security court in front of which he never appeared. He was sentenced to twelve months, but only served two.

²²¹ *Domenichini v. Italy*, §33.

²²² *Erdem v. Germany*, §69.

²²³ *Akdivar and Others v. Turkey*, 16 September 1996.

²²⁴ *Zana v. Turkey*, §12.

The Court began by describing the situation in Southeast Turkey since 1985. On the alleged violation of Article 10, the Court observed that the fundamental principles, which emerged from its judgments applicable to Article 10, also apply to cases regarding terrorism. In this matter “it must, with due regard to the circumstances of each case and a State’s margin of appreciation, ascertain whether a fair balance has been struck between the individual’s fundamental right to freedom of expression and a democratic society’s legitimate right to protect itself against the activities of terrorist organisations.”²²⁵ The Court clearly expressed that the PKK was a terrorist organisation that uses violence to achieve its ends and that to declare supporting the PKK, but not violence, was a contradictory choice of words.²²⁶ Also, this statement could not be isolated from the situation in Southeast Turkey where the PKK had murdered numerous civilians. To say that the PKK was a national liberation movement by the former mayor of the most important city in Southeast Turkey, in an important national journal could “exacerbate an already explosive situation in that region”.²²⁷ It follows, that no violation of Article 10 resulted from the State’s interference. This case shows that it is possible to punish simply the defence or justification of acts of terrorism.²²⁸

Following this, in the case of *Incal v. Turkey*, the applicant, a member of the opposition party, was convicted by a National Security Court for his participation in the preparation of a leaflet containing virulent remarks on the Turkish government and a call for Kurds to unite in their political demands. The Court considered the content of the leaflet not to incite to violence, hostility or hatred. Also, it found the penalty to be of a radical nature in the present circumstances. The Court did take into account the background of problems linked to the prevention of terrorism. However, the circumstances here were not the same as the *Zana* judgment and in no way could the applicant be responsible for the problems of terrorism in Turkey.²²⁹ Therefore, there was a violation of Article 10 ECHR.

On July 8 1999, the Court delivered a series of judgments dealing with Turkey and freedom of expression in the fight against terrorism.²³⁰ In a number of cases the impugned statements were made in books or newspapers. Once more the crucial question was if the impugned words were an incitement to

²²⁵ *Ibid.* §55.

²²⁶ *Ibid.* §58.

²²⁷ *Ibid.* §60.

²²⁸ Iain Cameron, *National Security and the European Convention on Human Rights*, (The Hague: Kluwer, 2000).p. 393; see also *Sürek* (No.1) and *Sürek* (No.3).

²²⁹ *Incal v. Turkey*, §58.

²³⁰ *Ceylan; Arslan; Gerger; Polat; Karatas; Erdogdu and Ince; Baskaya and Okçuiglu; Sürek* (No.1); *Sürek* (No.2); *Sürek* (No.3); *Sürek* (No.4); *Sürek and Özdemir v. Turkey; Okçuoglu v. Turkey*; 8 July 1999. See also, *Öztürk v. Turkey*, 28 September 1998. A violation of Article 10 ECHR was found in each of those cases, except *Sürek* (No.1) and *Sürek* (No.3). See also *Sener v. Turkey*, judgment of 18 July 2000.

violence. The Court found a violation of Article 10 ECHR in all the cases where the words did not result in incitement of violence, such as simple references to part of the Turkish territory as “Kurdistan” and a part of the population as “Kurds”. Contracting States will benefit of a wide margin of appreciation when words incite to violence against individuals or a public official or part of the population, as long as they can justify that there is a link with the terrorism problem. The Court will have particular regard to the words used and the context in which they were published, in particular the problems linked to the prevention of terrorism. Also, the duties and responsibilities of the media professional will be even more important in the situations of conflict and tension.

Among those decisions, the case of *Süreker and Özdemir v. Turkey* shows that the Court also accepts that there exists a right for the public to know the objectives and motivation of terrorists, as “the domestic authorities in the instant case failed to have sufficient regard to the public’s right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them”.²³¹

Also on 8 July 1999, the Court delivered the *Karatas v. Turkey* judgment. The difference in this case is the form of expression, which was artistic expression. The applicant used poetry in a book to express his political ideas. He was convicted under the Prevention of Terrorism Act of 1991. The Court stressed the importance that this case involved a private individual who expressed his views in a book of poetry rather than mass media, a fact that limited substantially any impact on national security. “Thus, even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation”.²³² Moreover, the Court noted that the applicant was convicted not for his incitement to violence but for separatist propaganda. Notwithstanding that the Court struck by the severity of the sentence, more than thirteen months imprisonment.

To sum it up, this provision allows freedom of political discourse, which is fundamental in a democratic society. According to the case law, it is possible to punish simply the defence or justification of acts of terrorism if it can be regarded as incitement to the use of violence. Otherwise, every time the State interferes with the freedom of expression when there is no incitement to violence or terrorism, the court will find a violation of Article 10. Even when considering the terrorism background, there has to be something justifying a responsibility for any problem linked to that terrorism situation in order for the interference to respect Article 10. The case law also shows that States are not free to use terrorism as an excuse to punish political criticism just because a terrorism crisis exists on its territory.

²³¹ *Süreker and Özdemir v. Turkey*, §61.

²³² *Karatas v. Turkey*, §52.

3.2.5 Freedom of Association and Assembly, Article 11

The question of banning political parties for reasons linked with the Turkish terrorism crisis, as claimed by the authorities, was brought up on three occasions to the Court.

The first case was the *United Communist Party of Turkey and Others v. Turkey*,²³³ the political party in this case was dissolved before it even started its activities, only on the basis of its constitution and programme. Regarding political parties, the margin of appreciation left to States under Article 11 is very limited and submitted to rigorous European supervision.²³⁴ The Court took into consideration the terrorism background in Turkey. There was no justification to hinder this political party because it sought to debate in public situation of part of State's population and to take part in nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. No evidence could allow the Court to conclude, in absence of any activity by the party, that it had borne any responsibility for problems which terrorism posed in Turkey. The dissolution was ruled in violation of Article 11.

In *Socialist Party and Others v. Turkey*,²³⁵ the main issue was the dissolution of a political party. One of the reasons for its dissolution was for the reason that of it had aims similar to terrorist organizations. The Court considered the background of the case, meaning the difficulties of the prevention of terrorism. For the Court, the Government failed to established how the statements in issue were in any way responsible for the problems of terrorism in Turkey.²³⁶ It is not a problem for a party to refer to the self-determination of part of the population through peaceful means, such as a federal state or a referendum. The dissolution resulted in a violation of Article 11.

The *Freedom and Democracy Party (ÖZDEP) v. Turkey*²³⁷ judgment followed the Communist party and Socialist party cases. Once more it concerned the dissolution of a political party. The reasons of the dissolution were because its programme sought to undermine the territorial integrity and secular nature of the State and the unity of the nation, also its stance was similar to the one of terrorist organizations.²³⁸ The Court stressed that the ÖZDEP's programme, though voicing criticism and demands, was not a call for violence or not to comply with the principles and rules of democracy. Like all other cases, the Court took into account the background of cases before it, in particular the

²³³ *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998.

²³⁴ *Ibid.* §46.

²³⁵ *Socialist Party and Others v. Turkey*, 25 May 1998.

²³⁶ *Ibid.* §52.

²³⁷ *Freedom and Democracy Party (ÖZDEP) v. Turkey*, 8 December 1999.

²³⁸ *Ibid.* §38.

difficulties associated with the fight against terrorism. Regarding this, the Government argued that ÖZDEP was partly responsible for the problems caused by terrorism in Turkey. Nevertheless, this was rejected as ÖZDEP barely had time to take any significant action. Therefore, the only danger would have to come from the party's programme but once more the Government failed to establish that the programme could be regarded as having exacerbated terrorism in Turkey.²³⁹ In the end, the Court concluded that there was a violation of Article 11 ECHR.

This particular case law demonstrates how a State can attempt to use terrorism in order to justify its restrictions under the Convention. Political parties are essential to the proper functioning of democracy. None of the political parties were terrorist organizations, but the Turkish government attempted to link some of them with the ones of terrorist organizations and therefore hide the fact that their dissolution was based on other political reasons.

3.2.6 Right to an Effective Remedy, Article 13

Article 13 guarantees the provision of an effective remedy for anyone who has an arguable complaint that one of the rights and freedoms of the Convention has been infringed. The scope of States' obligations under this provision will vary depending of the complaint, thus the remedy must be effective in practice as in law.²⁴⁰

The Court interpretation of Article 13 in regard to terrorism appeared to be very weak recognized in the *Klass and Others v. FRG*. In this case, the Court accepted that terrorism requires the use of secret surveillance as a counter measure in the interest of national security and crime prevention, which in this case respected Article 8. On Article 13, the Court recognized that the secret measures made it almost impossible for the individual to seek any remedy while he was being under surveillance, but then the court applied Article 13 subsidiary with Article 8 by stressing: "The Court cannot interpret or apply Article 13 (art. 13) so as to arrive at a result tantamount in fact to nullifying its conclusion that the absence of notification to the person concerned is compatible with Article 8 (art. 8) in order to ensure the efficacy of surveillance measures". Therefore, Article 13 could not be interpreted in a way to invalid measures of secret surveillance already recognized as necessary under Article 8.²⁴¹ The Court concluded by observing that a remedy under Article 13 only needs to be as "effective as it can be".²⁴²

²³⁹ *Ibid.* §46.

²⁴⁰ See *e.g. Aksoy v. Turkey*, §95; *Aydin v. Turkey*, §103; *Kaya v. Turkey*, 19 February 1998 §107.

²⁴¹ *Klass and Others v. FRG*, §68.

²⁴² *Ibid.* §69.

In *Chahal v. the United Kingdom*, a violation of Article 13 in conjunction with Article 3 ECHR was found. The right to appeal a deportation order under national security reasons, e.g. terrorism, did not lie on a court, but instead on an advisory panel. The procedure to this panel did not provide the right for the individual for legal representation. The UK argued that in *Klass v. RFG*, Article 13 only required a remedy to be as “effective as it can be” in the circumstances. However, the Court considered that this *Klass* principle was suitable for Articles 8 and 10 of the Convention, but not for a provision such as Article 3 ECHR since the “requirement of a remedy which is “as effective as can be” is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3 (art. 3), where the issues concerning national security are immaterial”.²⁴³

As it was already mentioned in the sub-paragraph regarding Article 2, from the case of *Kaya v. Turkey*, numerous cases in the context of the terrorism situation in Turkey have produced a series of findings of failures by the authorities to investigate allegations of wrongdoing by the security forces, both in the context of the procedural obligations under Article 2 of the Convention and the requirement for effective remedies imposed by Article 13 of the Convention.

Moreover, the *Kaya* judgment went further in asserting that considering the importance of the alleged violation of right to life by the Government as a fundamental scheme in the Convention this must have an impact on the “nature of the remedies which must be guaranteed for the benefit of the relatives of the victim. In particular, where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure ...”.²⁴⁴ Consequently, the Court concluded that “seen in these terms the requirements of Article 13 are broader than a Contracting State’s procedural obligation under Article 2 to conduct an effective investigation”.²⁴⁵

Furthermore, in *Akkoç v. Turkey*, the Court decided that the Turkish authorities violated Article 2 ECHR by not taking “reasonable measures available to them to prevent a real and immediate risk to the life” of the applicant’s husband.²⁴⁶ Subsequently, there was a violation of Article 2 on the ground that there was no effective investigation into the death, which also resulted in a violation of Article 13 for the lack of effective remedy to the applicant.

²⁴³ *Chahal v. UK*, §150.

²⁴⁴ *Kaya v. Turkey*, §107.

²⁴⁵ *Ibid.* See e.g. *Ülkü Ekinci v. Turkey*, 16 July 2002, §159; *Tanrikulu v. Turkey*, § 119, and *Avsar v. Turkey*, § 431.

²⁴⁶ *Akkoç v. Turkey*, §94.

Also, the lack of investigation following the brutal destruction of property by security forces during an anti-terrorism operation was found in violation of Article 13 in the cases of *Mentes and Others v. Turkey*, *Selçuk and Asker v. Turkey*, and *Dulas v. Turkey*.

To sum it up, it is hard to establish some specific rules concerning Article 13 and cases in relation to terrorism. In the cases of *Klass v. FRG* the interpretation of the Court was very restrictive on Article 13, but this position seems to have change in the most recent cases, particularly in regard to alleged violations of rights where the terrorism concern is immaterial. Thus, the important legal criterion remains the “arguable claim” of a violation of the convention.

3.2.7 Right to Property, Protocol 1 Article 1

The *Akdivar and Others v. Turkey*, *Selçuk and Asker v. Turkey*, and *Bilgin v. Turkey* cases all concerned anti-terrorism operations by security forces, in which they destroyed the homes and property of the applicants. The deliberate destructions of the homes, with no justification presented by the government, was judged in each case as contrary to both Article 8 ECHR and Article 1 of the Protocol 1.²⁴⁷

3.3 Provisions of the Convention Regarding the Enjoyment of the Rights and Freedoms and Regarding their Restriction

3.3.1 Prohibition of Discrimination, Article 14

In *Ireland v. the United Kingdom*, the Irish government alleged that there was a violation of Article 14 combined with Article 5 ECHR. The argument was that in February 1973 the special powers were used only against those suspected of terrorism who belonged to the IRA or suspected of having information related to it. Later on, the special powers were applied also against Loyalist terrorists, but to a lesser extent. The Court found no violation and explained there were profound differences between the two terrorist opponents, essentially the fact that to that point in time the vast majority of violent acts were linked to the IRA. In the end, the Court stated that the aim of eliminating the most formidable terrorist organization first was legitimate and the measures taken did not appear disproportionate.²⁴⁸

²⁴⁷ *Akdivar and Others v. Turkey*, §88; *Selçuk and Asker v. Turkey*, §87; *Bilgin v. Turkey*, §109.

²⁴⁸ *Ireland v. UK*, §230.

In May 2001, the Court reached four judgments concerning the United Kingdom investigation procedure in the killing of suspected terrorists by either security forces or loyalist paramilitaries: the *Mckerr, Kelly and Others, Shanaghan*, and *Hugh Jordan* judgments. In all cases the applicants argued with statistical support that the killings disclosed discrimination under Article 14 ECHR, because of the fact that the majority of victims in Northern Ireland were coming from the national minority, therefore there was a discriminatory use of lethal force and lack of protection vis-à-vis this minority. Even if the applicants had statistical support, the Court rejected those arguments by stating that there was no substantial evidence to establish a practice that could be classified as discriminatory within the meaning of Article 14 ECHR.

In numerous Turkish cases it has been argued that the Kurdish civilian population in general in southeast Turkey did not received the same human rights protection as persons of non-Kurdish origin. These allegations were meant to establish that the attitude of the security forces was to treat the Kurdish civilian population like if involved with the PKK. Thus, that no distinction was made between terrorists and ordinary civilians belonging to minorities. However, these allege violations of Article 14 with other provisions of the convention were never successful, as the Court never considered them as substantiated²⁴⁹ or that it was necessary to analyse the case under Article 14.²⁵⁰

In *Gerger v. Turkey*, the applicant alleged a violation of Article 14 in that he was discriminated against because of his detention condition as a terrorist. The Court stressed that the purpose of the Turkish law was to penalized “people who commit terrorist offences and that anyone convicted under that law will be treated less favourably with regard to automatic parole than persons convicted under the ordinary law ... the distinction is made not between different groups of people, but between different types of offence, according to the legislature’s view of their gravity”.²⁵¹ Accordingly, the Court found no violation of Article 14.

As of this date, the protection of Article 14 ECHR in cases regarding counter-terrorism measures remains doubtful. Considering the statistical evidence in some cases, the problems of fact finding and to obtain substantial evidence of discriminatory practices in terrorism cases might be one explanation. Nonetheless, fact finding should not constitute too much of an excuse as counter-terrorism measures are often aimed at minorities or foreigners, especially subsequent to the events of 11 September 2001 and the emergence of

²⁴⁹ See e.g. *Akdivar and Others v. Turkey*, *Avsar v. Turkey*, *Bilgin v. Turkey*, *Ergi v. Turkey*, *Kaya v. Turkey*, *Kurt v. Turkey*, *Mentes and Others v. Turkey*, *Selçuk and Asker v. Turkey*.

²⁵⁰ See e.g. *Arslan v. Turkey*, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, *Mahmut Kaya v. Turkey*, *Okçuoglu v. Turkey*, *Ohran v. Turkey*, *Ülkü Ekinci v. Turkey*, *Yasa v. Turkey*.

²⁵¹ *Gerger v. Turkey*, 69.

stereotypes associating some ethnic, racial, religious or minorities with terrorism. It should be recommended that all jurisdictions, including the ECtHR, pay special attention to racial, ethnic and religious profiling in counter-terrorism measures and absolutely prohibit it.

3.3.2 Right of States to Derogate, Article 15

From the case law described above, if a case has a background linked with terrorism, the Court will definitively take this background into account when considering the merits. In this respect, the Court will “take into account the special nature of terrorist crime and the exigencies of dealing with it, as far as is compatible with the applicable provisions of the Convention in the light of their particular wording and its overall object and purpose”.²⁵² Nonetheless, in some terrorism crisis threatening the life of a nation States have the possibility to “water down” even more the application of the Convention by resolving to a derogation in accordance with Article 15 of the Convention.

The question whether terrorism could constitute a public emergency threatening the life of a nation was addressed in the first ever Court judgment. In *Lawless v. Ireland*,²⁵³ G.R. Lawless was arrested under the suspicion of belonging to an unlawful organization, the IRA (Irish Republican Army). He was detained without trial for almost five months in 1957. The Court proceeded to declare the detention contrary to the provisions of Article 5(1)c) and 5(3), prior to finding justification for the detention in Article 15. The ECtHR acknowledged that terrorism could amount to a state of public emergency justifying derogation under Article 15. It also noted in its judgment that the terrorist character of a group and the fear it creates among the population could cause great difficulties in the finding of evidence, therefore sometimes ordinary law could not suffice in stopping the danger.²⁵⁴

The interstate complaint of *Ireland v. the United Kingdom* dealt with the Irish Government alleging that the UK derogation was abusive. First, the Court found that the special powers of detention used were contrary to Article 5 on a variety of points, but still because of the derogation under Article 15 those special powers were considered necessary and proportionate in the present circumstance. The Irish government argued that the special measures taken by the UK failed to stop terrorism and even had the effect of increasing it, therefore the derogation of the UK was not necessary *a posteriori* because of the ineffectiveness of the measures. The Court rejected this argument declaring that it was not its function to substitute itself to the national government on what is the most efficient way to combat terrorism. It can do no more than “review the

²⁵² Fox, *Campbell and Hartley v. the United Kingdom*, §28; see e.g. *Murray v. the United Kingdom*, §47

²⁵³ *Lawless v. Ireland*, 01/07/1961.

²⁵⁴ *Ibid.* §36.

lawfulness, under the Convention, of the measures adopted by that Government ...”.²⁵⁵ Interestingly, the Commission made the statement concerning Article 15(1) that Article 3 common to all four Geneva Conventions of 1949 was ... not directly applicable here ...”,²⁵⁶ this is the only time to my knowledge that a ECHR organ made reference to the international humanitarian law aspects of terrorism.

In response to the above *Brogan* case, the United Kingdom Government resorted to Article 15 ECHR as regard to Article 5(3) ECHR. First, the Secretary of State made a statement in the House of Commons announcing derogation to Article 15 ECHR and to Article 4 of the *International Covenant on Civil and Political Rights*. Then, in December 1988, the UK informed the Secretary General of the Council of Europe of its derogation. In the case of *Brannigan and McBride v. the United Kingdom*,²⁵⁷ two individuals were arrested under section 12 of the “1984 Act” and detained respectively for six days, fourteen hours and thirty minutes, and four days, six hours and twenty-five minutes. The detention occurred shortly after the introduction of the derogation and the Government conceded that the detentions were longer than the shortest period in the *Brogan* case that violated Article 5(3), therefore affirming that there was a breach again of the same provision.²⁵⁸ However, the Government had derogated from this provision by having resort to Article 15 ECHR, therefore requiring the Court to examine the validity of such derogation in the present case.

The Court reaffirmed that States are granted a wide margin of appreciation to determine if a situation of emergency exists and the measures (including derogations) necessary to overcome it, thus the national authorities being in a better position than the international judge.²⁵⁹ Nonetheless a European supervision accompanies this national margin of appreciation, since States do not have unlimited power in this matter.²⁶⁰ In the present case and with regard to the evidence of terrorist violence in Northern Ireland, the Court finds no doubt that such an emergency situation existed.

When deciding if the measures were strictly required by the exigencies of the situation, the Court echoed its past decisions when it mentions that it is not its “role to substitute its views as to what measures were most appropriate or expedient ... for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism ... and respecting individual rights”.²⁶¹ The Court observed the margin of appreciation had not been exceeded when considering the terrorism situation, the limited scope of the derogation and the reasons for it, and also the existence of safeguards.²⁶²

²⁵⁵ *Ireland v. UK*, §214.

²⁵⁶ Commission Report, 25 January 1976 (B series), vol.23-1,p.379.

²⁵⁷ *Brannigan and McBride v. UK*, 26 May 1993.

²⁵⁸ *Ibid.* §37.

²⁵⁹ *Ibid.* §43.

²⁶⁰ *Ibid.* §43.

²⁶¹ *Ibid.* §59; see e.g. *Ireland v. UK*, §214 and *Klass and Others v. FRG*, §49.

²⁶² *Brannigan and McBride v. UK*, §66.

As regard to the obligation to respect international law in paragraph 1 of Article 15 ECHR, the applicants presented for the first time the argument that no valid derogation of Article 4 ICCPR had been made (it had been only stated in Parliament). The Government replied that the United Nations Human Rights Committee did not suggest that the derogation was not valid under Article 4 ICCPR. In this respect, the Court first observed that it was not its role to define the requirements of derogation under the ICCPR, but it accepted to inspect the basis of the applicants' argument.²⁶³ Then, the Court rejected the argument, since the statement made for the derogations in the Parliament, which was formal and public, constituted an official declaration.²⁶⁴ In conclusion, the derogation satisfied the requirements of Article 15 ECHR, so no violation of Article 5(3) was found.

Following this judgment, an evolution in the European Court's case law occurred with the cases of *Aksoy v. Turkey* and *Demir and Others v. Turkey*.²⁶⁵ In the *Aksoy* judgment, a man was detained for 14 days during which he was subjected to 'Palestinian hanging', following his arrest in Turkey on suspicion of terrorism.²⁶⁶ The Court accepted Turkey's derogation under Article 15 ECHR considering that the particular PKK terrorist activity in Southeast Turkey had created a "public emergency threatening the life of the nation".²⁶⁷ A reference was made to the case of *Brannigan and McBride*, however, even if the Court accepts that investigation of terrorist offences creates special problems, it does not find necessary to detain a terrorist suspect for fourteen days without judicial review.²⁶⁸ Also, the government did not give explanation on why the terrorism problem in Southeast Turkey made the judicial review impossible. Moreover, in opposition to the *Brannigan and McBride* case, the Court considered that no sufficient safeguards were available. So, even if the serious terrorism problems of Turkey were taken into account, the Court was not satisfied that it was necessary to hold the suspect in custody for fourteen days without judicial supervision, therefore Article 5(3) ECHR was violated. Article 13 was also violated, since no investigation concerning the torture allegation was instigated.

In the case of *Demir and Others* judgement, the detention lasted at least sixteen days and twenty-three hours and in a region also subject to a Turkish derogation under Article 15 of the Convention. The Court recognised Turkey's derogation from obligations under Article 5. However, the sixteen days incommunicado detention, without any judicial intervention, was not required by the terrorism crisis existing in Turkey. Moreover, the mere fact that this length of detention was in accordance with domestic law or that an inquiry or investigation had not been completed could not justify under Article 15 measures derogating

²⁶³ *Ibid.* §72.

²⁶⁴ *Ibid.* §73.

²⁶⁵ *Demir and Others v. Turkey*, 23 September 1998.

²⁶⁶ "Palestinian hanging" is a torture technique in which the person has her arms behind her back and is then suspended by her arms.

²⁶⁷ *Askoy v. Turkey*, §70.

²⁶⁸ *Ibid.* §78.

from Article 5 § 3. Even if the suspect was subsequently convicted, this has no impact on the legal question of whether there was a situation necessitating his incommunicado detention for so long. The Court concluded in a violation of Article 5(3).

On a more formal aspect of Article 15, the *Sakik and Others v. Turkey* judgment set the standard that a derogation made by a State because of terrorism could not to part of the State territory that was not explicitly named in the derogation notice. It followed that the derogation was inapplicable *ratione loci* to the present case.

The events of September 11th 2001 had an impact on the European Human Rights system as the United Kingdom delivered a notice that it would derogate from Article 5 in order to detain individuals of foreign origin considered as a risk for the State, but where it is almost impossible to ascertain that risk. Thus, it is the first time that terrorist attacks outside the European continent have ever resulted in such derogation and it has been questioned whether the Al Qaeda network truly was a threat to the life of the UK nation. Following the events of Bali in Indonesia, Kenya, Yemen and the recent threats to Australia, Canada, France, UK by the Al Qaeda network, it can be understood why the UK feels threatened and that Al Qaeda as the aim of “terrorizing” all the western countries and not just the USA. However, one controversial aspect of this derogation notice is that the derogation is aimed at detention of individuals of foreign origin only. Consequently resulting in racial, ethnic or religious group profiling, something that should be absolutely prohibited by Article 14 with Article 5 ECHR. The important legal factor is that when a State makes a derogation it must restrict itself to what is absolutely necessary, otherwise the Court will find the State in violation of the Convention.

3.3.3 The Prohibition of Using the Convention to Justify Acts Contrary to it, Article 17

The origin of this principle can be associated with the old French expression “pas de liberté pour les ennemis de la liberté”, nonetheless their interpretation differ substantially as of today with the evolution of human rights standards to give absolutely no freedom to those “enemies” is an attack on freedom itself.

In the first case regarding terrorism presented to the Court, the Irish Government try to oppose Article 17 to the claims of a suspected terrorist who alleged violations of Article 5 and 6. In *Lawless v. Ireland*, the Court denied the government’s argument on Article 17, stating that this provision shall not be interpreted *a contrario* as denying the fundamental rights of an individual to the protection of Articles 5 and 6 of the Convention. In this case, the presumed terrorist did not use the Convention in an attempt to justify acts contrary to its

fundamental rights and freedoms, instead he was complaining of being refused, because of the counter-terrorism measures, the protection of Articles 5 and 6 ECHR.²⁶⁹ Consequently, from the first Court's case it was established that even if an individual is suspected of being involved in terrorism this does not deprive him of the protection of the rights and freedoms of the Convention.

The Turkish Government also attempted to oppose Article 17 to political parties that it had dissolved for reasons partly linked to the terrorism situation in Turkey. In *United Communist Party of Turkey and Others v. Turkey*, *Socialist Party and Others v. Turkey*, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, the Court considered the aims and objectives of each political party within the terrorism background of Turkey and concluded that there is no need to apply Article 17 "as nothing ... the conclusion that it relied on the Convention to engage in activity or perform acts aimed at the destruction of any of the rights and freedoms set forth in it".²⁷⁰

These cases demonstrate how Governments used the "terrorism excuse" as an attempt to avoid the rights and freedom protected in the Convention, but the Court has proven to be aware of such tactics.

3.4 Concluding Remarks on the ECtHR Case Law Regarding Terrorism

Terrorism can amount to a crime of an extreme nature which every State has the duty to protect its population against. On the other side, even when individuals are suspected of the worst crimes possible such as crimes against humanity, this will not deprive them of the protection of the Convention. Even terrorists have the right of the protection of the Convention.

The case law on terrorism resumed above shows that the Court and the Commission have established an impressive jurisprudence on how to balance the respect for human rights and the fight against terrorism. This balance is inherent in the system of the Convention. To my opinion, such a balance is also an absolute necessity otherwise there would be no one left to protect the population from terrorism or intimidation. The Court observation in the *Klass* judgment is very relevant in that states cannot "in the name of the struggle against ... terrorism, adopt whatever measures they deem appropriate".²⁷¹ In this respect, the Court will "take into account the special nature of terrorist crime and the exigencies of dealing with it, as far as is compatible with the applicable

²⁶⁹ *Lawless v. Ireland*, 01/07/1961, The Law §7.

²⁷⁰ *United Communist Party of Turkey and Others v. Turkey*, §60; *Socialist Party and Others v. Turkey*, §53; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, §47.

²⁷¹ *Klass and Others v. FRG*, §90.

provisions of the Convention in the light of their particular wording and its overall object and purpose”.²⁷²

When a State has a particular history with terrorism and counter-terrorism, the Court will engaged in a comprehensive study of the situation before getting into the merits. The case of *Ireland v. UK* is particularly impressive on that aspect as it details the history behind the IRA, why it gained support and even compared the terrorism performed by the IRA and the Loyalists. If a case has a background linked with terrorism, the Court will definitively take this background into account when considering the merits.

The Court will establish specific legal principles to apply when terrorism is concerned. The counterpart of this practice is that States might use terrorism to justify the restrictions of the rights in the Convention or “water down” the protection offered by those provisions. “Terrorism” actually becomes a tool that States might be tempted to use for influencing the Court, especially when the proportionality principle can apply. Also, the lack of definition of terrorism can raise difficulties against the States arguments, however, the Court has managed to escape all those difficulties with its scrupulous examination of the cases and the weight of its arguments on terrorism and counter-terrorism.

As for the positive aspects of the case law, first the Court recognizes the obligation to protect the population from terrorism under Article 2, but also that this provision requires that States carefully plan the conduct of a counter-terrorism operation in order to avoid as much as possible the risks to the lives of individuals, including the lives of terrorists. Moreover, even if the Court accepts that terrorism might require some special measures, it has developed a case law which absolutely prohibits the use of torture or inhumane or degrading treatment or punishment and unacknowledged detention of terrorists or suspected terrorists. Furthermore, the Court has set limits to the actions of States towards rights that can be restricted in order to fight terrorism, as States must not destroy democracy on the grounds of defending it.²⁷³

However, the case law has some questionable points. One of them is that there has been only one case in relation to hostage-taking, in which the protection of the hostage’s life appears rather doubtful in this split decision.²⁷⁴ In future cases, notice should be given to the dissenting opinions of this case in relation to the already established standard of planning carefully and well conducting a counter-terrorism operation. Additionally, from the case law on terrorism it appears that the Court has granted more extent to the application of the Convention regarding the protection of rights like Article 5 and 8, especially

²⁷² *Fox, Campbell and Hartley v. the United Kingdom*, §28; see e.g. *Murray v. the United Kingdom*, §47

²⁷³ *Klass v. FRG*, §49.

²⁷⁴ *Andronicou and Constantinou v. Cyprus*.

when the margin of appreciation is applicable. Finally, the protection of Article 14 appears to be doubtful since the Court requires more than statistical elements as substantive evidence to conclude that counter-terrorism measures are in violation of this provision, which consists a difficult challenge as cases concerning terrorism often have some fact finding difficulties.

Considering all this, the Court has to stay aware of the growing danger of terrorism, but it should refrain from becoming “too lenient” to the States after the events of 11 September 2001. Special measures to fight terrorism, including derogations, have to remain temporary, so that the law of exception never becomes the standard in the European system. Moreover, the Court has to assure that those special measures are strictly necessary for their aim and purposes, as States might become tempted to use terrorism as an excuse to avoid their legal obligations and hide another political agenda. Particularly, the court has to show better awareness over complaints on Article 14, since harsh counter-terrorism measures are often aimed at racial, ethnic, religious groups or minorities, and foreigners.

4 Case Law on Terrorism in the United Nations Human Rights Committee

The United Nations Human Rights Committee has also considered cases in relation to terrorism or counter-terrorism measures. Though, there exists only a small number of cases regarding terrorism. Therefore, the HRC case law will be analyzed in a case-by-case chronological exposé (4.1 The Cases), prior to the concluding remarks (4.2 Concluding Remarks on the HRC Case Law Regarding Terrorism).

4.1 The Cases

In 1977, many arrests were made in Sweden in connection to a plan to abduct a former member of the Swedish Government. It was alleged that this plan originated from Norbert Krocher from the Federal Republic of Germany, an alleged terrorist who was at the time staying in Sweden illegally. Consequently, he was expelled along with other arrested foreigners. These events further lead to the first case of the Human Rights Committee to deal with terrorism. In *Maroufidou v. Sweden*,²⁷⁵ the author of the communication was a legal resident in Sweden and was also arrested and expelled since she had been in working with some of the alleged terrorists in relation to those events. The Swedish Government based its decision on its Alien Act's provisions on terrorism. The applicant argued that mere knowledge of planned terrorist acts was not enough to justify her expulsion. She alleged a violation of Article 13 ICCPR because her expulsion was not "in accordance with the law" and that the Swedish Alien Act had not been correctly interpreted. The HRC rejected that claim stressing that the interpretation of domestic law is a matter of the national jurisdictions concerned. Unless the domestic law was not interpreted and applied in good faith or that an abuse of power is evident, the HRC will not evaluate if the "authorities of the State party in question have interpreted and applied the domestic law correctly in the case before it under the Optional Protocol".²⁷⁶ Thus, no violation of Article 13 ICCPR was found.

The case *Cabreira Estradet v. Uruguay*²⁷⁷ involved the ill treatment and holding in inhuman prison conditions of the author's son. The Government claimed that the author's son was not a political prisoner as he took

²⁷⁵ *Maroufidou v. Sweden*, No. 58/1979

²⁷⁶ *Ibid.* §10.1.

²⁷⁷ *Cabreira Estradet v. Uruguay*, No. 105/1981.

part in terrorist activities, which the author denied arguing that he was never charged of terrorism.²⁷⁸ The Committee did not address this issue but concluded a violation of Article 10(1) as the State party never justified that the treatment and living conditions of the prisoner met the requirements of that provision of the Covenant.

In *J.R.C. v. Costa Rica*,²⁷⁹ the Costa Rican authorities had arrested an illegal alien in possession of a terrorist plan to attack the Guatemalan Embassy. For security measures linked to the author's terrorism background, he was being detained pending deportation. The Committee concluded that he had been lawfully arrested and detained. Moreover, "it is not for the Committee to test a sovereign State's evaluation of an alien's security rating".²⁸⁰ Over and above, the case was declared inadmissible.

The case of *Celepli v. Sweden*²⁸¹ involved a suspected terrorist who received an expulsion order in 1984. The expulsion was never executed because of the possible persecution he would face in Turkey if returned. Instead, he was subjected to limitations and conditions in his freedom of movement. Originally, the author could not leave his town of residence or change employment without the police permission and had to report to the police three times a week. The author complained that he never could challenge those restrictions as the grounds of suspicion were never disclosed to him and that no right existed under Swedish law to appeal a decision to expel a suspected terrorist. In 1989, the 1989 Alien Act replaced the Act under which the measures were taken. Under this amendment, it is impossible to prescribe an alien to a place of residence. In August 1989, a decision was taken to soften the restrictions on the author and two years later the expulsion order was revoked. The Committee decided to examine this decision solely on the basis of Article 12. The Committee considered the restrictions on the author were compatible with Article 12(3) and took into account that Sweden had invoked national security reasons to justify its restrictions. The HRC also noted that Sweden had reviewed itself the restrictions and finally revoked them. Thus, no violation was found.

In *Polay Campos v. Peru*,²⁸² Mr. Polay Campos was convicted of terrorism in front of a tribunal of "faceless judges" established under special anti-terrorist legislation. Five different accounts of violation were found in this case. The first one concerned the detention condition from 22 July 1992 to 26 April 1993, Mr. Polay Campos was detained in comunicado, was prohibited to talk to anyone, kept in an unit cell twenty-three and half hours a day and in

²⁷⁸ *Ibid.* §§ 4-5.

²⁷⁹ *J.R.C. v. Costa Rica*, No. 296/1988

²⁸⁰ *Ibid.* §8.4.

²⁸¹ *Celepli v. Sweden*, No. 456/1991

²⁸² *Polay Campos v. Peru*, No. 577/1994

freezing temperature. The HRC observed that those conditions resulted in a violation of Article 10(1) of the Covenant.

In second place, during a transfer the convicted terrorist was displayed to the media in a cage. The Committee declared this to be degrading treatment in violation of Article 7 and 10(1) as it was also contrary to the inherent and individual dignity protected under that provision.

The third factor related to the refusal to allow any visits of family and relatives for one year and the denial to send or receive correspondence. The Committee found this to be total isolation and with the restrictions on correspondence it amounted to inhuman treatment under Article 7 and also in violation of Article 10(1).

The fourth consideration was the general conditions of detention for over three years from 26 April 1993. The detainee was kept in solitary confinement in a two metres by two cell and could not see the sunlight more than ten minutes a day. These conditions were contrary to Article 7 and 10(1).

Finally, the Committee addresses the issue of the “faceless judges”. Such a system is meant to allow judges to cover their faces and remain anonymous to prevent them from the harm of terrorists groups. The HRC opinion was that such a system “fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that the tribunal must be, and be seen to be, independent and impartial”.²⁸³ There exist a serious risk that such a tribunal might include military judges. Moreover, the presumption of innocence is not protected under such a system. Therefore, the HRC concluded in a violation of paragraphs 1, 2, 3(b) and (d) of Article 14 ICCPR.

Four communications were considered together in the cases of *Domukhovsky*,²⁸⁴ *Tsiklauri*,²⁸⁵ *Gelbakhiani*²⁸⁶ and *Dokvadze*²⁸⁷ v. *Georgia*. Except for the second one, each of the authors was convicted for the preparation of terrorist acts. Domukhovsky and Gelbakhiani both claimed to have been kidnapped from Azerbaijan by Georgian forces, which the Government denied on the basis that it had an agreement with Azerbaijan on cooperation in criminal matters. However, the Committee was not provided with any specific information regarding such an agreement or how it could have been applied to the authors. Therefore, the arrests were unlawful in violation of Article 9(1) of the Covenant.

Each author claimed to have been subjected to torture and ill treatment resulting in a concussion for Domukhovsky, scarring for Gelbrakhiani and torture and threats to the lives of his two daughters for Dovkaze. Since no investigation before courts occurred and no medical reports were provided by the State, the Committee considered the torture and cruel and inhuman treatment to be facts in violation of Article 7 and 10(1).

²⁸³ *Ibid.* §8.8.

²⁸⁴ *Domukhovsky v. Georgia*, No. 623/1995.

²⁸⁵ *Tsiklauri v. Georgia*, No. 624/1995.

²⁸⁶ *Gelbakhiani v. Georgia*, No. 626/1995.

²⁸⁷ *Dokvadze v. Georgia*, No. 627/1995.

Moreover, each author was facing the death penalty in his trial and Georgia did not assured the continued presence of the authors to their trial nor did it allowed the authors to be at all time defended by a lawyer of their choice. This failure was in violation of Article 14(3) d). Also, it was not possible for the authors to appeal their convictions and sentences but only to review it. In conclusion, this was considered in violation of 14(5) by the HRC.

In the case of *Arredondo v. Peru*,²⁸⁸ Ms. Arredondon was accused three times of terrorism offences and acquitted on each occasion until the first case was reopened in front of a “faceless court” which sentenced her to fifteen years of imprisonment. The Committee first found a violation of Article 9 (1) and (3) as the State did not reply adequately to the allegations of the arrest without warrant of Ms. Arredondo and that she was not brought promptly before a judge after being taken in custody.

Moreover, when considering the conditions of detention, the Committee took into account the Government’s argument that it considered the detention conditions to be “justified by the seriousness of the offences committed by the prisoners and by the serious problem of terrorism which the State party has experienced”.²⁸⁹ However, even by recognizing the need for security restrictions, the HRC found the conditions to be excessive and not justified. On this account, the Committee found a violation of Article 10(1).

As for the complaint concerning the “faceless court”, the HRC recalled its decision of *Polay Campos v. Peru* and reiterated that such tribunals were contrary to Article 14(1).²⁹⁰ Furthermore, the HRC considered unacceptable and in violation of Article 14(3)c) the delays to the appeal of the reopened case.

The case of *Karker v. France*²⁹¹ concerned the co-founder of the movement known as Ennahdha. He was granted refugee status by France for political reasons but later faced an expulsion order because of terrorism suspicion. However, the expulsion was never enforced and instead Mr. Karker was restricted of his freedom of movement within France, like compulsory residence and reporting to the police once a day. The State party argued that those restrictions were justified for reasons of national security.

First, the HRC considered the case under Article 12. The national security reason was invoked and evidence in this matter had been produced under domestic jurisdiction. Also, the compulsory residence was subjected to a reasonable wide area. Furthermore, those restrictions of movement were submitted to review in domestic courts and they were held on the basis of national security. In addition, only the original order on restrictions was challenged, none of the following restriction orders were reviewed. Considering all this, the Committee concluded that France did not act contrary to Article 12(3).

²⁸⁸ *Arredondo v. Peru*, No.688/1996.

²⁸⁹ *Ibid.* §10.4.

²⁹⁰ *Polay Campos v. Peru*, No.577/1994, §8.8.

²⁹¹ *Karker v. France*, No. 833/1998.

Regarding Article 13, Mr. Karker was not allowed originally to submit arguments against the expulsion order because of urgent reasons of national security. However, he had the chance to have his case review by two domestic jurisdictions with the help of a counsel. Therefore, the HRC found no violation of Article 13.

4.2 Concluding Remarks on the HRC Case Law Regarding Terrorism

The HRC relevant case law on terrorism is very limited. It should be noted that there is no analysis of cases concerning guerrillas, as this concept can be considered different from terrorism. Without a doubt, guerrillas can resolve to acts of terrorism. However, what mainly distinguishes them is the fact that a guerrilla will control part of the territory while a terrorist group's presence will not be as visible. The purpose of this thesis is to focus on the application of human rights in the fight against terrorism.

As for today, the HRC does not engage itself in the deep analysis of the terrorist situation in a State or the history of a terrorist group. The Committee will usually refer to the term of "national security issues" rather than explicitly use the word "terrorism". Neither does it come to conclusions that establish legal principles directly aimed at the application of human rights to terrorism situation, or explain why counter-terrorism measures must respect human rights and how to balance fighting terrorism and respecting human rights. In the cases about terrorism discussed above, the HRC will relatively maintain a strict application of the Covenant. However, the case law does include some unique features compared to the ECtHR, such as restrictions that can be imposed on the freedom of movement of a terrorist who cannot be expelled from the country because of international obligation, the absolute prohibition of Courts with "faceless" judges and the prohibition under the ICCPR to display a convicted terrorist in a cage to the media. After September 11th 2001, the latter conclusion by the HRC is particularly interesting when considering the detention conditions of the alleged Al-Qaeda detainees in Guantanamo Bay. Close to 600 suspected terrorists by the United States have been in detention without trial at that military camp.²⁹² This is an obvious case of suspected terrorists in cages displayed to the international media and is in my opinion a clear violation of both Articles 7 and 10(1) of the Covenant. Moreover, the former cannot be derogated in accordance with Article 4(2) ICCPR.

Regarding all this, if the HRC is not to adopt an extensive approach to cases regarding terrorism like the ECtHR, it should nevertheless stress more principles on why human rights protection is important in the fight against

²⁹² "Guantanamo inmates 'to be freed'" (23 October 2002), online: BBC <<http://news.bbc.co.uk/1/hi/world/americas/2351649.stm>> (date accessed: 25 October 2002).

terrorism, as States must not only be condemned for some of their excessive actions but they must also understand the legal framework in which they can operate to suppress terrorism. On that aspect, the HRC should follow the UN General Assembly's recommendation to take into account in its case law "the consequences of the acts, methods and practices of terrorist groups."²⁹³

Finally, at this time there is no case law in relation to terrorism since September 11th 2001. However, the HRC does take into account the security measures taken by States in relation with these events. For instance, the concluding observations on the Swedish State report in 2002 do get into details of the country's reaction to the events and its respect of the Covenant when it is stated "While it understands the security requirements relating to the events of 11 September 2001, and takes note of the appeal of Sweden for respect for human rights within the framework of the international campaign against terrorism, the Committee expresses its concern regarding the effect of this campaign on the situation of human rights in Sweden, in particular for persons of foreign extraction".²⁹⁴ The HRC specifies three obligations for the State party. First, the measures taken to fight international terrorism must respect the obligations of the Covenant and the concern regarding terrorism must not become a source of abuse. Second, the State party's practice and tradition of non-refoulement should not be affected. Third, the HRC requests that the State "undertake an educational campaign through the media to protect persons of foreign extraction, in particular Arabs and Muslims, from stereotypes associating them with terrorism ...".²⁹⁵ It should be recommended that the HRC adopts the same extensive approach to human rights and the fight against terrorism in its future case law like it did in this State report.

²⁹³ A/RES/49/185, §6; A/RES/50/186, §8.

²⁹⁴ CCPR/CO/74/SWE, §12.

²⁹⁵ *Ibid.* §12 (a),(b) and (c).

5 Analysis and Final Remarks

5.1 The Concept of Terrorism

Like the concept of “minorities”, and “persecution “ in 1951 and 1967 UN Refugee Conventions, the concept of terrorism does not need a definition to exist in international law. Despite the absence of a universal definition, most of international legal instruments recognize terrorism as a crime of a grave nature. From an international human rights perspective, it can be qualified as an act aimed at the violation of the freedom from fear, the right to life and security of the person. Furthermore, one major negative aspect of the absence of a definition is that it allows States to subjectively select who they label as terrorists and this can lead to heavy consequences on individuals and international relations as the term “terrorism” in itself is “emotive [and] highly loaded politically”.²⁹⁶

It is inherent to the universal instruments on terrorism that to legally consider an act as terrorism, the principle to apply is the one of analogy. From the list of offences included in those conventions, one can by analogy associate an act with terrorism. However, the missing legal element is the intention. For sure the commission of the offence has to be intentional and unlawful, but the extra *mens rea* to distinguish the terrorist crime from the ordinary crime is missing from almost all conventions. Pursuant to the *International Convention for the Suppression of the Financing of Terrorism*, it appears that this extra intention is “when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”.²⁹⁷

Despite this continuous debate in relation to defining terrorism, the real need, as it was stated in Chapter 2, is for proper mechanisms to deal with the acts within the concept of terrorism and the counter-terrorism measures adopted by States. The concept of terrorism is a complex one, though this does not imply that in the fight against terrorism it is impossible to clarify the protection of individuals, especially their fundamental rights and freedoms. As there is no proper international mechanism to monitor the application of counter-terrorism measures in full respect of international law, then international human rights supervision becomes even more essential for the protection of individuals.

²⁹⁶ Joseph J. Lambert, “Terrorism and Hostages in International Law” (Cambridge: Grotius Publications Limited, 1990), p.13.

²⁹⁷ *International Convention for the Suppression of the Financing of Terrorism*, Art.2(1)b).

5.2 The Case Law of the ECtHR and HRC

The role of the ECtHR and the HRC are of significant importance for several reasons, like the establishment of an international legal framework of obligations and limits for States in combating terrorism. Furthermore, when States react too strongly to threats of terrorism, the international human rights monitoring procedures might be in certain circumstances the last protection for individuals against terrorism and intimidation.

The ECtHR has the strongest case law on terrorism, not just because of its number of cases on the subject, but particularly because of its scrupulous examination of the cases and the weight of its arguments on terrorism and counter-terrorism. One of the aspects of the ECtHR judgments that might prevent national jurisdiction to defy the European supervision is that the Court explicitly recognizes that fighting terrorism requires special needs and measures. It remains that when a violation is alleged, the Court will start with the Convention and the background of the case will be taken into account, but it is for the Court to determine what the background is and its implication on the application of the Convention to the case. Under the European system, States have generally benefited from a rather wide margin of appreciation, when applicable, in cases regarding terrorism. However, the Court gained experience in the field of terrorism and its relation to human rights it has been less “lenient” to States, mostly after 1990, and it remains to be seen what impact 11 September 2001 will have on the Court. So far only a few cases have been concluded since the events of September of 2001 and no significant change of direction has been noticed. This is understandable because at this date no cases has involved complaints concerning new counter-terrorism legislation following September 11th 2001 and the Court has mostly been confronted with regional forms of terrorism, like the IRA in Northern Ireland and the PKK in Turkey, and there is no logical reasons to believe that the events of September 11th 2001 have changed those situations. There is yet to be a case in relation to an international terrorist organization such as Al Qaeda and it could be expected that the Court would perhaps narrow the margin of appreciation of States, when applicable, because in classic cases the domestic judge has been in a better position to decide on domestic terrorism but the international judge is not in a lower position to decide regarding international terrorism. There are also a number of cases in relation to Chechnya pending before the European Court of Human Rights and it will be interesting to see how the Court will approach this situation.

Though, the case law of the HRC on terrorism might be limited at the moment, but like the ECtHR it does not let States do whatever they deem appropriate under the excuse of terrorism in order to escape human rights, as it can be demonstrated from its cases on “faceless” judges, torture and inhuman treatment of terrorists in detention. However, regarding the development of international human rights law the ECtHR approach is superior due to the fact that

it explains in depth why States cannot use whatever means they deem appropriate to fight terrorism, where the HRC remains silent and strictly finds or not a violation of the ICCPR.

A comparison of the case law of both the ECtHR and the HRC might prove useful to the human rights professional who has to choose which forum to address a human rights complaint because of a State's reaction to terrorism. The ECtHR is more predictable as the legal principle that will be applied and the effect of terrorism in application of the Convention are often well defined in the existing case law of the Court on the subject.

It is regrettable that the prohibition of discrimination in cases concerning counter-terrorism measures was never successfully brought before to an international body or considered by it. No cases regarding terrorism have ever been presented to the Committee on the Elimination of Racial Discrimination and it might be a more appropriate forum than the ECtHR or HRC for eventual complaints of racial discrimination in counter-terrorism measures. Thus, the CERD concluding observations of Canada in 2002 can support this proposition, as it was stated that: "The Committee notes with concern that, in the aftermath of the events of 11 September 2001 Muslims and Arabs have suffered from increased racial hatred, violence and discrimination ... In this connection, the Committee requests the State party to ensure that the application of the Anti-terrorism Act does not lead to negative consequences for ethnic and religious groups, migrants, asylum-seekers and refugees, in particular as a result of racial profiling".²⁹⁸ There is a high risk that "terrorism" might be used to target and deprive of human rights protection racial, ethnic, religious groups or minorities and foreign individuals. Unfortunately, harsh security measures against terrorism might be "tolerated" or not condemned in the public opinion, as they often do not affect everyone in the population, but mostly these specific groups.

To conclude on the international case law, the irony remains that terrorism is often aimed at the destruction of human rights and freedoms, but still the State cannot use the international human rights mechanisms to bring terrorists to international justice, while the opposite is common. It remains to be seen if the development of international criminal law and the International Criminal Court will eventually counter balance this irony. However, the access to international jurisdictions to balance the States' fight against terrorism and their obligations to protect human rights is an absolute necessity as otherwise there would be no one left to protect the population from terrorism and intimidation.

²⁹⁸ CERD/C/61/CO/3, §24.

5.3 Final Remarks

After the fall of the Third Reich, international human rights have been in constant evolution. However, since the events of September 11th 2001, the trend has shown a downside of human rights protection as special counter-terrorism legislation and measures emerged in a great number of countries. The result being that the law of exception has been normalized. International law can be partly responsible in this matter as the UN Security Council acting under Chapter VII of the UN Charter made it an international obligation to all States to adopt special measures on terrorism, without advising or requesting them to respect human rights in doing so. Moreover, States have the obligation to report to the Counter-Terrorism Committee established pursuant to Security Council resolution 1373, and Irene Khan made the interesting remark that “It is instructive to note that by January 10 2002, in the first 90 days of its operations, the Counter-Terrorism Committee had received reports from 117 countries. Around the same time there were 1334 overdue reports to the human rights Treaty Bodies”.²⁹⁹ Considering these facts and the absence of a human rights expert on the CTC, international human rights monitoring reveals to be even more essential and so is the knowledge of its jurisprudence on terrorism. Hopefully, the present case study in this Master thesis will mirror the recommendation of the Policy Working Group on the United Nations and Terrorism for a publication by the United Nations of “a digest of the core jurisprudence of international and regional human rights bodies on the protection of human rights in the struggle against terrorism. Governments and human rights organizations could find such a compilation of direct use in the development of counter-terrorism policies.”³⁰⁰

In reaction to the numerous excessive counter-terrorism measures adopted by States and the lack of human rights protection in the measures adopted at the UN SC in the year following 11 September 2001, the author of this thesis recommends the strengthening of human rights education at all levels of education and Governmental positions. This need for “balance” between fighting terrorism and respecting human rights has to be not only known but also understood in order to maintain the common heritage of humanity and international peace and security.³⁰¹ Fighting terrorism exceeds the complex question of national security, as it is also a fight to defend and strengthen the fundamental values and heritage of human rights both at the domestic and

²⁹⁹ Irene Khan, “Human Rights Challenges Following the Events of September 11 and Their Impact on Universality and Human Rights Movement”, conference paper from *Terrorism & Human Rights After September 11*, ed. Ashlid Kajok, (Cairo: Cairo Institute for Human Rights Studies, 2002), p.36.

³⁰⁰ *Report of the Policy Working Group on the United Nations and Terrorism*, UN GA, A/57/273 - S/2002/875, 6 August 2002, Annex, p.14, Recommendation 5.

³⁰¹ “... it must be also understood that international law requires the observance of basic human rights standards in the struggle against terrorism” [emphasis by the author], *Report of the Policy Working Group on the United Nations and Terrorism*, UN GA, A/57/273 - S/2002/875, 6 August 2002, Annex, §26.

international level. In a democracy respectful of human rights, the absolute absence of risks of terrorism does not exist.³⁰² Though, in States where human rights and freedoms are respected and a hope for justice exists, it is less likely that movements will emerge with the aim of using mass murdering of innocent people as a political or ideological tool.

To conclude, on 11 September 2001, on board the hijacked United Airlines Flight 93, which crashed in Pennsylvania, some passengers might have prevented a more serious attack and loss of lives by standing up to the terrorists. What I find remarkable regarding the story told so far is that those passengers actually secretly **voted** before confronting the terrorists. They instinctively used a human right to fight and defeat terrorism. Their actions were an inspiration all through the writing of the present thesis. Hopefully, the world leaders will honour their memory and follow in their steps.

³⁰² Olivier De Schutter, “La Convention européenne des droits de l’homme à l’épreuve de la lutte contre le terrorisme”, in Bribosia, Emmanuelle and Anne Weyembergh, dir., *Lutte contre le terrorisme et droits fondamentaux*, (Bruxelles: Nemesis, Bruylant, 2002), p.92.

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