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Threats of Terrorism and Selected Case Law of the European Court of Human Rights

Terrorism in its essence is an attempt to undermine democracy and the rule of law by acts so outrageous, that democratic society is driven from the moderate one, where it normally governs itself, to the extreme right or left from where it may develop authoritarian measures in order to defend itself. Terrorism seeks to impose upon the majority the views of a minority, because it stops at nothing in pursuit of its aims. Terrorism attacks the pillars of democracy and the rule of law upon which the human rights structure is based on. Democratic nations must defend against assault, and human rights law must accommodate that need. The President of the European Court of Human Rights, Judge Luzius Wildhaber in one of his speeches observed: "the European Convention should not be applied in such a way as to prevent States from taking reasonable and proportionate action to defend democracy and the rule of law. Moreover, as the European Court of Human Rights ("Court") has held, Convention States have a duty under Article 2 of the Convention to take appropriate measures to safeguard the lives of those within their jurisdiction."²

As far as Europe is concerned, terrorism did not start on 11 September 2001. Different terrorist attacks, which occurred before that date, called different international bodies and institutions in the past for adequate and immediate response. Within the Council of Europe it was e.g. the European Convention on the Suppression of Terrorism (1977), but also other documents (declarations, recommendations, resolutions), adopted by the Committee of Ministers and by the Parliamentary Assembly.³

Also the Court has frequently been called upon since its very first case of *Lawless v. Ireland*⁴ in 1959 to deal with complaints arising from counter-terrorist measures taken by Contracting States. Mentioned case dealt with a person who was arrested and kept in detention because he was a member of the IRA and was suspected of being engaged in activities prejudicial to the conservation of public peace and order or to the security of the state.

Many other cases concerning IRA-members followed, among which the famous cases were the case of *Ireland v. UK*⁵ and *McCan and Others v. UK*⁶. In the latter

1 Judge of the European Court of Human Rights. The views expressed are those of the author.

2 Mr. Luzius Wildhaber, former President of the ECHR.

3 See also Council of Europe Standards, compiled in *The fight against terrorism*, Council of Europe 2003.

4 *Lawless v. Ireland*, 1 July 1961.

5 Of 18 January 1978.

6 Of 27 September 1995.

one, the Court dealt with the case, where a security forces operation killed a number of terrorist's suspects. The United Kingdom alleged that the suspects were involved in planting a bomb in Gibraltar which is, among other things, a British military base. A shootout killed the deceased. The operation by the authorities was planned in such a way that it seemed inevitable that any force used would be lethal. The suspects were neither armed, nor was there in fact a bomb in Gibraltar, which they could have detonated. The Court found, that this aim could not justify the unnecessary risk of death to either the victims or to innocent parties. "In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respect, at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded, that the killing of three terrorists, constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of the Article 2/2/a of the Convention." It seems clear, that the Court based its finding upon a finding of inadequate planning by the authorities. The requirement by the Court seems to put upon the State the burden of arranging matters so that a minimum risk to life occurs in any anti-terrorist activities that it carries out.

According to Article 1 of the Convention, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". Everyone means everyone, including criminals and alike.

In the case of *Osman v. UK*⁷, the Court said: "States have a positive obligation to protect the life of their citizens. They should do all that could be reasonably expected from them to avoid a real and immediate risk to life of which they have or ought to have knowledge. The same applies to the protection of other rights." In other words it means, that the ECHR obliges the States to take care that citizens can live without any fear that their life or goods will be at stake – the right for a Freedom from Fear.

However, States are not allowed to reach that goal at all costs. The Convention (and the Protocols thereto) contains minimum standards which shall be secured to everyone within the jurisdiction of the High Contracting Parties (Art. 1). Only from some rights derogation in time of emergency – among which serious terrorist threats – is allowed (Art. 15). Convention rights, which are absolute in nature and in respect of which no derogation is possible are enumerated in Article 15 of the Convention (Art. 2, 3, 4 and 7).

In the Grand Chamber case of *Ogur v. Turkey*⁸ the security forces carried out on 24 December 1990 an armed operation at a site belonging to a mining company some six kilometres from the village of Dagkonak. The applicant's son, who worked at the mine as a night-watchman, was killed at about 6.30 a.m. as he was about to come off duty. On 26 December 1990 the public prosecutor's office declared that it had no jurisdiction to institute proceedings against civil servants and forwarded the file to the Administrative Council of the province of

7 Application No.: 23452/94, Judgement of 28 October 1998.

8 Application No.: 21594/93, Judgement of 20 May 1999.

Sirnak. On 15 August 1991 the Administrative Council decided that no proceedings should be brought in the criminal courts against the members of the security forces who had taken part in the operation of 24 December 1990. In its view, the victim had died after warning shots had been fired during the operation in question. Neither the evidence in the file nor taking statements from witnesses would make it possible to identify with any certainty the person who had fired. The Supreme Administrative Court upheld that decision.

Before the Court, the applicant complained of a violation of the right to life guaranteed under Article 2 of the Convention.

As to the death of the applicant's son, the Court first noted that none of those appearing before it had disputed that the victim had been killed by a bullet fired by the security forces. The disagreement related solely to whether that bullet came from a warning shot or from a shot fired at the victim, and on the circumstances in which the shot was fired. Of all the witnesses interviewed, only the members of the security forces had stated that they had been the target of an armed attack. The Court considered that there was insufficient evidence to establish that the security forces had come under any armed attack at the scene of the incident. It further noted that only one of the witnesses questioned had stated that verbal warnings had been given, while another had indicated that no warning had been given and a third witness had said that he could not remember what had happened. The Court concluded that there was not sufficient evidence to establish that the security forces had given the warnings usual in such cases. Several witnesses had explained the death of the applicant's son as having been caused by a warning shot and the Government had added, in their memorial that as the shot had struck the applicant's son in the nape of the neck, he had been running away. In that connection, the Court pointed out that, by definition, warning shots were fired into the air, with the gun almost vertical, so as to ensure that the suspect was not hit. That was all the more essential in the instant case as visibility was very poor. It was accordingly difficult to imagine that a genuine warning shot could have struck the victim in the neck. The Court consequently considered that, even supposing that the applicant's son had been killed by a bullet fired as a warning, the firing of that shot had been badly executed, to the point of constituting gross negligence, whether the victim was running away or not. In sum, all the deficiencies noted in the planning and execution of the operation in issue sufficed for it to be concluded that the use of force against the applicant's son had been neither proportionate nor, accordingly, absolutely necessary in defence of any person from unlawful violence or to arrest the victim. Therefore, the Court found a violation of that right.

In respect of the investigations by the national authorities, the Court reiterated that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention, required by implication that there should be some form of effective official investigation when individuals had been killed as a result of the use of force. The investigation should have been capable of leading to the identification and punishment of those responsible. The Court observed that when he inspected the scene of the incident, the Sirnak public prosecutor

confined himself to noting findings in respect of the victim's body, making an inspection and a sketch of the scene, reconstructing the events and interviewing three witnesses, all of them night-watchmen colleagues of the victim. It noted, however, that here, too, a proper examination, in particular a ballistic test, could have revealed exactly when those items had been used. As to the witnesses questioned at the scene, they were all members of the night-watchmen's team. No member of the security forces that had taken part in the operation was interviewed. Lastly, the expert report prepared at the prosecutor's request contained information that was very imprecise and findings mostly unsupported by any established facts. The subsequent investigation carried out by the administrative investigation authorities had scarcely remedied the deficiencies noted above in that, again, no post-mortem or other forensic examination, notably in the form of ballistic tests, had been ordered and no security forces members that had taken part in the operation had been questioned. Moreover, the case file had been inaccessible to the victim's close relatives, who had had no means of learning what was in it. The Supreme Administrative Court had ruled on the sole basis of the papers in the case, and that part of the proceedings had likewise been inaccessible to the victim's relatives. In conclusion, the investigations were not effective capable of leading to the identification and punishment of those responsible for the events in question. In conclusion, the Court found a violation of mentioned Convention right.

Thus Article 3 prohibiting torture, and inhuman or degrading treatment or punishment enshrines one of the most fundamental values of democratic society. While the Strasbourg Court is well aware of the immense difficulties faced by States in protecting their communities from terrorist violence, even in these circumstances the Convention prohibits in absolute terms torture or inhuman or degrading treatment, irrespective of the victim's conduct. The prohibition provided for in Article 3 against ill-treatment is equally absolute in expulsion cases. Where substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to a particular receiving State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion.

The case-law of the Court shows many examples of cases introduced by members of all kind of extremist groups (RAF, ETA) or so-called liberation movements (PKK). In case of *Aksoy v. Turkey*⁹, the Court for the first time found a State guilty of torture. Authorities stripped the applicant naked and with his arms tied behind his back, suspended him by his arms. In the Court's view, authorities deliberately inflicted this and of so serious and cruel a nature that Court could only describe it as torture.

The Court in *Selmouni v. France*¹⁰ case found that exposure of the applicant, a prisoner suspected of drug smuggling, to severe beatings, to running the gauntlet of police officers trying to trip him up, being urinated upon, threatened with a blow lamp and threats of sexual assaults amounted to torture. The Court considered, that certain acts which in the past might have been classified as

9 Application No.: 21987/93, Judgement of 18 December 1996.

10 Application No.: 25803/94, Judgement (GCH) of 28 July 1999.

"inhuman or degrading treatment" as opposed to "torture", could be classified differently in the future. It took the view that increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

In case of *Mamatkulov & Askarov v. Turkey*¹¹, the applicants were two Uzbek nationals and members of an opposition party in Uzbekistan. They were arrested by Turkish police under international arrest warrants on suspicion of having committed terrorist acts in their country of origin. The Republic of Uzbekistan made a request for their extradition to which the Turkish authorities acceded. The applicants appealed in vain. They alleged, inter alia, that they risked being ill-treated if they were extradited. The European Court of Human Rights indicated to the Turkish Government under Rule 39 of the Rules of Court that they should not extradite the applicants until it had examined the case. However, before it had done so, the Turkish authorities issued a decree ordering extradition. The Turkish authorities did not comply with the measure indicated and handed the applicants over to the Uzbek authorities, subsequently informing the Court that they had received assurances before the extradition that the applicants would not be tortured or sentenced to capital punishment in Uzbekistan. The applicants were convicted by the Uzbek courts and sentenced respectively to twenty years' and eleven years' imprisonment. Following the applicants' extradition, their representatives were unable to contact them further.

The applicants had been extradited to Uzbekistan on the 27th March 1999, despite the interim measure that had been indicated by the Court under Rule 39. It was, therefore, that date that had to be taken into consideration when assessing whether there was a real risk of their being subjected in Uzbekistan to treatment proscribed by Article 3. A failure by a Contracting State to comply with interim measures was to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right.

Having regard to the material before it, the Court concluded that, by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, Turkey was in breach of its obligations under Article 34 of the Convention.

The Strasbourg Court has consistently recognized the particular difficulties which combating terrorism creates for democratic societies. It has accepted e.g. that the use of confidential information is essential in combating terrorist violence and the threat that organized terrorism poses to lives of citizens and democratic society. This does not mean however, as Court concluded in the case of *Murray v. the United Kingdom*¹², that the investigating authorities should be given blank card under Article 5 of the Convention to arrest suspects for questioning free from effective control by the domestic courts or by the Convention supervisory mechanism. Again, in the context of Article 5 of the Convention, the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding an arrest of a suspected terrorist by disclosing the confidential sources or their identity. But the exigencies of the situation cannot justify stretching the notion of

11 Application No.: 46827/99, Judgement (GCH) of 4 February 2005.

12 Judgement of 28 October 1994.

reasonableness to the point where the essence of the safeguard secured by Article 5/1/c – requiring among other things "reasonable suspicion" of having committed an offence – is impaired¹³.

In the course of battling terrorism, States have created special courts in order to deal with the problems brought about by terrorism. Also in the case of *Incal v. Turkey*¹⁴, the Court found, that the national security courts in Turkey failed to satisfy the standard of independent and objective impartiality required by Article 6/1 of the Convention, due to the presence of a military legal officer on the Court. The Turkish government argued that the military experience of such judges would assist their militarily experienced civil counterparts in dealing with cases involving armed action directed against the State. The Court, however, took the view that there was a reasonable suspicion or appearance that such a military judge who remained in the army and who depended for his future career prospects upon his military superiors might not have the required degree of independence or appearance thereof.

In the case of *Ocalan v. Turkey*¹⁵, the applicant, a Turkish national and the former leader of the Workers' Party of Kurdistan ("the PKK"), in October 1998 was expelled from Syria. After staying in various countries, he was put up at the Greek Ambassador's residence in Nairobi, Kenya. On 15 February 1999 he was separated from the Greek Ambassador and taken by a Kenyan official to a Turkish-registered aircraft at the Nairobi Airport in which Turkish officials were waiting to arrest him. The applicant was transferred to Turkey and taken into custody in a prison on the island of İmralı on 16 February 1999, following which he was interrogated by members of the security forces. In an indictment submitted in April 1999 the public prosecutor accused the applicant of carrying on activities with a view to bringing about the secession of part of the national territory and of having formed and led an armed organization to that end. He sought the death penalty pursuant to Article 125 of the Criminal Code. During the trial the Constitution was amended so as to exclude military members from the composition of the state security courts. A civilian judge was therefore appointed to replace the military judge on the panel which was hearing the applicant's case. The applicant was found guilty of the offences as charged and was sentenced to death. On 25 November 1999 the Court of Cassation upheld that judgment. Also in this case the Court did not find as sufficient guarantee, that the civilian judge replaced the military one only in the final stage of the court proceedings.

As the Article 5(1) of the Convention is concerned, the applicant had been arrested by members of the Turkish security forces inside a Turkish-registered aircraft in the international zone at Nairobi Airport. Directly after being handed over to the Turkish officials by the Kenyan officials he had come under effective Turkish authority and had therefore been brought within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey had exercised its authority outside its territory. The applicant's arrest and

13 *Fox, Campbell and Hartley v the United Kingdom*, Judgement of 30 August 1990 (Application No.: 12244/86, 12245/86 and 12383/86).

14 *Incal v. Turkey*, Application No.: 22678/93, judgement of 9 June 1998.

15 Application No.: 46221/99, Judgement (GCH) of 5 May 2005.

detention had been carried out in accordance with arrest warrants issued by the Turkish criminal courts with a view to bringing him before "the competent legal authority on reasonable suspicion" of having committed an offence. The arrest and detention had therefore been in accordance with Turkish domestic law. Therefore his detention had to be regarded as having been in accordance with "a procedure prescribed by law" for the purposes of Article 5(1).

In the Grand Chamber case of *Al-Adsani v United Kingdom*¹⁶ the applicant, a dual British/Kuwaiti national, served as a pilot in the Kuwaiti Air Force during the Gulf War and remained in Kuwait after the Iraqi invasion. He came into possession of sexual video tapes involving a sheikh related to the Emir of Kuwait. According to the applicant, the sheikh, who held him responsible for the tapes entering general circulation, gained entry to his house along with two others, beat him and took him at gunpoint to the State Security Prison, where he was detained for several days and repeatedly beaten by guards. He was later taken at gunpoint to a palace where he was repeatedly held under water in a swimming pool before being taken to a small room where the sheikh set fire to mattresses soaked in petrol, as a result of which the applicant sustained serious burns. After returning to the United Kingdom, the applicant instituted civil proceedings against the sheikh and the Government of Kuwait. He obtained a default judgment against the sheikh and was subsequently granted leave to serve proceedings on two named individuals. However, he was refused leave to serve the writ on the Kuwaiti Government. On appeal, the Court of Appeal concluded that leave should be granted and the writ was served, but on the application of the Kuwaiti Government the High Court ordered that the proceedings be struck out on the ground that the Kuwaiti Government was entitled to state immunity. The applicant's appeal was dismissed by the Court of Appeal and leave to appeal to the House of Lords was refused.

Although Articles 1 and 3 taken together place a number of positive obligations on States, designed to prevent and provide redress for torture and other ill-treatment, the obligation applies only in relation to acts allegedly committed within the State's jurisdiction. Article 3 has some, limited, extraterritorial application, in so far as the State's responsibility may be engaged if it expels an individual to a country where there are substantial grounds for believing that there is a real risk of torture or ill-treatment. However, any liability would be incurred by reason of the expelling State having taken action which had as a direct consequence the exposure of the individual to such treatment. In the present case, as the applicant did not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence, it could not be said that the State was under a duty to provide a civil remedy in respect of torture allegedly carried out by the Kuwaiti authorities; therefore the Court found no violation of this Article.

As regards Article 6(1) of the Convention, the question was, whether a person has an actionable domestic claim may depend not only on the substantive content of the right as defined under national law but also on the existence of procedural bars. It would not be consistent with the rule of law or the basic principle

16 Application No.: 35763/97, Judgement of 21 November 2001.

underlying Article 6(1) if a State could, without control by the Convention organs, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on large groups or categories. In the present case, the proceedings which the applicant intended to pursue concerned a recognised cause of action, namely damages for personal injury, and the grant of immunity did not qualify a substantive right but constituted a procedural bar on the courts' power to determine the right. There thus existed a serious and genuine dispute over civil rights and Article 6 was applicable. The right of access to court may be subject to limitations, provided they do not impair the very essence of the right. Such limitations must pursue a legitimate aim and be proportionate. The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States. As to proportionality, the Convention should as far as possible be interpreted in harmony with other rules of international law, including those relating to State immunity. Thus, measures taken by a State which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court. In that respect, the relevant United Kingdom statute complies with the 1972 Basle Convention. However, the applicant contended that the prohibition of torture had acquired the status of *jus cogens*, taking precedence over treaty law and other rules of international law. While his allegations had never been proved, the alleged ill-treatment could properly be categorised as torture within the meaning of Article 3 of the Convention. The right enshrined in that provision is absolute and several other international treaties also prohibit torture; in addition, a number of judicial statements have been made to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens*, which the Court accepted. However, the present case did not concern the criminal liability of an individual but the immunity of a State in civil proceedings and there was no firm basis in international instruments, judicial authorities or other materials for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State in respect of alleged torture. Consequently, the United Kingdom statute was not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity and the application of its provisions could not be said to have amounted to an unjustified restriction on the applicant's access to court. Based on what mentioned above, the Court found no violation of Article 6 of the Convention.

The Article 7 of the Convention protects against retrospective criminalization. In case of *Ecer & Zeyrek v. Turkey*¹⁷, the government charged applicants with aiding and sheltering alleged terrorists. The Court was satisfied that these offences had been committed in 1988 and 1989. The applicants were sentenced pursuant to the Prevention of Terrorism Act 1991, which imposed a 50% increased tariff on punishment for offences in connection with terrorism. As a result, they were given a higher sentence than that provided by law at the time of the commission of the offences. Given this, the Court therefore found a violation of Article 7 of

17 Applications No.: 29295/95 & 29363/95, Judgement of 27 February 2001.

the Convention. The Court held that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the convention system of protections, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency.

Before the end of my presentation, I'd like to mention a case relating to the terrorism and media and Article 10 of the Convention. In case of Cetin and Others v Turkey¹⁸, the Court came to the conclusion, that the prohibition on distributing and bringing the newspaper into the region under the state of emergency constituted an interference with the applicants' freedom to communicate ideas and information. There was no point in determining whether the legal provision in question satisfied the requirements of accessibility and foreseeability in view of the finding reached below from the point of view of the necessity for the interference. In view of the sensitive nature of the fight against terrorism and the need for the authorities to show vigilance in the face of acts liable to increase violence, it could be accepted that the prohibition pursued the aim of defending public order and the protecting national security. As for the necessity for the interference, the prefect of the region under a state of emergency had wide-ranging prerogatives with regard to the administrative prohibition of the distribution and introduction of publications. Such prior restrictions were not incompatible *a priori* with the Convention but they had to be set in a particularly strict legal framework as regards the delimitation of the prohibition and the effectiveness of judicial review of any abuses. In this case, the powers conferred on the prefect of the region under a state of emergency and the application of the rules governing the state of emergency were not subject to strict and effective judicial review of any abuses. Admittedly, account had to be taken of the difficulties associated with the fight against terrorism and of the political tension existing in the region in question at the material time on account of acts of terrorism. The articles which had been the subject of seizure proceedings were certainly capable of having a particular impact on that sensitive climate, even though the press often had less immediate and less powerful an impact than audiovisual media. However, the prohibiting decision had not been reasoned and made no reference to the decisions relating to the seizures. In the absence of a detailed statement of reasons, accompanied by adequate judicial review, the application of such a measure was capable of different interpretations. In short, the lack of judicial review of the administrative prohibition of publications deprived the applicants of guarantees sufficient to avoid any abuses. The interference connected with the application of the rules on the state of emergency in question was not necessary in a democratic society.

In the Grand Chamber case of Ilascu & Others v. Moldova¹⁹ the applicants, Mr Ilie Ilaşcu, Alexandru Leşco, Andrei Ivanţoc and Tudor Petrov-Popa were Moldovan nationals at the time when the application was lodged. Mr Ilaşcu acquired Romanian nationality in 2000, as did Mr Leşco and Mr Ivanţoc in 2001. The applicants, with the exception of Mr Ilaşcu and Mr Leşcu, who were released in May 2001 and June 2004 respectively, were at the relevant time detained in the

18 Applications No.: 40153/98 and 40160/98, Judgement of 13 February 2003.

19 Application No.: 48787/99, Judgement of 8 July 2004.

"Moldavian Republic of Transdniestria" ("the MRT"), a region of Moldova known as Transdniestria, which declared its independence in 1991. At the material time Mr Ilaşcu was the local leader of the Popular Front and was working towards the unification of Moldova with Romania. He was twice elected to the Moldovan Parliament and was appointed as a member of the Moldovan delegation to the Parliamentary Assembly of the Council of Europe. In December 2000 he was elected to the Senate of the Romanian Parliament and appointed as a member of the Romanian delegation to the Parliamentary Assembly.

Following the dissolution of the Soviet Union, the Moldovan Parliament adopted a declaration of independence in 1991. Separatists in the Transdniestrian region of Moldova had already proclaimed MRT, which has not been recognised by the international community. Violent clashes broke out, during which the separatists obtained weapons from troops of the Soviet Union (subsequently the Russian Federation) which had remained in Moldovan territory, some of whom joined the separatists. In July 1992 a ceasefire agreement was reached between Moldova and the Russian Federation, providing for the withdrawal of the two sides and the creation of a security zone. A further agreement providing for the withdrawal of Russian troops was signed in 1994 but was never ratified by the Russian Federation. In 1997 the President of Moldova and the President of the MRT signed a memorandum laying down the basis for the normalisation of relations. Since then, further negotiations have taken place.

The four applicants were arrested in June 1992 and accused of anti-Soviet activities, fighting by illegal means against the State of Transdniestria and other offences, including murder. They were ill-treated while in custody. Three of them were taken to the garrison of the Russian army, where they claim they were guarded and tortured by soldiers of that army. They had no access to the outside world and were held in cells which had no toilets, water or natural light, with only 15 minutes of outdoor exercise each day. The applicants were subsequently held at a police headquarters. The cells had no natural light and the applicants were not permitted to send or receive mail, had no access to a lawyer and received family visits only on a discretionary basis. The applicants were convicted in December 1993 by the Supreme Court of the MRT, which sentenced the first applicant to death and the others to lengthy terms of imprisonment. The Supreme Court of Moldova examined the judgment of its own motion and quashed it, ordering the applicants' release, but the MRT authorities did not respond to this judgment. Following their conviction, the applicants were held in single cells with no natural light. The conditions of their detention led to their health deteriorating but they did not receive proper medical treatment. The conditions of their detention got worse after their application was lodged with the Court. The first applicant was released in May 2001; the others remained in prison.

Article 1 of the Convention. As to the question of whether the applicants came within the jurisdiction of Moldova, the Court stated that the presumption that "jurisdiction" is exercised throughout a State's territory may be limited in exceptional circumstances, in particular when the State is prevented from exercising its authority over part of its territory. In order to establish whether such a situation exists, the Court examined both the objective facts and the State's conduct, since the State has positive obligations to take appropriate steps

to ensure respect for human rights within its territory. Moreover, in exceptional circumstances the acts of a State which take place or produce effects outside its territory may also amount to the exercise of "jurisdiction" and where a State exercises overall control in an area outside its territory its responsibility extends to acts of the local administration which survives by virtue of its support. In addition, acquiescence in the acts of a private individual may also engage the State's responsibility, in particular in the case of recognition by the State of the acts of self-proclaimed authorities not recognised by the international community.

In the present case, the Moldovan Government, the only legitimate one under international law, did not exercise authority over the part of its territory under the control of the MRT. However, the Government still had a positive obligation to take the measures within its power to secure the applicants' rights. Where a State is prevented from exercising its authority over the whole of its territory, it does not cease to have "jurisdiction", although the factual situation reduces the scope of that jurisdiction, so that the State's undertaking under Article 1 must be considered only in the light of its positive obligations. These obligations, in the present case, related both to the measures needed to re-establish control over Transdniestria and to measures to ensure respect for the applicants' rights, including attempts to secure their release. The obligation to re-establish control required Moldova to refrain from supporting the MRT regime and to take all the measures at its disposal to re-establish its control. In that respect, the Moldovan authorities had never stopped complaining of the "aggression" and had rejected the MRT declaration of independence but there was little they could do against a regime sustained by a power such as the Russian Federation. Moldova had continued to take steps both internally and internationally after the 1992 ceasefire and after ratifying the Convention in 1997, in particular at the diplomatic level. While cooperation with MRT authorities had been established in a number of areas, these acts represented an affirmation of the desire to re-establish control and could not be regarded as support for the regime. As regards the situation of the applicants, a number of measures had been taken prior to ratification of the Convention, including the quashing of their convictions by the Moldovan Supreme Court, and measures to secure their release had also been taken after ratification. However, there was no evidence that since the release of the first applicant effective measures had been taken to put an end to the continuing infringements of the other applicants' rights. Indeed, no mention had been made of them in the continuing negotiations, although it was within the power of the Moldovan Government to raise the matter in that context. Consequently, Moldova's responsibility was capable of being engaged on account of its failure to discharge its positive obligations with regard to the acts complained of which occurred after May 2001.

In respect of the question of whether the applicants came within the jurisdiction of the Russian Federation, the Court held that the Russian Federation had supported the separatist authorities during the conflict by their political declarations and had subsequently signed the ceasefire agreement as a party. Its responsibility was thus engaged in respect of the unlawful acts committed by the separatists, regard being had to the support it gave and to the participation of its military personnel in the fighting. Moreover, it continued to provide military, political and economic support after the ceasefire agreement. The applicants were

arrested with the participation of Russian troops and three of them were detained and ill-treated on their premises. The applicants thus came within the jurisdiction of the Russian Federation, although the Convention was not at that time applicable. Actually, the events had to be considered to include not only the acts in which its agents participated but also the transfer of the applicants into the hands of the MRT regime and their subsequent ill-treatment, since the agents of the Russian Federation were fully aware that they were handing the applicants over to an illegal and unconstitutional regime and knew, or should have known, the fate which awaited them. It remained to be determined whether that responsibility remained engaged after ratification of the Convention in May 1998. In that respect, the Russian army remained stationed on Moldovan territory and in view of the level of weapons stocks there the importance of that military presence persisted. Significant financial support was also provided. Thus, the MRT remained under the effective authority, or at the very least the decisive influence, of the Russian Federation, and there was a continuous link of responsibility for the applicants' fate, since after ratification no attempt had been made to put an end to their situation. The applicants therefore came within the jurisdiction of the Russian Federation and its responsibility was engaged.

Competence *ratione temporis*. The Court held that as the applicants' trial had taken place prior to ratification of the Convention by the respondent States, it did not have jurisdiction *ratione temporis* to examine their complaints of unfairness. As to their complaints under Articles 3, 5 and 8 of the Convention it stated that while the events had begun in 1992 with the detention of the applicants, they were still going on and it therefore had jurisdiction. It finally considered that the death sentence imposed on the first applicant had not been set aside when respondent States ratified the Convention and that, therefore, it had jurisdiction.

Article 2 of the Convention. While the death sentence imposed on the first applicant had been set aside by the Moldovan Supreme Court in 1994, that judgment had had no effect. The Court was not in a position to establish the exact circumstances of his release or whether the death sentence had been commuted, but since the applicant was now living in Romania as a Romanian national the risk of enforcement was more hypothetical than real. He must have suffered on account of the sentence and the conditions of detention but it was more appropriate to examine that under Article 3 of the Convention. In conclusion, the Court held that it was not necessary to examine it under this head.

Article 3 of the Convention

(i) While the Convention is only binding on States in respect of events subsequent to its entry into force, the Court could take into consideration the whole period during which the first applicant had been detained under sentence of death in order to assess the effect of his conditions, which remained essentially the same throughout that time. The applicant had lived in constant fear of execution, unable to exercise any remedy, and his anguish was aggravated by the fact that the sentence had no legal basis or legitimacy, in view of the patently arbitrary nature of the circumstances in which the applicants were tried. The conditions in which the first applicant was held had a deleterious effect on his health and he did not receive proper medical care or nutrition. Moreover, the

discretionary powers in relation to correspondence and visits were arbitrary and had made the conditions of detention even harsher. There had been a failure to observe the requirements of Article 3 and the treatment to which the first applicant had been subjected amounted to torture. The Russian Federation was responsible for that treatment, whereas since Moldova's responsibility was engaged only after the time of his release there had been no violation by Moldova. The Court found, that there was a violation by the Russian Federation (16 votes to 1) and found no violation by Moldova (11 votes to 6).

(ii) The Court held that the treatment of the third applicant and the conditions in which he had been kept, denied proper food and medical care, amounted to torture. As he remained in these conditions, the responsibility of both States was engaged as from the respective dates of ratification. Therefore, the Court found a violation by the Russian Federation (16 votes to 1) and also a violation by Moldova (11 votes to 6).

(iii) The Court further considered that two other applicants had been kept in extremely harsh conditions which amounted to inhuman and degrading treatment and the responsibility of both States was engaged. The Court found a violation by the Russian Federation (16 votes to 1) and also a violation by Moldova (11 votes to 6).

Article 5 § 1(a) of the Convention. The Court did not have jurisdiction to rule whether the proceedings against the applicants had breached Article 6 of the Convention but in so far as the applicants' detention continued after ratification by the respondent States it had jurisdiction to determine whether they were lawfully detained after conviction by a competent court. In view of the arbitrary nature of the proceedings, none of the applicants had been convicted by a "court" and the prison sentences imposed on them could not be regarded as "lawful detention" ordered "in accordance with a procedure prescribed by law". This conduct was imputable to the Russian Federation in respect of all the applicants, whereas the responsibility of Moldova was engaged only in respect of the second, third and fourth applicants. The Court found a violation by the Russian Federation (16 votes to 1); violation by Moldova (11 votes to 6) in respect of three applicants, no violation by Moldova in respect of the first applicant (11 votes to 6).

Article 8 of the Convention. The Court considered unanimously that it was not necessary to examine the complaints concerning correspondence and visits, which had been taken into account in the context of Article 3 of the Convention.

Article 1 of Protocol No. 1. Even supposing the Court had jurisdiction *ratione temporis* to examine the applicants' complaint that their property had been confiscated following their trial, the complaint had not been substantiated. The Court found no violation (15 votes to 2).

Article 34 of the Convention. The Court noted that the applicants claimed that they had not been able to apply to the Court and that their wives had had to do so on their behalf. Moreover, they had been threatened and the conditions of their detention had deteriorated after their application was lodged. Such acts constituted an improper and unacceptable form of pressure which hindered

exercise of the right of petition. In addition, the Russian Federation had apparently requested Moldova to withdraw certain observations submitted to the Court. Such conduct was capable of seriously hindering the Court's examination of the application and there had therefore been a breach by the Russian Federation of its obligations under Article 34 of the Convention. Furthermore, remarks by the Moldovan President following the first applicant's release, making an improvement in the applicants' situation dependent on withdrawal of the application represented direct pressure intended to hinder exercise of the right of petition under Article 34 of the Convention by Moldova. The Court found failure by Moldova to discharge obligations (16 votes to 1) and failure by the Russian Federation to discharge obligations (16 votes to 1).

Conclusion

Democratic society acting in full conformity with the Convention is therefore not defenceless in the face of terrorism. Some compromise may be necessary, as the Court has recognized, between the requirements for defending democratic society and individual rights²⁰. It would run counter to the fundamental object and purpose of the Convention, for national authorities to be prevented from making a proportionate response to such threats in the interests of safety of the community as a whole.

One should never forget that the insidious undermining of fundamental rights is one of the dangers of terrorism. Limitations which may be possible within the margin of appreciation must never be so broad as to impair the very essence of the right in question; in Strasbourg terms, they must also pursue a legitimate aim and bear a reasonable relationship of proportionality between the means employed and the aims sought to be achieved. At the same time, the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organized terrorism²¹.

The above examples demonstrate the way in which the Convention has developed its jurisprudence to meet the requirements of the fight against terrorism; it remains the obligation of the governments to fight terrorism because it is an attack on democracy and the rule of law, the very pillars which the human rights protection system is based on. States must have the ability to protect themselves effectively against terrorism, and human rights law must accommodate this need.

Annex

Other relevant case-law of the Court related to terrorism:

- Lawless v. Ireland judgment of 1 July 1961;
- Ireland v. the United Kingdom judgment of 18 January 1978;

20 *Klass and Others v. Germany*, Application No.: 5029/71.

21 *Fox, Campbell and Hartley v. the United Kingdom*, Judgement of 30 August 1980.

- McCann and Others v. the United Kingdom, judgement of 27 September 1995
- Heaney and McGuinness v. Ireland, judgement of 21 December 2000
- Ecer & Zeyrek v. Turkey, judgement of 27 February 2001
- Klass and Others v. Germany, judgement of 6 September 1978
- Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990;
- Brogan and Others v. the United Kingdom judgment of 29 November 1988;
- Murray v. the United Kingdom judgment of 28 October 1994;
- O'Hara v. the United Kingdom judgment of 16 October 2001.
- Dikme v. Turkey judgment of 11 July 2000.
- Debboub alias Hussein Ali v. France judgment of 9 November 1999.
- Chahal v. the United Kingdom judgment of 15 November 1996.
- Brannigan and McBride v. the United Kingdom judgment of 26 May 1993;
- Aksoy v. Turkey judgment of 18 December 1998;
- Marshall v. the United Kingdom decision (inadmissible) of 10 July 2001
- Zana v. Turkey, judgement of 25 November 1997
- Ozturk v. Turkey, judgement of 28 September 1999
- Halis Dogan & Others v. Turkey, judgement of 10 January 2006
- Bladet Tromso & Stensaas v. Norway, judgement (GCH) of 20 May 1999
- Polat v. Turkey, judgement (GCH) of 8 July 1999
- Erdoglu and Ince v. Turkey, judgement (GCH) of 8 July 1999
- Surek & Ozdemir v. Turkey, judgement (GCH) of 8 July 1999
- Al-Adsani v. the United Kingdom, judgement (GCH) of 21 November 2001
- Ilascu & Others v. Moldova & Russia, judgement (GCH) of 8 July 2004
- Mamatkulov & Askarov v. Turkey, judgement (GCH) of 4 February 2005
- Ocalan v. Turkey, judgement (GCH) of 5 May 2005
- Ramirez Sanchez v. France, judgement (GCH) of 4 July 2006

Documents adopted by the Council of Europe in relation to combat the terrorism:

- * Declaration of the Committee of Ministers on the fight against international terrorism – adopted by the Committee of Ministers on 8 November 2001
 - intensifying legal co-operation to combat terrorism
 - whilst safeguarding fundamental rights (measures must remain consistent with the requirements of democracy, the rule of law and human rights) and
 - investing in democracy (wide intercultural dialogue, to find greater cohesion and reduce the risks of misunderstanding)

* The Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002.

* The Preamble mentions the imperative duty of States to protect their populations against possible terrorist acts. Art. 1 of the Guidelines elaborates on that: States are under the obligation to take measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.

* In the preface of the first printed edition of the first guidelines, (September 2002) the then SG of the Council of Europe Walther Schwimmer wrote: (The guidelines) are designed to serve as a realistic, practical guide for anti-terrorist policies, legislation and operations which are both effective and respectful for human rights.

* The Guidelines on the protection of victims of terrorist acts adopted by the Committee of Ministers on 2 March 2005.

* In the preface of the March 2005 printed edition the SG of the Council of Europe Terry Davis wrote: Faced by terrorist acts and threats, the temptation for governments and parliaments is to react at once with force, setting aside the legal safeguards which exist in a democratic state. But let us be clear: in crises, such as those brought about by terrorism, respect for human rights is even more important. Any other choice would favour the aims of terrorists and would undermine the foundations of our society. On the other hand, the need to respect human rights is not an obstacle to the effective fight against terrorism.

* The Opinion of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on "The Role of Judges in the Protection of the Rule of Law and Human Rights in the Context of Terrorism" adopted by the CCJE on 10 November 2006.

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