TERRORISM AND THE LIMITATION OF RIGHTS

Taking as a starting point the widely accepted view that states confronted with terrorism must find a proper equilibrium between their respective obligations of preserving fundamental rights and fighting terrorism effectively, this book seeks to demonstrate how the design and enforcement of a human rights instrument may influence the result of that exercise. An attempt is made to answer the question how a legal order's approach to the limitation of rights may shape decision-making trade-offs between the demands of liberty and the need to guarantee individual and collective security. In doing so, special attention is given to the difference between the adjudicative methods of balancing and categorisation. The book challenges the conventional wisdom that individual rights, in times of crisis, are better served by the application of categorical rather than flexible models of limitation. In addition, the work considers the impact of a variety of other factors, including the discrepancies in enforcing an international convention as opposed to a national constitution and the use of emergency provisions permitting derogations from human rights obligations in time of war or a public emergency.

Volume 12: Human Rights Law in Perspective

HUMAN RIGHTS LAW IN PERSPECTIVE

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The language of human rights figures prominently in legal and political debates at the national, regional and international levels. In the UK the Human Rights Act 1998 has generated considerable interest in the law of human rights. It will continue to provoke much debate in the legal community and the search for original insights and new materials will intensify.

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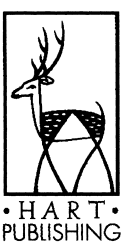

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To the memory of my mother, Suzanne Lambrechts

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I

Introduction

> When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; (…) but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those entrusted with the guardianship of the Constitution and laws.[1]

I. HUMAN RIGHTS AND TERRORISM

WHEN I STARTED this project in the spring of 2001 the relationship between human rights and terrorism was an interesting topic with sufficient social relevance to justify doctoral research. A few months later it was to become one of the most pressing issues of our time. While there was already a considerable amount of literature on the topic before the devastating attacks on New York and Washington DC, the events of September 11 and their aftermath brought about an explosion of popular and scholarly contributions considering the interplay between human rights and terrorism from all imaginable perspectives. The wave of terrorism the world has witnessed since that infamous day served only to enhance the international awareness of the impact terrorism can have on fundamental democratic values.

This work does not aim to contribute to the current debate by providing any new grand theory on the subject. Its purpose is a more modest one. Taking as a starting point the widely accepted view that decision-makers faced with the problem of terrorism must seek to balance the competing values of liberty and security, this thesis attempts to discover how the design and the enforcement of a human rights instrument may influence the outcome of this exercise. Its central objective is to provide an answer to the following question: which approach to the limitation of fundamental rights is most likely to result in solutions that appropriately reconcile competing claims of individual rights and national security in the context of terrorist activity?

Before commencing this inquiry it is necessary to expand briefly on some of the assumptions concerning the link between terrorism and human right

[1] *Ex p Milligan*, 71 US 2, 123–4 (1866) (Davis, D).

underpinning the analysis presented in this work. These are by no means new or original, but are commonplace amongst human rights scholars,[2] and confirmed by a growing body of national and international case law, as well as statements of international organisations.[3] Key to the argument is the paradox that is evidenced in the relationship between terrorism and human rights: terrorism poses a threat to the enjoyment of some of the most essential of human rights, and jeopardises collective goods such as national security and public order; the fight against terrorism, for its part, is liable to erode a significant number of individual rights and freedoms. In her reports on terrorism and human rights Kalliopi Koufa, the Special Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights, describes this phenomenon as the 'direct' and 'indirect' link between terrorism and human rights: the link is seen directly when terrorists kill or injure innocent civilians, deprive them of their freedom, or damage their property; the link is seen indirectly when a state's response to terrorism leads to the adoption of policies and practices that impinge on fundamental rights.[4] Legal systems conforming to a human rights regime are thus confronted with a dual responsibility. On the one hand, they are under the obligation to combat terrorism effectively; on the other hand, they must ensure that anti-terrorist measures unfold within the existing human rights framework.

[2] See, eg, Olivier de Schutter, 'La Convention européenne des Droits de l'Homme à l'epreuve de la lutte contre le terrorisme' in Emmanuelle Bribosia and Anne Weyembergh (eds), *Lutte contre le terrorisme et droits fondamentaux* (Brussels, Bruylant, 2002) 85; Rusen Ergec, 'Les libertés fondamentales et le maintien de l'ordre dans une société démocratique: un équilibre délicat' in Rusen Ergec *et al* (eds), *Maintien de l'ordre et droits de l'homme* (Brussels, Bruylant, 1987) 3; Paul Hoffman, 'Human Rights and Terrorism' (2004) 26 *Human Rights Quarterly* 932; Paul Lemmens, 'Respecting Human Rights in the Fight Against Terrorism' in Cyriel Fijnaut, Jan Wouters and Frederik Naert (eds), *Legal Instruments in the Fight Against International Terrorism. A Transatlantic Dialogue* (Leiden/Boston, Martinus Nijhoff, 2004) 223; Anja Seibert-Fohr, 'The Relevance of International Human Rights Standards for Prosecuting Terrorists' in Christian Walter *et al* (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin, Springer, 2004) 125; Gérard Soulier, 'Lutte contre le terrorisme et droits de l'homme. De la Convention à la Cour européenne des droits de l'homme' (1987) *Revue de science criminelle* 663; Gérard Soulier, 'Terrorism' in Mireille Delmas-Marty (ed), *The European Convention for the Protection of Human Rights. International Protection versus National Restrictions* (Dordrecht, Kluwer, 1992) 15; Colin Warbrick, 'The European Convention on Human Rights and the Prevention of Terrorism' (1983) 32 *International and Comparative Law Quarterly* 82; Colin Warbrick, 'Terrorism and Human Rights' in Janusz Symonides (ed), *Human Rights: New Dimensions and Challenges* (Aldershot, Dartmouth, 1998) 219; Colin Warbrick, 'The Principles of the European Convention on Human Rights and the Response of States to Terrorism' (2002) 3 *European Human Rights Law Review* 287.

[3] See below nn 5, 7 and 9.

[4] Kalliopi K Koufa, 'Terrorism and Human Rights: Preliminary Report', UN Doc E/CN.4/Sub.2/1999/27, para 25. See also Kalliopi K Koufa, 'Terrorism and Human Rights: Progress Report', UN Doc E/CN.4/Sub.2/2001/31; Kalliopi K Koufa, 'Terrorism and Human Rights: Second Progress Report', UN Doc E/CN.4/Sub.2/2002/35.

The obligation on states to take appropriate legislative and administrative measures to protect everyone within their jurisdiction against acts of terrorism derives from human rights law in two respects. The first is premised on the fact that actions of terrorists may, and often will, amount to serious breaches of the human rights of their victims. This aspect was first highlighted in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993, and since then has recurred systematically in the numerous UN resolutions on the subject.[5] Leaving aside the theoretical discussion as to whether interferences by non-state actors can properly be characterised as human rights violations, it is clear that international human rights law obliges states not only to refrain from actively violating fundamental rights, but also to secure the effective enjoyment of these rights by everyone within their jurisdiction.[6] To comply with this obligation, states may be required to take positive measures of protection against the harmful behaviour of groups or persons within their territory. In the context of terrorism, this may amount to an affirmative duty to respond to terrorist violence by putting in place effective strategies of prevention, prosecution, and consequence management. Several international courts and monitoring bodies as well as a number of international and regional organisations have drawn attention to this obligation.[7]

[5] UN Doc A/CONF.157/23 (12 July 1993) para 17: 'The acts, methods and practices of terrorism in all its forms and manifestations (…) are activities aimed at the destruction of human rights.' See, eg, General Assembly Resolution 54/164 of 17 December 1999 on Human Rrights and Terrorism, raising concern over 'the gross violations of human rights perpetrated by terrorist groups', and describing terrorist acts as 'activities aimed at the destruction of human right' (UN Doc A/RES/54/164 (24 February 2000) para 3). See also General Assembly Resolution 56/160 of 19 December 2001 on Human Rights and Terrorism (UN Doc A/RES/56/160 (13 February 2002)). In *Ireland v UK*, the European Court of Human Rights observed that 'it is not called upon to take cognizance of every single aspect of the tragic situation prevailing in Northern Ireland. For example, it is not required to rule on the terrorist activities in the six countries of individuals or groups, activities that are in clear disregard of human rights.' (Ireland v UK Series A no 25 (1978) para 149).

[6] This obligation can be inferred from the fact that parties to universal and regional human rights instruments undertake not only to 'protect' but also to 'ensure' the rights enshrined in those documents to all individuals within their jurisdiction. See, eg, Art 2 s 1 of the International Covenant on Civil and Political Rights.

[7] The obligation for states to protect their population from the consequences of terrorism was explicitly affirmed by the Committee of Ministers of the Council of Europe and the Inter-American Commission on Human Rights. The former, in its 'Guidelines on Human Rights and the Fight Against Terrorism', established the state's positive obligation 'to take measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts' (Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002, Art I). The latter, in its 'Report on Terrorism and Human Rights', underscored the state's 'right and duty to guarantee the security of all' (IAComHR, 'Report on Terrorism and Human Rights', OEA/Ser.L/V/II.116, Doc 5 Rev. 1 corr. (22 October 2002) para 107). In *Velasquez Rodriguez v Honduras* the Inter-American Court of Human Rights affirmed the duty of States Parties to 'prevent, investigate and punish any violation of the rights recognised by the Convention'

Although there is probably not a single right exempted from the impact of terrorism, the example of a right implicated by terrorist crime is the right to life. Consequently, the right to life has often been identified as the primary source of the state's duty to combat terrorism.[8] A judgment not itself concerned which terrorism, but one which nevertheless offers a clear indication of how far a state's positive obligation to protect the lives of those within its jurisdiction against terrorist violence can be extended, is the decision of the European Court of Human Rights in *Osman v United Kingdom*.[9] According to the Strasbourg Court, the right to life protected by Article 2 section 1 of the European Convention on Human Rights enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take 'appropriate steps to safeguard the lives of those within its jurisdiction'.[10] Not only do the states have a 'primary duty to secure the right of life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions'; the right to life may also imply in 'certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.[11]

(IACtHR, *Velasquez Rodriguez v Honduras* Series C no 4 (1988) para 166). A similar approach is taken by the UN Human Rights Committee. In its observations on the report submitted by Peru, the Committee noted that 'the State has both the right and the duty to adopt vigorous measures to protect its population against terrorism' (See, eg, HRC, 'Concluding Observations on the Report of Peru', CCPR/C/79/Add.72 (18 November 1996) para 3).

[8] According to the UN High Commissioner for Human Rights, '[t]errorism is a threat to the most fundamental human right, the right to life'. See UN High Commissioner for Human Rights, 'Human Rights: A Uniting Framework', UN Doc E/CN.4/2002/18 (27 February 2002) para 2.

[9] *Osman v UK* Reports 1998-VIII (1998) para 115. In an early decision the European Commission on Human Rights held that the applicant's complaint concerning the murder of her husband and brother by the IRA, and her own security in Northern Ireland raised questions about the respondent state's responsibility to protect the right of life. The applicant complained, inter alia, that the United Kingdom had breached the Convention in failing to provide an effective and commensurate response to the crimes of terrorism perpetrated against her in Northern Ireland. In the applicant's opinion, the United Kingdom was under the obligation to protect the right to life 'by such preventive control, through deployment of its armed forces, as appears necessary to protect persons who are considered to be exposed to the threat of terrorist attacks'. The Commission declared the application inadmissible, holding that the positive obligation on the part of the state cannot be interpreted as requiring the exclusion of any possible violence. Refusing to rule on the 'appropriateness and efficiency of the measures taken by the United Kingdom to combat terrorism', it stated that the Convention did not require 'measures going beyond those actually taken by the authorities in order to shield life and limb of the inhabitants of Northern Ireland against attacks from terrorists'. See *W v UK* Application no 9348/81, 32 *DR* 190 (1983) at 199 and 200. See also *W v Ireland*, Application no 9360/81, 32 *DR* 211 (1983).

[10] *Osman v UK*, previous n at para 115.

[11] *Ibid*.

The second reason why states have a duty under the international human rights regime to take appropriate counter-terrorist measures springs from the threat terrorism poses to the democratic regime of a country. Not only do acts of terrorism affect individual human rights standards, their purpose often includes the undermining or overthrowing of the entire political system. One way for terrorists to achieve such goals is in provoking the government to overreact to the terrorist violence by embracing and employing oppressive counter-terrorist measures.[12] Such an overreaction may ultimately result in the destabilisation of democratic institutions and values.[13] Even if the terrorist objective is not as such incompatible with democratic traditions (eg, national self-determination), the terrorist method of seeking political change through violence and fear is clearly at odds with one of the basic principles of a democratic society, namely the peaceful resolution of a country's political problems through dialogue.[14]

A democracy should not stand idly by when confronted with such anti-democratic forces.[15] It has been convincingly maintained that international human rights law obliges states to secure the preservation of their democratic system of government.[16] This is not the place to dig into the theoretical underpinnings of the relationship between democracy and human rights. It may safely be said, however, that there is an increasing awareness of the interdependence of both concepts. As stated in the Preamble of the European Convention on Human Rights, 'fundamental freedoms (…) are best maintained (…) by an effective political democracy'.

[12] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises always be Constitutional?' (2003) 112 *Yale Law Journal* 1030.

[13] See, eg, Yehezkel Dror, 'Terrorism as a Challenge to the Democratic Capacity to Govern' in Martha Crenshaw (ed), *Terrorism, Legitimacy, and Power: The Consequences of Political Violence* (Middletown, Wesleyan University Press, 1983) 65 and 72–3: 'In weakened democracies, the regime may change into a nondemocratic one, with terrorism serving as a convenient 'enemy' ostensibly justifying such a step. (…) In robust democracies, terrorism may aggravate pre-existing government overloads, reducing problem-handling capacity in general, distorting policy agendas, causing panic decisions, and increasing the opportunity costs caused by devoting scarce mental attention and capacities to terrorism.'

[14] According to the European Court of Human Rights, one of the principal characteristics of democracy is 'the possibility it offers of resolving a country's problems through dialogue, without resource to violence'. See, eg, *United Communist Part of Turkey and others v Turkey* Reports 1998-I (1998) para 57.

[15] See John Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1971) 218 ('Justice does not require that men must stand idly by while others destroy the basis of their existence.').

[16] See Gregory H Fox and Georg Nolte, 'Intolerant Democracies' (1995) 36 *Harvard International Law Journal* 1 (arguing that international human rights law not only allows states to protect themselves against anti-democratic forces, but also under certain conditions obliges them to do so). In *Velasquez Rodriguez v Honduras*, the Inter-American Court of Human Rights declared that a state 'has the right and the duty to guarantee its own security' (IACtHR, *Velasquez Rodriguez v Honduras*, above n 7 at para 154. See also IACtHR, *Castillo Petruzzi v Peru* Series C no 52 (1999) para 89).

In other words, just as democracy cannot function without certain basic rights, human rights can only flourish within the framework of a democratic society and through stable democratic institutions.[17] The importance of this observation is clear. If democracy is seen as an indispensable vehicle for the enjoyment and development of fundamental rights, its protection against terrorist subversion becomes an important goal of human rights law.

It should be clear by now that a human rights response to terrorism cannot be limited to a mere defence of traditional rights and freedoms. However principled and courageous such a position may appear, it is particularly ill-advised in light of the above characterisation of terrorism as a threat to human rights and democracy. Quite the contrary, the need to respond effectively to terrorism may require actions that would amount to unjustified intrusions on human rights absent the exigencies of fighting terrorism. A democratic state in which such measures are in place can be characterised as a 'militant' democracy. This concept is traditionally associated with restrictions on anti-democratic political parties but is equally applicable in the context of terrorism.[18] The dilemma evidenced in the current fight against terrorism is indeed no more than a contemporary manifestation of the traditional dilemma faced by militant democracies: how can a society defend itself against its enemies without destroying the basis and justification of its own existence?[19]

The latter point brings the discussion to the second way in which the relationship between human rights and terrorism manifests itself. Human rights law not only serves as the primary source of the state's responsibility to counter terrorism, but it also imposes the boundaries within which the state's response to terrorism must unfold. Lawmakers and law-enforcing bodies must respect the rights of everyone who might be affected by the anti-terrorism campaign, including those who are suspected or convicted of terrorist offences. While the obligation to combat terrorism may justify, or require, special measures of prevention and prosecution, it is essential that such action is implemented in a manner that is consistent with the principles of human rights law. As the European Court of Human Rights explained in the following oft-quoted paragraph, not all means are acceptable in the cause of fighting terrorism:

[17] Gerhard van der Schyff, Limitation of Rights. A Study of the European Convention and the South Bill of Rights (Nijmegen, Wolf Legal Publishers, 2005) 200.

[18] See, eg, Aharon Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 16, 148. The term 'militant democracy' ('Wehrhafte Demokratie') originated in the work of Karl Loewenstein. See, eg, Karl Loewenstein, 'Militant Democracy and Fundamental Rights' (1937) 31 *American Political Science Review* 417.

[19] Loewenstein, previous n at 431.

> Being aware of the danger such a law poses of undermining or even destroying democracy on the grounds of defending it, [the Court] affirms that the Contracting States may not, in the name of the struggle against (…) terrorism, adopt whatever measures they deem appropriate.[20]

Summarising, it can be said that human rights law controls a democratic nation's response to terrorism in two ways. One the one hand, the state may not *under-react* in failing to employ meaningful counter-terrorist strategies; on the other hand, the state may not *over-react* in violating the rights of individuals affected by those same strategies. Although these two obligations are like two sides of the same coin,[21] it will be unavoidable that conflicts between them arise: both obligations serve the protection of human rights, but they each point in a different direction. At the heart of the former lies a general interest in security, whereas the central value underlying the latter is a general interest in liberty. Consequently, terrorism, like other violent challenges, confronts the state with a tension of 'tragic dimension': to what extent can limitations on fundamental rights be justified in the name of protecting those very same rights and the democratic system as a whole?[22]

The conventional view is that legal systems must aim to strike an appropriate balance between the two competing values at stake. Governments must 'weigh' their respective duties of fighting terrorism and guaranteeing the individual rights affected by those efforts. Although opinions differ as to the manner in which this should be done (*cf* below), the need for a balanced solution as such is relatively uncontroversial in the context of the struggle against terrorism.[23] Even though there are numerous difficulties inherent in a decision process based on weighing competing

[20] *Klass and others v Germany* Series A no 28 (1978) para 49. Similar statements can be found in the case law of other national and international courts. The Inter-American Court of Human Rights ruled that 'no matter how terrible certain actions may be and regardless of how guilty those in custody on suspicion of having committed certain crimes may be, the State does not have a license to exercise unbridled power or to use any means to achieve its ends, without regard for law or morals. The primacy of human rights is widely recognised. It is a primacy that the State can neither ignore nor abridge.' (IACtHR, *Castillo Petruzzi v Peru*, above n 16 at para 204).

[21] Seibert-Fohr, above n 2 at 138. See also Schutter, above n 2 at 90–91. Both authors rightly point out that the perceived antinomy between fighting terrorism and observing individual rights is a false one. The proposition that anti-terrorist measures are aimed at protecting human rights implies that those measures should themselves be in conformity with the very standards they are said to further. In other words, once it is recognised that the purpose of fighting terrorism is the protection of human rights, the contradiction between the two interests ceases to exist.

[22] See Oren Gross, 'Chaos and Rules', above n 12 at 1027, referring to Pnina Lahav, 'A Barrel without Hoops: The Impact of Counterterrorism on Israel's Legal Culture' (1988) 10 *Cardozo Law Review* 529, 531.

[23] For a different view, see, eg, Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton, NJ, Princeton University Press, 2006) 24–51: 'We must decide not where our own interest lies on balance but the very different question of what

interests (eg, the problem of measuring and quantifying risks and harms),[24] these are not such as to undermine the usefulness of the balancing metaphor.[25] An important question in this last regard is whether the same weight is to be assigned to the different values on either side of the scale. Put differently: is there a hierarchy of importance between the interest in liberty from government interference and the interest in national security?[26] The answer to this question turns on whether the conflict in question is to be conceived of as a clash between rights or between rights and collective goods.[27] The position taken in this book is that serious (threats of) terrorist violence confronts decision-makers with conflicts of the first type. It would be difficult to maintain that the state's positive obligation to *protect* the rights of its citizens is less important than its negative obligation to *respect* those rights.[28] The former duty is as firmly grounded in human rights law as the latter: both stem from the same fundamental legal guarantees.[29] To attach more weight to the state's negative obligation to respect than to its positive obligation to protect would boil down to introducing a hierarchy between the rights occurring on the different sides of the balance, and there is no place in modern human rights law for such a hierarchy. The conflict between liberty and security in the context of terrorism is one between two equally significant human rights values, one of which cannot take precedence over the other. As Richard Posner recently noted, 'One is not to ask whether liberty is

morality requires, even at the expense of our own interests, and we cannot answer that question by asking whether the benefit of our policy outweigh its costs to us.'

[24] See, eg, Richard A Posner, *Not a Suicide Pact. The Constitution in a Time of National Emergency* (Oxford, Oxford University Press, 2006) 41; Michel Rosenfeld, 'Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror' (2006) 27 *Cardozo Law Review* 2079, 2089: '[J]udicial balancing involving liberty and security is anything but simple, straightforward, or transparent. The benefits of liberty and security may not be quantifiable, and even if quantifiable, they may not be comparable.'

[25] See Richard A Posner, *Not a Suicide Pact*, previous n at 41.

[26] See also Richard A Posner, *Law, Pragmatism, and Democracy* (Cambridge, Mass., Harvard University Press, 2003) 298. For a critique, see Geoffrey R Stone, *Perilous Times, Free Speech in Wartime* (New York, WW Norton and Company, 2004) 546–7.

[27] For the distinction between conflicts of rights and collective interests and conflicts of competing claims of rights, see, eg, Ronald Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) 197–9.

[28] For a different view see de Schutter, above n 2 at 92–3 (arguing that the state's obligation to 'respect' rights takes precedence over its obligation to 'protect' against terrorist violence). See also Ronald Dworkin, 'The Threat to Patriotism', *The New York Review of Books* (28 February 2002) 44, 47.

[29] Note, however, that to argue that both duties are equally weighty is not to say that they should be preformed by the same institutions. One can argue that courts should take a more deferential stance with regard to the enforcement of positive duties, as this often involves the allocation of scarce resources (for instance the employment of security personnel), which is primarily a political task.

more or less important than safety. One is to ask whether a particular security measures harms liberty more or less than it promotes safety'.[30]

The question of what constitutes a proper equilibrium between liberty and security cannot be answered in the abstract. The relative weight of principles such as liberty and security cannot be determined absolutely or quantitatively and changes over time.[31] The idea of balancing merely offers a framework for analysis. Drawing on the terminology introduced by Robert Alexy, one can characterise the interests in public safety and individual freedom as two 'optimisation requirements': decision-makers must seek to realise one interest to the greatest extent possible given the legal constraints imposed by the other interest.[32] According to Alexy, competing principles give rise to the Law of Balancing: 'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.'[33] However, as Alexy makes clear, the requirement that a balance be struck says nothing about the arguments that can be used to justify the result: 'Those who say that a very intensive infringement can only be justified by a very important satisfaction of an opposing principle are not saying when a very intensive infringement and a very important satisfaction are present. But they are saying what has to be shown in order to justify (…) [the] result from the balancing exercise, namely statements about degrees of infringement and importance.'[34] In practice, a great variety of arguments can be used to justify such statements, ranging from empirical data to normative judgments.[35]

II. OBJECT AND PURPOSE

Although the twofold relationship between terrorism and human rights is the background against which the present study is conducted, the focus in what follows will be on the 'indirect' impact terrorist attacks can have on human rights, namely the restrictions imposed on individual rights for the purpose of effectively combating terrorism. Rather than exploring the nature of the state's positive obligation to counter terrorism, the study concentrates on the human rights limits states must respect in their legitimate fight against terrorism. Stated differently: the remainder of the inquiry is concerned with the extent to which a democratic nation's duty to

[30] Richard A Posner, *Not a Suicide Pact*, above n 24 at 31–2.

[31] *Ibid* at 32 ('The point (of balance) shifts continuously as threats to liberty and safety wax and wane. At no time can the exact point be located.').

[32] Robert Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002) 47–8.

[33] *Ibid* at 102.

[34] *Ibid* at 105.

[35] *Ibid* at 105–6.

prosecute and prevent terrorism justifies limitations on and derogations from existing human rights standards.

Whether a legal system will succeed in adopting and implementing the required security measures, while, at the same time, preserving a sufficient level of human rights protection, depends on many different historical, political and legal factors present in that system.[36] It is the unique combination of those factors that will determine how well a system performs in reconciling counter-terrorist action and its commitment to preserving human rights.[37] This research project concentrates on the potential impact of one particular element that relates to the nature of a human rights instrument itself, namely its system of limitation.

It is a self-evident principle of human rights law that the exercise of individual rights cannot be unlimited.[38] Yet, despite common elements, the way in which the question of the limitation of rights is dealt with differs significantly from one human rights system to another. Some of the differences follow directly from the text of a human rights instrument (eg, the existence of an express limitation clause), others are related to different institutional settings (eg, the particular characteristics of an international convention versus a national bill of rights), and still others are the result of different adjudicative methods (eg, categorisation versus balancing). An additional distinguishing factor is the existence of provisions specifically concerned with the limitation of fundamental rights in war and emergency situations. While some jurisdictions explicitly allow for the suspension of, or derogation from, human rights to meet the exigencies of a crisis, other systems do not provide for such general emergency powers.

The primary aim of this project is to examine how a legal order's approach to the limitation of fundamental rights may shape decision-making trade-offs between rights and security in the context of counter-terrorism. More precisely, which model of limitation offers the best prospect of preserving individual rights while leaving sufficient room to accommodate security interests? As the sub-title indicates, this question will be approached through a comparative analysis of the limitation of fundamental rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the 'European Convention') and the United States Constitution (hereinafter the 'US

[36] See Shawn Boyne, 'The Future of Liberal Democracies in a Time of Terror: A Comparison of the Impact on Civil Liberties in the Federal Republic of Germany and the United States' (2003) 11 *Tulsa Journal of Comparative and International Law* 111.

[37] *Ibid* at 173.

[38] Albert Bleckmann and Michael Bothe, 'General Report on the Theory of Limitations on Human Rights' in Armand de Mestral *et al* (eds), *The Limitation of Human Rights in Comparative Constitutional Law=La limitation des droits de l'homme en droit constitutionnel comparé* (Cowansville, Yvon Blais, 1986) 107.

Constitution').[39] The focus will be on the following five rights: (i) the right to freedom of expression, (ii) the right to freedom of association, (iii) the right to personal liberty, (iv) the right to privacy and (v) the right to a fair trial.

Before going further, it may be useful at this point to clarify what is meant here by the term terrorism. Most studies on the relationship between human rights and terrorism devote some attention to the difficulties associated with defining terrorism.[40] These problems have been dealt with elsewhere and need no mention here.[41] Moreover, it is not necessary for the further development of the inquiry to come up with a comprehensive definition of terrorism.[42] The intent of this contribution is not so much to evaluate whether the notion of terrorism is correctly used to justify restrictions on human rights, as to examine how an appropriate balance can be struck between the counter-terrorist interests invoked by the state

[39] The European Convention for the Protection of Human Rights and Fundamental Freedoms was drafted in the Council of Europe and adopted on 4 November 1950. The United States Bill of Rights refers to the first ten Amendments to the 1787 US Constitution. They were adopted in 1791.

[40] See, eg, Kalliopi K Koufa, 'Terrorism and Human Rights: Progress Report', above n 4 at paras 24–81.

[41] *Ibid*. Some of the controversial questions include: should state or stated-sponsored terrorism be included in the definition? What is the difference between internal armed conflict and terrorism? How can terrorism and war be distinguished? Disagreement over these issues has long prevented the international community to come up with a general definition of terrorism and frustrated efforts to adopt anti-terrorism conventions. See, eg, Rosalyn Higgins, 'The General International Law of Terrorism' in Rosalyn Higgins and Maurice Flory (eds), *Terrorism and International Law* (London, Routledge, 1997) 13. The problem of defining terrorism was long avoided by addressing specific terrorist acts instead (eg, the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft). The first treaty covering a general offence of terrorism was the 1999 Convention on the Suppression of Financing of Terrorism. Art 2 s 1, b of the Convention 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 organisation to do or abstain from doing any act.'

[42] There have been many efforts in national and international law to define terrorism. Even within one jurisdiction various definitions may be used in different contexts. For recent surveys see, eg, Christian Walter, 'Defining Terrorism in National and International Law' in Christian Walter *et al* (eds), above n 2 at 23; Ben Saul, 'Attempts to Define "Terrorism" in International Law' (2005) *Netherlands International Law Review* 57. It is unnecessary at this point to examine these definitions in abstracto. Some of the human rights aspects of the problem of defining terrorism will be examined in the chapters that follow. Most concerns are associated with the use of vague and over broad definitions of terrorism. In addition to being difficult to reconcile with the principle of legality, such sweeping definitions can raise issues under various human rights norms. If the special rules that apply to the prosecution and prevention of terrorism interfere with human rights norms, an expansion of the definition of terrorism tends to increase the level of interference. For instance, special surveillance powers combined with a broad notion of terrorism may give rise to a disproportionate interference with the right to privacy. Questions may also arise under the right to freedom of expression and association. An oft-expressed concern in this respect is that the use of a wide definition of terrorism entails the danger of criminalising legitimate forms of public protest.

and competing rights. It is therefore sufficient for the purpose of delineating the scope of the present study to regard an issue as being one of terrorism if the state itself asserts a counter-terrorist interest. It may be observed, in this context, that international courts confronted with counter-terrorist limitations on fundamental rights do not usually rely on abstract definitions of terrorism, but rather look at the actual manifestation of terrorism in the case before them.[43]

Nevertheless, this study proceeds with an important assumption about which there is little normative disagreement, namely that a distinction is to be made between terrorism and other types of (organised) crime.[44] There is today a consensus that treating terrorists as 'ordinary' criminals is an inadequate approach. First, the potential destructiveness of the attacks and the direct risk for the lives of civilians is much greater in the case of terrorism. To be sure, other types of criminal activity, too, may lead to the deaths of thousand of civilians (eg, the drugs Mafia). But, as Bruce Ackerman emphasises, they do not present the same challenge to the democratic regime:

> Even the most successful organized crime operations lack the overweening pretensions of the most humble terrorist cell. (…) Whatever else is happening in Palermo, the mayor's office is occupied by the duly elected representative of the Italian Republic. But the point of a terrorist bomb is to launch a distinctly political challenge to the government.[45]

It is insisted that the state authorities cannot limit their response to arresting and prosecuting the perpetrators after the events. Given the degree of harm that may be caused by terrorism, the government's primary goal will be the prevention of future attacks.[46] While this observation holds true for conventional terrorism, the importance of prevention becomes all the more evident in the prospect of the terrorist use of weapons of mass destruction, be they chemical, biological or even

[43] See Warbrick, 'The Principles' above n 2 at 288 (considering the approach taken by the European Court of Human Rights). See also Colin Warbrick, 'Emergency Powers and Human Rights: The UK Experience' in Cyrille Fijnaut, Jan Wouters and Frederik Naert, *Legal Instruments in the Fight against International Terrorism, A Transatlantic Dialogue* (Leiden/Boston, Martinus Nijhoff Publishers, 2004) 361 and 364–5.

[44] See, eg, Richard A Posner, *Not a Suicide Pact*, above n 24 at 11 (arguing that the terrorist threat neither fits the 'war' nor 'crime' category); Rosenfeld, above n 24 at 2086–9 (distinguishing the 'criminal law', 'law of war', and 'police power law' paradigms). For a discussion of the specific problems presented by terrorism see, eg, Philip B Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society* (Cambridge, Mass., MIT Press, 2001) and Philip B Heymann, *Terrorism, Freedom, and Security: Winning without War* (Cambridge, Mass., MIT Press, 2003).

[45] Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1035–6.

[46] Heymann, *Terrorism and America*, above n 44 at 79–80.

nuclear.[47] The second reason why fighting terrorism fits badly with traditional concepts of criminal law enforcement is the special difficulties in investigating terrorism and prosecuting the perpetrators. Thus, for instance, in contrast to fighting 'ordinary' crime, terrorists may be less deterrable; terrorist groups may be harder to infiltrate; it may be more difficult to narrow the list of potential suspects; and terrorists may be better trained to cope with aggressive interrogation techniques.[48]

To conclude this section on object and purpose, it may be instructive to clarify what the present work is *not* about. It neither can, nor was intended to provide an exhaustive summing up of all human rights concerns encountered in the fight against terrorism (assuming that the production of such a list is at all possible). Since almost every fundamental right is implicated by terrorism in one way or another, it was necessary to make a selection of human rights norms. Accordingly, apart from occasional references, a number of important rights are left aside, notably the right to life and the right to be free from torture and inhuman or degrading treatment or punishment. Several arguments can be given to justify the exclusion of precisely these two rights, but the main reason is the lack of sufficient material to permit a fruitful comparative analysis. Thus, the US Constitution does not contain a general ban on torture comparable to Article 3 of the European Convention.[49] Similarly, the right to life in Article 2 of the Convention—which is primarily enforced through the concept of positive obligations—finds no clear counterpart in the Bill of Rights. Furthermore, even with regard to the rights discussed, it proved to be impossible to cover all issues with a counter-terrorist aspect. It is submitted, however, that the five rights selected provide a sufficiently broad basis to warrant the conclusions presented in this work.

[47] Terrorism experts have focused on the possibility that terrorists might gain access to weapons of mass destruction from the late 1990s. See, eg, Walter Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (Oxford, Oxford University Press, 1999). Laqueur and others have warned that the terrorism of the future (sometimes labelled 'superterrorism') will be more deadly and uncontainable than traditional political terrorism: 'The new terrorism is different in character, aiming not at clear defined political demands but at the destruction of society and the elimination of large sections of the population. In its most extreme form, this new terrorism intends to liquidate all satanic forces, which may include the majority of a country or of mankind, as a precondition for the growth of another, better, and in any case different breed of human. It its maddest, most extreme form it may aim at the destruction of all life on earth, as the ultimate punishment for mankind's crimes. (*Ibid* at 81).'

[48] For a discussion of some of the problems of investigating terrorist crime see Heymann, *Terrorism and America*, above n 44.

[49] To be sure, a constitutional torture ban is sometimes derived from other constitutional provisions (notably the due process clauses of the Fifth and Fourteenth Amendment and the privilege against self-incrimination). However, in those cases the ban on torture is not seen as an independent right, though rather as a means to accomplish other constitutional interests (for instance a fair trial). See, eg, Marcy Strauss, 'Torture' (2004) 48 *New York Law School Law Review* 201.

A second and final point is in order here. This work does not attempt to establish the exact point of balance between security and liberty considerations in any given case. Rather, the attention is directed to the general characteristics of a human rights instrument that may affect the resolution of that conflict. In other words, the focus is not on where the appropriate balance lies between conflicting claims, but on the tools by which such balancing may be preformed. An important part of this enterprise is of a descriptive nature: for every one of the rights studied, the first step consists in the identification of the limitations that have been imposed for the purpose of combating terrorism, and the way in which the courts have dealt with these issues. In the next step, an attempt is made to juxtapose the solutions found in both jurisdictions, and to explain the differences and similarities against the respective backgrounds of their limitation systems. However, it is not the intent of this work to take position in the legal and socio-political controversies that surround many of the topics reviewed here. To make such second-order reflections would require for each topic a study on its own.[50] In this work, evaluative and normative judgments on the results reached in both systems will take place at a more global level. The purpose of what follows is to identify the advantages and disadvantages, the possibilities and pitfalls, of different models of limitation in the era of modern terrorism. Evaluative claims will be reserved for those anti-terrorist measures or judicial decisions that so obviously under- or over-value either liberty or security interests that the scales are completely out of balance. In doing so, it will be possible to establish which approach to the limitation of fundamental rights provides the most fertile ground for generating well-balanced trade-offs between personal liberty and public safety in the struggle against terrorism.

III. SELECTION OF HUMAN RIGHTS INSTRUMENTS

This section addresses two questions: what is the value of a comparative approach to the subject; and why were the European Convention and the US Constitution chosen? The answer to the first question should not raise many difficulties. It needs no arguing that it is necessary for the solution of the central problem of this work—ie, which doctrines of limitation offer the best conditions for sensible trade-offs between rights and security—to widen the scope of the study to cover different methods of limitation, developed in different legal atmospheres, against different historical and

[50] See Alexy, above n 32 at 105–6 (writing that a great variety of arguments can be used to justify the result of a balancing exercise, ranging from empirical data to normative judgments).

political backgrounds. Confining the inquiry to one system, say the Convention system, would tell us little about its comparative advantages and disadvantages.

In taking a comparative perspective, this project builds on an increasing international awareness of the importance of the comparative study of human rights law. A simple survey of case reports and law journals reveals a rising interest on the part of both courts and commentators to engage in a comparative analysis of human rights questions.[51] This evolution has received ample attention in academic literature, where there is said to be a new trend, in which courts and judges see themselves as being engaged in a 'global dialogue on human rights', resulting in 'a common law of human rights'.[52] As Anne-Marie Slaughter argues in a contribution on 'transjudicial communication', there is today a growing recognition of 'a global set of human rights issues to be resolved by courts around the world in colloquy with one another'.[53]

Commentators agree that one factor urging judges to look to other jurisdictions as an aid to the interpretation of fundamental rights is the existence of common problems to be solved. When deciding how to deal with new questions, Claire L'Heureux Dube writes, 'judges look at a broad spectrum of sources in the law of human rights'.[54] This development is to be welcomed, she continues, because 'foreign comparison broadens the perspective for decision-making, and leads to consideration of the solutions

[51] It is interesting to note, in this respect, that the highest courts in both jurisdictions studied have shown a willingness to cite each other's judgments. An example in the case law of the European Court of Human Rights is *Appleby and others v UK* Reports 2003-VI (2003) para 47, quoting *Marsh v Alabama*, 326 US 501 (1946). For a discussion of the influence of the US Supreme Court's jurisprudence on the European Convention, see Jean-François Flauss, 'La présence de la jurisprudence de la Cour Suprême des États-Unis d'Amérique dans le contentieux européen des droits de l'homme' (2005) 62 *Revue trimestrielle des droits de l'homme* 313. The first time a majority of the Supreme Court chose to cite a judgment of the European Court was is in *Lawrence v Texas*, 123 S Ct 2472, 2483–4 (2003), quoting, inter alia, *Dudgeon v UK* Series A no 45 (1981). For a discussion of the relevance of foreign and international law to the interpretation of the US Constitution, see, eg, Harold Hongju Koh, 'International Law as Part of Our Law' (2004) 98 *American Journal of International Law* 43.

[52] Claire L'Heureux-Dube, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 *Tulsa Law Journal* 15 and Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *Oxford Journal of Legal Studies* 499. See also Cherie Booth and Max du Plessis, 'Home Alone?—The US Supreme Court and International and Transnational Judicial Learning' (2005) 2 *European Human Rights Law Review* 127; Ruth Bader Ginsburg, 'Looking beyond Our Borders: the Value of a Comparative Perspective in Constitutional Adjudication' (2003) 40 *Idaho Law Review* 1; Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discours* (Northampton, The Free Press, 1991) 158–70; Ann-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.

[53] Slaughter, 'A Typology of Transjudicial Communication', previous n at 121–2.

[54] L'Heureux Dube, above n 52 at 21.

of others who have considered the problem in a world facing increasingly similar issues'.[55] In a similar vein, Ann-Marie Slaughter argues that the 'awareness of a common enterprise, even if only in the sense of confrontation of common issues or problems', is an important precondition for transjudicial communication.[56] She adds: 'Recognition of this commonality does not obviate cultural differences, but it assumes the possibility that generic legal problems such as the balancing of rights and duties, individual and community interests, and the protection of individual expectations, may transcend those differences.'[57] These observations demonstrate the importance of a comparative study of the relationship between terrorism and human rights. If there is one issue facing legislators and courts throughout the world today, it is indeed the difficulty of bringing the legal response to terrorism in line with international human rights standards.

This leads us to the second question posed at the beginning of this section. Why the European Convention and the US Constitution? A first factor that encourages a comparative study of the two declarations of rights is of course the fact that both continents are confronted with similar terrorist problems. Longstanding differences as to the nature and sources of domestic terrorism, which may have previously put a brake on comparative legal practice, are today overshadowed by the globalisation of terrorism.[58] Besides ideology-based terrorism, domestic terrorism in Europe has traditionally been inspired by ethnic and regional desires for autonomy. Not only did the United States suffer less from domestic terrorist activity than many European countries, the causes of such terrorism have been more difficult to classify. In matters of international terrorism, however, both continents have much more in common.[59] With the advent of international terrorist movements, operating in different countries and seeking to dictate the international political agenda, the United States and the Member States of the Council of Europe have come to face very similar threats. Recent events illustrate that terrorism truly is a global problem and that democracies on both sides of the Atlantic will continue to be targets for many years to come.

A second factor underlying the choice of the two human rights instruments is the large body of cases dealing with conflicting claims of security and liberty that have been decided by courts applying the European

[55] *Ibid* at 39.

[56] Slaughter, 'A Typology of Transjudicial Communication', above n 52 at 127.

[57] *Ibid*.

[58] For inquiries into the nature and causes of both domestic and international terrorism, see, eg, Bruce Hoffman, *Inside Terrorism* (New York, Columbia University Press, 1998) and Laqueur, above n 47.

[59] See, eg, Jeremie J Wattellier, 'Comparative Legal Responses to Terrorism: Lessons from Europe' (2004) 27 *Hastings International and Comparative Law Review* 397.

Convention or the US Constitution. The factual background of these cases is by no means limited to terrorism. Terrorist activity is not the only security threat that presents a serious test for states committed to fundamental rights and democracy. Quite to the contrary, the United States and the Members States of the Council of Europe have a long history of dealing with both external enemies and subversive movements operating within their own borders. Notwithstanding the specific nature of the fight against terrorism, there is much to be learned from experience in other matters involving the judicial assessment of national security and emergency powers. The dilemma of the democratic nation's response to terrorism is indeed not fundamentally different from other attempts to repel domestic and foreign security threats without sacrificing the nation's democratic identity.

However, the value of a comparative analysis does not so much lie in the commonalities between the two systems but rather in the factors that distinguish them. Hence, the third and most important reason for choosing the European Convention and the US Constitution is the textual and structural dissimilarity between the two documents, their unique historical context, and the differing constitutional philosophies underlying them. Several of these distinctive features either directly or indirectly bear on the central issue of this thesis, namely the limitation of rights. As will be seen, the European Convention and the US Constitution in many ways take fundamentally different approaches to the restriction and suspension of fundamental rights. Since these issues are discussed at length in the second chapter, it suffices here to briefly draw attention to some of the key elements.

A first important issue is of course the fact that the European Convention is an international treaty whereas the US Constitution is a domestic instrument.[60] The discrepancies in enforcing an international convention as opposed to a national human rights declaration may in various ways affect the limitation and suspension of rights in the context of terrorism. On the one hand, the claim is often made that the domestic political and judicial authorities are better placed to asses the seriousness of a security threat and the necessity of concomitant human rights restrictions.[61] Sensitive to this

[60] This element should not be overstated. Although the European Convention is an international treaty, the European Court described it as 'a constitutional instrument of European public order' (*Loizidou v Turkey (Preliminary Objections)* Series A no 310 (1995) para 75). Many of the principles of interpretation developed under the European Convention have a great deal in common with principles of constitutional interpretation. See, eg, Steven Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23 *Oxford Journal of Legal Studies* 405.

[61] See, eg, DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995) 490 (noting that confronted with national emergency situations the European Convention organs 'may be properly cautious about disputing the conclusions of the national authorities (…) but need not defer absolutely to

fact, judges exercising international supervision would tend to adopt a more deferential standard of judicial review in matters of national security than their domestic colleagues. On the other hand, it is submitted that the international character of a supervising body—composed of members of many different nationalities—allows it to take a more independent and detached stance from domestic legislative and executive attempts to curb fundamental rights.[62] This observation becomes all the more real in countries confronted with serious terrorist violence. The argument is often made that a national security crisis will result in an increase in the prestige and power of the political branches. In such circumstances it may well be more difficult for national courts to censure security legislation than it is for international supervising bodies. Because domestic judges are part of the national government, they may be more inclined to identify with their government's interests, especially when that government is charged with the defence of the nation.[63] According to David Cole, one of the reasons why domestic courts in the United States have often assumed a deferential attitude towards the political branches, is that 'judges cannot stand above the crisis, precisely because the threat at least presumably implicates them as well—both as part of the government and as part of society'.[64] Members of an international tribunal may be less vulnerable to this kind of pressure.

them'). As the European Court held in *Ireland v UK*, '[b]y reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of (…) an emergency and on the nature and scope of derogations necessary to avert it.' (*Ireland v UK*, above n 5 at para 207). See in this respect the discussion of the concept of the 'margin of appreciation' in ch 2.

[62] See, eg, George J Alexander, 'The Illusory Protection of Human Rights by National Courts during Periods of Emergency' (1984) 5 *Human Rights Law Journal* 1, 3 ('It is entirely possible that superior courts whose relevant executive authority is not threatened may in fact effectively place limits on subordinate executives'); LC Green, 'Derogation of Human Rights in Emergency Situation' (1978) 16 *Canadian Yearbook of International Law* 92, 112–13; Oren Gross and Fionnuala Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 22 *Human Rights Quarterly* 625, 639: '[I]t may well be that the supranational Court, detached and further removed from the immediate turmoil, reviewing the relevant issues post facto rather that at the time of their occurrence, is able to judge matters more clearly and more accurately.' However, see Fionnuala Ní Aoláin, 'The Emergency of Diversity: Differences in Human Rights Jurisprudence' (1995) 19 *Fordham International Law Journal* 101 (criticising the European Court's deferential attitude in respect of emergency derogations under Art 15 of the Convention); Oren Gross, '"Once More unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law* 437 (challenging the assumption that international and regional judicial organs may be better suited to review national government's conduct in times of national emergency).

[63] See, eg, George J Alexander, previous n at 3.

[64] David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 *Michigan Law Review* 2565, 2570. See also George J Alexander, above n 62 (observing, inter alia, that an important limiting factor facing domestic courts in emergencies is concern for popular opinion'); Melville B Nimmer, 'The Right to Speak from

A second element is the different language and structure of the rights protected under the European Convention and the US Constitution. Many of the rights enumerated in the US Constitution are defined in negative terms ('Congress shall make no law'). By contrast, the European Convention, like other modern human rights instruments, contains affirmative statements of political and civil rights.[65] While the focus in the US Constitution is on the guarantee itself, without providing general or specific limitations, the European Convention expressly permits limitations of most of the enumerated rights, either within the rights themselves or in the form of general limitation provisions. This is not to say that the rights listed in the US Constitution receive unlimited protection. Through a variety of adjudicative techniques, American courts have limited the enjoyment of constitutional rights. Here too, however, American and European approaches diverge markedly. As explained in more detail in chapter two, the European Court generally relies on open-ended balancing formulations, while the US Supreme Court often employs relatively determinate doctrinal formulations when interpreting fundamental rights.

A final distinctive feature relevant for the purpose of this study concerns the power to suspend or derogate from protected rights. Article 15 of the European Convention permits a Contracting State to derogate from certain rights 'in time of war or other public emergency threatening the life of the nation', while the US Constitution contains no general derogation clause. With one important exception—the power to suspend the writ of habeas corpus—the US Constitution makes no express provision for the suspension of fundamental rights during crisis situations. As Clinton Rossiter observes in his classic 1948 study of crisis government, Americans have an 'ingrained distaste for emergency power'.[66] The traditional theory of the Constitution, he adds,

> is clearly hostile to the establishment of crisis institutions and procedures. It is constitutional dogma that this document foresees any and every emergency, and that no departure from its solemn injunctions could possibly be necessary.[67]

The absolute rejection of constitutional emergency powers received its most famous articulation and defence in Justice David Davis's majority opinion in *Ex parte Milligan*:

Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56 *California Law Review* 935, 940 ('It is too much to expect that our judges will be entirely untouched, consciously or otherwise, by strong popular feelings.')

[65] On this issue, see, eg, Ruth Bader Ginsburg, 'An Overview of Court Review for Constitutionality in the United States' (1997) 57 *Louisiana Law Review* 1019, 1025.

[66] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, NJ, Princeton University Press, 1948) 210.

[67] *Ibid* at 212.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.[68]

'The illustrious men who framed that instrument [the Constitution]', the *Milligan* opinion continues, 'limited the suspension to one great right [habeas corpus], and left the rest forever inviolable'.[69] To be sure, the absence of an express emergency provision in the US Constitution does not mean that the executive and legislative branches have never resorted to emergency measures. As explored in more detail in the chapters that follow, the expansion of governmental powers in times of crisis has often resulted in significant constraints on the fundamental rights safeguarded in the Bill of Rights.

The divergences in attitude towards the formulation, limitation and suspension of rights are symptomatic of important historical and philosophical differences between the rights traditions of both jurisdictions. Drafted in 1787, the US Constitution is the oldest written Constitution still in use.[70] It is primarily concerned with the structure of the national government and details few individual rights. Guarantees of individual liberty are primarily found in the first ten Amendments to the Constitution, adopted in 1791 and often referred to as the Bill of Rights. The Bill of Rights was prompted largely by widespread concerns expressed in the state ratifying conventions that the federal governments might abuse its powers.[71] The European Convention tracks a different history. It evolved as a reaction against the totalitarianism of pre-war Europe and the horror of the Second Word War. Drafted under the auspices of the Council of Europe and adopted in 1950, it aims to secure democracy and fundamental rights and freedoms in every Member State of the Council of Europe.[72]

[68] *Ex p Milligan*, above n 1 at 120–21.

[69] *Ibid* 126. See also *Home Bldg. & Loan Ass'n v Blaisdell*, 290 US 398, 425–6 (1934): 'Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reversed. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the lights of emergency, and they are not altered by emergency.'

[70] Michael Ignatieff portrays the American Bill of Rights as the 'late 18th century constitution surrounded by the 21st century ones, a grandfather clock amidst a shop window of digital timepieces'. Michael Ignatieff, 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton, NJ, Princeton University Press, 2005) 11.

[71] See, eg, John E Nowak and Ronald D Rotunda, *Constitutional Law* (St Paul, West Group, 2000) 339–46; Geoffrey R Stone, Louis M Seidman, Cass R Sunstein and Mark V Tushnet, *Constitutional Law* (New York, Aspen Law & Business, 1996) 1–23.

[72] See, eg, AH Robertson, *Human Rights in Europe* (Manchester, Manchester University Press, 1963) 1; Pierre-Henri Teitgen, 'Introduction to the European Convention on Human

Comparatists frequently draw attention to the differing constitutional philosophies underlying the US Constitution and the European Convention.[73] The Bill of Rights is said to reflect an individualistic conception of rights, in contrast to the Convention which, like other twentieth-century human rights instruments, would be based on a more community-oriented approach. As Michael Ignatieff points out in a contribution on American exceptionalism in the field of human rights:

> US rights guarantees have been employed in the service of a political tradition that has been consistently more critical of government, more insistent on individual responsibility, and more concerned to defend individual freedom than the European socialist, social democratic, or Christian democratic traditions.[74]

The American discourse about rights, Mary Ann Glendon writes, 'is set apart by the way that rights, in our standard formulations, tend to be presented as absolute, individual, and independent of any necessary relation to responsibilities'.[75] The European Convention, by contrast, would be rooted in a political tradition that is more concerned with balancing private and public interests, protecting the equality and dignity of all citizens, and ensuring that the attributes of democratic government are preserved.[76]

One of the perceived consequences of this is that European human rights law would allow more infringements of liberty, in the name of national security and public order, than does the US Constitution. The European Convention system is traditionally said to favour a more militant view of

Rights' in RStJ Macdonald, F Matscher and H Petzold, *The European System for the Protection of Human Rights* (Leiden/Boston, Martinus Nijhoff, 1993) 3.

[73] See, eg, Glendon, above n 52 at 34 and 86 (arguing that the different approach is partly explained by the respective influences of Jean-Jacques Rousseau on continental European political thinking and John Locke and Thomas Hobbes on American theories about rights). The distinctive constitutional philosophies are often brought to light to explain the different attitudes towards freedom of expression. See, eg, Paul Mahoney, 'Emergence of a European Conception of Freedom of Speech' in Peter Birks (ed), *Pressing Problems in the Law*, vol 1 (Oxford, Oxford University Press, 1995) 149; Eric Barendt, 'Freedom of Speech in an Era of Mass Communication' in Peter Birks (ed), *Pressing Problems in the Law*, vol 1 (Oxford, Oxford University Press, 1995) 109; David Feldman, 'Content Neutrality' in I Loveland (ed), *Importing the First Amendment: Freedom of Expression in American, English and European Law* (Oxford, Hart Publishing, 1998) 139; Christopher McCrudden, 'Freedom of Speech and Racial Equality' in Peter Birks (ed), *Pressing Problems in the Law*, vol 1 (Oxford, Oxford University Press, 1995) 125; Aernout Niewenhuis, 'Freedom of Speech: USA vs Gemany and Europe' (2000) 18 *Netherlands Quarterly of Human Rights* 195.

[74] Ignatieff, 'Introduction', above n 70 at 11.

[75] Glendon, above n 52 at 12. Mary Ann Glendon summarises: 'American rights talk is set apart from rights discourse in other liberal democracies by its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities.'(*Ibid* at x).

[76] See, eg, L'Heureux Dube, above n 52 at 35 (discussing modern human rights declarations in general).

democracy than its American counterpart. This is not only evidenced by the limitation and derogation powers outlined above; the legitimacy of self-protection also follows more directly from Article 17 of the Convention. This provision states:

> Nothing in this Convention may be interpreted as implying for any State, group or person any rights to engage in any activity or perform any act aimed at the destruction of any rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in this Convention.

Article 17, which emerged from the memories of the Communist and Fascist revolutions in pre-war Europe, was included to prevent anti-democratic forces from abusing the Convention rights to further their subversive objectives.[77] Although Article 17 has played only a modest role in the European Court's national security jurisprudence, the 'militant' nature of the Convention is a recurring thread in decisions reviewing security measures. On several occasions the Court has underlined that 'some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention'.[78] In *Refah Partisi (The Welfare Party) and others v Turkey* this idea was captured as follows:

> In view of the very clear link between the Convention and democracy, no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole.[79]

This militant attitude is absent in traditional American constitutional thinking.[80] No provision in the US Constitution expressly legitimises the fight against the enemies of democracy, and statements as to the necessity of defending democracy against internal or external subversion are not easily found in the Supreme Court's jurisprudence. It is a 'fundamental principle of republican government', Alexander Hamilton proclaims in *The*

[77] See, eg, *Lawless v Ireland* Series A no 3 (1961) para 6: '[T]he general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interest the principles enunciated by the Convention.'

[78] See, eg, *Klass and others v Germany*, above n 20 at para 59.

[79] *Refah Partisi (The Welfare Party) and others v Turkey* Reports 2003-II (2003) para 99.

[80] Gregory H Fox and Georg Nolte describe the United States as a 'militant procedural democracy'. However, this classification is based not so much on the nature of the US Constitution, but on the high quantity of anti-subversion statutes and the deferential attitude of the Supreme Court in the first part of the twentieth century. Furthermore, the authors maintain that the United States has become progressively less militant since the 1950s, due to heightened scrutiny of the Supreme Court. See Fox and Nolte, above n 16 at 24–6.

Federalist, to allow 'the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness'.[81] Thomas Emerson, a leading author on the constitutional protection of freedom of speech, maintains that 'the existence of national security considerations does not justify the suspension, modification, or abandonment of constitutional rights'.[82] The more tolerant American conception of democracy is perhaps best illustrated by prevailing free-speech theories, which are grounded in a profound belief in democracy's ability to diffuse extremist threats through open debate (eg, the 'free market-place of ideas' metaphor).[83] Such doctrines presuppose that citizens are 'courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government'.[84] So do Benjamin Franklin's words inscribed on the statute of liberty: 'They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.'[85]

These are the main reasons for the selection of the European Convention and the US Constitution. On the one hand, both instruments protect a number of fundamental rights and freedoms, the underlying purpose of which is to further the same substantive democratic values. On the other hand, the two systems are sufficiently diverse to justify the expectation that the issues discussed in the subsequent chapters will be dealt with in different ways. Comparing the solutions to a single problem under different models of limitation should help to clarify the relative strengths and weaknesses of these models. To put it in the words of US Supreme Court Justice Breyer:

> Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.[86]

IV. PRELIMINARY CONCLUSIONS

Comparative analysis of the counter-terrorist limitations of human rights under the European Convention and the US Constitution strongly suggests

[81] Alexander Hamilton, *The Federalist* No 78 (1788).

[82] Thomas I Emerson, 'National Security and Civil Liberties' (1982) 9 *Yale Journal of World Public Order* 78, 82.

[83] See Justice Holmes in *Abrams v United States*, 250 U.S. 616, 630 (1919): '[W]hen men have come to realize that time has upset many fighting faiths, they may come to believe even more than the foundation of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the markets.'

[84] *Whitney v California*, 274 US 357, 377 (1927) (Brandeis, L, concurring).

[85] Benjamin Franklin, *Historical Review of Pennsylvania* (1759).

[86] *Printz v United States*, 521 US 898, 921, n 11, 977 (1997) (Breyer, J, dissenting).

that a system's overall approach to the limitation of rights is one of the factors that determines how well states faced with terrorist violence succeed in reconciling the interest in protecting life and maintaining the democratic structures on the one hand, and safeguarding individual rights and freedoms on the other hand. The argument put forward in this work is that attempts to balance the competing claims of liberty and security may be most successful in systems that have flexible models of limitation in place, provided, however, that courts responsible for reviewing national security or emergency restrictions are able and willing to exercise independent non-deferential judicial review.

The notion of a 'flexible' model of limitation is used here to refer to two separate, yet intertwined, strategies. Firstly, the term serves as a synonym for what is commonly referred to as a 'balancing' approach in human rights adjudication. As will be seen in more detail in chapter two, a distinction is often made between two general approaches to the limitation of rights: balancing and categorisation.[87] A balancing method is 'flexible' in that it allows the decision-maker (ie the judge) to consider all the relevant factors or the totality of the circumstances when reviewing alleged infringements on human rights. Balancing methods are characterised by open-ended standards and elastic notions (eg, 'reasonable', 'prompt'). The most important feature of a flexible approach in the present context is that it confers upon the courts a certain degree of discretion to accommodate security and liberty interests in a particular case.[88] When a balancing style is adopted, an assessment will thus be made not only of the individual rights implicated by a limiting measure, but also of the specific threat posed by the terrorist violence and the difficulties of dealing with it. Contrasted with flexible or balancing approaches are categorical approaches. Categorical methods of limitation are typified by the use of bright-line rules, with fact-situations falling on one side or the other of the rule's pre-defined boundaries.[89] Under categorical approaches, there is no room for flexibility: once a categorical rule has been established, any

[87] On the distinction between categorisation and balancing, see, eg, Kathleen M Sullivan, 'Foreword: The Justices of Rules and Standards' (1992) 106 *Harvard Law Review* 22, 57–60. For further references, see ch 2. As will be seen in ch 2, the distinction between flexible and categorical approaches is not an absolute dichotomy. In fact, a system's limitation methods lie along a spectrum, ranging from extremely flexible case-by-case approaches to the most formalistic categorical methods. See David L Faigman, 'Reconciling Individual Rights and Government Interests: Madisonian Principles versus Supreme Court Practice' (1992) 78 *Virginia Law Review* 1521, 1535.

[88] Note that some authors have distinguished between balancing aimed at the accommodation of conflicting claims, and balancing that results in an exclusive choice of one interest over the other. See T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943, 946–947; Paul W Kahn, 'The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell' (1987) 97 *Yale Law Journal* 1, 3–6 and 26 (distinguishing between 'representative' and 'zero-sum' balancing).

[89] Sullivan, 'Foreword', above n 87 at 59.

further consideration of the different facts and interests involved in a particular case is screened out. In other words, when dealing with a terrorism-related case, the courts will not be able to take into account the specific problems linked to the fight against terrorism.[90]

Secondly, the term 'flexibility' stands for a particular approach to the limitation of rights in war and emergency situations. Flexibility can be used here to describe those systems that offer specific legal mechanisms to deal with emergencies, for instance in the form of an explicit derogation provision. The flexibility of such systems lies in the fact that they allow for the continued adherence to the human rights framework, while at the same time providing certain exceptional powers to confront the reality of emergency restrictions on individual rights.[91] The opposite approach is inflexible in that it either requires that the state responds to a crisis in a 'business as usual' fashion[92]—in which case a state of emergency does not justify any derogation from existing standards—or it regards the government's reaction to a war or emergency situation as falling completely outside the realm of the ordinary system of human rights protection.

At first glance, a preference for a flexible balancing approach to the limitation of rights may seem to be logically implied by the idea that the state's response to terrorism requires a proper balance between liberty and security. Yet, this is not the case. Although state's should strive to the best possible balance, it is an entirely separate question whether they are more likely to reach that result through judicial balancing or some other style of reasoning. In fact, the common wisdom, shared by many, mainly American, legal scholars, is that balancing is the wrong approach. The traditional view holds that individual freedom, in times of stress or crisis, is better served by the formulation and application of bright line rules rather than loose balancing tests.[93] The belief is that allowing decision-makers to

[90] There is, of course, the possibility that the context of terrorism is taken in to account at the moment the relevant rule is formulated. See Mark Tushnet, 'Defending Korematsu? Reflection on Civil Liberties in Wartime' (2003) *Wisconsin Law Review* 273, 283.

[91] Oren Gross, 'Chaos and Rules', above n 12 at 1058.

[92] *Ibid* at 1043 (distinguishing between the 'business as usual' model and 'models of accommodation').

[93] See, eg, Vincent Blasi, 'The Pathological Perspective and the First Amendment' (1985) 85 *Columbia Law Review* 449, 468: 'Those features of pathology suggest an emphasis in adjudication during normal times on the development of procedures and institutional structures that are relatively immune form the pressure of urgency by virtue of their formality, rigidity, built-in delays, or strong internal dynamics.' See also John Hart Ely, 'Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis' (1975) 88 *Harvard Law Review* 1482, 1500–01: '[W]here messages are proscribed because they are dangerous, balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing—or if not that, at least with the relative confidence or paranoia of the age in which they are doing it.' John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass., Harvard University Press, 1980) 109; Emerson, 'National Security', above n 82 at 82; Oren Gross, 'Chaos and Rules', above n 12 at 1096–7 ('The models of accommodation seem unsatisfactory in that any act of

weigh national security interests against individual rights will lead to results skewed by the pressure of events: in times of stress or emergency, national security concerns will supersede respect for individual rights. A familiar explanation is that during a serious security crisis decision-makers are particularly susceptible to popular pressures to overreact to the situation. Moreover, due to various cognitive limitations, any act of balancing would be heavily biased against liberty interests. Besides historical proof, scholars have drawn on social sciences research to explain the phenomenon of 'skewed risk assessment', which would lead decision-makers to exaggerate threats to national security and undervalue liberty interests.[94] All this would hold true not only for legislators and executive officials, but also for the members of the judiciary.[95] Since judges are subject to the same pressure, they too tend to overvalue security concerns at the cost of individual rights.[96] As a result, judges would too readily defer

balancing during an emergency is likely to disadvantage the values we normally hold as fundamental.'); Geoffrey R Stone, 'Limitations on Fundamental Freedoms: The Respective Roles of Courts and Legislatures in American Constitutional Law' in Armand de Mestral, *et al* (eds), above n 38 at 182; Laurence H Tribe, *American Constitutional Law* (Westbury, Foundation Press, 1988) 794: 'Categorical rules (…) tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties. Tushnet, 'Defending Korematsu?', above n 90 at 281–2 (arguing that categorical rules may screen out of consideration the features of the circumstances that are likely to induce misjudgment by decision-makers who might not appreciate the importance of fundamental rights considerations); Christina E Wells, 'Fear and Loathing in Constitutional Decision-Making' (2005) *Wisconsin Law Review* 115, 201: 'The amorphous balancing required in the clear and present danger test [in *Dennis*] made it particularly susceptible to the skewing effects of psychological phenomena such as the availability heuristic, confirmation trap bias, overconfidence bias, and the dreaded nature of the predicted event.'

[94] See, eg, Christina E Wells, 'Questioning Deference' (2004) 69 *Missouri Law Review* 903 (referring to the 'availability heuristic', the excessive fear for dreaded and unknown risks, and social dynamics to explain irrational decision-making in a national security context). See however Eric A Posner and Adrian Vermeule, 'Accommodating Emergencies' in Mark Tushnet (ed), *The Constitution in Wartime. Beyond Alarmism and Complacency* (Durham, NC, Duke University Press, 2005) 55 (arguing that the panic theory has conceptual, normative, and empirical difficulties).

[95] For this reason, Judge Learned Hand rejected the 'clear and present danger' test announced by Justice Holmes in *Abrams v United States*, 250 US 616, 628–30 (1919) (Holmes, J, dissenting). 'I am not wholly in love with Holmesy's test and the reason is this. Once you admit that the matter is one of degree, while you may put it where it genuinely belongs, you so obviously make it a matter of administration, i.e. you give to Tomdickandharry, D.J., so much latitude that the jig is at once up. Besides even their own ineffabilities, the Nine Elder Statesmen, have not shown themselves wholly immune from the 'herd instinct' and what seems 'immediate and direct' today may seem very remote next year even though the circumstances surrounding the utterance be unchanged. I own I should prefer a qualitative formula, hard, conventional, difficult to evade. (Letter from Learned Hand to Zechariah Chafee, Jr (2 January 1921), quoted in John Hart Ely, *Democracy and Distrust*, above n 93 at 112–13).'

[96] See, eg, the following observation of Justice Jackson in *Woods v Cloyd W Miller Co*: '[T]his vague, undefined and indefinable 'war power' (…) usually is invoked in haste and excitement when calm legislative considerations of constitutional limitation is difficult. It is

to the liberty restricting measures adopted by the political branches.[97] By confining the range of discretion that is left to future courts, categorical approaches would be able to overcome this tendency. By adhering to inflexible rules courts would come closer to the balance they might strike in calmer times.[98] Geoffrey Stone summarises the argument as follows:

> As American courts have learned from experience, unstructured inquiries into 'reasonableness' in the realm of individual liberties too often result in the sacrifice of fundamental rights in the face of what seem at the time of decision to be more pressing societal needs. Clear, narrowly-defined standards are more likely in the long run to preserve fundamental liberties, for they are less to induce courts in stressful times to 'balance' those rights out of existence.[99]

In spite of the objections to flexible doctrines of limitation, the thesis of this work is that they may nevertheless do a better job in upholding human rights standards while accommodating security interests than do categorical models. As will be seen in the chapters that follow, a flexible approach to the limitation of rights generally induces decision-makers, both in the political branches and the judiciary, to adopt what may be called 'strategies of accommodation'. Categorical approaches, by contrast, tend to give rise to 'strategies of avoidance'. Whereas flexible standards of limitation encourage the executive, legislative, and judicial branches to respond to the security threat from within the human rights framework, thus guaranteeing a minimum degree of protection, categorical approaches often lead to the adoption of solutions that wholly circumvent existing safeguards. In other words, in systems that leave room for adjudicative discretion, policy makers and courts will be inclined to stay within the existing rights system, reducing, where justified, the level of protection of certain guarantees to

executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures.'(*Woods v Cloyd W Miller Co*, 333 U.S. 138, 146 (1948) (Jackson, J, concurring).

[97] Oren Gross, 'Chaos and Rules', above n 12 at 1034 (arguing that both domestic and international courts share this systematic failure).

[98] A related argument in favour of categorical approaches is what has been called the 'strategy of resistance'. See, eg, Frederick Schauer, 'May Officials Think Religiously?' (1986) 27 *William and Mary Law Review* 1075; Oren Gross, 'Chaos and Rules', above n 12 at 1048–50. Under this strategy, the use of categorical prohibitions on certain governmental actions is preferable because it could slow down the inclination to succumb to the pressure of events. Oren Gross explained the argument as follows: 'A firm insistence on the applicability of ordinary legal norms is times of emergency (…) may lead government officials to be more circumspect before breaking the law.' (*ibid* at 1048–9). According to Frederick Schauer, it may be valuable to say 'no' even to the inevitable: 'The mere fact that courts will fold under pressure (…) does not dictate that they should be told that they may fold under pressure, because the effect of the message may be to increase the likelihood of folding even when the pressure is less. Moreover, stating a norm that is unlikely to be followed still may have some effect, in the long run, on what is or is not inevitable.' (Schauer, 'May Officials Think Religiously', this note, at 1084–5).

[99] Stone, 'Limitations', above n 93 at 182.

further legitimate security interests. However, a government or a judiciary bound by bright-line categories is left with no other option but to attempt to escape the rules it considers inappropriate to meet the security threat.

It lies in the nature of categorical methods to result in all-or-nothing solutions: either a situation is covered by the rule or it is not. Whatever the benefit of such an approach may be in times of normalcy,[100] the shadow side of it is that in crisis and emergency situations—when human rights protection is most needed—the outcome of the all-or-nothing contest tends to be nothing at all. As will be explained in chapter two, rule-based decision-making is imperfect in that it generates errors of over- or under-inclusiveness.[101] The result produced by the application of a rule may diverge from what a decision-maker, not constrained by the rule, would consider optimal in a particular situation.[102] There is reason to believe that decision-makers, both in the political branches and the judiciary, will not be willing to tolerate such erroneous outcomes in the face of a terrorist threat, where the lives of many are at stake.[103] The consequence will be rule-avoiding behaviour, for instance in the form of a public safety exception. However, an exception to a rule—adopted under conditions of stress—may provide less protection for liberty than a measure that is the outcome of a balancing formula under which neither liberty nor safety have priority. At best, the exception is the result of a fresh act of balancing, in which case all the arguments for and against balancing play. At worst, the exception will be based on security interests only. There is indeed much to be said for the thesis advanced by Justice Frankfurter in *Dennis v United States*, a First Amendment case decided in the 1950s. Justice Frankfurter predicted that '[a]bsolute rules would inevitably lead to

[100] For a discussion of the arguments in favour of categorical rules, see ch 2.

[101] See, eg, Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (Oxford, Clarendon Press, 1998) 31–4.

[102] Frederick Schauer, 'Formalism' (1988) 97 *Yale Law Journal* 509, 536 ('Rules doom decisionmaking to mediocrity by mandating the inaccessibility of excellence.').

[103] See, eg, Oren Gross, 'Chaos and Rules', above n 12 at 1097: '[E]ven if we were to impose categorical prohibitions on certain governmental activities, it seems likely that these prohibitions would not restrain the government from acting in a way that runs afoul of such prohibitions. This is because such actions are deemed to be necessary for the preservation of the nation or for the advancement of its significant interests. To believe otherwise is to be naïve or a hypocrite.' See also Nimmer, 'The Right to Speak', above n 64 at 945; Richard A Posner, *Not a Suicide Pact*, above n 24 at 12; Tushnet, 'Emergencies and the Idea of Constitutionalism' in Mark Tushnet (ed), above n 94 at 39, 42: 'It makes a mind-set that is, I think, quite difficult to achieve for a person to rule out of consideration for himself or herself in the future something that the person today thinks plainly relevant to the decision.' See further Eric A Posner and Adrian Vermeule, above n 94 at 58: 'Although people and officials do panic, we have found no evidence that constitutions or other laws or institutions can control the panic and cause people to lose their fear, or else to choose, while panicked, laws that they would choose if the were not panicked.'

absolute exceptions, and such exceptions would eventually corrode the rules'.[104] According to Justice Frankfurter,

> [t]he demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.[105]

Of course, there remains the possibility that decision-makers will not succumb to the pressure of events, and adhere to pre-established rules when confronted with matters of national security. In this scenario, however, categorical approaches entail the danger of unduly impeding an effective response to terrorism, once again frustrating efforts to attain an appropriate equilibrium between liberty and security interests. Perhaps the inflexible approach is an example of the naturalistic fallacy, as Eric Posner and Adrian Vermeule observe:

> [W]hatever complex of legal rules happens to exists, at some status quo, is taken to be good, and any shift in the direction of greater security is taken to be bad. But if the status quo can embody too much liberty, rather than the right amount, the picture is arbitrary.[106]

American readers may perceive the reliance on Justice Frankfurter's concurrence in *Dennis* as somehow problematic. *Dennis*, after all, is infamous for its water-downed version of the 'clear and present' danger test, which resulted in the conviction of several members of the American communist party. Much of the failure to protect the First Amendment rights of the defendants has been attributed to the balancing approach applied by Chief Justice Vinson, and more expressly articulated and defended by Justice Frankfurter.[107] The question, however, is whether the Court's poor performance in protecting freedom of speech in *Dennis* was inherent in the use of a flexible balancing formula. Interestingly, Justice Frankfurter's *Dennis* opinion is famous not only for its balancing language, but also for its defence of judicial deference. Having made his case for a balancing approach, Justice Frankfurter went on to ask how the competing interests were to be assessed. '[W]ho is to balance the relevant factors and ascertain which interest is in the circumstances to prevail?'[108] The answer was plain:

[104] *Dennis v United States*, 341 US 494, 524 (1951).
[105] *Ibid* at 524–5.
[106] Eric A Posner and Adrian Vermeule, above n 94 at 69.
[107] Relying on the work of Judge Learned Hand, Chief Justice Vinson reformulated the 'clear and present danger' test to mean the following: 'In each case courts must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger' (*Dennis v United States*, above n 104 at 510). For a critique see, eg, Laurent B Frantz, 'The First Amendment in the Balance' (1962) 71 *Yale Law Journal* 1424.
[108] *Dennis v United States*, above n 104 at 525.

> Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. (…) Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. (…) We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it.[109]

This brings us to an important point. As will be seen in subsequent chapters, the real problem in cases such as *Dennis* may not so much lie in the flexible nature of doctrinal standards, but in a tendency of the judiciary to uncritically defer to the judgment of the political branches of government, an approach for which Justice Frankfurter has been a primary spokesman.

A similar picture emerges as regards the limitation of rights in times of emergency and war. A survey of the counter-terrorist emergency measures in the two jurisdictions studied indicates that a flexible approach to derogations may be more successful in striking a proper balance between security and liberty than is a system which is less responsive to crisis government.[110] It is a commonplace that the principled rejection of emergency powers does not prevent the de facto derogation from certain human rights standards under the pressure of the circumstances. Summarising his review of the emergency-regimes in several Member States of the Council of Europe, Rusen Ergec warns, for instance, that 'ni le silence de la Constitution, ni même l'interdiction de la suspendre ne feront obstacle au recours à la théorie de l'état de nécessité pour sauvegarder l'existence de l'Etat'.[111] The thesis put forward here is that in stable political system with a longstanding democratic tradition, a properly designed and judicially enforced derogation clause provides the best legal foundation for reconciling the interest in effectively meeting a terrorist emergency with the rights

[109] Ibid.

[110] For a similar view, see Rusen Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles* (Brussels, Bruylant, 1987) 95–6 (arguing that the protection of human rights in emergencies is best served by the application of flexible derogation provisions); Jan Velaers, *De beperking van de vrijheid van meningsuiting* [The Limitation of the Right to Freedom of Expression] (Antwerpen, Maklu, 1991) 966 (observing that the flexible derogation system of Art 15 of the European Convention results in a higher degree of protection than the categorical prohibition on the suspension of constitutional rights in Art 187 of the Belgian Constitution).

[111] Ergec, *Les droits de l'homme*, previous n at 96. See also Gabriel L Negretto and José Antonio Rivera, 'Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship' (2000) 21 *Cardozo Law Review* 1797, 1804 (observing that the absence of emergency provisions in many nineteenth-century Latin American constitutions forced governments to act beyond or against the constitution).

of the individual.[112] The substantive and procedural requirements governing the use of emergency powers tend to put a brake on unjustified infringement of fundamental rights. By contrast, a human rights regime with no (or very restricted) provisions for emergency derogations leave decision-makers with no other choice but to circumvent particular norms or the legal order as a whole. Such systems fail to constrain the state's response to emergencies all together.[113] As Ergec sees it: 'cette politique laisse aux autorités des pouvoirs dont les seules limites seront celles que dicteront les circonstances'.[114]

To conclude this section, the question may be posed which of the two declarations of rights—the European Convention or the Bill of Rights—is structurally and institutionally best adapted to accommodate the competing interests of effectively countering terrorism and respect for fundamental rights. Before touching this issue, it is important to note that any general statement on the relative strengths and weaknesses of both systems should not lead the reader to conclude that the better solution is always to be found in one particular jurisdiction. Moreover, on several of the topics discussed in this work, courts and legislators operating under the two different systems have reached largely similar solutions. This being said, it may be observed that the European Convention system, insofar as it

[112] See also Negretto and Rivera, previous n at 1797 (emphasising the importance of properly designed emergency provisions to constrain potential abuse); Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (Leiden/Boston, Martinus Nijhoff, 1998) 44: 'History (…) provides the important lesson that the use of emergency powers has functioned best when those powers, as well as the limits beyond which they cannot expand, have been properly defined in permanently applicable and non-suspendible constitutions.'

[113] Several authors have pointed out that derogation provisions, such as Art 15 of the European Convention, must be seen as attempts to constrain, rather than broaden, the scope of government action in emergency situations. See, eg, Rosalyn Higgins, 'Derogations under Human Rights Treaties' (1978) 48 *British Yearbook of International Law* 281, 286; John F Hartman, 'Derogation from Human Rights Treaties in Public Emergencies—A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' (1981) 22 *Harvard International Law Journal* 1, 6, n 24. An opposite view, recently defended by Oren Gross and Mark Tushnet, questions the ability of constitutional emergency powers to constrain crisis government. Both authors suggest that it might therefore be better not to deal with emergencies within the constitutional framework, in order to avoid the 'contamination' or 'manipulation' of the ordinary system with emergency exceptions. See Oren Gross, 'Chaos and Rules', above n 12 at 1097 *ff*; Tushnet, 'Defending Korematsu?' above n 90. For a critique of these proposals, see Cole, 'Judging the Next Emergency' above n 64 at 2585–94; Eric A Posner and Adrian Vermeule, above n 94. The view that courts should not rationalise emergency powers was famously defended by Justice Jackson in *Korematsu v United States*, 323 US 214, 246 (1944): '[O]nce a judicial opinion rationalizes such an [military] order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has vindicated [that] (…) principle (…). The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.'

[114] Ergec, *Les droits de l'homme*, above n 110 at 95.

generally combines flexible methods of limitation with a meaningful standard of international review, tends to generate more balanced trade-offs of rights and security than the approach taken under the US Constitution. In many fields of constitutional law, the latter system exhibits a more categorical model of limitation of rights. Furthermore, in the United States there is a strong tendency of the national judiciary to defer to the judgment of the political branches in times of national crisis. As a result, under the Bill of Rights, more than under the European Convention, decision-makers are induced to resort to 'strategies of avoidance', a phenomenon often resulting in the under-protection of human rights in times of crisis.[115] Thus, paradoxically, despite its 'militant' nature, the European Convention by and large succeeds in upholding the rights of those (allegedly) involved in terrorist activity, whereas the US Bill of Rights does not always live up to its promise of being a 'tolerant' document designed by and for 'courageous' and 'self-reliant men'.[116]

V. STRUCTURE AND METHODOLOGY

After this introductory chapter, chapter two gives a brief description of the models of limitation of rights in the two systems under review. The purpose of this chapter is to provide a general framework for the analysis presented in the subsequent chapters. With this background complete, the hard core of this book consists of five chapters, each one analysing a separate human rights norm: the right to freedom of expression (chapter three), the right to freedom of association (chapter four), the right to personal liberty (chapter five), the right to privacy (chapter six) and the right to a fair trial (chapter seven). Every one of these five central chapters follows the same general structure: the first section provides some basic notions as to the scope, content and limitation of the right in question; the next two sections undertake a detailed study and comparison of the limitations imposed for the purpose of fighting terrorism, respectively in ordinary situations and in the specific circumstances of a war or emergency. Finally, the general conclusion at the end of each chapter juxtaposes

[115] The under-protection of fundamental rights under the US Constitution in crisis situations has been documented and regretted by many commentators. For example, former Supreme Court Justice Brennan wrote: 'There is considerable less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil rights have received in the United States during times of war and perceived threats to its national security (…). After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven itself unable to prevent itself from repeating the error when the next crisis came along. (William J Brennan, 'The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises' (1988) 18 *Israel Yearbook on Human Rights* 11).

[116] *Whitney v California*, above n 84 at 377 (Brandeis, L, concurring).

the solutions found in the two systems, and attempts to explain and evaluate the differences and similarities against the background of the central research question of this thesis. The general conclusion (chapter eight) brings together the key issues and conclusions of the preceding chapters.

An important methodological point is in order. The main focus of the present study is on the case law of the judicial organs competent to review the state's compliance with the European Convention and the US Constitution. The study is generally limited to the jurisprudence of the highest judicial bodies on both sides of the Atlantic: the Supreme Court of the United States (hereinafter the 'Supreme Court') and the European Court of Human Rights (hereinafter the 'European Court' or 'Strasbourg Court') and the European Commission of Human Rights (hereinafter the 'Commission').[117] Thus, no systematic analysis is made of the case law of lower federal or state courts in the United States or domestic courts in Europe. However, where appropriate, reference will be made to important lower court decisions. Moreover, it has not been considered either possible or desirable to engage in an independent examination of the anti-terrorism legislation currently in force in the United States and the Member States of the Council of Europe. Past and present security legislation will, however, be considered in the context of the concrete cases discussed in this work.

I have sought to state the law as it was on 1 January 2007.

[117] Where reference is made to both the Court and Commission case law, the phrase 'Convention organs' or 'Strasbourg organs' is used.

2

The Limitation of Rights under the European Convention and the US Constitution

I. INTRODUCTION

WHILE MANY OF the rights enumerated in the European Convention and the US Constitution serve similar purposes, there are apparent differences in the way in which the question of the limitation of rights is dealt with. What both instruments have in common, however, is that none of the rights they enshrine are unlimited. The two systems permit restrictions on human rights to protect competing individual rights and collective interests. This chapter seeks to outline the basic principles governing the limitation of fundamental rights in both jurisdictions. Its purpose is to provide the general background against which the central research question is addressed in subsequent chapters. No attempt is made here to examine the specific conditions upon which the state may limit a particular right. Chapters three to seven all begin with a brief introduction to the general principles regarding the limitation of the rights discussed therein.

At the outset of this chapter a theoretical observation is in order. A distinction is commonly made between two separate enquiries in human rights adjudication.[1] The first step involves the question whether certain conduct is covered by the right in question. At this stage of the inquiry the

[1] See, eg, David L Faigman, 'Reconciling Individual Rights and Government Interests: Madisonian Principles versus Supreme Court Practice' (1992) 78 *Virginia Law Review* 1521 (distinguishing between the definition prong and the application prong in constitutional adjudication); Laurent B Frantz, 'The First Amendment in the Balance' (1962) 71 *Yale Law Review* 1424, 1434: 'Deciding the scope to be accorded a particular constitutional freedom is different from deciding whether the interest of a particular litigant (…) is outweighed by society's interest in "order", "security", or national "self-preservation".' See also Frederick Schauer, 'Speech and "Speech"-Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language' (1979) 67 *Georgetown Law Journal* 899, 905 (distinguishing between 'coverage' and 'protection' in the First Amendment context); Gerhard van der Schyff, *Limitation of Rights. A Study of the European Convention and the South African Bill of Rights* (Nijmegen, Wolf Legal Publishers, 2005) (distinguishing between one- and two-stage models of limitation).

content or scope of protection of a right is identified. Ideally, this investigation is based, not upon the weight of countervailing interests, but upon such issues as the language used to formulate the right, its purpose, its underlying values, or the original intent of those who drafted it. Having delineated the scope of the right through this interpretive process, the second stage of the inquiry consists of a review of competing individual or societal interests. The aim of this part of the investigation is to ascertain whether a particular interference with the protection guaranteed under a right is justified by reference to these interests. Some authors contend that only restrictions imposed on the properly defined scope of a right can correctly be termed 'limitations'.[2]

Although convincing arguments have been advanced to clearly distinguish between these two prongs in the application of human rights,[3] the courts' day-to-day practice reveals that the two-stage model is not always respected. A survey of Supreme Court jurisprudence has indicated, for instance, that the court regularly uses government interest analysis to define the meaning of the constitutional text at the first stage of the inquiry.[4] Similarly, the Convention organs' practice contains several examples of cases in which the balancing of interests occurred at the definitional stage.[5] As Albert Bleckmann and Michael Bothe rightly observed, it then becomes

[2] See C Edwin Baker, 'Limitations on Basic Human Rights—A View from the United States' in Armand de Mestral et al (eds), *The Limitation of Human Rights in Comparative Constitutional Law=La limitation des droits de l'homme en droit constitutionnel comparé* (Cowansville, Yvon Blais, 1986) 75, 77; van der Schyff, previous n at 126 ('A limit is (…) an impairment of the realisation of the protection under a right.').

[3] See, eg, Faigman, 'Reconciling Individual Rights and Government Interests', above n 1 (noting that a constitutional right loses much of its vitality when the first stage of the inquiry is infected with public interests analysis, inter alia, because such a move has the effect of reallocating the burden of justifying an interference from the State to the individual); Gerhard Erasmus, 'Limitation and Suspension' in Dawid van Wyk, John Dugard, Bertus de Villiers and Dennis Davis (eds), *Rights and Constitutionalism: The New South African Legal Order* (Cape Town, Juta & Co, 1994) 645 (observing that the balancing between the rights of an individual and the interests of society should only occur once the state has demonstrated and identified those interests which will trigger the application of a limitations clause); van der Schyff, above n 1 n at 60–61 (arguing that limitation considerations should not 'cloud the first stage of the analysis which is intended to identify the right in its unlimited state by means of wide interpretation').

[4] Faigman, 'Reconciling Individual Rights and Government Interests', above n 1. See also David L Faigman, 'Madisonian Balancing: A Theory of Constitutional Adjudication' (1994) 88 *Northwestern Law Review* 641, 670 *ff*. As an example of a case in which the Supreme Court failed to differentiate between the two prongs of constitutional adjudication, the author refers to *Roth v United States*, 354 US 476 (1957) (defining obscenity out of the category of First Amendment speech on the basis of a government interests analysis).

[5] Eg, under the Convention organ's traditional application of the abuse of rights provision in Art 17, the balancing question is dealt with at the definitional stage. See, eg, *Garaudy v France* Reports 2003-IX (2002) (in accordance with Art 17 a conviction for denying crimes against humanity is not covered by the right to freedom of expression in Art 10). See van der Schyff, above n 1 at 84.

> rather a question of semantics whether we call this [ie the narrow definition of the scope of protection of a right] an implied or inherent limitation, or whether we say that the real question is how far the scope of protection or the certain guarantee goes.[6]

To avoid semantic confusing, the term 'limitation' is used here in its broadest sense. It refers both to the restrictive definition of the scope of protection of a fundamental right, as to restrictions following from the consideration of countervailing public and individual interests once its scope has been established.

II. BALANCING AND CATEGORICAL METHODS OF LIMITATION

In the preceding chapter a distinction was made between categorical and balancing modes of human rights adjudication. The comparative analysis undertaken in this work demonstrates that a system's preference for either categorisation or balancing may affect its ability to find and maintain a proper equilibrium between individual rights and security in the context of terrorism. Before describing the basic tenets of the limitation of rights under the two systems, it may therefore be instructive to clarify what the balancing/categorisation debate is all about. Balancing and categorisation have received considerable attention in American constitutional theory as two competing styles for analysing infringements on constitutional rights.[7] The difference between both approaches lies in the measure of discretion each of them accords to decision-makers interpreting and applying constitutional provisions. In order to clarify the nature of categorisation and balancing, a comparison may be made with the traditional opposition in legal theory between 'rules' and 'standards'.[8] Rules and standards have in common that they translate certain background principles (eg, autonomy, democracy etc) into legal directives. Where they differ, however, is in the

[6] Albert Bleckmann and Michael Bothe, 'General Report on the Theory of Limitations on Human Rights' in Armand de Mestral *et al* (eds), above n 2 at 105, 107 ('There is no material difference between defining the scope of protection of a specific guarantee or ascertaining the existence of some implied or inherent limitation.'). See also Frank N Coffin, 'Judicial Balancing: The Protean Scales of Justice' (1988) 63 *New York Law Review* 16, 28 (observing that threshold definitions at the definitional stage are not beyond the pale of balancing).

[7] See, eg, T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943; Faigman, 'Reconciling Individual Rights and Government Interests', above n 1; Faigman, 'Madisonian Balancing', above n 4; Kathleen M Sullivan, 'Foreword: The Justices of Rules and Standards' (1992) 106 *Harvard Law Review* 22; Kathleen M Sullivan, 'Post-Liberal Judging: The Roles of Categorization and Balancing' (1992) 63 *University of Colorado Law Review* 293.

[8] On the distinction between rules and standards, see, eg, Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685; Pierre J Schlag, 'Rules and Standards' (1985) 33 *UCLA Law Review* 379; Sullivan, 'Foreword', previous n at 57–63.

degree of discretion they each confer upon the decision-maker responsible for their application. In her article 'The Justices of Rules and Standards', Kathleen Sullivan describes the difference between rules and standards as follows. 'Rule-like' legal directives, she writes, '[bind] a decisionmaker to respond in a determinate way to the presence of delimited triggering facts'.[9] 'Standard-like' legal directives, by contrast, '[tend] to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation'.[10] In other words, rules afford the decision-maker less discretion than do standards, because rules limit the number of factors a decision-maker may take into account, whereas standards allow the decision-maker to consider all the relevant factors or the totality of the circumstances.[11] This brings us back to the distinction between balancing and categorisation in human rights adjudication. In fact, as Sullivan illustrates, the balancing/categorisation divide is a particular manifestation of the differentiation between rules and standards.[12] The balancing method is standard-like in that it allows the decision-maker a realm of discretion to weigh the different rights and interests implicated by the case against the background principles at stake.[13] The categorical approach, by contrast, favours the use of bright-line categories. Once the boundaries of a category have been established, there is no more room for the further consideration of the different facts and interests involved. Hence, the categorical style is rule-like.[14] As will be seen in more detail below, the distinction between categorical and balancing modes is not an absolute dichotomy. Rather, it is a continuum representing the varying degrees of discretion which the use of a particular method of adjudication allows to future or subordinate decision-makers.[15]

There is a host of stereotyped arguments for and against the adoption of categorical and balancing methods—for and against rules and

[9] Sullivan, 'Foreword', above n 7 at 58. See also Kennedy, previous n at 1687–9 (discussing von Ihering's concept of 'formal realisability'); Schlag, 'Rules and Standards', previous n at 381–3; Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford, Clarendon Press, 1998) (describing rules as entrenched instantiations of background justifications).

[10] Sullivan, 'Foreword', above n 7 at 59.

[11] *Ibid* at 58–9. See Frederick Schauer, 'Formalism' (1988) 97 *Yale Law Journal* 509, 536 ('By limiting access to the reasons behind the rule, rules truncate the array of considerations available to a decisionmaker.').

[12] Sullivan, 'Foreword', above n 7 at 59.

[13] *Ibid* at 60. See also Richard H Fallon, 'Foreword: Implementing the Constitution' (1997) 111 *Harvard Law Review* 56, 80 (defining 'balancing' as 'a metaphor for (rather than a literal description of) decision processes that call for consideration of the relative significance of a diverse array of potentially relevant factors'). For a discussion of different forms of judicial balancing, see Aleinikoff, above n 7 at 945–8.

[14] Sullivan, 'Foreword', above n 7 at 59.

[15] See, in particular, Faigman, 'Reconciling Individual Rights and Government Interests', above n 1 at 1535.

standards—in (fundamental rights) adjudication.[16] It suffices here to briefly summarise some of the main issues that have been raised. Undoubtedly, the values most often attributed to rule-based decision-making are predictability, certainty, and consistency.[17] The attractiveness of the categorical method lies in its ability to confine judicial discretion, thus allowing those affected by the application of a rule to foresee the consequences of their behaviour. Other relevant arguments for rule-based decision-making include fairness and restraint of official arbitrariness,[18] efficiency,[19] and democratic decision-making.[20] Categorical methods for the limitation of rights may foster these values in several ways.[21] Critics of categorisation question the desirability of rule-based decision-making. The main objection against rules, as opposed to standards, is that they preclude decision-makers from considering all the relevant differences and similarities between particular fact situations.[22] A rule-based process constrains decision-makers from arbitrary behaviour, but it also dictates certain outcomes regardless of specific facts, which may in turn result in arbitrary decisions. In other words, predictability and consistency are achieved at the cost of fairness and substantive justice.[23] More flexible balancing

[16] See, eg, Fallon, above n 13 at 79–82; Robert F Nagel, 'The Formulaic Constitution' (1985) 84 *Michigan Law Review* 165; Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175; Schauer, 'Formalism', above n 11 at 538–45; Schauer, *Playing by the Rules*, above n 9 at 135–66; Schlag, 'Rules and Standards', above n 8 at 383–90; Sullivan, 'Foreword', above n 7 at 62–9.

[17] Eg, Schauer, *Playing by the Rules*, above n 9 at 137–45.

[18] Eg, Kennedy, above n 8 at 1688 ('Official arbitrariness means the sub rosa use of criteria of decision that are inappropriate in view of the underlying purpose of the rule.').

[19] Eg, Schauer, *Playing by the Rules*, above n 9 at 145–9 (arguing that rules allocate the limited decisional resources of individual decision-makers, freeing them from the responsibility of scrutinising every relevant aspect of a situation).

[20] A common objection against balancing approaches is that they transfer the responsibility for weighing competing public interests from the political branches to the judicial branch. See, eg, Aleinikoff, above n 7 at 984–6; Sullivan, 'Foreword', above n 7 at 64–5. See also Schauer, *Playing by the Rules*, above n 9 at 158–62, arguing that the essence of rules lies in the concept of jurisdiction: 'Rules (…) operate as tools for the allocation of power. A decision-maker not constrained by rules has the power, the authority, the jurisdiction to take everything into account. Conversely, the rule-constrained decision-maker loses at least some of that jurisdiction.'

[21] For a discussion of the justifications for categorical decision-making in constitutional adjudications, see Scalia, above n 16.

[22] As a result, rule-based decision-making necessarily entails a number of wrong decisions. The reason therefore is that rules, as generalisations, are over- and/or under-inclusive from the perspective of their background justifications. See, eg, Schauer, *Playing by the Rules*, above n 9 at 31–4.

[23] Sullivan, 'Foreword', above n 7 at 66 ('Standards are (…) less arbitrary than rules. They spare individuals from being sacrificed on the altar of rules (…).'). A similar concern was voiced by Supreme Court Justice Stevens in several First Amendment cases. According to Stevens, the categorical approach to the First Amendment 'sacrifices subtlety for clarity' and 'does not take seriously the importance of context' (See *RAV v City of St Paul*, 505 US 377, 426 (1992)).

approaches, by contrast, allow decision-makers to adapt to the changing circumstances, thus not forcing 'the future into the categories of the past'.[24]

It is not the purpose of this work to judge the strength and weakness of rules and standards in any abstract way. The limited aim of what follows is to see how a preference for either one of the two decision-making methods may affect the state's efforts to striking a balance between liberty and security interests.

III. THE LIMITATION OF RIGHTS UNDER THE EUROPEAN CONVENTION

A. Overview

Every one of the rights enumerated in the European Convention can be said to be subject to limitations in the broad sense. First of all, the text of the European Convention contains a number of different limitation clauses. A first category of express limitations can be found in the general limitation clauses of Articles 15, 16 and 17, which permit limitations in three specific areas: restrictions on rights during public emergencies threatening the life of the nation (Article 15),[25] restrictions on the political activity of aliens (Article 16),[26] and restrictions on activities subversive of Convention rights (Article 17).[27] A second category of express limitations is set out in the 'common limitation clauses' of Articles 8 to 11.[28] Each of these provisions contains two similar paragraphs: the first defining the scope of the right, the second describing the conditions upon which the state may limit the right. A final category of express limitations are the 'specific limitation clauses' found in various other articles of the Convention.[29] In addition to these express limitation clauses, the Convention

[24] Schauer, 'Formalism', above n 11 at 542. Besides flexibility in the light of changing circumstances, standards may also be desirable because they promote judicial responsibility. As Sullivan observes, standards make visible the inevitable weighing process that rules obscure. See Sullivan, 'Foreword', above n 7 at 67.

[25] See below section E.

[26] 'Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.'

[27] Art 17 states: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

[28] For the terminological distinction between 'common limitation clauses' and 'specific limitations clauses', see Francis G Jacobs, 'The "Limitation Clauses" of the European Convention on Human Rights' in Armand de Mestral *et al*, above n 2 at 21, 27–8.

[29] Thus, for instance, the right to life protected in Art 2 s 1 of the Convention is made subject to specific limitations in Art 2 s 1 (exemption for the death penalty) and Art 2 s 2 (eg,

organs have developed 'implied' or 'inherent' limitations in some areas.[30] Finally, as far as the so-called 'absolute' rights are concerned—most notably the prohibition of torture or inhuman or degrading treatment or punishment in Article 3—restrictions in the broad sense can be said to result from narrow, context-based interpretations of the scope of protection afforded under the rights in question.[31] It what follows the focus will be on those issues most relevant for the rights discussed in the subsequent chapters.

B. The Common Limitation Clauses of Articles 8 to 11

The common limitation clauses of Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience, and religion), Article 10 (freedom of expression), and Article 11 (freedom of association and peaceful assembly) authorise restrictions in a more or less similar terminology.[32] In each of those articles the limitation clause is set out in paragraph 2. For instance, the second paragraph of Article 8 states in respect to the right to private and family life:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic

necessary police force). Another example of a 'specific limitation clause' can be found in Art 5 s 1, which safeguards the right to liberty and security of the person, but also lists the various purposes for which that right may be limited.

[30] See below, section C.

[31] See, eg, Michael K Addo and Nicholas Grief, 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?' (1998) 9 *European Journal of International Law* 510; Johan Callewaert, 'L'Article 3 de la Convention européenne: une norme relativement absolue ou absolument relative?' in *Liber Amicorum Marc-André Eissen* (Brussel, Bruylant, 1995) 32–5; van der Schyff, above n 1 at 20: 'T]he "absolute" nature of the right in the sense of the absence of the possibility of limitation is compensated for or relativated by means of flexible interpretation to take account of changing perceptions and standards.'

[32] For general introductions to the common limitation clauses, see, eg, Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford, Oxford University Press, 2000) 320–32; Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Strasbourg, Council of Europe, 1997); DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995) 283–301; Berend Hovius, 'The "Limitation Clauses" of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?' (1985) 17 *Ottowa Law Review* 213; Jacobs, above n 28; Johan Vande Lanotte and Yves Haeck, *Handboek EVRM,* Deel 1. *Algemene beginselen* [Handbook ECHR, Part 1. General Principles] (Antwerp, Intersentia, 2005); van der Schyff, above n 1 at 167–234.

> well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[33]

As the cited example indicates, the common limitation clauses trigger three questions. When a Contracting State seeks to justify an interference with any of the rights protected under Articles 8 to 11, the Convention organs will examine (1) whether the interference was in accordance with, or prescribed by, law; (2) whether the interference pursues one of the specific aims described in the limitation clauses, and (3) whether the interference is necessary in a democratic society. These three issues are considered in turn.

i. Prescribed by Law

The first condition pertains to the legality of a limiting measure: an interference with one of the rights protected under Articles 8 to 11 must be 'prescribed by law' or 'in accordance with the law'.[34] The leading authorities regarding these phrases are *Sunday Times v United Kingdom*, *Silver v United Kingdom* and *Malone v United Kingdom*.[35] The court in these cases interpreted the expressions 'prescribed by law' and 'in accordance with the law' so as to impose three main requirements. Firstly, the interference in question must have some basis in national law.[36] Secondly, the law must be 'adequately accessible'.[37] According to the *Sunday Times* judgment, the requirement of accessibility entails that 'the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case'.[38] Thirdly, the law must be sufficiently foreseeable:

[33] For an examination of the limitation clauses of Arts 10 and 11, see chs 3 and 4 below. The limitation clause attached to the right to freedom of thought, conscience and religion in Art 9 is not further discussed in this work. Art 9 s 2 provides: 'Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.'

[34] The phrase 'prescribed by law' appears in para 2 of Arts 9 to 11. The expression 'in accordance with the law' is used in Art 8. The difference in language is of no importance. See *Sunday Times v UK* Series A no 30 (1979) para 48 (observing that the French text of the Convention uses one single expression—'prévues par la loi'—for the two different expressions found in the English text).

[35] *Sunday Times v UK*, previous n; *Silver v UK* Series A no 61 (1983); *Malone v UK* Series A no 82 (1984).

[36] *Silver v UK*, previous n at para 86. The Convention organs have interpreted the word 'law' in its substantive rather than in its formal sense. It covers not only statutory law but also judge-made law, executive decrees, international obligations, etc. See, eg, *Sunday Times v UK*, above n 34 at para 47.

[37] *Sunday Times v UK*, above n 34 at para 49.

[38] *Ibid*. Accessibility requires that the law must be in the public domain in some form or another (eg, published). See van der Schyff, above n 1 at 178.

> [A] norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[39]

However, the court in *Sunday Times* continued,

> [t]hose consequences need not be foreseeable with absolute certainty (…). [M]any laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[40]

In subsequent cases the court held that the level of precision required depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover, and the number and status of those to whom it is addressed.[41]

ii. Legitimate Aim

The second issue the Strasbourg organs consider when reviewing an interference with one of the rights enshrined in Articles 8 to 11 is whether that interference pursues a legitimate purpose. Each of the common limitation clauses contains an exhaustive list of the legitimate grounds on which the rights contained in those articles may be restricted.[42] As will be seen in subsequent chapters, the legitimate aims most relevant to the fight against terrorism are the interest of national security, the prevention of disorder or crime, and the protection of the rights and freedoms of others.[43] It may be observed as a general point that the legitimate aims are expressed in rather broad terms, and that it will be fairly easy for the respondent government to convince the Convention organs that the limiting measure serves one of the prescribed purposes.[44]

[39] *Sunday Times v UK*, above n 34 at para 49.

[40] *Ibid*.

[41] See, eg, *Groppera Radio AG and others v Switzerland* Series A no 173 (1990) para 68.

[42] The following aims figure in one or more of the common limitation clauses: national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, the protection of the rights and freedoms of others, the protection of public order, the protection of territorial integrity, the protection of the reputation of others, the prevention of the disclosure of information received in confidence, and the maintenance of the authority and impartiality of the judiciary.

[43] For a detailed analysis of the meaning of 'national security' under the European Convention, see Iain Cameron, *National Security and the European Convention on Human Rights* (London/The Hague/Boston, Kluwer Law International, 2000) 49–58.

[44] See, eg, Karel Rimanque, 'Noodzakelijkheid in een democratische samenleving—een begrenzing van beperkingen aan grondrechten' [Necessary in a Democratic Society—A Limit to the Limitation of Fundamental Rights] in *Liber Amicorum Frédéric Dumon* (Antwerp, Kluwer, 1983) 1217, 1219 (concluding that the generality of the aims provided for in Arts 8 to 11 means, in fact, that every 'reasonable interest' can be brought under one of them).

iii. Necessary in a Democratic Society

The third prerequisite for an interference to be justified under Articles 8 to 11 is that it be 'necessary in a democratic society'. The standard of *necessity in a democratic society* is designed to determine the legitimacy of the relationship between the interference and its purpose.[45] It is composed of two concepts: that of a 'democratic society' and that of 'necessity'. The notion of a 'democratic society' functions as the background against which the justification of the interference must be measured.[46] Key to the understanding of the democratic necessity test, however, is the court's interpretation of the adjective 'necessary'. The meaning of this term was first explored in *Handyside v United Kingdom*, a case in which the European Court considered the compatibility with Article 10 of the seizure and subsequent forfeiture of a book on obscenity grounds.[47] The court observed that 'the adjective "necessary" (…) is not synonymous with "indispensable" (…), neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable"'.[48] 'Necessity', the court continued, implies the existence of a 'pressing social need', and every restriction imposed must be 'proportionate to the legitimate aim pursued'.[49] The democratic necessity test was later summarised as follows: '[T]he notion of necessity implies that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.'[50]

As these citations indicate, the principle of proportionality is one of the central elements of the democratic necessity requirement.[51] Proportionality

[45] van der Schyff, above n 1 at 196 *ff*.

[46] *Ibid* at 272. As the court explained in *United Communist Party of Turkey and others v Turkey* Reports 1998-I (1998) para 45: 'Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is "necessary in a democratic society". The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from "democratic society". Although the Convention Organs have not settled on a general definition of a "democratic society", they have sought to identify certain key features of a democratic society. These include principles such as "pluralism", "tolerance", and "broad-mindedness".' See, eg, *Handyside v UK Series A no 24* (1976) para 49.

[47] *Handyside v UK*, previous n.

[48] *Ibid* at para 48.

[49] *Ibid* at paras 48–9.

[50] *Olsson v Sweden* Series A no 130 (1988) para 67.

[51] For an analysis of the principle of proportionality in the Convention context, see, eg, Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Intersentia, 2002); Marc-André Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights' in RStJ MacDonald *et al* (eds), *The European System for the Protection of Human Rights* (Leiden/Boston, Martinus Nijhoff, 1993) 125; Jeremy McBride, 'Proportionality and the European Convention on Human Rights' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart Publishing, 1999) 23; van der Schyff, above n 1 at

analysis usually consists of the following three well-known sub-principles: (1) suitability (the limiting measure must be capable of achieving the (legitimate) aim pursued); (2) necessity (the limiting measure must be the *least restrictive means* to achieve the relevant purpose); and (3) proportionality in the narrow sense (there must be a reasonable balance between the limiting measure and the aim pursued).[52] However, reference to the notion of proportionality does not imply that the Convention organs systematically apply these three tests to a limiting measure.[53] The case law demonstrates that the notion of proportionality is used by the European Court and the Commission to refer to several different inquiries.[54] In the broad sense, the term is employed to assert that a 'fair balance' must be struck between the rights of the individual and the public interest.[55] As Gerhard van der Schyff writes,

> [p]roportionality in this sense is simply a different characterisation of the very act of balancing competing interests, but with an emphasis on evaluating the acceptability of all the proportions of a particular interference.[56]

Sometimes, the principle of proportionality is applied in a more specific sense, namely as a tool to asses the adequacy of the particular means employed to further the interest is question—for instance the nature and severity of a penalty.[57] Occasionally, the Convention organs have engaged in a *least restrictive means* analysis when considering the proportionality of an interference.[58] An inquiry by the Strasbourg organs as to the existence of less restrictive alternatives for a limiting measure indicates a willingness to adopt a strict standard of review (see below).

214–17; Sébastien van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme. Prendre l'idée simple au sérieux* (Brussel, Bruylant, 2001).

[52] See, eg, *R v Oakes*, [1986] 1 SCR 103 (S Ct Canada). See also Robert Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002) 66–9 and 397–414; Steven Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) 63 *Cambridge Law Journal* 412, 415–16.

[53] See, eg, Arai-Takahashi, above n 51 at 194 (arguing that the specific evaluative criteria designed by the Strasbourg organs to enhance the standard of proportionality remain 'sporadic and underdeveloped').

[54] Arai-Takahashi, above n 51 at 14 and 193; van der Schyff, above n 1 at 214–17.

[55] Eg, *James and others v UK* Series A no 98 (1986) para 50. For another example see *Kokkinakis v Greece* Series A no 260 (1993) para 47: 'The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate. In order to rule on this latter point, the Court must weigh the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused.'

[56] van der Schyff, above n 1 at 215.

[57] Eg, *Sürek v Turkey (No 1)* Reports 1999-IV (1999) para 64: 'The Court observes in this connection that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference.'

[58] See, eg, *Campbell v UK* Series A no 233 (1993) para 48; *Peck v UK* Reports 2003-I (2003) para 80.

It is not the intention of this chapter to explore the results reached by the application of the democratic necessity standard in particular fact situations. Chapter three (freedom of expression), chapter four (freedom of association) and chapter five (right to privacy) deal with the approach taken by the Strasbourg organs in determining the necessity of counter terrorist measures adopted by the Members States. What is important here is to highlight some of the general features of the democratic necessity test. Most commentators agree that the democratic necessity standard functions as a highly flexible balancing formula, allowing the Convention organs to weigh competing claims of individual rights and collective goals on a case-by-case basis.[59] Characteristic of the democratic necessity test is its strong fact sensitivity.[60] It is recurring dicta in the court's reasoning that an interference must be based upon 'an acceptable assessment of the relevant facts', and that the necessity of a limiting measure will be considered 'in the light of the case as a whole'.[61] In other words, the outcome of the balancing exercise depends very much on the circumstances of the case, the result of which is that it will be difficult to predict future applications.[62] One commentator concludes that 'the style of reasoning adopted by the court places the flexibility needed to deal with cases on their facts above the achievement of doctrinal clarity or engagement with the philosophical issues at stake'.[63] As will be seen below, the flexible—according to some critics unprincipled and incoherent[64]—nature of the democratic necessity test is compounded by the application of the doctrine of the 'margin of appreciation'.

[59] Eg, Greer, *Exceptions*, above n 32 at 14: 'The phrase 'necessary in a democratic society' (…) gives the Strasbourg organs the widest possible discretion in condoning or condemning interferences with rights which states seek to justify by reference to one or more of the legitimate purposes in the second paragraphs of Articles 8 to 11.' Hovius, above n 34 at 242: '[T]he test of necessity in a democratic society has proved to be extremely flexible, permitting the Commission and the Court to balance the needs of society and the individual's right or freedom.'See also van der Schyff, above n 1 at 213 (describing necessity as an 'instrument of flexibility')

[60] On 'fact sensitivity' see Philip Sales and Ben Hooper, 'Proportionality and the Form of Law' (2003) 119 *Law Quarterly Review* 426, 428 *ff*.

[61] See respectively *Oberschlick v Austria* Series A no 204 (1991) para 60 and *Olsson v Sweden*, above n 50 at para 68.

[62] Greer, *Exceptions*, above n 32 at 42.

[63] Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *Modern Law Review* 671, 673.

[64] See, in particular, Steven Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23 *Oxford Journal of Legal Studies* 426–27; McHarg, previous n at 685–95.

C. Implied Limitations

Implied or inherent limitations can be described as restrictions not expressly sanctioned by the text of the European Convention.[65] There is no room under the Convention for implied limitations to those rights for which the Convention sets forth express limitation provisions. In a series of early decisions, the European Commission appeared to accept that, in addition to restrictions following from the application of paragraphs 2 of Articles 8 to 11, certain categories of persons were subject to inherent limitations by virtue of their special status (eg, prisoners).[66] This approach was explicitly rejected in *Golder v United Kingdom*, where the court held that '[t]he restrictive formulation used at paragraph 2 (…) leaves no room for the concept of implied limitations'.[67] The respondent government in this case had argued that the right to respect for correspondence of prisoners was subject to limitations, apart from those covered by Article 8 section 2.

The situation is different where the Convention makes no express reference to restrictions. In those circumstances the Strasbourg organs are sometimes willing to accept implied limitations. A classic example concerns the right of access to a court. The above-mentioned *Golder* case is not only famous for its rejection of implied limitations under Article 8; the court in that case also accepted that the right of access to a court—which was read into in Article 6 (fair trial)—is subject to implied limitations:

> The Court considers (…) that the right of access to the courts is not absolute. As this is a right which the Convention sets forth without, in the narrower sense of the term, defining it, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.'[68]

In a similar vein, the right to vote and stand for elections implied in Article 3 of Protocol 1 (right to free elections) was made subject to inherent limitations.[69] It is important to note that the court's substantive approach to inherent limitations resembles the justificatory exercise conducted under Articles 8 to 11. For example, in *Ashingdane v United Kingdom*, the court held that a limitation to the right of access to a court will not be compatible with Article 6 if it does not pursue a 'legitimate aim' and if there is no 'reasonable relationship of proportionality between the means

[65] As regards implied limitations in the Convention context, see, eg, Arai-Takahashi, above n 51 at 12–14; Clayton and Tomlinson, above n 10, 315–19; Jacobs, above n 28 at 35–6; van der Schyff, above n 1 at 18, n 21.

[66] See, eg, *De Courcy v UK* Application no 2749/66, 10 *Yearbook* 388 (1967), 412.

[67] *Golder v UK* Series A no 18 (1975) para 45.

[68] *Ibid* at para 38.

[69] Eg, *Mathieu-Mohin and Clerfayt v Belgium* Series A no 113 (1987) para 52.

employed and the aim sought to be achieved'.[70] In other words, inherent limitations should not be seen as the product of a narrow definition of the scope of protection under a right, but follow from a balancing exercise similar to the one applied in the context of the express limitation clauses.[71]

D. Article 17: Abuse of Rights

In chapter one brief reference was already made to Article 17 to highlight the militant nature of the European Convention system.[72] This provision can be classified as a limitation clause in the broad sense.[73] It contains a general prohibition of abuse of Convention rights, which is formulated in the following terms:

> Nothing in this Convention may be interpreted as implying for any State, group or person any rights to engage in any activity or perform any act aimed at the destruction of any rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in this Convention.[74]

As has been seen in the chapter one, Article 17 aims to safeguard the democratic systems against subversive forces. This rationale was explicitly acknowledged in *Lawless v Ireland*, where the court held that the main

[70] *Ashingdane v UK* Series A no 93 (1985) para 57.

[71] For a positive appraisal of this approach see van der Schyff, above n 1 at 18, n 12. For the opposite view see Vande Lanotte and Haeck, above n 32 at 148 (arguing that inherent limitations do not justify interference with Convention rights but amount to a narrow interpretation of the scope of those rights).

[72] There is a vast amount of literature on Art 17, in particularly as regards the regulation of hate speech. For a recent survey see, eg, Eva Brems, 'State Regulation of Xenophobia versus Individual Freedoms: The European View', *Journal of Human Rights* 481 (2004). For general introductions to Art 17, see, eg, Harris, O'Boyle and Warbrick, above n 34 at 510–13; P Le Mire, 'Article 17' in LE Pettiti, E Decaux and PH Imbert (eds), *La Convention européenne des droits de l'homme. Commentaire article par article* (Paris, Economica, 1999) 509; Clare Ovey and Robin White, *Jacobs and White. The European Convention on Human Rights* (Oxford University Press, 2002) 361–367; P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague, Kluwer Law International, 1998) 750–55; van der Schyff, above n 1 at 76–88; Jan Velaers, *De beperking van de vrijheid van meningsuiting* [The Limitation of the Right to Freedom of Expression] (Maklu, 1991) 256–62 and 332–36.

[73] Some authors maintain that Art 17 would more properly be characterised as an instrument of narrow interpretation or definition of rights rather than as a provision for the limitation of rights. See van der Schyff, above n 1 at 78; Karel Vasak, *La Convention européenne des droits de l'homme* (Paris, Pichon, 1964) 71; Velaers, *De beperking*, previous n at 255.

[74] Gerhard van der Schyff argues that Art 17 is an example of what he calls the doctrine of the *transgression of rights*, rather than an instance of the theory of the *abuse of rights*. In this view, the effect of an application of Art 17 is that certain conduct is not included under the scope of protection of a given right. To put it differently: a violation of Art 17 does not mean that a right was abused, but simply that its boundaries were transgressed. See van der Schyff, above n 1 at 44–53 and 79.

objective of Article 17 is to prevent totalitarian groups from exploiting the principles enunciated by the Convention in their own interest.[75]

While the primary evil against which Article 17 was directed was a feared relapse into the totalitarian conditions of pre-war Europe, it may, for instance, also be invoked to prevent persons or groups engaging in terrorist activities from relying on the Convention to further their subversive ends. It is important to note, in this respect, that the fact that certain terrorist activities fall within the ambit of Article 17 does not mean that the persons or groups involved may be deprived of all the rights and freedoms guaranteed in the Convention. As the court has made clear on several occasions, Article 17 applies only to those rights which, if invoked, would facilitate actions aimed at the destruction of Convention rights (eg, the right to freedom of expression).[76] It cannot serve as the basis for restrictions imposed on other rights, such as the procedural protections enshrined in Articles 5 and 6. The latter issue is examined in more detail in chapter five on the right to personal liberty.

E. Article 15: Emergency Derogations

The second general limitation clause already touched upon in the previous chapter is the emergency derogations provision of Article 15.[77] Like Article 17, this provision can be seen as an instance of the militant conception of democracy inherent in the European Convention system.[78] Almost all cases that have arisen under Article 15 involved crisis situations caused by continuing campaigns of terrorist violence. Since these decisions will be

[75] See, eg, *Lawless v Ireland*, 1 July 1961, Series A no 3 para 6:

[76] Eg, *Ibid*.

[77] See generally Rusen Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles* (Brussels, Bruylant, 1987); Pinheiro Farinha, 'L'article 15 de la Convention', in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension. Essays in Honour of Gérard Wiarda* (Cologne, Heymann, 1990) 521; Harris, O'Boyle and Warbrick, above n 32 at 489; Ovey and White, above n 72 at 367; van Dijk and van Hoof, above n 72 at 730. On emergency derogations in international human rights law, see Joan Fitzpatrick, *Human Rights in Crisis. The International System for Protecting Rights during States of Emergency* (Philadelphia, University of Pennsylvania Press, 1994); Jaime Oraa, *Human Rights in States of Emergency in International Law* (Oxford, Clarendon Press, 1992); Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (Leiden/Boston, Martinus Nijhoff, 1998).

[78] See, eg, Council of Europe, *Case-Law Topics No. 4: Human Rights and their Limitations* (Strasbourg, Council of Europe, 1973) 3 (noting that Art 15 concerns 'the overriding rights of the State to protect its democratic institutions'); Ergec, *Les droits de l'homme*, previous n at 12–13, characterising Art 15 as an instrument against the destruction of the democratic order: '[L]e droit de dérogation s'inscrit dans la ligne d'un équilibre inhérent à l'ensemble de la Convention: la défense des droits de l'individu, d'une part, et la protection de la démocratie constitutionnelle (…) d'autre part.'

discussed at great length throughout this work, it suffices here to outline the general approach taken by the Convention organs in their application of Article 15. Article 15 provides:

> 1. In time of was or public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
>
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.[79]

The language of Article 15 indicates that a derogation from the Convention will be valid only when a number of substantive and procedural conditions are met: (1) there must be a war or public emergency threatening the life of the nation; (2) the derogating measures must be strictly required by the exigencies of the situation; (3) the derogating measures must be consistent with other obligations under international law; and (4) there must be a notification to the Secretary-General of the Council of Europe of the measures taken and the reasons for doing so. To date, conditions (3) and (4) have played little part in the Strasbourg organs' jurisprudence.[80] The focus in what follows is therefore on conditions (1) and (2).

[79] The non-derogable rights enumerated in the second paragraph of Art 15 are: the right to life, except in respect of deaths resulting from lawful acts of war (Art 2); the prohibition of torture or degrading treatment or punishment (Arts 3); the prohibition of slavery or servitude (Art 4(1)) and the requirement that there be no punishment without law (Art 7). It may be observed, in this respect, that the derogation provision in Art 4 of the International Covenant on Civil and Political Rights contains a longer list which includes, for instance, freedom of thought, conscience and religion (Art 18). Moreover, the Human Rights Committee has made it clear that derogations from other rights not listed in Art 4 (eg, the right to a fair trial) may be equally inappropriate in times of emergency. See HRC, 'General Comment No 29: States of Emergency (Art 4)', CCPR/C/21/Rev.1/Add.11 (2001).

[80] As far as requirement (4) is concerned, the court has held that the notice of derogation to the Secretary-General of the Council of Europe must not necessarily be prior to the date on which the derogating measures are implemented in the Contracting State. Art 15 requires the notification to be made 'without delay'. Furthermore, the notice of derogation addressed to the Secretary-General of the Council of Europe must not be (officially) promulgated in the territory of the state concerned. See *Lawless v Ireland*, above n 75 at para 47.

The meaning of the words 'public emergency threatening the life of the nation' was clarified in *Lawless v Ireland*. In the opinion of the court, the expression refers to

> an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.[81]

This definition was further refined by the Commission in the *Greek* case. There it was held that an emergency must have the following characteristics to be covered by Article 15: (1) it must be actual or imminent; (2) its effects must involve the whole nation; (3) the continuance of the organised life of the community must be threatened; and (4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[82] As will be seen in subsequent chapters, the Convention organs have on various occasions accepted that serious terrorist violence may constitute a public emergency threatening the life of the nation.

The second substantive requirement for a valid derogation is that the measures be taken only to 'the extent strictly required by the exigencies of the situation'. This obligation reflects the principle of proportionality which is common to the limitation of rights both in ordinary and emergency situations (see, eg, the limitation clauses of Articles 8 to 11). The first inquiry conducted under the 'strictly required' prong is whether the derogating measures were *necessary*, in that ordinary limiting measures would not have been adequate to meet the emergency. Thus, for instance, in the *Lawless* case the court observed that the ordinary law had proved unable to check the growing terrorist danger which threatened the Republic of Ireland.[83] Preventive detention had accordingly been justified as a measure required by the circumstances. Next, the Strasbourg organs will consider the proportionality of the derogating measures by weighing the seriousness of the emergency against the gravity of the interference: the greater the danger, the greater the permissible derogation, both as a matter of degree and duration.[84] A significant issue, in this respect, is whether the

[81] *Ibid* at para 28. The French version of the *Lawless* judgment mentioned not only the word 'exceptionnel', but also required the crisis situation to be 'imminent'. The latter requirement was incorporated in the English definition in the *Greek* case. See below n 82.

[82] *Greek case*, 5 November 1969, 2 *Yearbook* 72 (1969). In spite of what these definitions may suggest, a crisis limited in scope to a certain part of the territory of a State, may nevertheless amount to an emergency threatening the life of the nation as a whole. See, eg, *Ireland v UK*, 18 January 1978, Series A no 25 para 205.

[83] *Lawless v Ireland*, above n 75 at para 36 (observing that the ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order in the region). For a detailed discussion of this case, see ch 5.

[84] Harris, O'Boyle and Warbrick, above n 32 at 499.

respondent state has put in place sufficient guarantees against abuse. To take the same example, the court in the *Lawless* case had particular regard to the presence of a number of safeguards designed to prevent abuses in the operation of the system of preventive detention.[85]

Although the words 'strictly required' suggest a standard of scrutiny more demanding than the adjective 'necessary' in the common limitation clauses of Articles 8 to 11, the Convention organs have taken a rather deferential attitude with respect to applications based on Article 15.[86] The question as to the appropriate standard of review for both of the aforementioned substantive conditions was first considered by the European Commission in *Greece v United Kingdom*.[87] The Commission considered itself 'competent to pronounce on the existence of a public danger (…) [and] to decide whether the measures (…) had been taken to the extent strictly required by the exigencies of the situation'.[88] It added, however, that 'the Government should be able to exercise a certain measure of discretion' in this regard.[89] The notion of a 'certain measure of discretion' later developed into what has become know as the doctrine of the margin of appreciation.[90] The impact of this doctrine on the limitation of Convention rights in general is considered in the section below. It may already be observed here that the Convention organs grant the states a wide margin of appreciation in reviewing emergency derogations under Article 15.[91] The recurring observation in this connection reads as follows:

[85] *Lawless v Ireland*, above n 75 at para 37 (the court had regard to the constant parliamentary supervision and the existence of a 'Detention Commission' which could hear applications by detainees). For a detailed discussion of this case, see ch 5.

[86] See Judge Martens' concurring opinion in *Brannigan and McBride v UK*, 26 May 1993, Series A no 252-B para 4: 'The second question is whether the derogation is to "the extent strictly required by the exigencies of the situation". The wording underlined clearly calls for a closer scrutiny than the words "necessary in a democratic society" which appear in the second paragraph of Articles 8–11. Consequently, with respect to this second question there is, if at all, certainly no room for a wide margin of appreciation.' According to some critics, the discretion left to the Contracting States in the context of Art 15 is too broad. See, eg, Fionnuala Ní Aoláin, 'The Emergency of Diversity: Differences in Human Rights Jurisprudence' (1995) 19 *Fordham International Law Journal* 101; Oren Gross, '"Once More unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law* 437; Cora S Feingold, 'The Doctrine of the Margin of Appreciation and the European Convention on Human Rights' (1977) 53 *Notre Dame Law Review* 90, 98–9; Rosalyn Higgins, 'Derogations Under Human Rights Treaties' (1978) 48 *British Yearbook of International Law* 281, 314.

[87] *Greece v UK*, Application No 176/56, 2 *Yearbook* 174, 176 (1958–9).

[88] *Ibid*.

[89] *Ibid*.

[90] An important step was made in *Ireland v UK*, the case in which the court for the first time mentioned the margin of appreciation with respect to Art 15. See *Ireland v UK*, 18 January 1978, Series A no 25 para 207.

[91] Harris, O'Boyle and Warbrick, above n 32 at 501–2 describe the court's standard of review as follows: '[The] essentially negative review, which takes into account matters of evidence, necessity, proportionality, adequacy of safeguards, individually and together, does

> [I]t falls to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.[92]

F. The Margin of Appreciation

The doctrine of the margin of appreciation was introduced in the Strasbourg organs' case law to indicate the measure of discretion the Contracting States enjoy in their observance of the rights and freedoms set forth in the Convention.[93] As noted above, the origins of the doctrine can be traced back to the early cases dealing with emergency derogations under Article 15. However, the margin of appreciation soon became a general principle guiding the application of other Convention rights. The idea underlying the doctrine was explained in *Handyside* in the context the democratic necessity test of Articles 8 to 11:

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion (…) on the 'necessity' of a 'restriction' or 'penalty' (…). Consequently, Article 10 § 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (…) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.[94]

Much has been written and said about the nature and purpose of the margin of appreciation.[95] According to Richard Clayton and Hugh Tomlinson the doctrine essentially performs two functions: it serves both as an

not amount to a particular intrusive form of review, despite the strong words of Article 15(1). What it does do is force the state into a public justification for its actions.'

[92] *Aksoy v Turkey*, 18 December 1996, Reports 1996-VI, para 68. A wide margin of appreciation should not be equated with an unlimited discretion. According to settled case law, the domestic margin of appreciation is accompanied by a European supervision. In exercising this supervision, the court will take into account 'such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation'. *Ibid*.

[93] The concept originated in the case-law concerning judicial review of administrative action in civil law jurisdictions. See Arai-Takahashi, above n 51 at 3–4.

[94] *Handyside v UK*, above n 46 at paras 48–9

[95] See, eg, Arai-Takahashi, above n 51; Eva Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240; Paul Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *Human Rights Law Journal* 57; Paul Mahoney, 'The Doctrine of the Margin of

interpretive obligation on the part of international supervising bodies to respect national cultural values and traditions, and as a *standard of judicial review* for the enforcement of human rights.[96] At the basis of the margin of appreciation lies the principle of subsidiarity. The machinery of protection established by the Convention is conceived of as a system which is complementary to national schemes for the protection of rights.[97] There is, in other words, a 'shared responsibility' for the enforcement of the Convention guarantees between the Contracting States and the Strasbourg organs, with the primary responsibility resting with the domestic authorities.[98] As a doctrine of international human rights law, the margin of appreciation can also be seen as the international counterpart of domestic theories of judicial deference. Several authors have drawn attention to the analogy between judicial deference to the sovereignty of the Contracting States and judicial deference to the political branches at the domestic level.[99]

The margin of appreciation affects the standard of review applied in a particular case: if the margin of appreciation is narrow, the European Court and the Commission will more closely scrutinise the impugned measures than in cases in which there is a wide margin.[100] This is of particular importance for the balancing exercise conducted under the principle of proportionality. In a comprehensive study on the subject, Yutaka Arai-Takahashi demonstrates that there is a significant correlation between the degree of rigour with which the proportionality inquiry is

Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice' (1998) 19 *Human Rights Law Journal* 1; Thomas A O'Donnel, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Convention of Human Rights' (1982) 4 *Human Rights Quarterly* 474; Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (The Hague, Kluwer, 1996).

[96] Clayton and Tomlinson, above n 32 at 274.

[97] Eg, *Handyside v UK*, above n 46 at paras 48: '[I]t is for the national authorities to make the initial assessment of the reality of the pressing social need.' See Arai-Takahashi, above n 51 at 3.

[98] Mahoney, 'The Doctrine of the Margin of Appreciation', above n 95 at 3.

[99] *Ibid*. See also Brems, 'The Margin of Appreciation Doctrine', above n 95 at 297–8.

[100] Cp, eg, *Karner v Austria*, 24 July 2003, *Reports* 2003-IX, para 41: 'In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people—in this instance persons living in a homosexual relationship—from the scope of application of section 14 of the Rent Act' and *James and others v UK*, 21 February 1986, Series A no 98 para 46: 'The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation.'

pursued and the width of the margin of appreciation.[101] This is not to say that where the Convention organs grant a wide margin, they will show complete deference to the decisions of the domestic authorities. As was already made clear in *Handyside*,

> [t]he Court (…) is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.[102]

On numerous occasions, the court emphasised that the existence of a margin of appreciation should not be equated with the applicability of a reasonableness test: 'The margin of appreciation does not mean that the court's supervision is limited to ascertaining whether a respondent state exercised its discretion reasonably, carefully and in good faith.'[103] Conversely, a narrow margin of appreciation does not always entail that the European Court will carry out the most stringent proportionality review—for instance the least restrictive means inquiry.

The margin of appreciation is pre-eminently a tool of flexibility.[104] Its scope varies from case to case depending on a variety of issues, such as the nature of the rights concerned,[105] the existence or non-existence of a 'common ground' amongst the Member States of the Council of Europe,[106] and the nature and seriousness of the interest furthered by the limiting measure.[107] Although these factors provide some guidance as to the content of the margin of appreciation, it remains difficult to foretell whether in any given case the margin will be wide or narrow.[108] As the

[101] Arai-Takahashi, above n 51 at 2 and 204–5. van der Schyff argues that the scope of the margin of appreciation in a particular case (or series of cases) is itself the result of a balancing exercise of the competing interests at stake (van der Schyff, above n 1 at 221 and 224) ('[M]arginal testing can be said to amount to an ex post facto characterisation of a balancing exercise, it can be no given or point of departure.').

[102] *Handyside v UK*, above n 46 at paras 49.

[103] See, eg, *Sunday Times v UK*, above n 34 at para 59.

[104] As Eva Brems, The Margin of Appreciation Doctrine' above n 95 at 313 puts it: '[B]ecause flexibility is an essential element of the margin of appreciation, absolute predictability is out of the question. The concrete circumstances and context of each case will always remain very important in determining the margin of appreciation.'

[105] See, eg, *Dudgeon v UK* Series A no 45 (1981) para 52 (noting that where an 'intimate aspects of private life' is concerned the margin of appreciation left to the Contracting States is narrow).

[106] See, eg, *Rees v UK*, 17 October 1986, Series A no 106 para 37 (noting that where there is little common ground between the Contracting States the latter enjoy a wide margin of appreciation).

[107] See, eg, *Leander v Sweden*, 26 March 1987, Series A no 116 para 59 (recognising a wide margin of appreciation where the protection of national security is concerned).

[108] Hovius, above n 32 at 256: 'The amount of discretion left to domestic authorities is determined largely on an *ad hoc* basis and is, one suspects, governed to some extent by what can loosely be termed political considerations.' Lord Lester of Herne Hill, 'The European Convention in the new architecture of Europe' (1996) Spring *Public Law* 5, 6 ('The concept

court explained in several judgments, 'the scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background'.[109] Richard Clayton and Hugh Tomlinson conclude that

> [i]t is (…) impossible to predict how the margin of appreciation will affect the outcome in any particular case: in other words whether the Court will apply a high standard of judicial review and a strict approach towards proportionality; or whether it will utilise a low standard of review where great weight is attached to the domestic state's margin of appreciation.[110]

IV. THE LIMITATION OF RIGHTS UNDER THE US CONSTITUTION

A. Introduction

Unlike the European Convention, the US Constitution does not contain express provisions for the limitation of rights. The Bill of Rights neither sets forth a general limitation clause, nor are any of the individual rights made subject to specific limitation clauses comparable to those found in the Convention. Quite the opposite, many constitutional rights are phrased in absolute terms. Yet, such absolute language has not precluded courts from limiting rights by upholding governmental interferences.[111] More important than textual outlook is therefore the question whether the

of the "margin of appreciation" has become as slippery and elusive as an eel.'); O'Donnel, above n 96 at 479 ('The US Supreme Court has develop a fairly clear set of standards governing the extent of the deference to be granted, but the European Court has not.'); Rimanque, above n 44 at 1226–7 (arguing that is difficult to predict the application of the margin of appreciation in future cases); Vande Lanotte and Haeck, above n 32 at 210 and 16 (arguing that it is close to impossible to define the scope of application and the content of the margin of appreciation); van Dijk and van Hoof, above n 72 at 588: 'Despite the rather long period of time during which the Court and the Commission have now been using the doctrine it is still extremely difficult to precisely define the nature of the test enshrined in the margin of appreciation doctrine as well as the conditions of its application.'

[109] See, eg, *Rasmussen v Denmark*, 28 November 1984, Series A no 87 para 40.

[110] Clayton and Tomlinson, above n 32 at 285.

[111] According to a minority view, some rights (notably the First Amendment) are absolute. This view is traditionally associated with the work of Justice Black. Eg, *Barenblatt v United States*, 360 US 109 (1959) (Black, J, dissenting); *Koningsberg v State Bar*, 366 US 36 (1961) (Black, J, dissenting). See also Hugo L Black, *A Constitutional Faith* 45 (New York, Knopf, 1968) ('I simply believe that "Congress shall make no law" means Congress shall make no law.'). See, inter alia, Frantz, above n 1 at 1440–45; Alexander Meiklejohn, 'The First Amendment is an Absolute', (1961) *Supreme Court Review* 245. Proponents of this view are usually apt to point out that the 'absolute' nature of a right does not imply that it is unlimited in scope (on the distinction between 'limiting' and 'defining' rights, see above). Meiklejohn captures this idea as follows: 'We are looking for a principle which (…) is 'absolute' in the sense of being 'not open to exceptions', but a principle which is also subject to interpretation, change, or to abolition, as the necessities of a precarious world may require' (*Ibid*, 253). As Schauer writes: '[A]bsolute in force is not the same as unlimited in range. A principle or right can be absolute when applied without being applicable to every situation.' (Schauer, 'Speech and "Speech"-Obscenity and "Obscenity"', above n 1 at 903).

different formulations have generated different judicial approaches to analysing limitations of rights. It will become clear in the subsequent chapters of this book that European and American methods of adjudication indeed differ markedly, although it is an open question as to what extent this is the result of the text of the basic documents or some other factors.[112]

B. Recurring Methods of Limitation

Whereas the Convention contains general standards authorising the Strasbourg organs to balance rights and countervailing interests—eg, the democratic necessity test—no comparable, generally applicable, modes of limitation can be found in the Supreme Court's jurisprudence. Instead, the court has developed a wide range of justificatory tests to resolve the clash between different rights and between rights and collective interests. Yet, despite the absence of any overall doctrine of limitation in American constitutional law, it is possible to discern recurrent styles for analysing interferences with constitutional rights.[113] One way to structure these methods is by placing them on the above-discussed continuum between rule—and standard-like decision-making.[114]

i. Category Definition

At the far end of the rule-pole lies the method called category definition.[115] Under this approach, constitutional disputes are resolved, not through considering the relationship between rights and other interests, but merely through defining the scope of rights. Adherents of category definition contend that the proper object of constitutional adjudication is to discover the true meaning of rights through interpretation, not to assess countervailing public interests. In other words, in this view, human rights adjudication is a one-stage process. As Faigman put it, '[w]hen the categorical method is adopted (…) constitutional implication signifies constitutional protection'.[116] Category definition typically results in all-or-nothing solutions: if

[112] For possible explanations in the area of freedom of expression, see Frederick Schauer, 'Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture' in Georg Nolte (ed), *European and U.S. Constitutionalism* (Cambridge, Cambridge University Press, 2005) 49.

[113] See, eg, Aleinikoff, above n 7; Faigman, 'Reconciling Individual Rights and Government Interests', above n 1; Faigman, 'Madisonian Balancing', above n 4; Sullivan, 'Foreword', above n 7; Sullivan, 'Post-Liberal Judging', above n 7.

[114] Faigman, 'Reconciling Individual Rights and Government Interests', above n 1 at 1535.

[115] *Ibid*.

[116] *Ibid* at 1548.

an asserted right fits into the claimed category, it receives absolute protection; if the asserted right does not fall into that category, it receives no protection at all. This style of reasoning was the predominant method of constitutional interpretation in the nineteenth and early twentieth century.[117] Not surprisingly, it is the preferred method of those who maintain that certain constitutional rights are 'absolute'.[118]

ii. Definitional Balancing

In American constitutional theory a distinction is often made between two ways of balancing competing rights and interests: definitional balancing and ad hoc balancing.[119] Melville Nimmer, who is credited with introducing the distinction, wrote that the

> profound difference between ad hoc and definitional balancing lies in the fact that a rule emerges from definitional balancing which can be employed in future cases without the occasion for further weighing of interests.[120]

In other words, courts engaging in definitional balancing assess the weight of a right against the state interest at a certain level of abstraction, with a view to generating substantive constitutional principles of general application.[121] It is a rule-like style of adjudication in that it limits the exercise of judicial discretion in future cases.[122]

Definitional balancing is a popular method of First Amendment analysis. Melville first used the term to describe the Supreme Court's decision in *New York Times Company v Sullivan*.[123] In this case, the court defined the kind of defamatory speech which is protected by the First Amendment.[124] In adopting its rule, Melville argued, the court implicitly referred to certain competing policy considerations.[125] A more straightforward example of definitional balancing is found in *New York v Ferber*, a case concerning child pornography.[126] Although the prohibition at issue constituted an interference with First Amendment interests, it was upheld on the basis of, inter alia, the state's 'compelling' interest in safeguarding the physical and

[117] Aleinikoff, above n 7 at 948 *ff*.
[118] See above n 111.
[119] See generally Melville B Nimmer, 'The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) *56 California Law Review* 935 (advocating definitional balancing as the appropriate methodology for First Amendment adjudication).
[120] *Ibid* at 944–5.
[121] Aleinikoff, above n 7 at 948.
[122] Faigman, Reconciling Individual Rights and Government Interests', above n 1 at 1536.
[123] *New York Times Company v Sullivan*, 376 US 255 (1964).
[124] *Ibid* at 279–80 (adopting the rule that public officials can recover damages for a defamatory statement only when the statement was made with 'actual malice').
[125] Nimmer, 'The Right to Speak', above n 119 at 943.
[126] *New York v Ferber*, 458 US 747 (1982).

psychological well-being of a minor.[127] In the Supreme Court's opinion, 'the evil to be restricted so overwhelmingly outweighs the expressive interests (…) at take, that no process of case-by-case adjudication is required'.[128] In other words, the rule that child pornography is not protected by the First Amendment can be applied in subsequent cases irrespective of the particular circumstances of those cases.

iii. Multi-Tiered Tests

In various fields of constitutional law the Supreme Court applies fixed 'tiers' or 'standards' of review.[129] Each of these tiers exhibits the same basic structure: first, the court assesses the importance of the government interest advanced by the interference; second, the focus shifts to the degree of fit between that interest and the means the government has chosen to attain it.[130] Multi-tiered tests are typically associated with Equal Protection and Due Process analysis, but also occur in other constitutional contexts.[131] A well-known example is the three-tiered test to assess claims that the Equal Protection Clause of the Fourteenth Amendment has been violated. When confronted with classifications based on certain 'suspect' criteria—notably race—the court applies the 'most exacting scrutiny' standard. To pass constitutional muster, such distinctions must be justified by a 'compelling governmental interest' and must be 'necessary to the accomplishment' of their legitimate purpose.[132] For other criteria, such as gender or illegitimacy, the court adopts a mid-level category of 'intermediate scrutiny'. In order to withstand judicial scrutiny, such classifications must serve 'important governmental objectives', and the means employed must be 'substantially related to achievement of those objectives'.[133] Finally, under the highly deferential 'rational basis' standard, a distinction must be 'reasonably' or 'rationally' related to a 'legitimate' government interest. The rational basis test is used, inter alia, to review equal protection challenges in the context of social and economic legislation.[134]

[127] *Ibid* at 756–7.
[128] *Ibid* at 763–4.
[129] See, eg, Faigman, 'Reconciling Individual Rights and Government Interests', above n 1 at 1537 and 1563–71; Sullivan, 'Post-Liberal Judging', above n 7 at 295–301.
[130] Daniel J Solove, 'The Darkest Domain, Judicial Deference, and the Bill of Rights', (1999) 4 *Iowa Law Review* 941, 954.
[131] See, for instance, the *O'Brien* test for symbolic speech discussed in ch 3 (*United States v O'Brien*, 391 US 367, 377 (1968))
[132] Eg *Loving v Virginia*, 388 US 1, 11 (1967).
[133] Eg *Craig v Boren*, 429 US 190, 197 (1976).
[134] Eg, *United States Railroad Retirement Board v Fritz*, 449 US 166 (1980).

Some observes have drawn attention to the similarities between these formulations and traditional proportionality analysis.[135] Albeit, as noted, proportionality testing is underdeveloped under the European Convention, it is interesting to see the commonalities between multi-tired tests and the language used in the limitation clauses of Articles 8 to 11. Both require the courts to assess the adequacy of the government interest and the legitimacy of the relationship between the means (the limiting measure) and ends (the government interest). But there are also differences: while the common limitation clauses in the Convention set out an exhaustive list of specific legitimate purposes, the Supreme Court employs abstract categories such as 'compelling', 'substantial', or 'legitimate', depending on the level of review deemed appropriate for the constitutional claim under review. The level of scrutiny also determines the measure of perfection which the relationship between the means employed and the objectives pursued must attain: the required degree of 'fitness' varies from 'necessary' over 'substantially related' to 'rationally related'.

It is difficult to say where multi-tiered tests take their place on the categorisation-balancing continuum. Such formulations clearly use the vocabulary of balancing.[136] However, not all multi-tiered tests exhibit the degree of flexibility traditionally associated with balancing approaches. Much depends on the level of scrutiny the court applies. The intermediate scrutiny standard would be a typical balancing mode, leaving decision-makers to weigh interests and means with little guidance.[137] Hence, the outcome of the intermediate scrutiny test would be difficult to predict in advance.[138] Things are different where the court applies 'strict scrutiny' or 'rationality review' tests. According to Kathleen Sullivan, these inquiries have much more in common with the categorical method of analysis.[139] This is so because under strict and rational basis review the result is usually predetermined at the threshold: once the standard of review is established the outcome is certain. Sullivan explains this point as follows:

> True, the standard formulations of these tests require the court to go through the motions of balancing a right against a legitimate or compelling interest. But this

[135] See Vicki C Jackson, 'Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism' (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 583, 609–10.

[136] Several authors describe multi-tiered analysis as a balancing method. See, eg, Christina E Wells, 'Fear and Loathing in Constitutional Decision-Making' (2005) *Wisconsin Law Review* 115, 207–14; Solove, above n 130 at 954.

[137] See, eg, Aleinikoff, above n 7 at 968–9 (depicting mid-level review as 'a sliding-scale balancing approach'); Fallon, above n 13 at 78–9; Sullivan, 'Post-Liberal Judging', above n 7 at 297 (describing intermediate scrutiny as 'an overly balancing mode').

[138] Sullivan, 'Post-Liberal Judging', above n 7 at 297; Wells, 'Fear and Loathing' above n 136 at 211.

[139] Sullivan, 'Post-Liberal Judging', above n 7 at 296.

> is not real balancing. If the standard is rationality, the government is supposed to win (…). If strict scrutiny is applied, the challenged law is never supposed to survive.[140]

From another point of view, multi-tiered tests can be said to be 'quasicategorical' because they fit cases into one of the pre-existing tiers of analysis.[141] As Faigman made clear, multi-tiered analysis has features common to both definitional and 'ad hoc' balancing: 'Definitional balancing informs the construction of the individual right, but this result, rather than being applied inexorably like the definitional balance, is balanced once again in a quasi ad-hoc fashion.'[142]

iv. Ad Hoc Balancing

This brings us to the opposite pole of category definition, namely ad hoc balancing. In ad hoc balancing, Nimmer wrote, the judicial inquiry consists of the weighing of 'the interests presented in the particular circumstances of the case before the court'.[143] In contrast to definitional balancing, the purpose of this exercise is not so much to establish generally applicable rules, but to determine 'which litigant deserves to prevail in the particular case'.[144] Ad hoc balancing is standard-like in that it allows the decision-maker to consider all relevant factors or the totality of the circumstances, thus conferring upon the judge a significant measure of discretion.[145]

A typical example of ad hoc balancing is the test announced in *Mathews v Eldridge* to determine the procedural due process requirements in a non-criminal law context.[146] According to the Supreme Court in *Mathews*, 'due process is flexible and calls for such procedural protections as the particular situation demands'.[147] It was accordingly decided that the identification of the proper procedures requires a balance between the following three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;

[140] *Ibid*. In this connection, reference is often made to Gerald Gunther's observation that 'strict in theory' means 'fatal in fact'. See Gerald Gunther, 'Foreword: In search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection' (1972) 86 *Harvard Law Review* 1, 8.

[141] Faigman, 'Reconciling Individual Rights and Government Interests', above n 1 at 1538.

[142] *Ibid* at 1560. See also Coffin, above n 6 at 26 (1988) ('In a sense, when a court adopts a heightened scrutiny standard, it has already done much of the balancing.').

[143] Nimmer, 'The Right to Speak', above n 119 at 944.

[144] *Ibid*. at 942.

[145] Sullivan, 'Foreword', above n 7 at 58–9 and 60.

[146] *Mathews v Eldridge*, 424 US 319 (1976). See also ch 7.

[147] *Ibid* at 334.

> and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[148]

The court sometimes arrives at an ad hoc balancing test through definitional balancing. An example is *Maryland v Craig*.[149] In this case the court considered whether the Sixth Amendment Confrontation Clause guarantees a criminal defendant an absolute right to a face-to-face meeting with the witnesses against him at trial. This question was answered in the negative. Justice O'Connor, writing for the majority, stated that a defendant's fair trial rights may be satisfied absent a physical face-to-face confrontation, 'where denial of such confrontation is necessary to further an important public policy'.[150] The requisite finding of necessity, she continued, must be a case-specific one: in every single case, the trial courts must balance the psychological needs of the particular child against the rights of the defendant.[151]

C. Emergency Derogations

One of the factors that set the US Constitution apart from twentieth-century human rights instruments is the absence of a general derogation clause.[152] Unlike the European Convention, the US Constitution does not contain a clause providing for a general suspension of rights and liberties in periods of war or national emergencies.[153] The only important constitutional provision expressly authorising the suspension of individual rights during an emergency is Article I, section 9:

[148] *Ibid* at 335.
[149] *Mathews v Eldridge*. See also ch 7.
[150] *Ibid* at 850.
[151] *Ibid* at 855.
[152] There is a vast amount of literature on individual rights in war and emergency situations in the United States. For general introductions, see, eg, George J Alexander, 'The Illusory Protection of Human Rights by National Courts During Periods of Emergency' (1984) 5 *Human Rights Law Journal* 1; Baker, above n 2 at 93–102; Developments in the Law, 'The National Security Interest and Civil Liberties' (1972) 85 *Harvard Law Review* 1284–321; Samuel Issacharoff and Richard H Pildes, 'Emergency Contexts without Emergency Powers: The United States' Constitutional Approach to Rights during Wartime' (2004) 2 *International Journal of Constitutional Law* 296; Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, NJ, Princeton University Press, 1948) 207–315; William H Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (Vintage Books, 1998).
[153] For a recent proposal to incorporate an elaborate set of emergency provisions in the United States constitutional scheme, see Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029. For a critique, see, eg, David Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot' (2004) 113 *Yale Law Journal* 1753; Laurence H Tribe and Patrick O Gudridge, 'The Anti-Emergency Constitution' (2004) 113 *Yale Law Journal* 1801.

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

However, as noted in the previous chapter, the principled rejection of emergency powers does not prevent the de facto suspension of individual rights during emergencies. The history of the United States contains many instances of such war and emergency derogations.

Only a limited number of those measures have reached the Supreme Court.[154] As will become clear in subsequent chapters, the position of the court with regard to emergency derogations has varied widely. It is difficult to infer any general principles from the case law comparable to those developed under Article 15 of the Convention. Sometimes the court has taken the position that government action in war and emergency situations is subject to the same constitutional standards as are applicable in normal times. The court embraced this view in *Ex parte Millgan*, where it held that

> [t]he Constitution of the United States is a law for rules and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.[155]

The idea underlying this absolute stance is that the specific constitutional grant of power to suspend the writ of habeas corpus precludes any other emergency derogation from protected rights.[156] On other occasions, however, the court has adopted a deferential standard of review and accepted government claims of (military) necessity to justify infringements of constitutional rights. A notable example of this position is *Korematsu v United States*.[157] In this World War II case the court upheld an order excluding persons from Japanese ancestry from the West Coast, stating that it could not reject as unfounded the judgment of the military authorities and of Congress that the exclusion was necessary under the circumstances. In *Korematsu* and other cases the court limited its inquiry to whether there was a reasonable relationship between the derogating measure and the government interests.[158]

These examples show that the court has issued highly contradictory opinions with regard to emergency derogations:

> At one time the justices have emphasised a Constitution inflexible amidst military stress, and at another, a Constitution readily adaptable to the novel

[154] Baker, above n 2 at 99.
[155] *Ex p Milligan*, 71 US 2, 120–21 (1866).
[156] *Ibid* at 126: 'The illustrious men who framed that instrument [the Constitution] (…) limited the suspension to one great right [habeas corpus], and left the rest forever inviolable.'
[157] See, eg, *Korematsu v United States*, 323 US 214 (1944).
[158] Developments in the Law, 'National Security Interest', above n 152 at 1296.

> imperatives of total war. They have alternated between a jealous devotion to the sanctity of individual rights and a prudential emphasis on the primacy of national power.[159]

Moreover, the Supreme Court's jurisprudence has been said to be only of limited relevance to the real status of individual rights in wartime.[160] As Edwin Baker observers, there may be much more to learn from lower court decisions and actual government practice than from Supreme Court opinions often decided after the war was finished.[161] The common wisdom that there often is a gap between theory and practice was famously captured in former Attorney General Francis Biddle's observation that '[t]he Constitution has not greatly bothered any wartime President'.[162]

V. CONCLUSION

The preceding sections brought to light some of the main differences and commonalities between the system of limitation of rights under the US Constitution and the European Convention. The key points may be summarised as follows. To begin with, there are a number of textual dissimilarities. The European Convention sets forth different categories of express limitation clauses, thus providing decision-makers with a general framework for the restriction of rights both in normal circumstances and in war and emergency situations. The Bill of Rights, by contrast, leaves it entirely to the courts to develop methods to resolve conflicts between constitutional rights and countervailing individual or public interests. With a few minor exceptions, the US Constitution does not explicitly provide for the limitation of or derogation from protected rights.

The impact of these formal differences should not be overestimated. Both systems permit restrictions on human rights to protect competing individual rights and collective interests. As will be seen in the chapters which follow, it is not so much the formal outlook as the judicial approaches to analysing limitations of rights that often mark the difference between the two human rights instruments. When reviewing restrictions on Convention rights, the Strasbourg organs usually follow a more or less fixed sequence of questions. This approach is best exemplified by jurisprudence on the common limitation clauses of Articles 8 to 11. In addition, there are a number of adjudicative principles—eg the doctrine of the margin of appreciation—that recur throughout the Convention case law.

[159] Louis Smith, *American Democracy and Military Power* (Chicago, University of Chicago Press, 1951) 287–8, quoted in George J Alexander, above n 152 at 10.

[160] See, eg, Baker, above n 2 at 94.

[161] *Ibid*.

[162] Francis Biddle, *In Brief Authority* (New York, Doubleday, 1962) 219, quoted in Rehnquist, above n 152 at 191.

No comparable, general doctrine of limitations can be found in the Supreme Court's jurisprudence. The court applies a variety of methods to reconcile individual rights and community interests, rather than to codify a fixed set of limitation principles.

A comprehensive comparison and evaluation of the different styles of reasoning practiced in both systems is beyond the scope of this preliminary chapter. Before examining the counter-terrorist limitations on individual rights, the subsequent chapters provide a brief comparative analysis of the system of limitation of the right in question. One conclusion may nevertheless be drawn from the previous sections. The Strasbourg organs generally take a flexible approach to the limitation of rights. This is perhaps best evidenced by the democratic necessity test which, as noted, functions as a highly flexible balancing formula. But the flexible approach is also reflected in other Convention contexts, where the use of open-ended standards and elastic notions allows the European Court to weigh the different rights and interests at stake in a particular case. Although, as will be seen, there are some areas in which the court has moved from ad hoc balancing to definitional balancing, the resultant test is often more standard- than rule-like.

The situation is somewhat different under the Bill of Rights. Although balancing is an important adjudicative method practiced by the Supreme Court, it is less pre-eminent and occurs in different forms than is the case in Convention jurisprudence. First, several constitutional disputes are resolved through category definition rather than through the balancing of competing claims. Second, where the court engages in a balancing exercise, it often does so in a categorical way, defining the relationship between competing rights and interest on an abstract level, and so limiting the adjudicative discretion in future cases. When the court engages in definitional balancing, the rules or tests it produces are often so strict as to rule out any further context-based inquiries.

3

The Right to Freedom of Expression

I. INTRODUCTION

IT IS NO coincidence that the first right considered here is the right to freedom of expression. A very special relationship exists between terrorism and the right to impart information and ideas.[1] Terrorism can be seen as a specific act of communication: terrorists seek to inform the government, the public or any other target about their goals and motives. This chapter considers counter-terrorist limitations on freedom of expression and explores the special relationship between terrorism and freedom of expression. It consists of five sections. Section II offers a brief introduction to Article 10 of the European Convention and the First Amendment to the US Constitution. Following on from that, section III raises the question of whether terrorist acts, given their communicative aims, deserve protection as expressive conduct. In section IV, the focus shifts from terrorist acts to various forms of terrorism-related speech. These include terrorist threats, incitement to terrorism, the advocacy or glorification of terrorism, and the teaching of terrorist methods. In order to deal with these problems, a substantial portion of this section will be concerned with the general standards governing subversive and violence-conducive expression. Finally, section V presents an analysis of the tension between the media coverage of terrorism and counter-terrorist actions.

II. THE RIGHT TO FREEDOM OF EXPRESSION: BASIC NOTIONS

A. Introduction

Article 10 s 1 of the European Convention guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without

[1] Jan Velaers, 'De informatievrijheid en de strijd tegen het terrorisme' [The Right to Impart Information and the Fight Against Terrorism]' in Rusen Ergec *et al* (eds), *Maintien de l'ordre et droits de l'homme* (Brussels, Bruylant, 1987) 37–8. See below section III.

> interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The First Amendment to the US Constitution, for its part, states that

> Congress shall make no law (…) abridging the freedom of speech, or of the press.

Both provisions have been the subject of countless comparative studies.[2] In most studies emphasis is placed on the different formal and literal structure of the two safeguards and their distinctive historical background. It is worth noting that despite these differences, similar justifications have been advanced to explain why freedom of expression is protected. Two of the three classic free speech theories—'democratic decision-making', 'individual self-fulfilment' and 'marketplace of ideas'—serve as key rationales for freedom of expression on both sides of the Atlantic. In its case law on Article 10, the European Court consistently describes freedom of expression as 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'.[3] With regard to the democratic self-governance rationale, it explicitly stated that freedom of expression, particularly freedom of political debate, is 'the bedrock of any democratic system'.[4] Similarly, the important contribution of free speech to both democratic self-governance and individual self-fulfilment is widely acknowledged in the American constitutional tradition.[5] As the Supreme Court put it in a 1984 decision, the First Amendment

[2] See, eg, Paul Mahoney, 'Emergence of a European Conception of Freedom of Speech' in Peter Birks (ed), *Pressing Problems in the Law*, vol 1 (Oxford, Oxford University Press, 1995) 149; Eric Barendt, 'Freedom of Speech in an Era of Mass Communication' in Peter Birks (ed), *ibid* 109; David Feldman, 'Content Neutrality' in I Loveland (ed), *Importing the First Amendment: Freedom of Expression in American, English and European Law* (Oxford, Hart Publishing, 1998) 139; Christopher McCrudden, 'Freedom of Speech and Racial Equality' in Peter Birks (ed), 125; Aernout Niewenhuis, 'Freedom of Speech: USA vs Gemany and Europe' (2000) 18 *Netherlands Quarterly of Human Rights* 195; JA Peters, Het Primaat van de vrijheid van meningsuiting [The Primacy of Freedom of Expression] (Nijmegen, Ars Aequi, 1981); Frederick Schauer, 'Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture' in Georg Nolte (ed), *European and U.S. Constitutionalism* (Cambridge, Cambridge University Press, 2005) 49.

[3] See, eg, *Lingens v Austria* Series A no 103 (1986) para 41.

[4] See, eg, *Bowman v UK* Reports 1998-I (1998) para 42.

[5] With regard to the democratic self-governance rationale, see, eg, Alexander Meiklejohn's classic work, *Free Speech and Its Relation to Self-Government* (New York, Harper, 1948). See also *Landmark Communications, Inc v Virginia*, 435 US 829, 838 (1979): 'Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.' With regard to the self-fulfilment rationale, see, eg, David Richards, 'Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment' (1974) 123 *University of Pennsylvania Law Review* 45.

> presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.[6]

The only justification of free speech which occupies a prominent place in the philosophy of the First Amendment, but seems to play no significant role in the Convention organ's jurisprudence, is the 'free marketplace of ideas' rationale.[7]

B. Content, Scope and Limitations of Freedom of Expression

i. The European Convention

The Strasbourg organs' jurisprudence evidences a rather generous approach at the definitional stage. As will be seen in subsequent sections, the scope or coverage of Article 10 s 1 is extensive both with regard to the content and the form of expressive activity.[8] However, the rights covered by Article 10 s 1 are not unlimited. This is already clear from the first sentence of the second paragraph of Article 10, where it is stated that freedom of expression 'carries with it duties and responsibilities'. By contrast to the First Amendment, the European Convention explicitly provides for a system of limitation. Article 10 s 1 stipulates that States may require the licensing of broadcasting, television or cinema enterprises. Paragraph 2 of Article 10 further provides that the exercise of the right to freedom of expression

> may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[6] *Bose Corporation v Consumers Union*, 466 US 485, 503 (1984).

[7] The central position of the marketplace of ideas theory in Unites States constitutional law began with Justice Holmes' dissent in *Abrams v United States*, 250 U.S. 616, 630 (1919): '[W]hen men have come to realize that time has upset many fighting faiths, they may come to believe even more than the foundation of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the markets.'

[8] Eg, the court made it clear in *Handyside v UK* that Art 10 'is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".' See *Handyside v UK* Series A no 24 (1976) para 49.

The common limitation clause of Article 10 s 2 contains three requirements: an interference with the right to freedom of expression is justified if it is prescribed by law, has one or more of the legitimate aims referred to, and is necessary in a democratic society for achieving such an aim or aims. Since the meaning of these three conditions has been discussed at length in chapter two, it suffices here to summarize some of the main points. The leading Article 10 case in connection to the 'prescribed by law' requirement is *Sunday Times v United Kingdom*.[9] For an interference with the right to freedom of expression to be prescribed by law, the domestic law must satisfy the criteria of accessibility and foreseeability.[10] The meaning of the second key requirement—ie necessary in a democratic society—has gradually been developed in a number of landmark decisions.[11] The European Court's settled interpretation of the necessity test in the context of Article 10 s 2 now runs as follows:

> The adjective 'necessary', within the meaning of Article 10 s 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.[12]

Limitations on the right to freedom of expression may also follow from the application of a number of other Convention provisions. Under Article 15 the Contracting States are permitted to take measures derogating from Article 10 in time of war or other public emergency. Article 16 provides that nothing in Article 10 shall be regarded as preventing the states from imposing restrictions on the political activity of aliens. Finally, in accordance with Article 17, no Convention guarantee may be interpreted as implying a right to engage in any activity, or perform any act, aimed at the

[9] *Sunday Times v UK* Series A no 30 (1979).
[10] *Ibid* at para 49.
[11] See, inter alia, *Handyside v UK*, above n 8; *Lingens v Austria*, above n 3; *Barfod v Denmark* Series A no 149 (1989); *Jersild v Denmark* Series A no 298 (1994).
[12] Eg *Zana v Turkey* Reports 1997-VII (1997) para 51.

destruction of the rights and freedoms set forth in the Convention. This last provision has been used by the court to categorically deny Article 10 protection to revisionist speech.[13]

ii. The US Constitution

Separating the determination of the scope from the determination of the limitations of freedom of speech is more difficult in the First Amendment context.[14] The debate that took place between proponents of an absolutist and non-absolutist view of free speech may serve to illustrate this point. Unlike Article 10, the First Amendment appears to speak in absolute terms:

> Congress shall make no law (…) abridging the freedom of speech, or of the press.

According to some Supreme Court Justices this command should be taken literally. The absolutist position is traditionally associated with the work of Justice Black.[15] In *Konigsberg v State Bar of California*, Black rejected the view that the rights protected under the First Amendment can be balanced against competing interests:

> I do not subscribe to that doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field.[16]

However, Black and other advocates of the absolutist methodology were usually apt to point out that the 'absolute' nature of the First Amendment does not imply that it is unlimited in scope. Alexander Meiklejohn captured this idea as follows:

[13] See, eg, *Lehideux and Isorni v France* Reports 1998-VII (1998), paras 47 and 53 (holding that there is 'a category [of] clearly established historical facts—such as the Holocaust—whose negation or revision would be removed from the protection of Article 10 by Article 17').

[14] For a discussion of the distinction between coverage and protection under the First Amendment, see, eg, Frederick Schauer, 'Codifying the First Amendment: New York v. Ferber' (1982) *Supreme Court Review* 285, and more recently, Frederick Schauer, 'The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience' (2004) 117 *Harvard Law Review* 1765.

[15] See, eg, *Barenblatt v United States*, 360 US 109 (1959) (Black, J, dissenting); *Koningsberg v State Bar*, 366 US 36 (1961) (Black, J, dissenting). See also Hugo L Black, *A Constitutional Faith* (New York, Knopf, 1968) 45 ('I simply believe that "Congress shall make no law" means Congress shall make no law.').

[16] *Koningsberg v State Bar*, previous n at 61.

> We are looking for a principle which (…) is 'absolute' in the sense of being 'not open to exceptions', but a principle which is also subject to interpretation, change, or to abolition, as the necessities of a precarious world may require.[17]

In other words, the 'absolute' nature of free speech is compensated by restrictive definitions of speech at the first stage of the inquiry.[18] Whether this approach is properly characterised as defining rather than restricting freedom of speech depends on whether the determination of non-coverage is made solely on the basis of First Amendment values or by considering countervailing interests.[19]

The absolutist view has never gained acceptance by a majority of the Supreme Court. Despite the absence of a limitation clause in the First Amendment, a broad consensus exists that not all expressions are protected under it. In his majority opinion in the above-mentioned *Konigsberg* case, Justice Harlan responded to Black's absolutist interpretation of the First Amendment as follows:

> [W]e reject the view that freedom of speech and association (…) are 'absolutes', not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.[20]

If the First Amendment is subject to limitations, the question arises as to how the Court has analysed interferences with freedom of speech. Although it adopted a great variety of free speech methodologies, reflecting different positions on the categorisation/balancing continuum, the court clearly leans towards the categorisation side. In many fields of First Amendment law, it has resorted to the techniques of category definition and definitional balancing to draw the line between constitutionally protected and unprotected speech.[21] The former method involves the classification of certain categories of speech as utterly outside the protection of the First Amendment. In *Chaplinsky v State of New Hampshire*, for instance, the Court observed that

> [t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the

[17] Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) *Supreme Court Review* 245, 253.

[18] David L Faigman, 'Reconciling Individual Rights and Government Interests: Madisonian Principles versus Supreme Court Practice' (1992) 78 *Virginia Law Review* 1521, 1557.

[19] See ch 2. See also Schauer, 'Codifying the First Amendment', above n 14 at 303.

[20] *Koningsberg v State Bar*, above n 15 at 49.

[21] For a discussion, see, eg, Melville B Nimmer, 'The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56 *California Law Review* 935 (advocating definitional balancing as the appropriate methodology for First Amendment adjudication); Pierre J Schlag, 'An Attack on Categorical Approaches to Freedom of Speech' (1983) 30 *UCLA Law Review* 671 (criticising categorical approaches).

> libelous, and the insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[22]

An example of definitional balancing in First Amendment jurisprudence can be found in *New York v Ferber*.[23] As has been seen in chapter two, the court in this case held that—given the state's compelling interest in safeguarding the physical and psychological well-being of a minor—child pornography is never protected by the First Amendment, irrespective of the particular circumstances of the case. In other words, the result of the balancing exercise carried out in *Ferber* is a definitional rule with respect to child pornography. Finally, there are some areas of First Amendment law in which the court adopted a more flexible balancing method. The paradigmatic example concerns the assessment of content-neutral restriction on speech, such as time, place and manner regulations. Content-neutral regulations do not violate the Constitution in so far as they are designed to serve a 'substantial governmental interest' and do not 'unreasonably limit alternative avenues of communication'.[24]

C. Concluding Remarks

This short introduction reveals similarities (eg, free speech rationales) as well as differences (eg, textual framework) between the European and American approaches to freedom of expression. A basic commonality is that neither of the two systems protects speech in an unlimited fashion. Courts labouring under both Article 10 and the First Amendment have sought to strike a proper balance between freedom of expression and other competing rights and interests. However, as far as the methods of limitation are concerned, the American approach distinguishes itself from the Convention system in that it exhibits a more categorical style of reasoning. Whereas the Strasbourg organ's Article 10 jurisprudence is shaped by the joined operation of the highly flexible democratic necessity standard and margin of appreciation doctrine, two dominant approaches under the First Amendment are category definition and definitional balancing. This is not to say that flexible balancing is absent from First Amendment law (eg, content-neutral regulations), or that the European Court balances in a purely ad hoc fashion. As subsequent sections will illustrate, the Convention organs have, on several occasions, attempted to state a more or less fixed standard to assess future interferences with the right to freedom of expression. However, as will be seen, the application of such definitional

[22] *Chaplinsky v State of New Hampshire*, 315 US 568, 571–572 (1942).
[23] *New York v Ferber*, 458 US 747 (1982).
[24] See, eg, *City of Renton v Playtime Theatres*, Inc., 475 US 41, 47 (1986).

standards typically requires more ad hoc judgment or further balancing than is the case under First Amendment rules.

III. TERRORISM AS EXPRESSIVE CONDUCT

A. The Communication Theory of Terrorism

Many different theories have been proposed to understand the nature of terrorism.[25] Although there is little agreement as to the exact meaning of the term, it is widely accepted that there is more to terrorism than the use of violence. It is commonly held that one of the distinctive features of terrorism lies in its communicative function. Terrorism is 'expressive' violence. 'Terrorists', Brian Jenkins writes, 'want a lot of people watching and a lot of people listening (…) Terrorists choreograph incidents to achieve maximum publicity, and in that sense, terrorism is theatre'.[26] In their classic study of 1982, *Violence as Communication*, Alex P Schmid and Janny de Graaf analyse terrorist violence as acts of communication.[27] Schmid and de Graaf conceptualise the terrorists' communicative strategy in the triangle Terrorist–Victim–Target. According to their theory, the victim serves as an instrument to convey a message to the target.[28] The message (the terrorist act) is designed to intimate or otherwise influence the intended recipient of the communication (the target). This communicative dimension of terrorism is clearly reflected in the United Nation's 'academic consensus definition' of terrorism, drafted by Schmid:

> Terrorism is an anxiety-inspiring method of repeated violent action, (…) whereby—in contrast to assassination—the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from the target population, and serve as message generators. Threat— and violence-based communication processes between terrorist (organization), (imperilled) victims, and main targets are used to manipulate the main target

[25] For an overview see, eg, Alex P Schmid, *Political Terrorism: A Research Guide to Concepts, Theories Data Bases and Literature* (Amsterdam, North-Holland Publishing Company, 1984) 160–239.

[26] Brian M Jenkins, 'International Terrorism: A New Mode of Conflict' in David Carlton and Carlo Schaerf (eds), *International Terrorism and World Security* (London, Croom Helm, 1975) 15.

[27] Alex P Schmid and Janny de Graaf, *Violence as Communication, Insurgent Terrorism and the Western News Media* (London, Sage Publications, 1982). The communication theory of terrorism does not explain all types of terrorism. For example, it is of little use to describe the newer forms of terrorism which are not inspired by political ideals but motivated by revenge or simple destruction. See Walter Laqueur, *The New Terrorism* (London, Phoenix Press, 2001) 81.

[28] Schmid and de Graaf, above n 27 at 176.

> (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.[29]

The use of violence for communicative purposes is usually traced back to late nineteenth-century Russia.[30] Having grown impatient with the slow pace of Tsarist reforms, the Russian middle and upper class revolutionaries sought to reach the masses through violent symbolic acts. The 'propaganda of the deed' was propagated as a more effective alternative to the conventional means of communication. Carlo Pisacane, a republican extremist who is credited with first defining the concept, believed the 'propaganda of the idea' to be a chimera: 'Ideas result from deeds, not the latter from the former, and the people will not be free when they are educated, but educated when they are free.'[31] Secret Russian societies like the notorious 'Narodnaya Volya' ('People's Will') were the first terrorist organisations to put Pisacane's theory into practice. One violent 'exemplary deed' could, in a few days, make more propaganda than the distribution of pamphlets and wall posters.[32]

If it is assumed that terrorist acts constitute a form of communication, implying both a communicator and a target audience, and intended to express a point of view, the question arises whether they fall within the ambit of the freedom of speech guarantees. Although it seems self-evident that terrorist violence deserves no human rights protection, it is worth pausing briefly to consider this point, if only for theoretical purposes. Terrorism raises the classic free speech problem of expressive conduct. It is generally agreed that no sharp lines can be drawn between speech and conduct.[33] 'Speech is conduct, and actions speak', Louis Henkin wrote. The meaningful constitutional distinction, he continued, 'is not between

[29] See <http://www.unodc.org/unodc/terrorism_definitions.html> accessed 4 October 2007. See also Philip A Karber, '"Urban Terrorism" Baseline Data and a Conceptual Framework' (1971) 52 *Social Science Quarterly* 527 (describing terrorism as a symbolic act consisting of four basic components: transmitter (terrorist), intended recipient (target), message (bombing, ambush) and feed back (reaction of target)).

[30] Schmid and de Graaf, above n 27 at 12 *ff*.

[31] Bruce Hoffman, *Inside Terrorism* (New York, Columbia University Press, 1998) 17.

[32] As the legendary anarchist Peter Kropotkin wrote: 'By action which compel general attention, the new idea sweeps into people's minds and wins converts. One such act may, in a few days, make more propaganda than thousands of pamphlets. Above all, it awakens the spirit of revolt; it breeds daring (…) Soon it becomes apparent that the established order does not have the strength often supposed. One courageous act has sufficed to upset in a few days the entire governmental machinery, to make the colossus tremble (…) The people observe that the monster is not so terrible as they thought (…) hope is born in their hearts.' (Peter Kropotkin, *The Spirit of Revolt*, quoted in Schmid, *Political Terrorism*, above n 25 at 220).

[33] See, eg, Louis Henkin, 'Foreword: On Drawing Lines' (1986) 82 *Harvard Law Review* 63; Melville B Nimmer, 'The Meaning of Symbolic Speech under the First Amendment' (1973) 21 *UCLA Law Review* 29; Steven H Shiffrin, *The First Amendment, Democracy, and Romance* (Cambridge, Mass., Harvard University Press, 1990) 17–33.

speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct'.[34] As will be seen in the pages to follow, courts on both sides of the Atlantic have long recognised that the right to freedom of expression may cover non-verbal expressive conduct.

B. Standards of the US Constitution

The principle that the First Amendment protections stretch beyond the spoken and written word was first acknowledged in *Stromberg v California*.[35] The court in this case struck down a statutory prohibition to publicly display 'any flag, badge, banner, or device' designed 'as a sign, symbol or emblem of opposition to organised government'. A few years later, in a case concerning compulsory flag saluting in public schools, the Supreme Court more explicitly affirmed that at least some forms of non-verbal expressive conduct deserve constitutional protection. Justice Jackson wrote that '[s]ymbolism is a primitive but effective way of communicating ideas', and that 'the use of an emblem or flag to symbolize some system, idea, institution, or personality is a short-cut from mind to mind'.[36] However, not all activities with an expressive component are regarded as 'speech' within the meaning of the First Amendment. In *United States v O'Brien*, the court rejected the idea that 'an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea'.[37] In *Spence v Washington*, the court observed that the determinative question is whether the conduct is 'sufficiently imbued with elements of communication' to warrant protection.[38] The applicant in this case had been convicted for displaying a United States flag, on which he had affixed a large peace symbol, out of the window of his apartment. According to the court, the nature of this activity, combined with the factual context and environment in which it was undertaken, led to the conclusion that the applicant had engaged in a form of protected expression.[39]

Even when non-verbal action has a communicative content sufficient to implicate the First Amendment, this does not mean that it is immune from government interference. In *O'Brien*, the Supreme Court laid down a comprehensive test to be applied in those contexts. The applicant in *O'Brien* was convicted under the Universal Military Training and Service Act for burning his draft-card in public. He argued that he had burned his

[34] Henkin, previous n at 79–80.
[35] *Stromberg v California*, 283 US 359 (1931).
[36] *West Virginia State Board of Education v Barnette*, 319 US 624, 632 (1943).
[37] *United States v O'Brien*, 391 US 367, 376 (1968).
[38] *Spence v Washington*, 418 US 405, 409 (1974).
[39] *Ibid* at 409–10.

registration certificate to influence others to adopt his anti-war beliefs, and that his act constituted symbolic speech protected by the First Amendment. The court replied that when 'speech' and 'non-speech' elements are combined in the same course of conduct, 'a sufficiently important governmental interest' in regulating the non-speech element can justify limitations on First Amendment freedoms. In the court's opinion, a regulation of conduct, which incidentally burdens free expression, is valid if: (1) the regulation is within the constitutional power of government; (2) it furthers an 'important' or 'substantial' governmental interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest.[40] The *O'Brien* standard for content-neutral restrictions on expressive conduct resembles the balancing test applied to content-neutral time, place, and manner regulations.[41]

Returning to the problems related to the fight against terrorism, the question emerges whether terrorist violence is subject to the same balancing test as applied to the other forms of expressive conduct. As has been seen, terrorism may be a highly expressive activity. Nevertheless, the above question must be answered in the negative. The Supreme Court's jurisprudence indicates that acts of violence can never be protected as symbolic speech, and fall wholly outside the scope of the First Amendment. Thus, in *NAACP v Claiborne Hardware Co*, the court emphasised that 'violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy".[42] The event at the root of this judgment was a boycott of white merchants, organised by the National Association for the Advancement of Coloured People. The purpose of the boycott was to secure compliance with a list of demands for racial equality. The court decided that the non-violent elements of the protest-activities were entitled to free speech protection. However, liability for violent conduct did not raise constitutional problems. Similarly, in *Roberts v United States Jaycees*, a case concerning the tension between freedom of speech and anti-discrimination legislation, the court made it clear that

[40] *United States v O'Brien*, above n 37 at 377.

[41] See above section II. See however John Hart Ely, 'Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis' (1975) 88 *Harvard Law Review* 1482, 1484–91 (arguing that the Court in *O'Brien* adopted a weak form of 'less restrictive alternative' analysis).

[42] *NAACP v Claiborne Hardware Co*., 458 US 886, 916 (1982).

> acts of invidious discrimination in the distribution of publicly available goods, (…) like violence or other types of potentially expressive activities that produce special harm distinct from their communicative impact, (…) are entitled to no constitutional protection.[43]

It follows from these cases that violent terrorist acts are excluded from First Amendment coverage at the definitional stage, as they are by definition intended to produce 'special harm distinct from their communicative impact.'

C. Standards of the European Convention

The Convention organ's case law regarding expressive conduct is less developed than the First Amendment jurisprudence. As noted previously in section II, the notion 'expression' in Article 10 has been interpreted broadly to include all forms of communication: spoken and written words, paintings, films, videos, images, television and radio programs etc. The first time the Strasbourg organs were asked to consider whether the term 'expression' also comprises non-verbal activity was in *X v United Kingdom*.[44] Challenging his imprisonment for homosexual activity, the applicant argued that the right to freedom of expression includes the protection of sexual conduct. The European Commission rejected such a broad reading of Article 10. It held that the term 'expression' in Article 10 'concerns mainly the expression of opinions and receiving and imparting information and ideas.'[45] It does not 'encompass any notion of the physical expression of feelings in the sense submitted by the applicant'.[46] The first reference in the court's case law to the concept of symbolic conduct appears many years later in a more traditional Article 10 case. In *Grigoriades v Greece*, the court reviewed the applicant's prosecution and subsequent conviction for insulting the Greek army.[47] Mr Grigoriades made a written statement criticising both army life and the army as an institution. The majority of the court had no difficulty in finding a violation of Article 10. In a concurring opinion, Judge Jambrek specifically tackled the question as to what extent the public interest in showing proper respect for national symbols may justify interference with the right to freedom of expression. In this respect, Judge Jambrek drew inspiration from the American 'flag burning' cases, and wrote that symbolic speech, 'offensive even to the supreme national values', deserves protection under

[43] *Roberts v United States Jaycees*, 468 US 609, 628 (1984).
[44] *X v UK* Application no 7215/75, 3 *EHRR* 63 (1978).
[45] *Ibid* at 74.
[46] *Ibid*.
[47] *Grigoriades v Greece* Reports 1997-VIII (1997).

Article 10 of the Convention, whenever the interference is not proportional and necessary in a democratic society.[48]

It was not until 1998 that the court explicitly recognised that the term 'expression' may also cover non-verbal conduct. Ms Steel, one of the applicants in *Steel and others v United Kingdom*, was convicted for 'breach of the peace', following her participation in a protest against a grouse shoot in Yorkshire.[49] According to the police-report, she intentionally hindered a member of the shoot by walking in front of him as he lifted his shotgun to take aim. Ms Steel complained that the measures taken against her violated her right to freedom of expression. The respondent government argued that Article 10 was not applicable to the impugned activity. In the opinion of the court, however, the measures taken against the applicant constituted an interference with her rights under Article 10. Despite the fact that the protest took the form of 'physically impeding the activities of which the applicant disapproved', it nonetheless constituted 'expressions of opinion within the meaning of Article 10'.[50] The court went on to apply the democratic necessity test. Given, inter alia, the dangers inherent in the applicant's particular conduct and the risk of disorder arising from it, the court found the measures taken against Ms Steel to be proportionate.

The principles set out in *Steel* have been applied in a number of inadmissibility decisions which mainly concerned protest activities (eg, a Greenpeace campaign against Norwegian whaling,[51] a sabotage of a fishing competition,[52] a demonstration against an arms fair,[53] and the blockading of a public road[54]). In most cases the court was prepared to accept that the impugned activities amounted to an expression of opinion within the meaning or Article 10. In *Drieman and others v Norway*, the court explicitly stated that restrictions on 'conduct may constitute an interference with freedom of expression under Article 10'.[55] However, without exception, the measures taken against the protesters were considered to be necessary in a democratic society in the interest of public safety and the prevention of disorder. In several cases the court took into account the fact that the applicant's activities were liable to provoke violence.[56] In *Drieman and others v Norway*, where the protest campaign amounted to 'a form of coercion forcing the whalers to abandon their lawful activity', the court made clear that the conduct in question

[48] *Ibid* at para 74.
[49] *Steel and others v UK* Reports 1998-VIII (1998).
[50] *Ibid* at para 92.
[51] *Drieman and others v Norway*, 4 May 2000.
[52] *Nicol and Selvanayagam* v UK, 11 January 2001.
[53] *McBride v UK*, 5 July 2001.
[54] *Lucas v UK*, 18 March 2003.
[55] *Drieman and others v Norway*, above n 51 at 8.
[56] See *Nicol and Selvanayagam v UK*, above n 52 at 12; *McBride v UK*, above n 53 at 6.

> could not enjoy the same privileged protection under the Convention as political speech or debate on questions of public interest or the peaceful demonstration of opinions on such matters.[57]

In the court's opinion, the Contracting States must be allowed a wide margin of appreciation in their assessment of the necessity in taking measures to restrict such conduct. However, in reaching its conclusion, the court attached particular importance to the fact that the contested interference 'related exclusively' to the coercive conduct, and that the applicants remained able to express and demonstrate without restraint their disapproval of the whaling activity.[58]

D. Concluding Remarks

In sum, and not surprisingly, neither Article 10 nor the First Amendment embody a right to engage in violent terrorist activity, whatever its expressive dimension may be. While the Supreme Court applies a structured balancing test to content-neutral restrictions on expressive conduct, it also categorically defines violent conduct as falling wholly outside the scope of the First Amendment. The European Court has not directly addressed the issue of violent expressive activity. Although the decisions in the protest-activity cases suggest a broad understanding of the notion of 'expression', it is highly unlikely that restrictions on violence would be held to constitute an interference with the rights protected by Article 10. In any event, *Steel* and its progeny leave little doubt that the prevention and punishment of violent expressive conduct—even if it would be covered by the notion of 'expression'—will raise no serious Convention obstacles. In this respect, it is interesting to observe that, in contrast to its American counterpart, the Strasbourg Court has not yet attempted to state a coherent test applicable to non-verbal expressive conduct. It continues to assess such cases under a case-by-case application of the democratic necessity test. Finally, although most commentators seem to agree that acts of terrorism are rightly excluded from the scope of the free speech provisions[59]—thus not triggering the justificatory exercise at the second stage of human rights adjudication—states do not have carte blanche to define and criminalise

[57] *Drieman and others v Norway*, above n 51 at 9.

[58] *Ibid*.

[59] See, eg, Eric Barendt, *Freedom of Speech* (Oxford, Oxford University Press, 2005) 79–80 (observing that to impose an obligation on the state to justify criminal restrictions on acts of terrorism and political assassination would be grotesque); M Cherif Bassiouni, 'Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, Proposals' (1981) 72 *Journal of Criminal Law & Criminology* 36 (arguing that terrorist crimes 'are not properly "speech" at all, but rather "conduct" causing harm without time or opportunity for speech in response').

terrorism. The cases discussed in this section plainly indicate that the regulation of even coercive or dangerous non-verbal expressive conduct may raise free speech concerns.

IV. TERRORISM-RELATED SPEECH

A. Introduction

Whereas the focus in the preceding section was on terrorist activity as such, it now shifts to the various forms of terrorism-related speech.[60] There are many instances of speech, involving different categories of speakers and modes of expression, which may occur in connection to terrorism. To begin with, terrorists themselves often use speech to further their interests. Terrorist organisations usually express their political goals and demands through written and spoken statements, in interviews, books, videos etc. Today, the Internet also carries a considerable amount of terrorist propaganda. The purpose of this may vary from the threatening of potential targets, over persuading others to support the terrorist cause, to simply drawing attention to certain grievances. Secondly, a terrorist group's goals and ambitions are often publicly endorsed and disseminated by a larger group of 'non-violent' supporters. Here too, several distinctions can be made, for instance between the passive supporters who advocate the terrorists' goals and methods, and those who endorse the terrorists' political grievances but renounce their destructive means. Each of these categories of terrorism-related speech raise different, though interconnected, free speech issues. In order to assess the limitations imposed on terrorism-related speech, the next section first explores the general principles governing subversive and violence-conducive expression.

B. General Principles Governing Subversive and Violence-Conducive Expression

i. Standards of the US Constitution

The contemporary standard against which the government's efforts to restrict subversive and violence-conducive speech are measured, traces a

[60] For recent accounts of this problem, see, eg, Meryem Aksu, 'Beperking van de vrijheid van meningsuiting (10 EVRM) met een Beroep op terrorismebestrijding' [Limitations of Freedom of Expression (10 ECHR) in the Fight Against Terrorism] (2005) 30 *NJCM-Bulletin* 384; Laura K Donohue, 'Terrorist Speech and the Future of Free Expression' (2005) 27 *Cardozo Law Review* 233.

long history of judicial craftsmanship and scholarly debate.[61] The 'intent to incite imminent lawless action' test evolved out of the 'clear and present danger' test, developed by Justice Oliver Wendell Holmes, and the 'direct incitement' test, advocated by Judge Learned Hand. Since its genesis in the early part of the twentieth century, Holmes' original 'clear and present danger' formula has more than once been restated and reformulated. Its history is usually sketched against the background of the historical events that led to the adoption of criminal legislation outlawing certain categories of speech.

a. First World War Cases

The first important cases arose under the Espionage Act of 1917, which was adopted in an intensely patriotic war atmosphere to protect the American war interests and to prevent agitation against the draft.[62] The Espionage Act made it a crime, inter alia, to 'wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States'. In *Schenck v United States*, decided in 1919, the court reviewed the criminal conviction of a member of the Socialist Party who had distributed leaflets that were critical of the American involvement in the war.[63] The pamphlets opposed the war in 'impassioned' language, and stated that conscription was 'despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few'.[64] Justice Holmes delivered the opinion of the court. Although the leaflets confined themselves to a call for peaceful measures against the draft, the conviction was upheld. Holmes wrote that in 'many places and ordinary times' the applicant's expressions would have been protected under the First Amendment. But, he continued, that 'the character of every act depends upon the circumstances in which it is done'. Therefore,

> [t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger

[61] There is an enormous amount of literature on the subject. See, eg, Gerald Gunther, 'Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History' (1975) 27 *Stanford Law Review* 719; Hans A Linde, '"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto' (1970) 22 *Stanford Law Review* 1163; Martin H Redish, 'Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger' (1982) 70 *California Law Review* 1159; Geoffrey R Stone, *Perilous Times, Free Speech in Wartime* (New York, WW Norton & Company, 2004); G Edward White, 'The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America' (1996) 95 *Michigan Law Review* 299.

[62] See generally Stone, *Perlious Times*, above n 61 at 135 *ff*.

[63] *Schenck v United States*, 249 US 47 (1919).

[64] *Ibid* at 51.

> that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[65]

The application of the 'clear and present danger' test in *Schenck* and other early cases resulted in the suppression of fairly moderate political speech.[66] The change began later the same year when *Abrams v United States* was decided.[67] This case involved Russian immigrants charged with unlawfully writing and publishing language intended to incite, provoke and encourage resistance to the American war-policy. The court observed that the words used were of an 'inflammatory' nature and of a 'bitter' tone. One of the sentences contained a 'threat of armed rebellion'.[68] The majority affirmed the convictions applying the so-called 'bad tendency' test. Under this test, any tendency in speech to produce dangerous acts, no matter how remote, was sufficient to constitutionally justify speech-repressive measures. This time, however, Holmes dissented. He cautioned,

> that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[69]

The conditions of 'clear and present danger' were not met:

> [N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.[70]

b. The 'Red Scare' Cases

Following the end of the First World War and the Russian Revolution the United States entered the so-called 'Red Scare' era.[71] In this period many states enacted criminal syndicalism statutes, which made it a crime to attempt to overthrow the government of the United States. One of the Supreme Court decisions considering the constitutionality of these statutes

[65] *Ibid* at 52.

[66] *Schenck* was immediately followed by two other Holmes decisions: *Debs v United States*, 249 US 211 (1919) (upholding the conviction of Eugene Debs, a presidential candidate of the Socialist Party, who had expressed sympathy for men who were in jail for helping others who had refused to register for the draft) and *Frohwerk v United States*, 249 US 204 (1919) (upholding criminal sentences for anti-war propaganda).

[67] *Abrams v United States*, above n 7.

[68] *Ibid* at 620, 621 and 623.

[69] *Ibid* at 630.

[70] *Ibid* at 628.

[71] See generally Stone, *Perilous Times*, above n 61 at 220 *ff*.

is *Whitney v California*.[72] The 'clear and present danger' test once again made an appearance, yet this time in a concurrence drafted by Justice Louis Brandeis (joined by Holmes). The applicant in *Whitney* was convicted of assisting in the organisation of the Communist Labor Party of California. The majority of the court sustained the conviction. It began by noting that 'the freedom of speech (…) does not confer an absolute right to speak, without responsibility'.[73] In the court's opinion, the First Amendment does not prevent the punishment of those who abuse the freedom of speech by utterances 'inimical to the public welfare' and 'tending to incite to crime'.[74] Justice Brandeis rejected the majority's approach, and reaffirmed that the proper standard to be applied was the 'clear and present danger' test, which he re-framed as follows:

> [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.[75]

According to Brandeis, the following two conditions need to be satisfied in order for the suppression of subversive speech to be constitutionally permissible: 'There must be reasonable ground to believe that the danger apprehended is imminent' and '[t]here must be reasonable ground to believe that the evil to be prevented is a serious one.'[76] By imposing strict requirements concerning both the timing and the nature of harm, the Brandies formulation gave the 'clear and present danger' analysis a more protective meaning.[77] In *Whitney*, Brandeis also elaborated on the difference between 'advocacy' and 'incitement'. He explained that advocacy of law violation, 'however reprehensible morally', may not serve as a justification for denying free speech, 'where there is nothing to indicate that the advocacy would be immediately acted on'.[78]

c. The Cold War Period

After the Second World War, in a time when many Americans experienced the growing influence of communism as a serious national security threat, the court reinterpreted the Holmes–Brandeis doctrine.[79] The leading case of the Cold War era arose under the Smith Act of 1940, a federal law which made it illegal for anyone to knowingly or wilfully advocate or teach

[72] *Whitney v California*, 274 US 357 (1927). See also *Gitlow v New York*, 268 US 652 (1925).
[73] *Whitney v California*, previous n at 371.
[74] *Ibid*.
[75] *Ibid* at 377.
[76] *Ibid* at 376.
[77] See, eg, Redish, above n 61 at 1170.
[78] *Whitney v California*, above n 72 at 376.
[79] See generally Stone, *Perilous Times*, above n 61 at 331 *ff*.

the necessity or desirability of overthrowing the government through the use of force.[80] The defendants in *Dennis v United States* were convicted of violating the Smith Act by conspiring to organise the Communist Party of the United States. Chief Justice Vinson delivered the opinion of the court. At the outset, he observed that it is within the power of Congress to prohibit political change through violence, revolution and terrorism.[81] According to Vinson's plurality opinion, the appropriate test under which to review the constitutionality of the Smith Act convictions was the 'clear and present danger' standard. However, the Chief Justice was quick to add that the test should not be applied as a rigid rule, but be interpreted flexibly, with regard to the circumstances of each case.[82] In interpreting the test, Vinson so dramatically altered the nature of the original Holmes–Brandeis standard that most commentators agree that the court in fact adopted a new type of analysis.[83] The Chief Justice reinterpreted the original test on the basis of a watered down version developed in the lower court by Judge Learned Hand:

> In each case, [the courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.[84]

The *Dennis* balancing test contains two elements: the gravity of the evil and the probability of its success. The greater the gravity of the act advocated, the less clear and present the danger needs to be to justify state interference. In other words, whereas in the Holmes–Brandeis version the imminence and the seriousness of the threat functioned as two independent conditions, the *Dennis* analysis made both requirements work in inverse correlation.[85] The result was a more flexible, less protective standard. Despite the fact that the Communist Party had not used force or violence, the majority opinion concluded that

> the formation (…) of such a highly organised conspiracy, with rigidly disciplined members subject to call when the leaders […] felt that the time had come for action, coupled with the inflammable nature of world conditions [and] similar uprisings in other countries

[80] *Dennis v United States*, 341 US 494 (1951).
[81] *Ibid* at 503.
[82] *Ibid* at 507, observing that '[s]peech is not an "absolute" [and that] [t]o those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.'
[83] See, eg, Gunther, 'Learned Hand', above n 61 at 751; Redish, above n 61 at 1171.
[84] *Dennis v United States*, above n 80 at 510.
[85] Redish, above n 61 at 1171–2.

posed a sufficiently grave danger to justify an interference with the petitioners' rights.[86]

d. The Contemporary Standard: The Brandenburg Test

The final chapter in the history of the 'clear and present danger' doctrine is *Brandenburg v Ohio*.[87] The doctrinal change brought about by the test adopted in *Brandenburg* can only be understood against the background of the work of Judge Learned Hand, a contemporary and critic of Holmes and Brandeis. The original 'clear and present danger' doctrine, which, in its early application, had not been able to effectively guarantee the right to freedom of speech, invited a lot of dispute. One of its foes was District Judge Hand. In *Masses Publishing Co v Patten*, decided in 1917, Hand considered whether the radical magazine 'The Masses' could be banned from the mails under the Espionage Act.[88] In deciding the case, Hand proposed his 'direct incitement' standard as an alternative to the Holmes–Brandeis approach. In his opinion, the proper constitutional question was whether the challenged utterances constituted direct incitement to a violation of the law.[89] In other words, whereas Holmes' 'clear and present danger' analysis essentially turned on an evaluation of the probable consequences of an expression, Hand used a test that concentrated more on the content of the expression.[90] The underlying idea was that a strict and objective test, focusing primary on the speaker's words, would be more speech-protective than a consequence-based approach, which requires judges and juries to guess about the possible effects created by the impugned expression.[91]

[86] *Dennis v United States*, above n 80 at 511. In his concurring opinion, Justice Frankfurter referred to the structure of the American Communist Party as a relevant factor in assessing its danger to national security. Frankfurter observed that the Communist Party was of significant size, well-organised and well-disciplined. Moreover, evidence supported the conclusion that members of the Party occupied positions of importance in political and labour organisations. In a dissenting opinion, Justice Douglas questioned the strength and tactical position of Communist Party in the United States. In his view, communists in the United States were no more than 'miserable merchants of unwanted ideas' (*ibid* at 589). Douglas therefore doubted whether the strict conditions of the 'clear and present danger' test were met.

[87] *Brandenburg v Ohio*, 395 US 444 (1969).

[88] *Masses Publishing Co v Patten*, 244 Fed. 535 (SDNY 1917), reversed, 246 Fed 24 (2d Cir 1917).

[89] *Ibid* at 540: '[T]o assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government.'

[90] See FM Lawrence, 'Violence-Conductive Speech: Punishable Verbal Assault or Protected or Protected Political Speech' in D Kretzmer and FK Hazan (eds), *Freedom of Speech and Incitement against Democracy* (The Hague, Kluwer Law International, 2000) 19.

[91] Gunther, 'Learned Hand', above n 61 at 721.

The current test for subversive and violence-conducive speech, adopted in *Brandenburg*, combines Hand's 'direct incitement' standard with the main elements of Holmes' 'clear and present danger' test. In a per curiam opinion, the *Brandenburg* court reversed the conviction of a leader of the Ku Klux Klan under an Ohio criminal syndicalism statute (for a detailed discussion, see below). Relying on *Dennis*, the court found that the *Whitney* ruling (which dealt with a similar statute) had been thoroughly discredited by later decisions. From these decisions the court deduced the following new test:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[92]

Under the newly adopted test, a restriction on the advocacy of illegal action is justified only if (1) the speaker subjectively intended incitement;[93] (2) in context, the words used were likely to produce imminent, lawless action; and (3) the words used by the speaker objectively encouraged and urged incitement.[94] The *Brandenburg* approach is a typical example of definitional balancing.[95] The court drew the line between advocacy of illegal action that is protected, and such speech that is not protected, by adopting a definitional rule of general application. Moreover, the result of the court's (implicit) balancing process is a highly protective standard, which 'combines the most protective ingredients of the Masses incitement emphasis with the most useful elements of the clear and present danger heritage'.[96] As Gerald Gunther explains:

> The incitement emphasis is Hand's; the reference to 'imminent' reflects a limited influence of Holmes, combined with later experience; and the 'likely to incite or produce such action' addition in the *Brandenburg* standard is the only reference to the need to guess about future consequences of speech.[97]

[92] *Brandenburg v Ohio*, above n 87 at 447.

[93] As regards the requirement of subjective intent, see *Hess v Indiana*, 414 US 105, 109 (1973), observing that '[s]ince there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had "a tendency to lead to violence".'

[94] JE Nowak and JR Rotunda, *Constitutional Law* (St Paul, West Publishing, 1995) 1018.

[95] See Norman T Deutsch, 'Professor Nimmer Meets Professor Schauer (and Others): An Analysis of "Definitional Balancing" as a Methodology for Determining the "Visible Boundaries of the First Amendment"' (2006) 39 *Akron Law Review* 483, 503–7.

[96] Gunther, 'Learned Hand', above n 61 at 754.

[97] *Ibid* at 754–5.

ii. Standards of the European Convention

The development of the European Convention subversive speech principles is of more recent date than the history of the 'clear and present danger' test sketched in the previous section.[98] It is not until the late 1990s that the Strasbourg Court began to work out a full scale doctrine to assess interferences with expressions which are potentially harmful to national security. Although by then it had already dealt with a number of cases in which the Contracting States relied on national security interests to justify restrictions on Article 10 interests,[99] the first important judgment is *Zana v Turkey*, decided in 1997.[100] Nevertheless, in order to gain a good understanding of the settled case law, it is useful to first go back to a number of early European Commission decisions.

a. Early Commission Decisions

The Commission's 1975 decision in *X v United Kingdom* involved a violation of the British Incitement to Disaffection Act.[101] The applicant was sentenced to two years imprisonment for the possession of letters persuading soldiers to disobey orders and deviate from their duty in active military service. Because one of the impugned letters 'urged disobedience' to orders to fire, the Commission found the suppression to be necessary in the interest of public safety, taking into account the state of public emergency in Northern Ireland. Three years later *Arrowsmith v United Kingdom* was decided.[102] Ms Pat Arrowsmith was sentenced to a prison term of eighteen months, primarily on the ground that she had distributed leaflets to troops stationed at an army camp, endeavouring to seduce them from their military duties in Northern Ireland.[103] At the outset of its

[98] See, eg, Iain Cameron, *National Security and the European Convention on Human Rights* (The Hague, Kluwer Law International, 2000) 354–97; Paul Mahoney and Lawrence Early, 'Freedom of Expression and National Security: Judicial and Policy Approaches Under the European Convention on Human Rights and Other Council of Europe Institutions' in Sandra Coliveret al (eds), *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (Leiden, Martinus Nijhoff Publishers, 1999) 109; Stefan Sottiaux, 'The "Clear and Present Danger" Test in the Case Law of the European Court of Human Rights' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 653.

[99] See, eg, *Observer and Guardian v UK* Series A no 216 (1991) (dealing with an injunction against the publication of sensitive information regarding the British Security Service); *Vereinigung Demokratischer Soldaten Osterreichs and Gubi v Austria* Series A no 302 (1994) (considering the limitation of the right to freedom of expression of members of the military); *Grigoriades v Greece*, above n 47 (considering the limitation of the right to freedom of expression of members of the military).

[100] *Zana v Turkey*, above n 12.

[101] *X v UK* Application no 6084/73, 3 *DR* 62 (1975).

[102] *Arrowsmith v the UK* Application no 7075/75, 19 *DR 5* (1978).

[103] *Ibid* at para 2.

opinion, the Commission observed that the situation prevailing in Northern Ireland was one of 'utmost gravity', as the army was under daily attack from the Irish Republican Army (hereinafter IRA), with an alarmingly high casualty rate.[104] Next, the Commission reviewed the content of the impugned leaflets. In its opinion, the text did not simply express a political opinion, but also contained sentences which 'could have been interpreted by soldiers, as an encouragement or incitement to disaffection'.[105] Since desertion of soldiers creates a threat to national security even in peacetime, the Commission concluded that the applicant's conviction served an aim consistent with Article 10 s 2. The question remained whether the interference with the applicant's freedom of expression was 'necessary in a democratic society'. In this connection, the Commission attached a lot of weight to the fact that the national authorities had taken into account the difficult situation in Northern Ireland, and the 'possible effect' of Ms Arrowsmith's leafleting campaign.[106] Given these circumstances, the interference with the applicant's rights under Article 10 were considered to answer a pressing social need.

Two members of the Commission filed dissenting opinions. Mr Opsahl distinguished *Arrowsmith* from *X v United Kingdom*, where there had been 'direct incitement' to disobey orders under actual service in Northern Ireland. He believed that Ms Arrowsmith's action had been too remote to actually endanger national security.[107] Mr Klecker, on his behalf, observed that the tone of the pamphlet was rather moderate and that its language was 'neither threatening nor abusive nor insulting'.[108] In his opinion, the central issue concerned the 'nature of the threat', and not the 'narrower question of whether the leaflet could be regarded as an "incitement"'.[109] An institution as solidly rooted in discipline as the army, he noted, could not be seriously threatened by an 'ineffectual troop of leafleteers'.[110] Klecker concluded that 'the aim of influencing others who are themselves responsible for their actions is a legitimate feature of the exercise of freedom of expression and that those who are persuaded to accept the views expressed must carry their own burden of responsibility'.[111]

[104] *Ibid* at para 18.
[105] *Ibid* at para 91.
[106] *Ibid* at para 96. In a similar cases, decided many years later by the European Court, *Arrowsmith* was distinguished on the basis of a different 'potential impact'. See *Düzgören v Turkey*, 9 November 2006, para 31.
[107] Mr Opsahl opined that '[t]he aim of influencing others who are themselves responsible for their actions is an essential and legitimate aspect of the exercise of freedom of expression and opinion, in political and other matters' (*Arrowsmith v the UK*, above n 102 at para 6).'
[108] *Ibid* at para 7.
[109] *Ibid* at para 9.
[110] *Ibid* at para 12.
[111] *Ibid* at para 13.

b. The Case Law of the European Court

Zana v Turkey

The Turkish efforts to fight the Kurdistan Workers' Party (Partiya Karkeren Kurdistan, hereinafter 'PKK') has led to the adoption of various laws outlawing expressions deemed harmful to the country's security interests.[112] Over the last decade, a considerable number of individuals convicted for Turkish speech crimes appealed to the Strasbourg organs. The first important case to reach the court was *Zana v Turkey*.[113] Mr Zana was the former mayor of an important Turkish city. While serving several sentences in military prison, he made the following remarks in an interview with journalists:

> 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.[114]

Following the publication of this statement in a national daily newspaper, Mr Zana was convicted under Article 312 of the Turkish Criminal Code, which made it an offence 'publicly to praise or defend a serious crime' and 'publicly to incite hatred or hostility between the different classes in society'.[115]

Reviewing Mr Zana's twelve months' prison sentence, the European Court first observed that the interference with the applicant's right to freedom of expression was prescribed by law and pursued the legitimate aims of protecting national security and public safety. In this last respect, the court took into account the sensitivity of the security situation in south-east Turkey, where, at the time, serious disturbances were raging between the security forces and members of the PKK.[116] Next, the court went on to consider whether the interference was 'necessary in a democratic society'. As an initial matter, it stated that the general principles concerning the interpretation of the democratic necessity test also apply to measures taken by national authorities to maintain national security and

[112] See, eg, Cameron, above n 98 at 386 *ff*; Ibrahim Özden Kaboglu, 'La liberté d'expression en Turquie' (1999) *Revue trimestrielle des droits de l'homme* 253.

[113] *Zana v Turkey*, above n 12.

[114] *Ibid* at para 12.

[115] *Ibid* at para 31.

[116] *Ibid* at para 50. According to the Turkish government, the confrontation between the PKK and the security forces had claimed the lives of 4,036 civilians and 3,884 members of the security forces (see *ibid* at para 10).

public safety as part of the fight against terrorism.[117] Against this background, the court first examined the content of the words used by Mr Zana. The applicant's statement was found to be both contradictory and ambiguous:

> contradictory because it would seem difficult simultaneously to support the PKK, a terrorist organisation which resorts to violence to achieve its ends, and to declare oneself opposed to massacres; (…) ambiguous because whilst Mr Zana disapproves of the massacres of women and children, he at the same time describes them as 'mistakes' that anybody could make.[118]

In any event, the content of the applicant's remarks had to be seen in light of the circumstances of the case and the situation prevailing in South East Turkey at the time.[119] In this connection, the court noted that the impugned statement was made by a former mayor of an important city and was published in a major national newspaper. Moreover, its publication coincided with the murder of civilians by PKK militants. As a consequence, the words used were 'likely to exacerbate an already explosive situation in that region'.[120] The court accordingly concluded that the penalty imposed on the applicant could reasonably be regarded as answering a pressing social need. Several judges filed dissenting opinions questioning the majority's assessment of the context of the case. Judge van Dijk, joined by five other judges, noticed that the interview was with a *former* mayor who was in prison at the relevant time, a fact that may have limited the possible effects of his statement. Similarly, Judge Vilhjálmsson believed that words published in a newspaper in Istanbul—far away from the zone of conflict—could hardly be taken to be a danger to national security or public safety or territorial integrity.

Incal v Turkey

The second major case to reach the European Court was *Incal v Turkey*.[121] It involved a former member of the Turkish People's Labour Party, who was convicted for the distribution of a leaflet criticising measures taken by the local authorities, in particular against squatters' camps surrounding the city of Izmir. The pamphlet referred to 'state terror against Turkish and Kurdish proletarians', and called on all 'democratic patriots' to oppose the 'special war being waged against the proletarian people'.[122] The Turkish authorities confiscated the leaflet and Mr Incal was subsequently found

[117] *Ibid* at para 55.
[118] *Ibid* at para 58.
[119] *Ibid* at para 56.
[120] *Ibid* at para 60.
[121] *Incal v Turkey* Reports 1998-IV (1998).
[122] *Ibid* at para 10.

guilty of 'incitement to commit an offence' under article 312 of the Criminal Code. The European Court found a violation of Article 10 of the Convention. In order to determine whether the applicant's conviction was justified, the court considered both the leaflet's content and the background of the case. Although the applicant made 'virulent' remarks about the policy of the local authorities, and urged the population of Kurdish origin to unite to raise certain political demands, the challenged expressions could not 'if read in context, be taken as incitement to the use of violence, hostility or hatred between citizens'.[123] Furthermore, the court emphasised that the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician.[124] Finally, the circumstances of the case had to be distinguished from those found in *Zana*, as nothing indicated that Mr Incal was in any way responsible for the problems of terrorism in Turkey.[125]

The July 1999 Cases

On 8 July 1999 the European Court delivered thirteen judgments dealing with criticism of the Turkish government's Kurdish policy. In eleven cases the Court found a violation of Article 10 of the Convention.[126] Only in two cases, *Sürek v Turkey (No 1)* and *Sürek v Turkey (No 3)*, were the interferences with the applicant's right to freedom of expression held to be justified under Article 10 s 2.[127] Albeit the majority/minority ratio differed from case to case, the reasoning adopted in the majority opinions on the one hand, and the dissenting and concurring opinions on the other hand, was quasi-identical in every case. The majority and the concurring and dissenting opinions are considered in turn.

The majority opinions. Referring to its decision in *Zana*, the court made it clear at the outset of every judgment that the security problems in south-east Turkey could, at the time, justify measures in furtherance of the protection of national security and territorial integrity. However, in those cases where there was no violation of Article 10, the Turkish measures were considered to be neither necessary nor proportionate. These included the convictions for a publication of an interview with a scientist analysing

[123] *Ibid* at para 50.
[124] *Ibid* at para 54.
[125] *Ibid* at para 58.
[126] *Erdogu and Ince v Turkey* Reports 1999-IV (1999); *Karatas v Turkey* Reports 1999-IV (1999); *Polat v Turkey*, 8 July 1999; *Gerger v Turkey*, 8 July 1999; *Ceylan v Turkey*, Reports 1999-IV (1999); *Arslan v Turkey*, 8 July 1999; *Sürek and Özdemir v Turkey*, 8 July 1999; *Sürek v Turkey (No 2)*, 8 July 1999; *Sürek v Turkey (No 4)*, 8 July 1999; *Okçuoglu v Turkey*, 8 July 1999; *Baskaya and Okçuoglu v Turkey* Reports 1999-IV (1999).
[127] *Sürek v Turkey (No 1)* Reports 1999-IV (1999); *Sürek v Turkey (No 3)*, 8 July 1999.

the Kurdish situation mainly from a sociological perspective,[128] a book describing the ill-treatment of political prisoners in Diyarbakir prison and criticising the 'bloody repression' of the Kurds by the 'fundamentalist dictatorship of the bourgeoisie',[129] a 'virulent' speech at a ceremony criticising the local authorities,[130] an article accusing the government of 'state terrorism' and 'genocide',[131] a historical book written in a 'hostile' tone,[132] and a news commentary proclaiming, inter alia, that it was 'time to settle accounts'.[133] In several of these judgments, the court explained that the context in which an utterance takes place may be such as to reduce its potential impact on national security and public order.[134] One important factor in this connection is the medium used to convey the message: views made public by means of a literary work,[135] in a periodical whose circulation is low,[136] through poetry,[137] or to a limited group of people attending a commemorative ceremony,[138] have a lesser effect than views dispersed through the mass media. Yet, the decisive factor in the majority's assessment seemed to have been the content of the message. In this regard, the Court adopted the following new principle:

> [W]here (…) remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.[139]

Indeed, in those cases in which the communications constituted 'incitement to violence', the freedom-restricting measures were upheld. The majority reached this conclusion in *Sürek (No 1)* and *Sürek (No 3)*. The former case concerned the publication of two readers' letters in a weekly review, entitled 'Weapons cannot win against freedom' and 'It is our fault'. Both letters strongly condemned the military action in south-east Turkey and the suppression of the Kurdish people in their struggle for independence. The owner of the review was found guilty and convicted of disseminating propaganda against the indivisibility of the state. The court in Strasbourg noted that there had been

[128] *Erdogdu and Ince v Turkey*, above n 126 at para 51.
[129] *Polat v Turkey*, above n 126 at para 44.
[130] *Gerger v Turkey*, above n 126 at para 47.
[131] *Ceylan v Turkey*, above n 126 at para 33.
[132] *Arslan v Turkey*, above n 126 at para 45.
[133] *Sürek v Turkey (No 4)*, above n 126 at para 58.
[134] See, eg, *Polat v Turkey*, above n 126 at para 47.
[135] *Polat v Turkey*, above n 126 at para 47 and *Arslan v Turkey*, above n 126 at para 48.
[136] *Okçuoglu v Turkey*, above n 126 at para 48.
[137] *Karatas v Turkey*, above n 126 at para 52.
[138] *Gerger v Turkey*, above n 126 at para 50.
[139] Eg, *Sürek and Özdemir v Turkey*, above n 126 at para 60.

> a clear intention to stigmatise the other side to the conflict by the use of labels such as 'the fascist Turkish army', 'the TC murder gang' and 'the hired killers of imperialism' alongside references to 'massacres', 'brutalities' and 'slaughter'.[140]

It further held that both letters 'amounted to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence'.[141] Given the already sensitive security context in the region, the content of the letters was seen 'as capable of inciting to further violence in the region by instilling a deep-seated and irrational hatred against those depicted as responsible for the alleged atrocities'.[142] Moreover, one of the letters identified some persons by name, stirred up hatred against them and exposed them to the risk of physical violence. Comparable circumstances were found in *Sürek (No 3)*. The applicant in this case was convicted for publishing a news comment describing the Kurdish struggle as 'a war directed against the forces of the Republic of Turkey', and calling for 'a total liberation struggle'.[143] In the court's opinion, it was 'clear that the impugned article associated itself with the PKK and expressed a call for the use of armed force as a means to achieve national independence of Kurdistan'.[144] '[T]he message which is communicated to the reader', the Court continued, 'is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor'.[145] Bearing in mind the already sensitive security context, the publication was again considered to be capable of inciting further violence in the region.

The dissenting and concurring opinions. In all thirteen cases Judge G Bonello filed a dissenting opinion in which he criticised the standard adopted by the majority of the Court. As an alternative to the 'incitement to violence' test, Bonello explicitly endorsed the US Supreme Court's 'clear and present danger' doctrine.[146] He wrote that 'when the invitation to the use of violence is intellectualised, abstract, and removed in time and space from the loci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail'. Several other dissenting opinions sought to distinguish the circumstances of *Sürek (No 1)* and *Sürek (No 3)* from those found in *Zana*. Judge M Fischbach subscribed to the majority's point of view that the Contracting States enjoy a wider margin of appreciation in cases concerning expressions inciting the use of violence. However, according to Fischbach, restrictive measures can only

[140] *Sürek v Turkey (No 1)*, above n 127 at para 62.
[141] *Ibid* para 62.
[142] *Ibid*.
[143] *Sürek v Turkey (No 3)*, above n 127 at para 40.
[144] *Ibid*.
[145] *Ibid*.
[146] Bonello referred to *Schenck v United States*, above n 63; *Whitney v California*, above n 72; *Abrams v United States*, above n 7; *Brandenburg v Ohio*, above n 87.

be justified in circumstances that are 'sufficiently unambiguous'. He further held that the medium used should cover an audience wide enough to give rise to the fear that remarks of a violent nature 'will trigger serious and unforeseeable consequence for national security and democratic order'. Judge Palm took a similar approach. She opined that the majority attached too much weight to the language used, and paid insufficient attention to the general context in which the words were uttered and to their likely impact. In this respect, both *Sürek (No 1)* and *Sürek (No 3)* had to be distinguished from *Zana*. In the first place, the applicant was not punished for the offence of incitement to hatred but for the offence of disseminating separatist propaganda. Secondly, the applicant was merely the major shareholder of the review, not the author of the letters. Nor was he (or one of the authors) a prominent figure in Turkish life capable, like Mr *Zana*, of exercising influence on public opinion. Thirdly, the review was published in Istanbul far away from the zone of conflict in south-east Turkey. Finally, Palm stressed that 'letter-writing' by readers does not occupy a central or headline position in a review and is, by its very nature, of limited influence. In those cases in which the majority found a violation of Article 10, Judge Palm—joined by Judge F Tulkens, M Fischbach, J Casadevall and HS Greve—wrote a concurring opinion defending an approach to subversive and violence-conducive speech that would focus less on the 'inflammatory nature' of the words employed, and more on the different elements of the 'contextual setting' in which the expression took place. Under such an approach, the decisive questions would be: 'Was the language intended to inflame or incite to violence?' and '[w]as there a real and genuine risk that it might actually do so?'

Özturk v Turkey

Less than three months later, the court was again asked to pass judgment in a Turkish speech case. The applicant was convicted for the publication of a book, which gave an account of the life of İbrahim Kaypakkaya, who had been one of the founder members of the Communist Party of Turkey—Marxist–Leninist, an illegal Maoist organisation. The Turkish government described the book as the biography of a 'terrorist'. According to the Turkish National Security Court, the author expressly incited hatred and hostility by venerating the life of Kaypakkay.[147] In its unanimous judgment in *Özturk v Turkey*, the European Court held that the challenged measures did not satisfy the democratic necessity test under Article 10 s 2. It first observed that, given its epic style, the book could be seen as an apologia of the thoughts and deeds of Kaypakkaya: 'Albeit indirectly, the book gave

[147] *Özturk v Turkey* Reports 1999-VI (1999) para 16.

moral support to the ideology which he had espoused.'[148] The court then went on to apply the principles set out by the majority in the July 1999 cases. Those were summarised as follows: Firstly, there is little scope under Article 10 s 2 of the Convention for restrictions on political speech or on debate on matters of public interest; secondly, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician; thirdly, it remains open to the competent state authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to critical remarks; finally, where such remarks incite violence against an individual, a public official or a sector of the population, the national authorities enjoy a wider margin of appreciation when examining the need for an interference with the exercise of freedom of expression.[149]

Applying these principles to the facts of the case, the court first observed that the words used in the book could not be regarded as incitement to the use of violence or to hostility and hatred between citizens.[150] Nor was there any evidence that the book concealed objectives and intentions different from the ones it proclaimed.[151] The court next considered the background of the case, and in particular the problems linked to the prevention of terrorism. It concluded that there were no reasons to believe that, 'in the long term', the book could have had 'a harmful effect on the prevention of disorder and crime in Turkey'.[152] In this connection, importance was attached to the fact that the book had been on open sale since 1991, and had not apparently aggravated the 'separatist threat' which, according to the government, existed both before and after the applicant's conviction.[153]

iii. Concluding Remarks

In their efforts to reconcile freedom of expression and the public interest in regulating subversive and violence-conducive speech, the Supreme Court and the European Court have both adopted their own tests. From a theoretical perspective, their respective attempts to state a coherent test of general application can both be described as a form of definitional balancing. But this is where the similarities end. Whereas the European test

[148] *Ibid* at para 64.
[149] *Ibid* at para 66.
[150] *Ibid* at para 68.
[151] *Ibid*.
[152] *Ibid* at para 69.
[153] *Ibid*.

is standard-like, leaving considerable room for ad hoc judgment, its American counterpart is a clear example of a categorical rule.

The First Amendment test that continues to serve as the standard to assess restrictions on dangerous speech was adopted in *Brandenburg v Ohio*. Under this test, government regulation is constitutionally justified only where the challenged expression (i) is directed to inciting or producing (ii) imminent, lawless action, and (iii) is likely to incite or produce such action.[154] The *Brandenburg* test is highly protective of speech: even the most inflammatory expressions are constitutionally protected if any one of these three elements is absent. The three-part test focuses both on the *nature* of the words used and the probable *consequences* of the expression. The requirement of incitement draws on Hand's 'direct incitement' approach articulated in the *Masses Publishing* case.[155] It is speaker-centred in that it focuses on the content of the expression and the intention of the speaker. The conditions of imminence and likelihood are inspired by the original 'clear and present danger' formula. As has been seen, Holmes' standard of 'proximity and degree' primarily concentrated on the possible consequences of an expression.

Under Article 10, the central issue today is whether the challenged utterances 'incite to violence against an individual, a public official or a sector of the population'.[156] If the answer to that question is positive, 'the national authorities enjoy a wider margin of appreciation when examining the need for an interference with the exercise of freedom of expression'.[157] As some commentators rightly observe, the Strasbourg Court's approach resembles Hand's 'direct incitement' standard.[158] However, one would be wrong to conclude that the narrow question of whether the words used incite to violence, is the only decisive criterion under the present European standard. A careful analysis of the Convention case law suggests that besides content, the probable effects of an expression are equally relevant. The concern with consequences was already present in the early Commission decisions. When the applicant in *Arrowsmith* suggested that the Supreme Court's 'clear and present danger' doctrine be applied, the Commission did not reject this idea. On the contrary, it regarded the 'clear and present danger' test as relevant to the interpretation of Article 10 s 2.

[154] *Brandenburg v Ohio*, above n 87 at 447.

[155] *Masses Publishing Co v Patten*, above n 88.

[156] See, eg, *Özturk v Turkey*, above n 147 at para 66. The Court employs various alternative formulations. See, eg, *Polat v Turkey*, above n 126 at para 47 ('incitement to violence, armed resistance or an uprising'); *Dicle v Turkey*, 10 November 2004, para 17 (no violation because the impugned expressions 'do not encourage violence, armed resistance or insurrection and do not constitute hate speech').

[157] See, eg, *Özturk v Turkey*, above n 147 at para 66.

[158] Mark Janis, Richard Kay and Anthony Bradley, *European Human Rights Law* (Oxford, Oxford University Press, 2000) 187.

The notion of a pressing social need, the Commission observed, 'may include the clear and present danger test and must be assessed in the light of the circumstances of a given case'.[159] The court's judgment that resembles the 'clear and present danger' doctrine the most is *Zana v Turkey*. Similar to Holmes' original formula, the court in this case considered the likelihood of the expected danger in order to justify the interference with the applicant's freedom of expression. A decisive factor in the final assessment was the fact that the applicant's statement coincided with the murders of civilians by the PKK, which made it 'likely to exacerbate an already explosive situation in that region'.[160]

The shift towards a more speaker-based approach is reflected most clearly in the July 1999 cases. However, the impact of this doctrinal change should be qualified. In fact, the Strasbourg Court was rather reluctant to interpret the applicants' utterances as constituting incitement to violence. While several of the cases involved highly hostile language, the majority did not find a violation of Article 10. Notably, in their separate opinions judges Tulkens, Casadevall and Greve asked why the majority in *Sürek (No 1)* and *Sürek (No 3)* interpreted the messages as inciting violence, but declined to do so in the other cases decided the same day. One possible explanation for this can be found in a different appreciation of the probable consequences of the impugned utterances. This brings us to an important point. In reality, in its July 1999 decisions and their progeny, the court has never made a clear distinction between an expression's intrinsic meaning and the extrinsic circumstances accompanying the expression. Quite the contrary, the court's interpretation of the content of an expression depends very much on its assessment of the contextual setting. This is evidenced by the routinely cited phrase that 'in such a context the content of the letters must be seen as capable of inciting to further violence'.[161] What is crucial here is that the court's contextual evaluation of an expression not only serves the purpose of discovering the true meaning of the words used, but is also aimed at assessing the probable impact of the expression. Indeed, in deciding whether there is incitement, the court considers such factors as the authority of the speaker (eg, a private individual as opposed to a public figure), the means used to convey the message, and the security situation prevailing at the time.[162]

It follows that the court's notion of the concept of incitement is not restricted to the use of particular words. Expressions which, taken literally,

[159] *Arrowsmith v the UK*, above n 102 at 95.
[160] *Zana v Turkey*, above n 12 at para 60.
[161] Eg *Sürek v Turkey (No 1)*, above n 127 at para 62.
[162] See, eg, *Polat v Turkey*, above n 126 at para 47: 'The Court observes, however, that the applicant is a private individual and that he made his views public by means of a literary work rather than through the mass media, a fact which limited their potential impact on "national security", public "order" and "territorial integrity" to a substantial degree.'

do not invite the audience to act in a certain way may, depending on the circumstances, be interpreted as incitement. But the opposite holds true as well: words that conventionally denote that the speaker is advocating certain conduct, may, given the context, not be considered as incitement. For example, in the case of *Karatas v Turkey* the court observed that, taken literally, 'the poems might be construed as inciting readers to hatred, revolt and the use of violence'.[163] However, the court continued that

> in deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers.[164]

The conclusion that emerges form the foregoing analyses is that the Convention test to review government suppression of subversive and violent conductive speech is less protective and more flexible than its counterpart across the Atlantic. In *Brandenburg,* the Supreme Court articulated clear and strict criteria to justify criminal and civil sanctions to regulate harmful speech.[165] While previous formulations of the 'clear and present danger' standard required the courts to balance the various interests involved (or at least make contextualised judgments about the nature and the likelihood of the harm), the *Brandenburg* test can be classified as a categorical rule.[166] As John Hart Ely put it:

> There is in Brandenburg no talk of balancing (…): the expression involved in a give case either does or does not fall within the described category, and if it does not it is not protected.[167]

Although even the clearest rule does not remove all judicial discretion and flexibility, the *Brandenburg* formula leaves little room for a further assessment of the circumstances presented in each case.[168]

The situation is different in Europe. The Strasbourg Court employs a broad standard—incitement to violence—the meaning of which, in the end,

[163] *Karatas v Turkey*, above n 126 at para 49.

[164] *Ibid*.

[165] The *Brandenburg* test also applies to attempts to regulate speech through civil sanctions (eg, tort liability). See *New York Times Co v Sullivan*, 376 US 254, 277 (1964) (holding that tort liability against a speaker for the harmful results of speech constitutes state action).

[166] Ely, 'Flag Desecration', above n 41at 1491 *ff*. For a balancing formulation of the 'clear and present danger' test, see, eg, *Dennis v United States*, above n 80. See, however, Redish, above n 61 at 1183–7 (arguing that the difference between the original 'clear and present danger' test and the *Brandenburg* test is more of a quantitative than a qualitative nature).

[167] Ely, 'Flag Desecration', above n 41 at 1491. In Ely's view, the imminence and likelihood prongs of the *Brandenburg* formula can be seen as a mere supplementation of the categorical rule with a reference to likely effects (*ibid* at 1491, n 35).

[168] See Redish, above n 61 at 1184: '[I]t is simply impossible to string together a group of words (…) that will remove from judges the ability to manipulate general rules when those are applied to specific cases.'

always depends on an appreciation of the nature of the words and context in which they were used. Although the 'incitement to violence' standard can be regarded as a concretisation of the highly flexible democratic necessity test[169]—in this sense it can serve as an example of definitional balancing—it leaves ample discretion to the courts to consider the circumstances of a case and balance the various interests involved. Compared to *Brandenburg*, the Convention standard gives less guidance to decision-makers and law enforcement officers seeking to restrict harmful expression.[170] It may indeed be difficult to predict whether the Strasbourg Court will read speech as incitement to violence. An illustration of this can be found in *Karatas v Turkey*, a case in which the court, by twelve votes to five, held that there had been a violation of Article 10. Six judges found that the applicant's 'songs of rebellion' did not incite violent action. Five dissenting judges, by contrast, interpreted the same poems as exhorting readers to armed violence. The six remaining judges concurred in the result but declined to apply the 'incitement' test.

C. Categories of Terrorism-Related speech

States seeking to limit the harm caused by speech in the context of terrorism have a multitude of different legal methods at their disposal. One way in which the state may limit the right to freedom of expression in the interest of fighting terrorism, is by criminalising specific forms of terrorism-related speech. Against the background of the general principles discussed in the previous section, the following sub-sections examine several of such categories of terrorism-related speech: terrorist threats, incitement to terrorism, the glorification or apology of terrorism, and the teaching of terrorist methods. Although these instances of speech may amount to common criminal law offences, some jurisdictions have adopted specific provisions outlawing such expressions in relation to terrorism.[171]

i. Terrorist Threats

A first category that deserves attention here are terrorist threats. In the United States, various states have enacted statutes making it an offence to

[169] As the court explains in several cases, the question whether an expression incites violence, armed resistance or insurrection, 'is the essential factor in the assessment of the necessity of the measure'. See, eg, *Gümüs and others v Turkey*, 15 March 2005, para 18.

[170] Sottiaux, 'The "Clear and Present Danger" Test', above n 98 at 678–9.

[171] For an overview of the state practice of the Member and Observer States of the Council of Europe, see Olivier Ribbelink, *'Apologie du terrorisme' and 'incitement to terrorism'* (Strasbourg, Council of Europe Publishing, 2004).

engage in terrorist threatening or to utter a terrorist threat.[172] Such statutes typically criminalise a threat to commit a crime of violence or a threat to cause bodily injury to another person. The purpose of these statutes is to prevent the psychological distress following from an invasion of the victim's sense of security. In several lower-court decisions, terrorist threat statutes have been upheld against First Amendment challenges.[173] The general position of the lower courts is that terrorist threats lie outside the First Amendment's protective ambit. As one court put it:

> The communication of threats to another person to commit a crime of violence upon that person clearly falls outside of those communications and expressions which are protected by the First Amendment to the Constitution.[174]

Although the Supreme Court has never reviewed a terrorist threats statute, several of its cases deal with threatening speech more generally. The court's jurisprudence indicates that the *Brandenburg* incitement test is not applied in cases involving threatening language.[175] While the court has not developed a comprehensive constitutional test to deal with the suppression of such speech, it has consistently held that so-called 'true threats' receive no constitutional protection.[176] The term 'true threats' first appeared in *Watts v United States*, a case decided in the late 1960s.[177] The applicant in this case was convicted for threatening to take the life of the President. During a political debate at a small public gathering, Watts made the remark that if he were made to carry a rifle, the President would be the first man he would shoot. The Supreme Court unanimously overturned Watt's conviction for violating a statute prohibiting threats against the President. It held that the defendant's statement was mere 'political

[172] See Lawrence, above n 90 at 30.

[173] See, eg, *Masson v Slaton*, 320 F Supp 669 (ND Ga 1970); *People v Lopez*, 74 Cal App 4th 678, 88 Cal Rptr 2d 252 (2d Dist 1999); *Lanthrip v State*, 235 Ga 10, 218 SE 2d 771 (1975); *Thomas v Com*, 574 SW 2d 903 (Ky Ct App 1978); *Allen v State*, 759 P.2d 541 (Alaska Ct App 1988).

[174] *Lanthrip v State*, previous n at 12.

[175] On the distinction between 'threats' and 'incitement', see, eg, Jennifer Elrod, 'Expressive Activity, True Threats, and The First Amendment' (2004) 36 *Connecticut Law Review* 541 (arguing that the 'true threats', 'incitement' and, 'fighting words' doctrines each stand on different analytical footings). For a different view, see, eg, Steven G Grey, 'The Nuremberg Files and the First Amendment Value of Threats' (2000) 78 *Texas Law Review* 541 (reviewing the link between threats and incitement).

[176] The Ninth Circuit Court of Appeals summarised the dividing line between protected and protected speech in this context as follows: 'advocating violence is protected, threatening a person with violence is not.' See *Planned Parenthood of the Columbia/Willamette, Inc v Am Coalition of Life Activists*, 290 F.3d 1058, 1072 (9th Cir 2002), cert. denied, 123 S Ct 2637, 2638 (2003).

[177] *Watts v United States*, 394 US 705 (1969).

hyperbole' which, in light of its context and conditional nature, and the reaction of the listeners, did not constitute a wilful threat against the president.[178]

The Supreme Court again considered the matter in *Virginia v Black*.[179] The defendants were convicted for the violation of a statute making it a crime to burn a cross with intent to intimidate. Justice O'Conner announced the opinion of the Court. She observed that the First Amendment permits states to ban a 'true threat',[180] and continued:

> True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.[181]

To date, the Strasbourg organs have not been called upon to review convictions for terrorist threats under Article 10 s 2.[182] However, it is to be expected that the suppression of threatening speech will easily satisfy the democratic necessity test. States have an important interest in safeguarding the rights of others by protecting them against statements that—to use the Supreme Court's terminology—can be understood as true threats. It may be observed, in this respected, that in declining to find a violation of Article 10 in *Sürek (No 1)*, the court attached special importance to the fact that the impugned statement 'identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence'.[183] Although this case was not concerned with terrorist threats as such, the quoted fragment indicates the significance the court attaches to protecting the individual's sense of security.

[178] *Ibid* at 708.

[179] *Virginia v Black*, 538 US 343 (2003). See also, inter alia, *RAV v City of St Paul*, 505 US 377 (1992).

[180] *Virginia v Black*, previous n at 359

[181] *Ibid* at 359–60. When applying the Supreme Court's 'true threats' doctrine, the lower courts employ an 'objective, reasonable person' standard (see, eg, Elrod, above n 175 at 577–8). Eg, in the ninth Circuit, the question is whether a 'reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm.' See, eg, *United States v Mitchell*, 812 F.2d 1250, 1255 (9th Cir 1987), quoted in Elrod, above n 175 at 577–8.

[182] For a European example of a terrorist threatening statute, see, eg, Art 170 of the Spanish Criminal Code.

[183] *Sürek v Turkey (No 1)*, above n 127 at para 62.

ii. Incitement to Terrorism

Most legal systems have criminal law provisions with regard to incitement of crime. In addition, several states adopted specific legislation making it a crime to incite to terrorist acts.[184] As regards the EU Member States, the Council Framework Decision on Combatting Terrorism requires States to take the necessary measures to ensure that 'inciting' terrorist offences is made punishable.[185] Similarly, the 2005 Council of Europe Convention on the Prevention of Terrorism obliges the Parties to criminalise 'public provocation to commit a terrorist offence (…) when committed unlawfully and intentionally'.[186] The present sub-section explores how such offences are dealt with under the First Amendment and Article 10 respectively.

Brandenburg is the modern test to review government regulation of incitement to law violation, and, as such, also applies to incitement of terrorist acts. In fact, the *Brandenburg* case involved the criminal conviction of a Ku Klux Klan leader for advocating 'the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform'.[187] The defendant delivered a speech at a Klan meeting, which was filmed by a television crew and later broadcast on local and national television. The film in question showed twelve hooded persons, some carrying weapons, gathered around a burning cross. No one else was present at the scene except the participants and the journalists. In one scene the defendant spoke the following words:

> We [the Klan] are not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.[188]

As noted, the court overturned the speaker's conviction because it was based on 'mere advocacy', and not on advocacy 'directed to inciting or

[184] As far as the Member and Observer States of the Council of Europe are concerned, see Ribbelink, above n 171 at 43 (observing that of the 45 states that replied to the survey, only 8 have enacted legislation specifically criminalising incitement to terrorism).

[185] Art 4, Council Framework Decision on Combating Terrorism of 13 June 2002 (2002/475/JHA).

[186] Art 5 s 2, Council of Europe Convention for the Prevention of Terrorism (CETS No. 196). Art 5 s 1 provides that, for the purpose of the Convention, 'public provocation to commit a terrorist offence', means 'the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.' According to the UN Special Rapporteur, this provision is a 'sound response' to the threat posed by terrorism-related speech, taking into account the double requirement of a subjective intent to incite and an objective danger that one or more terrorist offences would be committed. See Martin Scheinin, Special Rapporteur on the Promotion and Protection of Human rights and Fundamental Freedoms while Countering Terrorism, E/CN.4/2006/98, 28 December 2005, para 56 (c).

[187] *Branderburg v Ohio*, above n 87 at 444–5.

[188] *Ibid* at 446.

producing imminent lawless action and likely to incite or produce such action'.[189] *Brandenburg* implies that statements advocating terrorist violence are beyond the pale of constitutional protection only where the words used objectively urge terrorist action, the speaker subjectively intends to incite such action, and the terrorist action is imminent and likely to occur. In other words, the room provided by the *Brandenburg* test to outlaw incitement to terrorism is very limited, not in the least because the requirements of imminence and likelihood of illegal action are particularly difficult to satisfy.[190]

Legal scholars have questioned whether a standard as restrictive as *Brandenburg* will (and should) continue to serve as the basis for subversive speech restrictions at a time when terrorism constitutes a serious threat to national security.[191] In an era in which terrorist organisations might gain access to weapons of mass destruction, courts may feel the need to relax the current incitement standard. As Laura Donohue asks: 'Are we entering an age where the clear and present danger will push back on the Brandenburg standard?'[192] Other commentators cast doubt on the appropriateness of the *Brandenburg* test to tackle terrorism-related issues involving religiously motivated incitement and incitement on the Internet.[193] In this last respect, there are several authors according to whom the *Brandenburg* criteria are wholly unworkable in cyberspace.[194] For instance, the 'imminence' requirement would prevent any conceivable regulation of subversive and violence-conducive speech on the Internet, because in

[189] *Ibid* at 447.

[190] An illustration of the highly protective nature of the *Brandenburg* test can be found in *NAACP v Claiborne Hardware Co*, above n 42. This case involved a boycott of White merchants organised by the NAACP. At a meeting of members of the NAACP calling for a total boycott, a highly hostile and threatening speech was made against those members of the black community who violated the boycott. In the court's opinion, the speech in question failed to meet the *Brandenburg* test, inter alia because the violence connected with the speech occurred only weeks or months later. *Ibid* at 628.

[191] Donohue, 'Terrorist Speech', above n 60 at 248–50.

[192] *Ibid* at 249.

[193] As regards religiously motivated speech, see, eg, Joseph Grinstein, 'Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism' (1996) 105 *Yale Law Journal* 1347 (arguing that the conventional 'clear and present danger' test is an inappropriate tool for evaluating 'seditious' religious speech).

[194] See, eg, John P Cronan, 'The Next Challenge for the First Amendment: the Framework for an Internet Incitement Standard' (2002) 51 *Catholic University Law Review* 425; Cass Sunstein, 'Constitutional Caution' (1996) 1996 *University of Chicago Legal Forum* 361. But see, eg, Adam R Kegley, 'Regulation of the Internet: the Application of Established Constitutional Law to Dangerous Electronic Communication' (1997) 85 *Kentucky Law Journal* 997 (arguing that current doctrine is appropriate to cope with speech on the Internet).

cyberspace words are usually 'heard' long after they are 'spoken'.[195] According to one commentator, the September 11 events and their aftermath have placed

> the likelihood of further terrorist acts at a 'threshold of imminence' such that the serious advocacy of terrorist acts via the Internet can be placed beyond the pale of constitutional protection in accord with the Brandenburg incitement exception.[196]

The Article 10 'incitement to violence' standard leaves the Contracting States more leeway to regulate speech advocating terrorist violence. In the court's opinion, domestic authorities enjoy a wide margin of appreciation to restrict expressions involving incitement to violence against an individual, a public official or a sector of the population. Incitement to terrorist violence clearly falls in this broad category. Under the Convention standard the national authorities neither need to prove that the speaker subjectively intended incitement to terrorism, nor that the terrorist action was imminent and likely to occur. For instance, in *Sürek (No 1)*, the publication of labels such as 'the fascist Turkish army', 'the TC murder gang' and 'the hired killers of imperialism' in a reader's letter in a weekly review, sufficed to justify interference with Article 10.[197] Although no mention was made in *Sürek (No 1)* and subsequent cases of a *Brandenburg* type mens rea requirement, one of the factors that determines the outcome of the incitement test is whether there has been a 'clear intention to stigmatise' the other side to the conflict.[198] Thus, for example, in *Halis Dogan v Turkey (No 3)*, two articles discussing the challenges that confronted the PKK after the arrest of its leader Abdullah Öcalan, were held to incite to terrorist violence, inter alia because they revealed an intention to stigmatise the other side of the conflict.[199]

As noted, the European Court's concept of incitement is not limited to an evaluation of the nature of the words used. Whether or not an expression will be interpreted as inciting terrorist acts, not only depends on the intrinsic meaning of the utterance but also on the circumstances surrounding it. In assessing the circumstances, the court is prepared to take into account 'the problems linked to the prevention of terrorism'.[200] The precise impact of this statement is not entirely clear. The result reached in *Sürek (No 1)* suggests that it may imply that statements which, at first

[195] Cronan, previous n at 455 (arguing that in the context of the Internet the 'imminence' prong should be interpreted from the perspective of the listener).

[196] Thomas E. Crocco, 'Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites' (2004) 23 *Saint Louis University Public Law Review* 451, 457–8.

[197] *Sürek v Turkey (No 1)*, above n 127 at para 62.

[198] *Ibid*. Settled case law: see, eg, *Hocaogullari v Turkey*, 7 March 2006, para 39; *Halis Dogan v Turkey (No 3)*, 10 October 2006, para 34.

[199] *Halis Dogan v Turkey (No 3)*, previous n at para 34.

[200] See, eg, *Sürek v Turkey (No 1)*, above n 127 at para 62.

sight, do not incite violence, can nevertheless be held to do so in the context of a serious terrorist campaign.[201] Thus, in *Özgür Gündem v Turkey*, the Court reasoned as follows: 'Three articles were found by the Commission to contain passages which advocated intensifying the armed struggle, glorified war and espoused the intention to fight to the last drop of blood. The court agrees that, in the context of the conflict in the south-east, these could reasonably be regarded as encouraging the use of violence.'[202]

Even where the words used cannot as such be regarded as incitement to the use of violence, the court is prepared to consider the possibility that the impugned text may conceal objectives and intentions different from the ones it proclaims.[203] However, to justify interference, the court requires 'evidence of any concrete action' that belies the prima facie intention of the speaker.[204] This condition is not easily satisfied. In *Yagmurdereli v Turkey*, for instance, the court reviewed a statement which indirectly called on the people of Kurdish origin to unite and raise certain political demands. An ambiguous reference was made to the growing number of people resisting the Turkish state and residing in the mountains.[205] Although not neutral, this statement could not be regarded as incitement to violence. Again, special importance was attached to the context and probable consequences of the expression.[206] The statement was made during a speech at a peaceful gathering in Istanbul, far away from the zone of conflict. Moreover, the speech was made against the background of a nation wide public debate on the propriety of a newly adopted anti-terrorism law. In this last respect, the court reiterated that there is little scope under Article 10 s 2 for restrictions on political speech or on debate on matters of public interest.[207]

This brings us to another important point. In various cases with a counter-terrorism aspect, the Strasbourg Court has indicated that limitations on political speech are subject to close scrutiny.[208] This is certainly true for an interference with the freedom of expression of a politician who is a member of an opposition party.[209] In other words, the political relevancy of a particular expression may also be a factor bearing on the decision whether or not it will be interpreted as incitement to violence. In

[201] Aksu, above n 60 at 389.
[202] *Özgür Gündem v Turkey* Reports 2000-III (2000) para 62.
[203] *Özturk v Turkey*, above n 147 at 68.
[204] *Ibid*.
[205] *Yagmurdereli v Turkey*, 4 June 2002, para 52 ('Même si, aujourd'hui, nous paraissons peu nombreux ici, on sait que nous sommes nombreux dans les montagnes et nous serons de plus en plus nombreux.')
[206] *Ibid*.
[207] *Ibid* at para 51.
[208] See, eg, *Özturk v Turkey*, above n 147 at 66.
[209] *Incal v Turkey*, above n 121 at para 46. Settled case law: see, eg, *Odabasi v Turkey*, 10 November 2004, para 24; *Elden v Turk*ey, 9 December 2004, para 21.

this connection, the court has consistently held that the limits of permissible criticism are wider with regard to the government than in relation to a private citizen.[210] As a consequence, citizens must be free to denounce the government's anti-terrorism policy. On several occasions, the court has held that sharp criticism of the state's counter-terrorist campaign does not as such amount to incitement to violence.[211]

iii. Glorification and Apology of Terrorism

A separate though related question is whether the right to freedom of expression allows measures to be taken against those who praise, support or justify terrorism, as opposed to inciting terrorist action.[212] The increase of terrorist violence has sparked a heated debate within several member states of the Council of Europe as to whether or not to adopt a new crime of 'apology of terrorism'.[213] A 2003 survey of the legislation of the member and observer States of the Council of Europe indicates that at that time only three states (Denmark, France and Spain) had provisions in place that mention apology of terrorism as a specific crime.[214] The United Kingdom adopted a 'glorification of terrorism' offence in the aftermath of the 7 July 2005 London bombings.[215] It should be observed, however, that in the European context neither the EU Council Framework Decision on Combatting Terrorism, nor the Council of Europe Convention on the Prevention of Terrorism, require states to criminalise apology of terrorism.[216]

[210] As the Court put it in *Incal v Turkey*, above n 121 at para 54: 'The limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.'

[211] Settled case law: see, eg, *Sener v Turkey*, 18 July 2000, para 44; *Cetin v Turkey*, 20 December 2005, para 29.

[212] Ribbelink, above n 171 at 12 proposes the following working definition of apology of terrorism: 'the public expression of praise, support or justification of terrorists and/or terrorist acts'.

[213] For the Netherlands, see, eg, JA Peters and IJ De Vré, *Vrijheid van meningsuiting. De betekenis van een grondrecht in tijden van spanning* [Freedom of Expression. The Meaning of a Fundamental Right in Times of Tension] (Mechelen, Kluwer, 2005) 37–45; for the United Kingdom, see, eg, Mark Stephens, 'Comment' (2006) 156 *New Law Journal* 469.

[214] Ribbelink, above n 171 at 44–5.

[215] See s 1 of the Terrorism Act 2006, prohibiting the glorification of terrorism, if 'members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.'

[216] However, it should be noted that Art 5 s 1 of the Council of Europe Convention on the Prevention of Terrorism includes within its definition of 'public provocation to commit a

The First Amendment traditionally protects the abstract discussion of the propriety of violence. In *Gitlow v New York*, decided in 1925, the Supreme Court upheld a conviction for the publication of a manifesto that called for mass action to bring about the dictatorship of the proletariat.[217] The court held that the manifesto would have been protected if it had been confined to a statement of 'abstract doctrine'. However, the text in question advocated and urged mass action and contained language of direct incitement.[218] In the majority's opinion, this was sufficient to constitutionally justify the applicant's conviction. In *Gitlow*, Justice Holmes filed one of his dissenting opinions in which he defended the 'clear and present danger' test. Holmes strongly rejected the court's 'incitement' approach, writing that 'every idea is an incitement', and that 'the only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result'.[219]

In the 1950s, the government prosecuted many communists for violations of the Smith Act.[220] In *Yates v United States*, the court set aside the convictions of several Communist Party officials who were convicted for 'advocating the necessity of overthrowing the federal government by violence'.[221] The court explained that the trial court's instructions to the jury gave inadequate guidance on the distinction between advocacy of abstract doctrine and advocacy of concrete action. According to Justice Harlan, 'the essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe something'.[222] In *Noto v United States*, a case decided eight years before *Brandenburg*, the court considered the conviction of a member of the Young Communist League for attempting to introduce communism in the United States through conferences and lectures on Leninism. Justice Harlan, who again delivered the majority opinion, distinguished between 'the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for resort to force and violence' on the one hand, and 'preparing a group for

terrorist offence', 'indirect' advocacy of terrorism. It was observed in the Explanatory Report that 'presenting a terrorist offence as necessary and justified may constitute the offence of indirect incitement' (para 98). It was further added, however, that the provision allows the Parties a certain amount of discretion and that, in any event, the provision requires 'a specific intent to incite the commission of a terrorist offence', and that 'the result of such an act must be to cause a danger that such an offence might be committed' (paras 98–100).

[217] *Gitlow v New York*, above n 72.
[218] *Ibid* at 665.
[219] *Ibid* at 673.
[220] See generally Stone, *Perilous Times*, above n 61 at 331 *ff*.
[221] *Yates v United States*, 354 US 298 (1957).
[222] *Ibid* at 324.

violent action and steeling it to such action' on the other hand.[223] In order to deny First Amendment protection, Harlan concluded,

> [t]here must be some substantial direct or circumstantial evidence of a call to violence (…) which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding the Communist Party.[224]

Noto clearly foreshadowed the modern *Brandenburg* test.[225] It will be clear by now that under *Brandenburg*, the mere abstract discussion, support or praise of dangerous and harmful ideas and conduct, including terrorist violence, cannot be proscribed absent incitement to imminent lawless action that is likely to occur.

In the Convention context, it is impossible to draw the same sharp line between unprotected incitement to terrorism and permissible support or advocacy of such conduct. The question where the boundary lies between incitement and protected speech again turns on the court's overall assessment of the nature of the expression and the accompanying circumstances. For instance, in *Zana* the criminal conviction of an influential politician for publicly supporting a terrorist organisation was held to answer a pressing social need.[226] In *Öztürk*, by contrast, the court protected a biography which gave 'moral support' to the ideas of an alleged terrorist.[227] The crucial factor distinguishing both cases was the probable consequences of the impugned utterances. Whereas the challenged expression in *Zana* was 'likely to exacerbate an already explosive situation in that region', the court in *Öztürk* was not convinced that the speech involved 'could have had a harmful effect on the prevention of disorder and crime in Turkey'.[228] It will be recalled that Zana's statements were published in a daily national newspaper, whereas Kaypakkaya's biography, reviewed in *Öztürk*, came in the format of a book.

In this respect, the (pseudo-)academic character of the impugned expressions may be of some relevance. In *Polat v Turkey*, for instance, the court dealt with a book that commented on certain episodes in Turkish history. Even though it was not a neutral description of historical facts and the author encouraged the population to oppose the Turkish authorities, it did not constitute incitement to violence.[229] In *Erdogdu and Ince v Turkey*, the incriminating publication was an interview with a Turkish sociologist,

[223] *Noto v United States*, 367 US 290, at 298 (1961).
[224] *Ibid*.
[225] The Court in *Brandenburg* referred to *Noto* when it adopted the current three-part test. See *Brandenburg v Ohio*, above n 87 at 448.
[226] *Zana v Turkey*, above n 12.
[227] *Özturk v Turkey*, above n 147.
[228] Compare *Zana v Turkey*, above n 11 at para 60 and *Özturk v Turkey*, above n 147 at para 69.
[229] *Polat v Turkey*, above n 126 at para 47.

which, according to the Turkish government, offered moral support to violence and terrorism.[230] However, in the court's opinion the content of the interview was of an analytical nature and the text did not contain any passages which could be described as incitement of violence.[231] Similarly, in *EK v Turkey*, a text which could be interpreted as 'a praise of armed struggle' fell within the protective ambit of Article 10, given, inter alia, the fact that it was presented at an international conference on the Kurdish question, and was published only as a chapter in the conference book.[232]

It would be beyond the scope of this work to review every single case in which the European Court reviewed Turkish convictions for the alleged support of the terrorist violence perpetrated by the PKK. One other interesting case is *Halis v Turkey*.[233] The applicant was convicted for reviewing a book written by the leader of the PKK (Abdullah Öcalan). The respondent government maintained that the applicant's article upheld the ideas and words of Öcalan and praised the PKK's so-called liberation struggle.[234] The passages of the book review quoted in the Strasbourg Court's judgment, show that the applicant both reproduced and commented on Öcalan's views on the 'liquidation of the liquidators'.[235] The court decided that the impugned article did not amount to incitement to violence for two main reasons. In the first place, the applicant was not the author of the book but merely a journalistic commentator.[236] Secondly, the applicant was convicted and sentenced to imprisonment for disseminating terrorist propaganda even though the impugned article was never actually disseminated due to a seizure of the newspaper in which it was printed.[237]

A final case that deserves mentioning here is the court's inadmissibility decision in *Hogefeld v Germany*.[238] The applicant was a former member of

[230] *Erdogdu and Ince v Turkey*, above n 126 at para 45.
[231] *Ibid* at para 52.
[232] *EK v Turkey*, 7 February 2002, para 88.
[233] *Halis v Turkey*, 11 January 2005.
[234] *Ibid* at para 31.
[235] The text contained the following passages: 'Combating "liquidation" (tasfiye) is of paramount importance for every revolutionary movement. There is hardly any great movement in which "liquidation" (tasfiye) does not exist. Abdullah Öcalan, the General Secretary of the PKK, examined the characteristics of the liquidators and the destructive damage they caused in the struggle. He reveals his determination on this issue by declaring: 'I will not hesitate even if I have to sacrifice the whole party in order to liquidate one of them.' In this connection, a further success of the PKK is its never ceasing firm struggle against 'liquidation' (tasfiye). The PKK has revealed facts that almost no other revolutionary movement managed to do. This discipline and determination of the PKK may give an idea about its prospective system and the characteristics of its creators.' (*ibid* at para 11).
[236] *Ibid* at para 34. The court reasoned that 'freedom of expression requires that care be taken to dissociate the personal views of the writer of the commentary from the ideas that are being discussed or reviewed even though these ideas may be considered offensive to many or even to amount to an apologia for violence.'
[237] *Ibid* at para 36.
[238] *Hogefeld v Germany*, 20 January 2000.

the German left-wing terrorist movement Red Army Faction (hereinafter 'RAF'), who served a lifetime prison sentence for her involvement in several violent terrorist attacks. She challenged the decision by the German authorities not to allow her to be interviewed by press and radio journalists. The refusal to grant the interviews was based on Section 129a of the German Criminal Code, which prohibits the support and promotion of a terrorist organisation.[239] In the court's view, there was no violation of Article 10. This conclusion was reached after an examination of the applicant's statements made during her criminal trial. Those were found to be ambiguous: on the one hand, the applicant exhibited a critical attitude towards the strategy of the RAF in the eighties and also disapproved of certain terrorist attacks perpetrated by the RAF. But, on the other, she continued to identify herself with the aims and the ideology of the RAF, and continued to claim 'that our beginnings and our fight for a different world were at any time well-founded and justified, and that the fight has to be conducted as a confrontation'.[240] Although the court acknowledged that those declarations did not necessarily amount to a promotion of terrorist activity, interference with Article 10 interests was nevertheless justified. A decisive factor in reaching this conclusion was the applicant's personal history: as she was one of the main representatives of the RAF, her words could possibly be interpreted by supporters as an appeal to continue the activities of that organisation.[241]

iv. Teaching the Methods of Terrorism

In 1997 the US Department of Justice conducted a study on the availability of bomb-making information. The concluding report stated that

> anyone interested in manufacturing a bomb, dangerous weapon, or a weapon of mass destruction can easily obtain the detailed instructions from readily accessible sources, such as legitimate reference books, the so-called underground press, and the Internet.[242]

The report also established that in several crimes involving the use of explosives, the perpetrators relied upon such instructional information in manufacturing their devices.[243]

[239] *Ibid* at 4.
[240] *Ibid* at 6.
[241] *Ibid* at 6.
[242] US Dep't of Justice, Report on the Availability of Bombmaking Information, the Extent to Which Its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the United States Constitution (1997), see <http:/cryptome.org/abi.htm/> (accessed 4 October 2007) 1.
[243] *Ibid*.

There is indeed a vast amount of literature on the methods and tactics of terrorism. A classic example is William Powell's *The Anarchist Cookbook*.[244] More current titles include: *The Terrorist Handbook*, *The Home and Recreational Use of High Explosives*, *The Complete How-to-Kill Book* and *Guerrilla's Arsenal: Advanced Techniques for Making Explosives and Time-Delay Bombs*.[245] Books like these are readily available in libraries, bookshops and on the Internet. As the Department of Justice's report explained: 'Bombmaking information is literally at the fingertips of anyone with access to a home computer equipped with a modem.'[246] This section addresses the question whether attempts to place strictures on the dissemination of such instructional information can be justified under the free speech protections of the Constitution and the Convention.

The position of the highest courts on instructional speech remains unclear. There are occasional references in Supreme Court opinions to this type of speech. Thus, for instance, in his dissenting opinion in *Dennis*, Justice Douglas wrote that the 'teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality'.[247] The examples he included were, 'teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like'.[248] However, apart from such dicta, the court has never announced a specific doctrine regarding instructional speech.[249] In the absence of a specific constitutional standard, the question emerges whether the *Brandenburg* test applies to instructional speech. According to some commentators, the *Brandenburg* rule covers the teaching of terrorist methods.[250] Yet, others argue that current First Amendment law, including the *Brandenburg* incitement test, is poorly suited to confront the issue of instructional speech.[251] According to Eugene Volokh, for instance, a

[244] The Anarchist Cookbook was originally published in 1971. A recent edition was published in 1991 by Barricade Books.

[245] For references, see Emma Dailey, 'Rice v. Paladin Enterprises, Inc.: Does the First Amendment Protect Instruction Manuals on How to Commit Murder?' (1999) 6 *Villanova Sports and Entertainment Law Journal* 79; Theresa J Pulley Radwan, 'How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals' (1997) 8 *Seton Hall Constitutional Law Journal* 47, 62.

[246] See above n 242 at 6.

[247] *Dennis v United States*, above n 80 at 581.

[248] *Ibid*.

[249] Eugene Volokh, 'Crime-Facilitating Speech' (2005) 57 *Stanford Law Review* 1095, 1128.

[250] David B Kopel and Joseph Olson, 'Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation' (1996) 21 *Oklahoma City University Law Review* 247, 278.

[251] Several authors argue that *Brandenburg*'s protective standard is inappropriate in the context of civil liability. See, eg, S. Elizabeth Wilborn Malloy, 'Taming Terrorists But Not "Natural Born Killers"' (2000) 27 *Northern Kentucky Law Review* 81; Andrew B Sims, 'Tort

distinction should be made between 'persuasive speech' and 'crime-facilitating speech': the former persuades or inspires the reader or listener to commit harmful acts; the latter is giving people information that helps them commit harmful acts—acts that they probably already want to commit.[252] Although the lower courts have decided various cases involving crime-facilitating speech—ranging from speech facilitating tax evasion to bomb-making instruction—they have not reached a consistent result.[253]

One lower-court decision that received much attention is *Rice v Paladin Enterprises*.[254] While this is a civil, not a criminal case, the First Amendment issues may be of some relevance here. In *Rice*, the relatives and representatives of three murder victims brought civil wrongful death suits against Paladin Enterprises, the publishers of a book named *Hit Man: A Technical Manual for Independent Contractors*.[255] The book provides detailed, step-by-step instructions on how to kill someone, including information on constructing weapons, committing the murder and subsequently concealing the crime.[256] Contract killer James Perry closely followed the directions in *Hit Man* in preparing for the murder of two women and a child. After his conviction, the victims' families filed suits against the publisher for aiding and abetting in the commission of the murders through the publication of the book. In addressing Paladin's liability, the Maryland District Court applied the *Brandenburg* incitement test.[257] After a careful analysis of the language of the book and the circumstances surrounding the crime, it concluded that *Hit Man* did not satisfy the *Brandenburg* criteria:

Liability for Physical Injuries Allegedly Resulting form Media Speech: A Comprehensive First Amendment Approach' (1992) 34 *Arizona Law Review* 231.

[252] Volokh, above n 249 at 1102. Volokh gives the following definition of 'crime-facilitating speech': '(1) Any communication that, (2) intentionally or not, (3) conveys information that (4) makes it easier of safer for some listeners or readers (a) to commit crimes, torts, acts of war (or other act by foreign nations that would be crimes if done by individuals), or suicide, or (b) to get away with committing such acts. (*ibid* at 1103)'. Laura K. Donohue uses the term 'knowledge-based speech' to describe '[i]nformation on its face innocuous, but which can be used either for good or ill' (Donohue, 'Terrorist Spech', above n 60 at 271).

[253] For references see Volokh, above n 249 at 1129–30.

[254] *Rice v Paladin Enterprises*, 940 F Supp 836 (D Md 1996) rev'd, 128 F.3d 233 (4th Cir 1997).

[255] Rex Feral, *Hit Man: A Technical Manual for Independent Contractors* (Boulder, Paladin Press, 1983).

[256] The instructions provided in *Hit Man* are very detailed. See, eg, the following passage: 'Using your six-inch serrated blade knife, stab deeply into the side of the victim's neck and push the knife forward in a forceful movement. This method will half decapitate the victim, cutting his main arteries and wind pipe, ensuring immediate death'. (*ibid* at 58, quoted in Isaac Molnar, 'Resurrecting the Bad Tendency Test to Combat Instructional Speech: Militias Beware' (1998) 59 *Ohio State Law Journal* 1333, 1333)

[257] *Rice v Paladin Enterprises*, 940 F Supp 836 (D Md 1996).

> The Court finds that the book merely teaches what must be done to implement a professional hit. The book does not cross that line between permissible advocacy and impermissible incitement of crime or violence.[258]

Firstly, *Hit Man* failed to meet the intent requirement, as the publisher did not intend for Perry to commit the murders. Secondly, the book did not command immediate lawless action but merely contained abstract teaching of the methods to carry out such action:

> Nothing in the book says 'go out and commit murder now!' Instead the book seems to say, in so many words, 'if you want to be a hit man this is what you need to do.'[259]

Thirdly, the murder was not likely to occur as a result of the publication. In this respect, the court noted that in the ten years in which *Hit Man* was in circulation, only one person acted upon the information presented in the book.[260]

The victim's families appealed against the District Court's judgment, and the Fourth Circuit Court of Appeals ruled unanimously that the First Amendment does not protect the kind of speech involved in *Hit Man*.[261] Applying a line of criminal cases, the court held that the Constitution does not pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word.[262] The culpability in such cases, the court noted, 'is premised, not on defendants' "advocacy" of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes'.[263] According to the Fourth Circuit, Paladin aided and abetted in Perry's triple murder by providing detailed instructions on the techniques of murder. The fact that Paladin disseminated this information to a wide audience was irrelevant:

> Were the First Amendment to offer protection even in these circumstances, one could publish, by traditional means or even the internet, the necessary plans and instructions for assassinating the President, for poisoning a city's water supply, for blowing up a skyscraper or public building, of for similar acts of terror and mass destruction, with the specific, indeed even the admitted, purpose of assisting such crimes—all with impunity.[264]

[258] *Ibid* at 847.
[259] *Ibid*.
[260] For objections against this approach, see, eg, Radwan, above n 245 at 73 (arguing that a publisher's knowledge of the potential consequences of their actions should be sufficient to subject them to liability for causes of action with a lower level of intent).
[261] *Rice v Paladin Enterprises*, 128 F.3d 233 (4th Cir 1997).
[262] The court referred, inter alia, to *United States v Barnett*, 667 F.2d 835, 842 (9th Cir 1982) (holding that the First Amendment does not pose a bar against charges of aiding and abetting crime through publication and distribution of instructions for making illegal drugs).
[263] *Rice v Paladin Enterprises*, above n 261 at 246.
[264] *Ibid* at 246.

Although the Fourth Circuit agreed that the *Brandenburg* test applied, it held that the latter could not be read as to protect the type of speech involved in *Hit Man*. It noted that *Hit Man* was not 'abstract advocacy', but constituted

> the archetypal example of speech which, (…) methodically and comprehensively prepares and steels its audience to specific criminal conduct through exhaustively detailed instructions on the planning, commission, and concealment of criminal conduct.[265]

In the court's opinion, the District Court misinterpreted *Brandenburg*. It reasoned that the 'mere *abstract* teaching of principles', protected under *Brandenburg*, does not necessarily include the 'mere teaching' of criminal methods.[266] According to the court, the political and social discourse at issue in *Brandenburg* could not be compared with the speech found in *Hit Man*:

> [C]oncrete instructions and adjurations to murder stand in stark contrast to the vague, rhetorical threats of politically or socially motivated violence (…) rightly protected under *Brandenburg*.[267]

The Supreme Court declined to hear the *Paladin* case and it was eventually settled out of court.[268]

Thus far, the Strasbourg organs have not considered a case concerning the teaching of terrorist methods. Under its current approach, the court would be unlikely to read Article 10 as providing protection for the author or publisher of terrorist or other crime instructing manuals. Interference in this context is likely to be justified under paragraph 2, in the interest of national security, the prevention of crime and the protection of the rights of other. More difficult is to predict how such a result would be reached. To date, the court has confronted the issue of instructional speech in only one case. In *Palusinski v Poland*, it considered the criminal conviction of the publisher of a book called 'Narcotics—the Guide'.[269] The subtitle of the work ran as follows: 'Part 1: Soft Drugs. Marijuana—LSD 25—Mushrooms. History—Production—How to Use—Effects—Dangers.' At the outset of its judgment, the court rejected the respondent government's contention that the application amounted to an abuse of rights within the meaning of Article 17. Even though the views expressed were against the domestic anti-drugs policy, the court was not convinced that the applicant sought to employ Article 10 as a basis for a right to engage in

[265] *Ibid* at 255.
[266] *Ibid* at 263.
[267] *Ibid*.
[268] 118 S Ct 1515 (1998). For a critical discussion of the Fourth Circuit judgment, see, eg, Molnar, above n 256 (arguing that the *Paladin* decision resurrected the 'bad tendency' test).
[269] See *Palusinski v Poland*, 3 October 2006.

activities which are contrary to the text and the spirit of the Convention.[270] Nevertheless, the court declared the application inadmissible. Its tersely reasoned judgment gives little guidance as to the doctrinal footing of the decision. For example, no distinction was made between the persuasive and crime-facilitating elements of the book. In its proportionality assessment, the court drew attention to both the information in the book that was aimed at inducing readers to take narcotics and to the information making it easier to obtain and prepare narcotics.[271] No reference was made to the incitement to violence line of cases.

v. Concluding Remarks

The observation made earlier, that the Convention evidences a less protective and more flexible approach to the limitation of subversive and violent conductive speech, in contrast to the more categorical methods applied under the Bill of Rights, clearly transpires in respect of the limitation of terrorism-related speech. This is particularly true for the treatment of the crimes of incitement to terrorism and apology of terrorism. It will be apparent from the above that Article 10 leaves more freedom to lawmakers seeking to regulate these instances of terrorism-related speech than does the First Amendment. Whereas the categorical *Brandenburg* test leaves no room to specifically accommodate the difficulties associated with the struggle against terrorism, the Convention organs' balancing-oriented 'incitement to violence' standard allows decision-makers to take into account all the relevant circumstances, including the difficulties linked to the fight against terrorism, when considering restricting incitement and apology. It is more difficult to draw comparative conclusions as regard the restrictions on terrorist threats and the teaching of terrorist methods, as the Strasbourg organs have not yet grappled with these issues. The foregoing illustrates that the *Brandenburg* test has only a limited reach or no reach at all in these areas. Thus, rather than applying the incitement test, the Supreme Court appears to define the category of 'true threats' as falling wholly outside the scope of the First Amendment. In the Convention context, it is to be expected that the Contracting States will encounter few obstacles in dealing with these categories of terrorism-related speech under Article 10 s 2.

[270] *Ibid* at 9.

[271] *Ibid* at 12. (The court noted, inter alia, that '[t]he book offered very little if any information on the negative consequences of the use of those substances or on possible addictions', that it included 'instructions on how to obtain ingredients and how to prepare them', and that according to the book 'narcotics immediately cause pleasure (…) and (…) that taking the doses suggested by the accused is not going to cause any negative consequences for life and for health.')

V. TERRORISM AND THE MEDIA

A. Introduction

The tension between the right to freedom of expression and the interest in effectively fighting terrorism reaches its zenith when the government seeks to regulate the media coverage of terrorist activity: on the one hand, media reporting on matters of public interest traditionally receives strong protection under the free speech guarantees of the two declarations of rights studied; on the other hand, the media coverage of terrorist violence may have a direct adverse impact on the handling of ongoing terrorist incidents and the prevention of future terrorist violence.

The First Amendment states that 'Congress shall make no law (…) abridging the freedom (…) of the press'. Some First Amendment scholars have argued that the specific reference to the press entitles it to greater protection against governmental interference.[272] The most famous advocate of the Press Clause as a specific source of constitutional protection was former Supreme Court Justice Potter Stewart. According to Stewart, the primary purpose of the Press Clause is to create a 'fourth branch' of government as an additional check on the three official branches.[273] However, despite the explicit terms, most press claims have been analysed under the generally applicable free speech standards.[274] Turning to Article 10 of the Convention, no similar textual reference to the press can be found. Nevertheless, the freedom of the press occupies a special position in the Strasbourg organ's jurisprudence. The Court has consistently emphasised the essential function the press fulfils in a democratic society and its corresponding duty to impart information and ideas on all matters of public interest.[275] Because the press must be able to play a vital role as a 'public watchdog', the national margin of appreciation is circumscribed in cases involving the press.[276]

The effects of the media coverage of terrorism have been the subject of numerous surveys, conferences, and popular and scholarly contributions over the last decades.[277] Although the conclusions of these studies vary greatly, few experts would deny that terrorism and the media are in some

[272] For references, see Stone *et al*, *The First Amendment* (New York, Aspen Law & Business, 1999) 455 *ff*.

[273] Potter Stewart, 'Or the Press' (1975) 26 *Hastings Law Journal* 631, 633–4.

[274] See Gerald Gunther and Kathleen M Sullivan, *Constitutional Law* (Westbury, The Foundation Press, 1997) 1420–60.

[275] See, eg, *Jersild v Denmark*, above n 11 at para 31.

[276] *Bladet Tromso and Stensaas v Norway* Reports 1999-III (1999) para 59.

[277] For an overview of the academic literature on terrorism and the media see, eg, David L Paletz and John Boiney, 'Researchers' Perspectives' in David L Paletz and Alex P Schmid (eds), *Terrorism and the Media* (London, Sage Publications, 1992) 6–29.

way linked to each other. Most scholars see their relationship as a symbiotic one, each exploiting the other for its own benefit. The terrorist's use of the media will be no surprise if one recalls that the target of terrorism is often not the victim but the state authorities or the public at large (see above). To bridge the spatial gap between the victim and the target, a network of communication is needed, and the media, initially the mass-press but later the radio and television, have to some extent fulfilled that task.[278] Schmid and de Graaf identify not less than thirty contemporary terrorist uses of the news media, both active and passive.[279] For example, through the media terrorists communicate their message and create fear among their target group, attempt to mobilise wider support for their political cause, attract new members to their organisation, or incite the public against the state authorities. Conversely, the media takes advantage of terrorism to further its own commercial interests. Experts note that terrorist events unite all the ingredients of an exciting news-story: politics, crime, violence and theatre. Bruce Hoffman expounds this idea as follows:

> Indeed, in this key respect, the terrorists' and the networks' interests are identical: having created the story, both are resolved to ensure its longevity. The overriding objective for the terrorists is to wring the incident, while for the networks it is to squeeze from the story every additional ratings point that their coverage can provide.[280]

More important from a legal point of view, however, are the actual consequences of the publicity which terrorism receives in the media. Do the media provide the oxygen of publicity on which terrorism thrives, as former British Prime Minister Margaret Thatcher warned? Two schools of thought can be distinguished in this respect.[281] The first school maintains that the media coverage encourages terrorism (the so-called 'contagion' thesis). The media is accused of facilitating many of the terrorists' objectives, thus convincing others of terrorism's benefit.[282] According to Yonah Alexander, for instance, the result of the media coverage 'is the exportation of violent techniques which, in turn, often triggers similar extreme actions by other individuals and groups'.[283] Some authors go as far as to contend that without the media there would be no terrorism. At a

[278] Schmid and de Graaf, above n 27 at 17.
[279] Schmid and de Graaf, above n 27 at 53–4.
[280] Bruce Hoffman, above n 31 at 138.
[281] A Odasuo Alali and Kenoye Kelvin Alali (eds), *Media Coverage of Terrorism* (London, Sage Publication, 1991) 8.
[282] Paletz and Boiney, above n 277 at 10.
[283] Yonah Alexander, 'Terrorism, the Media and the Police' (1978) 32 *Journal of International Affairs* 101.

1986 conference, a journalist explained that media publicity is the terrorist's lifeblood: 'If the media were not there to report terrorist acts (…) terrorism as such would cease to exist.'[284] In a similar vein, former Prime Minister of Israel Benjamin Netanyahu posited that 'unreported, terrorist acts would be like the proverbial tree falling in the silent forest'.[285]

However, there is a significant group of scholars who do not believe in this direct relationship between the occurrence of terrorist events and the attention they receive in the news media.[286] An argument often made to counter the contagion thesis is that terrorism existed long before the mass media existed. In this respect, Paul Wilkinson refers to the so-called Assassins, a medieval Islam sect that succeeded in sowing terror in the Muslim world by relying solely upon rumours that spread around in the mosques and the market places.[287] Scholars who oppose the contagion theory also point out that so far no convincing evidence has been submitted that media publicity causes or affects the occurrence of terrorist activity.[288] Moreover, media attention is said to be a double-edged sword in that it provides terrorists with the publicity they need, but not always in a useful manner.[289]

In terms of the impact on public opinion, it is worth mentioning an empirical study conducted in the 1980's by the RAND Corporation, which focused on the public perception of terrorism. The results indicate that despite the media's continual attention to their activities, the public approval of terrorists was effectively zero.[290] Moreover, it is generally acknowledged that the depiction of terrorist violence in the media increases fear and concern for terrorist risks, which, in turn, fosters the public's willingness to sacrifice civil liberties for the sake of security. Thus, rather than undermining the existing regime, the media coverage of terrorism would have the effect of strengthening it.[291] The causal relation between

[284] John O'Sullivan, 'Deny Them Publicity' in Benjamin Netanyahu (ed), *Terrorism, How the West Can Win* (New York, Avon, 1996) 120.

[285] Benjamin Netanyahu, 'Terrorism and the Media' in Benjamin Netanyahu (ed), above n 284 at 109.

[286] See Alali and Alali (eds), above n 281 at 8.

[287] Paul Wilkinson, 'The Media and Terrorism: A Reassessment' (1997) 9 *Terrorism and Political Violence* 54.

[288] A Odasuo Alali and Kenoye Kelvin Alali (eds), above n 286 at 9.

[289] Bruce Hoffman, above n 31 at 154.

[290] Theo Downes-LeGuin and Bruce Hoffman, *The Impact of Terrorism on Public Opinion, 1988 to 1989* (Santa Monica, RAND Corporation, 1993), quoted in Bruce Hoffman, above n 31 at 144.

[291] G Gerbner, L Gross, N Signorielli, M Morgan and M Jackson-Beeck, 'The Demonstration of Power: Violence Profile No. 10' (1979) 29 *Journal of Communication* 177.

the public's risk assessments and their willingness to forgo civil liberties was again illustrated in a survey conducted after the September 11 terrorist attack in the United States.[292]

Whichever position one adopts in these discussions, it seems clear that there is a close relationship between terrorism and the media. Unsurprisingly, decision-makers and law enforcement authorities have frequently called for measures restricting and regulating the media reporting of terrorism-related speech and events. The following sections focus on some of the areas where there is a potential tension between freedom of the press and the prevention of terrorism: the publication of statements by terrorist organisations, the disclosure of terrorism-related information, prior restraint on terrorism-related media reporting, the protection of journalistic sources, access to information and media self-regulation and informal censorship.

B. Publication of Statements by Terrorist Organisations

The publication of manifestos, interviews, demands, threats and other messages in the print media is one example of the terrorist use of the news media.[293] Some of the terrorism-related speech cases discussed in the previous section concerned the dissemination by the press of declarations made by members of a terrorist organisation.[294] In *Sürek and Özdemir v Turkey*, the European Court considered the convictions of the owner and the editor-in-chief of a weekly review entitled *The Truth of News and Comments*.[295] The review published two interviews with a senior figure in the PKK, as well as a joint statement issued on behalf of four illegal political organisations. Similarly, *Özgür Gündem v Turkey* involved newspaper publications of reports and declarations of PKK-related organisations, statements and interviews with PKK commanders, including its leader Abdullah Öcalan.[296] In both cases the court stressed the essential role played by the press:

> While the press must not overstep the bounds set, inter alia, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless

[292] W Kip Viscusi and Richard J Zeckhauser, 'Sacrificing Civil Liberties to Reduce Terrorism Risk' (2003) 26 *Journal of Risk and Uncertainty* 99.

[293] The related issue of radio and television broadcasting of such information is discussed below.

[294] Most cases arose under Section 6 of the Turkish Prevention of Terrorism Act 1991, which makes it an offence 'to print or publish declarations or leaflets emanating from terrorist organizations'. See, eg, *Sürek and Özdemir v Turkey*, above n 126 at para 23.

[295] *Sürek and Özdemir v Turkey*, above n 126.

[296] *Özgür Gündem v Turkey*, above n 202.

> incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them.[297]

The approach taken in these two cases is testament to the fact that the court's general 'incitement to violence' standard is equally applicable to media publications of statements by terrorists. The mere fact that the interviews or declarations are given by or emanate from members of a proscribed terrorist organisations, does not in itself justify an interference with the journalist's right to freedom of expression.[298] Nevertheless, when considering the circumstances surrounding an expression, the court is sensitive to the fact that views dispersed through the media may have a greater impact on national security than views made public by other means.[299] Moreover, the court has not hesitated to underline the duties and responsibilities that accompany the exercise of the right to freedom of expression by media professionals contemplating the publication of statements by terrorist organisations:

> [P]articular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence.[300]

In *Sürek and Özdemir v Turkey* the text of the impugned interview could not be seen as inciting violence and hatred. In the court's opinion, statements such as 'the war will go on until there is only one single individual left on our side' or 'they want to annihilate us' had a newsworthy content because they demonstrated the PKK's determination and refusal to compromise.[301] The publications of such statements allows the public 'both to have an insight into the psychology of those who are the driving force behind the opposition (…) and to assess the stakes involved in the conflict'.[302] It is interesting to compare this case with *Sürek (No 3)*, which dealt with an editorialising news commentary published in the same weekly review.[303] The impugned editorial comment described the Kurdish liberation struggle as 'a war directed against the forces of the Republic of Turkey'.[304] This time the court was prepared to read the text as an

[297] *Sürek and Özdemir v Turkey*, above n 126 at para 58; *Özgür Gündem v Turkey*, above n 202 at para 58.
[298] *Sürek and Özdemir v Turkey*, above n 126 at para 61; *Özgür Gündem v Turkey*, above n 202 at para 63. Settled case law: see, eg, *Capan v Turkey*, 25 July 2006, paras 41–2; *Halis Dogan v Turkey (No 2)*, 25 July 2006, paras 37–8.
[299] See, eg, *Polat v Turkey*, above n 126 at para 47
[300] *Sürek and Özdemir v Turkey*, above n 126 at para 63.
[301] *Ibid* at para 61.
[302] *Ibid* at para 61.
[303] *Sürek v Turkey (No 3)*, above n 127.
[304] *Ibid* at para 40.

incitement to violence. According to Iain Cameron, a comparison of both cases suggests that it is permissible for journalists to pose neutral questions to terrorists, thereby offering them a forum to propagate their ideas, but that it is not allowed for them to associate themselves with a terrorist organisation or to call for the use of terrorist violence in an editorial.[305] Nevertheless, in the court's opinion, a general requirement for journalists systematically and formally to distance themselves from the content of a quotation considered to be a threat to national security, is irreconcilable with the press's role of providing information on current events, opinions and ideas.[306]

The Supreme Court has not addressed the constitutionality of possible efforts to outlaw the publication of statements, made by terrorists, by the press. However, it is difficult to imagine that sanctions against journalists for the publication of interviews with, or declarations from, members of terrorist organisations would meet the *Brandenburg* criteria.[307] Even where media reports would have the effect of inciting imminent terrorist violence that is likely to occur, journalists and other media professionals do not usually intend to incite such violence.[308]

C. Disclosure of Terrorism-Related Information

Lawmakers in the United States and several Council of Europe Member States enacted legislation criminalising the release of (non-public) government information.[309] The offence of revealing the names of intelligence officers can serve as an example here. In the United States, for instance, the Intelligence Identities Protection Act 1982 prohibits any person

> with reason to believe that such activities would impair or impede the foreign intelligence activities (…), [to disclose] any information that identifies an individual as a covert agent, [if the disclosure is part of a] pattern of activities intended to identify or expose covert action.[310]

[305] Cameron, above n 98 at 394. See also *Jersild v Denmark*, above n 11.

[306] *Özgür Radyo-Ses Radyo Televizyon Yayin Yapim Ve Tanitim A S v Turkey*, 30 March 2006, para 82.

[307] See Paul Hoffman and Kate Martin, 'Safeguarding Liberty: National Security, Freedom of Expression and Access to Information: United States of America' in Sandra Coliver *et al* (eds), *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (Leiden/Boston, Martinus Nijhoff Publishers, 1999) 477, 485.

[308] For a discussion of the regulation of radio and television broadcasting under *Brandenburg*, see below.

[309] For references, see Sandra Coliver, 'Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information' in Sandra Coliver *et al* (eds), above n 307 at 63–9.

[310] Pub. L. 97–200, 96 Stat. 122, 50 USC s 421. See Paul Hoffman and Kate Martin, above n 307 at 494.

A comparable provision from the European continent is Section 6 of the Turkish Prevention of Terrorism Act 1991, which makes it a crime

> to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.[311]

The court in Strasbourg reviewed a conviction under Section 6 of the Prevention of Terrorism Act 1991 in *Sürek v Turkey (No 2)*.[312] Mr Sürek, the major shareholder of a weekly review, was charged with revealing the identity of officials mandated to fight terrorism and thus rendering them terrorist targets. The impugned news report provided information given at a press conference by two former MPs and a British human rights delegation. The publication reported the Governor of Sirnak as having told the delegation that the Sirnak Chief of Police had given the order to open fire against the people.[313] The publication also quoted a former MP stating a named gendarme commander who had told another former MP: 'Your death would give us pleasure. Your blood would not quench my thirst.'[314]

To begin with, the court observed that

> [a]lthough the statements were not presented in a manner which could be regarded as incitement to violence against the officers concerned or the authorities, they were capable of exposing the officers to strong public contempt.[315]

In view of the sensitive security situation in south-east Turkey, the applicant's conviction could therefore be seen as pursuing a legitimate aim under Article 10 s 2. As regards the necessity of the measures, the court first observed that the contested interference related to journalistic reporting of statements made by politicians to the press.[316] The court went on to hold that, assuming that the assertions were true, 'the public had a legitimate interest in knowing not only the nature of the conduct but also the identity of the officers'.[317] Lastly, the court had regard to the fact that the information in question was already in the public domain, as the news reports had already been published in other newspapers.[318] These considerations led the court to conclude that there had not been a fair balance between the freedom of the press and the interest in protecting the identity of the security officials.[319] In other words, the decision reached in *Sürek (No 2)* suggests that under Article 10 the interest in protecting the identity

311 See, eg, *Sürek v Turkey (No 2)*, above n 126, para 16.
312 *Ibid*.
313 *Ibid* at para 10.
314 *Ibid* at para 37.
315 *Ibid* at para 37.
316 *Ibid* at para 39.
317 *Ibid*.
318 *Ibid* at para 40.
319 *Ibid* at para 42.

of security officials should be weighed against the duty of the press to inform the public on the activities of security agencies.[320]

The Supreme Court has never considered a similar case. A First Amendment decision that is worth mentioning here is *Haig v Agee*, which was decided before the Intelligence Identities Protection Act was adopted.[321] The applicant was an American citizen and former employee of the Central Intelligence Agency (CIA). At a press conference Agee announced his intention 'to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating'.[322] He then engaged in activities abroad that resulted in the identification of undercover agents and violence against the persons and organisations involved. As a response to his actions, the US Secretary of State revoked Agee's passport. Agee challenged this measure, reasoning that the revocation of his passport violated his First Amendment rights. In his opinion, the Secretary of State's action was intended to penalise his exercise of freedom of speech and deter his criticism of the government's policies and practices. The Supreme Court rejected this claim, observing that the obstruction of intelligence operations and the recruiting of intelligence personnel is 'clearly not protected by the Constitution'.[323] In reaching its decision, the court recalled its earlier decision in *Near v Minnesota ex rel Olson*, where it was observed that

> [n]o one would question that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.[324]

D. Prior Restraint on Terrorism-Related Media Reporting

Prior restraint is perhaps the most far-reaching interference with the dissemination of terrorism-related speech in the media. Prior restraint can take a variety of forms. The second part of this section is concerned with prior restrictions on the publication of information in the print media. The related issue of broadcasting bans is explored separately in the third part.

[320] For a similar reasoning, see, eg, *Özgür Gündem v Turkey*, above n 202 at paras 66–8.
[321] *Haig v Agee*, 453 US 280 (1981).
[322] *Ibid* at 283.
[323] *Ibid* at 309.
[324] *Ibid* at 308. See *Near v State of Minnesota ex rel Olson*, 283 US 697, 716 (1931) (for a discussion of this case see below).

The section begins with a brief introduction to the general principles governing prior restraint in both jurisdictions.

i. General Standards

Although restrictions in advance of publication or broadcasting are not prohibited per se under Article 10 and the First Amendment, cases from both systems demonstrate the high level of scrutiny that prior restraint must be given. The Supreme Court has constantly held that there is a heavy presumption that prior restraint on media publication is constitutionally invalid.[325] In a case concerning the pre-trial coverage of criminal proceedings, it indicated that the presumption may be overcome only upon showing that (1) no other measures, less restrictive of freedom of speech, would be likely to mitigate the harmful effects of unrestrained pre-trial publicity, and (2) the restraining order would be effective.[326] Similarly, in the national security context, prior restraint has been held to be justified only in exceptional circumstances. According to Justice Stewart in *New York Times Co v United States* (also known as the Pentagon Papers case), prior restraint is permitted if publication would 'surely' result in 'direct, immediate, and irreparable damage to the nation or its people'.[327] *New York Times Co* concerned the government's request for a prior restraint against the publication of extracts from a classified study entitled 'History of U.S. Decision-Making Process on Vietnam Policy' in the *New York Times* and the *Washington Post*. Despite the government's argument that publication of the materials would cause harm to national security and jeopardise the lives of soldiers, the court struck down the injunction to prevent the publication. The court's three-paragraph per curiam opinion did however not define the precise circumstances in which a court may enjoin the publication of information relating to national security.[328] A case that shows that protection against prior restraint must sometimes give way to national security interests is *Near v Minnesota ex rel Olson*.[329] In this case it was held that that prior restraint can be justified in 'exceptional cases'.[330] In a statement of dicta, the Court observed that

[325] See, eg, *Organization for a Better Austin v Keefe*, 402 US 415, 419 (1971).
[326] *Nebraska Press Assn v Stuart*, 427 US 539, 562 (1976).
[327] *New York Times Co v United States*, 403 US 713 (1971).
[328] One of the Justices who voted for allowing disclosure opined that 'the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases' (*ibid* at 731, White, J, concurring). Justices Black and Douglas took an absolutist view of the First Amendment protection against prior restraint, arguing that there are practically no situations in which it can be justified (*ibid* at 715–19, 720).
[329] *Near v State of Minnesota ex rel Olson*, above n 324.
[330] *Ibid*.

> no one would question that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.[331]

Article 10, like the First Amendment, does not contain an absolute ban on prior restraint. This is evidenced by the words 'conditions', 'restrictions' and 'prevention' in the second paragraph of Article 10. Nonetheless, as the Court held in *Observer and Guardian v United Kingdom*, 'the dangers inherent in prior restraint are such that they call for the most careful scrutiny (…), especially (…) as far as the press is concerned'.[332] The case concerned an injunction to stop the publication of excerpts from the book *Spycatcher*, written by a retired member of the British security service. The respondent government argued that publication could undermine the interest of preserving the secrecy of confidential information. The book dealt with the operational organisation, methods and personnel of the secret service, and also gave an account of alleged illegal activities by the secret service. In the court's opinion, the interim injunction was justified on the grounds of national security prior to July 1987. However, the injunctions could not be deemed necessary in the period after July 1987, because by then the book had become widely available to the public, destroying the confidentiality of the material. The case demonstrates that the court's assessment of prior restraint partially depends on the effectiveness of the attempted suppression of information: an injunction must at least have the effect to protect information that is still confidential at the time it is issued.[333]

ii. Prior Restraint and the Print Media

Only a few cases can be noted in which the courts have considered prior restrictions on terrorism-related publications in the print media. Moreover, with the advent of the Internet, in a time when it has become much harder to prevent the dissemination of information, it will be very difficult to justify prior censorship as an affective measure.[334] It is nevertheless worth mentioning a number of cases which are relevant in the present context, one of which arose under the First Amendment, the others under Article 10.

A highly publicised First Amendment case is *United States v Progressive*, decided in 1979.[335] In this case Federal District Judge Robert Warren issued an injunction restraining the publication of an article entitled 'The

[331] *Ibid*.
[332] *Observer and Guardian v UK*, above n 99 at para 60.
[333] See also *Vereniging Weekblad Bluf! v Netherlands* Series A no 306-A (1995).
[334] Cameron, above n 98 at 380.
[335] *United States v Progressive, Inc*, 467 F Supp 990 (DC Wis, 1979).

H-Bomb Secret: How We Got It, Why We're Telling It' in an issue of the magazine *The Progressive*. The article brought together information on how to manufacture a hydrogen bomb, allegedly gathered from the public domain. The government sought to prevent its publication through a preliminary injunction based on the 1954 Atomic Energy Act. In Judge Warren's opinion, the government had 'met the test enunciated by two Justices in the *New York Times* case, namely grave, direct, immediate and irreparable harm to the United States'.[336] Moreover, the publication of the technical information on a hydrogen bomb was found to be analogous to the publication of troop movements or locations in time of war, and therefore fell within the narrow exception to the principle against prior restraint announced in *Near v Minnesota*. Interestingly, the District Judge analysed the case as a conflict between freedom of speech and the right to life:

> While it may be true in the long-run (…) that one would prefer death to life without liberty, nonetheless, in the short-run, one cannot enjoy freedom of speech, freedom to worship or freedom of the press unless one first enjoys the freedom to live. Faced with a stark choice between upholding the right to continued life and the right to freedom of the press, most jurists would have no difficulty in opting for the chance to continue to breathe and function as they work to achieve perfect freedom of expression.[337]

Although the District Court acknowledged that a preliminary injunction could seriously interfere with First Amendment rights, it continued to hold that 'a mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all'.[338] Judge Warren attached special weight to two further facts in reaching the conclusion that the prior restraint was justified. First, the article combined data vital to the operation of a hydrogen bomb, which were, at the time, not found in the public realm. Secondly, there was no convincing reason why the public needed to be informed about the technical details to carry on an informed debate on the danger of nuclear weapons. While an appeal against the injunction was pending, essentially the same information was published in another newspaper, rendering prior restraint useless. Consequently, the government decided to dismiss the case against *The Progressive*.[339]

[336] *Ibid* at 996.
[337] *Ibid* at 995.
[338] *Ibid* at 996.
[339] For a discussion of this case see, eg, LA Powe, 'The H-Bomb Injunction' (1990) 61 *University of Colorado Law Review* 55.

The major terrorism-related prior restraint case in the Convention context is *Cetin and others v Turkey*, decided in 2003.[340] At issue was a ban on the publication and distribution of a daily newspaper imposed by the governor of the state of emergency, in a region where such an emergency had been declared. Despite the Court's willingness to take into account the difficulties inherent in the fight against terrorism in the provinces concerned, the publication ban was found to violate Article 10. Although the court recalled that prior restrictions are not, in principle, incompatible with the Convention, it continued to hold that such measures may only be imposed 'if a particularly strict framework of legal rules regulating the scope of bans and ensuring the effectiveness of judicial review to prevent possible abuse is in place'.[341] In the present case these conditions were not met. To begin with, the Turkish legislation at the root of the ban granted the governor very broad powers to impose administrative bans in order to ensure public order in the region.[342] Secondly, and more importantly, the courts were not empowered to review the administrative bans, thus depriving the applicants of sufficient safeguards against abuse.[343] The court observed, in this connection, that in the absence of detailed reasoning accompanied by proper judicial scrutiny, the decision to impose the ban was open to various interpretations. It could, for instance, be perceived as an attempt to cut off the newspapers' criticism of the security forces' operations in the region.[344] In view of these concerns, the court concluded that the publication ban did not meet the democratic necessity test. The same approach was taken in *Halis Dogan and others v Turkey*, which concerned a similar ban imposed by the governor of the state of emergency. An additional issues taken into consideration in this case was the fact that there had been no indication that the newspaper in question had been 'likely to impart ideas of violence and rejection of democracy, or had had a potentially damaging impact that warranted its prohibition'.[345]

[340] *Cetin and others v Turkey* Reports 2003-III (2003). The approach taken is this case has been confirmed in subsequent judgments. See, eg, *Halis Dogan and others v Turkey*, 10 January 2006, paras 19–30; *Mehmet Emin Yildiz and others v Turkey*, 11 April 2006, paras 17–21.

[341] *Ibid* at para 59.

[342] *Ibid* at para 58 and 60 (the governor of the state of emergency was empowered to prohibit the circulation of any written material considered liable seriously to undermine public order in the region, cause agitation among the local population or obstruct the security forces).

[343] *Ibid* at para 61.

[344] *Ibid* at para 63.

[345] See *Halis Dogan and others v Turkey*, above n 340 at para 28.

iii. Broadcasting Bans

a. Introduction

Broadcasting bans are treated separately here because radio and television broadcasting take a special position under the European Convention and the American Constitution. The first paragraph of Article 10 states that the right to freedom of expression shall not prevent the Contracting States from requiring the licensing of broadcasting, television or cinema enterprises. However, the court gave a narrow interpretation of that sentence in *Groppera Radio AG and others v Switzerland*.[346] It ruled that the purpose of the licensing provision must be considered in the context of Article 10 as a whole. Consequently, Article 10 s 1 does not entail that broadcasting regulations would not be subject to the requirements of Article 10 s 2. Nevertheless, the court acknowledges the special characteristics of the broadcasting media. For example, in *Jersild v Denmark*, it emphasised that 'the audiovisual media have often a much more immediate and powerful effect that the print media'.[347] In the United States, broadcasting is traditionally subject to greater regulation than the print media. Over time, the Supreme Court has put forward different arguments to justify the special position broadcasting takes under the First Amendment, ranging from the 'scarcity' rationale[348] over 'the uniquely pervasive presence that medium occupies in the lives of our people',[349] to the fact that broadcasting 'is uniquely accessible to children'.[350]

b. Standards of the European Convention

In their attempts to fight the terrorist activities linked to the conflict in Northern Ireland, both the British and the Irish governments resorted to broadcasting bans to prevent the dissemination of terrorism-related information. The measures were upheld by the European Commission in *Purcell v Ireland* and *Brind v United Kingdom*.[351]

Purcell and others v Ireland

Section 31 of the Irish Broadcasting Authority Act of 1960 empowered the competent Minister to issue an order to refrain from broadcasting 'a

[346] *Groppera Radio AG & others v Switzerland* Series A no 173 (1990).
[347] *Jersild v Denmark*, above n 11 at para 31.
[348] See *Red Lion Broadcasting Co v FCC*, 395 US 367 (1969).
[349] See *FCC v Pacifica Foundation*, 438 US 726, 728 (1978).
[350] *Ibid*.
[351] *Purcell et al v Ireland* Application no 15404/89, 70 *DR* 262 (1991); *Brind and others v UK* Application no 18714/91, 77 *DR* 42 (1994).

particular matter or any matter of a particular class' that would 'likely promote, or incite to, crime or would tend to undermine the authority of the State'.[352] The constitutional validity of Section 31 and the ensuing broadcasting orders was highly contested. In 1982, the Irish Supreme Court put an end to the legal controversy, holding that Section 31 did not violate the free speech guarantees in Article 40.6.1 of the Irish Constitution.[353] In reaching its conclusion, the court relied on the duties conferred upon the state in the second paragraph of Article 40.6.1.[354] Justice O'Higgins stated for the Court that

> it is clearly the duty of the State to intervene to prevent broadcasts on radio or television which (…) would be likely to have the effect of promoting or inciting to crime or endangering the authority of the State.[355]

The specific order challenged before the European Commission restricted the broadcasting of interviews or reports of interviews with members of certain listed organisations, as well as broadcasts made by or on behalf of the organisation Sinn Fein.[356] Likewise, broadcasts advocating, offering or inviting support for Sinn Fein were prohibited. In order to comply with the terms of the order, Radio Telefis Eireann (the official Irish broadcasting station) issued detailed guidelines to its staff. The applicants in Strasbourg, consisting of a group of journalists, producers of radio and television programmes, and two unions, argued that Section 31 violated Article 10 of the Convention. In their submissions to the Commission, the applicants claimed that the broadcasting ban undermined their 'professional morale

[352] *Purcell et al v Ireland*, previous n at 265.

[353] See *The State (Lynch) v Cooney*, [1982] IR 337; *O'Toole v RTE (No 2)*, [1993] ILRM 458.

[354] The second para of Art 40.6.1 runs as follows: 'The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticisms of Government policy, shall not be used to undermine public order or morality of the authority of the State.'

[355] *The State (Lynch) v Cooney*, above n 353 at 361. However, in *O'Toole v RTE (No 2)* the Irish Supreme Court held that the exclusion of a member of Sinn Fein from a discussion programme about a particular industrial dispute, was a breach of s 31: 'Someone speaking on an innocuous subject on the airwaves, even though he is a member of an organisation which includes in its objects a desire to undermine public order or the authority of the State, is neither outside the constitutional guarantee of freedom of expression nor is he within the ministerial order.' (*O'Toole v RTE (No 2)*, above n 353 at 467). See also *Brandon Book Publishers Ltd v RTE*, [1993] ILRM 806 (concerning a radio advertisement carrying the voice of Sinn Fein president Gerry Adams). For a discussion of the Irish cases, see, eg, Caroline Banwell, 'The Court's Treatment of the Broadcasting Bans in Britain and the Republic of Ireland' (1995) 16 *Media Law & Practice* 21; Gerard Hogan, 'The Demise of the Irish Broadcasting Ban' (1995) 1 *European Public Law* 69.

[356] *Purcell et al v Ireland*, above n 351 at 265. The listed organizations were: The Irish Republican Army, Sinn Fein, Republican Sinn Fein, Ulster Defence Association, Irish National Liberation Army and any organisation proscribed in Northern Ireland.

and competence'.[357] In addition, the applicants argued that the wording of the Section 31 order lacked the requisite precision to be 'prescribed by law' within the meaning of Article 10 s 2.

The Commission agreed that the order amounted to an interference with the applicants' Article 10 right to receive and impart information or ideas. Although the order was not directly addressed to the applicants, it nevertheless produced 'serious effects on (…) [their] work as journalists and producers, by virtue of the guidelines issued by their employer which they have to observe'.[358] The claim that the interference was not 'prescribed by law' was rejected. In the Commission's opinion, the consequences of the order were sufficiently foreseeable, as it described in great detail 'not only the kind of material to which it applies but also the manner in which such material may be conveyed'.[359] As to the legitimacy of the interference, the Commission noted that the applicants did not attempt to deny the seriousness of the terrorist threat in Ireland and the involvement of the groups enumerated in the order. Even though Sinn Fein itself was not proscribed, it condoned the terrorist activities of the enumerated organisations, and was closely associated with them. The central question was therefore whether the broadcasting restrictions were 'necessary in a democratic society'. In applying the democratic necessity test, the Commission acknowledged the difficulty of striking a fair balance between the competing interests at stake:

> In a situation where politically motivated violence poses a constant threat to the lives and security of the population and where advocates of this violence seek access to the mass media for publicity purposes, it is particularly difficult to strike a fair balance between the requirements of protecting freedom of information and the imperatives of protecting the State and the public against armed conspiracies seeking to overthrow the democratic order which guarantees this freedom and other human rights.[360]

[357] The applicants gave the following examples of the impact of the order: 'The restrictions prevent RTE staff from giving a balanced account of many events as they are happening. During elections' campaigns RTE staff are not permitted to interview candidates (…); Restrictions on coverage of Sinn Fein candidates, notwithstanding that Sinn Fein is a lawful political party in Ireland, mean that journalists could not cover press conferences live but could only read out press statements afterwards. This prevented the applicants from challenging the candidates on their campaign manifesto (…); Even programmes critical of Sinn Fein are subject to the restrictions under the Section 31 Order. Thus in a television programme reporting on the morality of voting for Sinn Fein it was not possible to interview anybody from Sinn Fein itself to represent their views in a panel discussion (…).'(*Purcell et al v Ireland*, above n 351 at 269–71).

[358] *Ibid* at 275.

[359] *Ibid* at 277.

[360] *Ibid* at 279.

This being said, the Commission concluded that, 'on balance', the Irish measures were not incompatible with Article 10 s 2.[361] In weighing the various interests at stake, the members of the Commission attached particular importance to the limited scope of the restrictions imposed on the journalists. In its opinion, the order did not refer to the contents of radio and television programmes. Rather than prohibiting media reporting on the activities of the organisations involved, the order sought to prevent that representatives of known terrorist organisations and their political supporters would use live broadcasts as a platform for advocating their cause, encouraging support for their organisations, and conveying the impression of their legitimacy.[362] In this connection, the Commission also took into account the special nature of broadcasting:

> In contemporary society radio and television are media of considerable power and influence. Their impact is more immediate that that of the print media, and the possibilities for the broadcaster to correct, qualify, interpret or comment on any statement made on radio or television are limited in comparison with those available to journalists in the press. Live statements also involve a special risk of coded messages being conveyed, a risk which even conscientious journalists cannot control within the exercise of their professional judgement.[363]

Brind and others v United Kingdom

In the United Kingdom, a comparable broadcasting ban was imposed in 1988. The British ban took the form of two orders: one issued to the British Broadcasting Corporation (BBC); the other to the Independent Broadcasting Authority (IBA).[364] The orders prohibited both organisations from broadcasting 'any words spoken, whether in the course of an interview or discussion or otherwise' by a member of a listed organisation.[365] In an explanatory letter to the BBC, the Home Office clarified that the orders applied only to direct statements and not to reported speech. In other words, the showing of a film or a still picture of the speaker, together with a voice-over account of her statement, remained permitted.[366] The government gave several reasons to justify the restrictions. Their purpose was, inter alia, to prevent viewers and listeners from being offended by

[361] *Ibid*.
[362] *Ibid*.
[363] *Ibid* at 279–80.
[364] *Brind and others v UK*, above n 351 at 76. (The orders were authorised under powers conferred on the Home Secretary in a 'Licence and Agreement' of 2 April 1981 in respect of the BBC, and under s 29 of the Broadcasting Act 1981 in respect of the IBA.)
[365] *Ibid* at 76–7. The organisations referred to were: '(a) any organisation which is for the time being a proscribed organisation for the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978; and (b) Sinn Fein, Republican Sinn Fein and the Ulster Defence Association.'
[366] *Ibid* at 77.

members and supporters of terrorist organisations, to avoid undeserved publicity for terrorists appearing in the media and to protect those at whom the statements are directed from intimidation.[367]

A television producer, several journalists, and a number of other applicants complained that the impugned measures constituted a continuing interference with their right to impart and receive information.[368] As to the question of the necessity of the interference, the applicants primarily challenged the proportionality of the broadcasting restrictions. In their submissions, the journalists drew attention to the far-reaching consequences of non-compliance with the Home Secretary's directions—namely the loss of the right to broadcast—and the lack of any convincing evidence that the restrictions would in fact further the fight against terrorism.[369] The journalists also warned for the substantial chilling effect of the ban: due to the far-reaching consequences of failure to comply, broadcasters would tend to err on the safe side.[370] In response, the government pointed out that the restrictions at issue were less onerous than those upheld in *Purcell*. In addition, the government called for a wide margin of appreciation, considering the extensive experience of the executive and the legislator in countering terrorist violence.[371]

The European Commission had little difficulty in holding that the order amounted to an interference with Article 10 s 1.[372] In this respect, particular regard was had to the essential role of journalists and broadcasters in channelling news and information about political movements to the public. In the Commission's opinion, the interference was 'prescribed by law' and perused legitimate aims.[373] Finally, for much of the same reasons as in *Purcell*, the Commission found the measures not to be disproportionate. A crucial factor in the Commission's application of the necessity test was again the limited impact of the interference. The extent of the impugned measures was limited in that they did not restrict the words that could be spoken and the images that could be shown:

> The Commission accepts that it must be inconvenient for journalists to have to use the voice of an actor for the broadcasting of certain interviews, and

[367] See Lord Ackner in *R v Secretary of State for the Home Department, Ex p Brind* [1991] 2 WLR 588, at 599, quoted in Banwell, above n 355 at 25.

[368] For instance, as a result of the impugned measures several interviews with Gerry Adams and other Sinn Fein spokesmen could not be transmitted. Also, historical programmes were refused repeat showings because they contained historical documentary footage of notable Irish leaders who were past members of the IRA or Sinn Fein. Even a record made by the Irish Folk group 'The Pogues' was banned form radio broadcasting on the ground that its lyrics were supportive of the IRA. See *Brind and others v UK*, above n 351 at 79.

[369] *Ibid* at 80.

[370] *Ibid*.

[371] *Ibid* at 83.

[372] *Ibid* at 80.

[373] *Ibid* at 82.

> appreciates that the logic of the continuation of the directions is not readily apparent when they appear to have very little real impact on the information available to the public. The very absence of such impact is, however, a matter the Commission must bear in mind in determining the proportionality of the interference to the aim pursued.[374]

In reaching its conclusion, the Commission was also prepared to take into account the special nature of the struggle against terrorism, which it considered to be a very important area of domestic policy.[375] In sum, the British Broadcasting ban was not in breach of Article 10, in view of both its limited impact and the margin of appreciation left to the national authorities. A similar conclusion was reached in *McLaughlin v United Kingdom*, a case decided the same day.[376]

Subsequent Developments

The Irish and British Broadcasting bans were lifted in 1994. From the moment of their adoption, the broadcasting bans were highly controversial in both countries. Critics have drawn on a range of arguments to denounce the measures. A recurring issue is their counterproductivity. For instance, Gerard Hogan explains that one of the main reasons why the Irish ban was ultimately lifted was that it offered terrorists the opportunity to attack the state as being undemocratic, while at the same time enabling them to avoid media scrutiny.[377] Caroline Banwell criticises the British ban as both futile and pointless:

> If anything it gives greater publicity to those it seeks to affect because of the advantage that broadcasters have taken of the 'lip-synching' technique. (…) [The ban] had the effect of making the UK appear bigoted and tyrannical.[378]

In 1993, the Irish restrictions were subject to criticism by the United Nations Human Rights Committee in its Report on Ireland. In the Committee's opinion, the ban was in breach of Article 19 of the International Covenant of Civil and Political Rights:

> [T]he prohibition on interviews with certain groups outside the borders by the broadcast media infringes upon the freedom to receive and impart information under Article 19 § 2 of the Covenant.[379]

It remains to be seen whether the court, if faced with similar restrictions on the broadcasting media, will take the same stance as the Commission. The

[374] *Ibid* at 83.
[375] *Ibid* at 83–4.
[376] *McLaughlin v UK* Application no 18759/91, 77 *DR* 42 (2005).
[377] Hogan, above n 355 at 77.
[378] Banwell, above n 355 at 29.
[379] Quoted in Hogan, above n 355 at 75, fn 29.

court has on various occasions held that the mere fact that an interview is given by a leading member of a terrorist organisation cannot, in itself, justify an interference with the right to freedom of expression of the journalist.[380] As the court posited in *Sürek and Özdemir v Turkey*, the public has a legitimate interest in gaining an 'insight into the psychology of those who are the driving force behind the opposition (…) and to assess the stakes involved in the conflict'.[381] To be sure, these cases involved criminal convictions for publications in the print media. Broadcasters traditionally receive reduced Article 10 protection: in view of the potential impact of the broadcasting media, the latter may be regulated in ways the print media may not.[382] Thus, in *Cetin and others v Turkey*, the court distinguished prior restrictions on the publication of a newspaper from the facts found in *Purcell* and *Brind*, noting that the broadcasting media's impact is often 'far more immediate and powerful than that of the press'.[383] Yet, the court's approach in *Cetin* also suggests that, whatever the type of media involved, prior restrictions may only be imposed 'if a particularly strict framework of legal rules regulating the scope of bans and ensuring the effectiveness of judicial review to prevent possible abuse is in place'.[384] Finally, although not prior-restraint cases sticto sensu, mention should be made of two decisions concerning a one-year withdrawal of a permission to broadcast on account of failure to comply with the broadcasting regulations.[385] The sanctions were imposed by a Turkish government agency in response to violations of a prohibition to broadcast material which incites to hate, violence, terrorism and discrimination. Applying its general incitement to violence standard, the Strasbourg Court declined to find a violation in one case, but denounced the measures in the other case.[386]

c. Standards of the US Constitution

Since no regulations similar to the Irish and British broadcasting bans have been adopted in the United States, one can only speculate on how such measures would be dealt with under the First Amendment. First of all, it is interesting to observe that, despite the special status conferred upon the broadcasting media, there are no precedents suggesting a more lenient standard of scrutiny regarding criminal or civil sanctions of subversive and

[380] *Sürek and Özdemir v Turkey*, above n 126 at para 61.
[381] *Ibid*.
[382] *Jersild v Denmark*, above n 11 at para 31.
[383] *Cetin and others v Turkey*, above n 340 at para 62.
[384] *Ibid* (observing that these requirements were met in *Purcell* and *Brind*).
[385] *Özgür Radyo-Ses Radyo Televizyon Yayin Yapim Ve Tanitim A S v Turkey*, above n 306; *Medya FM Reha Radyo Ve Iletisim Hizmetleri A S v Turkey*, 14 November 2006.
[386] *Özgür Radyo-Ses Radyo Televizyon Yayin Yapim Ve Tanitim A S v Turkey*, above n 306 at paras 83–6 (violation of Art 10); *Medya FM Reha Radyo Ve Iletisim Hizmetleri A S v Turkey*, previous n at 7–9 (no violation of Art 10).

violence-conducive speech broadcasted on radio and television. Quite the contrary, several civil suits against television broadcasters have been unsuccessful because the speech in question did not constitute incitement under the *Brandenburg* standard.[387] For example, in *Zamora v Columbia Broadcasting System*, the District Court for the Southern District of Florida rejected the claim that several television networks breached 'their duty to plaintiffs by failing to use ordinary care' to prevent a teenage boy from being 'impermissibly stimulated, incited and instigated' to duplicate the atrocities he viewed on television.[388] Declining to find incitement, the District Judge commented that

> at the risk of overdeveloping the apparent, I suggest that the liability sought for by plaintiffs would place broadcasters in jeopardy for televising Hamlet, Julius Caesar, Grimm's Fairy Tales; more contemporary offerings such as All Quiet On the Western Front, and even The Holocaust, and indeed would render John Wayne a risk not acceptable to any but the boldest broadcasters.[389]

Similarly, in *DeFilippo v National Broadcasting Co*, the Supreme Court of Rhode Island found that the showing of a dangerous stunt on television could not be said to incite the viewers to immediate harmful action.[390] A final example of this line of cases is *Olivia N v NBS*.[391] In this case the California Court of Appeals held that a television station could not be held liable for the 'rape' of a young girl with a bottle, allegedly inspired by a scene from the movie 'Born Innocent', because the requirements of *Brandenburg* were not met.[392] In dismissing the case, the court observed that 'imposing liability on a simple negligence theory (…) would frustrate vital freedom of speech guarantees'.[393]

Considering the approach taken in these cases, one can expect prior restrictions on terrorism-related broadcasting to raise even more constitutional difficulties. Under *Brandenburg*, any regulation of terrorism-related broadcasting, whether it takes the form of prior restraint or subsequent punishment, will have little chance to withstand constitutional scrutiny. Media reports of terrorist activities do not generally urge viewers or listeners to commit lawless action, and broadcasters do not usually intend to incite such action. Moreover, even if a broadcasting ban similar to the ones upheld by the Commission in *Purcell* and *Brind* would be measured by some other standard than the *Brandenburg* test, it would be unlikely to

[387] For an overview see, eg, Sandra Davidson, 'Blood Money: When Media Expose Others to Risk of Bodily Harm' (1997) 19 *Hastings Communication and Entertainment Law Journal* 230.
[388] *Zamora v Columbia Broadcasting System*, 480 F Supp 199, 200 (SD Fla 1979).
[389] *Ibid* at 206.
[390] *DeFilippo v National Broadcasting Co*., 446 A.2d 1036 (RI 1982).
[391] *Olivia N v NBC*, 74 Cal App 3d 383 (Cal App, 1977).
[392] *Ibid* at 494–5.
[393] *Ibid* at 497.

pass constitutional muster.[394] The general First Amendment test for content-based restrictions outside the context of incitement is 'most exacting scrutiny', which requires a regulation to be 'narrowly tailored' to achieve a 'compelling interest'.[395] It has been submitted that broadcasting bans would fail to meet at least one of the prongs of this test, namely the 'narrowly tailored' requirement.[396] While courts may be willing to accept that a ban furthers a compelling government interest, it will be difficult to prove that it does not restrict more speech than necessary to achieve that end. '[W]hen it comes to television violence', Harry Edwards and Mitchell Berman observe, 'separating out the harmless from the harmful will prove a daunting task'.[397]

E. Protection of Journalistic Sources

Prior restraint and subsequent punishment are not the only free speech restrictions liable to interfere with the press's efforts to cover terrorism-related news items. Counter-terrorist action may also impede the news gathering activities of journalists.[398] A first example, are measures aimed at the disclosure of journalistic sources. In this connection, a further distinction can be made between compelled disclosure of the identity of a source (for instance pursuant to a court order) and disclosure by means of physical searches or electronic surveillance.

As there is no specific case law considering the compelled disclosure of journalistic sources on terrorism-related grounds, this section only briefly considers the principles that would apply when such a situation would arise. The European Court's landmark decision regarding the protection of journalistic sources is *Goodwin v United Kingdom*.[399] The case arose under Section 10 of the British Contempt of Court Act, which authorises

[394] It may be observed in passing that several US scholars have argued that the *Brandenburg* test is inappropriate to assess regulations of violence on television. See, eg, E Barrett Prettyman and Lisa A Hook, 'The Control of Media-Related Imitative Violence' (1987) 38 *Federal Communications Law Journal* 317, 382; Sims, above n 251 at 262.

[395] See, eg, *Boos v Barry*, 485 US 312, 321 (1988).

[396] See Russel L Weaver and Geoffrey Bennett, 'Banning Broadcasting—A Transatlantic Perspective' (1992) *Media Law & Practice* 179, 181 (arguing that such bans would be constitutionally invalid as being overbroad). See also Harry T Edwards and Mitchell N Berman, 'Regulating Violence on Television' (1995) 89 *Northwestern University Law Review* 1487, 1553 (discussing the related issue of bans on television violence).

[397] Edwards and Berman, previous n at 1553.

[398] The right to gather newsworthy information is an important corollary to the right to impart information. See Marc O Litt, '"Citizen-Soldiers" or Anonymous Justices: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors' (1992) 25 *Columbia Journal of Law and Social Problems* 371, 377. See also *Branzburg v Hayes*, 408 US 665, 681 (1972) ('without some protection for seeking out the news, freedom of the press could be eviscerated').

[399] *Goodwin v UK* Reports 1996-II (1996).

the courts to order a person to disclose his confidential sources when they are satisfied that disclosure is 'necessary in the interest of justice or national security, or for the prevention of disorder or crime'.[400] The applicant, a journalist, received confidential information about the financial conditions of a company. The company obtained two injunctions: the first preventing the publication of the confidential information; the second requiring the applicant to disclose the identity of his sources. In Strasbourg, the applicant successfully challenged the second order and the fine imposed for refusing to comply with it. The court recognised that Article 10 includes the right of journalists not to disclose their source of information. It explained that the protection of journalistic sources is one of the basic conditions for press freedom.[401] Therefore, efforts to interfere with the confidentiality of journalistic sources are subject to a strict standard of review: 'Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[402] Stated differently, limitations of the confidentiality of journalistic sources call for the 'most careful scrutiny'.[403] Interestingly, the court's heightened scrutiny test appears to involve some form of least restrictive means analysis.[404]

The situation is different across the Atlantic. Unlike the Strasbourg Court, the Supreme Court has never recognised a journalist's right to withhold confidential information. The leading case here is *Branzburg v Hayes*.[405] The applicants were journalists who declined to testify before juries about criminal activities they had encountered in the course of their information-gathering activities. By a close four to six vote, the Supreme Court rejected the applicant's claim that the First Amendment confers on journalists a testimonial privilege that other citizens do not enjoy. The court observed that 'these cases involve no intrusions upon speech or assembly' and that 'the use of confidential sources by the press is not

[400] *Ibid* at para 20.

[401] *Ibid* at para 39: 'Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.'

[402] *Ibid* at para 39. (In the present case, the company's interests, inter alia in unmasking a disloyal employee, were found to be insufficient to outweigh the vital public interest in the protection of journalistic sources.)

[403] *Ibid* at para 40.

[404] *Ibid* at para 40; *Roemen and Schmidt v Luxembourg* Reports 2003-IV (2003) para 56; *Ernst and others v Belgium*, 15 July 2003, para 102.

[405] *Branzburg v Hayes*, above n 398.

forbidden or restricted'.[406] In the court's opinion, the possible chilling-effect of compelled source-disclosure was insufficient to override the public's interest in law enforcement and in ensuring effective grand jury proceedings: 'we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify', and 'we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future'.[407] Justice Powell filed a concurring opinion in which he interpreted the majority opinion in a speech-protective manner. Powell placed special emphasis on the majority's statement that 'news gathering is not without its First Amendment protections', and proposed a balancing approach: 'The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.'[408] Following *Branzburg*, several states have enacted laws protecting the confidentiality of journalistic sources.[409]

Turning to the context of terrorism-related newsgathering, the question may briefly be posed how the courts would deal with compelled source-disclosure in the interest of facilitating a terrorist investigation. Since the confidentiality of journalistic sources falls outside the First Amendment's protective ambit, such efforts would not appear to raise any serious constitutional difficulties. Under the current Convention standard, a disclosure order violates Article 10 unless it is 'justifiable by an overriding requirement in the public interest'. The prevention and punishment of terrorist crime certainly qualifies as an overriding requirement in the public interest. However, reliance on counter-terrorist interests does not in itself justify a disclosure order. In addition, the requirements of necessity (least restrictive means) and proportionality in the narrow sense will have to be met. Not only do both conditions appear to be implied in the court's strict scrutiny test, they also follow more directly from Recommendation (2000) 7 of the Committee of Ministers of the Council of Europe on the Right of

[406] *Ibid* at 681–2.
[407] *Ibid* at 695.
[408] *Ibid* at 709–10.
[409] Stone *et al*, above n 272 at 462.

Journalists not to Disclose their Sources of Information.[410] Pursuant to principle 3 of this Recommendation, an order to reveal a source is only legitimate when it can be convincingly established that: (1) reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or the public authorities that seek the disclosure; and (2) the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure. As regards the proportionality (in the narrow sense) of compelled source-disclosure, the Explanatory Memorandum specifies that the general interest in non-disclosure 'can possibly' be overbalanced by such concerns as 'the protection of human life' and 'the prevention of major crime'.[411] In other words, strict scrutiny in this context by no means predetermines the outcome in favour of freedom of expression.

In addition to compelled disclosure, the confidentiality of sources may also be jeopardised as a result of physical searches or electronic surveillance measures. The European Court accepts that such measures may constitute an interference with the freedom of the press. Where searches are intended to uncover the identities of journalistic sources, it is immaterial whether or not they prove to be productive.[412] With respect to electronic surveillance, the mere danger that telecommunications for journalistic purposes might be monitored and that journalistic sources might be either disclosed or deterred from calling or providing information by telephone, is sufficient to raise Article 10 concerns.[413] In examining whether such types of interference are necessary in a democratic society, the court applies the *Goodwin* strict scrutiny test. In two cases dealing with physical searches of a journalist's home and workplace, it found a violation of Article 10, noting, inter alia, that the government had failed to prove that other, less drastic measures were ineffective and that searches conducted with a view to uncover journalistic sources 'undermined the protection of sources to an even greater extent than the measures at issue in *Goodwin*'.[414] A different result was reached in the case of *Weber and Saravia v Germany*.[415] The court reviewed the power to carry out strategic

[410] Committee of Ministers, Recommendation (2000) 7 on the Right of Journalists not to Disclose their Sources of Information, 8 March 2000, DH-MM (2000) 2, 125–8. See Dirk Voorhoof, 'The Protection of Journalistic Sources: Recent Developments and Actual Challenges' (2003) 1 *Auteurs & Media* 9.

[411] See Voorhoof, previous n at 17–18. According to the Explanatory Memorandum, 'the protection of human life is the foremost right of human beings, since all other human rights and fundamental freedoms are logically subsequent hereto' (no 39, Explanatory Memorandum). The category of 'major crime' includes 'activities which may contribute to or result in such crimes as murder, manslaughter, severe bodily injury, crimes against national security, or serious organised crime' (no 40, Explanatory Memorandum).

[412] *Roemen and Schmidt v Luxembourg*, above n 404 at para 47.

[413] *Weber and Saravia v Germany*, 29 June 2006, para 145.

[414] *Roemen and Schmidt v Luxembourg*, above n 404 at paras 56 and 57; *Ernst and others v Belgium*, above n 404 at paras 102 and 103.

[415] *Weber and Saravia v Germany*, above n 413.

monitoring in order to prevent a number of serious offences, including terrorism. In balancing the competing interests at stake, the court attached particular importance to the fact that the surveillance measures were not directed at uncovering journalistic sources. Hence, the court reasoned, the interference with freedom of expression by means of strategic monitoring was not a 'particularly serious' one.[416] It further observed that although the impugned legislation contained no special rules regarding the non-disclosure of sources, numerous safeguards were in place to keep the interference with the freedom of the press to a minimum.[417] The court concluded that measures were necessary in a democratic society in the interest of national security and the prevention of crime.

F. Access to Information

In their efforts to cover terrorism-related news items, journalists may seek access to information or places and public facilities not open to the general public, including the scenes of terrorist events, prisons, or closed court proceedings. The United States and most of the Member States of the Council of Europe have in place specific legislation creating a statutory right to freedom of information.[418] An analysis of the statutory framework is beyond the scope of this book.[419] The present section is only concerned with access rights that may directly be derived from the two human rights declarations under review.

In *Branzburg*, the Supreme Court stated that 'the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally' and that 'newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded'.[420] This approach was confirmed in a series of cases dealing with press demands for access to prisons.[421] For example, in *Pell v Procunier*, the court upheld the constitutionality of a law prohibiting interviews between press representatives and inmates. It held that the proposition that

[416] *Ibid* at para 151.
[417] *Ibid* at para 152. These safeguards are discussed at length in ch 6, section III.
[418] For the United States, see, eg, the Freedom of Information Act (FIOA), 5 USC s552 (Supp 2003).
[419] For a broader discussion of restrictions on freedom of information in the national security context, see, eg, Coliver, above n 309 at 54–72.
[420] *Branzburg v Hayes*, above n 398 at 684–5.
[421] *Pell v Procunier*, 417 US 817 (1974); *Saxbe v Washington Post Co*, 417 US 843 (1974).

> the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public (…) finds no support in the words of the Constitution or in any decision of this Court.[422]

One commentator observed in the light of these cases that because the public is typically banned from terrorist crime scenes, security officials may lawfully deny requests for access to journalists.[423]

Similarly, the right to receive and impart information under Article 10 is traditionally limited to the right to gather information free from government interference, and does not embody an obligation on the government to provide information.[424] As the court put it in *Leander v Sweden*:

> [T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.[425]

However, there is said to be a trend in international human rights law towards a more positive duty on governments to provide access to information.[426] To date, the Strasbourg organs have not decided whether demands of journalists to access information or places not generally open to the public fall within the ambit of Article 10. In the aforementioned inadmissibility decision in *Hogefeld v Germany*, the court reviewed a refusal to grant permission for an interview requested by a convicted terrorist.[427] Although the applicant was in prison at the time of the request, the court was willing to consider the refusal as an interference with the exercise of her right to freedom of expression. It should be noted, however, that the case arose out of a request by a detainee, not a journalist.[428] As regards demands to access terrorist crime scenes, there seems to be little

[422] *Pell v Procunier*, previous n at 834.
[423] See Bassiouni, 'Terrorism, Law Enforcement, and the Mass Media', above n 59 at 44.
[424] Coliver, above n 309 at 55.
[425] *Leander v Sweden* Series A no 116 (1987) para 74.
[426] Coliver, above n 309 at 55.
[427] *Hogefeld v Germany*, above n 238.
[428] But see Committee of Ministers, Recommendation Rec (2003) 13 of the Committee of Ministers to Member States on the Provision of Information through the Media in relation to Criminal Proceedings. According to Principle 17 of this recommendation, '[j]ournalists should be permitted to have contacts with persons serving court sentences in prisons, as far as this does not prejudice the fair administration of justice, the rights of prisoners and prison officers or the security of a prison.' See also Eva Brems and Dirk Voorhoof, 'Politieke vrijheden van gedetineerden: vrijheid van meningsuiting, recht op toegang tot informatie, vrijheden van vergadering en vereniging, recht op deelname aan verkiezingen' [Political Freedoms of Detainees: Freedom of Expression, Freedom to Access Information, Freedom to Assembly and Association, Right to Participate in Elections] in Eva Brems *et al*, *Vrijheden en vrijheidsbenemig* [Liberties and the Deprivation of Liberty] (Antwerp, Intersentia, 2005) 79, 87–8 (arguing that refusals to grant media access must meet the democratic necessity test).

doubt that the Contracting States are entitled under Article 10 s 2 to refuse such demands where the interests of national security and the protection of the rights of others require so.

One particular issue that prompted controversy in the United States, following the terrorist events of 11 September 2001, is the government's decision to conduct certain immigration proceedings in complete secrecy. Ten days after the attacks, Chief Immigration Judge Michael Creppy issued a directive ordering that all immigration proceedings designated as 'special interest' cases by the Department of Justice be closed to the public, including family and friends.[429] Special interest cases involve immigrants with possible ties to terrorism. Attempts by members of the press to challenge the constitutionality of the measure resulted in a split between two circuit courts of appeal: the Sixth Circuit ruled that the directive violates the First Amendment;[430] the Third Circuit upheld the measure.[431]

Both courts reviewed the directive under a test adopted by the Supreme Court in a line of cases concerning the right of access to criminal trial proceedings. Under the test, a right of access exists when

> the place and the process have historically been open to the press and general public [and] public access plays a significant positive role in the functions of the particular process in question.[432]

The first part of this two-part inquiry has come to be referred to as the 'experience prong' (whether the place and process have traditionally been open to the press and general public), the second part as the 'logic prong' (whether public access plays a significant positive role in the functioning of the particular process in question).[433] Even where a right of access exists, however, that right is not absolute. It may still be denied by a showing that such denial is necessitated by a compelling state interest and is narrowly tailored to serve that interest.[434]

Applying the two-prong test, the Sixth Circuit held that there is a sufficient history of openness in the immigration hearings concerned, and

[429] See Memorandum from Michael Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (21 September 2001). For a discussion of the memorandum and the legal controversy surrounding it, see, eg, Harlan Grant Cohen, 'The (Un)favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History' (2003) 78 *New York University Law Review* 1431; Kathleen K Miller, 'Do Democracies Die Behind Closed Doors? Finding a First Amendment Right of Access to Deportation Hearings by Reevaluating the Richmond Newspapers Test' (2004) 72 *George Washington Law Review* 646.

[430] *Detroit Free Press v Ashcroft*, 303 F.3d 681 (6th Cir 2002).

[431] *N Jersey Media Group, Inc v Ashcroft*, 308 F.3d 198 (3d Cir 2002).

[432] *Press-Enterprise Co v Superior Court*, 478 US 1, 8 (1986). This principle was first established in an influential concurring opinion by Justice William Brennan in *Richmond Newspapers, Inc v Virginia*, 448 US 555, 589 and 598 (1980).

[433] *Press-Enterprise Co v Superior Court*, previous n at 8–9.

[434] *Global Newspapers Co v Superior Court*, 457 US 596, 606–07 (1982).

that public access undoubtedly enhances the quality of such proceedings.[435] Having concluded that a right of access exists, the court went on to consider whether that right could be restricted under the strict scrutiny standard. This question was answered in the negative. While the government's anti-terrorist campaign 'certainly implicates a compelling interest', the blanket closure rule mandated by the directive was not narrowly tailored.[436] It this respect, the court indicated that a case-by-case analysis would have been a more reasonable approach to reconciling individual rights with the interest of fighting terrorism. The court further stressed the importance of a First Amendment right of access for the press and the public, stating that '[d]emocracies die behind closed doors', and that '[w]hen government begins closing doors, it selectively controls information rightfully belonging to the people'.[437]

A different conclusion was reached by the Third Circuit. Under the same two-prong analysis, the Third Circuit reasoned that the history of open immigration hearings was 'too recent and inconsistent to support a First Amendment right to access'.[438] Moreover, while the court acknowledged the benefits of openness, it also suggested that in determining whether the logic prong is met, it must take account of the opposing government interests. In this respect, the court gave substantial weight to the government's contention that public hearings would adversely affect counter-terrorist efforts, for instance by revealing sources and methods of investigation.[439] The court took a highly deferential approach with regard to the security concerns advanced by the executive, and stated that it was

> unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.[440]

Despite the contrary conclusions of the two circuits, the Supreme Court declined to hear any appeal from these decisions.[441]

[435] *Detroit Free Press v Ashcroft*, above n 430 at 700–04. In addition to the traditional arguments for openness (eg, protection against government abuse), the Court also referred to the therapeutic value of public proceedings: '[A]fter the devastation of September 11 and the massive investigation that followed, the cathartic effect of open deportations cannot be overstated. They serve a "therapeutic" purpose as outlets for "community concern, hostility, and emotions"' (*ibid* at 704).

[436] *Ibid* at 705–10.

[437] *Ibid* at. 683.

[438] *N Jersey Media Group, Inc v Ashcroft*, above n 431 at 211.

[439] *Ibid* at 218.

[440] *Ibid* at 220.

[441] See *N Jersey Media Group, Inc, v Ashcroft*, 124 S Ct 2215 (2003).

G. Media Self-Regulation and Informal Censorship

The cases discussed in the preceding sections all concerned legal attempts to restrict media coverage of terrorism-related news items. But the suppression of media reporting during a terrorist crisis may result not only from official state action or interference by public authorities, but also from private activity and informal government pressure for self-censorship.[442] Although such private and informal initiatives are generally immune from free speech challenges under the human rights instruments studied here,[443] they may restrict political expression more extensively than official government action.[444] This section therefore briefly examines the main areas where such problems can arise.

An alternative to state interference with media coverage of terrorism, often advanced by media representatives and law enforcement agencies, is voluntary self-regulation by the media.[445] The benefit of such initiatives would be to avoid the dangers inherent in government-imposed regulations and the human rights problems associated with them. Self-regulation can take many different forms, varying from a written 'code of conduct' to unwritten editorial rules.[446] Surveys in both Europe and the United States indicate that a growing number of media have guidelines on the coverage of terrorism.[447] Examples of such guidelines include: refraining from live coverage of terrorist incidents; avoiding offering an excessive platform for

[442] For an historical account and discussion of media self-regulation and informal censorship, see, eg, Schmid and de Graaf, above n 27 at 145–73.

[443] Ordinarily, the First Amendment only applies to direct government action, and not to actions of private persons (the 'state action' requirement). Similarly, the primary purpose of Art 10 is to protect the individual against arbitrary interference by public authorities. However, the European Court has indicated that Art 10 may in addition require positive measures of protection, even in the sphere of relations between individuals (see, eg, *Özgür Gündem v Turkey*, above n 202 at paras 42–6 (concerning the government's failure to protect a newspaper and journalists against violence, intimidation and harassment)).

[444] See Gregory P Magarian, 'The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate' (2004) 73 *George Washington Law Review* 101 (criticising the public-private distinction that undergirds the state action limitation in the US Constitution).

[445] See Schmid and de Graaf, above n 27 at 162 *ff*. Self-regulation may be encouraged by the government. With respect to the Council of Europe, see Declaration on freedom of expression and information in the media in the context of the fight against terrorism, adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers' Deputies (inviting the media to adopt 'self-regulatory measures, where they do not exist, or adapt existing measures so that they can effectively respond to ethical issues raised by media reporting on terrorism, and implement them').

[446] See Schmid and de Graaf, above n 27 at 163 (arguing that clear and publicly known guidelines are to be preferred over unverifiable codes of conduct).

[447] *Ibid* at 164–5.

terrorists; omitting names and photos of victims; giving sufficient background information; and not bringing news that helps the perpetrators.[448] Schmid and de Graaf conclude their study of the literature on media self-regulation with the observation that '[n]o hard and fast rules have been developed anywhere but [that] a certain consensus about the danger zones in reporting terrorist incidents is being built up'.[449] Despite its advantages, the practice of media self-regulation is open to critique. For example, full compliance with self-generated guidelines by all the participants in the competitive news market is generally believed to be an unrealistic goal. Besides these obvious practical difficulties, the point is often made that media self-regulation is a form of private censorship, not necessarily less problematic than state interference.[450] In this respect, several authors have drawn attention to the commercial media's strong tendency to be over-responsive to government policy and popular opinion, so as not to alienate consumers and potential advertisers.[451] The result of this would be the underexposure of information necessary for an informed political debate on the problem of terrorism and the government's counter-terrorist policy.

The dangers inherent in media self-censorship are further enhanced by informal government censorship, a phenomenon which has occurred on both continents.[452] Governments can use various tactics to force the media into self-censorship. One way to influence the information distributed by the media is through direct pressure on journalists or calls for media co-operation. The success of such attempts was again illustrated by the American media coverage of the September 11 attacks and the subsequent 'war' against terrorism. While the Bush Administration avoided legal action, it took various informal initiatives aimed at controlling the news media.[453] The most blatant example was National Security Advisor Condoleezza Rice's phone call to the chief executives of the major television

[448] Most guidelines are confidential. For an overview and discussion of some of the guidelines made public, see Schmid and de Graaf, above n 27 at 165–8.

[449] *Ibid* at 164.

[450] *Ibid* at 171.

[451] See, eg, Magarian, above n 444 at 117; Marin R Scordato and Paula A Monopoli, 'Free Speech Rationales After September 11th: The First Amendment on Post-World Trade Center America' (2002) 13 *Stanford Law and Policy Review* 185, 201.

[452] See, eg, Schmid and de Graaf, above n 27 at 160–62 (discussing informal government pressure on the media in the United Kingdom and Ireland); Doris A Graber, 'Terrorism, the 1st Amendment and Formal and Informal Censorship: In search of Public Policy Guidelines', paper presented at the Harvard Symposium Restless Searchlight: The Media and Terrorism, 19 August 2002. Available at <http://www.apsa.com/~polcomm/news/2003/terrorism/papers/Graber.pdf> (accessed 6 February 2006) (describing informal government censorship following the September 11 attacks).

[453] See also Jean-Paul Marthoz, 'L'impact du 11 septembre sur la liberté de la presse: la presse américaine poussée à l'auto-censure' in E Bribosia et A Weyembergh (eds), *Lutte contre le terrorisme et droits fondamentaux* (Brussles, Bruylant, 2002) 289.

networks, asking them not to broadcast taped messages from Osama bin Laden.[454] The Bush Administration argued that such broadcasts might contain encoded messages and could stir up more violence against the United States. The networks willingly promised to comply with Rice's request.[455] In addition to direct calls for cooperation, public pronouncements by government officials may create a climate hostile to government criticism, in which the media are pressured to show loyalty and refrain from broadcasting dissenting viewpoints.[456] One such attempt that received much public attention was Attorney General Ashcroft's effort to silence critics of the government's post-September 11 measures by suggesting that their pursuit of 'phantoms of lost liberty' was unpatriotic, and that they gave 'ammunition to America's enemies and pause to America's friends'.[457]

H. Concluding Remarks

The case law discussed in section V confirms that freedom of the press and the prevention of terrorism can be conflicting goods. It is not necessary to repeat here all the comparisons drawn in the previous sections with regard to the major areas where such conflicts have arisen or may arise. Rather, this final section highlights the general tendencies that emerge from the above discussion.

With respect to Article 10, the foregone survey discloses a general tendency on the part of the Convention organs to resolve conflicting claims of liberty and security in a flexible balancing manner. This has been evidenced in all the fields reviewed here, ie criminal sanctions against journalists (eg, the publication of statements by terrorist groups), prior restrictions on terrorism-related media reporting (eg, broadcasting bans), and the various restrictions on newsgathering activities (eg, the protection of journalistic sources). Three important considerations seem to underpin

[454] Graber, above n 452 at 7.
[455] *Ibid*.
[456] *Ibid*.
[457] *Ibid* at 8. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression expressed his concerns about the intolerance of dissenting views in the United States in the aftermath of the September 11 attacks: '[T]here has been a disturbing trend, particularly in the coverage by the media in North America, in which the views and opinions of those who dissent or express concerns are aggressively met with contempt. In a number of instances, it has been suggested by both officials and, for example, "talk-radio" commentators, that anyone who questions the measures, laws and policies that are now current is 'unpatriotic' and, by their criticisms, are giving aid and comfort to "the enemy".' See UN Commission on Human Rights, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain, submitted in accordance with Commission Resolution 2001/47, UN Doc E/CN.4/2002/75, para 76.

the Strasbourg organ's balancing exercise in the context of media reporting of terrorism-related speech and events. The first is their readiness to weigh in the difficulties inherent in the fight against terrorism. This is usually expressed in the phrase that 'the Court is prepared to take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism'. A second issue put in the balance in many of the media cases, is the potential impact of press coverage of terrorism-related news items, in particular the invasiveness of television and radio broadcasting. The joint operation of these two elements is likely to broaden the margin of appreciation of the Contracting states. The third recurring theme in the jurisprudence analysed in this part, is the press's fundamental role to the proper functioning of democracy. Contrary to circumstances one and two, this third element represents an indication for heightened scrutiny under the democratic necessity test. In the end, it will be the interplay of these three variables that determines the outcome in cases concerning terrorism-related media reporting. Close examination of the cases further reveals that the solutions reached may be highly particularistic, depending on such diverse elements as the manner in which views are represented, the scope of a ban, the nature of the penalty, the legal safeguards accompanying a restriction, the effectiveness of the interference and so on. In other words, even under the 'most careful scrutiny' standard, notably in the source-disclosure cases, the outcome of a case is not determined at the threshold but requires case-specific balancing.

Drawing such general conclusions in the context of the First Amendment is a more difficult task, but certain features emerge from the analysis. Firstly, it is clear that in those areas where the *Brandenburg* test applies, lawmakers will face nearly insurmountable obstacles when seeking to punish or otherwise regulate the media reporting of terrorism-related speech and events. Indeed, the *Brandenburg* criteria will be particularly difficult to satisfy taking into account that journalists and other media representatives generally neither urge the public to commit lawless action nor intend to do so. Further, as noted in the concluding remarks to section IV, the categorical nature of the *Brandenburg* test precludes courts from considering the specific problems associated with combating terrorism when reviewing interferences with terrorism-related media coverage. Finally, there are no Supreme Court precedents that indicate a relaxation of the *Brandenburg* standard in order to deal with the special nature of broadcasting. However, for those areas not directly related to the incitement jurisprudence, notably several issues concerning the news gathering activities of journalists, the First Amendment is far less protective. Rather than balancing the opposing claims involved, the Court tends to dispose of these cases in a categorical fashion, defining the interests outside the First Amendment's scope (eg, the protection of journalistic sources). Finally, there are some decisions in which a typical balancing approach can be

discerned. The outcome of these cases is often shaped by the standard of review adopted by the court and the degree of deference accorded to the security concerns advanced by the government (eg, the opposing rulings regarding the closed immigration hearings).

VI. GENERAL CONCLUSION

Chapter three offered a comparative analysis of the counter-terrorist limitations on the right to freedom of expression under Article 10 and the First Amendment. Throughout the chapter, differences and similarities have been demonstrated, not only with regard to the particular solutions found in both jurisdictions, but also with respect to the adjudicative methods employed to reach these conclusions.

As has been highlighted on a number of occasions, balancing is the pre-dominant adjudicative method applied in the context of Article 10, whereas limitations of First Amendment rights are generally established in a more or less categorical fashion. The Strasbourg organ's balancing-oriented approach can readily be discerned in all the major areas examined here, be it in the emerging expressive conduct jurisprudence, be it in the open-ended 'incitement to violence' standard, or be it in the terrorism-related media reporting cases. Characteristic of this approach is the Convention organ's preparedness to weigh the individual rights implicated by a limiting measure against the threat posed by terrorism and the difficulties of dealing with it. This reasoning is articulated by the recurring observation that 'the Court is prepared to take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism'. Moreover, although balancing under Article 10 does not proceed on a purely ad hoc basis, the unique circumstances found in a particular case have a significant impact on the ultimate result that is reached.

The same flexibility is absent in several important areas of First Amendment jurisprudence explored in this chapter. With the adoption of the three-part *Brandenburg* test, the flexibility inherent in the original 'clear and present danger' formula was replaced by a strict rule not open to further balancing on a case-by-case basis. In stark contrast to the subversive and violence-conducive speech jurisprudence developed under the democratic necessity test of Article 10, the *Brandenburg* rule screens out a fresh assessment of the concrete facts and interest involved in a particular case. Under the highly protective *Brandenburg* criteria, no further discretion is left to courts and other decision-makers to take the special circumstances of terrorism into account in determining the limits of freedom of speech. A similar picture emerges in certain areas where the court's incitement jurisprudence has no reach, for instance with regard to

the newsgathering activities of journalists. Although the Constitution is far less protective in these areas, the adjudicative method practiced by the court is comparable. Instead of balancing the conflicting interests presented by a particular fact situation, these cases are often disposed with in a categorical fashion, defining the applicant's claims to fall outside the scope of the First Amendment.

Which system best reconciles freedom of expression and security in the context of terrorism? There is no easy answer to that question. Besides the traditional merits of rule-based decision-making (eg, predictability, certainty, consistency), a considerable advantage of the categorical *Brandenburg* rule is that it guards against attempts to suppress speech worthy of protection under the pretext of fighting terrorism. The historical account of the subversive speech cases in section III, illustrates the United States' long history of excessively sacrificing freedom of speech in response to the (perceived) dangers of wartime. To put it in the words of the prominent First Amendment scholar Geoffrey Stone:

> Although Congress and the president have often *underprotected* free speech in wartime, there is not a single instance in which the Supreme Court has *overprotected* wartime dissent in a way that caused any demonstrable harm to the national security.[458]

Brandenburg's high hope is that it may serve to prevent the continuation of this pattern of under-protection in the current 'war' against terrorism. Indeed, as indicated in chapter one, many American scholars believe that the formulation of clear and unambiguous rules is the best guarantee to avoid wartime erosion of fundamental rights.[459] It is noteworthy, in this connection, that, unlike during previous crises, the US government has taken relatively few *legal* actions directly aimed at suppressing subversive or violent conductive speech linked to terrorism.

However, there are convincing arguments in favour of the more balancing-oriented Convention approach. To begin with, the flexibility inherent in the democratic necessity standard may serve to produce more balanced trade-offs between liberty and security in the face of a terrorist danger than the highly protective *Brandenburg* test. As has been seen, the court's 'incitement to violence' standard provides a meaningful degree of protection to subversive and violent conductive speech, while still allowing the Contracting States to respond effectively to the specific dangers posed by terrorism-related speech. Secondly, the more inclusive interpretation of the scope of Article 10—for instance as concerns the news gathering

[458] Geoffrey R Stone, above n 61 at 544.
[459] See ch 1, section IV above.

activities of journalists—guards against government policies aimed at eluding the free speech protections (eg, foreclosing press access to terrorism-related information).

This brings us to a final point. The inflexible nature of the *Brandenburg* standard may have the dangerous effect of inducing decion-makers to circumvent the existing regime when confronted with a serious terrorist threat. The US government's current war against terrorism illustrates that officials responsible for combating terrorism will find ways to do so. As will become clear in the following chapters, there a several counter-terrorist initiatives that do not directly target speech, but which may nevertheless affect freedom of expression. For a more visible example of this tendency, one could point to the Bush Administration's efforts to impose informal censorship on the media reporting of terrorism-related news items in the years following the September 11 attacks. Although the government has avoided legal measures that might prompt First Amendment challenges, it succeeded in impinging the freedom of the press by forcing the media into self-censorship.

4

The Right to Freedom of Association

I. INTRODUCTION

TERRORISM IS USUALLY not the work of isolated individuals but of organised groups. Hence, an important aspect of the fight against terrorism consists in the suppression of the associations involved in it. Measures aimed at combating terrorist organisations obviously tend to interfere with the right to freedom of association of those organisations and their members. The present chapter seeks to explore this tension between counter-terrorism and the right to freedom of association. The first section provides a brief overview of the general principles associated with freedom of association under the European Convention and the US Constitution. In the second section the attention shifts to the different tools that have been used to restrict the associational rights of terrorist and terrorism-related organisations.

II. THE RIGHT TO FREEDOM OF ASSOCIATION: BASIC NOTIONS

A. Introduction

The right to freedom of association is guaranteed in Article 11 s 1 of the European Convention, which states that

> [e]veryone has the right (…) to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

The scope of the right protected in Article 11 s 1 is broad. To begin with, the notion of 'association' has an autonomous Convention meaning: the fact that the domestic authorities do not qualify certain collective activities as an 'association' is not determinative for the question whether Article 11

interests can be invoked.[1] It should be noted, however, that mere causal contacts between persons are not sufficient to establish an association.[2] Scholars have indicated that the term 'association' presupposes at least some organisational structure, a common purpose and a certain degree of stability.[3] Secondly, the range of conduct protected by Article 11 is wide, and includes the right to choose whether or not to form and join associations and the right to freely establish an association's organisational structure.[4]

In contrast to the European Convention, the right to freedom of association is not mentioned in the Bill of Rights. Nevertheless, the Supreme Court has held that freedom of association is implicitly protected by other constitutional provisions.[5] Firstly, associational rights may be derived from the First Amendment freedoms of speech and assembly if they serve an 'expressive' function.[6] While the Supreme Court has not given a comprehensive definition of First Amendment association, it has identified several types of government interference that fall within the ambit of the First Amendment.[7] Secondly, associational activity receives protection under the concept of liberty in the due process clauses of the Fifth and Fourteenth Amendments when it is 'intimate'.[8] This aspect of the right to association is related to the fundamental right to privacy, and includes such interests as the freedom to choose one's spouse and to maintain a relationship with members of one's family.[9] There is, however, no independent right to freedom of association: when association is neither expressive nor intimate, it is categorically excluded from constitutional protection.[10]

[1] See, eg, P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague, Kluwer Law International, 1998) 591.

[2] Christian Tomuschat, 'Freedom of Association' in RStJ Macdonald *et al* (eds), *The European System for the Protection of Human Rights* (Boston/London/The Hague, Martinus Nijhoff Publishers, 1993) 493 and 494.

[3] See, eg, van Dijk and van Hoof, above n 1 at 592 (referring to several early European Commission decisions); Tomuschat, above n 2 at 493.

[4] For a discussion and references, see, eg, Tomuschat, above n 2 at 498–504.

[5] See generally Gerald Gunther and Kathleen M Sullivan, *Constitutional Law* (New York, Foundation Press, 1997) 1374–400; John E Nowak and Ronald D Rotunda, *Constitutional Law* (St Paul, West Publishing Co, 1995) 1118–125.

[6] See below.

[7] Several of these cases are examined in section III. A further example of associational activity protected under the First Amendment is political party contributions. See, eg, *Buckley v Valeo*, 424 US 1, 22–4 (1976) ('[T]he primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association.').

[8] Nowak and Rotunda, above n 5 at 1119.

[9] *Ibid*. For a further discussion of the right to privacy, see ch 6 below.

[10] See, eg, *Dallas v Stanglin*, 490 US 19 (1989) (holding that the Constitution does not recognise a generalised right of social association). See also David Cole, 'Hanging with the

As far as the underlying values of freedom of association are concerned, the European Court and the Supreme Court have both underscored the essential role played by freedom of association in ensuring democracy and pluralism. The Strasbourg Court has emphasised that the pluralism rationale is not limited to political parties but extends to associations formed for other purposes.[11] It held that:

> [P]luralism is (…) built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.[12]

The same values have been assumed to underlie the freedom of association implied in the First Amendment: 'According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'[13]

B. Freedom of Association and Freedom of Expression

Another essential point of comparison is that the courts in both jurisdictions recognise the close nexus between the freedoms of association and expression. According to the European Court's settled case law, the right to freedom of association enshrined in Article 11 of the Convention must, notwithstanding its autonomous role, be considered in the light of Article 10: 'The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11.'[14] In the court's opinion, Article 11 is a lex specialis in relation to the lex generalis of Article 10.[15] As a result of this approach, the court has consistently invoked the basic principles governing freedom of expression in dealing with complaints under Article 11. Thus, for instance, the strict standard of scrutiny for restrictions on political expression applies

Wrong Crowd: Of Gangs, Terrorists, and the Right to Association' (1999) 1999 *Supreme Court Review* 203 (criticising the limited categorical conception of freedom of association under the US Constitution).

[11] *Gorzelik and others v Poland* Reports 2004-I (2004) para 92.

[12] *Ibid*.

[13] *Roberts v United States Jaycees*, 468 US 609, 622 (1984).

[14] Eg, *United Communist Party of Turkey and others* Reports 1998-I (1998) para 42.

[15] Eg, *Ezelin v France* Series A no 202 (1991) para 62.

mutatis mutandis to government interferences with political associations.[16] A similar approach is found in the United States where, as noted, the right to expressive association is seen as a corollary to the freedom of speech protected by the First Amendment. On several occasions, the Supreme Court has emphasised that the exercise of First Amendment rights presupposes association with other persons. The first decision to recognise the instrumental relationship between speech and association is *NAACP v Alabama ex rel Patterson*.[17] In this case, the court considered the compelled disclosure of the names and addresses of the members of the National Association for the Advancement of Colored People (NAACP). Writing for a unanimous Court, Justice Harlan held that

> [e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association (…). [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters (…).[18]

Stated differently,

> an individual's freedom to speak (…) could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.[19]

C. Limitations of Freedom of Association

Neither the European Convention nor the US Constitution protects freedom of association absolutely. The common limitation clause of Article 11 s 2 is comparable to the one found in Article 10 s 2.[20] An interference with the exercise of freedom of association must be 'prescribed by law', have one or more legitimate aims, and be 'necessary in a democratic society'. As regards the interpretation of these requirements, the court has consistently invoked the principles associated with the application of the other common limitation clauses found in the Convention. Those principles were examined in chapter two and need no further mention here. One remark regarding the democratic necessity test and the margin of appreciation is in order however. In recognition of the importance of the right to freedom of

[16] See below Section III.
[17] *NAACP v Alabama ex rel Patterson*, 357 US 449 (1958).
[18] *Ibid* at 460–61.
[19] *Roberts v U.S. Jaycees*, above n 13 at 622.
[20] Art 11 s 2 provides as follows: 'No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police or of the administration of the State.'

association in a democratic society, the court has said that restrictions on associational freedom are generally subject to rigorous supervision, regardless of whether the association has political or other aims.[21] This approach is usually expressed as follows:

> [T]he exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions in freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts.
>
> When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that the based their decisions on an acceptable assessment of the relevant facts.[22]

Restrictions on freedom of association may also follow from the application of other Convention provisions. As has been seen, the political activity of aliens may be regulated in accordance with Article 16. This provision is particularly relevant in the context of Article 11, since associations are amongst the main instruments to carry out political activities.[23] Limitations on freedom of association may further be imposed pursuant to Article 15 (derogation in time of war and public emergency) and Article 17 (abuse of rights).

The Supreme Court acknowledges that the right to freedom of association is not unlimited.[24] Under the US Constitution, the framework for assessing restrictions on the right to freedom of association depends on the Supreme Court's diagnosis of the type of associational freedom at issue.[25] According to *Roberts v United States Jaycees*,

[21] *Gorzelik and others v Poland*, above n 11 at para 88 (stating that '[a]ll (…) restrictions [to freedom of association] are subject to rigorous supervision by the Court').
[22] See, eg, *Sidiropoulos and others v Greece* Reports 1998-IV (1998) para 40.
[23] Tomuschat, above n 2 at 512.
[24] *Roberts v U.S. Jaycees*, above n 13 at 623.
[25] Nowak and Rotunda, above n 5 at 1119.

> the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutional protected liberty is at stake in a given case.[26]

As far as expressive association is concerned—the kind of association most relevant for the purpose of this chapter—the court generally applies a strict scrutiny balancing test.[27] Thus, in *Roberts*, the court indicated that

> [i]nfringements on (…) [the right to associate for expressive purposes] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedom.[28]

Or stated differently: 'the regulation of association must be narrowly tailored to promote an end that is unrelated to suppressing the message that will be advanced by the association'.[29]

D. Concluding Remarks

This short introduction reveals important similarities between the systems of freedom of association in both jurisdictions. In spite of the different textual framework, the two systems appear to have in common the underlying justifications for freedom of association, the recognition of the close affinity between the freedoms of association and expression, and a strict scrutiny balancing approach to the limitation of associational rights, at least in so far as expressive association is involved. One distinguishing feature is the limited scope of freedom of association under the Bill of Rights, which, in contrast to Article 11, only protects expressive and intimate associational activity.

[26] *Roberts v U.S. Jaycees*, above n 13 at 623.

[27] See *NAACP v Alabama ex rel Patterson*, above n 17 at 460–61: '[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'

[28] *Roberts v United States Jaycees*, above n 13 at 623.

[29] Nowak and Rotunda, above n 5 at 1119.

III. COUNTER-TERRORISM AND THE RIGHT TO FREEDOM OF ASSOCIATION

A. Introduction

In chapter one attention was drawn to the importance of the prevention of terrorism rather than the mere prosecution of terrorist acts.[30] The goal of prevention can be achieved in many different ways, but one essential aspect will be the suppression of terrorist and terrorism-related organisations. Measures aimed at impeding the associational activity of terrorists allow the law enforcement authorities to act against those involved in terrorism without having to wait before illegal activity has been initiated or committed. Lawmakers have a variety of tools at their disposal to restrict the associational activity of organisations (allegedly) concerned in terrorism. These may either be directly aimed at the association and its structures, or at the individuals involved in it. The following sections discuss three methods commonly employed in both jurisdictions studied: the proscription of terrorist organisations, the punishment of membership in terrorist organisations and the offence of providing material support to terrorist organisations. But first there is a brief reflection on the various problems related to the definition and designation of terrorist organisations.

B. Definition and Designation of Terrorist Organisations

Before any measures can be taken against terrorist, or terrorism-related, organisations and the individuals affiliated with them, those organisations must first be identified. This can be done in different ways. The first possibility is the adoption of a general legal definition of what constitutes a 'terrorist organisation'. An example of this approach can be found in the EU Framework Decision on Combating Terrorism. Article 2 s 1 defines a 'terrorist group' as

> a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. 'Structured group' shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.[31]

A second option is the designation by the public authorities of certain groups or entities as terrorist organisations. For instance, in the United

[30] See ch 1, section II above.

[31] Art 2(1), Council Framework Decision on Combating Terrorism of 13 June 2002 (2002/475/JHA).

States the 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA) empowers the Secretary of State to designate an organisation as a 'foreign terrorist organisation' if (1) the organisation is a foreign organisation; (2) the organisation engages in terrorist activity; and (3) the organisation threatens the national security of the United States or the security of its citizens.[32] The Secretary of State is to make his findings on the basis of an administrative record which can contain classified information.[33] Examples of such direct designations can also be found on the European continent. Thus, for instance, EU Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism sets forth a list of persons, groups and entities which are considered to be involved in 'terrorist acts' as defined by the Common Position.[34] The list of designated organisations is drawn up

> on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned.[35]

The human rights implications of both techniques will vary according to the consequences an organisation suffers when it falls under the definition of a 'terrorist organisation' or is included in a list of designated organisations. As with the definition of 'terrorism', the definition of 'terrorist organisation' will have to satisfy the requirements of legal certainty (*nullum crimen sine lege*) if it is to serve as the basis for penal provisions against those involved in the organisation. In addition, where certain criminal, civil or administrative sanctions are attached to the classification of a group as terrorist, questions will almost certainly arise as to the fairness of the designation procedure. This last problem is not further elaborated in this work.[36] However, it is interesting to refer to the inadmissibility decision by the European Court in the joint cases of *Segi and others* and *Gestoras Pro-Amnistia and others* against fifteen states of the European Union.[37] The applicants were two Basque organisations included in the list of the aforementioned EU Common Position. As a

[32] See AEDPA, Pub. L. No. 104–32, s 302 (codified at 8 USC s 1189).

[33] 8 USC s 1189(a)(2)(i), (3)(a).

[34] Council Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism. For a discussion see Steve Peers, 'EU Responses to Terrorism' (2003) 52 *International and Comparative Law Quarterly* 227, 237–39.

[35] Council Common Position 2001/931/CFSP, above n 34 Art 1 s 4.

[36] See, eg, Eric Broxmeyer, 'The Problems of Security and Freedom: Procedural Due Process and the Designation of Foreign Terrorist Organizations under the Anti-Terrorism and Effective Death Penalty Act' (2004) 22 *Berkeley Journal of International Law* 439; Steven Dewulf and Didier Pacquée, 'Protecting Human Rights in the War on Terror: Challenging the Sanctions Regime Originating from Resolution 1267 (1999)' (2006) 24 *Netherlands Quarterly of Human Rights* 607; Martin Scheinin, 'Protection of Human Rights and Fundamental Freedoms while Countering Terrorism', UN. Doc A/61/267, paras 30–41.

[37] *Segi and others v 15 States of the European Union* Reports 2002-V (2002).

result of their designation, the applicant organisations were subject to strengthened police and judicial cooperation in criminal matters. Both associations complained that the common positions violated various human rights, including the right to a fair trail, the right to freedom of expression and association, and the right to property.[38] In the Strasbourg Court's opinion, the sole fact that an association is listed as a terrorist organisation may be 'embarrassing', but does not in itself constitute a violation of Convention rights. According to the court, the applicants could not be considered as 'victims' within the meaning of Article 34 of the Convention because the provision regarding the improved police and judicial cooperation was not directly applicable in the Member States in that its implementation required the adoption of concrete provisions in national law.[39] In this respect, the applicant organisations had to be distinguished from those enlisted organisations which were subject to the provisions ordering the freezing of funds.[40] This last observation suggests that the court may reach a different conclusion when confronted with directly applicable measures, such as the freezing of funds.

C. Proscription of Terrorist and Terrorism-Related Organisations

i. Introduction

Many Member States of the Council of Europe provide for the proscription or dissolution of terrorist or terrorism-related organisations, either constitutionally[41] or statutorily.[42] Currently, no comparable provisions can

[38] *Ibid* at 4.
[39] *Ibid* at 6.
[40] *Ibid*.
[41] See, eg, Art 9 s 2 German Constitution: 'Associations, the purposes of which conflict with criminal statutes or which are directed against the constitutional order or the concept of international understanding, are prohibited.' Art 18 s 2 Italian Constitution: 'Secret associations and associations pursuing political aims by military organization, even if only indirectly, are forbidden.' Art 22 s 2 Spanish Constitution: 'Associations which pursue purposes or use methods which are classified as crimes, are illegal.'
[42] See, eg, s 3 of the British Terrorism Act 2000 (empowering the Secretary of State to add an organisation to a list of proscribed organisations if (s)he believes that it is involved in terrorism). For a detailed discussion, see Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford, Oxford University Press, 2002) 38–64. Comparable provisions can be found in the 1936 French Law on Paramilitary Groups (see Stéphanie Dagron, 'Country Report on France' in Christian Walter *et al* (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin, Springer, 2004) 268, 289–90) and in the 1964 German Act Governing Private Associations (see Markus Rau, 'Country Report Germany' in Christian Walter *et al* (eds), above n 42 at 311, 326–27).

be found in the United States.[43] Hence, the primary focus in this section is on the European Convention jurisprudence. Although the purpose of proscribing an organisation may be purely symbolic, it usually also carries with it certain direct negative consequences for the association involved (eg, the confiscation of its assets) or for the individuals affiliated with it (eg, punishment of membership or support).[44] Somewhat surprisingly, the Strasbourg organs never had to deal with a decision to ban an organisation allegedly involved in terrorism. However, the court's extensive case law on the dissolution of anti-democratic political parties gives a clear indication on how such cases would be dealt with under the right to freedom of association protected in Article 11. The first sub-section therefore outlines the basic principles associated with anti-democratic political parties. Following that, the focus shifts to the proscription of terrorist organisations. There being little doubt that the proscription and dissolution of terrorist organisations would not raise serious Article 11 obstacles, the crucial question to be considered is how the label 'terrorist organisation' may serve to justify interference under the second paragraph of Article 11. Surely, not every group that the contracting states decide to be of a terrorist nature necessarily qualifies for proscription pursuant to Article 11 s 2. In light of the party closure jurisprudence, sub-sections three to five accordingly distinguish three hypothetical organisations: groups engaging in terrorist violence, groups supporting terrorist methods, and groups supporting the political goals of terrorists but renouncing their destructive means.

ii. Dissolution of Political Parties

Several Council of Europe Member States passed legislation that provides for the dissolution of political parties or analogous measures.[45] Both the European Court and the European Commission have examined the compatibility of such restrictions with Article 11.[46] The now settled case law

[43] Although the designation of an organisation as a 'foreign terrorist organisation' under the AEDPA (see above n 32) is not all the same as a proscription or dissolution, the consequence of that designation are equally serious. These include the blocking of the funds of the organisation and the punishment of material support to that organisation (see below).

[44] See below.

[45] For a survey of the legislation, see European Commission for Democracy through Law (Venice Commission), 'Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures', adopted by the Venice Commission at its 41st plenary session (Venice, 10–11 December, 1999), appendix 1.

[46] For an analysis of the case law, see, eg, Eva Brems, 'Freedom of Political Association and the Question of Party Closures' in Wojciech Sadurski (ed), *Political Rights Under Stress in 21st Century Europe* (Oxford, Oxford University Press, forthcoming); Mustafa Koçak and Esin Örücü, 'Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights' (2003) 9 *European Public Law* 399; Stefan

began with two rather summarily reasoned decisions in which the Commission recognised the legitimacy of a party closure. In 1957, the Commission reviewed the dissolution by the German Constitutional Court of the German Communist Party.[47] Relying on the abuse of rights provision in Article 17 of the Convention, the Commission declared the application inadmissible. In its opinion, the aim of the Communist Party was to establish a communist society by means of a proletarian revolution and the dictatorship of the proletariat. Such a goal was found to be incompatible with the principles laid down in the Convention, and constituted an activity aimed at the destruction of many of the rights and liberties it protects. In *X v Italy*, decided in 1976, the Commission considered the applicant's criminal conviction for an attempt to restore the dissolved Italian Fascist Party.[48] Although no application was made of Article 17 in this case, the application was again declared inadmissible. The Commission simply stated that the impugned measures could be considered as necessary in a democratic society for the protection of public order and the rights and freedoms of others pursuant to Article 11 paragraph 2.

The modern Convention approach to party closures was developed in a series of cases against Turkey.[49] This sub-section briefly examines the cases that paved the way to the present standard, and cumulated in the landmark judgment of *Refah Partisi (the Welfare Party) and others v Turkey*. The relevant aspects of subsequent cases are discussed in the following subsections.

a. United Communist Party of Turkey and others v Turkey

The first case in which the court examined the dissolution of a party was *United Communist Party of Turkey and others v Turkey*.[50] The United Communist Party was dissolved by the Turkish Constitutional Court, inter alia because it included in its name the prohibited word 'communist', and its constitution and programme undermined the territorial integrity of the state. More precisely, the party programme referred to two nations: the Kurdish nation and the Turkish nation, which would reveal the party's

Sottiaux, 'Anti-Democratic Associations: Content and Consequences in Article 11 Adjudication' (2004) 22 *Netherlands Quarterly of Human Rights* 585.

[47] *KPD v FRG* Application no 250/57, 1 YBECHR 222 (1957). The legal basis for the dissolution was Art 21 s 2 of the German Constitution: 'Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality.'

[48] *X v Italy* Application no 250/57, 5 *DR* 83 (1976).

[49] Most Turkish party closures were based on Law No 2820 on the regulation of political parties and Art 69 of the Turkish Constitution. For the text of both instruments, see, eg, *United Communist Party of Turkey and others*, above n 14 at paras 11 and 12.

[50] *Ibid*.

separatist intentions. In Strasbourg, the Turkish government submitted that the interference with Article 11 pursued the legitimate aims of protecting national security, territorial integrity and the rights and freedoms of others.[51] It further argued that, where those aims are concerned, the Convention does not require that the threat posed by the association should be 'real, current or imminent'.[52]

None of the two reasons relied upon by the Turkish Constitutional Court were accepted as adequate justifications for the interference with the political party's right to freedom of association. The court began by recalling the close affinity between the freedoms of association and expression. The nexus between the two rights, the court observed, applies all the more in relation to political parties, 'in view of their essential role in ensuring pluralism and the proper functioning of democracy'.[53] According to the court, political parties engage in 'a collective exercise of freedom of expression'.[54] As a result, the exceptions set out in Article 11 had to be construed strictly, which means that only 'convincing and compelling reasons' can justify restriction on political parties' freedom of association.[55]

Applying these principles to the case at hand, the court first observed that a political party's choice of name cannot in itself justify a measure as drastic as dissolution.[56] In this connection, the court lent significant weight to the fact that the party did not actually intend to establish the domination of one social class over the other, in spite of what its name suggested. Therefore, the United Communist Party had to be distinguished from the German Communist Party dealt with by the Commission forty years earlier. As to the contention that the United Communist Party supported separatism and Kurdish self-determination, the court found that the party's programme insisted on a peaceful and democratic solution for the Kurdish aspirations, and that resort to violence was explicitly rejected.[57] It made the following observation:

> [O]ne of the principal characteristics of democracy (…) [is] the possibility it offers of resolving a country's problems through dialogue, without resource to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of

[51] *Ibid* at para 49.
[52] *Ibid*.
[53] *Ibid* at para 43.
[54] *Ibid*.
[55] *Ibid* at para 46.
[56] *Ibid* at para 54.
[57] *Ibid* at para 56.

> the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.[58]

Although the court was prepared to accept that a party's political programme may conceal objectives and intentions different from the ones it proclaims, no proof of such intentions were found in the present case.[59] Because the United Communist Party was dissolved immediately after it had been created, its programme could hardly have been belied by any practical action. Finally, while the court was prepared to take into account 'the difficulties associated with the fight against terrorism', it found no evidence that the United Communist Party 'bore any responsibility for the problems which terrorism poses in Turkey'.[60]

b. Socialist Party and others v Turkey

The next Turkish party closure to reach the Strasbourg Court was reviewed in *Socialist Party and others v Turkey*.[61] In contrast to *United Communist Party of Turkey*, the dissolution of the Socialist Party was not based on the party's programme, but on oral and written statements by the president of the party. Those declarations supported the creation of minority rights and the establishment of a Kurdish nation. According to the Turkish Constitutional Court, the Socialist Party's political activity was incompatible with the aims of the Convention, 'since it was similar to that of terrorist organisations, notwithstanding a difference in the means employed'.[62] Similarly, the respondent government contended that the speeches of the party's chairman contained violent, aggressive and provocative language and sought to vindicate the use of violence and terrorist methods.[63] These contentions were set aside by the European Court. In its view, the content of the statements in question could not justify the dissolution of the Socialist Party, because nothing in them could be interpreted as 'a call for the use of violence, an uprising or any other form of rejection of democratic principles'.[64] In this connection, the court observed that the 'fact that (…) a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy'.[65] While the court was willing to take into account the difficulties associated with the fight against

[58] *Ibid* at para 57.
[59] *Ibid* at para 58.
[60] *Ibid* at para 59.
[61] *Socialist Party and others v Turkey* Reports 1998-III (1998).
[62] *Ibid* at para 15.
[63] *Ibid* at para 38.
[64] *Ibid* at para 46.
[65] *Ibid* at para 47.

terrorism, it held that it had not been established that the impugned statements were in any way responsible for the problems of terrorism in Turkey.[66]

c. Freedom and Democracy Party (ÖZDEP) v Turkey

The reasons given by the Turkish Constitutional Court for ordering the dissolution of the Freedom and Democracy Party were twofold.[67] First, by calling, inter alia, for a right to self-determination for the Kurdish people, the party's programme tended to undermine the territorial integrity of the state and the unity of the nation. Second, the party's proposal to abolish the government Religious Affairs Department undermined the constitutional principle of secularism. For the European Court these grounds were insufficient to legitimise such a radical measure as dissolving a party. In its attempt to distinguish the present case from the previous ones, the respondent government claimed that the Freedom and Democracy Party had openly supported the armed struggle for independence, by declaring that the 'ÖZDEP supports the people's just and legitimate struggle for their independence and freedom. It stands by that struggle'.[68] The European Court noted that while that phrase represented a statement of intent to make certain political demands, it found no trace in it of any incitement to use violence or to break the rules of democracy.[69] According to the court, the statement in question 'is virtually indistinguishable from passages to be found in the programmes of certain bodies that are politically active in other member States of the Council of Europe'.[70]

d. Refah Partisi (the Welfare Party) and others v Turkey

In the cases discussed so far, the European Court was not prepared to accept the respondent government's allegations as to the anti-democratic character of the programme and activities of the political parties involved. The situation was different in the case of *Refah Partisi and others v Turkey*, in which the court, for the first time in its history, was called upon to review restrictions imposed on a political party it found to support ideas contrary to the concept of a democratic society.[71]

In 1998, the Turkish Constitutional Court dissolved the Refah party on the grounds that it had become a 'centre of activities contrary to the

[66] *Ibid* at para 52.
[67] *Freedom and Democracy Party (ÖZDEP) v Turkey* Reports 1999-VIII (1999) para 14.
[68] *Ibid* at para 35.
[69] *Ibid* at para 40.
[70] *Ibid*.
[71] *Refah Partisi (the Welfare Party) and others v Turkey*, 31 July 2001 (Third Section); *Refah Partisi (the Welfare Party) and others v Turkey* Reports 2003-II (2003) (Grand Chamber).

principles of secularism'.[72] It ordered the transfer of its assets to the Turkish Treasury, and, as an additional penalty, stripped several party members of their status as Members of Parliament and suspended some of their political rights. In 2001, the Third Section of the European Court held, by four votes to three, that the dissolution of Refah did not amount to a violation of Article 11.[73] On request of the applicants, the case was referred to the Grand Chamber, which in 2003 unanimously confirmed the Third Section's judgment.[74]

Both the Third Section and the Grand Chamber concurred in the Turkish government's view that the political plans of Refah were incompatible with the concept of a secular democratic society. In the court's opinion, the acts and speeches of the political party's members and leaders revealed its long-term policy of setting up a regime based on Islamic law within the framework of a plurality of legal systems. The court also accepted the contention that some of Refah's leaders did not exclude recourse to force in order to implement its policy. The majority of the Third Section gave two major reasons why it believed a plurality of legal systems to be incompatible with the Convention system: (1) such a societal model would do away with the state's role as the guarantor of individual rights, and (2) it would be incompatible with the principle of non-discrimination.[75] The Grand Chamber saw no reason to depart from that conclusion.[76] As regards the introduction of Islamic law, the majority of the Third Section argued that the sharia 'faithfully reflects the dogmas and divine rules laid down by religion' and that it 'clearly diverges from Convention values'.[77] In

[72] *Refah Partisi (the Welfare Party) and others v Turkey* (Grand Chamber), previous n at para 23.

[73] *Refah Partisi (the Welfare Party) and others v Turkey* (Third Section), above n 71.

[74] *Refah Partisi (the Welfare Party) and others v Turkey* (Grand Chamber), above n 71.

[75] See *Refah Partisi (the Welfare Party) and others v Turkey*, (Third Section), above n 71 at para 70: 'Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention. Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs.'

[76] *Refah Partisi (the Welfare Party) and others v Turkey* (Grand Chamber), above n 71 at para 119.

[77] *Refah Partisi (the Welfare Party) and others v Turkey* (Third Section), above n 71 at para 72.

particular, the sharia's criminal law, its rules on the legal status of women and the way it intervenes in all spheres of private and public life were viewed to be at odds with the conception of democracy inherent to the Convention system. Again, the Grand Chamber concurred in the Chamber's position.[78] Having reached the conclusion that Refah's political goals were anti-democratic from a Convention perspective, the court went on to formulate the standards by which freedom-restricting measures against such parties must be judged.

The Test as Formulated by the Third Section

To judge the necessity of the restrictions imposed on Refah, the Third Section first reiterated the settled principles regarding the position of political parties and the limits within which they may conduct their activities under the Convention system. From the previous Turkish party closure cases the majority deduced the following rule:

> [A] political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles.[79]

The majority continued to hold that it necessarily follows from both requirements that

> a political party whose leaders incite recourse to violence, or propose a policy which does not comply with one or more of the rules of democracy or is aimed at the destruction of democracy and infringement of the rights and freedoms afforded under democracy cannot lay claim to the protection of the Convention against penalties imposed for those reasons.[80]

However, to reach the final verdict that the dissolution of Refah was justifiable under the democratic necessity test, the Third Section did not seem to satisfy itself with the conclusion that the party's political aims infringed upon a number of democratic principles. In applying its newly adopted test to the particular situation of Refah, the majority 'further noted' that the party's political project was 'neither theoretical nor illusory but achievable for two reasons'.[81] The first reason was Refah's influence as

[78] *Refah Partisi (the Welfare Party) and others v Turkey* (Grand Chamber), above n 71 at para 123. For a critical discussion of the reasons put forward by the Third Section and the Grand Chamber, see, eg, Brems, 'Freedom of Political Association ', above n 46 at 29–30 (arguing that neither legal pluralism nor the introduction of the sharia necessarily entail human rights violations).

[79] *Refah Partisi (the Welfare Party) and others v Turkey* (Third Section), above n 71 at para 47.

[80] *Ibid*.

[81] *Ibid* at para 77.

a political party and its chances of gaining power.[82] The second reason was the fact that in the past several political movements based on religious fundamentalism had been able to seize political power in Turkey.[83] Both elements led the court to the conclusion 'that the real chance Refah had to implement its political plans undeniably made the danger of those plans for public order more tangible and more immediate'.[84]

The Test as Formulated by the Grand Chamber

At the outset of its opinion, the Grand Chamber took a rather 'militant' approach. It pointed out that 'no-one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society'.[85] Further, it found that pluralism and democracy 'are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy to guarantee greater stability of the country as a whole'.[86] Against the background of these two observations, the Grand Chamber recalled the two-part test relied upon by the Third Section.

In a second step, however, the Grand Chamber went on to stress that European supervision must be rigorous where restrictions on political parties are concerned. According to the unanimous judgment, 'drastic measures'—such as the dissolution of an association—may be taken only in the most serious cases.[87] In this connection, the court reflected on what it called 'the appropriate timing for dissolution', holding that

> a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent.[88]

In light of these considerations, the Grand Chamber articulated a new overall standard for assessing whether the dissolution of a political party satisfies the requirements of the democratic necessity test. In order to

[82] *Ibid*. The court observed that, at the time of its dissolution, Refah had nearly a third of the seats in the Turkish Grand National Assembly. In the 1995 general elections Refah obtained 22% of the votes, in the 1996 local elections Refah obtained 35 % of the votes.

[83] *Ibid*.

[84] *Ibid*.

[85] *Refah Partisi (the Welfare Party) and others v Turkey* (Grand Chamber), above n 71 at para 99.

[86] *Ibid* at para 98.

[87] *Ibid* at para 100.

[88] *Ibid* at para 102. The court continued that 'a State may reasonably forestall the execution of such a policy, (…), before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime.' (*Ibid*.)

ascertain whether dissolution meets a pressing social need, the court must concentrate on the following three points:

> (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a 'democratic society'.[89]

e. Concluding Remarks

For a good understanding of the Convention approach to the proscription of terrorist and terrorism-related organisations, it is instructive to compare the Strasbourg Court's Article 11 adjudication with the subversive and violence conducive speech jurisprudence examined in chapter three.[90] The *Refah* test, like the court's 'incitement to violence' standard, can be regarded as a concretisation of the highly flexible democratic necessity test. As has been seen, the main question under Article 10 is whether the expressions involved 'incite to violence against an individual, a public official or a sector of the population'.[91] If the answer is positive, the national authorities enjoy a wide margin of appreciation in regulating it. The speaker-focused Article 10 'incitement to violence' standard is clearly mirrored in some of the party-ban cases discussed above. Thus, for instance, in *Freedom and Democracy Party*, the court based its conclusion that there had been a violation of Article 11, partly on the fact that the statements of the party's president could not be read as inciting people to use violence.[92] Similarly, In the *Refah* case, both the Third Section and the Grand Chamber took the position that 'a political party whose leaders incite violence' cannot claim Convention protection against penalties imposed on those grounds.[93]

On the other hand, the European Court's Article 11 standard also bears resemblance to the more consequence-based First Amendment approach. In the Third Section's *Refah* judgment, the majority stressed the 'tangible' and 'immediate' danger the party's programme and activities presented to the democratic system. This terminology is reminiscent of the Supreme Court's 'clear and present danger' doctrine. However, the importance of

[89] *Ibid* at para 104.
[90] See also Sottiaux, 'Anti-Democratic Associations', above n 46 at 596–97.
[91] See, eg, *Özturk v Turkey* Reports 1999-VI (1999) para 66.
[92] *Freedom and Democracy Party (ÖZDEP) v Turkey*, above n 67 at para 40.
[93] *Refah Partisi (the Welfare Party) and Others v Turkey (Third Section)*, above n 71 at para 47; *Refah Partisi (the Welfare Party) and Others v Turkey (Grand Chamber)*, above n 71 at para 98.

this phrase in the Third Section's final assessment was not entirely clear. More precisely, the question arose as to what extent the court intended to add a third condition to its two-step test.[94] The Grand Chamber resolved the issue, at least as far as the dissolution of an entire political party is concerned (and arguably similar 'drastic measures'),[95] by explicitly adopting an additional 'imminent threat' requirement. According to the first prong of the Grand Chamber's standard, the national authorities must provide plausible evidence that 'the risk to democracy' is 'sufficiently imminent'.[96] In this respect, the court also noted that it must take account of the 'historical context' in which the dissolution of the party concerned took place.[97] The Grand Chamber's focus on imminence made more explicit a concern with consequences already implied in the Third Section's ruling, and integrated this element in a new formula for assessing the dissolution of a political party. The result is a comprehensive test, which is both content-based and consequence-based: not only need 'the model of society conceived and advocated by the party be incompatible with the concept of a democratic society', it must also present a 'sufficiently imminent' threat to the democratic regime. Consequently, the Article 11 standard for assessing drastic measures against anti-democratic associations clearly resembles certain aspects of the Supreme Court's subversive and violence-conducive speech jurisprudence. Note, however, that the *Refah* standard does not exhibit the same categorical nature as the *Brandenburg* formula. For example, the words '*sufficiently* imminent' appear to leave more room for case by case balancing than does the stricter 'imminent lawless action' prong under *Brandenburg*. Furthermore, what remains unclear is how the *Refah* 'imminence' requirement relates to the 'incitement' standard endorsed by both the Third Chamber and the Grand Chamber. Does a political party qualify for dissolution because its programme or (some of) the statements of its leaders incite to violence, even where it does not pose an imminent threat to democracy?

iii. Groups Engaging in Terrorist Violence

At the risk of stating the obvious, the proscription and dissolution of groups that employ violence as a means for political ends is justifiable under Article 11 s 2, in the interests of national security, public safety, the

[94] See Stefan Sottiaux and Dajo De Prins, 'La Cour européenne et les organisations antidémocratiques' (2002) 52 *Revue trimestrielle des droits de l'homme* 1008, 1032–34.

[95] See, eg, *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania*, 3 February 2005 (referring to the 'imminent threat' requirement when considering the refusal to register a political party).

[96] *Refah Partisi (the Welfare Party) and Others v Turkey (Grand Chamber)*, above n 71 at para 104.

[97] *Ibid* at para 105.

prevention of disorder or crime and the protection of the rights and freedoms of others.[98] In *Refah*, the European Court stressed that associations enjoy Convention protection only if the 'means' they use to promote a change in the law or the constitutional structures of a country are 'legal and democratic'.[99] It goes without saying that bombings, assassinations, kidnappings and other terrorist tactics cannot be regarded as legal and democratic political methods. Moreover, not only are states allowed to impose restrictions on violent terrorist groups on the basis of Article 11 s 2, proscription is also justified pursuant to the state's positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within its jurisdiction.[100]

Nonetheless, it would be a step too far to infer from *Refah* that every organisation that, from a contracting state's point of view, engages in some form of illegal activity, can legitimately be proscribed under Article 11 s 2. Firstly, the criminalisation of the conduct in question must itself be compatible with the Convention. Thus, for instance, the offence of disseminating separatist propaganda constitutes a violation of Article 10, and should therefore not serve as a ground for establishing that an organisation is involved in illegal activity for the purposes of Article 11.[101] Secondly, not every breach of the law by an association or its members is a sufficient basis for proscribing that association as a 'terrorist' organisation. In the context of anti-democratic political parties, the Third Section in *Refah* posited that a party's methods must 'in every respect' be legal and democratic.[102] However, this strict wording was omitted by the Grand Chamber, which merely required that a party's activities be 'legal and

[98] See also the Venice Guidelines on the prohibition of political parties: 'Prohibition or enforced dissolution of political parties may (…) be justified in the case of parties which (…) use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution.' (European Commission for Democracy through Law (Venice Commission), above n 45, para 3). According to the Explanatory Report, there must be 'sufficient evidence' that the party is 'involved in terrorist or other subversive activities' (*Ibid* at para 15 of the Explanatory Report).

[99] *Refah Partisi (The Welfare Party) and Others v Turkey (Grand Chamber)*, above n 71 at para 98.

[100] See, eg, *Gorzelik and others v Poland*, above n 11 at para 94. See in this respect Brems, 'Freedom of Political Association ', above n 46 at 24 (considering the question whether States are obliged to proscribe organisations engaging in violence under their obligation to protect human rights).

[101] Cp, eg, *Sürek and Özdemir v Turkey*, 8 July 1999 (convictions for the dissemination of separatist propaganda in violation of Art 10) with *United Macedonian Organisation Ilinden—Pirin and others v Bulgaria*, 20 October 2005, para 61 (holding that the mere fact that the members of a political association advocate separatist ideas is not a sufficient basis to justify its dissolution on national security grounds under Art 11 s 2).

[102] *Refah Partisi (the Welfare Party) and Others v Turkey, (Third Section)*, above n 71 at para 47.

democratic'.[103] Whatever the significance of this condition may be, it would, for instance, not seem to be necessary in a democratic society to ban or dissolve an entire political organisation for the simple reason that its members took part in a proscribed manifestation or called for acts of civil disobedience. Thus, for instance, in *Christian Democratic People's Party v Moldova*, the court held that a temporary ban on the activities of a political association on the grounds that its members participated in an unauthorised public gathering, amounted to a violation of Article 11.[104] In the court's opinion, the failure to comply with legislation on public assemblies was not a 'relevant and sufficient' reason for imposing such a drastic measure as a ban on the activities of an opposition party.[105] The disproportionate nature of the measure was not alleviated by the temporary nature of the ban, since even a temporary ban could have a 'chilling effect' on the organisations protected activities.[106]

iv. Groups Supporting Terrorist Methods

Non-violent political associations sometimes lend their support to groups involved in terrorism, and, conversely, terrorists sometimes make use of non-violent associations to pursue their aims. It is, for instance, well established that terrorist organisations sometimes form 'political wings' to complement their goals through the electoral process.[107] The symbiosis between terrorist and non-violent organisations can manifest itself in many ways. For example, a non-violent organisation may explicitly encourage, legitimise, or excuse the criminal acts of groups which engage in terrorist violence, or it may help in more indirect ways, for instance by failing to condemn violence as a political method, or by offering terrorist groups access to the media to facilitate the dissemination of their ideological aims. Although the existence of these types of organisations is widely acknowledged, scholars disagree as to the legitimacy and efficacy of proscription as

[103] *Refah Partisi (the Welfare Party) and others v Turkey* (Grand Chamber), above n 71 at para 98.

[104] See, eg, *Christian Democratic People's Party v Moldova*, 14 February 2006, paras 71–78.

[105] *Ibid* at para 73.

[106] *Ibid* at para 77.

[107] On the involvement of political parties in terrorist activities, see, eg, Leonard Weinberg (ed), *Political Parties and Terrorist Groups* (London, Frank Cass, 1992); Leonard Weinberg, 'Turning to Terror: The Conditions Under Which Political Parties Turn to Terrorist Activities' (1991) 23 *Comparative Politics* 423; Leonard Weinberg and William Lee Eubank, 'Political Parties and The Formation of Terrorist Groups' (1990) 2 *Terrorism and Political Violence* 125.

a counter-terrorist strategy.[108] In addition to the traditional arguments on the advantages and disadvantages of banning anti-democratic political parties, academics have pointed to the need to collect detailed empirical data regarding the practical effects of proscription on reducing the terrorist threat.[109] Be that as it may, a 1998 survey indicates that a number of Member States of the Council of Europe have in place legislation that allows for the proscription and forced dissolution of political parties that support violence as a political method.[110] A highly publicised example of such a piece of legislation is the Spanish Law on Political Parties (Ley Orgánica de Partidos Políticos), which was adopted to address the problem posed by the separatist Basque party Batasuna, widely perceived to be the political wing of the terrorist group ETA (Euzkadi ta Askatasuma).[111] The Spanish law enumerates the following activities which, if occurring repeatedly and systematically, may result in proscription:

> (a) violating fundamental rights by promoting, justifying, or excusing attacks on the life or dignity of the person or the exclusion or persecution of an individual by reason of ideology, religion, beliefs, nationality, race, sex, or sexual orientation; (b) encouraging or enabling violence to be used as a means to achieve political ends or as a means to undermine the conditions that make political pluralism possible; and (c) assisting and giving political support to terrorist organisations with the aim of subverting the constitutional order.[112]

[108] For an overview of the debate, see, eg, Katherine A Sawyer, 'Rejection of Weimarian Politics or Betrayal of Democracy?: Spain's Proscription of Batasuna Under the European Convention on Human Rights' (2003) 52 *American University Law Review* 1531, 1572–80.

[109] See, eg, John Finn, 'Electoral Regimes and the Proscription of Anti-Democratic Parties' in David C Rapoport and Leonard Weinberg (eds), *The Democratic Experience and Political Violence* (London, Frank Cass, 2001) 51, 56. One of the many concerns often raised by opponents of proscription is that it will become more difficult to negotiate with violent groups if the political wing in outlawed.

[110] European Commission for Democracy through Law (Venice Commission), above n 45, appendix I.

[111] ETA stands for 'Basque Homeland and Liberty'. For a discussion of the Law on Political Parties and the subsequent dissolution of Batasuna by the Spanish courts, see, eg, Thomas Ayres, 'Batasuna Banned: The Dissolution of Political Parties Under the European Convention of Human Rights' (2004) 27 *Boston College International and Comparative Law Review* 99; Sawyer, above n 108; Leslie Turano, 'Spain: Banning Political Parties as a Response to Basque Terrorism' (2003) 1 *International Journal of Constitutional Law* 730.

[112] Ley Orgánica de Partidos Políticos, Art 9 s 2, quoted in and translated by Turano, previous n at 733. According to Para 3, these types of behaviour may consist of activities such as, 'a) giving express or tacit political support to terrorism, and thus legitimizing terrorist actions by seeking to minimize the importance of human rights and their violation; b) creating a culture of confrontation linked to the actions of terrorists and thereby seeking to intimidate, deter, neutralize, or socially isolate anyone who opposes such actions, forcing them to live with the daily threat of coercion and fear and depriving them of the fundamental right of freedom of expression and participation in public life; c) including regularly in its directing bodies and on its electoral lists persons who have been convicted of terrorist crimes and who have not publicly renounced terrorist methods and aims, or maintaining among its membership a significant number of 'double militants' (ie, those who also belong to groups with links to terrorist organizations), except where there are attempts by the party to expel or discipline

The Law on Political Parties was upheld against constitutional challenges by the Spanish Constitutional Court,[113] and Batasuna was proscribed as a political party, inter alia for its refusal to condemn terrorist atrocities by ETA and the presence of 'double militants' in Batasuna and ETA.[114]

Commenting on the *Batasuna* case, several authors have argued that the banning of organisations such as Batasuna would not amount to a violation of Article 11.[115] The remainder of this sub-section contemplates how the court in Strasbourg would review the proscription and dissolution of these types of organisations. As a point of departure, it may be useful to recall the treatment of terrorist-supportive speech under the right to freedom of expression. As has been seen in chapter three, the criminal punishment of expressions advocating terrorist violence may be justified under Article 10 s 2 if those expressions can, in context, be interpreted as inciting violence.[116] Thus, in *Zana* the prosecution of an influential politician for publicly supporting a terrorist organisation was held to be answering a pressing social need.[117] In *Özturk*, by contrast, the European Court protected a biography, which, in the court's opinion, gave 'moral support' to the ideas of an alleged terrorist.[118] The book could not be analysed as incitement to violence. In other words, freedom restricting measures against the members of a political or a religious organisation for justifying or condoning the activities of terrorists may, depending on their content and the circumstances in which they were uttered, be justified under Article 10 s 2.

such persons; d) using in an official way symbols, slogans, or other representational elements that are normally identified with a terrorist organization; e) conceding to a terrorist organization or to those who collaborate with one the same rights and prerogatives that electoral law concedes to parties; f) collaborating habitually with groups that act systematically in accordance with terrorist or violent organizations or that protect and support terrorism and terrorists; g) giving institutional support, administratively or economically, to any of the groups mentioned in the preceding subparagraph; h) promoting, giving cover to, or participating in activities that have as their objective rewarding, paying homage to, or honouring violent or terrorist actions and those who commit or collaborate with them; and i) giving cover to actions that socially intimidate, coerce, or disrupt public order and that are linked to terrorism or violence.' (*Ibid.*)

[113] Tribunal Constitutional, 48/2003, 12 March 2003 (no violation of the right to freedom of association).

[114] Turano, above n 111 at 738.

[115] Eg, Ayres, above n 111 at 109–13 (arguing that while Batasuna does not have nearly the same power or influence as the Refah party when it was dissolved, the dangers it poses to public order are nevertheless 'tangible' and 'immediate' due to the long history of terrorist violence in Spain); Brems, 'Freedom of Political Association', above n 46 at 38 (contending that the case against Batasuna is likely to fall under the Refah criteria); Sawyer, above n 108 at 1566–72 (stating that the European Court will likely uphold the proscription of Batasuna).

[116] See ch 3, section IV.

[117] *Zana v Turkey* Reports 1997-VII (1997).

[118] *Özturk v Turkey*, above n 91.

Yet the question arises as to whether support of terrorist groups constitutes a sufficient reason for banning an entire organisation.[119] The fact that certain expressions that qualify for criminal punishment under Article 10 s 2 can be linked to an association, does not necessarily entail that it is permissible to proscribe or dissolve that entire organisation under Article 11 s 2. In 1991, the European Commission first touched upon this issue when dealing with the Irish broadcasting ban.[120] In *Purcell and others v Ireland*, the Commission suggested in a statement of dicta that a proscription of the Irish political party Sinn Fein for condoning the activities of the IRA would not have raised serious Convention problems:

> While it is true that Sinn Fein—as opposed to the other organisations enumerated in the Order—is not a proscribed organisation, it is also true that it condones the terrorist activities of one of the listed organisations—which is proscribed—and is closely associated with them (…). The Commission notes that under these circumstances it might well be possible under the Irish legislation to declare Sinn Fein an unlawful organisation. That it is not so proscribed, is a matter of policy which is alone for the Irish Government to determine.[121]

The court tackled the issue more directly in several Turkish party-ban cases. In some of the cases discussed in the preceding sub-section, regard was had to the fact that nothing in the dissolved party's programmes and statements could be read as 'a call for the use of violence'.[122] In *United Communist Party* and many subsequent judgments, the court also took into account that the parties involved bore no responsibility for 'the problems terrorism poses in Turkey'.[123] Finally, one of the many factors taken into consideration by the *Refah* Court in its overall assessment of the existence of a pressing social need was the fact that Refah did not exclude recourse to force in order to implement its policy.[124] In the court's opinion, the terminology used in several declarations by prominent party figures was ambiguous:

[119] See also the Venice Guidelines on the prohibition of political parties, above n 98. According to the Venice Commission Explanatory Report, above n 45, there must be 'sufficient evidence that the political party in question is advocating violence'. Moreover, 'State authorities should also evaluate the level of threat to the democratic order in the country and whether other measures, such as fines, other administrative measures or bringing individual members of the political party involved in such activities to justice, could remedy the situation. Obviously, the general situation in the country is an important factor in such an evaluation.' (*Ibid* at paras 15–16 of the Explanatory Report).

[120] See Colin Warbrick, 'The Principles of the European Convention on Human Rights and the Response of States to Terrorism' (2002) 3 *European Human Rights Law Review* 287, 308–9.

[121] *Purcell and others v Ireland* Application no 15404/89, 70 *DR* 262, 277–8 (1991).

[122] Eg, *Socialist Party and others v Turkey*, above n 61 para 46.

[123] *United Communist Party of Turkey and others*, above n 14 at para 46. Settled case law: see, eg, *Socialist Party and others v Turkey*, n 61 at para 52.

[124] *Refah Partisi (the Welfare Party) and others v Turkey* (Grand Chamber), above n 71 at para 132.

> [W]hatever meaning is ascribed to the term 'jihad' used in most of the speeches (…) (whose primary meaning is holy war and the struggle to be waged until the total domination of Islam in society is achieved) (…) [i]n all of these speeches the possibility was mentioned of resorting 'legitimately' to force in order to overcome various obstacles Refah expected to meet in the political route by which it intended to gain and retain power.[125]

The court further noted that while Refah's leaders did not, in government documents, call for the use of force and violence as a political weapon,

> they did not take prompt practical steps to distance themselves from those members of [Refah] who had publicly referred with approval to the possibility of using force against politicians who opposed them. Consequently, Refah's leaders did not dispel the ambiguity of these statements about the possibility of having recourse to violent methods in order to gain power and retain it.[126]

The Convention position of groups supporting terrorism was further developed in a series of Chamber judgments against Turkey. The first important case—*Yazar, Karatas, Aksoy and The People's Labour Party (HEP) v Turkey*—concerned the decision of the Constitutional Court to dissolve the People's Labour Party on the grounds that it pursued activities aimed at undermining the territorial integrity and the national union of the Turkish State.[127] To justify the interference with Article 11, the respondent government referred to statements by leading party members allegedly excusing the acts of terrorists. According to the findings of the Constitutional Court, several party officials portrayed members of the terrorist organisation PKK as 'freedom fighters', and criticised the Turkish authorities for not treating them as lawful combatants in accordance with international law.[128] However, in the Strasbourg Court's opinion, there was insufficient evidence that the targeted organisations advocated terrorist violence.[129] Although some statements were critical to the national authorities' efforts to fight terrorism and hostile in tone, they did not constitute sufficient proof 'to equate the HEP with armed groups carrying out acts of violence' ('afin d'assimiler le HEP aux groupes armés procédant à des actes de violence').[130] In this connection, the court recalled that the limits of permissible criticism are wider with regard to the government than in relation to private citizens, and concluded that it was not persuaded 'that by criticising the actions of the armed forces the HEP's

[125] *Ibid* at para 130.
[126] *Ibid* at para 131.
[127] *Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v Turkey*, 9 April 2002.
[128] *Ibid* at para 22.
[129] *Ibid* at para 55 (observing that the party did not express any explicit support for or approval of the use of violence for political ends, and that none of its leading members had been convicted for incitement to violence).
[130] *Ibid* at para 59.

members of parliament and officials were pursuing any other goal than that of discharging their duty to draw attention to their electors' concerns'.[131]

A second case worth mentioning is *Dicle for the Democratic Party of Turkey (DEP) v Turkey*.[132] The reasons for banning the Democratic Party of Turkey were very similar to those relied upon by the Turkish Constitutional Court in *People's Labour Party (HEP)*. The decision to dissolve the Democratic Party was based on a declaration issued by the party's central committee and two speeches by its former president; one delivered in Iraq, the other in Germany.[133] When considering the necessity of the interference, the European Court carefully reviewed the content of the three texts. As regards the speech pronounced in Bonn and the party's written declaration, the court discerned no explicit call for the use of violence.[134] The speech held at a meeting of the political party KDP in Iraq, by contrast, included two statements which, according to the court, amounted to a justification of recourse to violence as a political method.[135] The first assimilated the PKK's armed struggle with a liberation war and portrayed PKK casualties as 'children of the Kurdish people who have sacrificed themselves for their country and for the liberation of the Kurds in order to found a Kurdish State'.[136] The second message had been intended to stigmatise the other side to the conflict by portraying it as the 'enemy.'[137] In light of the problems linked to terrorism in the region, messages of such a nature were liable to reinforce deep-rooted feelings of hate and give the impression that resource to violence was a necessary and justified measure of self-defence in the face of the aggressor.[138] As a consequence, freedom-restricting measures taken against the former president of the Democratic Party of Turkey would have reasonably met a pressing social need. Nevertheless, the court went on to consider whether the statements in issue also justified the dissolution of the entire organisation. In this respect, it observed that a single speech by a former party official, delivered abroad in another language than Turkish, before a public which was not directly concerned with the situation in Turkey, only had a very limited potential impact on national security and public order.[139] For that reason, a

[131] *Ibid*.
[132] *Dicle for The Democratic Party of Turkey (DEP) v Turkey*, 10 December 2002.
[133] *Ibid* at para 18 *ff*.
[134] *Ibid* at para 59.
[135] *Ibid* at para 62.
[136] *Ibid* at para 61: 'Un deuxième message assimile le mouvement armé du PKK à une guerre de libération au Kurdistan du nord et qualifie les militants du PKK morts dans ce conflit armé, d'enfants du peuple kurde qui se sont sacrifiés pour la patrie et pour la libération des kurdes afin de fonder un Etat kurde.'
[137] *Ibid*.
[138] *Ibid* at para 62.
[139] *Ibid* at para 64.

far-reaching interference such as the dissolution of an entire organisation could not be said to be proportionate to the interests served.

What conclusions can be drawn from these cases? The first is that an association's support of terrorist groups does not in itself warrant interference with the right to freedom of association. Only if such support can be read as incitement to violence in accordance with the court's flexible 'incitement' standard, may interference with Article 10 and 11 interests be justified. As in the context of Article 10, the outcome of this inquiry does not turn solely on an appreciation of the literal meaning of the words used. In her analysis of the *Refah* case, Eva Brems writes that the court takes a broad approach to the issue of incitement: in certain circumstances explicit calls for violence are not required and ambiguity (for instance failure to denounce terrorism) may suffice.[140] Secondly, the fact that some of the speech that can be attributed to an organisation amounts to a call for (terrorist) violence does not automatically authorise the proscription or dissolution of that entire organisation. Pursuant to the proportionality requirement implicit in the democratic necessity test, the state authorities are under the obligation to assess whether less restrictive measures than proscription, such as prosecution of individual members, suffice to advance legitimate counter-terrorist interests. In other words, an association does not lose all of its protection under Article 11 merely because some of its members incite to violence.[141] It should be recalled that, at least as far as political parties are concerned, the court in *Refah* demanded evidence of a 'sufficiently imminent' risk to democracy to warrant far-reaching restrictions. Applying this principle to the threat of terrorism, the assimilation of a non-violent political party with a terrorist group, and its concomitant proscription, seems to require proof of some 'real' and 'tangible' connection between the organisation and the occurrence of terrorist violence. As Conor Gearty observed several years before *Refah* was decided: the more attenuated the link between a proscribed group and violence, the greater the likelihood that the interference will not be found to serve a pressing social need.[142]

[140] Brems, 'Freedom of Political Association', above n 46 at 36.

[141] For a similar reasoning, see *NAACP v Claiborne Hardware Co*, 458 U.S. 886, 908 (1982) (deciding that individuals and groups involved in a legal protest action cannot be held liable for the illegal conduct of certain participants).

[142] Conor Gearty, 'Terrorism and Human Rights: A Case Study in Impeding Legal Realities' (1999) 19 *Legal Studies* 366, 373. For a similar view, see the report of the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, Scheinin, above n 36 at para 28: 'As such, three conditions must be satisfied [for the proscription of organisations for incitement to terrorism]: first, that there is the intent to incite the commission of a terrorist offence; second, that this intent is not solely that of one or several individuals but that of the association, group or political party as a collective entity; and third, that there exists an actual risk that such an act will be committed.'

v. Groups Supporting the Political Goals of Terrorists

It emerges from the previous sub-sections that not every possible link between an association's written or oral statements and a terrorist group justifies the suppression of the association involved. Absent proof of incitement to violence or of an organisation's intentions to implement an anti-democratic agenda, interference with Article 11 interests will not be justified, let alone such drastic measures as the proscription of that organisation. Settled Article 11 jurisprudence abundantly illustrates that an association must be allowed to further and promote through peaceful means radical viewpoints that are contrary to the interests of the state without running the risk of being banned. These include the independence of a part of the state's territory,[143] a modification of the form of government,[144] fundamental social and economic change,[145] and the promotion of minority rights.[146] As the court explained in *United Macedonian Organisation Ilinden—Pirin and others v Bulgaria*:

> In a democratic society based on the rule of law, political ideas which challenge the existing order without putting into question the tenets of democracy, and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through, *inter alia*, participation in the political process. However shocking and unacceptable the statements of the applicant party's leaders and members may appear to the authorities or the majority of the population and however illegitimate their demands may be, they do not appear to warrant (…) interference.[147]

In other words, the mere circumstance that an organisation's political platform is similar to that of terrorist organisations cannot in itself be a reason for imposing restrictions on that organisation's right to freedom of association. On several occasions the court expounded on the rationale

[143] See, eg, *United Macedonian Organisation Ilinden—Pirin and others v Bulgaria*, above n 101 (reviewing the dissolution of a political party allegedly calling for the secession of part of the country's territory). See already *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* Reports 2001-IX (2001) para 97 (case concerning the right to freedom of assembly).

[144] See, eg, *United Communist Party of Turkey and Others*, above n 14 at para 27: '[A]n association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State.'

[145] See, eg, *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania*, above n 95 (holding that a refusal to register a newly formed communist party was not justified under Art 11 s 2, despite Romania's historical experience with communism).

[146] See the numerous cases in which the court reviewed the Turkish efforts to ban political parties promoting Kurdish self-determination and minority rights. Eg, *Socialist Party of Turkey (STP) and others v Turkey*, 12 November 2003; *IPSD and others v Turkey*, 25 October 2005.

[147] *United Macedonian Organisation Ilinden—Pirin and Others v Bulgaria*, above n 101 at para 61.

behind this principle. Thus, in *Yazar, Karatas, Aksoy and The People's Labour Party (HEP) v Turkey*, the court easily set aside the respondent government's argument that political parties ought to refrain from embracing the political demands of a terrorist organisation, especially in a country under terrorist threat. In the court's opinion, such a position would only but diminish the possibility of a peaceful democratic solution:

> [I]f merely by advocating those principles [endorsed by terrorist organisations] a political group were held to be supporting acts of terrorism, that would reduce the possibility of dealing with related issues in the context of a democratic debate and would allow armed movements to monopolise support for the principles in question. That in turn would be strongly at variance with the spirit of Article 11 and the democratic principles on which it is based.[148]

vi. Concluding Remarks

The conclusion that emerges from this section is that the Strasbourg Court takes a rather flexible balancing approach to the proscription of organisations (allegedly) involved in terrorism. To ascertain whether drastic measures such as proscription or dissolution satisfy the democratic necessity test incorporated in Article 11 s 2, the court engages in a multifaceted inquiry, pertaining to any or all of the following issues: whether the organisation's objectives and (proposed) methods of political action are compatible with the concept of a democratic society; whether written or oral statements emanating from the organisation can be read as incitement to violence; and whether there is plausible evidence that the organisation poses a 'sufficiently imminent' risk to the democratic system. The foregoing illustrates that the flexibility inherent in the court's Article 10 'incitement to violence' standard transpires in the context of Article 11. Furthermore, the additional 'sufficiently imminent threat' prong enhances the measure of discretion afforded to the court, in that it requires it to make an assessment of the potential consequences of the organisation's action on a case-by-case basis (for instance by considering the history of terrorist violence in the region concerned). The fact sensitivity in Article 11 proscription cases is

[148] *Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v Turkey*, above n 127 at para 57. See also *Dicle for The Democratic Party of Turkey (DEP) v Turkey*, above n 132 at para 54. Settled case law: see, eg, *Emek Partisi and Senol v Turkey*, 31 May 2005, para 25; *Democracy and Change Party and others v Turkey*, 26 July 2005, para 25: 'Quant à la thèse du Gouvernement selon laquelle les objectifs du DDP présentaient des similitudes avec ceux avancés par le PKK pour justifier ses actes de terrorisme, la Cour rappelle que, si on estime que la seule défense des principes susmentionnés se résume, de la part d'une formation politique, en un soutien aux actes de terrorisme, on diminuerait la possibilité de traiter les questions y relatives dans le cadre d'un débat démocratique, et on permettrait aux mouvements armés de monopoliser la défense de ces principes, ce qui serait fortement en contradiction avec l'esprit de l'article 11 et avec les principes démocratiques sur lesquels il se fonde.'

also evidenced by the recurring phrase that the court is 'prepared to take into account the background of cases before it, in particular the difficulties associated with the fight against terrorism'.

D. Membership and Participation in Terrorist and Terrorism-Related Organisations

i. Standards of the European Convention

The criminal codes of several Member States of the Council of Europe make it a crime to be a member in, or to participate as a member in, a terrorist organisation.[149] Following the September 11 terrorist attacks, some states extended the reach of these laws, for instance to cover membership in foreign associations.[150] In addition, the 2002 EU Terrorism Framework Decision on Combating Terrorism now obliges Member States to punish the 'intentional' act of 'participating in the activities of a terrorist group (…), with knowledge of the fact that such participation will contribute to the criminal activities of that group'.[151] The maximum sentence for this offence may not be less than eight years.[152]

To date, the Strasbourg organs have not considered whether the Convention imposes any limits on efforts to outlaw membership in terrorist or terrorism-related associations. This is not due to lack of opportunity—indeed, both the Commission and the European Court have reviewed several complaints against convictions for association with groups (allegedly) involved in terrorism. In a series of inadmissibility decisions against Turkey, the Commission,[153] later followed by the European Court,[154] summarily dismissed these applications as manifestly ill-founded. Most

[149] Eg, s 129a of the German Criminal Code (Organisationsdelikt) (see Rau, above n 42 at 346–7); s 11(1) of the British Terrorism Act 2000 (see Walker, above n 42 at 61); Art 421–2–1 of the French Criminal Code (see Dagron, above n 42 at 270); Art 270-bis of the Italian Criminal Code (see Karin Oellers-Frahm, 'Country Report on Italy' in Christian Walter *et al* (eds), above n 42 at 427, 442); Art 576 of the Spanish Penal Code (see José Martínez Soria, 'Country Report on Spain' in Christian Walter *et al* (eds), above n 42 at 517, 536).

[150] Eg, s 129b of the German Criminal Code; Art 270-bis of the Italian Criminal Code.

[151] Art 2(2)(b), Council Framework Decision on Combating Terrorism, above n 31. Note that the practice of prosecuting individuals for their association with certain organisations, regardless of their direct involvement in the commission of other crimes, was already introduced in European law to combat organised crime. See, eg, Valsamis Mitsilegas, 'Defining Organised Crime in the European Union: the Limits of European Criminal Law in an Area of "Freedom, Security and Justice"' (2001) 26 *European Law Review* 565.

[152] Art 5(3), Council Framework Decision on Combating Terrorism, above n 31.

[153] See, eg, *Waldberg v Turkey* Application no 22909/93, 82 *DR* 29 (1995) (concerning membership in and support to the PKK).

[154] See, eg, *Ari v Turkey*, 11 January 2000 (concerning membership in the organisation Dev-Yol (Revolutionary Way); *Kizilöz v Turkey*, 11 January 2000 (concerning membership in the organisation Dev-Yol); *Sahiner v Turkey*, 11 January 2000 (concerning membership in the

cases concerned convictions under Articles 168 and 169 of the Turkish Criminal Code, which make it a crime to be a member in or assist the members of an armed gang or organisation.[155] Rather than invoking the right to freedom of association, the applicants based their complaints on Articles 9 (freedom of thought, conscience, and religion) and 10 of the Convention. According to the Convention organs, the challenged measures fell outside the protective ambit of the Convention. The recurring consideration in these cases runs as follows:

> The Court notes that the Turkish courts convicted the applicant of his membership of an illegal organisation (…). It appears therefore that the applicant was not convicted on account of his political opinions. Nor was he prohibited from receiving and imparting such opinions. The Court therefore considers that there has been no interference with the applicant's rights protected by Articles 9 and 10 of the Convention and accordingly no question arises as to the possible justification for such interference under paragraph 2 of those provisions.

By thus categorically declining to find an interference with any of the Convention rights, the Strasbourg organs failed to form a judgment about the acceptable parameters of membership crimes. It is telling that in none of the inadmissibility decisions did the European Court or the Commission either question the domestic authorities' assessment as to the criminal character of the organisation involved, or the nature of the applicant's association with it. While such a categorical approach may be justified in cases where membership is established through the applicant's involvement in activities such as supplying weapons or commanding violent actions,[156] it is much less warranted where mere expression is used as evidence of one's connection with the organisation (allegedly) involved in terrorism.[157]

Two other cases deserve mention here. In *Hazar, Hazar and Acik v Turkey*, the applicants complained of violations of Articles 9, 10 and 11 in that they were sentenced to four years and two months' imprisonment for

organisation Dev-Yol); *Satik, Camli, Satik, Marasli v Turkey*, 13 March 2001 (concerning membership in the Party for the Liberation of Kurdistan (PRK)); *Koçak, Yavas, Özyurda v Turkey*, 3 July 2003; *Kiliç v Turkey*, 8 July 2003 (concerning membership in the PRK).

[155] See, eg, *Kiliç v Turkey*, previous n. Art 168 provides as follows: 'Any person who, with the intention of committing the offences defined in Articles (…), forms an armed gang or organisation or takes leadership (…) or command of such a gang or organisation or assumes some special responsibility within it shall be sentenced to not less than fifteen years' imprisonment. The other members of the gang or organisation shall be sentenced to not less than five and not more than fifteen years' imprisonment.' Art 169 states: 'Any person who, knowing that such an armed gang or organisation is illegal, assists it, harbours its members, provides it with food, weapons and ammunition or clothes or facilitates its operations in any manner whatsoever shall be sentenced to not less than three and not more than five years' imprisonment.'

[156] Eg, *Ari v Turkey*, above n 154 (membership in the organisation confirmed by involvement in activities such as supplying weapons and commanding robberies).

[157] Eg, *Kiliç v Turkey*, above n 154 (membership proved by the distribution of leaflets belonging to the group).

being members of the Turkish Communist Party.[158] The respondent government argued that the applicants were found guilty under Article 141 of the Turkish Criminal Code of participating in the activities of an organisation aiming at the dictatorship of the proletariat. The applicants responded that the offence was committed by the mere adherence to a particular opinion. In 1991, the Commission declared the applications admissible under Articles 9, 10 and 11 in conjunction with Article 14 of the Convention. However, the parties reached a friendly settlement and the merits of the complaints were not further examined.[159] In *Grande Oriente d'Itallia di Palazzo Giustiniani v Italy*, a case in which the European Court examined a law requiring candidates for public office to declare that they are not Freemasons, the court implicitly held that punishment of membership in an association may raise Article 11 concerns.[160] According to the court,

> freedom of association is of such importance that it cannot be restricted in any way (…), so long as the person concerned does not himself commit, by reason of his membership of the association, any reprehensible act.[161]

Finally, the European Court also touched upon the issue of membership in subversive organisations in a series of public employment cases. For example, in *Vogt v Germany*, the court reviewed the dismissal of a teacher because of her 'active membership' in the German Communist Party.[162] The German government argued that the applicant's behaviour was at odds with her duty of loyalty to the Constitution as a civil servant. In the Strasbourg Court's view, however, the reasons put forward to justify the interferences with Articles 10 and 11 were not sufficient to establish that Mrs Vogt's dismissal was necessary in a democratic society. The court had regard to the fact that dismissal was a severe sanction, that Mrs Vogt was a teacher of German and French, a post which did not intrinsically involve any security risks, and that the German Communist Party had not been banned by the Federal Constitutional Court.

ii. Standards of the US Constitution

As indicated above, the Anti-terrorism and Effective Death Penalty Act (AEDPA) empowers the Secretary of State to designate an organisation as a

[158] *Hazar, Hazar and Acik v Turkey* Application no 16311–13/90, 72 *DR* 200 (1991).
[159] *Hazar, Hazar and Acik v Turkey* Application no 16311–13/90, 73 *DR* 111 (1992).
[160] *Grande Oriente d'Italia di Palazzo Giustiniani v Italy* Reports 2001-VIII (2001).
[161] *Ibid* at para 26.
[162] *Vogt v Germany* Series A no 323 (1995). See also *Glasenapp v Germany* Series A no 104 (1986); *Kosiek v Germany* Series A no 105 (1986).

'foreign terrorist organisation'.[163] In contrast to various European anti-terrorism laws, the AEDPA does not prohibit mere membership in a designated organisation. In the past, however, the government frequently resorted to membership crimes to counter the associational activities of subversive groups. The constitutional doctrine which was developed as a response to these efforts today severely limits the possibility to punish mere membership in an association.

A first important decision is *Whitney v California*, decided in the Red Scare era.[164] In this case, the Supreme Court considered an application of Section 2 of the California Criminal Syndicalism Act, which punished any person who

> organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism.[165]

One of Mrs Whitney's objections to her conviction pursuant to Section 2 was that she had 'no purpose of helping to create an instrument of terrorism and violence'.[166] She contended that her activities within the Communist Party were aimed at committing the organisation to a legitimate policy of political reform through the process of democratic elections. The court replied that it could not review the question whether the applicant had joined the organisation with knowledge of its unlawful character and purposes, because this issue was one of fact only.[167] As to the constitutionality of the Act, the court held that to knowingly become a member in an association that advocates the commission of unlawful acts of violence and terrorism finds no shelter in the First Amendment. In the court's opinion, 'such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals'.[168]

In the Cold War period many anti-communist initiatives took the form of membership crimes. Individuals were prosecuted and punished for their mere affiliation with subversive associations, regardless of whether they actually intended to engage in the illegal activities of those associations. The main statutory instrument was the so-called Smith Act membership clause, which criminalised membership in any organisation advocating the forcible and illegal overthrow of government.[169] Similar prohibitions were

[163] See above.
[164] *Whitney v California*, 274 US 357 (1927).
[165] *Ibid* at 360.
[166] *Ibid* at 367.
[167] *Ibid*.
[168] *Ibid* at 372.
[169] Alien Registration Act of 1940, cf. 439, 54 Sta. 670: 'Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or

found in many national and local laws aimed at suppressing the Communist Party. In the 1960s, when the anti-communist sentiments had faded, a body of constitutional doctrine formed which in fact ended convictions under the Smith Act and similar membership provisions. The central case in this evolution is *Scales v United States*.[170] The applicant, a member of the Communist Party of the United States, was convicted of violating the Smith Act. The Supreme Court upheld the constitutionality of the membership clause but construed it strictly. It considered two constitutional challenges. The first was Mr Scales' contention that the Act was at odds with the principle of personal guilt implied in the due process clause of the Fifth Amendment: '[I]t [the Act] impermissibly imputes guilt to an individual merely on the basis of his association and sympathies, rather than because of some concrete personal involvement in criminal conduct'.[171] Next, the court examined whether the membership clause infringed the First Amendment freedoms of political expression and association.[172]

With regard to the first challenge, the court began by noting that a person who becomes a member of an illegal organisation, 'by the 'act' alone' need not be doing more than expressing his support for the organisation's (illegal) purposes and activities.[173] The court distinguished such 'moral encouragement' from the 'concrete, practical impetus given to a criminal enterprise which is lent for instance by a commitment on the part of a conspirator to act in furtherance of that enterprise'.[174] In relation to the second challenge, the court observed that a 'blanket prohibition of association with a group having both legal and illegal aims' would present a serious danger that 'legitimate political expression and association would be impaired'.[175] A crucial distinction was accordingly made between criminal conspiracies, which do not merit constitutional protection, and groups with both legal and illegal objectives. The court went on to resolve

encourage the overthrow or destruction of any (…) government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly or persons, knowing the purposes thereof shall be subject to a sentence of up to twenty years, a fine of up to $20,000, and shall remain ineligible for employment by the federal government for five years from the date of conviction.' (codified at 18 U.S.C. § 2385).

[170] *Scales v United States*, 367 US 203 (1961).

[171] *Ibid* at 220.

[172] *Ibid* at 229.

[173] *Ibid* at 227.

[174] *Ibid* at 227–8. Conspiracy is an offence in the United States. The federal conspiracy statute makes it an offence 'if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose' (18 U.S.C. § 371). The crime of conspiracy requires an agreement between two or more persons with the intent to commit an unlawful act. For a general discussion, see, eg, M. Cherif Bassiouni, *Substantive Criminal Law* (Springfield, Charles C Thomas Publisher, 1978) 212–23. Convictions for conspiracy have been upheld by the Supreme Court. See, eg, *Pinkerton v United States*, 328 US 640 (1946).

[175] *Scales v United States*, above n 170 at 229.

the constitutional dilemmas by strictly constructing the membership clause. More precisely, the court took the view that the statute required 'knowledge' of the group's illegal aims,[176] 'active' rather than merely 'nominal' membership,[177] and 'specific intent':

> There must be clear proof that a defendant specifically intends to accomplish the aims of the organization by resort to violence. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite specific intent to bring about the overthrow of the government (…). Such a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal.[178]

In other words, whereas the court in *Whitney* concluded that mere 'knowing membership' in an illegal association was sufficient to deny constitutional protection, the *Scales* decision requires a 'specific intent' to further a group's illegal activity before criminal liability can be imposed. In subsequent cases the court applied the *Scales* membership test to other measures suppressing membership in communist organisations, including loyalty oaths[179] and employment prohibitions.[180] Over the years, the court adopted the general principle that 'guilt by association alone, without any need to establish that an individual's association poses the threat feared by the government in proscribing it', violates the right to freedom of association protected by the First Amendment.[181]

Turning to the fight against terrorism, the question emerges whether lawmakers may punish membership of designated terrorist organisations. Much will depend on the nature of the organisation involved. Obviously, criminal conspiracies to commit terrorist acts receive no constitutional protection.[182] As the court observed in *Scales*, the 'knowing association' with a conspiracy, 'which is defined by its criminal purpose', finds no shelter in the First Amendment.[183] However, as far as 'quasi-political parties or other groups that may embrace both legal and illegal aims' are concerned, the First Amendment right to freedom of association requires that an individuals' personal guilt be proved by a specific intent to further

[176] *Ibid* at 229.
[177] *Ibid* at 222–3.
[178] *Ibid* at 229–30.
[179] *Elfbrandt v Russel*, 384 US 11 (1966).
[180] *United States v Robel*, 389 US 258 (1967).
[181] *Ibid* at 265 (1967).
[182] On conspiracy and freedom of association see, eg, Nathaniel L Nathanson, 'Freedom of Association and The Quest for International Security: Conspiracy from Dennis to Dr. Spock' (1970) 65 *Northwestern University Law Review* 153.
[183] *Scales v United States*, above n 170 at 229.

an organisations' unlawful ends.[184] The mere 'knowing membership' of such a group is insufficient to remove constitutional protection.

iii. Concluding Remarks

It is difficult to draw any definitive comparative conclusion regarding the punishment of membership in terrorist and terrorism-related organisations, as the Strasbourg organs do not (yet) appear to consider this matter as an issue raising Convention interests. As is often the case when applications are dismissed at the definitional stage, the inadmissibility decisions in the membership cases fail to offer a thorough examination of the competing rights and interests at stake. In the absence of clear Convention standards, the possibility exists that the Member States of the Council of Europe will resort to the punishment of individuals for their mere affiliation with organisations (allegedly) involved in terrorism, regardless of individual culpability. The danger inherent in such efforts is evidenced by the history of the Cold War prosecutions of communists in the United States. The Supreme Court brought an end to the practise of guilt by association by adopting a strict test—proof of a 'specific intent' to further a group's illegal activity—to judge the constitutionality of the punishment of membership in associations involved in both legal and illegal activity. The 'specific intent' requirement has been compared with the categorical rule adopted in *Brandenburg*. According to David Cole, the *Scales* 'specific intent' requirement

> identifies the only narrowly tailored way to punish individuals for group wrongdoing (essentially by requiring evidence of individual wrongdoing), just as the *Brandenburg* test sets forth the narrowly tailored way to respond to advocacy of illegal conduct.[185]

E. Material Support of Terrorist and Terrorism-Related Organisations

i. Standards of the US Constitution

The concept of criminal punishment for material support of terrorist organisations was introduced in American criminal law by the AEDPA and was considerably strengthened by the USA PATRIOT Act. Today, it is an offence under federal law, punishable with imprisonment for up to 15 years, to

[184] *Ibid* at 229.
[185] Cole, 'Hanging with the Wrong Crowd', above n 10 at 218.

> knowingly [provide] (…) material support or resources to a foreign terrorist organization.[186]

The term 'material support or resources' is broadly defined as

> currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.[187]

Since the September 11 attacks, the material support provision has become one of the major law enforcement tools in the fight against terrorism.[188] From the moment of its adoption, the material support provision spurred a major debate within the American legal community. There is a host of popular and academic contributions criticising the criminalisation of material support as a violation the First Amendment right to freedom of association.[189] The central theme of many of these commentaries is that the offence, or at least some of its applications, runs afoul of the guilt by association principles set out in *Scales* and its progeny. It is submitted that the material support provision amounts to a classic instance of guilt by association in that it imposes criminal liability on individuals, regardless of their personal intention to further the illegal activities of the designated organisation.[190] In addition, several commentators point at the absurd consequences of the material support offence. The provision would potentially outlaw such legitimate activities as peaceful conflict-resolution (eg, the representation of designated groups at peace negotiations), charitable and humanitarian work, and legal advice and representation.[191] As David Cole explained, under the AEDPA

[186] 18 USC s 2339B(a)(1).

[187] 18 USC s 2339A(b).

[188] See, eg, David Cole, 'The New McCarthyism: Repeating History in the War on Terrorism' (2003) 38 *Harvard Civil Rights-Civil Liberties Law Review* 1, 9 (observing that '[v]irtually every criminal 'terrorism' case that the government has filed since September 11 has included a charge that the defendant provided material support to a terrorist organization').

[189] See, amongst many other contributions, Jennifer A Beal, 'Note: Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism' (1998) 73 *Indiana Law Journal* 693 (arguing that the material support provision is an unconstitutional restriction on free speech and association); Nancy Chang, *Silencing Political Dissent* (New York, Seven Stories Press, 2002) 105–8 (raising guilt by association concerns); David Cole and James X Dempsey, *Terrorism and the Constitution. Sacrificing Civil Liberties in the Name of National Security* (New York, The New Press, 2002) 119–21 (raising guilt by association concerns); Cole, 'The New McCarthyism', previous n (raising guilt by association concerns); Andy Pearson, 'The Anti-Terrorism and Effective Death Penalty Act of 1996: A Return to Guilt by Association' (1998) 24 *William Mitchell Law Review* 1185 (arguing that AEDPA's material support provisions do not satisfy the *Scales* membership test).

[190] See, eg, Cole, 'The New McCarthyism', above n 188 at 9–15.

[191] The latter is not merely a theoretical concern. In a much-publicised case, attorney Lynne Stewart was charged with providing material support to terrorism under the AEDPA

> it would be a crime for a Quaker to send a book on Ghandi's theory of non-violence—a 'physical asset'—to the leader of a terrorist organization in hopes of persuading him to forgo violence.[192]

Conversely, the proponents of the material support provision stress its significance in preventing terrorism at a very early stage.[193] Moreover, the guilt by association analogy is said to be overstated.[194] The main argument here is that because a ban on material support burdens free speech only incidentally, it is subject to a lesser degree of First Amendment scrutiny, the result of which is that it does not trigger the *Scales* 'specific' intent requirement.[195]

The validity of the material support provision has been addressed in several lower-court judgments. The courts have considered a number of different constitutional challenges, and although portions of the statute have been held to raise First Amendment concerns, the courts have generally upheld the material support provision.[196] It would be beyond the scope of this inquiry to give a complete account of this growing body of case law. Instead, the following paragraphs focus on one case, namely *Humanitarian Law Project v Reno*, a decision which can be considered to be representative of the current judicial approach.[197] In *Humanitarian Law Project* the plaintiffs wished to provide funding and expertise to two designated foreign terrorist organisations: the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE). They contended that such support would be directed 'only to aid the nonviolent humanitarian and political activities of the designated organizations'.[198] One of the plaintiffs was the Humanitarian Law Project, a human rights organisation

based on her actions as a counsel. For an account of this case, see Alissa Clare, 'We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists' (2005) 18 *Georgetown Journal of Legal Ethics* 651.

[192] Cole, 'The New McCarthyism', above n 188 at 9–10.

[193] See, eg, Brian P Comerford, 'Preventing Terrorism by Prosecuting Material Support' (2005) 80 *Notre Dame Law Review* 723 ('The material support statute is essential to fighting terrorism because it allows prosecutors to act before a terrorist plot has been initiated and eliminate potential terrorist threats.').

[194] Robert M Chesney, 'Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security' (2003) 101 *Michigan Law Review* 1408, 1433 (arguing that the membership provisions is a content-neutral law which burdens First Amendment rights only incidentally, and that only the prohibition to provide 'personnel' raises serious guilt by association concerns); Gerald Neuman, 'Terrorism, Selective Deportation and the First Amendment after Reno v. AADC' (2000) 14 *Georgetown Immigration Law Journal* 313, 329–30 (arguing that the criminal offence will likely be upheld against First Amendment challenges because a prohibition on providing funds burdens speech only incidentally).

[195] Eg, Chesney, previous n 194 at 1442 *ff*.

[196] For an overview, see, eg, Comerford, above n 193.

[197] See also *United States v Hammoud*, 381 F.3d 316 (4th Cir 2004); *Boim v Quranic Literacy Inst and Holy Land Foundation for Relief and Development*, 291 F.3d 1000 (7th Cir 2002); *United States v Afshari*, 426 F.3d 1150 (9thCir 2005).

[198] *Humanitarian Law Project v Reno*, 205 F.3d 1130, 1133 (9th Cir 2000).

assisting the PKK in human rights advocacy and peace negation skills. The plaintiffs sought a preliminary injunction barring enforcement of the statute. Amongst other challenges, the plaintiffs argued that the statute imposed criminal liability on the basis of associational activity in the absence of proof of a specific intent to further an organisation's unlawful ends, in violation of the Supreme Court's settled case law.

The district court and the Ninth Circuit Court of Appeals dismissed most of the constitutional challenges.[199] The Ninth Circuit began by distinguishing contributions of material support from mere membership in an organisation: 'The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. Plaintiffs are even free to praise the groups for using terrorism as a means of achieving their ends. What AEDPA prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.'[200] Consequently, the Ninth Circuit declined to read a requirement into the First Amendment to demonstrate a specific intent to aid a terrorist organisation's illegal activity through material support. The court explained that funds donated to a terrorist organisation can be used to promote its unlawful activities, regardless of the donor's intent: 'Once the support is given, the donor has no control over how it is used'.[201]

Rather than applying the *Scales* 'specific intent' requirement, the Ninth Circuit went on to review the offence under the intermediate scrutiny balancing standard enunciated in *O'Brien*.[202] In the court's opinion, the four *O'Brien* criteria to justify interference with conduct incidentally burdening free speech were duly met.[203] First, the federal government clearly has the power to enact laws restricting the dealings of United States citizens with foreign entities.[204] Second, there is no doubt that the public interest in preventing the spread of international terrorism is substantial.[205]

[199] See *Humanitarian Law Project v Reno*, 9 F Supp 2d 1205 (C.D. Cal 1998); *Humanitarian Law Project v Reno*, 205 F.3d 1130 (9th Cir 2000).

[200] *Humanitarian Law Project v Reno*, 205 F.3d 1130, 1133 (9th Cir 2000). For a critique, see, eg, Cole, 'Hanging with the Wrong Crowd', above n 10 at 11 (arguing that the distinction between association and material support is illusory).

[201] *Humanitarian Law Project v Reno*, 205 F.3d 1130, 1134 (9th Cir 2000).

[202] *United States v O'Brien*, 391 US 367, 377 (1968).

[203] Under *O'Brien*, a regulation of conduct, which incidentally burdens free expression, is valid if: (1) the regulation is within the constitutional power of government; (2) it furthers an 'important' or 'substantial' governmental interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest. See ch 3, section III.

[204] *Humanitarian Law Project v Reno*, 205 F.3d 1130, 1135 (9th Cir 2000).

[205] *Ibid*.

Third, the government's interest is unrelated to suppressing free expression, as 'it restricts the actions of those who wish to provide material support to designated organisations, not the expression of those who advocate the ideas of these groups'.[206] Finally, as to the question whether the statute is properly tailored to its end of preventing terrorist fundraising, the Ninth Circuit began by noting that the political branches enjoy 'wide latitude in selecting the means to bring about the desired goal'.[207] This was due to the fact that the issue under review is closely related to foreign policy concerns. The court accepted the government's claim that all contributions to a foreign terrorist organisation—also donations for humanitarian purposes—may possibly facilitate terrorist activity: 'money is fungible' and 'giving support intended to aid an organization's peaceful activities frees up recourses that can be used for terrorist acts'.[208] The court declined to second-guess Congress' conclusions in this respect.[209] The Ninth Circuit only agreed with the plaintiffs on one point, namely that two of the components included in the definition of material support are unconstitutionally vague. In the court's opinion, both the terms 'personnel' and 'training' blur the line between protected political speech and unprotected conduct.[210] For instance, someone supporting the political cause of the PKK could be seen as supplying that organisation with 'personnel', and someone teaching international law to PKK members as giving 'training'. Because the words 'personnel' and 'training' encompass protected First Amendment activity, the court enjoined the prosecution of any of the plaintiff's members for activities covered by these terms.[211]

ii. Standards of the European Convention

As noted in the preceding sub-section, the EU Framework Decision on Combating Terrorism obliges EU Member States to criminalise the 'intentional' participation in the activities of a terrorist group. According to Article 2(2)(b), participation includes 'supplying information or material resources' to a terrorist organisation and 'funding its activities in any way'. The maximum sentence given for this offence must be at least eight years'

[206] *Ibid*.
[207] *Ibid* at 1136.
[208] *Ibid*.
[209] *Ibid*. 'We will not indulge in speculation about whether Congress was right to come to the conclusion that it did. We simply note that Congress has the fact-finding resources to properly come to such a conclusion. Thus, we cannot say that AEDPA is not sufficiently tailored.'
[210] *Ibid* at 1138.
[211] See Tom Stacy, 'The "Material Support" Offense: The Use of Strict Liability in the War Against Terror' (2005) 14 *Kansas Journal of Law and Public Policy* 461, 465–7 (criticising this approach with respect to single method groups as Al Qaeda, whose sole purpose is violence against innocent civilians).

imprisonment.[212] Some European states already outlawed material support of terrorist organisations prior to the adoption of the EU Framework Decision;[213] others have enacted material support provisions modelled after it.[214] The Strasbourg organs have not yet considered the compatibility of the material support provisions with the right to freedom of association. It is noteworthy, however, that the EU Framework Decision appears to be drafted in a more association protective way than its American counterpart. Whereas the AEDPA punishes persons who 'knowingly' provide material support,[215] the EU provision more specifically requires 'knowledge of the fact that (…) participation will contribute to the *criminal* activities of the terrorist group'.[216] Although this phrase stops short of asking specific intent to further the illegal activities of an organisation, it requires knowledge of the fact that support will further the unlawful aims of the organisation, before criminal liability can be attached to it. Since this condition protects genuine support of the legitimate non-violent activities of groups allegedly involved in terrorism, the Strasbourg Court would be unlikely to censure convictions pursuant to criminal provisions modelled after the EU Framework Decision.

iii. Concluding Remarks

Providing material support to terrorist organisations is a crime in both jurisdictions under review. Consistent with the current approach to membership cases, the punishment for this offence would be unlikely to raise serious issues under Article 11 of the Convention. Like the Convention organs, the Supreme Court has not weighed in on the constitutionality of material support provisions. Several lower courts have declined to expand the reach of the *Scales* 'specific intent' test to convictions for material support, and upheld such measures applying the intermediate scrutiny balancing standard adopted in *O'Brien*.

[212] Art 5(3), Council Framework Decision on Combating Terrorism, above n 31.

[213] See, eg, s 129a of the German Criminal Code; s 12 of the British Terrorism Act 2000; Art 270-ter of the Italian Criminal Code; Art 576 of the Spanish Penal Code.

[214] See, eg, Art 6 of the Belgian Law on Terrorist Crime (introducing a new Art 140 in the Criminal Code modelled after Art 2(2)(b) of the Council Framework Decision on Combating Terrorism).

[215] The knowledge requirement has been litigated in United States courts. For a discussion, see Comerford, above n 193 at 742–6. For instance, in *Humanitarian Law Project v U.S. Dept. of Justice*, the Ninth Circuit Court of Appeals held that, in order not to violate the Fifth Amendment due process clause's requirement of personal guilt, the statute should be interpreted as 'to require proof that a person charged with violating the statute had knowledge of the organization's designation or knowledge of the unlawful activities that caused it to be designated' (*Humanitarian Law Project v U.S. Dept. of Justice*, 352 F 3d 382, 400 (9th Cir 2003)).

[216] Emphasis added.

IV. GENERAL CONCLUSION

In this chapter two distinct counter-terrorist methods were discussed: the punishment of membership in or support of terrorism-related organisations and the proscription of such organisations. Penalising individuals for their association with others may well be an indispensable part of a successful counter-terrorism strategy, it also amounts to a far-reaching interference with the right to freedom of association as it undermines the continued existence of the organisation in question. In an attempt to strike a balance between the right to freedom of association and the public interest of combating organisations involved in illegal conduct, the Supreme Court developed a constitutional doctrine that makes it particularly difficult to punish persons for the mere affiliation with organisations that engage in both lawful and unlawful activities. Criminal punishment for membership in such a group will pass constitutional muster only if the prosecution demonstrates that the defendant specifically intended to further the illegal ends of the organisation. To date, the Strasbourg Court has not considered a membership case under the democratic necessity test of Article 11 s 2, let alone formulated a rule comparable to the *Scales* test. By categorically defining membership crimes outside the scope of Article 11 s 1, the court leaves the door wide open for possible abuse by the Contracting States in this area.

However protective the Supreme Court's approach to membership offences may be, the courts have not been willing to fully extend the *Scales* test to the offence of providing material support to designated terrorist organisations. Whereas punishment for membership in subversive organisations was the preferred method to suppress political dissent during the Cold War, the targeting of material support of terrorist groups is one of the principle instruments in the current fight against terrorism. Critics contend that the material support law is a classic example of guilt by association, in that it does not require evidence that the defendant intended to further the group's terrorist activity. Seen this way, prosecutions for contributions of material support would be nothing else but attempts to circumvent the categorical 'specific intent' requirement erected after the Cold War abuses. A principle proponent of this view is David Cole. Although the government argues that it has avoided the mistakes of the past in its efforts to combat terrorism, Cole believes that

> it would be more accurate to say that we have adapted the mistakes of the past, substituting new forms of political repression for old ones. Today's war on

> terrorism has already demonstrated our government's remarkable ability to evolve its tactics in ways that allow it simultaneously to repeat history and to insist it is not repeating history.[217]

Whereas legislative action in the United States has primarily been aimed at criminalising an individual's associational activity with others, European efforts to counter the illegitimate activity of associations have more directly concentrated on the association itself, for instance through proscription or dissolution. The well-developed jurisprudence with regard to anti-democratic political parties gives a clear indication of how the European Court would deal with such measures against organisations allegedly concerned in terrorism. Although the court has often stated that all restrictions on freedom of association are subject to rigorous supervision and that only 'convincing and compelling' reasons can justify interference with Article 11 interests, the foregoing illustrates that in reality the court takes a flexible balancing approach to the proscription of organisations (allegedly) involved in terrorism, leaving ample leeway to the Member States to outlaw not only those groups actively involved in terrorism but also those lending passive, non-violent support. As in other Convention contexts, the court has indicated that it is 'prepared to take into account the background of cases before it, in particular the difficulties associated with the fight against terrorism'.

[217] Cole, 'The New McCarthyism', above n 188 at 1–2.

5

The Right to Personal Liberty

I. INTRODUCTION

SOME OF THE most common counter-terrorist measures involve restrictions on the right to personal liberty. The deprivation of liberty may serve different counter-terrorist interests, ranging from traditional criminal law enforcement to prevention of future terrorism (eg, detention for the purpose of intelligence gathering). While personal liberty takes an important place in the two declarations of rights under review, both systems recognise a number of different legal grounds on which individuals may justifiably be deprived of their liberty. Following an introductory discussion of the general principles associated with the right to personal liberty, section III of this chapter explores those areas of liberty deprivation most relevant to the fight against terrorism, ie criminal law enforcement and immigration law. It reviews the generally applicable liberty standards, followed by a discussion of the extraordinary detention powers governments have asserted in the context of terrorism. This section also looks at the safeguards afforded to persons deprived of their liberty, including the right to habeas corpus. Certain measures aimed at combating terrorism may expand the government's detention powers beyond the boundaries set by the traditional right to liberty framework. Section IV therefore presents a discussion of the limitations of the right to personal liberty that have been imposed in war and emergency situations.

II. THE RIGHT TO PERSONAL LIBERTY: BASIC NOTIONS

A. Introduction

The right to personal liberty is commonly held to be one of the most fundamental of all rights recognised in the European Convention and the US Constitution. In the opinion of the Strasbourg Court, freedom from arbitrary arrest and detention is a cornerstone of a democratic society.[1]

[1] See, eg, *De Wilde, Ooms and Versyp v Belgium* Series A no 12 (1971) para 65.

American constitutional history is rife with similar statements pertaining to the democratic value of protecting the individual from arbitrary infringements on personal liberty. In *The Federalist* no 84 Alexander Hamilton wrote that 'the practice of arbitrary imprisonments, has been, in all ages, the favourite and most formidable instrument of tyranny'.[2] Or, as Justice Stevens expounded, the arbitrary power to detain an individual is 'the hallmark of the totalitarian state'.[3] The significance of the right to liberty is further enhanced by the role it plays in safeguarding against the potential violation of other human rights, such as the right to life, the right not to be subjected to torture or inhuman or degrading treatment, and the protection of private and family life.[4]

The right to personal liberty is enshrined in Article 5 s 1 of the Convention, which proclaims that

> everyone has the right to liberty and security of the person.

The remainder of the comprehensive text of Article 5 s 1, sums up a limited number of areas in which liberty rights may be curtailed. In addition, paragraphs 2 to 5 of Article 5 contain several more specific guarantees which derive from the general right to personal liberty. By contrast, the US Bill of Rights does not set forth a general right to personal liberty in one single article or amendment. Rather, different liberty safeguards are scattered over several constitutional provisions and federal and state statutes. To begin with, the due process clauses of the Fifth and Fourteenth Amendment limit governmental action interfering with liberty rights by requiring that no person shall

> be deprived of life, liberty or property, without due process of law.

A second major liberty safeguard is the Fourth Amendment protection against unreasonable seizures. The Fourth Amendment provides, in relevant part, that

> [t]he right of the people to be secure in their persons (…) against unreasonable (…) seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing (…) the persons (…) to be seized.

A final example of a liberty right protected in the US Constitution is the Eighth Amendment's proclamation that

> excessive bail shall not be required.

[2] Alexander Hamilton, 'The Federalist, No. 84', in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, with an introduction by Clinton Rossiter (New York, New American Library, 1961), 480.

[3] *United States v Montalvo-Murillo*, 495 US 711, 723 (1990).

[4] See *Aksoy v Turkey*, Reports 1996-VI (1996) para 76.

B. The Scope of the Term 'Liberty'

Article 5 and the Fifth and Fourteenth Amendment due process clauses essentially protect against the arbitrary deprivation of liberty. These provisions require the courts initially to clarify the meaning of the term 'liberty' at the definitional prong.[5] In this respect, the European Court decided that in proclaiming the 'right to liberty', Article 5 s 1 contemplates individual liberty in its classic sense, that is to say the physical liberty of the person.[6] Liberty neither includes individual freedom of choice and action nor integrity of the person. According to the court, this follows both from the use in Article 5 of the terms 'deprived of his liberty', 'arrest' and 'detention', and from a comparison between Article 5 and the other Convention guarantees.[7] In the Convention context, a distinction must further be drawn between a mere 'restriction' upon physical liberty and an actual 'deprivation'. As the court made clear on various occasions, the difference between the two is one of degree and intensity, not one of nature and substance.[8] In order to decide whether a deprivation of liberty has occurred, regard will be had to a number of factors, including the type, the duration, the effects and the manner of implementation of the impugned measures.[9] Besides objective factors, the court takes into account an additional subjective element, namely whether or not the person deprived of his or her liberty has validly consented to the impugned measures.[10] The classic example of an Article 5 deprivation of liberty is detention in a prison. However, the case law contains several examples of borderline cases. For instance, compulsory residence on a small island in difficult circumstances was found to be covered by Article 5, whereas the prohibition to leave a village was not.[11]

The term 'liberty' has a much broader meaning in American constitutional law. The due process clauses of the Fifth and Fourteenth Amendment impose two distinct requirements on government action: substantive and procedural due process.[12] 'Substantive' due process prevents the government from engaging in conduct that 'shocks the conscience', or

[5] See David L Faigman, 'Reconciling Individual Rights and Government Interests: Madisonian Principles versus Supreme Court Practice' (1992) 78 *Virginia Law Review* 1521, 1548–9 (arguing that the courts must avoid balancing liberty and countervailing government interests at the definitional stage).

[6] *Engel and others v the Netherlands* Series A no 22 (1976) para 58.

[7] *Ibid*.

[8] *Guzzardi v Italy* Series A no 39 (1980) para 93.

[9] *Ibid* at para 92.

[10] *Storck v Germany*, 16 June 2005, paras 73–4.

[11] Compare *Guzzardi v Italy*, above n 8 at para 94 with *Cyprus v Turkey (First and Second Applications)* Application nrs 6780/74 and 6950/75, 4 *EHRR* 482, 524 (1976).

[12] See generally John E Nowak and Ronald D Rotunda, *Constitutional Law* (St Paul, West Group, 2000) 374–439.

interferes with rights 'implicit in the concept of ordered liberty'.[13] In this regard, the Supreme Court held that '[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects'.[14] However, the scope of 'liberty' is much wider than that, and includes a variety of personal, political and social rights and privileges. 'Procedural' due process, on the other hand, is concerned with the procedural safeguards accorded to an individual when his or her life, liberty of property is impaired. Any significant bodily restraint and punishment of an individual is treated as a deprivation of liberty and accordingly requires some procedural safeguards.[15] There is, nevertheless, 'a de minimis level of imposition with which the Constitution is not concerned'.[16] Finally, questions of definition also arise with respect to the Fourth Amendment protection against unreasonable seizures of persons. According to the court, the notion of 'seizures' is broader than 'arrests' in traditional terminology.[17] In *Terry v Ohio*, the court stated that '[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person'.[18]

C. Limitations of the Right to Personal Liberty

i. Standards of the European Convention

As indicated in the previous section, Article 5 s 1 enumerates the cases in which a person may be deprived of his or her liberty. The court has held that the list in Article 5 s 1, sub-paragraphs (a) to (f), is an exhaustive one and should be interpreted narrowly.[19] Article 5 s 1 further stipulates that any deprivation of liberty is to be carried out 'in accordance with a procedure described by law'. In addition, each sub-paragraph requires that the deprivation be 'lawful'. The court has clarified the meaning of these two overlapping conditions in several statements. The settled case law can be summarised as follows.[20] In the first place, the term 'lawful' and the phrase 'in accordance with a procedure described by law' refer to domestic law, in that they require the conformity of a deprivation of liberty with the

[13] *United States v Salerno*, 481 US 739, 746 (1987).
[14] *Zadvydas v Davis et al*, 533 US 678, 690 (2001).
[15] See Nowak and Rotunda, above n 12 at 526.
[16] *Ingraham v Wright*, 430 US 651, 674 (1977).
[17] *Terry v Ohio*, 392 US 1, 16 (1968).
[18] *Ibid*.
[19] *Winterwerp v the Netherlands* Series A no 33 (1979) para 37.
[20] For a summary of the settled case law see, eg, *Baranowski v Poland*, 28 March 2000, paras 50–52.

substantive and procedural rules of national law.[21] Secondly, the court has interpreted both conditions as imposing a general prohibition of 'arbitrariness'.[22] In the court's view, any deprivation of liberty must be consistent with the purpose of Article 5 s 1 which is to prevent persons from being deprived of their liberty in an arbitrary fashion.[23] This implies that a deprivation of liberty must be in conformity with the specific purpose of the particular sub-paragraph concerned. A number of authors contend that the prohibition of arbitrariness resembles the democratic necessity test of Articles 8 to 11.[24] Thus, in some cases the 'arbitrariness' test would amount to an analysis of the proportionality of a deprivation of liberty in relation to the aim served by it.[25] Finally, Article 5 s 1 requires that the national law be of a certain quality. In order for a deprivation of liberty to satisfy the Convention standard of 'lawfulness', the applicable domestic law must meet the requirements of accessibility and foreseeability developed in the context of the common limitation clauses of Articles 8 to 11.[26]

Because Article 5 does not figure in the list of non-derogable rights of Article 15 s 2, restrictions on the right to personal liberty may also follow from emergency derogations pursuant to Article 15 s 1. The Strasbourg organs have been faced with such derogations on numerous occasions. These cases will be dealt with in section IV of this chapter. As a final matter, it can be observed that states cannot rely on the abuse of rights provision of Article 17 of the Convention to justify a deprivation of liberty. In *Lawless v Ireland*, both the Commission and the European Court observed that the guarantees set forth in Article 5 are not of such a nature as to facilitate activities or acts aimed at the destruction of any of the rights and freedoms in the Convention.[27] Consequently, the rights protected by Article 5 are in no way affected by Article 17, even if the defendant was pursuing activities incompatible with the principles of the Convention.[28]

[21] *Winterwerp v the Netherlands*, above n 19 at paras 39 and 45.

[22] *Ibid* at para 39 (holding that 'no detention that is arbitrary can ever be regarded as lawful').

[23] See, eg, *Baranowski v Poland*, above n 20 at para 51.

[24] See DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995) 105; Stefan Trechsel, 'Liberty and Security of Person' in RStJ Macdonald *et al* (eds), *The European System for the Protection of Human Rights* (Leiden/Boston, Martinus Nijhoff Publishers, 1993) 277, 293.

[25] Harris, O'Boyle and Warbrick, above n 24 at 106.

[26] *Steel and others v UK* Reports 1998-VIII (1998) para 54 (referring to the principles adopted in the context of Art 10 s 2 in *The Sunday Times v UK* Series A no 30 (1979) para 49).

[27] *Lawless v Ireland* Application no 332/57, Series B no 1 (1959), 180; *Lawless v Ireland (No 3)* Series A no 3 (1961) paras 6–7.

[28] *Lawless v Ireland* (Commission), previous n at 180.

ii. Standards of the US Constitution

The various constitutional provisions safeguarding personal liberty interests are primarily formulated as negative claims against government action. Unlike Article 5, the Bill of Rights does not contain a list of grounds that may serve as the basis for a deprivation of liberty, nor is there any other limitation scheme explicitly provided for in the Constitution. One important exception to the latter is the habeas corpus provision of Article I, s 9, clause 2 of the Constitution, which states that

> [t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it.

The Suspension Clause is discussed in section IV together with the Convention organ's Article 15 jurisprudence.

The absence of limitation provisions should not lead one to conclude that the liberty rights enshrined in the Bill of Rights receive absolute protection. In fact, none of the negative rights mentioned above are framed in unqualified terms. For instance, not all seizures are invalid under the Fourth Amendment, but only those seizures that are 'unreasonable'. Similarly, the due process clauses only forbid deprivation of liberty *without* due process of law. According to the Supreme Court, detention violates the due process clauses 'unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and narrow non-punitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint'.[29]

The court has relied on different methods to reconcile liberty rights with competing individual and societal interests. As the following sections will show, in interpreting and applying the due process clauses and the Fourth Amendment protection against unreasonable seizures, the Justices have oscillated between the two poles of the categorisation-balancing continuum, ie category definition on the hand, and case-by-case balancing on the other hand.[30] The conventional interpretation of the Fourth Amendment probable cause requirement for arrests can be viewed as a typical instance of categorical reasoning. Under this approach, an arrest is reasonable only if there is probable cause of the suspect's involvement in a crime, whatever the circumstances surrounding the case may be.[31] An

[29] *Zadvydas v Davis et al*, above n 14 at 690.

[30] For a more detailed discussion of Fourth Amendment limitations, see ch 6, section I below; for a more detailed discussion of due process analysis, see ch 7, section I below.

[31] See below. For a discussion of the 'conventional interpretation' of the Fourth Amendment requirements as opposed to the more balancing-oriented approach that has emerged in recent years, see Nadine Strossen, 'The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Restrictive Alternative Analysis' (1988) 63 *New York University*

illustration of a balancing approach is the court's analytical framework for determining an individual's due process rights in a non-criminal law context. In *Mathews v Eldridge* the court set forth three factors that must be balanced in order to identify the level of due process protection:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[32]

D. Concluding Remarks

There are significant differences in the way in which the right to personal liberty is protected in the two declarations of rights under review. Some of the liberty guarantees explicitly provided for in the text of Article 5 are not found in the Bill of Rights, and vice versa. The Convention proclaims a general right to liberty, followed by an exhaustive list of situations in which a person may be deprived of his liberty. Under the US Constitution, protections against arbitrary deprivations of liberty are found in different provisions, ranging from very specific safeguards (eg, the Fourth Amendment warrant and probable cause requirement) to broadly conceived ones (eg, the due process clauses). Nevertheless, despite this different outlook, the liberty guarantees in both jurisdictions may reasonably be compared as two systems based on the same fundamental purposes and underlying values.

Law Review 1173 (criticising the use of balancing tests due to their inherent subjectivity, their tendency to deprive rights of the special protection they deserve, and the likelihood that they will produce inconsistent results).

[32] *Mathews v Eldridge*, 424 US 319, 335 (1976). For an analysis of the flexible approach the court has adopted in dealing with due process claims, see, eg, 'Note: Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing' (1975) 88 *Harvard Law Review* 1510 (describing and criticising interest-balancing in due process analysis); Martin H Redish and Lawrence C Marshall, 'Adjudicatory Independence and the Values of Procedural Due Process' (1986) 95 *Yale Law Journal* 455 (arguing that flexible balancing should only come into play after the establishment of a value-oriented basis for procedural due process).

III. THE RIGHT TO LIBERTY AND COUNTER-TERRORISM MEASURES

A. Deprivation of Liberty in Criminal Procedures

i. Grounds for Arrest of Criminal Suspects

a. General Standards

Article 5 s 1 (c) permits the

> lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence.[33]

In other words, arrest and pre-trial detention must be based on 'reasonable suspicion' of involvement in criminal behaviour. The principal decision pertaining to the interpretation of this requirement is *Fox, Campbell and Hartley v United Kingdom*.[34] In this case, the European Court emphasised that the 'reasonableness' of the suspicion on which an arrest must be based is an essential safeguard against arbitrary arrest and detention.[35] In the court's opinion, the test of reasonable suspicion is an objective one: '"Reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.'[36] The court added, however, that what might be regarded as 'reasonable' will depend on all the circumstances of the case.[37] In order to allow the court to determine whether the requirement has been met, the respondent government needs to furnish 'at least some facts or information capable of satisfying the court that the arrested person was reasonably suspected of having committed the alleged offence'.[38]

A counterpart of the 'reasonable suspicion' standard in Article 5 s 1 (c) can be found in the Fourth Amendment's 'probable cause' requirement.

[33] The expression 'competent legal authority' is synonymous for 'judge or other officer authorised by law to exercise judicial power' in Art 5 s 3 (see below) (*Schiesser v Switzerland* Series A no 34 (1979) para 29). The term 'offence' in Art 5 s 1 (c) has an autonomous Convention meaning and refers to a criminal offence. For an overview of the relevant case law, see, eg, Clare Ovey and Robin White, *Jacobs and White: The European Convention on Human Rights* (Oxford, Oxford University Press, 2002) 109–10.

[34] *Fox, Campbell and Hartley v UK* Series A no 182 (1990).

[35] *Ibid* at para 32.

[36] *Ibid*. In subsequent cases, the court held that reasonable suspicion does not mean that the suspected person's guilt must be established at the stage of the arrest (see *Murray v the UK* Series A no 300-A (1994) para 55). Later, the court added that Art 5 s 1 (c) 'does not even presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant was in custody' (see *Erdagöz v Turkey* Reports 1997-VI (1997) para 51).

[37] *Fox, Campbell and Hartley v UK*, above n 34 at para 32.

[38] *Ibid* at para 34.

The Fourth Amendment allows the issuance of arrest warrants where there is 'probable cause' that the person involved has committed a crime ('no Warrants shall issue, but upon probable cause').[39] There is considerable case law on the nature of probable cause. According to the settled definition,

> [p]robable cause exists where the facts and circumstances within (…) [the police officers'] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.[40]

In the court's opinion, the probable cause standard 'represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime'.[41]

Similar to the test of 'reasonable suspicion' of Article 5 s 1 (c), probable cause is tested under an objective standard.[42] In other words, 'subjective good faith' on the part of the arresting officer is insufficient to support an arrest.[43] The line between 'mere suspicion' and 'probable cause' 'necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances'.[44] As the court put it in *Brinegar v United States*:

> 'In dealing with probable cause (…), as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.[45]

b. Exceptional Standards in the Fight against Terrorism

As noted, the Strasbourg Court's interpretation of the reasonableness requirement may vary according to the circumstances surrounding a

[39] See generally Wayne R LaFave, Jerold H Israel and Nancy J King, *Criminal Procedure* (St Paul, West Group, 2000) 146–50.

[40] *Brinegar v United States*, 338 US 160, 175–6 (1949).

[41] *Gerstein v Pugh*, 420 US 103, 111–12 (1975).

[42] Note that although 'reasonable suspicion' in Art 5 s 1 (c) and 'probable cause' in the Fourth Amendment are similarly defined by the European Court and Supreme Court respectively, the term 'reasonable suspicion' is used by the Supreme Court to indicate a reduced standard of suspicion. See, eg, Justice Douglas in *Terry v Ohio*, above n 16 at 37: '"probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion."'

[43] See, eg, *Beck v Ohio*, 379 US 89, 85 (1964): 'If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.'

[44] *Brinegar v United States*, above n 40 at 176.

[45] *Ibid*.

particular case.[46] Under this flexible approach, terrorist offences fall into a specific category.[47] This was first acknowledged by the court in the aforementioned case of *Fox, Campbell and Hartley v United Kingdom*, and has since then been confirmed in several judgments dealing with terrorist suspects.[48] In *Fox*, the court justified the different treatment of terrorist crime as follows:

> Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge.[49]

With this statement the court indicates that it may be somewhat easier for the domestic authorities to satisfy the reasonableness requirements of Article 5 s 1 (c) when terrorism is involved. As the court put it:

> [I]n view of the difficulties inherent in the investigation and prosecution of terrorist-type offences (…), the 'reasonableness' of the suspicion justifying such arrests [involving terrorist offences] cannot always be judged according to the same standards as are applied in dealing with conventional crime.[50]

Nevertheless, as the court continued in *Fox*, 'the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5 s 1 (c) is impaired'.[51]

[46] *Fox, Campbell and Hartley v UK*, above n 34 at para 32.

[47] In addition to the issue of reasonable suspicion, the Strasbourg Court also considered the interpretation of the term 'offence' in relation to terrorism. In *Brogan and others v UK*, the court held that suspicion of involvement in 'acts of terrorism' came within the meaning of 'offence' in Art 5 s 1 (c) (*Brogan and others v UK* Series A no 145-B (1988), paras 50–51). While involvement in unspecified acts of terrorism did not constitute a criminal offence in Northern Ireland at the relevant time, the court found that the notion of terrorism—defined as 'the use of violence for political ends'—was 'well in keeping with the idea of an offence'. It should be noted that the applicants were, in fact, not suspected of terrorism in general but of specific criminal offences, such as membership of a proscribed organisation. According to several commentators, the court's decision should be seen in the light of these circumstances. See Conor *Gearty*, 'Terrorism and Human Rights: A Case Study of Impeding Legal Realities' (1999) 19 *Legal Studies* 365, 371 (arguing that the court may come to a different conclusion in the absence of suspicion of involvement in specific offences); Harris, O'Boyle and Warbrick, above n 24 at 116; Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford, Oxford University Press, 2002) 121–2. See also Wilson Finnie, 'The Prevention of Terrorism Act and the European Convention on Human Rights' (1989) 52 *Modern Law Review* 703, 706–7 (urging for a reconsideration of the *Brogan* interpretation of the notion of an 'offence').

[48] *Fox, Campbell and Hartley v UK*, above n 34 at para 32.

[49] *Ibid*.

[50] *Ibid*.

[51] *Ibid*.

In *Fox*, three suspected terrorists were detained under section 11(1) of the Northern Ireland (Emergence Provisions) Act 1978, which conferred upon a police officer the power to arrest without a warrant 'any person whom he suspects of being a terrorist'.[52] This provision was interpreted by the domestic courts as requiring only a subjective test of honest belief in the mind of the arresting police officer. Upon their arrest in Belfast, the first two applicants were questioned by the police about their suspected involvement in intelligence-gathering for the Provisional IRA (Irish Republican Army), and their alleged membership of that organisation. The third applicant was believed to be involved in a kidnapping executed by the Provisional IRA. In Strasbourg, the three applicants argued that they had not been arrested on reasonable suspicion of having committed an offence, in violation of Article 5 s 1 (c). The court first observed that Article 5 speaks of 'reasonable suspicion' rather than of a subjective test of 'genuine and bona fide suspicion'.[53] Yet the court held that it was not its task to review national legislation in abstracto but to examine the merits of a particular case. In the present case, the only evidence produced by the national authorities—in addition to the bona fide suspicion by the arresting officer—was the fact that the applicants had previously been convicted of terrorist offences and that they had been questioned about specific terrorist acts immediately upon their arrest. The respondent government argued that it was unable to disclose other material on which the suspicion was based due to the sensitive nature of that information. Although the court in Strasbourg agreed that the Contracting States cannot be asked to disclose confidential information which may potentially jeopardise the security of sources, it stressed that the authorities cannot hide behind such information to dispense with their evidentiary burden under Article 5 s 1 (c). In the court's view, the elements adduced by the British government were insufficient to support the conclusion that there was reasonable suspicion as required by Article 5 s 1 (c).[54]

A different conclusion was reached in *Murray v United Kingdom*.[55] This case arose under section 14 of the Northern Ireland (Emergency Provisions) Act 1978, a provision which conferred powers of arrest to the armed forces similar to the powers reviewed in the *Fox* case.[56] Mrs Murray argued that her arrest and brief detention was not based on reasonable suspicion but was instead executed with the purpose of intelligence gathering. The court applied the principles set out in *Fox* but concluded that in this case the reasonable suspicion standard was satisfied. At the

[52] *Ibid* at para 16.
[53] *Ibid* at para 31.
[54] *Ibid* at para 35.
[55] *Murray v UK*, above n 36.
[56] *Ibid* at para 36.

outset, it emphasised that the more lenient standard of suspicion in terrorism cases does not entail that the investigating authorities have 'carte blanche' to arrest and confine persons for questioning, 'whenever they choose to assert that terrorism is involved'.[57] Turning to the facts of the case, a majority was prepared, in view of the terrorist campaign in Northern Ireland, to 'attach some credence to the respondent Government's declaration concerning the existence of reliable but confidential information grounding the suspicion against Mrs Murray'.[58] More importantly, the majority found that the respondent government succeeded in furnishing the necessary additional facts or information capable of satisfying the court that a reasonable suspicion against Mrs Murray existed.[59] These facts were the very recent convictions of her brothers in the United States for offences connected with the purchase of weapons for the Provisional IRA, which implied collaboration with trustworthy persons in Northern Ireland, her own visits to the United States and her contacts with her brothers there. The very brief period of detention involved was another factor distinguishing this case from the *Fox* case.[60]

In *O'Hara v United Kingdom*, the court reviewed an arrest under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984.[61] This provision permitted arrest without a warrant on the basis of 'reasonable grounds for suspicion'. It was therefore to be distinguished from the merely subjective legal standards of suspicion at issue in *Fox* and *Murray*. The applicant was arrested for his alleged involvement in a specific terrorist event, namely a murder by the Provisional IRA. The suspicion against him was based on intelligence from four different informants who had proved to be reliable in the past. The information was passed on to the arresting officer at a briefing by a senior officer. After several days Mr O'Hara was released without charges. In Strasbourg, he alleged that his detention was not based on reasonable suspicion but was executed to harass him and put pressure on him because he was a prominent member of the political party Sinn Fein. The court again referred to the principles adopted in *Fox*, and observed that there is a 'fine line' between cases where the suspicion is sufficiently grounded upon objective facts and those where it is not.[62] In the present case, the majority found that the suspicion against the applicant reached the required level, since it was based on specific information by informers who identified the applicant as a suspect

[57] *Ibid* at para 58.
[58] *Ibid* at para 60.
[59] *Ibid* at paras 60–62.
[60] *Ibid* at para 56 (observing that the length of the deprivation of liberty may be material to the level of suspicion required).
[61] *O'Hara v UK* Reports 2001-X (2001). See Adrian Hunt, 'Terrorism and Reasonable Suspicion by "Proxy"' (1997) 113 *Law Quarterly Review* 548.
[62] *O'Hara v UK*, previous n at para 42.

involved in a terrorist event. The court recognised that there was some force in the applicant's argument that police officers should not be allowed to hide behind anonymous informants to justify abuse of arrest powers, but it pointed out that the applicant had not raised any complaint concerning bad faith or oppression in the domestic proceedings.[63]

In the three Convention cases discussed above, a varying number of judges dissented. In *Fox*, Judges Evans, Bernhardt and Palm filed a joint dissent in which they argued that in sensitive terrorism cases no sharp distinction can be made between 'genuine suspicion' and 'reasonable suspicion'. The dissenters would therefore not have found a violation of Article 5 s 1 (c). By contrast, in *Murray*, Judge Jambrek criticised the modified standard of reasonable suspicion in terrorism-related cases. In his view, the specific features of terrorist crime can be used in the same way, to argue in favour of a more protective interpretation of the reasonableness standard. According to Jambrek, liberty rights may be violated more easily and on a larger scale during terrorist emergencies than in normal times. As far as the majority's factual assessment in *Murray* was concerned, the dissenting Judges Loizou, Morenilla and Makarczyk submitted that family ties with terrorists alone cannot given rise to a reasonable suspicion, absent corroboration by other facts. Finally, the majority's assessment in *O'Hara* was criticised by Judge Loucaides for shifting the burden to provide evidence of reasonable suspicion from the respondent government to the applicant. Despite these objections, the principles adopted in *Fox* and its progeny have been reiterated and applied in several subsequent cases involving terrorist suspects.[64]

The situational flexibility characteristic of the European Court's application of the reasonableness requirement in Article 5 s 1 (c), is absent from the Supreme Court's Fourth Amendment jurisprudence. No comparable examples exist in which the court adopted a more lenient interpretation of the probable cause test for arrests and detentions that form part of a counter-terrorist investigation. Although the court has relied upon a flexible balancing reading of the 'probable cause' standard in cases involving only minor interferences with personal liberty, it declined to

[63] *Ibid* at 43.

[64] See, eg, *Ikincisoy v Turkey*, 15 December 2004, paras 94–8 (reasonable and sufficient grounds to believe that the applicants were involved in terrorist activity); *Talat Tepe v Turkey*, 21 December 2004, paras 56–63 (information provided by two members of the PKK as to the applicant's involvement in an illegal organisation sufficient evidence of reasonable suspicion, even though the information dated several years back and was later withdrawn); *Korkmaz and others v Turkey*, 21 March 2006, paras 23–6 (possession of propaganda of illegal armed organisation sufficient basis for arrest); *Süleyman Erdem v Turkey*, 19 September 2006, paras 35–40 (information provided by alleged member of armed organisation sufficient ground for arrest); *Imakayeva v Russia*, 9 November 2006, para 175 (mere reference to the provisions of the Suppression of Terrorism Act insufficient basis for arrest).

extend this balancing approach to full-scale arrests and detentions.[65] In the latter cases, the probable cause requirement is treated as an absolute rule, which implies that the court is unwilling to modify the quantum of evidence required to satisfy it.[66] In his opinion for the majority in *Dunaway v New York*, Justice Brennan explicitly rejected a flexible reasonableness interpretation of the probable cause for conventional arrests:

> [T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the often competitive enterprise of ferreting out crime.[67]

Therefore, Brennan continued,

> [a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.[68]

ii. Information after Arrest

a. General Standards

The second paragraph of Article 5 requires that

> [e]veryone who is arrested shall be informed promptly in a language which he understands, of the reasons for his arrest and of any charge against him.

In the European Court's opinion, this provision contains 'the elementary safeguard that any person arrested should know why he is deprived of his liberty'.[69] The purpose of the guarantee is to enable an arrested person to challenge his or her detention before a judge.[70] As far as the nature of the information required by Article 5 s 2 is concerned, the court held that 'any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest'.[71] As to the condition of 'promptness', the court accepts that not all the necessary

[65] See, eg, *Terry v Ohio*, above n 17 (concerning brief investigative detentions (so-called 'stop and frisk' procedures)). For a critical discussion of Fourth Amendment balancing, see, eg, Strossen, above n 31.

[66] See *Dunaway v New York*, 442 US 200, 208 (1979) (observing that under the traditional reading of the Fourth Amendment the 'probable cause' standard applies to all arrests, without the need to balance the interests and circumstances involved in particular situations).

[67] *Ibid* at 213.

[68] *Ibid* at 213–14.

[69] *Fox, Campbell and Hartley v UK*, above n 34 at para 40.

[70] *Van de Leer* Series A no 170 (1990) para 28.

[71] *Fox, Campbell and Hartley v UK*, above n 34 at para 40.

information needs to be given at once by the arresting officer.[72] Information may be conveyed some time after the arrest, for instance when the detainee is first questioned. In sum, the requirement of Article 5 s 2 is a flexible one: 'Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features'.[73] No comparable guarantee is set forth in the Bill of Rights. However, it may be interesting to refer in this connection to *Miranda v Arizona*.[74] In this case, the Supreme Court read into the Fifth Amendment an obligation for the arresting officer to inform a person 'deprived of his freedom of action in any significant way', that (1) he has a right to remain silent, (2) anything he says will be used against him in court, and (3) he has a right to consult with a lawyer.[75] But the rationale of the *Miranda* rule is different from the one underlying Article 5 s 2. The purpose of the *Miranda* warnings is not so much to enable the arrestee to challenge the grounds for his or her detention, but to safeguard against potential violations of the Fifth Amendment's privilege against self-incrimination during interrogations in custody.[76]

b. Exceptional Standards in the Fight against Terrorism

In two of the terrorism cases discussed in the preceding sub-section, the European Court considered claims regarding a violation of the right to be informed of the reasons for arrest. In *Fox*, the court found that the mere indication by an arresting officer that a person is being detained pursuant to anti-terrorism legislation is insufficient for the purpose of Article 5 s 2.[77] Nevertheless, the majority concluded that the applicants were given adequate information because they were able to infer the factual basis for their arrests from their subsequent interrogation about specific terrorist acts.[78] Given the security context of the case, the intervals of a few hours between the arrests and the interrogations were held to satisfy the promptness standard. The court took a similar approach in *Murray*.[79] In this case, however, the dissenting judges were not convinced that the applicant was able to infer from 'questions about her brothers or about money and about America' that she was being questioned about her possible involvement in a specific terrorist offence. Commentators have

[72] *Ibid*.
[73] *Ibid*.
[74] *Miranda v Arizona*, 384 US 436 (1966).
[75] *Ibid* at 467–73.
[76] A further examination of the privilege against self-incrimination is outside the scope of this inquiry.
[77] *Fox, Campbell and Hartley v UK*, above n 34 at para 41.
[78] *Ibid*. See also *Dikme v Turkey* Reports 2000-VIII (2000), paras 51–7 (questioning about membership in an illegal organisation after arrest sufficient to satisfy Art 5 s 2).
[79] *Murray v UK*, above n 36 at paras 71–80.

criticised the court's broad reading of Article 5 s 2 in these cases as an unacceptable dilution of one the basic guarantees against arbitrary detention.[80] Nevertheless, the *Fox* and *Murray* doctrine has been applied in subsequent terrorism-related cases.[81]

iii. The Right to be Brought Promptly before a Judicial Authority

a. General Standards

An essential safeguard against arbitrary arrest and detention is judicial supervision at a very early stage.[82] Both jurisdictions provide for a system of judicial control. Article 5 s 3 of the Convention states that everyone arrested and detained for the purpose of bringing him before the competent legal authority (in accordance with Article 5 s 1 (c)) has a right 'to be brought promptly before a judge or other officer authorised by law to exercise judicial power'. According to the court, this provision is intended 'to minimum the risk of arbitrariness'.[83] There has been considerable debate about the proper meaning of the expressions 'promptly' and 'judge or other officer authorised by law to exercise judicial power'. As regards the latter, the court ruled that while the term 'officer' is not synonymous with 'judge', it must nevertheless have some of its attributes.[84] To start with, the officer must be independent from the executive and the parties. As a result, a public prosecutor does not satisfy the requirements of Article 5 s 3.[85] In the second place, the court imposes a procedural condition, namely that the officer must hear the individual brought before him in person.[86] Thirdly, the officer must be empowered to review

> the circumstances militating for or against detention (…), [and decide], by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons.[87]

[80] See Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford, Oxford University Press, 2000) 498; Harris, O'Boyle and Warbrick, above n 24 at 130.

[81] See, eg, *Korkmaz and others v Turkey*, 21 March 2006, paras 27–30 (applicants were able to infer basis for their arrests from questioning about alleged association with an armed organisation); *Süleyman Erdem v Turkey*, above n 64 at paras 41–3 (applicant was able to infer basis for his arrest from questioning about alleged association with an armed organisation).

[82] See generally Helena Cook, 'Preventive Detention—International Standards and the Protection of the Individual' in Stanislaw Frankowski and Dinah Shelton, *Preventive Detention* (Leiden/Boston, Martinus Nijhoff Publishers, 1992) 15–19.

[83] *Brogan v UK*, above n 47 at para 58.

[84] *Schiesser v Switzerland*, above n 33 at para 31.

[85] See, eg, *De Jong, Baljet and Van den Brink* Series A no 77 (1984) para 49.

[86] *Assenov and others v Bulgaria* Reports 1998-VIII (1998) para 146.

[87] *Schiesser v Switzerland*, above n 33 at para 31.

Moving on to the requirement of promptness, it should be noted that the court has refrained from developing a maximum time limit. According to its consistent case law, 'the issue of promptness must be assessed in each case according to its special features'.[88]

While there is no explicit demand in the US Constitution that an arrestee be brought promptly before a judicial authority, a safeguard comparable to Article 5 § 3 was read into the Fourth Amendment in Gerstein v Pugh.[89] In this case, the Supreme Court decided that the States

> must provide a fair and reliable determination of probable cause as a condition for any significant pre-trial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.[90]

The underlying philosophy of this principle is that the police or prosecutor's assessment of probable cause is insufficient to justify the prolonged detention of the defendant pending trial. As the court explained: 'the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.'[91] The *Gerstein* holding generates problems of interpretation similar to those of Article 5 s 3. Firstly, the court made it clear that the 'judicial officer' referred to must be someone who is independent of police and prosecution, as it is his task to review the initial probable cause determinations made by the law enforcing authorities.[92] The second question dealt with by the court in *Gerstein* is that of the required procedure for the probable cause determination. In this connection, the court held that the person arrested is neither entitled to be present at the probable cause determination nor to be represented by a counsel.[93] Herein lies an important difference when compared with Article 5 s 3, which obliges the magistrate to personally hear the individual involved (although the latter is not entitled to be accompanied by a lawyer).[94] A final issue raised by *Gerstein* is what may be regarded as 'prompt' judicial intervention. In an attempt to resolve the conflicting interpretations of this notion among the lower courts, the court in *County of Riverside v McLaughlin* established a specific time period during which probable cause must be

[88] *De Jong, Baljet and Van den Brink*, above n 85 at para 52.

[89] *Gerstein v Pugh*, above n 41.

[90] *Ibid* at 125. A probable-cause hearing is also required if pre-trial release is 'accompanied by burdensome conditions that effect a significant restraint of liberty.' *Gerstein* does not apply, however, when the arrest was made on the basis of an arrest warrant.

[91] *Ibid* at 114 (observing that pre-trial confinement may imperil the suspect's job, interrupt his source of income and impair his family relationships).

[92] *Ibid* at 118.

[93] *Ibid* at 120. This aspect of the decision was criticised by the concurring Justices Stewart, Douglas, Brennan and Marshall.

[94] *Schiesser v Switzerland*, above n 33 at para 36.

judicially determined.[95] Recognising that the 'prompt' requirement gave insufficient guidance to the states, the Supreme Court developed the following bright-line rule. Normally, a jurisdiction that provides judicial determination within 48 hours after arrest will comply with the promptness requirement.[96] A probable cause hearing within 48 hours may nonetheless violate the Fourth Amendment if the arrestee can prove that it was delayed unreasonably. On the other hand, where the detained person does not receives a probable cause determination within 48 hours, the burden shifts to the government to demonstrate 'the existence of a bona fide emergency or other extraordinary circumstance'.[97]

b. Exceptional Standards in the Fight against Terrorism

A number of Member States of the Council of Europe enacted legislation allowing for prolonged periods of police custody without judicial supervision for terrorist suspects.[98] The Convention organs have had several opportunities to review such laws, both under the traditional Article 5 framework as in the context of an Article 15 derogation. *Brogan v United Kingdom* is the first case in which the court considered the promptness requirement in relation to counter-terrorist measures.[99] Following their arrests under Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984, the four applicants were held in police custody for periods ranging from 4 days and 6 hours to 6 days and 16½ hours.[100] During their detention the applicants were all questioned about various

[95] *County of Riverside v McLaughlin*, 500 US 44 (1991).

[96] *Ibid* at 56. This approach was criticised by Justice Scallia who wrote that the majority's decision departed from the traditional common law protection that a person arresting any one must take him before a magistrate 'as soon as reasonably possible' and that '[h]ereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made.'(*ibid* at 71). Nevertheless, Scalia recognised the need for a specific time limit, suggesting a shorter period of 24 hours.

[97] *Ibid* at 57.

[98] To give but one example, Art 55 (2) of the Spanish Constitution declares that '[a]n organic law may determine the manner and the cases in which, in an individual manner and with the necessary judicial intervention and adequate parliamentary control, the rights recognised in Article 17 (2) [ie that executive detention may not exceed 72 hours] (…) may be susspended for certain persons with respect to investigations having to do with the activities of armed bands or terrorist elements.' Based on this provision, Arts 520bis and 527 of the Spanish Criminal Prosecution Act allow for the extension of the 72 hours period with an additional 48 hours for terrorist suspects (see José Martínez Soria, 'Country Report on Spain' in Christian Walter *et al* (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin, Springer, 2004), 516, 550–52).

[99] *Brogan v UK*, above n 47 at para 58.

[100] *Ibid* at para 30 (Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 permitted police detention without a warrant for 48 hours. This period was extendable by the Secretary of State for Northern Ireland by a maximum period of 5 additional days.).

terrorist incidents. None of them was brought before a judge, nor were any of them charged with a terrorist offence after subsequent release. In Strasbourg, the respondent government sought to justify the prolonged executive detention of suspected terrorists as an indispensable tool to combat terrorism.[101] It pointed at the difficulties in investigating terrorist crime and obtaining evidence which is both admissible and usable in criminal proceedings. Amongst the particular problems adduced by the British government, were the training of terrorists in anti-interrogation techniques and the time needed to correlate the information obtained from the arrestee with information from other detainees and security agencies. A final argument advanced by the British government against early judicial oversight was the sensitivity of the information on which the suspicion is often based in terrorism-related cases. The European Commission applied its established case-law holding that, in view of the exceptional context of terrorism, only detention periods of more than five days violated the requirement of promptness.[102] The court, however, went further and found that even the shortest of the four periods of detention (4 days and 6 hours) did not meet the standard of Article 5 s 3. At the outset, the majority noted that although the United Kingdom had withdrawn its previous derogation under Article 15, the background of terrorism in Northern Ireland remained relevant to the interpretation of Article 5.[103] It accepted that,

> subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 § 3, keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial office.[104]

However, the degree of flexibility in the interpretation of the notion of promptness is not unlimited. The significance attached to the specific circumstances of terrorism, the court added, 'can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 § 3'.[105] In the present case, the court felt that any justification of the lengthy

[101] *Ibid* at para 56.

[102] Several members of the Commission filed a partly dissenting opinion in which they criticised the majority's differentiation between 'normal' and 'special' cases. In their contention, the need for judicial supervision is even greater in security situations: 'In the opinion of the majority, the struggle against terrorism justifies that all citizens should accept the risk of being detained for some time beyond four days without being brought before a judge. We cannot accept this position. It is precisely in situations where wider powers of arrest are conferred on the authorities to cope with an organised terrorist threat that the need for judicial control against the abuse of power is greatest. It cannot be said that the need for judicial control is less than in respect of detention for ordinary criminal offences.'

[103] *Brogan v UK*, above n 47 at para 48.

[104] *Ibid* at para 61.

[105] *Ibid* at paras 59 and 62.

periods of detention would constitute an unacceptable wide interpretation of the expression 'promptly'.

Several dissenting opinions were drafted. The central tenet of most of the opinions was that the extended detention periods were justified, bearing in mind the need to strike a fair balance between the rights of the arrestee and the security interests of the community.[106] Judge Martens filed a comprehensive dissent in which he called for a wider margin of appreciation for the domestic authorities, who have, through experience, acquired a better insight in balancing counter-terrorist interests and protecting the rights of the individual. The *Brogan* case was also the subject of a number of academic contributions.[107] Some authors argue that the importance the *Brogan* court attached to the background factors of the case introduces an undesirable element of uncertainty in Article 5 s 3 adjudication.[108] As opined by Antonio Tanca, the 'elastic' interpretation of the right to prompt judicial oversight in terrorism-related arrests may ultimately lead to a de facto erosion of the right protected.[109] Nevertheless, the principles adopted in *Brogan* have been affirmed in numerous subsequent cases dealing with the arrest and detention of terrorist suspects. In most of these cases the court had little difficulty to find a violation of Article 5 s 3, as the periods of unsupervised detention were longer than the shortest period (4 days and 6 hours) the *Brogan* court held in breach of the Convention.[110] Nevertheless, in some of the cases the court declined to find a violation of the Convention due to the existence of a valid derogation under Article 15. These judgments are examined in section IV below.

[106] See the dissenting opinion of Judges Thór Vilhjálmsson, Bindschedler-Robert, Gölcüklü, Matscher and Valticos and the dissenting opinion of Judge Sir Vincent Evans.

[107] See, eg, Finnie, above n 47; S Livingstone, 'A Week is a Long Time in Detention', (1989) 40 *Northern Ireland Legal Quarterly* 288; PM Roche, 'The UK's Obligation to Balance Human Tights and its Anti-Terrorist Legislation' (1989–90) 13 *Fordham International Law Review* 328; Antonio Tanca, 'Human Rights, Terrorism and Police Custody: The Brogan Case' (1990) 1 *European Journal of International Law* 269.

[108] Finnie, above n 47 at 707–8.

[109] Tanca, above n 107 at 274–6 (arguing that erosion of the right in Art 5 s 3 could possibly be avoided by a temporary derogation under Art 15 of the Convention).

[110] It is impossible to give an exhaustive list. Some randomly chosen examples are: *Brannigan and McBride v UK* Series A no 258 (1993) para 37 (periods of 6 days and 14 hours and 4 days and 6 hours); *Aksoy v Turkey*, above n 4 at para 66 (period of at least 14 days); *Sakik and others v Turkey* Reports 1997-VII (1997) para 45 (periods of 12 days and 14 days); *Demir and others v Turkey* Reports 1998-VI (1998), paras 39–40 (periods of at least 23 days and at least 16 days); *O'Hara v UK,* above n 61 at paras 45–6 (period of 6 days and 13 hours); *Dikme v Turkey*, above n 78 at para 67 (period of 16 days); *Igdeli v Turkey*, 20 June 2002, para 30 (period of 7 days); *Filiz and Kalkan v Turkey*, 20 June 2002, para 26 (period of 8 days); *Uçar v Turkey*, 11 April 2006, 118–20 (period of 9 days); *Sahin and Sürgeç v Turkey*, 31 October 2006, paras 17–21 (period of 8 days).

In the Supreme Court's jurisprudence there are no examples of a different interpretation of the *Gerstein* promptness requirement in relation to terrorist crime. As noted, under *County of Riverside v McLaughlin* evidence of a bona fide emergency or other extraordinary circumstance may serve to justify a delay of the probable cause determination after the initial period of 48 hours. Although the court did not specify the meaning of this formula, it appears to leave some room for situational flexibility. It is interesting to observe that in a dissenting opinion in this case Justice Scalia referred to the British experience with unsupervised preventive detention as a counter-terrorist measure to highlight the protection offered by the Fourth Amendment and to support the use of a bright-line rule:

> It was the purpose of the Fourth Amendment to put this matter [the period of detention without impartially adjudicated cause] beyond time, place and judicial predilection, incorporating the traditional common law guarantees against unlawful arrest.[111]

iv. The Right to be Released Pending Trial

a. General Standards

The right to be released pending trial stems from the general prohibition on arbitrary detention and the presumption of innocence in criminal cases.[112] The right to provisional release is not absolute, however, and pre-trial detention of individuals charged with an offence can be justified. Article 5 s 3 provides, in this respect, that everyone arrested or detained for the purpose of bringing him before a competent legal authority 'shall be entitled to trial within a reasonable time or to release pending trial'. It further adds that '[r]elease may be conditioned by guarantees to appear for trial'. The text of this provision is susceptible to different interpretations, but it has been explained by the Strasbourg organs as conferring (1) a qualified right to provisional release and (2) a right to trial within a reasonable time.[113] With regard to the former, the Contracting States are under the obligation to demonstrate that the reasons advanced by the domestic authorities to deny the provisional release of a criminal suspect are 'relevant and sufficient'.[114] The court has identified various grounds which may justify the pre-trial deprivation of liberty: the danger of

[111] *County of Riverside v McLaughlin*, above n 95 at 66.

[112] See generally Cook, above n 82 at 19.

[113] See *Wemhoff v Germany* Series A no 7 (1968) paras 4 and 5 (rejecting a purely grammatical interpretation that would leave the judicial authorities with a choice between either conducting the proceedings within a reasonable time or releasing the accused pending trial).

[114] *Ibid* at para 12.

absconding,[115] the risk of interference with the course of justice,[116] the prevention of crime[117] and the protection of public order.[118] The reasonableness of an accused person's prolonged detention on one of these grounds 'must be assessed in each case according to its special features'[119] and the reasons for refusing provisional release must not be 'abstract and stereotyped'.[120] When the only remaining reason for continued detention is the danger of flight, the accused must be released if it is possible to obtain bail or other guarantees that will ensure his or her appearance.[121] Even where prolonged pre-trial detention is based on relevant and sufficient grounds, it may still be unreasonable if it is established that the competent national authorities failed to conduct the prosecution with 'special diligence'.[122] The court has explicitly refrained from setting a maximum length of pre-trial detention and instead weighs the various facts of the case.[123]

Under the Bill of Rights, the main provision pertaining to pre-trial detention is the Eighth Amendment's proclamation that

> excessive bail shall not be required.

The leading case on what constitutes 'excessive bail' is *Stack v Boyle*.[124] The defendants were charged with conspiring to violate the Smith Act.[125] The court ordered the reduction of the unreachable amounts of bail, holding that bail set at a figure higher than an amount reasonably calculated to fulfil the purpose of assuring the presence of the defendant is excessive.[126] It further found that the amount of bail should be adjusted to the particular circumstances of the case.[127] A question which has often

[115] *Ibid* at para 14.

[116] *Ibid*.

[117] In *Matznetter v Austria* Series A no 10 (1969) para 9 the court held that in 'special circumstances' a judge may reasonably take into account the danger that a person charged with a serious offence may commit the same offence again when released pending trial. The ruling was opposed by dissenting Judge Zekia who opined that Art 5 was not intended to authorise preventive detention of persons based solely on their criminal propensity.

[118] See *Letellier v France* Series A no 207 (1991) para 51 (holding that this ground can be regarded as relevant and sufficient provided that it is based on 'facts capable of showing that the accused's release would actually disturb public order').

[119] See, eg, *Wemhoff v Germany*, above n 113 at para 10.

[120] See, eg, *Yagci and Sargin v Turkey* Series A no 319 (1995) para 52.

[121] See, eg, *Wemhoff v Germany*, above n 113 at para 15.

[122] *Stögmüller v Austria* Series A no 9 (1969) para 5.

[123] See P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague, Kluwer Law International, 1998) 379. Factors that may be taken into account are the complexity of the case, and the conduct of the detained person as well as the conduct of the national authorities.

[124] *Stack v Boyle*, 342 US 1 (1951).

[125] See also ch 3, section IV.

[126] *Stack v Boyle* above n 124 at 5 (observing that '[t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction').

[127] *Ibid* at 5.

been raised in connection with the Eighth Amendment, is whether it allows pre-trial detention on grounds other than the danger of absconding. This issue was resolved in the case of *United States v Salerno*, in which the court decided that the Eighth Amendment does not guarantee a 'right' to bail.[128] The court ruled that the only purpose of the Eighth Amendment is to ensure that bail will not be set at an amount that is excessive when the interest of pre-trial detention is the prevention of flight; however, it does not prevent detention on grounds other than the danger of absconding.[129]

Both Congress and individual States enacted laws that authorise pre-trial detention on grounds other than the prevention of flight. The most important and far-reaching federal statute is the 1984 Bail Reform Act.[130] It provides that a

> judicial officer [shall order the detention of an arrested person if it is demonstrated by] clear and convincing evidence [that] no condition or combination of conditions will reasonably assure (…) the safety of any other person and the community.[131]

The Act further provides a number of procedural safeguards and lists the considerations which may be taken into account by the judicial officer ordering pre-trial detention.[132] In *Salerno*, the court upheld the Bail Reform Act against various constitutional challenges. The majority argued that the statute's pre-trial detention scheme is regulatory in nature and does therefore not constitute impermissible punishment before trial in violation of the Fifth Amendment.[133] In the court's opinion, an individual's strong interest in liberty may, 'in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society'.[134] Dissenting Justices Marshall and Brennan rejected the majority's reasoning. Both Justices associated the Bail Reform Act with 'the usages of tyranny' and the 'police state', and found it to be 'incompatible with the fundamental human rights protected by our Constitution'.[135]

[128] *United States v Salerno*, above n 13.
[129] *Ibid* at 754–5.
[130] 18 USC 3141 *ff*. For a discussion, see LaFave, Israel and King, above n 39 at 637–9.
[131] 18 USC 3142(e).
[132] 18 USC 3142(f)–(g). The factors to be taken into account include the nature and seriousness of the charges, the substantiality of the evidence against the arrested person and his personal background and characteristics.
[133] Note that although the US Constitution does not contain an express right to a trial within a reasonable time, the maximum length of pre-trial detention is limited by the time limitations of the Speedy Trial Act (see 18 USC 3161 *ff*). The existence of the Speedy Trial Act was one of the factors relied upon by the court in *Salerno* to uphold the pre-trial detention scheme of the Bail Reform Act.
[134] *United States v Salerno*, above n 13 at 750–51.
[135] *Ibid* at 755.

b. Exceptional Standards in the Fight against Terrorism

Both systems evidently allow for the pre-trial detention of suspected terrorists. The public interest in security clearly outweighs individual liberty claims. Nonetheless, the assertion that terrorism is involved in a particular case does not entail unlimited pre-trial detention powers.[136] The limits set by Article 5 s 3 of the Convention are evidenced by the Strasbourg Court's judgment in *Debboub alias Husseini Ali v France*.[137] The applicant in this case was suspected of involvement in a terrorist network that provided material support to Islamic terrorist groups. His pre-trial confinement lasted four years and two months. The protection of public order and the prevention of terrorist crime were found to be relevant and sufficient reasons to initially justify the applicant's pre-trial detention, but they had become less convincing as time went on. Because the national authorities failed to conduct the procedure with due diligence, the court found a violation of Article 5 s 3.[138]

v. Concluding Remarks

The magnitude of the terrorist threat naturally produces demands for early and sweeping police action against those possibly involved in terrorist crime. Such demands generate pressure on the liberty guarantees traditionally associated with the law of criminal procedure, and confront lawmakers with the intricate task of striking a proper balance between individual liberty interests and law enforcement needs.[139] The foregoing analysis of the Convention jurisprudence indicates that the Strasbourg organs are, to a certain extent, willing to accommodate the special needs of counter-terrorism in their interpretation of the Article 5 requirements relevant to the criminal process. In many respects, terrorist crime is treated as a special category. A first example is the somewhat lower standard of suspicion necessary to justify arrest and detention of persons believed to be involved in terrorism. The court's approval of extended periods of police custody before intervention by a judge is an illustration of the same tendency. Through an elastic construction of notions such as 'reasonable suspicion' and 'promptly', the court gives considerable latitude to the special circumstance of terrorism. However, this does not imply that the liberty rights

[136] See also Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002, Art VII, 2: 'Police custody shall be of a reasonable period of time, the length of which must be provided for by law.'

[137] *Debboub alias Husseini Ali v France*, 9 November 1999, paras 39–48.

[138] *Ibid* at para 45.

[139] See also William J Stuntz, 'Local Policing after the Terror' (2002) 111 *Yale Law Journal* 2137 (arguing that the scope of criminal process rights will invariably change in response to public outcry).

associated with the criminal process can be set aside whenever counter-terrorist interests are invoked. As the court made clear on numerous occasions, the special significance attached to combating terrorist crime can never be taken to a point where the essence of the safeguard involved is impaired. Such flexibility is virtually absent in the case law of the Supreme Court, at least as far as full-scale liberty deprivations are concerned. No cases were found in which the courts interpreted differently the Fourth Amendment 'probable cause' and 'promptness' requirements to specifically accommodate counter-terrorist needs. In fact, the court's preference for bright-line rules reveals a certain reluctance to modify general liberty standards to meet special circumstances. This is perhaps best illustrated by the court's explicit rejection of a balancing approach for the interpretation of what constitutes probable cause in *Dunaway v New York*.

B. Detention and Immigration Law

i. General Standards

Both the Convention and the Bill of Rights allow for the detention of foreign nationals for the purpose of enforcing immigration law. Article 5 s 1 (f) of the Convention permits the lawful 'detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. The protection provided by this sub-paragraph is limited in comparison to the guarantees afforded to the accused in criminal proceedings. For example, Article 5 s 1 (f) does not require that the deprivation of liberty is necessary to prevent the detainee from absconding or committing an offence; the sole requirement is that the person in question is the object of action 'with a view to deportation or extradition'.[140] The court will verify in this respect whether the detention had no other purpose than the one it was officially said to serve.[141] Regard will also be had to the length of the detention. While the Convention does not impose a time limit, immigration proceedings must be conducted with 'due diligence', otherwise detention will cease to be permissible under Article 5 s 1 (f).[142] Turning to the US Constitution, the due process clause of the Fifth Amendment

[140] *Chahal v UK* Reports 1996-V (1996) para 112.

[141] See, eg, *Bozano v France* Series A no 111 (1984) para 60 (finding a violation of Art 5 s 1 (f) because the applicant's detention was officially taken with a view to deportation, but amounted in reality to a disguised form of extradition).

[142] See, eg, *Quinn v France* Series A no 311 (1995) para 48 (detention for almost 2 years violates Art 5 s 1 (f)); *Singh v Czech Republic*, 15 January 2005 (detention period of more than 2 years violates Art 5 s 1 (f)); *Bordovskiy v Russia*, 8 February 2005 (detention period of 4 months justified under Art 5 s 1 (f)).

permits non-criminal detention in special and narrow non-punitive circumstances.[143] In *Wong Wing v United States*, the Supreme Court recognised the constitutionality of 'detention or temporary confinement, as part of the means necessary to give effect to the provision for the exclusion or expulsion of aliens'.[144] Thus, similar to Article 5 s 1 (f), the power to detain aliens is incidental to the government's authority of removal or deportation.[145] The court has rejected claims that a danger of absconding, or an individualised finding of dangerousness, is necessary to justify detention for immigration purposes.[146] Equally similar to the Convention approach is the court's critical stance towards lengthy periods of immigration detention. For instance, in *Zadvydas v Davis et al*, the Supreme Court held that a 'statute permitting indefinite detention of an alien would raise a serious constitutional problem' under the Fifth Amendment.[147] It therefore construed a potentially unlimited statutory power of post-removal detention of aliens to be limited to a period 'reasonably necessary to bring about that alien's removal from the United States'.[148]

ii. Exceptional Standards in the Fight against Terrorism

In *Chahal v United Kingdom* the Strasbourg Court considered the scope of Article 5 s 1 (f) in relation to terrorism.[149] Mr Chahal was an Indian Sikh who entered the United Kingdom illegally and was detained pending deportation. Being a leading figure of the Sikh community and previously involved in separatist activities, he feared returning to India. In the United Kingdom the applicant was first detained under the Prevention of Terrorism (Temporary Provisions) Act 1984 on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister. He was also arrested twice in connection with several other political conspiracies. In 1990, the Home Secretary commenced deportation proceedings against Mr Chahal, arguing that his continued presence in the country would not be conducive to the public good and hinder the international fight against terrorism. The Home Secretary claimed, among other things, that the applicant was involved in the raising of funds for Sikh terrorism in the Punjab. By the time his case reached the European Court, the applicant had been detained

[143] *Zadvydas v Davis et al*, above n 14 at 693.

[144] *Wong Wing v United States*, 163 US 228, 235 (1896) (arguing that deportation proceedings 'would be vain if those accused could not be held in custody pending the inquiry into their true character').

[145] David Cole, 'Enemy Aliens' (2002) 54 *Stanford Law Review* 953, 964.

[146] See *Carlson v Landon*, 342 US 524 (1952) and *Demore v Kim*, 533 US 678 (2003).

[147] *Zadvydas v Davis et al*, above n 14 at 690.

[148] *Ibid* at 699.

[149] *Chahal v UK*, above n 140. See Colin Harvey, 'Expulsion, National Security and the European Convention' (1997) 22 *European Law Review* 626.

with a view to deportation for over six years. In his submission, such a lengthy period rendered his detention unlawful under Article 5 s 1 (f). The majority of the court rejected that claim. Against the background of the case, the period taken into account by the court—three years and seven months[150]—was not found to be excessive. Bearing in mind the exceptional circumstances and the delays caused by the numerous applications for judicial review by the applicant, the deportation proceedings could not be said to be conducted without due diligence.[151] The court emphasised that it is neither in the interest of the detainee nor in the interest of the general public that decisions in complex immigration cases are taken hastily.[152] It further accepted that the review by an advisory panel of the Home Secretary's assertions concerning the dangerousness of the applicant constituted a sufficient safeguard against arbitrariness of the long period of custody.[153] However, the court agreed with the applicant that the advisory panel was insufficient as a judicial safeguard for the purpose of the habeas corpus provision of Article 5 s 4 (see below).

The *Chahal* case demonstrates that long periods of detention can be justified in immigration proceedings, especially if the person detained is somehow involved in terrorism.[154] Situations may nevertheless arise in which a Contracting State would find it difficult to reconcile the need to fight terrorism with Article 5 s 1 (f). The latter permits detention of aliens only where 'action is being taken with a view to deportation or extradition', and requires that immigration proceedings be conducted with 'due diligence'. Although that notion allows for a flexible assessment of time-periods in terrorism-related cases, it clearly does not permit indefinitely long periods of custody.[155] Detention must in any event be stopped after the immigration proceedings have been concluded, even where the outcome of the proceeding is that the alien can for some reason not be deported. In other words, Article 5 s 1 (f) cannot serve as the basis for the preventive detention of dangerous aliens. Being aware of this, the United Kingdom in 2001 opted out of its obligations under Article 5 by entering an Article 15 derogation.[156] The immediate cause for the derogation is the

[150] *Chahal v UK*, above n 140 at para 114.

[151] See Iain Cameron, *National Security and the European Convention of Human Rights* (The Hague/London/Boston, Kluwer Law International, 2000) 283 (criticising the court for failing to consider the option of less drastic measures to check on the applicant, such as a duty of periodic reporting).

[152] *Chahal v UK*, above n 140 at para 177.

[153] *Ibid* at para 122.

[154] See also Cameron, above n 151 at 283.

[155] See *Bordovskiy v Russia*, above n 142 at para 50 (observing that '[a]t the heart of the applicant's complaint lies the substantive interest not to spend an indefinitely long period of time in pre-extradition custody').

[156] See below section IV.

power to detain suspected international terrorists pursuant to the Anti-terrorism, Crime and Security Act 2001.[157] The latter empowers the Secretary of State to certify a foreign national as a suspected international terrorist if he reasonably believes that the individual's presence in the country is a risk to national security, and suspects that the person is a terrorist.[158] Appeals against certification can be made before the Special Immigration Appeals Commission, but other remedies such as habeas corpus are explicitly excluded. A certified alien may be detained for the purpose of immigration proceedings, yet without time limit and despite the fact that his or her removal or departure from the United Kingdom is impossible.[159] The rationale of these measures was to provide for the indefinite detention of aliens whose deportation is not legally permitted, for instance because it would likely result in torture or inhuman or degrading treatment contrary to Article 3 of the Convention.[160] It must be viewed against the background of the court's decision in *Chahal* that an individual cannot be returned if he faces a real risk of torture or other treatment contrary to Article 3.[161] The validity of the United Kingdom derogation is further examined in section IV below.

The United States government responded similarly to the September 11 events by expanding the powers to detain non-citizens suspected of terrorism. Shortly after the attacks, the Immigration and Naturalization Service (INS) issued a regulation extending the time an individual can be held in INS custody without charge of a criminal or immigration violation from 24 hours to 48 hours.[162] The regulation further provides that in times of 'emergency or extraordinary circumstance' the initial period can be prolonged for an additional 'reasonable period'.[163] Secondly, the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act) confers considerable power on the Attorney General to place suspected terrorists in

[157] For a detailed discussion see Walker, above n 47 at 217–37. See also Jonathan L Black-Branch, 'Powers of Detention of Suspected International Terrorists under the United Kingdom Anti-Terrorism, Crime and Security Act 2001: Dismantling the Cornerstones of a Civil Society' (2002) 27 *European Law Review* 19; Dana Keith, 'In the Name of National Security or Insecurity?: The Potential Indefinite Detention of Noncitizen Certified Terrorists in the United States and the United Kingdom in the Aftermath of September 11, 2001' (2004) 16 *Florida Journal of International Law* 405; Adam Tomkins, 'Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001' (2002) *Public Law* 205.

[158] S 21 of the Anti-terrorism, Crime and Security Act 2001.

[159] S 24 of the Anti-terrorism, Crime and Security Act 2001.

[160] In *Chahal v UK*, above n 140 at para 107 and subsequent cases the European Court has made it clear that if there is a real risk of torture, or inhuman and degrading treatment in the country of origin, a deportation of a suspected terrorist would give rise to a violation of Art 3.

[161] *Ibid*.

[162] 66 Fed. Reg. 48,334 (20 September 2001) (8 C.F.R. s 287.3(d)).

[163] *Ibid* at 48,335.

custody.[164] Section 412 authorises the Attorney General to certify a non-citizen if he has 'reasonable grounds to believe' that he is engaged in 'terrorist activity' or otherwise endangers the national security.[165] Following certification, the person involved must be taken into custody and may be held without charge for up to seven days.[166] To continue detention beyond seven days, he must either be placed in removal proceedings or charged with a crime.[167] However, if the certified non-citizen is deemed removable and his removal is unlikely in the 'reasonably foreseeable future', he may be detained for additional periods of up to six months if his release would 'threaten the national security of the United States or the safety of the community or any person'.[168] In other words, the PATRIOT Act subjects certain aliens to potentially indefinite mandatory detention.[169]

The INS regulation and the mandatory detention provisions of the PATRIOT Act have been criticised for interfering with several constitutional liberty safeguards.[170] However, scholars disagree as to whether the Supreme Court would uphold the PATRIOT Act detention powers.[171] At the root of the uncertainty is the court's decision in *Zadvydas v Davis et*

[164] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (hereinafter 'PATRIOT Act').

[165] *Ibid* s 412(a)(3) (8 USC s 1226A(a)). 'Terrorist activity' is broadly defined and includes the use of a 'firearm, or other weapon or dangerous device' 'with the intent to endanger, directly of indirectly, the safety of one or more individuals or to cause substantial damage to property' (*Ibid* s 411(a)(1)(E)(ii)11).

[166] *Ibid* at s 412(a)(5) (8 USC s 1226A(a)).

[167] *Ibid*.

[168] *Ibid* s 412(a)(6) (8 USC s 1226A(a)).

[169] The detention provisions of the PATRIOT Act are comparable to those found in the United Kingdom Anti-terrorism, Crime and Security Act 2001, although the former contains more protections against arbitrariness than the latter (eg, access to judicial review and periodical reconsideration of the certification). See Keith, above n 157 at 412 ('[I]t is astounding to observe how restrained the legal response of the United States appears when contrasted with that of the United Kingdom.').

[170] See, eg, Cole, 'Enemy Aliens', above n 145 at 972 (criticising the PATRIOT Act for authorising potentially indefinite detention on a seemingly lower standard than probable cause); Shirley Huey *et al*, 'Comment, Indefinite Detention with Probable Cause: A Comment on INS Interim Rule 8 C.F.R. s 287.3' (2001) 26 *New York University Review of Law and Social Change* 397 (contending that the INS regulation violates the Fourth Amendment); Developments in the Law, 'Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens' (2002) 115 *Harvard Law Review* 1915, 1936 (raising several due process concerns); Shirin Sinnar, 'Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA PATRIOT Act' (2003) 55 *Stanford Law Review* 1420, 1432 (observing that the PATRIOT Act's 'reasonable suspicion' standard may amount to a lower standard than Fourth Amendment probable cause).

[171] Cp, eg, Keith, above n 157 at 455–64 (arguing that the court would be likely to uphold the detention provisions of the PATRIOT Act given the judicial review and time-limit provisions) and Developments in the Law, 'Plight of the Tempest-Tost', previous n at 1936 (arguing that, contrary to the requirement of *Zadvydas*, the PATRIOT Act does not target a small set of highly dangerous persons, but instead captures a broad range of individuals by adopting an expansive definition of 'terrorist activity').

al.[172] As noted, the court in *Zadvydas* reviewed a statutory provision potentially allowing for the indefinite detention of deportable aliens who cannot be removed, for instance because their home countries are unwilling to accept them. In the court's opinion, indefinite detention of an alien would present serious due process problems. To pass constitutional muster, the court reasoned that indefinite civil detention must occur in 'non-punitive circumstances' where a 'special justification' exists.[173] In the court's opinion, there is no sufficiently strong justification for the indefinite detention of non-citizens once the likelihood of their repatriation becomes remote.[174] While the court acknowledged that protecting the community from harm may be a valid justification, it stressed that preventive detention based on dangerousness would be permitted only when it is imposed on 'specially dangerous individuals' and only if there are 'strong procedural protections' in place.[175] These conditions were not satisfied as the detention powers under review applied to a broad range of aliens and offered only minimal procedural protections.[176] In order to avoid finding a Fifth Amendment violation, the court read the statute as permitting detention only as long as removal remains 'reasonably foreseeable'.[177] However, it also suggested that it might take a more deferential stance in cases involving aliens suspected of terrorism. It observed that the provision under review 'did not apply narrowly to "a small segment of particularly dangerous individuals", say suspected terrorists'.[178] When terrorism or other special circumstances are involved, 'special arguments might be made for forms of preventive detention and for heightened deference to the judgements of the political branches with respect to matters of national security'.[179] In other words, it remains to be determined whether the court carved out a 'terrorism exception' to the general principles set forth in *Zadvydas*.[180]

[172] *Zadvydas v Davis et al*., above n 14.
[173] *Ibid* at 690.
[174] *Ibid* (arguing that the prevention of flight becomes a weak justification for detention when removal becomes a remote possibility). See Developments in the Law, 'Plight of the Tempest-Tost', above n 170 at 1923.
[175] *Zadvydas v Davis et al*, above n 14 at 690–91.
[176] *Ibid* at 691–2.
[177] *Ibid* at 699. The court further established a presumption that detention of a deportable alien is reasonable for six months (*Ibid* at 700). See Developments in the Law, 'Plight of the Tempest-Tost', above n 170 at 1924.
[178] *Zadvydas v Davis et al*., above n 14 at 691.
[179] *Ibid* at 696.
[180] Stephen Dycus, Arthur L Berney, William C Banks and Peter Raven-Hansen, *National Security Law* (New York, Aspen Law & Business, 2002) 732.

iii. Concluding Remarks

In comparing the general principles associated with immigration detention it becomes apparent that there are both remarkable similarities and differences between the two systems. Article 5 s 1 (f) and the Fifth Amendment due process clause permit the detention of non-citizens during their immigration proceedings. Although aliens are accorded fewer liberty protections in comparison to suspects in criminal proceedings, the power to detain non-citizens is not unlimited. Both the Strasbourg Court and the Supreme Court made it clear that lengthy, indefinite deprivations of liberty may amount to a breach of the liberty safeguards in the Convention and the Bill of Rights. However, whereas detention necessarily ceases to be justified under Article 5 s 1 (f) once the immigration proceedings have been concluded, the Supreme Court in *Zadvydas* appears to leave the door open for preventive detention of aliens based on dangerousness. This brings us to the issue of terrorism-related immigration detentions. *Chahal* indicates that the court in Strasbourg is willing to take into account the context of terrorism in its assessment of the diligence with which deportation proceedings must be conducted. However, the indefinite confinement of deportable aliens for counter-terrorist reasons is irreconcilable with Article 5 s 1 (f). The current situation under the Bill of Rights is less straightforward, as *Zadvydas* leaves doubt as to whether and, if so, under what conditions the Constitution permits the indefinite detention of aliens (allegedly) involved in terrorism.

Leaving the legal contours of immigration detention law aside, mention should be made of a remarkable aspect of the American government's immediate response to the September 11 events, namely the use of immigration law as a pretext to detain people who might pose a security threat. Amnesty International reported that in the two months after the attacks more than 1,200 foreigners were taken into custody in the United States, primary on the basis of violations of the immigration laws.[181] Most of them were men of Arab or South Asian origin and were held on minor immigration charges, mostly visa violations.[182] These persons were neither directly linked to terrorism nor were the detentions effectuated for deportation ends. Rather, the purpose of the measures was preventive law enforcement. As David Cole explains:

[181] Amnesty International, 'Amnesty International's Concerns regarding Post September 11 Detentions in the USA' (14 March 2002). In addition to immigration detentions, the law enforcement authorities also used 'material witness' detention provisions in their campaign of preventive detention. See, eg, Laurie L Levenson, 'Detention, Material Witnesses & the War on Terrorism' (2003) 35 *Loyola of Los Angeles Law Review* 1217.

[182] See Amnesty International, previous n at 11 (typical examples of visa violation are working on a tourist visa or failure to fulfil the requirements of a student visa).

> The real reason for their incarceration is not that they worked without authorization or took too few academic credits, for example. Rather, the government has used these excuses to detain them because it thinks they might have valuable information, because it suspects them but lacks sufficient evidence to make a charge, or simply because the FBI is not yet convinced that they are innocent.[183]

The government made no efforts to deny these tactics. Quite the contrary, as Assistant Attorney General Michael Chertoff declared: 'We're clearly not standing on ceremony, and if there is a basis to hold them we're going to hold them.'[184] Likewise, a member of the Senate Judiciary Immigration Sub-committee admitted:

> Clearly, clearly, our immigration laws and policies are instrumental to the war on terrorism. While a battle may be waged on many fronts, for the man or woman on the streets immigration is the front line.[185]

The immigration detentions were surrounded by a high level of secrecy: the government declined to provide information regarding the identity of the detainees,[186] and attempted to close immigration hearings in 'special interest' cases to the press and public.[187] There is little doubt that the purpose of the pre-textual use of the immigration law was to circumvent the more rigorous liberty safeguards associated with the criminal justice system (eg, probable cause, a prompt hearing by a judicial officer, the *Miranda* warnings) and to bypass traditional fair trial guarantees (eg, right to counsel, public trial).[188] Rather than to arrest non-citizens as criminal suspects, the law enforcement authorities have used the greater latitude under the immigration law to conduct counter-terrorist investigations against foreign nationals.[189] Cole concludes:

[183] Cole, 'Enemy Aliens', above n 145 at 962–3.

[184] Quoted in Dycus, Berney, Banks and Raven-Hansen, above n 180 at 729.

[185] Quoted in Levenson, above n 181 at 1220.

[186] See *Center for National Security Studies v Department of Justice*, 215 F Supp 2d 94 (DDC 2002) (enjoining the government to release information regarding de immigration detentions under the Freedom of Information Act).

[187] Memorandum from Michael Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (21 September 2001). For a discussion of the free speech implications of the Creppy memorandum, see ch III, part V.

[188] The use of immigration law to advance criminal or preventive law enforcement in times of crisis is not new in American history. Eg, during the so-called Palmer Raids of 1919–20 several thousands of aliens allegedly involved in subversive communist activities were arrested and over 500 deported following a series of bombings against governments officials. See David Cole, 'The New McCarthyism: Repeating History in the War on Terrorism' (2003) 38 *Harvard Civil Rights-Civil Liberties Law Review* 1, 16–19.

[189] Teresa A Miller, 'Blurring the Boundaries between Immigration and Crime Control after September 11th' (2005) 25 *Boston College Third World Law Journal* 81, 90.

> [B]y employing immigration procedures, the Justice Department was able to avoid those constitutional rights and safeguards that accompany the criminal process but that do not apply in the immigration setting.[190]

C. The Right of Habeas Corpus

i. General Standards

The right of habeas corpus has long been celebrated as an essential safeguard of personal liberty.[191] Under the European Convention, the principle of habeas corpus is guaranteed by Article 5 s 4:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The remedy of Article 5 s 4 is available irrespective of the basis for detention (eg, civil or criminal), albeit the required procedural guarantees and scope of review vary according to the type of deprivation of liberty at issue.[192] The notion 'speedily' indicates a lesser degree of urgency than the term 'promptly' in Article 5 s 3.[193] No exact time-limit emerges from the court's jurisprudence: the question as to whether there was a speedy determination of the lawfulness of the detention will be assessed in the light of the circumstances of each case.[194] As far as the procedural safeguards are concerned, the court has held that 'proceedings conducted under Article 5 s 4 of the Convention should in principle (…) meet, to the largest extent possible (…) the basic requirements of a fair trial'.[195]

[190] David Cole, *Enemy Aliens, Double Standards and Constitutional Freedoms in the War on Terrorism* (New York, The New Press, 2003) 34.

[191] See, eg, Zechariah Chafee, Jr, 'The Most Important Human Right in the Constitution' (1952) 32 *Boston University Law Review* 143, 143 (calling habeas corpus the most important human right in the US Constitution).

[192] The scope of review required by Art 5 s 4 is usually described in the following terms: '[A]rrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty.'

[193] *E v Norway* Series A no 181 (1990) para 64.

[194] *Sanchez-Reisse v Switzerland* Series A no 107 (1986) para 55.

[195] See, eg, *Schöps v Germany* Reports 2001-I (2001) para 44. Several safeguards associated with Art 6 concepts such as the right to 'equality of arms' and 'adversarial proceedings' were read into Art 5 s 4. Thus, for instance, in criminal cases the detainee must be heard in person (eg, *Wloch v Poland* Reports 2000-XI (2000) para 126) and provided access to specific documents in the prosecutor's file (eg, *Lamy v Belgium* Series A no 151 (1989) para 29). Whenever necessary for the effectiveness of the application, Art 5 s 4 requires access to legal assistance. For an overview of the relevant case law, see, eg, Harris, O'Boyle and Warbrick, above n 24 at 149.

In contrast, the US Constitution does not explicitly protect the right of habeas corpus, but contemplates the circumstances in which it can be limited. Article I, s 9, clause 2 of the Constitution states that

> [t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

In an early decision, the Supreme Court held that further congressional authorisation is required to grant the federal courts jurisdiction to issue the writ of habeas corpus.[196] Currently, the general federal habeas corpus statute, ie Title 28, Section 2241 of the United States Codes, provides that

> [w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.[197]

While the precise scope of the constitutional right to habeas corpus is not entirely clear, the Supreme Court observed that '[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention'.[198] In the court's opinion, 'at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789".[199] A discussion of the procedural and substantive rules of statutory habeas corpus law is beyond the ambit of this thesis. The conditions under which the writ of habeas corpus can be suspended in times of emergency will be dealt with in section IV of this chapter.

ii. Exceptional Standards in the Fight against Terrorism

In *Chahal v United Kingdom*, the European Court considered the procedural safeguards of Article 5 s 4 against the background of the fight against terrorism.[200] As noted in the preceding section, the *Chahal* case involved the lengthy detention of an alleged terrorist during his deportation proceedings. The court decided that neither the domestic habeas corpus provisions, nor the intervention of an advisory panel chaired by a senior judge, satisfied the requirements of Article 5 s 4. As to the former, the court observed that the domestic courts were not able to examine whether the applicant's detention was justified on national security grounds.[201] The advisory panel, on the other hand, could not, in the court's opinion, be considered as a 'court' within the meaning of Article 5 s 4, because the

[196] *Ex p Bollman*, 8 US (4 Cranch) 75, 93 (1807).
[197] 28 USC s 2241.
[198] *Immigration and Naturalization Service v ST. Cyr*, 533 US 289, 301 (2001).
[199] *Ibid* (deciding that federal courts have jurisdiction to consider 'pure questions of law' in a habeas corpus petition of an alien challenging the lawfulness of his detention).
[200] *Chahal v UK*, above n 140 at para 130.
[201] *Ibid* at para 130.

applicant was not entitled to legal representation before the panel, was only given an outline of the grounds for the notice of intention to deport, the panel had no power of decision, and its advice to the Home Secretary was not binding and was not disclosed'.[202] An additional defect of the proceedings before the advisory panel was the non-disclosure of confidential information. In this connection, significance was attached to the fact that in other countries procedures were in place, which more adequately reconciled the government's legitimate security concerns and the liberty rights of the individual.[203] The court again emphasised that the national authorities cannot do away with effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved.[204]

The principles developed in *Chahal* have been confirmed in subsequent cases. For instance, in *Al-Nashif v Bulgaria* the court was asked to review the Bulgarian practice of categorically denying any judicial appeal against immigration detentions in cases involving deportation orders issued on national security grounds.[205] Under the relevant law, the decision to invoke national security grounds was fully within the discretion of the government. Observing that no court was allowed to enquire into the lawfulness of the detention order, and the applicant was detained practically incommunicado and was not allowed contact with a lawyer, the court found a violation of Article 5 s 4.[206] Referring to *Chahal*, the court reiterated that terrorist circumstances do not relieve the Contracting States from providing effective judicial control of the lawfulness of detention, and that there are 'means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measures of procedural justice'.[207]

Incommunicado detention was also at issue in *Öcalan v Turkey*.[208] In this case, the court considered the arrest and police custody of the founder and leader of the PKK. One of the many complaints concerned a violation of Article 5 s 4.[209] During the first ten days of his detention, Mr Öcalan was held incommunicado on the island of Imrali, a prohibited military

[202] *Ibid*.
[203] *Ibid* at para 131 (referring to the Canadian Immigration Act 1976, which sought to reconcile the rights of the applicant and the interest in preserving the confidentiality of security information by the appointment of a security-cleared counsel). See also ch 7, section III.
[204] *Ibid* at para 131.
[205] *Al-Nashif v Bulgaria*, 20 June 2002, paras 90–98.
[206] *Ibid* at para 94.
[207] *Ibid* at paras 94 and 97.
[208] *Öcalan v Turkey*, 12 March 2003 (First Section); *Öcalan v Turkey*, 12 May 2005 (Grand Chamber).
[209] See also ch 7.

zone.[210] According to the court, the applicant's detention regime deprived him from his right under Article 5 s 4 to challenge the lawfulness of his detention:

> [T]he conditions in which the applicant was held and notably the fact that he was kept in total isolation prevented his using the remedy personally. He possessed no legal training and had no possibility of consulting a lawyer while in police custody. Yet (…) the proceedings referred to in Article 5 § 4 must be judicial in nature. The applicant could not reasonably be expected under such conditions to be able to challenge the lawfulness and length of his detention without the assistance of his lawyer.[211]

Similar habeas corpus concerns were raised in connection with the alleged use of secret detention centres operated by the American intelligence services in several Member States of the Council of Europe.[212] In an opinion on the international legal obligations of Contracting Parties to the European Convention in respect of such detention facilities, the Venice Commission observed that incommunicado detention in secret places would, among other things, raise serious concerns under Article 5 s 4.[213] The Commission held that incommunicado detention, which it defined as

> detention without the possibility of contacting one's lawyer and of applying to a court,

is clearly irreconcilable with the Convention, inter alia because it deprives the individual of his entitlement to habeas corpus proceedings. According to the Commission,

> [i]f and so far as incommunicado detention takes place, is made possible or is continued on the territory of a member State of the Council of Europe, in view of its secret character that detention is by definition in violation of the European Convention on Human Rights and the applicable domestic law of that State.[214]

Finally, the context of terrorism may be one of the issues the European Court takes into account when assessing whether there has been a speedy

[210] See *Öcalan v Turkey* (Grand Chamber), above n 208 at paras 20–24.

[211] *Ibid* at para 70 (quoting the First Section judgment).

[212] See the report of Parliamentary Assembly Rapporteur Dick Marty, 'Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States', 7 June 2006 (revealing what was called a global 'spider's web' of CIA detentions and transfers and alleged collusion in this system by 14 Council of Europe Member States).

[213] European Commission for Democracy through Law, 'Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners', 17–18 March 2006, Opinion no 363/2005, 121–36.

[214] *Ibid* para 125. The Venice Commission further noted that even if the detention is carried out by foreign authorities without the knowledge of the territorial state, the latter must take 'effective measures to safeguard against the risk of disappearance and must conduct a prompt and effective investigation into a substantial claim that a person has been taken into unacknowledged custody' (*Ibid* para 127).

determination, as required by Article 5 s 4. But here again the flexibility of the term 'speedily' is not unlimited. An example of a terrorism-related case pertaining to the speedily requirement is *Sakik v Turkey*.[215] Despite the difficulties linked to the investigation of terrorist offences, periods of twelve to fourteen days before judicial intervention were found to be irreconcilable with the notion of 'speedily'.[216] In several subsequent terrorism-related cases the court limited its inquiry under Article 5 s 4 by referring to the conclusions reached with regard to the promptness standard of Article 5 s 3.[217]

IV. DEPRIVATION OF LIBERTY IN WAR AND EMERGENCY SITUATIONS

Section III focused on terrorism-related liberty deprivations from a traditional law enforcement perspective. This section turns to government measures that may be employed in situations where the ordinary criminal and immigration process have proven inadequate to respond effectively to the threat posed by terrorism, thus requiring exceptional measures impinging on otherwise protected liberty rights. The paramount question then becomes whether extraordinary liberty restrictions can be justified by reliance on what is commonly labelled 'war and emergency' powers. The following sub-sections examine three different instances of extraordinary limitations of personal liberty protections relevant to the state's effort to combat terrorism: preventive detention, prolonged police custody, and suspension of the writ of habeas corpus. Whereas the first category is examined in relation to both declarations of rights, the second and third categories are distinctive for the European Convention and the US Constitution respectively.

A. Preventive Detention

i. Standards of the European Convention

The notion of preventive detention is used here to signify the incarceration of individuals suspected of no specific crime but (allegedly) involved in

[215] *Sakik and others v Turkey*, above n 110.
[216] *Ibid* at para 51.
[217] See, eg, *Igdeli v Turkey*, above n 110 at para 34 (holding that a period of seven days sits ill with the notion of 'speedily' under Art 5 s 4); *Fatma Tunç v Turkey*, 20 October 2005, para 26 (holding that a period of six days sits ill with the notion of 'speedily' under Art 5 s 4).

dangerous conduct. None of the six situations in which a state may detain a person pursuant to Article 5 s 1 envisages this type of detention. Article 5 s 1 (c) permits

> the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

In spite of what this language seems to indicate, the court has made it clear that detention within the meaning of Article 5 s 1 (c) is only permitted with the purpose of initiating criminal proceedings.[218] The second limb—allowing detention when considered reasonably necessary to prevent the commission of a crime—should be read in light of the purpose of Article 5 s 1 (c), which is to bring the criminal suspect before a court. Consequently, preventive detention where there is no actual suspicion that the detainee is concerned in a specific criminal offence is not permitted.[219] In view of this restrictive interpretation, the second and third limbs of Article 5 s 1 (c) are generally considered to be redundant.[220] As the court put it, the incarceration of 'dangerous' individuals, suspected of merely 'harbouring an intent to commit and offence', is 'repugnant to the fundamental principles of the Convention'.[221]

a. Article 15 Jurisprudence

To avoid violating the Convention, Contracting States contemplating preventive detention as part of their counter-terrorist campaign, have no other alternative but to exercise their right to derogate from their obligations under Article 5. As noted in part two, the right to personal liberty is not amongst the non-derogable rights of Article 15 s 2. The substantive and procedural conditions for a valid Article 15 derogation are discussed at length in chapter two.[222] It is sufficient to recall, at this point, that for a derogation to be permissible there must be a 'war or public emergency threatening the life of the nation', and the measures taken in response to it must be 'strictly required by the exigencies of the situation'. In the two early cases discussed below, the European Court was given the opportunity

[218] *Ciulla v Italy* Series A no 148 (1989) para 38.

[219] See, eg, *Jecius v Lithuania* Reports 2000-IX (2000) para 51 (holding that preventive detention of a person, even where there is 'sufficient reason' to believe that he may commit 'a dangerous act' is prohibited under Art 5).

[220] See, eg, Clayton and Tomlinson, above n 80 at 490; Harris, O'Boyle and Warbrick, above n 24 at 118; Trechsel, above n 24 at 304.

[221] *Lawless v Ireland (No 3)*, above n 27 at para 14. See generally Brian Doolan, *Lawless v. Ireland (1957–1961): The First Case Before the European Convention of Human Rights: An International Miscarriage of Justice?* (Aldershot, Ashgate, 2001).

[222] Ch 2, section 3 above.

to review measures of preventive detention taken in response to acts of violence committed by the terrorist organisation IRA.

Lawless v Ireland

In *Lawless v Ireland*, the first ever case before the Euopean Court, the applicant challenged his five-month preventive detention in a military internment camp without judicial supervision or criminal trial.[223] Mr Lawless, a suspected member of the IRA, was detained in accordance with an executive order adopted under the Offences against the State Act 1939. The latter conferred upon the government the power to detain individuals engaged in activities 'prejudicial to the preservation of public peace and order or the security of the State'.[224] Appeals against detention could only be heard by an extrajudicial committee set up by the government and composed of two judges and an officer of the Defence Forces (the 'Detention Commission').[225] In the second month of his detention, Mr Lawless was informed that he would be released upon agreeing to give an undertaking that he would not engage in terrorist activities. He refused to do so until he personally appeared before the Detention Commission three months later. In the meantime a habeas corpus application was dismissed.

After having established that the applicant's preventive detention departed from the requirements of Article 5, the court turned its attention to the validity of the derogation sought by the Irish government. The first issue addressed was the existence of a 'public emergency threatening the life of the nation', which it defined as 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'.[226] In a unanimous judgment, the court determined that a public emergency had existed in Ireland at the relevant time. A combination of several factors supported this conclusion: the existence and violent activities of a 'secret army' within the territory of the country; the operations of the IRA outside of Ireland potentially jeopardising relations with other countries; and the 'steady and alarming' increase in the intensity and scale of the terrorist violence.[227] From these factors, the court concluded that the Irish government could have 'reasonably' deduced the existence of a public emergency.[228] Next, the court examined whether the measures taken in derogation from Article 5 were 'strictly required by the exigencies of the situation'. In reaching its conclusion that the impugned measures were

[223] *Lawless v Ireland (No 3)*, above n 27.
[224] *Ibid* at para 12.
[225] *Ibid* at para 13.
[226] *Ibid* at para 28. See ch 2, section III above.
[227] *Ibid* at paras 31–2.
[228] *Ibid* at para 28.

proportionate, the court first observed that 'the application of ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland'.[229] Particular emphasis was placed on the difficulties of gathering the necessary evidence to convict persons involved in the IRA, due to the secret character of the organisation and the fear it created among the population.[230] In addition, the court believed that there were adequate safeguards designed to prevent abuses in the operation of the system of preventive detention, namely regular parliamentary review and the right to refer a case to the Detention Commission, whose opinion, if favourable to the release of the applicant, was binding upon the government.[231] These elements together with the government's 'promise' to release any detainee who gave an 'undertaking' not to engage in unlawful activity, led the court to the conclusion that the measures had not exceeded what was strictly required by the emergency situation.[232]

Ireland v United Kingdom

The terrorist campaign of the IRA and the crisis in Northern Ireland also lies at the root of *Ireland v United Kingdom*.[233] This case involved an Irish complaint against a number of extrajudicial powers of arrest, detention and internment exercised by the British authorities in the territory of Northern Ireland. The European Court reviewed several different orders and regulations. Some of them provided for unlimited internment by executive order which, in some cases, lasted for several years. According to the British government the preventive detention policy was aimed at persons suspected of committing terrorist acts but against whom sufficient evidence could not be produced in court. In one sweeping raid ('Operation

[229] *Ibid* at para 36 (noting that other measures, such as the use of special criminal or military courts, or the sealing of the border between the Republic of Ireland and Northern Ireland to control the IRA, were either insufficient or disproportionate).

[230] *Ibid*.

[231] *Ibid* at para 37.

[232] The court's approach in *Lawless* has been subjected to criticism. Most arguments are directed at the court's substantial deference to the domestic authorities' assessment of the existence of a state of emergency. See, eg, Fionnuala Ní Aoláin, 'The Emergency of Diversity: Differences in Human Rights Jurisprudence' (1995) 19 *Fordham International Law Journal* 101, 113; Rusen Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles* (Brussels, Bruylant, 1987) 151–7; Oren Gross, '"Once More unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law* 437, 462–4; Joan F Hartman, 'Derogation from Human Rights Treaties in Public Emergencies—A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' (1981) 22 *Harvard International Law Journal* 1, 24; Jan Peter Loof, *Mensenrechten en staatsveiligheid: verenigbare grondrechten?* [Human Rights and Security of the State: Reconcilable Fundamental Rights?] (Nijmegen, Wolf Legal Publishers, 2005) 395 and 422; Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (Leiden/Boston, Martinus Nijhoff, 1998) 293–4.

[233] *Ireland v UK* Series A no 25 (1978).

Demetrius') against the IRA some 350 persons were arrested for interrogation.[234] It was not contested that some of them were detained on the basis of inadequate or inaccurate information.

The court ruled that some of the techniques of interrogation used by the police constituted inhuman and degrading treatment, in violation of Article 3 of the Convention.[235] It also had little difficulty in finding a breach of paragraphs 1 to 4 of Article 5. In this respect, the court recalled that the Convention does not allow preventive detention for 'the preservation of the peace' or for interrogation.[236] Moreover, several of the regulations at issue did not guarantee 'prompt' judicial intervention or habeas corpus proceedings. The remaining issue to be determined was therefore whether the respondent government had made a valid derogation from its duties under Article 5. The existence of a public emergency in Northern Ireland was not contested by the parties and was 'perfectly clear' to the European Court.[237] It therefore immediately moved on to consider whether the derogating measures were strictly necessary. The court began its review by emphasising the wide margin of appreciation the domestic authorities enjoy in the context of Article 15:

> It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 leaves those authorities a wide margin of appreciation.[238]

This statement is the first reference to the margin of appreciation doctrine in an Article 15 case, and although it echoes the formulation adopted in the context of the common limitation clauses of Articles 8 to 11, the court held that the 'limits of the court's powers of review (…) are particularly apparent where Article 15 is concerned'.[239]

At the outset of its proportionality review, the court observed that detention of persons merely for the purpose of obtaining information can

[234] *Ibid* at para 39 *ff*.
[235] *Ibid* at para 168.
[236] *Ibid* at paras 192–201.
[237] *Ibid* at para 205. See Oren Gross and Fionnuala Ní Aoláin, 'To Know Where We Are Going, We Need to Know Where We Are: Revisiting States of Emergency' in Angela Hegarty and Siobhan Leonard (eds), *Human Rights: 21st Century* (London, Cavendish Publishing, 1999) 79, 99 (arguing that an agreement between the parties cannot exempt the Convention organs from independently reviewing whether an emergency existed at the relevant time).
[238] *Ireland v UK*, above n 233 at para 207.
[239] *Ibid*.

be justifiable only in 'very exceptional circumstances'.[240] The situation in Northern Ireland fell in this category. In view of the wide-spread practice of intimidation of witnesses, the authorities were entitled to confine those witnesses to question them 'in conditions of relative security'.[241] An important factor in the court's assessment was that deprivation of liberty for interrogation was authorised only for a maximum of 48 hours. In reply to the Irish government's contention that measures of preventive detention had proved to be ineffective, the court found that it was not its function 'to substitute for the British government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism.'[242] This reluctance to scrutinise measures retroactively for their efficacy demonstrates the court's deferential stance in this case.[243] Finally, the Strasbourg Court considered the absence of a judicial remedy against the detentions in question. In this respect, regard was had to the protection offered by an advisory committee and the creation of commissioners and appeal tribunals in subsequent revisions of the original regulations. Finding a place in Article 15 for 'progressive adaptation', the court concluded that although the incorporation of judicial safeguards from the start would have been 'desirable', Article 15 had not been violated.[244]

b. The United Kingdom's 2001 Derogation

The latest British efforts to circumvent the prohibition of preventive detention in Article 5 came in response to the September 11 attacks. In December 2001, the United Kingdom informed the Secretary General of its derogation from Article 5 s 1 (f) in respect of certain provisions of the Anti-Terrorism, Crime and Security Act 2001. As noted above, the statute provides for the potentially indefinite detention of non-deportable foreign nationals designated by the Secretary of State as suspected international terrorists. The court in Strasbourg has not been given the opportunity to

[240] *Ibid* at para 212.

[241] *Ibid*.

[242] *Ibid* at para 214 (adding that 'the Court must arrive at its decision in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken.')

[243] *Ibid* at para 214. See also Hartman, above n 232 at 34 (calling this consideration 'the most extreme statement of the margin of appreciation in Article 15 jurisprudence'); Loof, above n 232 at 559 (relating this statement to the margin of appreciation).

[244] *Ireland v UK*, above n 233 at para 220. For criticism of this case, see, eg, Gross and Ní Aoláin, 'To Know Where We Are Going', above n 237 at 99–100 (arguing that the continuous emergency regime in Northern Ireland runs contrary to the idea that a state of public emergency ought to be an exceptional phenomenon); Hartman, above n 232 at 32–5 (arguing that the discriminatory application of emergency detention measures—no detention orders were issued against Protestants—undercuts proof of necessity); Brendan Mangan, 'Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform' (1988) 10 *Human Rights Quarterly* 372, 376 and 386–8 (arguing that the internment procedures were disproportionate in severity, duration and scope).

review the derogation, but it has been the subject of an opinion by the Commissioner for Human Rights of the Council of Europe (hereinafter the 'Commissioner')[245] and a judgment by the United Kingdom House of Lords.[246] Both decisions merit attention here as they offer some insight into the current approach to Article 15 derogations.[247]

The first issue raised by the derogation is whether 'an emergency threatening the life of the nation' actually existed within the territory of the United Kingdom. Did the September 11 attacks cause a sufficient threat of terrorism for the purpose of an Article 15 derogation? In tackling this issue, both organs placed considerable emphasis on the domestic margin of appreciation. The House of Lords took the position that the assessment of whether an emergency exists is a

> pre-eminently political judgement, [as it involves making] a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did it.[248]

Consequently, great deference was owed to the political authorities.[249] The Commissioner, on his behalf, began by underlining the positive duty of governments to protect their citizens against terrorism. Declining to express a 'firm opinion' on the existence of a state of emergency, the Commissioner nevertheless observed that

[245] Opinion 1/2002 of the Commissioner for Human Rights, Mr Alvaro GIL-ROBLES, on Certain Aspects of the United Kingdom 2001 Derogation from Article 5 par. 1 of the European Convention on Human Rights, HRComm (2002) 7.

[246] *A (FC) and others v Secretary of States for the Home Department*; *X (FC) and others v Secretary of States for the Home Department*, [2004] UKHL 56. The House of Lords upheld the appeals against the derogating measures by a majority of eight to one. The lead opinion was delivered by Lord Bingham, the dissenting opinion by Lord Walker. For a comment, see Sangeeta Shah, 'The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish' (2005) 5 *Human Rights Law Review* 403.

[247] In addition, the United Kingdom's 2001 derogation has been the subject of much scholarly discussion. See, eg, Olivier de Schutter, 'La Convention européenne des droits de l'homme à l'épreuve de la lutte contre le terrorisme' in E Bribosia and A Weyembergh (eds), *Lutte contre le terrorisme et droits fondamentaux* (Brussels, Bruylant, 2002) 125, 129 (pointing out that there are no precedents in the Strasbourg case law allowing a Contracting State to invoke the existence of an emergency in a foreign nation to justify a derogation under the Convention); Virginia Helen Henning, 'Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation From the European Convention on Human Rights?' (2002) 17 *American University Law Review* 1263, 1267 (claiming that the United Kingdom was justified in concluding that a public emergency existed and that the measures taken satisfied the proportionality test); Keith, above n 157 at 466–75 (suggesting that the European Court would be unlikely to uphold the derogation); Walker, above n 47 at 236 (criticising the discriminatory nature of detention powers based on immigration and nationality).

[248] *A (FC) and others v Secretary of States for the Home Department*; *X (FC) and others v Secretary of States for the Home Department*, above n 246 at para 29.

[249] *Ibid*.

> general appeals to an increased risk of terrorist activity post September 11th 2001 cannot, on their own, be sufficient to justify derogation from the Convention.[250]

The Commissioner further stressed that other European states confronted with recurring terrorist activity, have not found it necessary to derogate from the Convention.[251]

With respect to the second point, ie whether the measures are sufficiently narrowly tailored to respond to the emergency, both organs took a more activist stance, highlighting that the indefinite incarceration of foreign nationals is a far-reaching interference with the right to liberty.[252] While the Commissioner acknowledged that in previous cases the Strasbourg organs declined to examine the 'relative effectiveness of competing measures', the suggestion was made that the 'demonstrable availability of more or equally effective non-derogating alternatives' may cast doubt on the necessity of the derogating measure.[253] In this respect, the Commissioner opined that it was not at all clear that indefinite preventive detention of suspected international terrorists would be more effective than, say, the monitoring of their activities in accordance with standard surveillance procedures.[254] The Commissioner also pointed to a number of anomalies in the preventive detention scheme, most notably the fact that suspected terrorists remained free to depart to a safe country should one become available.[255] In the Commissioner's view, such a possibility was difficult to reconcile with the belief that detention is strictly required by the exigencies of the situations. A similar concern was raised in the House of Lords.[256] In addition, the House of Lords inferred from the fact that the derogation was aimed solely at non-citizens, a category which could not be said to pose a qualitatively different threat than citizens, that there were other ways of addressing the terrorist threat.[257] Interestingly, the House of Lords rejected the claim that the judiciary must accord the political branches of government a large margin of appreciation on the question of proportionality. It argued that the margin of appreciation recognised by the Convention

[250] Opinion 1/2002 of the Commissioner for Human Rights, above n 245 at para 32.

[251] *Ibid*.

[252] *A (FC) and others v Secretary of States for the Home Department*; *X (FC) and others v Secretary of States for the Home Department*, above n 246 at para 36; Opinion 1/2002 of the Commissioner for Human Rights, above n 245 at para 39.

[253] Opinion 1/2002 of the Commissioner for Human Rights, above n 245 at para 35.

[254] *Ibid*.

[255] *Ibid* at para 37.

[256] See, eg, *A (FC) and others v Secretary of States for the Home Department*; *X (FC) and others v Secretary of States for the Home Department*, above n 246 at para 33: '[A]llowing a suspected international terrorist to leave our shores and depart to another country, perhaps a country as close as France, there to pursue his criminal designs, is hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of this country.'

[257] *Ibid*.

organs at the European level, precisely assumes that the derogating measures will, at the national level, receive closer scrutiny.[258]

ii. Standards of the US Constitution

a. Historical Examples of Preventive Detention

Despite the absence of an express authorisation for the derogation from the liberty guarantees enshrined in the Bill of Rights, the US government has resorted to preventive detention on several occasions. Before considering the powers of preventive detention invoked in the country's current efforts to fight terrorism, it is instructive to briefly sketch the Supreme Court's approach to this matter in previous emergency situations.[259] Some of these measures have been authorised by an act of Congress. One example of such a statute, still in force today, is the Enemy Alien Act of 1798.[260] It empowers the President, '[w]henever there is a declared war between the United States and any foreign nation or government', to detain and remove as 'alien enemies', all natives or citizens of the hostile nation.[261] When World War II President Roosevelt used these powers to neutralise thousands of German, Italian and Japanese aliens, the Supreme Court upheld the Act against due process challenges.[262] The Justices were not prepared to declare a law almost as old as the Constitution itself to be unconstitutional. In the court's view, the interpretation and application of the Enemy Alien Act was primarily a matter of political judgment, 'for which judges have neither technical competence nor official responsibility'.[263] Declining to interfere with the presidential war powers, it stated:

[258] *Ibid* at para 131 (Lord Hope). See also para 40 (quoting Opinion 1/2002 of the Commissioner for Human Rights, above n 245 at para 9: 'It is furthermore, precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations.')

[259] There is an enormous amount of scholarly literature on the suspension of constitutional rights in emergency situations in the United States. See, eg, Developments in the Law, 'The National Security Interest and Civil Liberties' (1972) 85 *Harvard Law Review* 1130, 1284–1326; William H Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York, Vintage Books, 1998); Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, NJ, Princeton University Press, 1948) 207–315.

[260] 50 USC ss 21–4.

[261] *Ibid* at s 21.

[262] *Ludecke v Watkins*, 335 US 160 (1948).

[263] *Ibid* at 170.

> Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined.[264]

In a series of World War II decisions, the Supreme Court reviewed the mass incarceration of 120,000 citizens and non-citizens of Japanese ancestry without charges, trial or due process guarantees.[265] Following the attacks on Pearl Harbor, several executive orders, later confirmed by Congress, authorised the Secretary of War to organise the removal of ethnic Japanese from designated military zones on the West Coast. The persons involved were required to report to relocation centres, and in a later stage were imprisoned in internment camps. According to the military authorities, these measures were necessary to counter possible acts of espionage and sabotage by 'disloyal' individuals. While the exclusion and detention programme were later condemned as an overreaction based on racial prejudice and wartime hysteria, most of the measures were upheld by the Supreme Court at the time.[266]

The first important case to reach the court, *Hirabayashi v United States*, involved the violation of a curfew order.[267] In upholding the order, the court stated that it was within the power of the government to impose emergency restrictions on constitutional liberty guarantees, and that the political branches of government were to be accorded a wide margin of discretion, both as regards the assessment of the nature of the threat and the measures necessary to cope with it:

> Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war making, it is not for any court to sit in review of the wisdom of their action or substitute it judgment for theirs.[268]

[264] *Ibid* at 172. This approach was rejected by dissenting Justices Douglas, Murphy and Rutledge: 'Due process does not perish when war comes. It is well established that the war power does not remove constitutional limitations safeguarding essential liberties.' (*Ibid* at 187).

[265] See generally, Peter Irons, *Justice Delayed: The Record of the Japanese American Internment Cases* (Middleton, Conn., Wesleyan University Press, 1989).

[266] See, eg, Nanete Dembitz, 'Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions' (1945) 45 *Columbia Law Review* 175; Eugene Rostow, 'The Japanese American Cases—A Disaster' (1945) 54 *Yale Law Journal* 489.

[267] *Hirabayashi v United States*, 320 US 81 (1943).

[268] *Ibid* at 93.

The court also found that the curfew order did not constitute discrimination of citizens of Japanese ancestry. In the court's view, the proper inquiry was whether 'in the light of all the facts and circumstances there was any substantial basis' to conclude that the measure was 'necessary to meet the threat of sabotage and espionage'.[269] Applying this standard to the facts of the case, the court found that the specific status of citizens of Japanese decent residing on the Pacific Coast, justified a differentiating treatment: 'The fact alone that the attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan.'[270]

The court relied upon much the same reasoning to uphold the relocation requirement in *Korematsu v United States*.[271] Justice Black, writing for the majority, argued that exclusion of a single racial group, though constitutionally suspect, was justified by the government's assertion of wartime necessity.[272] In 'circumstances of direct emergency and peril', race-based restrictions may need to be imposed: 'Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.'[273] Justice Black was not prepared to question emergency measures deemed necessary by the military authorities: 'We cannot—by availing ourselves of the calm perspective of hindsight—now say that at the time these actions were unjustified.'[274] Justice Murphy wrote a powerful dissent, in which he expressed his discord with the court's highly deferential approach, castigating it as a 'legalization of racism'.[275] In his view, there were limits to military discretion, especially where martial law has not been declared. Any military claim, Murphy wrote, 'must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled'.[276]

Finally, in *Ex parte Endo*, decided the same day as *Korematsu*, the court confronted the actual detention in a 'War Relocation Center' of an American citizen of Japanese ancestry whose loyalty to the United States was not contested.[277] The court ruled that, regardless of whether the

[269] *Ibid* at 95.
[270] *Ibid* at 101.
[271] *Korematsu v United States*, 323 US 214 (1944).
[272] *Ibid* at 216. ('[C]ourts must subject (…) [race-based restrictions] to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.').
[273] *Ibid* at 219.
[274] *Ibid* at 224.
[275] *Ibid* at 242.
[276] *Ibid* at 234. According to Justice Murphy, the proper judicial standard to assess the deprivation of constitutional rights in emergency situations, 'is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.' (*ibid*.)
[277] *Ex p Endo*, 323 US 283 (1944).

government had the right to exclude citizens of Japanese ancestry from the West Coast, it could not continue to detain a citizen whom the government itself conceded was loyal to the United States. However, the court avoided considering the constitutionality of preventive detention as such, finding that neither the presidential orders nor the Act of Congress permitting the relocation programme mentioned the possibility of detention after the evacuation.[278] The court favoured a restrictive interpretation of legislation impinging on otherwise protected rights:

> We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.[279]

b. Preventive Detention of 'Enemy Combatants' after September 11

Perhaps the most contested counter-terrorist policy the Bush administration adopted after the September 11 attacks is the preventive detention of persons classified as 'enemy combatants'. It is the government's position that enemy combatants can be held indefinitely until the end of the country's 'war on terrorism' without charge or trial. The government has used the enemy combatant status to hold a group of foreign-nationals at the Guantánamo Bay Naval Base in Cuba, as well as a small number of foreign-nationals and American citizens in naval brigs in the United States. Moreover, as previously noticed, various reports indicate that the CIA is holding several 'ghost detainees' in prolonged incommunicado detention in undisclosed locations around the world.[280]

Most of the persons held at Guantánamo Bay were captured during the international armed conflict in Afghanistan and Pakistan. However, the Guantánamo Bay detainees also include individuals allegedly linked to al Qaeda or other terrorists organisations and taken into custody in countries far a way from the battlefield. The principle legal basis for the detentions is

[278] *Ibid* at 301–2.
[279] *Ibid* at 300.
[280] See, eg, Human Rights Watch, The United States' "Disappeared": The CIA's Long-Term "Ghost Detainees"' (October, 2004), available at <http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf> accessed 8 October 2007 (documenting the prolonged incommunicado detention of high-profile terrorism suspects outside the United States); Dick Marty, Council of Europe Special Rapporteur, 'Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States', 7 June 2006 (revealing what was called a global 'spider's web' of CIA detentions and transfers and alleged collusion in this system by 14 Council of Europe Member States).

the President's Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism of 13 November 2001.[281] Under the Order, the Secretary of Defence is authorised to detain any non-citizen whom the President 'has reason to believe' (i) is or was a member of al Qaida, (ii) has engaged in acts of international terrorism or (iii) has knowingly harboured one or more of such individuals.[282]

The preventive detention of enemy combatants has been widely criticised for disrespecting both fundamental rights and humanitarian law standards.[283] An analysis of the humanitarian law aspects is beyond the scope of the present work. Suffice it to mention that the major point of discussion is whether the detainees qualify for prisoner-of-war status and should be treated accordingly.[284] Besides their position under humanitarian law, the question arises as to the constitutionality of the liberty deprivations—the preventive detention of enemy combatants clearly amounting to a radical departure from the constitutional liberty guarantees associated with the ordinary criminal law process.

In 2004, the Supreme Court handed down two much-awaited judgments, entertaining claims by both citizens and non-citizens held as enemy combatants.[285] The first case is examined below; a discussion of the second case can be found in sub-section C, which is concerned with the suspension of the writ of habeas corpus.

In *Hamdi v Rumsfeld* the court was faced with the preventive detention as enemy combatant of an American citizen, captured in Afghanistan in

[281] Military Order of November 13, 2001, 66 Fed. Reg. 57,831 (2001).

[282] *Ibid* s 3.

[283] See, eg, Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention; the Special Rapporteur on the Independence of Judges and Lawyers; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Special Rapporteur on Freedom of Religion or Belief; and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health on the Situation of Detainees at Guantánamo Bay, 15 February 2006, E/CN.4/2006/120 (arguing that the indeterminate detention of enemy combatants constitutes arbitrary deprivation of the right to liberty); Amnesty International, United States of America: Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay (14 April 2002), available at <http://web.amnesty.org /library/Index/ENGAMR510532002> accessed 15 October 2007 (arguing that the indefinite detention of enemy combatants at Guantánamo Bay may amount to cruel, inhuman and degrading treatment).

[284] Art 5 of the Third Geneva Convention requires that any dispute about the status of the prisoners must be determined by a 'competent tribunal.' On 12 March 2002, the Inter-American Commission on Human Rights called on the Unites States Government 'to take the urgent measures necessary to have the legal statutes of the detainees at Guantánamo Bay determined by a competent tribunal'. See Dinah Shelton, 'The Legal Status of the Detainees at Guantánamo Bay: Innovative Elements in the Decision of the Inter-American Commission on Human Rights of 12 March 2002' (2002) 23 *Human Rights Law Journal* 13–14.

[285] A third enemy combatant case was dismissed on technical procedural grounds and is not further examined here. See *Rumsfeld v Padilla*, 542 US 426 (2004).

2001 by the Afghan Northern Alliance as they fought the Taliban.[286] By the time his case reached the Supreme Court, Mr Hamdi had been transferred from Guantánamo Bay to a naval brig in South Carolina. Mr Hamdi's father filed a habeas corpus petition on his son's behalf, alleging, inter alia, that his son's preventive detention violated the Fifth and Fourteenth Amendments. In a plurality opinion by Justice O'Connor, the court upheld the government's authority to detain enemy combatants in certain circumstances, but, at the same time, imposed on the government the duty to provide those held as enemy combatants with a number of due process guarantees.

The court first focused on the question whether the government can claim the authority to detain citizens who qualify as enemy combatants. It observed that the 'capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incidents of war'.[287] In the court's opinion, the purpose of such detention 'is to prevent captured individuals from returning to the field of battle and taking up arms once again'.[288] In light of these principles, Congress could be said to have authorised the incarceration of enemy combatants when it passed the Authorisation for Use of Military Force (AUMF), which granted the President the power to use 'all necessary and appropriate force' against 'nations, organizations, or persons' associated with the September 11 events.[289] However, the court limited the potential impact of its holding by defining the term 'enemy combatant' narrowly to include only those persons who were 'part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there'.[290] Furthermore, the court indicated that its decision does not countenance perpetual preventive detentions in a broadly defined 'war on terror'.[291] In reply to Hamdi's objection to the prospect of indefinite detention in a conflict with no formal cease-fire agreement, the court held that detention is authorised so long as active combat operations against Taliban fighters are ongoing in Afghanistan, and that 'indefinite detention for the purpose of interrogation is not authorized'.[292]

Having upheld the authority of the government to detain citizens under these specific circumstances, the court went on to consider what process is constitutionally due to a citizen who contests his enemy combatant status. To resolve this issue, the court applied the due process balancing test

[286] *Hamdi v Rumsfeld*, 542 US 507 (2004).
[287] *Ibid* at 518.
[288] *Ibid*.
[289] *Ibid*.
[290] *Ibid* at 516.
[291] *Ibid* at 520.
[292] *Ibid* at 521.

announced in *Mathew v Eldridge*.[293] On one side of the scale, the court noted, lies 'the most elemental of liberty interests—the interest of being free from physical detention by one's own government'; on the other side of the scale was the 'weighty and sensitive' government interest in waging war effectively.[294] In striking a 'proper constitutional balance' between both interests, and having considered the risk that a detainee might be erroneously deprived of his liberty, as well as the costs and benefits of additional procedural safeguards, the court concluded that

> a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.[295]

However, in view of the 'exigencies of the circumstances', enemy combatant proceedings should be tailored so as not to unduly burden the government at a time of ongoing military conflict.[296] In thus requiring a limited though basic system of independent review, the court rejected the government's claim that it is inappropriate for courts to interfere with the government's war-time measures:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[297]

The fact that the *Hamdi* Court laid out a balancing test for evaluating preventive detention in war or emergency situations can be seen as a

[293] In *Mathews v Eldridge*, above n 32 at 335, the court set forth three factors that must be balanced in order to identify the level of due process protection required in a non-criminal law context: 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'

[294] *Hamdi v Rumsfeld*, above n 286 at 529 and 531.

[295] *Ibid* at 533.

[296] *Ibid* at 533–4. Such proceedings may involve the use of hearsay evidence and a presumption in favour of government evidence, so long as that presumption is rebuttable (*ibid*).

[297] *Ibid* at 535. See also Allison Elgart, 'Hamdi v. Rumsfeld: Due Process Requires that Detainees Receive Notice and Opportunity to Contest Basis for Detention' (2005) 40 *Harvard Civil Rights-Civil Liberties Law Review* 239, 246 (observing that the plurality opinion exhibits a major departure from the Supreme Court's traditional deference to the executive in wartime).

significant innovation to which not all the members of the court subscribed.[298] For instance, the court's flexible approach was met with heavy criticism in a dissenting opinion drafted by Justice Scalia. According to Scalia, the criminal process has traditionally been the only constitutionally available means—absent congressional suspension of the writ of habeas corpus—to punish and incapacitate citizens waging war against their own government.[299] Therefore, Scalia contended, since Congress had not suspended habeas corpus, Hamdi was entitled to be either prosecuted in a federal court for treason or some other crime, or to be released.[300] Rather than applying clear constitutional principles, Scalia criticised the plurality for having adopted a 'Mr. Fix-it Mentality', trying to make up the political branches' failure to invoke the Suspension Clause and put in place the required procedures.[301] Justice Scalia concluded that the plurality's 'judicious balancing' inappropriately increased the judiciary's limited role in a democratic society.[302]

B. Prolonged Police Custody

A second example of an extraordinary limitation on the right to personal liberty is the prolongation beyond normal limits of the period before which a suspected terrorist is brought before a judicial body. This hypothesis has arisen in several European states. As previously noted, in 1988 the *Brogan* court decided that a period of detention in police custody of four days and six hours without judicial scrutiny breaches the right to be brought promptly before a judge enshrined in Article 5 s 3 of the Convention, even taking into account the difficulties relating to the fight against terrorism.[303] However, in subsequent judgments the Strasbourg organs reviewed the

[298] The *Hamdi* balancing test has also been the subject of criticism in scholarly literature. See, eg, James B Anderson, 'Hamdi v. Rumsfeld: Judicious Balancing at the Intersection of the Executive's Power to Detain and the Citizen-Detainee's Right to Due Process' (2005) 95 *Journal of Criminal Law and Criminology* 689, 712 (concluding that a flexible balancing approach is inappropriate and that the court should instead look to the nature of the interest implicated in order to determine whether due process should apply).

[299] *Hamdi v Rumsfeld*, above n 286 at 568.

[300] *Ibid* at 554.

[301] *Ibid* at 576.

[302] *Ibid*.

[303] *Brogan v UK*, above n 47. See above.

question of prolonged police detention in cases where the Contracting States sought relief from their Article 5 obligations by lodging a derogation in accordance with Article 15.

i. Brannigan and McBride v United Kingdom

The first in this series of cases is *Brannigan and McBride v United Kingdom*.[304] The facts of this case are comparable to those of *Brogan*. Mr Brannigan and Mr McBride were two suspected IRA terrorists who contested their police detention for respectively 6 days and 14 hours and 4 days and 6 hours. As in *Borgan*, the detentions were based on a statutory provision permitting police custody of persons suspected of terrorism for up to 48 hours, extendable by the Secretary of State for an additional 5 days.[305] Yet, this time, the United Kingdom invoked a notice of derogation from Article 5, which it had filed in response to the *Brogen* decision.[306] The main argument adduced by the respondent government to justify the derogation was the fear of jeopardising the independence of the judiciary by involving it in decisions to authorise extended detentions, as required by Article 5 s 3. The government contended that any measure that seeks to avoid the risk of endangering those assisting the police, for instance the non-disclosure of intelligence, would represent a radical departure from the adversary system of the common law and would therefore seriously affect public trust and confidence in the judiciary.[307] The court in Strasbourg accepted this reasoning and decided that the derogation was a genuine response to the terrorist threat. It had little difficulty in finding that there was a public emergency at the relevant time, emphasising the 'extent and impact of terrorist violence in Northern Ireland and elsewhere in the United Kingdom'.[308] Turning to the necessity of the measures, the court stated as a general matter that regard will be had to such factors as 'the nature of the rights affected by the derogation, the circumstances leading to it, and the duration of the emergency situation'.[309] With regard to the facts of the present case, the majority of judges were prepared to lend some weight to the respondent government's concerns regarding public confidence in the independence of the judiciary, and observed that the judiciary

[304] *Brannigan and McBride v UK*, above n 110. Concerning this decision, see, eg, Edward Crysler, 'Brannigan and McBride v. U.K.: A New Direction on Article 15 Derogations under the European Convention on Human Rights?' (1994) *Revue belge de droit international* 601; Susan Marks, 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights' (1995) 15 *Oxford Journal of Legal Studies* 69.

[305] *Brannigan and McBride v UK*, above n 110 at para 16.

[306] *Ibid* at paras 30–32.

[307] *Ibid* at para 32.

[308] *Ibid* at para 47.

[309] *Ibid* at para 43.

in Northern Ireland is 'small and vulnerable to terrorist attacks'.[310] The court went on to consider the various safeguards against abuse of the power of detention.[311] Firstly, there was the remedy of habeas corpus. Secondly, detainees were granted an absolute and legally enforceable right to consult a solicitor after 48 hours from the time of arrest. Finally, the detainees were entitled to inform a relative or friend about their detention and to have access to a doctor. Taken together, these safeguards were found to provide 'an important measure of protection against arbitrary behaviour and incommunicado detention'.[312]

In sum, it was found that the United Kingdom had not overstepped its margin of appreciation in deciding that the measures were strictly required by the exigencies of the situation, taking into account (1) the nature of the terrorist threat, (2) the limited scope of the derogation, and (3) the existence of basic guarantees against abuse.[313] Despite arguments by the applicants and the third party interveners that 'strict scrutiny' should be applied where derogations from fundamental procedural safeguards are involved, the court was not willing to depart from its view that the Contracting States have a wide margin of appreciation in the context of Article 15:

> It is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other.[314]

Several judges filed separate and dissenting opinions. A first group of dissenting opinions cast doubt on the argument that judicial control would have undermined the independence of the judiciary. According to Judge Pettiti, a comparative survey revealed the existence of judicial mechanisms designed to protect the anonymity of police informers. Similar concerns were expressed in Judge Walsh's dissent. In his view, the procedural difficulties in fighting terrorist crime are indistinguishable from those associated with other types of crime where the police relies on confidential sources (eg, drugs-related crime). He concluded that

> [i]t is the function of national authorities so to arrange their affairs as not to clash with the requirements of the Convention. The Convention is not to be remoulded to assume the shape of national procedures.

[310] *Ibid* at para 59.
[311] *Ibid* at paras 60–65.
[312] *Ibid* at para 62.
[313] *Ibid* at para 66.
[314] *Ibid* at para 59.

A second group of opinions raised the issue of the margin of appreciation. Judge Martens regretted the majority's reliance on *Ireland v United Kingdom*, a 15-year-old precedent. In Martens' contention, the conditions had considerably changed since 1978. While at that time the benefit of a wide margin of appreciation to states with a long and firm tradition of democracy might have been justified, the argument was no longer tenable after the accession of eastern and central European states to the Convention. Martens further maintained that the words 'strictly required by the exigencies of the situation' call for a closer scrutiny than the democratic necessity test applied under the common limitation clauses. In a similar vain, most commentators denounced the broad conception of the margin of appreciation adopted in *Brannigan and McBride*, both with respect to the existence of a public emergency as with regard to the proportionality of the derogating measures.[315]

ii. Aksoy v Turkey

The second major case in which the court was faced with a derogation from the right to prompt judicial control originated in the Turkish efforts to fight the terrorist activity of the PKK in the south-east of Turkey. *Aksoy v Turkey* involved the incommunicado detention of an individual for at least 14 days on suspicion of aiding and abetting the PKK and being a member of that organisation.[316] In addition to a violation of Article 3 for torture by the police authorities, the court found a breach of Article 5 s 3.[317] The issue, therefore, was whether the Turkish government's derogation was a valid one under Article 15. The court accepted the government's stipulation that 'the particular extent and impact of PKK terrorist activity in South-East Turkey undoubtedly created, in the region concerned', a 'public emergency threatening the life of the nation'.[318] However, it was not convinced that the derogating measures were strictly required by the

[315] Oren Gross, '"Once more unto the Breach"', above n 232 at 481–2. See also Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Intersentia, 2002) 183 (concluding that proportionality scrutiny was almost absent in *Brannigan and McBride*); Ní Aoláin, above n 232 at 122 (describing *Brannigan and McBride* as a manifestation of the conservative agenda being followed by the court in respect to emergency situations); Oren Gross and Fionnuala Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625, 633; Marks, above n 304 at 93 (arguing that the wide margin of appreciation in this case represents a lost opportunity for the court to act when action is most needed). See, however, Crysler, above n 304 at 619 (indicating that the court in *Brannigan and McBride* started narrowing the margin on the question of the strict necessity of the measures).

[316] *Aksoy v Turkey*, above n 4.

[317] *Ibid* at para 65 *ff*.

[318] *Ibid* at para 70.

exigencies of the situation. To begin with, the length of unsupervised detention was found to be excessive. While the court acknowledged that the investigation of terrorist offences presents the authorities with special problems, it could not accept that it was necessary to hold a suspect for 14 days without judicial intervention.[319] Such an 'exceptionally long' period, the court reasoned, renders the applicant 'vulnerable not only to arbitrary interference with his right to liberty but also to torture'.[320] In this connection, the facts had to be distinguished from those of *Brannigan and McBride*, where the maximum period of detention was seven days. Another distinguishing factor seems to have been the failure of the respondent government to adduce 'any detailed reasons before the court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable'.[321] The next issue the court examined was the existence of adequate safeguards against 'arbitrary behaviour and incommunicado detention'.[322] In contrast to *Brannigan and McBride*, the safeguards offered by the Turkish detention scheme were held to be wholly insufficient. The denial of access to a council, doctor, relative or friend and the absence of any realistic possibility of challenging the detention before a court left the applicant 'completely at the mercy of those holding him'.[323] In conclusion, even taking account of the serious threats of terrorism in the region concerned, a departure so radical from the standards of Article 5 did not meet the requirement of Article 15.

iii. Subsequent Cases

The court's approach in *Brannigan and McBride* and *Aksoy* has become settled law. It suffices to mention a few examples that are indicative of the current doctrine. In *Demir and others v Turkey*, the court decided that the applicants' incommunicado detentions of 23 days and 16 days were not strictly required to cope with the terrorist problems in Turkey.[324] Assertions about the 'thorough' and 'careful' nature of the police investigation that had to be conducted, did not provide an answer to the central question at issue, 'namely for what precise reasons relating to the actual facts of the present case would judicial scrutiny of the applicants' detention have prejudiced the progress of the investigation'.[325] General references to the difficulties caused by terrorism and the number of people involved in the investigations, were not sufficient to justify the lengthy periods of

[319] *Ibid* at para 78.
[320] *Ibid*.
[321] *Ibid*.
[322] *Ibid* at para 82.
[323] *Ibid* at para 83.
[324] *Demir and others v Turkey*, above n 110.
[325] *Ibid* at para 52.

custody under review.[326] The European Court further emphasised the lack of effective safeguards against abuse.[327] The case file illustrated that there were only very superficial medical examinations at the beginning and end of the detentions, and that the applicants were deprived of any contact with their lawyers, thus rendering the right to lodge a complaint defective. In similar subsequent judgments the court held that periods of 10 days of incommunicado detention were not strictly required by the terrorist crisis in Turkey.[328] In another line of cases, beginning with *Sakik and others v Turkey*, the Strasbourg Court did not even reach the issue as to whether the derogating measures satisfied Article 15.[329] The reason for this was that the detentions were executed in a part of the Turkish territory which was not explicitly named in the notice of derogation. In other words, the derogation was inapplicable ratione loci to the facts of the case.[330] Finally, in *Marshall v United Kingdom* the court was confronted with yet another arrest under the British anti-terrorism legislation.[331] The deprivation of liberty in question lasted 6 days and 50 minutes. The applicant submitted that the government could no longer rely on Article 15 since the security situation in Northern Ireland had undergone a radical transformation following the IRA cease-fire in 1994. In his submissions, the court should tighten its scrutiny due to the almost permanent state of emergency rule in the region. Finally, the applicant argued that there was an emerging international consensus that due process rights must be given a heightened status akin to that of non-derogable rights, referring, inter alia, to the case law of the Inter-American Court of Human Rights.[332] The Strasbourg Court, however, saw no reason to depart from its previous approach with regard to the British derogation from Article 5 s 3, and declared the application inadmissible. It was not convinced that the security situation had improved to the point that the government had overstepped its margin of appreciation in judging that there was still a public emergency.

[326] *Ibid*.

[327] *Ibid* at para 56.

[328] See, eg, *Sen v Turkey*, 17 June 2003, paras 25–9 (deciding that incommunicado detention without access to a judge for 11 days violates the Convention); *Bilen v Turkey*, 21 February 2006, paras 44–50 (deciding that incommunicado detention without access to a judge for 18 days violates the Convention); *Tanrikulu and others v Turkey*, 6 October 2006, paras 39–42 (deciding that incommunicado detention without access to a judge for 10 days violates the Convention).

[329] *Sakik and others v Turkey*, above n 110. See, eg, *Sadak v Turkey*, 8 April 2004, paras 50–57; *Yurttas v Turkey*, 27 May 2004, paras 52–9; *Abdülsamet Yaman v Turkey*, 2 November 2004, paras 65–70.

[330] *Sakik and others v Turkey*, above n 110 at para 39.

[331] *Marshall v UK*, 10 July 2001.

[332] See, eg, Advisory Opinion OC-8/87, Inter-American Court of Human Rights (1987) 11 *EHRR* 33.

C. Suspension of the Writ of Habeas Corpus

A final extraordinary liberty restriction discussed here is the suspension of the writ of habeas corpus. Article I, s 9, clause 2 of the US Constitution permits the suspension of the writ of habeas corpus when 'in Cases of Rebellion or Invasion the public Safety may require it'. Although the precise scope the Suspension Clause is subject to interpretation, the language itself indicates that it will be satisfied only in cases of 'Rebellion or Invasion' where 'the public Safety may require it'. The Suspension Clause is the only constitutional provision expressly allowing for the restriction of a fundamental right in an emergency situation. In *Ex parte Milligan*, the Supreme Court justified the power to limit the right of habeas corpus in the following terms:

> It is essential to the safety of every government that, in a great crisis, (…) there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the period to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus.[333]

The Suspension Clause traces a long history.[334] It was first invoked during the American Civil War by President Lincoln. In *Ex parte Merryman*, Chief Justice Taney, sitting as a circuit judge, ordered the release of a Southern sympathiser because Lincoln had failed to consult Congress before suspending habeas corpus.[335] In Taney's opinion, the Constitution does not authorise the executive to suspend the writ. He reasoned that the framers of the Constitution would not have conferred upon the President alone 'a power which the history of England had proved to be dangerous and oppressive in the hands of the crown'.[336] Lincoln, however, ignored the *Merryman* decision, and in a message to a special session of Congress famously stated that Taney's interpretation of the Constitution would allow 'all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated'.[337]

[333] *Ex p Milligan*, 71 US 2, 125 (1866).

[334] For an up-to-date historical account, see Tor Ekeland, 'Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the Unites States Constitution and the War on Terror' (2005) 74 *Fordham Law Review* 1475.

[335] *Ex p Merryman*, 17 F Cas 144 (CCD Md 1861).

[336] *Ibid* at 150.

[337] Quoted in Rehnquist, above n 259 at 38.

The issue again reached the Supreme Court in two World War II decisions.[338] *Ex parte Quirin* concerned the appeals of several German Nazi saboteurs who were tried by a military commission established by a presidential proclamation.[339] Although the text of the proclamation sought to deprive the applicants of any remedy in a United States court, the Justices unanimously agreed that neither the proclamation nor the fact that the defendants were enemy aliens foreclosed habeas corpus review.[340] In the second case, *Application of Yamashita*, which dealt with the conviction of a commanding general of the Japanese army for violations of the law of war, the court again found that it had jurisdiction to hear a habeas corpus petition.[341] Justice Murphy's opinion fiercely disputed the government's claim that 'restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review'.[342] It should be noted that in both cases the court limited the scope of its habeas corpus review to the constitutionality of trial by military commission and declined to inquire into the guilt or innocence of the applicants.

Constitutional issues concerning the Suspension Clause have also arisen in relation to the current fight against terrorism. Although the government has made various efforts to limit habeas corpus petitions by persons allegedly involved in terrorism,[343] there has thus far not been an official (congressional) suspension of the writ. One of the questions that would have to be addressed if such an occasion would arise, is whether the terrorist threat amounts to a 'rebellion' or 'invasion'. However, rather than focusing on the conditions for suspension, the debate has centred on whether the various categories of detainees are entitled to habeas corpus review in the first place. For example, a much debated post-September 11

[338] See also ch 7 below.
[339] *Ex p Quirin*, 317 US 1 (1942).
[340] *Ibid* at 25.
[341] Application of Yamashita, 327 US 1 (1946).
[342] *Ibid* at 30.
[343] For instance, section 7(b)(2) of the Military Order of 13 November 2001 declares that individuals subject to it 'shall not be privileged to seek any remedy (…) in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.'(Military Order of November 13, 2001, §7(b)(2), 66 Fed.reg.57,833 (2001)). Despite its clear language, the Bush administration denies that this provision was intended to suspend the writ of habeas corpus. (See Dycus, Berney, Banks and Raven-Hansen, above n 180 at 813) Whatever the position of the government, section 7(b)(2) is said to raise serious constitutional problems. Firstly, it would be difficult to reconcile this provision with the court's 'longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction'. (See Neal K Katyal and Laurence H Tribe, 'Waging War, Deciding Guilt: Trying the Military Tribunals' (2002) 111 *Yale Law Journal* 1259, 1307). In the second place, the provisions in the PATRIOT Act providing habeas corpus review for aliens detained on suspicion of terrorismwould clearly indicate Congress' intent not to suspend the writ of habeas corpus. (See PATRIOT Act, above n 161, s 412(b)(1) (8 USC s 1226A(b)(1)); see Sinnar, above n 170 at 1434–6).

issue is whether the federal courts have jurisdiction to hear habeas corpus petitions brought by foreign nationals held as enemy combatants at the Guantánamo Bay in Cuba. In the 2004 decision in *Rasul v Bush*, the Supreme Court resolved the matter, holding that the federal habeas corpus statute—28 USC s 2241—confers upon United States courts jurisdiction to consider challenges to the legality of the detention of aliens held at Guantánamo Bay.[344] *Rasul* gave the court the opportunity to consider the territorial scope of the (statutory) writ of habeas corpus, and to decide whether detainees held abroad may seek relief in a United States court to test the constitutionality of their preventive detentions. Several lower courts had rejected challenges brought by family members and other representatives of the prisoners, relying on the 1950 decision in *Johnson v Eisentrager*.[345] This case involved a number of German citizens who were convicted of espionage by an American military commission in China and subsequently detained in Landsberg, Germany. Their petitions for writs of habeas corpus were rejected by the Supreme Court, which held that non-resident enemy aliens, captured and imprisoned abroad, have no right to access to a court of the United States.[346] According to the *Eisentrager* Court, the Constitution does not confer 'a right of personal security (…) upon an alien enemy engaged in the hostile service of a government at war with the United States'.[347] However, in finding habeas corpus jurisdictions, the *Rasul* court rejected the lower court's reliance on *Eisentrager*. In addition a rather technical statutory argument, the court identified several grounds for distinguishing the *Eisentrager* detainees from the *Rasul* petitioners.[348] One of the factual distinctions was that the *Eisentrager* detainees had never been in the United States and were imprisoned in Germany at the relevant time, whereas those held at Guantánamo Bay are 'imprisoned in territory over which the United States exercises exclusive jurisdiction and control'.[349] Justice Scalia dissented. He was particularly concerned

[344] *Rasul v Bush*, 542 US 466 (2004).

[345] *Johnson v Eisentrager*, 339 US 763 (1950).

[346] *Ibid* at 776.

[347] *Ibid* at 785. The court observed that the term 'any person' in the Fifth Amendment cannot be read to extend its protection to alien enemies everywhere in the world: 'If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.'(*Ibid* at 784).

[348] *Rasul v Bush*, above n 344 at 476.

[349] *Ibid*. By the express terms of its lease agreements with Cuba, the United States 'shall exercise complete jurisdiction and control' over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. (*Ibid* at 480).

about what he perceived as an extension of federal habeas corpus jurisdiction 'to the four corners of the world'.[350]

It is important to note that *Rasul* only resolved the narrow question of whether United States courts have jurisdictions to hear petitions for a writ of habeas corpus under the federal habeas statute.[351] The court left open if, and to what extent, the individuals held at Guantánamo Bay can invoke a constitutionally protected right to challenge the lawfulness of their preventive detentions.[352] This matter is currently litigated in the lower courts after Congress passed the Military Commissions Act of 2006.[353] The Military Commissions Act, which was signed into law by President Bush on 17 October 2006, amends the federal habeas corpus statute—ie 28 USC s 2241(e)(1). The new provision states that

> [n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United Sates to have been properly detained as an enemy combatant or is awaiting such determination.

The elimination of habeas corpus review for aliens prompted widespread controversy. Critics have denounced the Act, inter alia on the grounds that it amounts to an unconstitutional permanent abrogation of the writ of habeas corpus.[354] Supporters of the new provision maintain that alien enemy combatants (detained outside the territory of the United States) are not entitled to habeas corpus proceedings under the Constitution, and that

[350] *Ibid* at 498.

[351] *Ibid* at 485: 'Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.'

[352] See James E Pfander, 'The Limits of Habeas Jurisdiction and the Global War on Terror' (2006) 91 *Cornell Law Review* 497, 504.

[353] Military Commission Act of 2006, Pub.L. No. 109–366, 120 Stat. 2600 (2006). The courts that addressed the issue before the Military Commission Act was adopted reached opposing conclusions, ranging from the view that the Guantánamo Bay detainees have no rights under the Constitution, to the position that they are entitled to due process rights, the scope of which is to be determined under the *Mathews* balancing test as applied by the Supreme Court in *Hamdi*. Cp, eg, *In re Guantanamo Detainee Cases*, 355 F Supp 2d 443 (DDC 2005) (holding that the Fifth Amendment due process protections extended to those held at Guantánamo Bay), with *Khalid v Bush*, 355 F Supp 2d 311 (DDC 2005) (accepting the government's submission that aliens detained at Guantanamo Bay lack judicially enforceable rights).

[354] See, eg, the amicus brief by Gerald L Neuman, Harold Hongju Koh, Sarah H Cleveland and several other constitutional law professors from around the US in the case of Ali Saleh Kahlah al-Marri, at <http://www.law. yale.edu/documents/pdf/News_&_Events/Al_Marri_Amicus_Brief.pdf> accessed 15 October 2007.

the Military Commission Act can accordingly not be characterised as a suspension of habeas corpus within the meaning of the Suspension Clause.[355]

D. Concluding Remarks

In their efforts to combat terrorism, a number of Member States of the Council of Europe have availed themselves of the possibility offered by Article 15 of the Convention to derogate from the personal liberty rights guaranteed in normal circumstances pursuant to Article 5 of the Convention. Several conclusions emerge from the foregoing analysis. To begin with, the case law on Article 15 shows that the Convention organs accord to the national authorities a wide discretion in assessing whether a particular terrorist threat amounts to a 'pubic emergency threatening the life of the nation'. Thus, in the *Lawless* case, a public emergency was 'reasonably deduced' from the existence and activities of the terrorist organisation IRA.[356] As one commentator observed, these words merely seem to require good faith on the part of the respondent government, rather than the actual existence of a public emergency.[357] In more recent cases such as *Brannigan and McBride* and *Aksoy*, the court contented itself by briefly noting that there could be 'no doubt' about the existence of an emergency 'in the light of all the material before it as to the extent and impact of terrorist violence' in the region concerned.[358] In its inadmissibility decision in *Marshall*, the court accepted that an emergency existed even after the main terrorist organisations had announced a cease-fire. It was found to be sufficient for the purpose of Article 15 that the situation in the country had not completely 'return[ed] to normality', and that the weeks preceding the applicant's extended police custody were characterised by 'an outbreak of deadly violence'.[359] What all these cases plainly illustrate is that the Convention organs leave a very wide margin of appreciation to the national authorities to judge on the presence of a public emergency caused by terrorist activity.[360]

[355] Several lower courts have adopted this line of reasoning. See *Boumediene v Bush* and *Al Odah v. United States*, 476 F.3d 981, 1005–7 (2007). The Supreme Court expressed its intent to hear both cases.

[356] *Lawless v Ireland (No 3)*, above n 27 at para 28.

[357] Arai-Takahashi, above n 315 at 180.

[358] *Brannigan and McBride v UK*, above n 110 at para 47.

[359] *Marshall v UK*, above n 331.

[360] Scholars disagree as to whether deference on the question of the existence of a public emergency is to be welcomed. Cp, eg, Arai-Takahashi, above n 315 at 178 (reasoning that the domestic authorities are more aptly placed than a supranational monitoring body to assess whether a particular circumstance should be characterised as a public emergency), with Oren Gross, '"Once More unto the Breach"', above n 232 at 464 *ff* (arguing that due to the wide

A second conclusion that can be drawn from the cases discussed in this section is that the court has adopted a more active stance as regards the evaluation of the proportionality of the derogating measures. To be sure, here too, the Convention organs allow the national authorities a considerable margin of appreciation.[361] This is perhaps best illustrated by their reluctance to scrutinise measures retroactively for their efficacy, a position which was endorsed both in the context of preventive detention and prolonged police custody.[362] But the court's approach has come to be less deferential over time. A tendency to narrow down the margin of appreciation on the question of strict necessity was already discernable in *Brannigan and McBride*, and became more apparent in the Turkish cases. To ascertain whether derogating measures are sufficiently narrowly tailored to respond to the terrorist crisis, the court now engages in a multifaceted inquiry, weighing such factors as the nature of the terrorist threat, the importance of the right affected, the gravity of the interference (eg, the time spend in prolonged police custody), and the existence and scope of safeguards against abuse. As to the nature of the rights affected by the derogation, the court indicated in *Brannigan and McBride* that the right to personal liberty, and in particular the requirement of judicial control of executive detention, takes a special position in the Convention system:

> [J]udicial control of interference by the executive with the individual's right to liberty provided for by Article 5 is implied by one of the fundamental principles of a democratic society, namely the rule of law.[363]

With respect to the safeguards against abuse, the court has made it clear on several occasions that it will not accept 'arbitrary behaviour and incommunicado detention', even where a country is faced with serious terrorist violence.[364] And although the court has said that it will not substitute its view as to what measures are most appropriate in dealing with terrorism for that of the Contracting States, it nevertheless demands that the respondent government adduces 'precise reasons relating to the actual facts of the (…) case' why the observance of the ordinary liberty safeguards is rendered impracticable by the exigencies of the situation.[365] This rather activist language caused Judge De Meyer to conclude that the margin of

margin of appreciation with respect to the existence of a public emergency, the notion of emergencies as temporary and exceptional situations tends to be undermined).

[361] Deference as regards the evaluation of the necessity of the derogating measures is widely criticised. See, eg, Arai-Takahashi, above n 315 at 178 (observing that this issue is capable of objective assessment, and the margin of appreciation must accordingly be limited); Crysler, above n 304 at 629.

[362] *Ireland v UK*, above n 233 at para 224 (concerning preventive detention); *Brannigan and McBride v UK*, above n 110 at para 59 (concerning prolonged police custody).

[363] *Brannigan and McBride v UK*, above n 110 at para 48.

[364] *Aksoy v Turkey*, above n 4 at para 82.

[365] *Demir and others v Turkey*, above n 110 para 52.

appreciation in the field of emergency derogations has become a fallacious concept.[366] Finally, the retreat from uncritical deference and the adoption of a more exacting approach in the context of Article 15 is most clearly reflected in the various responses to the United Kingdoms 2001 derogation. An examination of the views of the Commissioner for Human Rights of the Council of Europe and the House of Lords indicate a willingness on their part to engage in some form of less restrictive alternative analysis.[367]

The US Constitution does not provide for a system of derogation comparable to Article 15 of the Convention. Yet, despite the absence of an express constitutional basis, the political branches have employed emergency powers infringing upon constitutionally protected liberty guarantees to meet crisis situations. The Supreme Court's early jurisprudence concerning wartime detention and exclusion measures discloses an extremely deferential standard of review.[368] In *Hirabayashi*, for instance, the court held that its investigation would not go beyond the inquiry whether, in the light of all the relevant circumstances, the government action (a curfew) had 'a reasonable basis'.[369] It refused to reassess measures deemed necessary at the relevant time by the military authorities, holding that Congress and the executive enjoy a wide discretion, both in determining the nature and extent of an emergency and in the selection of the means for resisting it.[370] Only in *Endo*, a case decided near the end of World War II, did the majority of Justices find a violation of the Constitution. However, the result in *Endo* was based on the narrow holding that the applicable legislation did not expressly provide for the preventive detention of people of Japanese ancestry.

The court departed from this highly deferential approach when it reviewed the preventive detention of enemy combatants as part of the government's struggle against international terrorism. In applying the general due process balancing test, the plurality in *Hamdi* dismissed the government's assertion that the role of the judiciary must be heavily circumscribed in times of war.[371] Justice O'Conner stated this principle clearly:

[366] *Ibid*.

[367] See Opinion 1/2002 of the Commissioner for Human Rights, above n 245 at para 35 (suggesting that the 'demonstrable availability of more or equally effective non-derogating alternatives' may cast doubt on the necessity of the derogating measure); *A (FC) and others v Secretary of States for the Home Department; X (FC) and others v Secretary of States for the Home Department*, above n 246 at para 35 (examining less restrictive measures applied to UK national suspected of international terrorism).

[368] See also Jules Lobel, 'Emergency Power and the Decline of Liberalism' (1989) 98 *Yale Law Journal* 1385, 1409.

[369] *Hirabayashi v United States*, above n 267 at 101.

[370] *Ibid* at 93.

[371] *Hamdi v Rumsfeld*, above n 286 at 535–6.

> [A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. (…) [U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.[372]

It remains to be seen, however, whether the government will succeed in eviscerating the various constitutional liberty safeguards and the Suspension Clause with respect to non-citizens detained abroad.

V. GENERAL CONCLUSION

Detention measures adopted in response to terrorist violence demonstrate the challenge of balancing the state's obligation to fight terrorism effectively with the importance of protecting individual rights. Jurisprudence under the Convention and the US Constitution evidences a keen awareness of the tension between personal liberty protections and counter-terrorist interests. This does not mean that both systems have always produced similar trade-offs between the conflicting interests at stake. An explanation of some of the differences can be sought in diverging approaches to the limitation of rights on both sides of the Atlantic.

Although no mention is made of the democratic necessity test in Article 5, an examination of the Strasbourg organ's jurisprudence discloses the use of similarly flexible balancing methods in interpreting the liberty guarantees enshrined in the Convention. A recurring observation in many of the Article 5 cases discussed in this chapter, is that the Convention system requires the court to strike 'a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights', and that it will therefore 'take into account the special nature of terrorist crime and the exigencies of dealing with it'. This reasoning is clearly exhibited in the court's contextualised interpretation of the liberty guarantees associated with criminal and immigration law proceedings. An elastic reading of expressions such as 'reasonable suspicion', 'promptly', 'speedily', and the introduction of malleable notions such as 'due diligence', allow the court to give considerable latitude to the special circumstance of terrorism. Yet, as the court stressed on numerous occasions, the flexibility inherent in Article 5 concepts is not unlimited. The domestic authorities do not have 'carte blanche' to arrest and detain persons, nor can they 'do away with effective control by the domestic courts'—to use the court's phraseology—'whenever they choose to assert that terrorism is involved'. The flexible balancing approach transpires with regard to Article 15 derogations. Although the Convention organs are

[372] *Ibid* at 536.

deferential to the Contracting States' assessment of a public emergency, they are not willing to simply defer to the respondent government's assessment of the measures required to meet that emergency. The Strasbourg Court's current application of the 'strictly required' test can best be described as a multifaceted balancing inquiry akin to the proportionality review practised in other Convention contexts. Moreover, an examination of the court's contemporary Article 15 jurisprudence reveals a gradual tightening of the margin of appreciation in this area, and a strengthening of the rigour with which the necessity of derogating measures is scrutinised. Consequently, the court increasingly offers meaningful human rights protection in emergency situations caused by terrorist violence.

The Supreme Court has generally been more hesitant to adopt flexible concepts, which are adaptable to the changing needs of criminal law enforcement. The conventional interpretation of the Fourth Amendment safeguards for full-scale arrests and detentions can be viewed as typical instances of categorical-like reasoning. Thus, for instance, under the traditional reading of the Fourth Amendment, the probable cause requirement is treated as an absolute rule, leaving no room for modification of the required quantum of evidence according to the circumstances of the case. Similarly, rather than labouring under the elastic notion of promptness, the court has favoured a specific time-limit before which an arrestee must be brought before a judge. As a result of this approach, no discretion is left to the courts and other decision-makers to take into consideration the special needs of counter-terrorism in determining the scope of Fourth Amendment safeguards.

The latter method has some important advantages over the Strasbourg organ's interpretation of Article 5 concepts. In developing bright-line rules, the Supreme Court provides clear guidance to decision-makers and law enforcement officials, thus avoiding the uncertainty inherent in the Convention organs' assessment of the background factors—ie the terrorist threat and the difficulties of dealing with it—imported in its application of the liberty safeguards set out in Article 5. In addition, the categorical approach poses a bar against the potential erosion of liberty rights in the face of what may appear to be pressing societal needs in the eyes of those responsible for fighting terrorism. However, the foregoing analysis suggests that categorical prohibitions on certain behaviour often do not restrain the government when it deems the rules to be inappropriate in a particular situation. Indeed, many of the practices and tactics developed by the United States government since September 11 in relation to persons arrested and detained in the fight against terrorism appear designed to evade the constitutional rights and safeguards that traditionally accompany the criminal process. Two major examples of this policy were highlighted is this chapter. Firstly, the pre-textual use of the immigration law allowed the law enforcement authorities to conduct part of their counter-terrorist

investigations unhindered by overburdening Fourth Amendment strictures. Secondly, the preventive detention of both foreign nationals and American citizens as 'enemy combatants', some of them in detention facilities outside the territory of the United States, amounted not merely to a reasonable attempt to accommodate legitimate security interest, but to a complete circumvention of the criminal justice system, which left those involved with barely any constitutional rights, for many years.

The foregoing should not lead one to conclude that balancing is absent from the Supreme Court's right to liberty jurisprudence. One illustration of a balancing method in this context is the court's analytical framework for determining an individual's due process rights in a non-criminal law context. An interesting, novel application of the *Mathews* three-prong test can be found in *Hamdi*, where the court sought to strike a proper constitutional balance between the conflicting claims of freedom from preventive detention and the government's interest in waging war effectively. Through the non-deferential balancing approach adopted in *Hamdi*, the court succeeded in providing more effective wartime protection of human rights than it did in cases decided in previous emergency situations, while still accommodating the government's national security interests. By contrast, the court's overly deferential review of Japanese internment in World War II is generally seen as a failure to limit exaggerated emergency measures in the light of constitutional principles.

6

The Right to Privacy

I. INTRODUCTION

COUNTER-TERRORIST ACTION is liable to interfere with the right to privacy in numerous ways. Besides arresting and prosecuting the perpetrators of terrorist offences, the seriousness of the terrorist threat requires the state to take pro-active measures aimed at preventing future attacks. In their efforts to prosecute and prevent terrorism effectively, states may seek to enhance the investigation powers of intelligence agencies and law enforcement authorities. The central issues raised in this chapter are whether, and if so to what extent, the privacy standards constraining the use of investigation techniques in ordinary criminal proceedings may be relaxed to meet the special needs of counter-terrorism. Section II provides the general backdrop for this analysis by presenting an introduction to the basic principles governing the right to privacy. Section III discusses some of the major measures commonly used to investigate crime: electronic surveillance, physical searches and seizures, and the use of undercover agents. It should be noted from the outset that an important aspect of the right to privacy, namely data protection, will not be dealt with in this chapter. The reason is that in the United States data protection is primarily governed by statutory law and receives little constitutional protection, thus rendering a comparison with the human rights standards of the European Convention problematic.[1]

[1] Suffice it to note that post-September 11 amendments to data protection laws have sparked considerable debate about the proper standards for the collection, storage and transmission of personal data on both sides of the Atlantic. In the European Convention context, the Guidelines on Human Rights and the Fight against Terrorism contain an Art V 'Collection and processing of personal data by any competent authority in the field of State security', which provides as follows: 'Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular: (i) are governed by appropriate provisions of domestic law; (ii) are proportionate to the aim for which the collection and the processing were foreseen; (iii) may be subject to supervision by an external independent authority.'(Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002). See also *Rotaru v Romania* Reports 2000-V (2000), paras 57–8. For further information on privacy and data protection in Europe, see, eg, Iain Cameron, *National Security and the European Convention of Human Rights* (The Hague/Boston/London, Kluwer

II. THE RIGHT TO PRIVACY: BASIC NOTIONS

A. Introduction

Although the origins of the right to privacy are commonly traced back to nineteenth-century American legal doctrine, the term 'privacy' is not expressly mentioned anywhere in the text of the Constitution.[2] It is due to the interpretation of the individual rights embodied in other constitutional guarantees that privacy gradually came to be regarded as an independent constitutional value. Most clearly, a framework for privacy protections can be found in the Fourth Amendment's 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures', and its concomitant guarantee that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched'. The Supreme Court has said on various occasions that the basic purpose of the Fourth Amendment is to safeguard the privacy of the individual against arbitrary interference by the government.[3] When the court first addressed the scope of the Fourth Amendment, it established that it applies to 'all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life'.[4] In the 1965 case *Griswold v Connecticut*, the court inferred a more general right to privacy from the 'penumbras' emanating from the protections of the First, Fourth, Fifth and Ninth Amendments. In the court's opinion, these various guarantees create identifiable 'zones of privacy'.[5] Under the European Convention the textual basis for the right to privacy is more clearly spelled out. Article 8 s 1 of the Convention secures

Law International, 2000) 170–258; Paul De Hert and Serge Gutwirth, 'Making Sense of Privacy and Data Protection. A Prospective Overview in the Light of the Future of Identity, Location Based Services and the Virtual Residence' in Institute for Protective Technological Studies, *Security and Privacy for the Citizen in the Post-September 11 Digital Age. A Prospective Overview* (Report to the European Parliament Committee on Citizens Freedoms and Rights, Justice and Home Affairs, 2003) 111. In the United States, the PATRIOT Act amended a great number of laws creating protective procedures for the collection, storage and transmission of various kinds of personal information. For a brief overview, see, eg, John W Whitehead and Steven H Aden, 'Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives' (2002) 51 *American University Law Review* 1081, 1131–3.

[2] In their well-known article written in 1890, Samuel Warren and Louis Brandeis argue that underlying a number of common-law property protections is a more general right to protection against invasion of privacy. See Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193. Justice Brandeis would later describe the 'right to be let alone' as 'the most comprehensive of rights and the right the most valued by civilized men'. See *Olmstead v United States*, 277 US 438, 478 (1928) (Brandeis, L., dissenting).

[3] See, eg, *Katz v United States*, 389 US 347 (1967).

[4] *Boyd v United States*, 116 US 616, 630 (1886).

[5] *Griswold v Connecticut*, 381 US 479, 484 (1965).

a general right to privacy in the following terms: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

B. The Scope and Content of the Right to Privacy

Article 8 s 1 of the Convention protects four different interests: family life, private life and the right to respect for home and correspondence. The right to respect for family life will not be treated in this chapter. The three other interest, although recognised as different rights, are closely connected with one another and are sometimes considered together by the Strasbourg organs. Privacy is often regarded as the unifying rationale behind them, the respect owed to home and correspondence being only specific aspects of private life.

The Convention organs have explicitly declined to give an exhaustive definition of private life, but have instead identified different aspects of human life falling within the ambit of this notion.[6] Importantly, the court has stressed that the meaning of private life is not restricted to the interest of living protected from publicity. In *Niemietz v Germany*, the court held that

> it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle.[7]
>
> Respect for private life, [the court added,] also compromise[s] to a certain degree the right to establish and develop relationships with other human beings.[8]

Examination of Article 8 jurisprudence discloses a wide conception of the notion of private life.[9] Yet, its scope is not unlimited. In the past, the Commission declined to find interference with Article 8 s 1 for activities taking place in a public setting. Thus, for instance, in *Friedl v Austria*, the Commission took the position that the use of photographs taken by the

[6] See, eg, *PG and JH v UK* Reports 2001-IX (2001) para 56 (holding that '[p]rivate life is a broad term not susceptible to exhaustive definition').

[7] *Niemietz v Germany* Series A no 251-B (1992) para 29.

[8] *Ibid*.

[9] Some of the interests and activities that form part of the concept of private life are: personal identity and development (eg, *Burghartz v Switzerland* Series A no 280-B (1994) (right to choose a name)); physical and psychological integrity (eg, *X and Y v the Netherlands* Series A no 91 (1985) (protection against physical and sexual assault)); private space (eg, *Powell and Rayner v UK* Series A no 172 (1991) (protection against noise nuisance caused by airport activity)); personal information (eg, *Murray v UK* Series A no 300 (1994) (fingerprinting and photography by the police)) and sexual activities (eg, *Dudgeon v UK* Series A no 53 (1981) (protection of homosexual conduct)). For a comprehensive survey, see, eg, Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford, Oxford University Press, 2000) 811–25.

authorities during a public demonstration did not amount to an interference with Article 8 s 1.[10] The court's subsequent case law nevertheless reveals that activities taking place in a public context may also fall within Article 8's protective ambit. Some guidance as to how the court will decide such questions was given in *Halford v United Kingdom*, which concerned the interception of telephone calls on business premises.[11] The court held that a telephone call made from a private line in an office fell within the concept of private life, because the applicant had 'a reasonable expectation of privacy' for such calls.[12] In subsequent judgments the court clarified that a person's reasonable expectations of privacy 'may be a significant, although not necessarily conclusive' factor to determine whether his private life is concerned by measures effected outside his home or private premises.[13]

The Bill of Rights does not contain a separate provision protecting privacy comparable to Article 8 of the European Convention. As noted, different aspects of the right to privacy have been read in various constitutional provisions. The guarantee of most relevance for present purposes is the Fourth Amendment's protection against unreasonable searches and seizures. The remainder of this chapter will mainly be concerned with the privacy interests secured by this provision. Rather than proclaiming a general right to privacy, the Fourth Amendment describes specific conduct the state may not adopt, ie unreasonable searches and seizures. Consequently, the scope and content of the Fourth Amendment hinges on the meaning of the terms 'search' and 'seizure'.[14] This is where the notion of privacy comes into play. In modern Fourth Amendment jurisprudence, a search or seizure is defined by an individuals' 'reasonable expectation of privacy'. For many years the Supreme Court regarded the protection of private property to be the rationale underlying the Fourth Amendment. As a result of this interpretation, the court required a physical intrusion (trespass upon private property) into one of the constitutionally protected areas (persons, houses, papers, and effects) for there to be a Fourth Amendment search. The private property reading of the Fourth Amendment was abandoned in the landmark case *Katz v United States*, in which the court confronted the issue of telephone tapping.[15] While the court refused to translate the Fourth Amendment into a general right to privacy, it recognised that that provision protects 'individual privacy

[10] *Friedl v Austria* Series A no 305-B (1995), paras 49–52.
[11] *Halford v UK* Reports 1997-III (1997).
[12] *Ibid* at paras 45–6.
[13] See, eg, *PG and JH v UK*, above n 6 at para 57.
[14] See generally Wayne R LaFave, Jerold H Israel and Nancy J King, *Criminal Procedure* (St Paul, West Group, 2000) 110–246.
[15] *Katz v United States*, above n 3.

against certain kinds of government intrusion'.[16] It was deemed irrelevant whether there had been physical intrusion into certain protected areas: 'For the Fourth Amendment protects people, not places.'[17] The key rationale of the court's decision in *Katz* was that the defendant had a 'reasonable expectation of privacy'.[18] In his concurring opinion, Justice Harlan defined the new boundaries of the Fourth Amendment as follows:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'.[19]

Harlan's 'reasonable expectation of privacy' approach embraces two questions: first, whether the individual has exhibited an actual (subjective) expectation of privacy; and second, whether his expectation is one that society is prepared to recognise as 'reasonable'.[20] The court's jurisprudence reveals that the reasonable expectation standard has given rise to a rather narrow conception of privacy, which is primarily understood in terms of seclusion and secrecy.[21] As the court observed in *Katz*, '[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection'.[22] The scope of Fourth Amendment privacy is limited 'to what an individual seeks to preserve as private, even in an area accessible to the public'.[23] Thus, for example, there is no reasonable expectation of privacy for objects open to the public eye (the plain view rule).[24] For the same reason, personal information kept by third parties (eg, financial records,[25] or a 'pen register')[26] is not covered. In the court's view, 'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties'.[27] Business or commercial

[16] *Ibid* at 350.
[17] *Ibid* at 351.
[18] *Ibid* at 353.
[19] *Ibid* at 361.
[20] The court also uses the terms 'justifiable' (eg, *United States v White*, 401 US 745, 752 (1971)), and 'legitimate' (eg, *Rakas v Illinois*, 439 US 128, 143 (1978)).
[21] For references, see, eg, LaFave, Israel and King, above n 14 at 135–138.
[22] *Katz v United States*, above n 3 at 351.
[23] *Ibid*.
[24] Eg, *Dow Chemical Co v United States*, 476 US 227 (1986).
[25] *United States v Miller*, 425 US 435 (1976).
[26] A 'pen register' is a device which registers telephone numbers. See *Smith v Maryland*, 442 US 735 (1979). The court reasoned that telephone users in general have no expectation of privacy regarding the numbers they dial, since they typically know that they must convey phone numbers to the telephone company and that the company has facilities for recording this information. By voluntarily conveying numerical information to a phone company, an individual assumes the risk that the company would reveal the information to the police.
[27] *Ibid* at 743–4.

premises, on the other hand, are sometimes entitled to protection.[28] Much will depend on whether or not they are open to the general public.[29]

C. Limitations of the Right to Privacy

Before considering the system of limitation in the two jurisdictions under review, it is useful to observe that the 'reasonable expectations of privacy' standard, which figures in the jurisprudence of both the European Court and the Supreme Court, may cause the courts to assess countervailing individual or societal interests at the definitional stager, ie when considering the scope of the privacy safeguards. The notion of 'reasonableness' is particularly liable to import government interest analysis at the definitional stage, thus mixing the issues of definition and limitation.[30]

i. Standards of the European Convention

Similarly to the rights to freedom of expression and freedom of association, the rights protected by Article 8 are qualified in the second paragraph of that provision. The limitation clause laid down in paragraph 2 follows the general pattern: an interference with privacy interests violates Article 8 unless it is 'in accordance with the law', pursues one or more of the legitimate aims referred to in paragraph 2, and is 'necessary in a democratic society'.[31] Following its judgment in *Silver v United Kingdom*, the European Court employs the threefold test set out in the *Sunday Times* case to determine whether a privacy intrusion is in accordance with the law.[32] The difference in the language used in Article 10 s 2 ('prescribed by law') and Article 8 s 2 ('in accordance with the law') is irrelevant. The court's interpretation of the democratic necessity test in Article 8 is based on the principles established in *Handyside v United Kingdom*.[33] The

[28] See, eg, *Manusi v DeForte*, 392 US 364, 367 (1968): 'This Court has held that the word 'houses,' as it appears in the Amendment, is not to be taken literally, and that the protection of the Amendment may extend to commercial premises.'

[29] See LaFave, Israel and King, above n 14 at 140–41.

[30] For a discussion of the problems associated with this approach, see ch 2, section I.

[31] Art 8 s 2 provides: 'There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[32] *Silver v UK* Series A no 61 (1983), paras 85–90. For a discussion of the *Sunday Times* case, see ch 2, section III.

[33] *Handyside v UK* Series A no 24 (1976) para 48–9. For a discussion of the democratic necessity test, see ch 2, section III.

Handyside framework was first applied in the sphere of Article 8 s 2 in the cases *Dudgeon v United Kingdom* and *Silver v United Kingdom*.[34]

In *Golder v United Kingdom*, the court confronted the issue of whether there are implied limitations to Article 8. The respondent government argued that lawful imprisonment entailed inherent restrictions on the right to respect for correspondence. The court rejected this claim, holding that the restrictive formulation used in paragraph 2 ('there shall be no interference (…) except such as') leaves no room for the concept of implied limitations.[35] As a final matter, it can be observed that the rights guaranteed by Article 8 may also be subject to limitations following from the application of other Convention provisions, such as Articles 15 (emergency derogations) and Article 17 (abuse of rights).

ii. Standards of the US Constitution

In their attempts to reconcile the Fourth Amendment privacy safeguards with competing government interests, the Justices of the Supreme Court have supported the use of both categorical and balancing methods.[36] For a good understanding of the debate over categorisation and balancing in the Fourth Amendment context, it is useful to distinguish between two alternative readings of the amendment.[37] The text contains two safeguards: the protection against 'unreasonable searches and seizures' ('reasonableness' clause) and the stipulation that 'no Warrants shall issue, but upon probable cause' ('warrant' clause).[38] Under the first—'conventional'—interpretation of the Fourth Amendment, both safeguards should be read together.[39] This implies that, as a general rule, a search or seizure is unreasonable in the absence of probable cause and a valid warrant. Stated differently, to be reasonable, searches and seizures must be backed by a valid warrant issued upon probable cause. According to the second interpretation—the 'general reasonableness' theory—the two clauses impose a general standard of reasonableness, the existence of probable cause and a warrant simply being two of the various factors to be

[34] *Dudgeon v UK*, above n 9 at paras 50–53; *Silver v UK*, above n 32 at para 97.

[35] *Golder v UK* Series A no 18, para 44 (1975).

[36] See generally David L Faigman, 'Reconciling Individual Rights and Government Interests: Madisonian Principles versus Supreme Court Practice' (1992) 78 *Virginia Law Review* 1521, 1574–8; Nadine Strossen, 'The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Restrictive Alternative Analysis' (1988) 63 *New York University Law Review* 1173.

[37] Nadine Strossen, previous n at 1179–84. See also Craig M Bradley, 'Two Models of the Fourth Amendment' (1985) 83 *Michigan Law Review* 1468 (distinguishing between the 'no lines' and 'bright line' approaches).

[38] Nadine Strossen, above n 36 at 1179.

[39] *Ibid* at 1179–80.

considered in the court's overall assessment.[40] The first approach clearly exhibits a categorical perspective whereas the second is more balancing-oriented.

The meaning of probable cause and the warrant requirement will be further examined in section III of this chapter in relation to the various investigative measures used in the fight against terrorism. At present it is sufficient to note that there are a limited number of exceptions to one or both of the Fourth Amendment safeguards.[41] Those exceptions are generally evaluated under a balancing test, in which the court weighs the intrusion on the individual's interest in privacy against the promotion of a legitimate public interest.[42] Different rationales were advanced to justify the exceptions. For example, a balancing test has been applied in cases involving only a minimal invasion of privacy. Activities which are substantially less intrusive than full-scale searches may be constitutional even absent a warrant or probable cause. Thus, for instance, in *Terry v Ohio*, the court substituted the inflexible 'probable cause' standard for an open-ended 'reasonable suspicion' standard for so-called 'stop and frisk procedures'.[43] Exceptions can also be justified in 'exigent circumstances', rendering the Fourth Amendment protections 'impractical', for instance due to the lack of time to obtain a warrant.[44] Finally, exceptions to the probable cause standard and warrant requirement have been based on the 'special needs' doctrine, under which a distinction is drawn between searches and seizures intended to enforce the criminal law on the one hand,

[40] *Ibid* at 1180.

[41] For an overview, see, eg, Craig M Bradley, above n 37 at 1473.

[42] See, eg, *Camara v Municipal Court*, 387 US 523, 536–7 (1967); *Delaware v Prouse*, 440 US 648, 654 (1979), observing that 'the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' Judges and scholars have vigorously debated the appropriateness of balancing Fourth Amendment rights. In *New Jersey v TLO*, Justice Brennan condemned the majority's balancing approach because it 'jettisons the probable-cause standard—the only standard that finds support in the text of the Fourth Amendment—on the basis of its Rohrschach-like balancing test.' (*New Jersey v TLO*, 469 U.S. 325, 357–8 (1985). In Brennan's view, the notion of reasonableness in the text of the Fourth Amendment 'does not grant a shifting majority of [the] Court the authority to answer all Fourth Amendment questions by consulting its momentary vision of the social good.' (*ibid* at 370).

[43] *Terry v Ohio*, 392 US 1 (1968). See Craig S Lerner, 'The Reasonableness of Probable Cause' (2003) 81 *Texas Law Review* 951, 997 (observing that reasonable suspicion has evolved into 'a variable standard, calibrated to the degree of both the privacy intrusion and the state interest', and that it is therefore 'not simply a lower standard that probable cause, but a different kind of standard').

[44] See, eg, *Schmerber v California*, 384 US 757 (1966) (holding that it is impractical to procure a warrant to remove blood from a drunk driver given inevitable dissipation of driver's blood alcohol level). See John F Decker, 'Emergency Circumstances: Police Responses, and Fourth Amendment Restrictions' (1999) 89 *Journal of Criminal Law and Criminology* 433.

and administrative or regulatory searches (eg, health and safety inspections) on the other hand.[45] It is important to point out that the 'special needs' doctrine is inapplicable where the primary goal of a search or seizure is criminal law enforcement. Warrantless and suspicionless searches and seizures are constitutional only 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable'.[46] An illustration of this principle can be found in *Indianapolis v Edmond*, a case concerning vehicle checkpoints designed to detect drugs-related crime.[47] In the court's opinion, the suspicionless searches did not fit within the 'special needs' exception because the 'primary purpose' of the checkpoints was merely 'to uncover evidence of ordinary criminal wrongdoing'.[48] The court accordingly refused to take into account the 'severe and intractable nature of the drug problem', holding that 'the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose'.[49]

D. Concluding Remarks

In comparing Article 8 and the Fourth Amendment differences can be found both with regard to the scope of the safeguards secured by those provisions and the limits that may be imposed on them. As to the former, the fairly broad protective ambit of Article 8 contrasts with the narrowly defined privacy concept underlying Fourth Amendment jurisprudence. Article 8 covers a whole range of human activity, while the focus of the Supreme Court's 'reasonable expectation of privacy' standard is very much on seclusion and secrecy. One important example of the disparity is the treatment of private information kept by third parties, which falls within the scope of Article 8 but goes unprotected under the Fourth Amendment. Dissimilarities also exist between the systems of limitation of both declarations of rights. The common limitation clause of Article 8 s 2 establishes a more or less fixed avenue for balancing the privacy interests of the individual and legitimate countervailing interest of the state. No similar, overall balancing approach is operative in the Fourth Amendment context. This is not to say that the protections of the Fourth Amendment are absolute. The court has recognised a limited number of exceptions to the

[45] See, eg, *Camara v Municipal Court*, above n 42 (concerning inspections to ensure compliance with housing codes); *Skinner v Railway Labor Executives' Assn*, above n 42 (concerning drug and alcohol tests for railway employees).

[46] *Griffin v Wisconsin*, 483 US 868, 873 (1987).

[47] *Indianapolis v Edmond*, 531 US 32 (2000).

[48] *Ibid* at 41–2.

[49] *Ibid* at 42.

probable cause standard and/or warrant requirement, which are subject to a flexible balancing test. However, the list of exceptions functions in an all or nothing manner. For those searches and seizures which do not fall within one of the special categories there is no room for balancing, and the requirements of the Fourth Amendment apply unconditionally.

III. THE RIGHT TO PRIVACY AND COUNTER-TERRORISM MEASURES

It is widely accepted that one of the crucial ingredients for the prevention of terrorism is intelligence.[50] The purpose of intelligence gathering is somewhat different from that of information usually obtained in the course of criminal law enforcement, its primary objective not being the punishment of past crime but the assessment of future threats. Consequently, intelligence operations necessarily differ from criminal investigation in various respects. For instance, they may need to be initiated without there being specific grounds of suspicion or evidence against identifiable persons, and they may be wider in scope and continue for longer periods of time than ordinary investigations. The question accordingly arises whether the privacy standards for the collection of information about terrorism differ from those applicable to normal criminal investigations. This part will be concerned with three investigative techniques commonly used to fight ordinary crime, and closely associated with intelligence gathering operations: electronic surveillance, physical searches and seizures, and the use of undercover agents.

A. Electronic Surveillance

Electronic surveillance is a broad term that refers to a variety of investigative measures. Surveillance can be defined as the monitoring of a person or group's activities; while the word 'electronic' indicates that electronic equipment is used by the agency conducting the monitoring.[51] Electronic surveillance measures typically occur without the knowledge of the target (secret or covert surveillance). There are many types of secret electronic surveillance, involving different levels of interference with the right to

[50] See, eg, Philip B Heymann, *Terrorism and America, A Commonsense Strategy for a Democratic Society* (Cambridge, Mass., MIT Press, 2001) 79–105 and 129–53.

[51] Cameron, above n 1 at 751.

privacy.[52] Examples are telephone tapping, bugging, and video surveillance. The first part of this section sketches the general privacy principles pertaining to surveillance measures in the context of ordinary criminal law enforcement. In the second subsection the focus shifts to the standards that apply when electronic surveillance is used as a means to gather intelligence about terrorism.

i. General Standards

a. The European Convention

The Article 8 standards for electronic surveillance were developed in *Malone v United Kingdom* and in the twin cases of *Huvig* and *Kruslin v France*.[53] When reviewing electronic surveillance in subsequent cases, the court has consistently invoked the principles set out in these three landmark decisions. The first issue to be resolved is whether electronic surveillance amounts to an interference with the right to privacy. *Malone*, *Huvig*, and *Kruslin* all concerned the interception of telephone conversations by police authorities. In the Strasbourg Court's view, such measures interfere with the right to respect for both correspondence and private life.[54] In subsequent cases a number of other types of electronic surveillance activities were found to interfere with one or more Article 8 interests. Examples include the use of covert listening devices (bugging),[55] covert video and audio recording,[56] the recording of a person's voice,[57] the interception of pager messages[58] and telephone metering (ie the gathering of information on called numbers).[59] As far as the secret surveillance of conversations or activities taking place in a public setting is concerned (eg,

[52] Cameron, above n 1 at 751, distinguishes nine types of secret state surveillance: interception of letters and parcels (falling outside the category of electronic surveillance), bugging (the use of a listening device), secret video surveillance, participant audio surveillance (the monitoring of a conversation in which the monitor participates), participant video surveillance, the monitoring of the content of telecommunications (eg, telephone tapping and opening of e-mails), metering information, obtaining location information and data collation (gathering information from data banks).

[53] *Malone v UK* Series A no 82 (1984); *Huvig v France* Series A no 176-B (1990); *Kruslin v France* Series A no 176-B (1990).

[54] Eg, *Malone v UK*, previous n at para 67. Some other telephone tapping cases include: *Halford v UK*, above n 11; *Kopp v Switzerland* Reports 1998-II (1998); *Valenzuela Contreras v Spain* Reports 1998-V (1998); *Lambert v France* Reports 1998-V (1998); *Amann v Switzerland* Reports 2000-II (2000); *Prado Bugallo v Spain*, 18 February 2003; *Doerga v The Netherlands*, 27 April 2004.

[55] Eg, *Khan v UK* Reports 2000-V (2000); *Chalkley v UK*, 12 June 2003; *Lewis v UK*, 25 November 2003.

[56] Eg, *Allan v UK* Reports 2002-IX (2002); *Perry v UK* Reports 2003-IX (2003).

[57] Eg, *PG and JH v UK*, above n 6.

[58] Eg, *Taylor-Sabori v UK*, 22 October 2003.

[59] Eg, *Malone v UK*, above n 53; *PG and JH v UK*, above n 6.

in a police station), the case law suggests that privacy issues will arise only where such conversations or activities are recorded in a systematic or permanent way.[60]

Having established an interference, the Strasbourg Court turns its attention to the legality and democratic necessity of the surveillance measures. A remarkable feature of the electronic surveillance jurisprudence is the court's policy of considering the compatibility of such measures with Article 8, primarily under the heading of 'in accordance with the law', rather than applying the democratic necessity test. In linking that requirement with the rule of law, the court requires that an individual be given adequate protection by domestic law 'against arbitrary interference by public authorities with the rights safeguarded by paragraph 1 [of Article 8]'.[61] Against this background, the court laid down a number of conditions relating to the quality of legislation governing electronic surveillance, in particularly as regards the foreseeability of these measures.

In *Malone*, the interception of private communications did not satisfy the standard of foreseeability, as it was regulated only by administrative practice, which was vague and open to different interpretations. As a starting point, the court accepted the respondent government's contention that the condition of foreseeability must be interpreted more lenient in the context of secret surveillance. It observed that

> the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly.[62]

However, the court immediately added that foreseeability implies that the domestic law

> must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.[63]

It concluded that 'the law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public

[60] *PG and JH v UK*, above n 6 at para 57: 'Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing the scene through closed-circuit television monitoring) is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain.'

[61] *Malone v UK*, above n 53 at para 67.

[62] *Ibid*.

[63] *Ibid*.

authorities'.[64] In *Huvig* and *Kruslin*, the court further refined its interpretation of the 'in accordance with the law' requirement. At issue was French statute and case law which empowered senior police officers to carry out telephone tapping under a warrant issued by an investigative judge. At the outset, the court observed that the interception of telephone communications amounts to a serious interference with the right to respect for private life and correspondence, and must accordingly be based on a law that is 'particularly precise'.[65] The court continued to hold that, in view of the increasingly sophisticated technology available, it is essential to have clear and detailed rules on the subject. These were lacking in the French practice, which granted the investigating judge unlimited discretion to order all surveillance measures deemed useful to establish the truth. The Strasbourg Court took the opportunity to list a number of minimum safeguards that should be secured in domestic law in order to avoid possible abuses of power.[66] In a more recent judgment these safeguards were summarised as follows:

> [A] definition of the categories of people liable to have their telephones tapped by judicial order, the nature of the offences which may give rise to such an order, a limit on the duration of telephone tapping, the procedures for drawing up the summary reports containing intercepted conversations, the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and by the defence and the circumstances in which recordings may or must be erased or the tapes destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court.[67]

The test of foreseeability will be met only if each of these safeguards is included in the domestic law governing telephone tapping.[68] Although the court has referred to the telephone-tapping cases when considering other types of electronic surveillance, it has not had the opportunity to expound on the safeguards which are required in those cases. It has been submitted that all measures involving a similar, or higher, level of interference with privacy, must comply with the *Huvig* and *Kruslin* requirements.[69] According to the court, 'what is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in

[64] *Ibid* at para 79. The court stated that 'since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power.' (*ibid* at para 68).

[65] *Huvig v France*, above n 53 at para 32; *Kruslin v France*, above n 53 at para 33.

[66] *Huvig v France*, above n 53 at para 34; *Kruslin v France*, above n 53 at para 35.

[67] *Valenzuela Contreras v Spain*, above n 54, para 46.

[68] See, eg, *ibid* at para 59.

[69] Cameron, above n 1 at 105.

question'.[70] Thus, for instance, the practice of metering is subject to different, less demanding, conditions than telephone tapping, as it only involves information on numbers called from a specific phone, not about the contents of those calls.[71]

Once it has been established that an interference is not 'in accordance with the law', the court does not generally proceed to consider whether the surveillance activities are necessary in a democratic society for one of the purposes listed in paragraph 2 of Article 8. In *Malone*, the court acknowledged that powers to intercept communications to aid the police in investigating and detecting crime 'may be' necessary in a democratic society for the prevention of disorder or crime.[72] However, as the British legislation did not satisfy the standard of foreseeability, the issue was not further examined. Judge Pettiti regretted this approach. He would have liked to see the court take position on the other issues arising under Article 8 s 2. Pettiti opined that the British system, which placed the power to intercept communications within the sole discretion of the executive, could not be regarded as necessary in a democratic society, even if it would have contained detailed rules on the manner in which that power is to be exercised. As far as criminal law enforcement is concerned, there is only one case in which the court reached the question of necessity. In *Lambert v France*, it was faced with a telephone tap executed after the French legislation had been remedied in accordance with the findings of *Huvig* and *Kruslin*.[73] The court held that, in order to decide on the democratic necessity of electronic surveillance, it will ascertain whether those measures are surrounded by 'effective control'.[74] What constitutes effective control varies according to the specific circumstances of the case. An important issue is whether effective control requires the involvement of a judge or a judicial body. In this respect, it may be recalled that one of the safeguards named in *Huvig* and *Kruslin* is a legal definition of 'the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order'.[75] The reference to a 'judicial order' seems to hint at a requirement of prior approval by a judge.[76]

[70] *PG and JH v UK*, above n 6 at 46.

[71] *Ibid*.

[72] *Malone v UK*, above n 53 at para 81. The court attached some weight to the government's assertion that in Great Britain 'the increase of crime, and particularly the growth of organised crime, the increasing sophistication of criminals and the ease and speed with which they can move about have made telephone interception and indispensable tool in the investigation and prevention of serious crime.' (*ibid*).

[73] *Lambert v France*, above n 54.

[74] *Lambert v France*, above n 54 at paras 33 and 34.

[75] *Huvig v France*, above n 53 at para 34; *Kruslin v France*, above n 53 at para 35.

[76] See also *Klass and others v Germany* Series A no 28 (1978). *Klass* concerned electronic surveillance conducted for national security purposes and is examined below. At this point it

b. The US Constitution

In the first major electronic surveillance case, *Olmstead v United States*, the Supreme Court held that wire-tap surveillance did not amount to a search and seizure and, therefore, was not governed by the Fourth Amendment.[77] Relying on the physical trespass doctrine, the court treated telephone tapping as falling outside the purview of the Fourth Amendment, because it did neither involve unlawful entry into the victim's house nor a search or seizure of material things.[78] The physical trespass doctrine was also applied in bugging cases. For example, in *Goldman v United States*, the court found that the use of a detectaphone placed against a wall in order to hear private conversations in the office next door, did not raise any Fourth Amendment issues.[79] The trespass doctrine adopted in *Olmstead* was vigorously criticised in a dissenting opinion by Justices Brandeis, who argued that every unjustifiable encroachment by the government on the privacy of the individual amounts to a violation of the Fourth Amendment.[80] He stated that

> [t]he evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard.[81]

The trespass doctrine and the underlying private property rationale were abandoned in 1967, in *Katz v United States*.[82] As previously noted, this case concerned the interception and recording of telephone conversations

can be observed that the *Klass* court appears to have contemplated a requirement of judicial supervision, at least as far as ordinary law enforcement is concerned: 'One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.' (*ibid* at para 55).

[77] *Olmstead v United States*, above n 2.

[78] Chief Justice Taft, writing for the court, observed that 'the language of the amendment cannot be extended to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.' (*ibid* at 465).

[79] *Goldman v United States*, 316 US 129 (1942).

[80] *Olmstead v United States*, above n 2 at 474 (holding that 'the progress of science in furnishing the Government with means of espionage is not likely to stop with wire tapping'). Justice Brandeis cautioned that '[e]xperience should teach us to be most on our guard to protect liberty when the government's purpose are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.' (*ibid* at 479).

[81] *Olmstead v United States*, above n 2 at 475.

[82] *Katz v United States*, above n 3 at 351.

by means of a listening device attached to the outside of a public telephone booth. In the court's opinion, the underpinnings of *Olmstead* and *Goldman* had been so eroded by subsequent decisions that the trespass doctrine could no longer be regarded as controlling. It concluded that

> [t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.[83]

Pursuant to *Katz*, electronic surveillance measures interfering with a person's reasonable expectation to privacy must comply with the requirements of the Fourth Amendment. In addition to telephone tapping, bugging[84] and covert video surveillance of private premises are covered by the Fourth Amendment.[85] Video surveillance of public places, by contrast, is unlikely to be characterised as a Fourth Amendment search.[86] Contrary to the European Court's approach under Article 8, the use of a pen register—a device to record the numbers dialled on a telephone—is not constrained by the Fourth Amendment safeguards. In *Smith v Maryland*, the Supreme Court ruled that the applicant had 'no actual expectation of privacy in the phone numbers he dialled, and that, even if he did, his expectation was not "legitimate"'.[87]

The next issue to be considered is how the Fourth Amendment protections have been applied in relation to electronic surveillance measures. The Fourth Amendment states that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'. The first requirement is that a warrant be obtained in order to engage in electronic surveillance activities. A warrant must not necessarily be issued by a lawyer or a judge.[88] According to the Supreme Court's settled case law, the judicial officer or magistrate issuing the warrant must meet two tests: 'he must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search.'[89] This

[83] *Ibid* at 352.
[84] Eg, *Dalia v United States*, 441 US 238 (1979).
[85] See, eg, *United States v Torres*, 751 F.2d 875 (7th Cir 1984); *United States v Biasucci*, 786 F.2d 504 (2d Cir 1986); *United States v Cuevas-Sanchez*, 821 F.2d 248 (5th Cir 1987). See Joyce W Luk, 'Identifying Terrorists: Privacy Rights in the United States and United Kingdom' (2002) 25 *Hastings International and Comparative Law Review* 223, 238–41.
[86] Luk, above n 85 at 245.
[87] *Smith v Maryland*, above n 26 at 745.
[88] See, eg, *Shadwick v City of Tampa*, 407 US 345, 350 (1972).
[89] *Ibid*.

implies that the person or body authorising the surveillance and determining probable cause must be independent of the police and prosecution.[90] The nature of the probable cause standard was discussed at length in chapter five.[91] According to the settled definition, probable cause is based upon evidence that establishes more than 'a mere suspicion' that a crime has been or is being committed by the target of surveillance.[92] It exists where

> the facts and circumstances within (…) [the police officers'] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.[93]

It has been argued that due to the highly privacy-intrusive nature of certain types of electronic surveillance, only the most rigorous standard of probable cause can justify them.[94] Thus, in *Berger v New York*, the court observed that an apparently more lenient standard, permitting the installation of a bugging device when 'there is reasonable ground to believe that evidence of crime may be obtained', raised serious probable-cause questions under the Fourth Amendment.[95]

In addition to probable cause and the warrant requirement, the Fourth Amendment has been read so as to impose certain procedural safeguards on electronic surveillance measures. The court commented on this issue in *Berger v New York*, in which it struck down an eavesdropping statute that provided for a 'blanket grant of permission to eavesdrop (…) without adequate judicial supervision or protective procedures'.[96] Firstly, the New York statute was at odds with the Fourth Amendment command that a warrant must 'particularly [describe] the place to be searched, and the persons or things to be seized'. The court observed that '[b]y its nature eavesdropping involves an intrusion on privacy that is broad in scope', and that therefore '[t]he need for particularity is (…) especially great in the case of eavesdropping'.[97] The statute under review did not meet this condition of 'particularity': eavesdropping was authorised without requiring belief that any particular offence had been committed, or that the property

[90] See *Johnson v United States*, 333 US 10, 14 (1948) (deciding that the Fourth Amendment protection consists in requiring that inferences of probable cause 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime').

[91] See ch 5, section III.

[92] See, eg, *Brinegar v United States*, 338 US 160, 175 (1949).

[93] *Ibid* at 176.

[94] *Berger v New York*, 388 US 41, 69 (1967) (Stewart, J, concurring).

[95] *Ibid* at 54–5.

[96] *Ibid* at 60.

[97] *Ibid* at 56.

sought, ie the conversation, be particularly described.[98] A second point of criticism was that the statute authorised surveillance for a two-month period, 'the equivalent of a series of intrusions, searches and seizures pursuant to a single showing of probable cause'.[99] The court reasoned that there should be 'precise and discriminate' procedures in place to minimise the interception of conversations that are unconnected to the crime that is under investigation.[100] A final defect of the statute considered in *Berger* was that it had no requirement for notice as do conventional warrants. While the court explicitly acknowledged that success of surveillance activities depends on secrecy, it criticised the statute's procedure for not compensating the lack of notice 'by requiring some showing of special facts'.[101] Finally, besides the Fourth Amendment standards, ordinary law enforcement surveillance must comply with the statutory requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[102] Much of Title III was drawn to meet the constitutional standards for electronic surveillance set out in *Katz* and *Berger*.[103]

[98] *Ibid* at 58–9 (noting that the statute's failure to describe with particularity the conversations sought gave the officers 'a roving commission to "seize" any and all conversations'). In a dissenting opinion Justice White contended that electronic surveillance is no more general than a physical search in a described area: 'Petitioner suggests that the search is inherently overbroad because the eavesdropper will overhear conversations which do not relate to criminal activity. But the same is true of almost all searches of private property which the Fourth Amendment permits. In searching for seizable matters, the police must necessarily see or hear, and comprehend, items which do not relate to the purpose of the search.' (*ibid* at 108). The lower courts have consistently held that secret surveillance is not rendered unconstitutional solely because it lasted for several days and encompassed different conversations. See LaFave, Israel and King, above n 14 at 264.

[99] *Berger v New York*, above n 94 at 60.

[100] *Ibid* at 58.

[101] *Ibid* at 60, observing that '[s]uch a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized'. The lower courts have rejected constitutional challenges to electronic surveillance legislation based on a lack of notice. See LaFave, Israel and King, above n 14 at 264–265.

[102] 18 USCA. ss 2510–20.

[103] For an overview of the statutory scheme, see LaFave, Israel and King, above n 14 at 261–3. Title III authorises federal judges to order interception of wire or oral communications when such interception may provide evidence of certain enumerated federal crimes. An interception order may be issued only if there is probable cause for belief that an individual is committing, has committed, or is about to commit one of the listed offences. Further, there must be probable cause that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed. The interception order must contain specific information such as the identity of the person whose communications are to be intercepted, and the nature of the communications facilities as to which, or the place where, authority to intercept is granted. In addition, interception may not be allowed for any period longer than necessary, with a maximum of thirty days. In emergency situations interception without prior judicial authorisation is permitted, but application for an order must be made within 48 hours. Finally, Title III provides a system of post factum notice.

c. Concluding Remarks

While the courts in both jurisdictions recognise that electronic surveillance may amount to an interference with the right to privacy, the general standards with which ordinary law enforcement surveillance must comply vary significantly in the two systems. The specific Fourth Amendment requirements for a valid search—a warrant, probable cause and particularity—are not found in the text of Article 8, and have not (yet) been read into that provision by the Strasbourg Court. Rather than describing the conditions for a valid surveillance measure, the court has focused its attention on the minimum safeguards national legislation authorising electronic surveillance must contain in order to be consistent with Article 8. One can nevertheless discern important similarities between the two systems studied. The Fourth Amendment requirements and the *Huvig* and *Kruslin* safeguards seem to be inspired by the same underlying concerns, namely the need to limit and minimise surveillance to information on specific criminal activity, and to subject such measures to control by someone independent of the person or agency carrying out the surveillance. Thus, for instance, while the European Court has not articulated a standard for approval similar to probable cause, the requirement of 'a definition of the nature of the offences which may give rise to a surveillance order' presupposes that electronic surveillance be restricted to persons suspected of involvement in certain criminal offences. In addition, the court's insistence in *Huvig* and *Kruslin* that domestic law include a time limit and a definition of the possible targets of surveillance, has a certain resemblance to the particularity and duration concerns raised by the Supreme Court in *Berger*, and later incorporated in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Finally, the case law of both the European Court and the Supreme Court reveals a preference for prior judicial supervision of ordinary law enforcement surveillance.

ii. Exceptional Standards in the Fight against Terrorism

a. The European Convention

Most Member States of the Council of Europe enacted specific legislation dealing with intelligence gathering for national security purposes, including the fight against terrorism.[104] In some European countries electronic

[104] A systematic discussion of this legislation is beyond the purpose of this chapter. For a survey of national practice and legislation on special investigation techniques in the Member States of the Council of Europe, see Philippe De Koster, *Terrorism: Special Investigation Techniques* (Strasbourg, Council of Europe Publishing, 2005). For additional information and references, see the country reports in Christian Walter *et al* (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin, Springer, 2004).

surveillance powers were extended in the aftermath of the September 11 attacks, for instance to cover new forms of communication technology.[105] Since the 1978 landmark decision in *Klass and others v Germany*, the Convention organs accept that the public interest in combating terrorism may justify the use of electronic methods of secret surveillance.[106] The complaint concerned a statute empowering the German authorities to open and inspect mail and post, to read telegraphic messages, and to listen to and record telephone conversations with the aim of protecting national security.[107] The statute, which is still in force in an amended version today, is known as the 'G 10' (referring to its constitutional basis in article 10 of the German Constitution). At the outset of the *Klass* judgment, the Strasbourg Court took 'judicial notice' of two important facts:

> The first consists of the technical advances made in the means of espionage and, correspondingly, of surveillance; the second is the development of terrorism in Europe in recent years. Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the state must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interest of national security and/or for the prevention of disorder or crime.[108]

Having established that the Contracting States enjoy a certain margin of appreciation ('a certain discretion') with regard to the conditions under which a system of secret surveillance is to be operated, the court in *Klass* went on to provide the following often-quoted cautionary note: 'The court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate'.[109] These quotations from the *Klass* judgment indicate that the Convention organs are prepared to lend some weight to the special background of terrorism in their assessment of electronic surveillance measures under Article 8.

[105] See Heike Krieger, 'Limitations on Privacy, Freedom of the Press, Opinion and Assembly as a Means of Fighting Terrorism' in Christian Walter Walter *et al* (eds), previous n at 8.

[106] *Klass and others v Germany*, above n 76.

[107] At the relevant time, art 1 of the statute authorised surveillance to protect against 'imminent dangers' threatening the 'free democratic constitutional order', the 'existence or the security of the Federation or of a Land', 'the security of the (allied) armed forces' stationed on the territory of the Republic and the security of 'the troops of one of the Three Powers stationed in the Land of Berlin'. *Ibid* at para 17.

[108] *Ibid* at para 48.

[109] *Ibid* at para 49.

However, because *Klass* was decided before the court developed its jurisprudence on electronic surveillance within the context of ordinary criminal law enforcement the question arises whether the Contracting States are bound by the principles set forth in *Malone*, *Huvig* and *Kruslin*, when they provide for electronic surveillance aimed at countering terrorism. Interestingly, Judge Pettiti, in his concurring opinion in *Malone*, suggested that it may be justified to draw a distinction between the dangers of 'a crisis situation caused by terrorism', and the problem of 'ordinary criminality', and hence to adopt different sets of surveillance standards.[110] More particularly, he observed that, 'in so far as the prevention of crime under the ordinary law is concerned', it is difficult to see a reason for not providing judicial control, thus intimating that the same might not be true when the purpose of surveillance is the prevention of terrorism. In the years following *Klass,* the European Commission declared inadmissible a number of complaints directed against electronic surveillance activities conducted under national security legislation. However, it is not until its inadmissibility judgment in *Weber and Saravia v Germany* (considering an amended version of the G 10 Act) in 2006 that the court had the opportunity to fully elaborate on the principles governing anti-terrorism intelligence gathering in the light of *Malone*, *Huvig* and *Kruslin*.[111] The following paragraphs examine the extent to which the standards developed in these decisions differ from the rules governing ordinary law enforcement surveillance.

Quality of the law

A first important issue relating to the quality of the law concerns the grounds on which the collection of information by means of electronic surveillance can be ordered. As far as ordinary law enforcement is concerned, the court requires the domestic law to contain a definition of the categories of people liable to surveillance by judicial order, and the nature of the offences which may give rise to such measures.[112] Within the context of national security, the European Court and the Commission have accepted fairly low standards as regards the legal definition of the

[110] *Malone v UK*, above n 53.

[111] *Weber and Saravia v Germany*, 29 June 2006. The only case on national security surveillance that reached the court before *Weber and Saravia* gives little guidance. In *Amann v Switzerland*, the court dealt with Swiss legislation that gave unlimited discretion to the police to engage in the 'surveillance and prevention of acts liable to endanger the Confederation's internal or external security'. In the court's opinion, such blanket authorisation was in breach of the Convention, as it contained 'no indication as to the persons concerned by such measures, the circumstances in which they may be ordered, the means to be employed or the procedures to be observed'. See *Amann v Switzerland*, above n 54 at para 58.

[112] *Huvig v France*, above n 53 at para 34; *Kruslin v France*, above n 53 at para 35.

intelligence agencies' competence to engage in electronic surveillance.[113] Thus, for instance, the German legislation under review in *Klass* confined surveillance measures to cases in which there are 'factual indications' for suspecting a person of planning, committing or having committed certain serious crimes against national security.[114] As Cameron observed, the term 'factual indications', although mentioned by the court as a factor limiting the interference, is a far less demanding standard than say 'probable cause' or 'reasonable suspicion'.[115] In addition, a number of national security offences listed in the G 10, such as membership in a criminal organisation, were broadly defined. The amended version of the G 10 Act which was before the court in *Weber and Saravia*, permitted the strategic monitoring (as opposed to monitoring of individuals) of international wireless communications 'in order to collect information about which knowledge was necessary for the timely identification and avoidance of certain dangers', including 'the commission of international terrorist attacks in the Federal Republic of Germany'.[116] In the court's opinion, this is a sufficiently 'clear and precise' definition of an 'offence' for the purposes of Article 8.[117] However, of particular importance was the fact that the German legislation clearly indicated which categories of persons were liable to have their telecommunications intercepted: the persons concerned had to have taken part in an international wireless telephone conversation, had to have used catchwords capable of triggering an investigation into one of the listed dangers or had to be foreign nationals or companies.[118]

In *Mersch and others v Luxembourg*, the Commission dealt with a provision in the Luxembourg Code of Criminal Procedure permitting telephone tapping and bugging for the purpose of detecting 'offences against the external security of the state'.[119] The Commission rejected the applicant's complaint that the latter notion was too vague, as it related only to a limited number of offences explicitly mentioned in the Criminal Code. The situation is different in the United Kingdom. Both the Interception of Communications Act 1985 and the Security Service Act 1989 empower the Secretary of State to order secret surveillance in the interest of national security and to protect the state against threats of espionage, terrorism and sabotage.[120] In a series of cases the Commission confronted

[113] See also Cameron, above n 1 at 123–4.
[114] *Klass and others v Germany*, above n 76 at para 17.
[115] Cameron, above n 1 at 110.
[116] *Weber and Saravia v Germany*, above n 111 at para 27.
[117] *Ibid* at para 96.
[118] *Ibid* at para 97.
[119] *Mersch and others v Luxembourg* Application nos. 10439–41/83, 10452/83 and 10512–3/83, 43 *DR* 78 (1985).
[120] The Interception of Communications Act 1985 permits warrants for interception of communications, inter alia in the interest of national security. The Security Service Act 1989 allows interference with property (eg, bugging) if it is 'likely to be of substantial value' in

the question whether these grounds were not too broad and vague to meet the test of foreseeability. This contention was rejected. According to the Commission, foreseeability does not require a comprehensive definition of such notion as 'the interest of national security'. It held that

> [m]any laws, which by their subject-matter require to be flexible, are inevitably couched in terms which are to a greater or lesser extent vague and whose interpretation and application are questions of practice.[121]

In *Christie v United Kingdom*, a case concerning the alleged interception of telexes send form East European trade unions to a Scottish trade union, the Commission further took into account that, while the term 'national security' was not expressly defined, its meaning became clear from 'executive statements and instructions'.[122] Accordingly, the requirement of foreseeability was satisfied.[123]

A second point relating to the quality of the law concerns the minimisation requirements adopted in *Huvig* and *Kruslin*.[124] The court insists, for instance, that the domestic law lays down rules guaranteeing that the recordings of telephone taps are communicated intact and in their entirety, for possible inspection by a judge and the defence. In addition, the domestic law must indicate the circumstances in which the recordings may or must be destroyed, particularly when the accused is acquitted. An important question arising in this last respect, and relevant in the context of national security surveillance, is the handling of so-called surplus information. Surplus information is a term used for information on activities other than the activity being investigated.[125] Most laws on security surveillance provide for the screening of information obtained and the subsequent destruction of surplus information.[126] In the court's view,

assisting the Security Service to discharge any of its functions. One of those functions is 'the protection of national security and, in particular, (…) [the] protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.'

[121] *Esbester v UK* Application no 18601/91, 18 *EHRR* 72 (1993); *Redgrave v UK* Application no 20271/92 (1993); *Hewitt and Harman* Application no 12175/86, 67 *DR* 88 (1993).

[122] *Christie v UK* Application no 21482/93, 78 *DR* 119, 134 (1994) (referring to the discussion of the notion in two annual reports drafted by a special Commissioner appointed under the 1985 Act).

[123] Cameron, above n 1 at 118 criticised this conclusion because the remarks made by the Commissioner did not, in fact, further specify the term 'national security'. He further questioned whether 'executive statements' can rightly be subsumed under the notion 'law'.

[124] *Huvig v France*, above n 53 at para 34; *Kruslin v France*, above n 53 at para 35.

[125] Cameron, above n 1 at 84.

[126] In his comprehensive work on security surveillance, Cameron cautions that rules on destruction of surplus information may have little consequence in practice. He observes that national security operations are not necessarily designed to amass evidence for criminal prosecution, and that, as a consequence, almost all information on a suspected person or

such measures are important safeguards limiting the possibility of abuse. For example, in *Klass* the court took notice of the fact that initial control of the information obtained was carried out by an official qualified for judicial office.[127] The supervising official was under the obligation to transmit to the competent authorities only the information relevant for the purpose of national security, and to destroy all the other information obtained. Similar minimisation requirements provided in the amended version of the G 10 Act were highlighted in *Weber and Saravia*. The Act required the destruction of personal data as soon as they were no longer necessary to achieve their statutory purpose, and the verification every six months of whether the conditions of such destruction were met.[128]

Likewise, the Commission in *Christie* attached significance to a provision in the Interception of Communications Act 1985 that required the destruction of information no longer necessary for the purpose of the Act.[129] Yet, the 1979 Commission decision in *A, B, C and D v Germany* discloses a deferential stance towards the handling of surplus information.[130] The applicants were all journalists whose telephone conversations with a lawyer had been tapped and recorded. The latter was suspected and later accused of promoting terrorism. A request by the applicants to destroy all recordings and documents relating to the conversations was rejected by the domestic courts, on the basis that the apparently irrelevant conversations might later have turned out to be of importance. According to the Commission, the retention of the information for a long period was not in breach of Article 8, taking into account the fact that the accused was suspected of 'the spreading of terrorist propaganda aimed at incitement to violent revolution'.[131]

Effective Control

The Strasbourg organ's review of the democratic necessity of electronic surveillance essentially boils down to an assessment of the procedures for authorising and supervising surveillance measures and the post hoc remedies available against them. In this respect, neither the court nor the Commission have drawn a sharp line between prior control and a posteriori review. Rather, a conclusion is reached on the basis of an overall

group may be of potential relevance. The author fears that in the absence of a cut-off point at which information ceases to be relevant, there may be no effective control over the information other than that of administrative convenience. See Cameron, above n 1 at 125.

[127] *Klass and others v Germany*, above n 76 at para 52.

[128] *Weber and Saravia v Germany*, above n 111 at paras 99–100 and 132.

[129] *Christie v UK*, above n 122 at 134–5.

[130] *A, B, C and D v Germany* Application no 8290/78, 18 *DR* 176 (1979).

[131] *Ibid* at 180.

examination of the safeguards available in a given system.[132] It may be recalled that Article 8 jurisprudence in the field of ordinary criminal law enforcement evidences a preference for some form of judicial supervision, be it when surveillance is initiated or at a later stage of the procedure. As the following discussion illustrates, the Strasbourg organs accept alternative methods of 'effective control' when confronted with national security surveillance. It is telling in this regard that no reference is made in the national security surveillance cases to a 'judicial order' under the 'quality of law' prong.[133]

The German system of national security surveillance examined in *Klass* explicitly excluded any form of judicial control. Instead, the law established administrative procedures at the authorising stage, and a specific system of post hoc control.[134] Surveillance measures were ordered on written application giving reasons, either by a federal Minister appointed by the Chancellor, or by the supreme Land authority for cases falling within the latter's jurisdiction. The implementation of the measures was supervised by an official qualified for judicial office. As far as the system of post hoc control is concerned, the G 10 law established two supervisory bodies: the G 10 Board, composed of five Members of Parliament appointed by the Bundestag in proportion to the parliamentary groupings; and the G 10 Commission, consisting of three members appointed by the G 10 Board after consultation with the government. The competent Minister was required to report to the Board on the application of the G 10 law at least every six months. In addition, the Minister was under the obligation to provide the G 10 Commission with an account of the measures he had ordered monthly. In reality, the Minister sought prior consent of the G 10 Commission, except in urgent cases. Finally, the G 10 Commission decided, ex officio or on application by a person believing himself to be under surveillance, on both the legality of and the necessity of the measures.

In the applicants' contention, such a system of 'political control' was insufficient for the purposes of Article 8 s 2.[135] The court, for its part, emphasised that 'it is in principle desirable to entrust supervisory control to a judge', but found that in the instant case the absence of judicial control did not amount to a violation of Article 8. It held that the G 10 Board and Commission were independent of the authorities carrying out the surveillance, and were vested with sufficient powers and competence to

[132] Cameron, above n 1 at 127.

[133] *Weber and Saravia v Germany*, above n 111 at para 95.

[134] The following discussion of the G 10 is based on *Klass and others v Germany*, above n 76 at paras 14–25. For subsequent changes see, eg, Cameron, above n 1 at 110–13 and 127–32; Markus Rau, 'Country Report on Germany' in Christian Walter *et al* (eds), above n 104 at 311–63.

[135] *Klass and others v Germany*, above n 76.

exercise effective control.[136] In reaching this conclusion, the court had regard to the democratic character of the two supervisory bodies, particularly the fact that members of the opposition were represented on the Board. In sum, both bodies could, 'in the circumstance of the case, be regarded as enjoying sufficient independence to give an objective ruling'.[137] The majority of the court was criticised on this point by Judge Farinha, who invoked the doctrine of the separation of powers to warn against a system 'in which a political authority may decide by itself whether there exist factual indications that criminal acts are about to be or are in the course of being committed'. When the court considered the amended version of the G 10 Act in *Weber and Saravia*, the German system of authorisation and supervision again satisfied the democratic necessity test, despite the considerable extension of the range of subjects in respect of which strategic monitoring could be ordered.[138]

Another aspect of effective control concerns the question of subsequent notification. In *Klass*, the court remarked that the possibility of post hoc recourse to a court is to a certain extent illusionary if the individual concerned is not informed about the measures secretly taken against him.[139] Nonetheless, the court was prepared to accept the respondent government's submission that it was difficult in practice to require subsequent notification in all cases. Pursuant to a ruling of the Federal Constitutional Court, the German system required notification only when it could be made without jeopardising the intelligence operation. The European Court upheld this compromise giving the following reasons:

> The activity or danger against which a particular series of surveillance measures is directed may continue for years, even decades, after the suspension of those measures. Subsequent notification to each individual affected by a suspended measure might well jeopardise the long-term purpose that originally prompted the surveillance. Furthermore (…) such notification might serve to reveal the working methods and fields of operation of the intelligence services and even possibly to identify their agents. In the Court's view, in so far as the 'interference' resulting from the contested legislation is in principle justified under Article 8 § 2, the fact of not informing the individual once surveillance has ceased cannot itself be incompatible with this provision since it is this very fact which ensures the efficacy of the 'interference'.[140]

However, as the court added in *Weber and Saravia*:

[136] *Ibid* at para 56.
[137] *Ibid*.
[138] *Weber and Saravia v Germany*, above n 111 at paras 115 and 117.
[139] *Klass and others v Germany*, above n 76 at para 57.
[140] *Klass and others v Germany*, above n 76 at para 58.

> As soon as notification can be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should (…) be provided to the person concerned.[141]

The principles adopted in *Klass* were endorsed by the Commission in a series of inadmissibility decisions. In *Mersch and others v Luxembourg*, the system of authorisation established in the Grand Duchy's legislation was found to afford sufficient guarantees of impartiality.[142] The statute under review vested the power to order electronic surveillance with the president of the government. Yet, the latter was required to seek the assent of a board consisting of the president of the Higher Court of Justice, the chairman of the Litigation Committee of the Council of State, and the president of the Audit Office. With respect to the applicants' complaints about the absence of official notification, the *Mersch* decision recalls the above-mentioned reasoning adopted in *Klass*.[143] Unlike the German system, the Luxembourg legislation excluded any form of notification, even in those cases in which it could be made without jeopardising the purpose of surveillance. Nevertheless, having regard to the specific situation of Luxembourg, there had not been a breach of Article 8. More precisely, the Commission found that a number of factors exposed Luxembourg's external security to increasing dangers: its small territory, the presence of several international organisations with a large diplomatic corps and recent terrorist attacks which had occurred in the country. It further agreed with the government that notification would be liable to disclose the surveillance techniques used.[144]

In *MS and PS v Switzerland*, the Commission reached the conclusion that, 'generally speaking', the Swiss rules on telephone interceptions for the purpose of detecting national security offences complied with the conditions set out in *Klass*.[145] Regard was had to the fact that at the authorising stage, surveillance measures ordered by the Attorney General of the Confederation had to be submitted for approval to the president of the Indictments Chamber of the Federal Court within 24 hours. The fact that judicial control procedures were secret even with respect to the person affected, did not amount to a violation of Article 8. Similarly, in *L v Norway*, the Commission upheld the Norwegian legislation on national security telephone surveillance.[146] In Norway, the authorisation was carried out by a court which examined whether all legal requirements are

[141] *Weber and Saravia v Germany*, above n 111 at paras 135.
[142] *Mersch and others v Luxembourg*, above n 119 at para 116.
[143] *Ibid*.
[144] *Ibid* at para 117.
[145] *MS and PS v Switzerland* Application no 10628/83, 44 *DR* 175 (1985). See also *Spillmann v Switzerland* Application no 11811/85, 55 *DR* 182 (1988).
[146] *L v Norway* Application no 13564/88, 65 *DR* 210 (1990). For a further discussion of the Norwegian legislation see Cameron, above n 1 at 121–3 and 140–41.

fulfilled. Further, an independent Control Commission was set up by the government to investigate complaints by individuals. The Commission concluded that such a system affords adequate and effective guarantees against abuse.

A final group of cases concerned the procedure for national security surveillance in the United Kingdom. In each case the Commission scrutinised the framework of control and declined to find a violation of Article 8.[147] The British Interception of Communications Act 1985 empowered the Secretary of State to issue electronic surveillance warrants. In case of emergency, warrants could be issued by a senior civil servant and confirmed by the Secretary of State. While there was no judicial or parliamentary supervision at the authorising stage, the statute provided for a limited degree of post hoc control. Firstly, a tribunal composed of five lawyers of at least 10 years' experience was empowered to investigate complaints from persons who believed that their conversations had been intercepted. Its competence was limited to the question of whether there had been a violation of the warrant requirement; it could not inquire into the correctness of the Secretary of State's factual assessment.[148] Secondly, the Act provided for the appointment of a senior judge (the Commissioner) to oversee the general application of the Act and make annual reports to the Prime Minister. A broadly similar system of authorisation and control existed under the Security Service Act 1989 for electronic surveillance measures interfering with private property (eg, bugging).

The Commission dealt with two complaints against the British system, namely the limited nature of the examination carried out by the reviewing bodies (the tribunal and the Commissioner), and the lack of reasons for their decisions. The Commission countered the first argument observing that despite the fact that the tribunal did not have jurisdiction to substitute its opinion for that of the Secretary of State, it nevertheless had a supervisory role which included reviewing whether there were reasonable grounds for a particular believe or decision.[149] As to the argument that the tribunal was prevented from giving reasons for its decision, the Commission invoked the decision in *Klass* to point out that the government may

[147] See, eg, *Esbester v UK*, above n 121; *Christie v UK*, above n 122. The following discussion of the British legislation is based on *Christie v UK*, above n 122 at 121–30. For further information, see, eg, Cameron, above n 1 at 114–19 and 132–7.

[148] Applying the principles of judicial review, the tribunal's competence is limited to considering whether the impugned decision is one which a reasonable Secretary of State could have reached. If the Tribunal determined that the statute had been violated, it gave notice of that finding to the applicant, and could make an order quashing the relevant warrant. In other cases, the Tribunal informed the applicant that there had been no violation of the law without giving reasons for that finding.

[149] See, eg, *Christie v UK*, above n 122 at 136; *Esbester v UK*, above n 121.

'legitimately fear that the efficacy of surveillance systems might be jeopardised if information is divulged to the person concerned'.[150] In *Christie v United Kingdom*, the Commission commented on the role of the Commissioner appointed under the 1985 Act. While noting that the latter makes a random selection of warrants to review, the Commission was satisfied that 'his existence must in itself furnish a significant safeguard against abuse'.[151] It further refuted the contention that the absence of successful complaints before the reviewing bodies proved the inefficiency of the system of controls. It concluded on the British legislation that 'the possibility of review by a court or involvement of parliamentarians in supervision would furnish additional independent safeguards to the system'.[152] Yet, in view of the wide margin of appreciation accorded to the Contracting States in this era, the Commission found that the system satisfied the democratic necessity test.

Transmission of Personal Data

In its application of the democratic necessity test in *Weber and Saravia*, the court considered separately the authority of the Federal Intelligence Service to report to the federal government and to a number of German law-enforcement agencies on the results of its monitoring measures. Earlier in the judgment, the court had held that the transmission of data and their use by other authorities constitutes a 'separate interference' with the right to privacy of the individuals concerned, noting that transmission enlarges the group of persons with knowledge of the intercepted data and can lead to criminal investigations being instituted against the persons concerned.[153] The fact that general surveillance without any 'specific prior suspicion' could result in criminal prosecution was considered to be a 'fairly serious interference' with the secrecy of telecommunications.[154] Nevertheless, the court declined to find a violation of Article 8 in view of the limited scope of the power to transmit data and the safeguards against abuse. To begin with, data could be transmitted only in order to prevent or prosecute a limited number of very serious crimes, amongst which were several terrorism-related offences (eg, the formation of terrorist associations).[155] Moreover, the G 10 Act, as interpreted by the Federal Constitutional Court, conditioned the transmission of personal data on the existence of 'specific facts' (as opposed to mere factual indications) arousing the

[150] *Esbester v UK*, above n 121. See also *Christie v UK*, above n 122 at 136.
[151] *Christie v UK*, above n 122 at 137.
[152] *Christie v UK*, above n 122 at 137.
[153] *Weber and Saravia v Germany*, above n 111 at para 79.
[154] *Ibid* at para 125.
[155] *Ibid* at para 126.

suspicion that someone had committed one of the listed offences.[156] Finally, the decision to transmit data could only be made by a staff member of the intelligence service qualified to hold judicial office, and was subject to review by the G 10 Commission.[157]

Concluding Remarks

In several of the cases analysed in the preceding sub-section, the European Court and the Commission emphasised that it is 'inherent in the Convention system' that 'a compromise' be found between the need to defend constitutional democracy and the need to protect the individual's right to privacy.[158] The Strasbourg organs' overall approach to national security surveillance is highly flexible: how the required compromise should be arrived at depends on all the circumstances of the case, including the nature and the scope of the measures involved.[159] Moreover, it is in the first place for the domestic authorities to balance counter-terrorist interests against the seriousness of the interference with the right to privacy. The case law discloses a deferential attitude on the part of the Convention organs, the latter leaving the Contracting States a wide margin of appreciation in the area of national security surveillance.[160] The court summarised its own approach in this area with the observation that the national authorities enjoy 'a fairly wide margin of appreciation in choosing the means for achieving the legitimate aim of protecting national security'.[161]

It is apparent from the cases reviewed in the foregoing, that the aim of preventing and prosecuting national security crimes may justify a departure from the general standards laid down in *Malone*, *Huvig* and *Kruslin*. By reason of the grave threat terrorism poses to national security, the interest of preventing terrorism may justify invasions of privacy beyond those necessary for the investigation of ordinary crime.[162] Thus, as far as the quality of the law is concerned, the obligation to adopt a clear legal definition of the nature of the offences that may give rise to electronic surveillance is interpreted more leniently in relation to national security

[156] *Ibid* at para 127.

[157] *Ibid* at para 128.

[158] See, eg, *Klass and others v Germany*, above n 76 at para 59; *Mersch and others v Luxembourg*, above n 119 at para 117; *L v Norway*, above n 146 at 122; *Esbester v UK*, above n 121.

[159] In *Klass*, the court stated that the assessment of the guarantees against abuse of surveillance powers, 'depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures' (*Klass and others v Germany*, above n 76 at para 50).

[160] See, eg, *Klass and others v Germany*, above n 76 at para 49; *Christie v UK*, above n 122 at 135; *Esbester v UK*, above n 121.

[161] *Weber and Saravia v Germany*, above n 111 at paras 106.

[162] See also Colin Warbrick, 'The Principles of the European Convention on Human Rights and the Response of States to Terrorism' (2002) 3 *European Human Rights Law Review* 287, 307.

surveillance. The case law suggests that generally formulated interests such as 'national security' and 'the prevention of terrorism' may be sufficient grounds to order electronic surveillance activities. With regard to the question of effective control, the Strasbourg organs have shown a readiness to accept something less than judicial supervision. Nonetheless, some form of control and remedies must be available. In practice, a decision as to whether the safeguards against abuse satisfy the democratic necessity test of Article 8 is reached on the basis of an overall examination of the composition and competences of the judicial, quasi-judicial, or political bodies involved.

b. The US Constitution

As with many European countries, the United States established a system of national security surveillance distinct from that of ordinary law enforcement surveillance. The main statutory instrument is the Foreign Intelligence Surveillance Act of 1978 (FISA), which was originally designed to regulate foreign intelligence gathering.[163] The scope, standards, and enforcement mechanism of this statute significantly depart from the general Fourth Amendment strictures and the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. With the enactment of the PATRIOT Act, several changes were made to the original procedures. To understand the controversy surrounding the Act and the post-September 11 amendments, this sub-section first addresses the case law on national security surveillance prior to the enactment of FISA. It proceeds with a brief comparison of the general Fourth Amendment standards and the special FISA surveillance rules. Next, the PATRIOT Act amendments to FISA are examined. The final paragraphs of this subsection reflect on the National Security Agency's warrantless surveillance programme, which was secretly authorised by the President in the wake of the September 11 events.

Constitutional Background

Courts and commentators have disagreed over whether regular Fourth Amendment procedures should apply when national security is at stake.[164] The discussion originated in a footnote in *Katz*, in which the Supreme Court explicitly declined to extend its holding that a warrant is required

[163] 50 USC ss 1801–62.

[164] For academic contributions on national surveillance, see, eg, William C Banks and ME Bowman, 'Executive Authority for National Security Surveillance' (2000) 50 *American University Law Review* 1; Americo R Cinquegrana, 'The Walls (and Wires) Have Ears: the Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978' (1989) 137 *University of Pennsylvania Law Review* 793.

for electronic surveillance to cases 'involving the national security'.[165] In his concurring opinion, Justice White added that the Constitution does not require judicial involvement if electronic surveillance is authorised by the President or the Attorney General for national security reasons.[166] Justice Douglas and Justice Brennan objected White's argument in their own concurrence, arguing that the Fourth Amendment does not allow a different framework for different types of crime:

> Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.[167]

As previously noted, Congress responded to *Katz* by enacting Title III of the Omnibus Crime Control and Safety Streets Act of 1968. Mirroring the Supreme Court's avoidance of the issue in *Katz*, Title III said nothing about electronic surveillance for national security purposes. Congress merely declared that nothing in the Act should be read to affect the constitutional power of the President to protect the country against attacks of foreign powers or against attempts to overthrow the government by force or other unlawful means. The first time a majority of the Supreme Court confronted the tension between executive national security surveillance and the Fourth Amendment was in *United States v United States District Court* (commonly referred to as the 'Keith' case).[168] In *Keith*, the executive used wire-taps to conduct electronic surveillance of several United States citizens suspected of conspiring to destroy government property, including the bombing of a CIA office. The challenged wire-taps were approved by the Attorney General but not by a judicial officer. In the government's contention, the electronic surveillance was a reasonable exercise of presidential power to 'protect the national security' against attacks and subversion by domestic organisations.[169]

Justice Powell, writing for the majority, analysed the question before the court as a conflict between two basic interests: the duty of the government to protect national security on the one hand; the danger posed by surveillance to individual privacy and freedom of expression on the other hand. As to the former, Powell began by noting that

[165] *Katz v United States*, above n 3 at 358, fn 23.
[166] *Ibid* at 364.
[167] *Ibid*.
[168] *United States v United States District Court*, 407 US 297 (1972). The case derives its name form Damon J Keith, the first judge to hear the case.
[169] *Ibid* at 300–1.

> unless Government safeguard its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered.[170]

Powell continued to observe that threats and acts of sabotage against the state may justify secret electronic surveillance with respect to them:

> The covertness and complexity of potential unlawful conduct against the Government and the necessary dependency of many conspirators upon the telephone make electronic surveillance an effective investigatory instrument in certain circumstances. The marked acceleration in technological developments and sophistication in their use have resulted in new techniques for the planning, commission, and concealment of criminal activities. It would be contrary to the public interest for Government to deny to itself the prudent and lawful employment of those very techniques which are employed against the Government and its law-abiding citizens.[171]

Turning to the other side of the scale, Justice Powell placed emphasis on the convergence of First and Fourth Amendment values in the national security context, reasoning that the Fourth Amendment protections become even more important than in cases of ordinary crime.[172] In Powell's opinion, security surveillances is especially problematic because of the inherent vagueness of the 'domestic security' concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilise such surveillances to oversee political dissent.[173]

While language in Powell's majority opinion suggests that the court would balance the two interests at stake under a general reasonableness analysis, it in fact affirmed that the requirements that a warrant issue from a neutral and detached magistrate upon a finding of probable cause fully apply to the investigation of national security crimes.[174] Holding that the definition of 'reasonableness' turns on the more specific commands of the warrant clause—the latter not being 'an inconvenience to be somehow "weighed" against the claims of police efficiency', the court decided that

[170] *Ibid* at 312.
[171] *Ibid* at 311–12.
[172] *Ibid* at 313–14. Powell concluded that '[t]he price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorised official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.' (*ibid* at 314).
[173] *Ibid* at 314 and 320.
[174] *Ibid* at 314–15 (observing that the Fourth Amendment is 'not absolute in its terms'; that it is the court's task to 'examine and balance' the two interests at stake; and that it must answer the question whether a warrant requirement would unduly frustrate the efforts of the Government to protect itself from security threats).

domestic security concerns do not justify a departure from the traditional Fourth Amendment guarantees.[175] In the majority's opinion, an individual's privacy interests

> cannot be properly guaranteed if domestic security surveillance may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates.[176]

Contrary to what the government claimed, post-surveillance judicial review could not remedy the absence of a warrant, as it would never reach surveillance which failed to result in prosecution.[177] Moreover, the court was not persuaded by the argument that internal security matters are too subtle and complex for judicial evaluation:

> Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.[178]

Finally, prior judicial approval was not believed to threaten the secrecy essential to intelligence gathering operations, because courts are used to deal with sensitive information in ordinary criminal cases.[179]

However, the court was not entirely oblivious to the government's security concerns. It acknowledged that domestic security surveillance may involve different 'policy and practical considerations' as compared to surveillance of other types of crime: the gathering of security intelligence is often long range and involves the interrelation of various sources and types of information; the exact targets of such surveillance may be more difficult to identify; and the emphasis of intelligence gathering may be more on the prevention of unlawful activity than on the punishment of past crime.[180] In short, 'the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.'[181] Given the potential distinctions between law enforcement and intelligence gathering, the court was willing to accept different rules and procedures for domestic security surveillance from those prescribed by Title III:

> Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence

[175] *Ibid* at 315–16.
[176] *Ibid* at 316–17.
[177] *Ibid* at 317–18.
[178] *Ibid* at 320.
[179] *Ibid* at 321.
[180] *Ibid* at 322.
[181] *Ibid* at 322.

> information and the protected interests of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.[182]

The controversy over the constitutional parameters of national security surveillance did not end with the court's decision in *Keith*. While the issue was not addressed directly, *Keith* left open whether the traditional Fourth Amendment guarantees apply to foreign intelligence surveillance: 'We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.'[183] Indeed opposing lower court decisions resulted from *Keith*, suggesting that different rules may be justified in cases where the purpose of electronic surveillance is foreign intelligence.[184] Numerous courts accepted the existence of a foreign intelligence exception to the warrant requirement.[185] In one of these cases, *United States v Truong Dinh Hung*, the Fourth Circuit formulated what came to be known as the 'primary purpose' doctrine.[186] It held that the executive is excused from securing a warrant only when surveillance is conducted 'primarily' for foreign intelligence purposes,

> because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.[187]

The Foreign Intelligence Surveillance Act

In 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA), which was created to regulate electronic surveillance of foreign powers and their agents inside the United States.[188] FISA was enacted both as a response to the *Keith* case and the conclusions of the Senate's Church Committee. The latter was set up in the wake of the Nixon administration's abuses of surveillance powers against political opponents (the Watergate scandal) to inquire into the activities of the United States

[182] *Ibid* at 322–3 (quoting *Camara v Municipal Court*, above n 42: 'In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness (…). In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.'

[183] *Ibid* at 321–2.

[184] For an overview, see, eg, Cinquegrana, above n 164 at 804.

[185] *Ibid*.

[186] *United States v Truong Dinh Hung*, 629 F.2d 908 (4th Cir 1980).

[187] *Ibid* at 915.

[188] 50 USC ss 1801–62

intelligence agencies.[189] It reported far-reaching executive interference with citizens' privacy rights through the use of electronic surveillance methods, and recommended the adoption of a statutory framework providing the necessary safeguards.

FISA procedures differ in various respects from the general Fourth Amendment and Title III requirements for electronic surveillance. The Act creates a special court composed of a fixed number of federal district court judges—the Foreign Intelligence Surveillance Court—which is authorised to grant foreign intelligence surveillance orders.[190] Applications for court orders must be submitted by federal officers and require approval by the Attorney General. They must include, inter alia, a certification that the information sought is foreign intelligence information, and that the information cannot reasonably be obtained by normal investigative techniques.[191] In addition, FISA establishes a review court—the Foreign Intelligence Surveillance Court of Review—composed of three federal district court or court of appeal judges, to hear government appeals against rejections of warrant applications by the FISC.[192]

One of the constitutionally most significant differences between FISA and ordinary Title III procedures is the standard for approval of a surveillance order. Under FISA the judge will enter an ex parte order if he finds that there is 'probable cause' to believe that the prospective surveillance target is 'a foreign power' or an 'agent of a foreign power', and that 'each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power'.[193] The definition of a 'foreign power' includes, inter alia, a foreign government, a faction of a foreign nation, an international terrorist group, and a foreign-based political organisation.[194] The term 'agent of a foreign power' includes any person who 'knowingly engages in clandestine intelligence gathering activities' or 'knowingly engages in sabotage or international terrorism, or activities that are in preparation thereof'.[195] As the lower courts have indicated, the FISA probable cause standard is fundamentally different and much looser than the probable cause standard required for electronic surveillance in ordinary criminal investigations.[196] Rather than providing proof of suspicion that the target of surveillance is engaged in criminal activity, the government

[189] For a discussion and references, see, eg, Cinquegrana, above n 164 at 806–7.
[190] 50 USC s 1803(a).
[191] 50 USC s 1804(a).
[192] 50 USC s 1803(b).
[193] 50 USC s 1805(a)(3).
[194] 50 USC s 1801(a).
[195] 50 USC s 1801(b).
[196] See, eg, *United States v Falvey*, 540 F Supp 1306, 1313 (EDNY 1982); *United States v Duggan*, 743 F.2d 59, 73–74 (2d Cir 1984).

must ascertain the identity of the target. With regard to the additional safeguards laid down in *Berger* FISA orders similarly differ from normal Title III warrants. As far as the particularity requirement is concerned, FISA does not require the government to have reason to believe that the surveillance will yield information about a particular crime. Applications for FISA orders need only certify that the information sought is foreign intelligence information. Regarding the duration of the interception, foreign intelligence surveillance may be approved for up to 90 days or 1 year, depending on the nature of the target.[197] Finally, there is no requirement under FISA that the persons whose communications were intercepted be notified after the interception ended.

From the moment of its inception, the constitutionality of FISA has been contested by criminal defendants. To date, none of these cases have reached the Supreme Court. One often-cited example of such a case is *United States v Duggan*.[198] The defendants in *Duggan* were alleged agents of the Provisional IRA who were convicted on the basis of evidence obtained through a FISA surveillance order. The Second Circuit rejected the defendant's constitutional challenges. The court first found that the FISA concepts of national defence, national security and foreign affairs were not overly broad, and that the sections and definitions, applicable to the defendant were 'explicit, unequivocal, and clearly defined'.[199] While acknowledging that the FISA standard of approval is lower than probable cause of criminal activity, the Second Circuit regarded the procedures fashioned in FISA as 'a constitutionally adequate balancing of the individual's Fourth Amendment rights against the nation's need to obtain foreign intelligence information'.[200] The defendants further complained that the surveillance was carried out to obtain evidence for their criminal prosecution. The court, noting that the collection of foreign intelligence information is the 'primary objective' of a FISA surveillance—thus clearly mirroring the pre-FISA ruling in *Truong*—nevertheless rejected the defendant's claim stating that

> otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used (…) as evidence in a criminal trial.[201]

[197] 50 USC s 1805(d).
[198] *United States v Duggan*, above n 196.
[199] *Ibid* at 71.
[200] *Ibid* at 73.
[201] *Ibid* at 78.

Other courts have similarly followed *Truong* and allowed evidence gathered trough FISA surveillance to be used for criminal prosecution, on the condition that foreign intelligence was the primary purpose of the surveillance.[202]

The PATRIOT Act Amendments to FISA

The PATRIOT Act modified electronic surveillance law in various ways.[203] As originally enacted, FISA required the government to certify that 'the purpose' of the investigation was to gather foreign intelligence. Section 218 of the PATRIOT Act expanded FISA to authorise electronic surveillance if 'a significant purpose' is to obtain foreign intelligence information.[204] This minor change of language was intended to allow the government to obtain FISA surveillance orders even when the primary purpose of the investigation is criminal prosecution rather than foreign intelligence gathering. Other PATRIOT Act amendment to FISA include the power to impose electronic surveillance orders against unspecified persons, rather than against specific communications providers (so-called 'roving' surveillance),[205] and the extension of the maximum duration of FISA orders.[206] Soon after their adoption, disputes arose over the constitutionality of the amendments. In the eyes of many, the PATRIOT Act changes signify a significant loss of privacy.[207] Most criticism is focused on the departure from the 'primary purpose' doctrine in section 218. This change would allow the government to sidestep traditional Fourth Amendment safeguards.[208] As explained by Nola Breglio: 'In all cases involving potential foreign agents, prosecutors and agents may now make an end run around

[202] Eg, *United States v Johnson*, 952 F.2d 565 (1st Cir 1991).

[203] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272. For a discussion of the PATRIOT Act amendments to FISA, see, eg, Nola K Breglio, 'Leaving FISA Behind:The Need to Return to Warrantless Foreign Intelligence Surveillance' (2003) 113 *Yale Law Journal* 197; David Hardin, 'The Fuss Over Two Small Words: the Unconstitutionality of the USA Patriot Act Amendments to FISA Under the Fourth Amendment' (2003) 71 *George Washington Law Review* 291; Nathan C Henderson, 'The Patriot Act's Impact on the Government's Ability to Conduct Electronic Surveillance of Ongoing Domestic Communications' (2002) 52 *Duke Law Journal* 179; Patricia Mell, 'Big Brother at the Door: Balancing National Security With Privacy Under the USA Patriot Act' (2002) 80 *Denver University Law Review* 375; Michael P O'Connor and Celia Rumann, 'Going, Going, Gone: Sealing the Fate of the Fourth Amendment' (2003) 26 *Fordham International Law Journal* 1234.

[204] s 218 (amending 50 USC s 1804(a)(7)(B)).

[205] s 206 (amending s 105(c)(2)(B) of FISA).

[206] s 207(a)(1) (amending s 105(e)(1) of FISA) and s 207(a)(2) (amending s 304(d)(1) of FISA).

[207] See, eg, American Civil Liberties Union, USA Patriot Act Boots Government Powers While Cutting Back on Traditional Checks and Balances (1 November 2001).

[208] See, eg, Breglio, above n 203 at 196; O'Connor and Rumann, above n 203 at 1249; Whitehead and Aden, above n 1 at 1101.

the normal procedures required to verify probable cause for criminal warrants.'[209] Those who support the new FISA procedures maintain that FISA, as amended by the PATRIOT Act, strikes a reasonable balance between the right to privacy and the public's interest to fight terrorism effectively.[210] According to many observers, foreign intelligence and domestic criminal activity have become so intertwined that the original 'primary purpose' standard prevented law enforcement agencies from efficiently monitoring threats to national security.[211] To illustrate this point, attention is often drawn to the fact that one of the suspects of the September 11 events may have escaped detection before the attacks due to difficulties in obtaining a FISA order based on primary purpose concerns.[212]

The PATRIOT Act amendments to electronic surveillance law have not been reviewed by the Supreme Court, but their precise impact and constitutionality were addressed by the specially created Foreign Intelligence Surveillance Court of Review (FISCR) in its first-ever opinion, *In re Sealed Case*.[213] The case originated in an appeal brought by the government from a Foreign Intelligence Surveillance Court (FISC) surveillance order, which imposed certain restrictions on the government's surveillance activities. The disputed restrictions constructed a barrier (a 'wall') between law enforcement officials and intelligence officials. In reviewing these restrictions, the FISCR took the opportunity to consider the constitutionality of the 'primary purpose' standard and the newly adopted 'significant purpose' standard.[214] Having first established that FISA does not compel

[209] Breglio, above n 203 at 196.

[210] See, eg, Henderson, above n 203 at 196 (drawing attention to the strict procedures and limited applicability of the FISA as compared to the unfettered authority to monitor people on national security grounds previously ascertained by the government); Grayson A Hoffman, 'Litigating Terrorism: The New FISA Regime, the Wall, and the Fourth Amendment' (2004) 40 *American Criminal Law Review* 1655, 1682 (arguing the new FISA procedures appear to be justified by the Supreme Court's 'special needs' doctrine, and are thus reasonable under the Fourth Amendment).

[211] For references see Hardin, above n 203 at 320, fn 237

[212] See, eg, Stephen Dycus, Arthur L Berney, William C Banks and Peter Raven-Hansen, *National Security Law* (New York, Aspen Law & Business, 2002) 689–90 (discussing early attempts to open FISA and criminal investigations against '20th hijacker' Zacarias Moussaoui).

[213] In re Sealed Case, 310 F.3d 717 (Foreign Intelligence Surveillance Court of Review 2002).

[214] Before commenting on the constitutionality of the PATRIOT Act changes, the FISCR engaged in a statutory analysis of the FISA. In the court's view, the drafters of the FISA never intended to draw a line between intelligence gathering and prosecution. In support of this argument, the court noted that the definition of 'an agent of a foreign power' is closely tied to criminal activity. According to the court, the 'primary purpose' tests rests on a 'false dichotomy' between foreign intelligence information and evidence of criminal activity, erroneously created in lower court decisions such as *Truong* (*ibid* at 725). More fundamentally, the court questioned the assumptions underlying the 'primary purpose' doctrine: '[I]f one considers the actual ways in which the government would foil espionage or terrorism it

the government to demonstrate that the primary purpose in conducting electronic surveillance is foreign intelligence, the FISCR considered the two following questions: (1) whether a FISA order qualifies as a warrant for Fourth Amendment purposes; and (2) whether electronic surveillance whose primary purpose is criminal prosecution is per se unreasonable if not based on a warrant.

As to the first question, the FISCR suggested that a FISA order is analogous to a warrant. Comparing FISA and Title III procedures, the court concluded that 'a FISA order comes close to meeting Title III', which, it added, 'certainly bears on its reasonableness under the Fourth Amendment'.[215] The FISCR first observed that FISA requires prior judicial approval and that the Foreign Intelligence Surveillance Court satisfies the requirement of a 'neutral and detached magistrate'.[216] Next, the more lenient standard of probable cause was found to be consistent with the Fourth Amendment, given the difficulties in detecting foreign intelligence crimes. Drawing from the Supreme Court's language in *Keith*, the court held that the focus of security surveillance 'may be less precise than that directed against more conventional types of crime'.[217] Similarly, the Fourth Amendment particularity requirement was met because FISA requires a designation of the type of foreign intelligence information being sought and a certification that the information sought is foreign intelligence information.[218] The court then considered the statute's necessity, duration and minimisation provisions. Differences with ordinary standards were justified given the special context of FISA surveillance. For instance, with regard to the duration provision, the court again referred to *Keith* to point at the specific nature of national security surveillance, which is 'often long range and involves the interrelation of various sources and types of information'.[219] Finally, the court addressed the complaint that FISA targets do not receive notice. Where Title III requires notice of the target once the surveillance order expires, FISA does not, unless the government intends to use the information obtained in a trial. To justify this different approach, the FISCR subscribed to Congress' observation that '[t]he need to preserve secrecy for sensitive counterintelligence sources and methods justifies elimination of the notice requirement'.[220]

becomes apparent that criminal prosecution analytically cannot be placed easily in a separate response category.' (*ibid* at 727). The court proceeded to observe that, apart from the validity of the primary purpose standard prior to the passage of the PATRIOT Act, the latter's amendments were clearly intended to eliminate the doctrine, and sanction consultation and coordination between intelligence and law enforcement officials.

[215] *Ibid* at 742.

[216] *Ibid* at 743.

[217] *Ibid* at 738 (quoting *United States v United States District Court*, above n 168 at 322).

[218] *Ibid* at 739.

[219] *Ibid* at 740 (quoting *United States v United States District Court*, above n 168 at 322).

[220] *Ibid* at 742.

The second issue confronted by the court was whether the PATRIOT Act's disavowal of the 'primary purpose' doctrine is consistent with the Fourth Amendment. Referring to *Keith*, the court proposed a balancing approach:

> Ultimately, the question becomes whether FISA, as amended by the Patriot Act, is a reasonable response based on a balance of the legitimate need of the government for foreign intelligence information to protect against national security threats with the protected rights of citizens.[221]

Having examined the underlying rationale of the primary purpose test as announced in *Truong*, the court concluded that this case struck an inappropriate balance between security and privacy. According to the court, the *Truong* court misconceived the nature of the governmental interest involved: in the case of intelligence gathering, the government's primary purpose is to stop espionage or terrorism, and criminal prosecution usually is interrelated with other techniques used to frustrate these efforts.[222] Rather than erecting a barrier between intelligence gathering and criminal prosecution, counter-terrorism requires 'the wholehearted cooperation of all the government's personnel who can be brought to the task' and '[a] standard which punishes such cooperation could well be thought dangerous to national security'.[223] The court went on to consider the reasonableness of the relaxed standards to issue a FISA order under the new foreign intelligence purpose standard. Relying on the distinction in *Keith* between ordinary crime and crime posing a threat to national security, the court decided that the amended version of FISA is constitutional:

> The main purpose of ordinary criminal law is twofold: to punish the wrongdoer and to deter other persons in society form embarking on the same course. The government's concern with respect to foreign intelligence crimes, on the other hand, is overwhelmingly to stop or frustrate the immediate criminal activity. (…) [T]he criminal process is often used as a part of an integrated effort to counter the malign efforts of a foreign power. Punishment of the terrorist or espionage agent is really a secondary objective; indeed, punishment of a terrorist is often a moot point.[224]

The FISCR concluded with a brief discussion of the Supreme Court's 'special needs' doctrine, which was developed to enable the government to conduct warrantless or suspicionless searches for administrative or regulatory purposes.[225] While the FISCR acknowledged that the court previously

[221] *Ibid* at 742.
[222] *Ibid* at 742–3.
[223] *Ibid* at 743.
[224] *Ibid* at 744–5.
[225] See above.

stated that 'the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement may employ to pursue a given purpose', it inferred from the 'special needs' cases that the protection of citizens against special threats may nevertheless justify taking a matter out of the realm of ordinary crime control.[226] According to the FISCR, the Supreme Court distinguishes between 'general crime control programs' and those that have another particular purpose, such as protection of citizens against 'special hazards'.[227] In 2003, the Supreme Court declined to hear an appeal against the Review Court's decision.[228]

The NSA Warantless Surveillance Programme

In a controversial article published in 2005, the *New York Times* revealed the existence of a classified presidential order, authorising the National Security Agency (NSA) to intercept communications of American citizens and foreign nationals to search for evidence of terrorist activity without warrants or other judicial approval.[229] Although the activities of the NSA are traditionally limited to monitoring communications taking place wholly outside the country, the new programme authorised the interception of phone calls and other communication between parties outside the country and parties located in the United States. According to officials cited in the article, the surveillance programme grew out of concerns that existing constitutional restrictions were ill-suited for dealing with the new threat of global terrorism.[230] The same officials were quoted to say that when the programme began, it had 'few controls' and 'little formal oversight'.[231]

The Bush administration's circumvention of the Fourth Amendment safeguards and the FISA framework raised immediate concern among human rights organisations, legal scholars and the public at large.[232] The American Civil Liberties Union, together with several other organisations

[226] *Ibid* at 745–6 (quoting *Indianapolis v Edmond*, above n 47 at 47).
[227] *Ibid* at 746.
[228] *ACLU v United States*, 123 S Ct 1615 (2003).
[229] James Risen and Eric Lichtblau, 'Bush Lets US Spy on Callers Without Courts', *New York Times* (16 Dec 2005).
[230] *Ibid*.
[231] *Ibid*.
[232] See, eg, the letter to Congress by several prominent legal scholars: Beth Nolan, Curtis Bradley, David Cole, Geoffrey Stone, Harold Hongju Koh, Kathleen M Sullivan, Laurence H Tribe, Martin Lederman, Philip B Heymann, Richard Epstein, Ronald Dworkin, Walter Dellinger, William S Sessions and William Van Alstyne, 'On NSA Spying: A Letter to Congres', *The New York Review of Books* (9 February 2006) (arguing that Congress did not authorise the NSA programme and that it raises serious Fourth Amendment concerns). See also Brian R Decker, '"The War of Information": the Foreign Intelligence Surveillance Act, Hamdan v. Rumsfeld, and the President's Warrantless-Wiretapping Progam' (2006) 9 *University of Pennsylvania Journal of Constitutional Law* 291; Robert Bloom and William J Dunn,

and individuals, filed suit to challenge the programme's legality. In 2006, a District Court ruled that the programme violated statutory law, the First and the Fourth Amendments and the principle of the separation of powers.[233] The court noted that in enacting FISA and its amendments, Congress made numerous 'concessions' to executive needs and to the exigencies of the national security threat.[234] It could not but observe that these concessions had been 'futile', and that the executive adopted a programme that both violates FISA and the Fourth Amendment warrant and probable cause requirements.[235] In addition, the court rejected the argument that the secret authorisation was within the constitutional powers of the President. The surveillance measures, the court held, violate 'the Separation of Powers ordained by the very Constitution of which this President is a creature'.[236] Drawing on Supreme Court precedents, it observed that in an area covered with statutory enactments (ie FISA), the presidential power is at its lowest ebb.[237] Finally, in the court's opinion, the Authorisation for Use of Military Force against al-Qaeda could not be interpreted as an implicit congressional authorisation of the NSA monitoring programme.[238]

c. Concluding Remarks

Although there is some flexibility in the interpretation of the Fourth Amendment safeguards with regard to national security surveillance, the Supreme Court has so far not been willing to adopt a general reasonableness interpretation as an alternative to enforcing the rule-like probable cause and warrant requirements in this area. In *Keith*, the court acknowledged the need to find a compromise between an individual's right to privacy and the government's duty to protect the democratic institutions, but nonetheless affirmed that the warrant clause is fully applicable to domestic national security investigations. The Justices squarely rejected the proposition that the Fourth Amendment safeguards are 'an inconvenience to be somehow "weighed" against the claims of police efficiency'.[239] While the court was prepared to recognise different rules and procedures for

'The Constitutional Infirmity of Warrantless NSA Surveillance: the Abuse of Presidential Power and the Injury to the Fourth Amendment' (2006) 15 *William and Mary Bill of Rights Journal* 147.

[233] *American Civil Liberties Union v National Security Agency*, 438 F Supp 2d 754 (ED Mich 2006).

[234] *Ibid* at 775.

[235] *Ibid* at 775.

[236] *Ibid* at 779.

[237] *Ibid* at 778 (referring to Justice Jackson's concurrence in *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 637 (1952)).

[238] *Ibid* at 779 *ff*.

[239] *United States v United States District Court*, above n 168 at 315.

domestic security surveillance, prior supervision of a neutral and detached magistrate and evidence of probable cause were two safeguards not to be balanced away.

However, the foregoing illustrates that this principled position did not prevent subsequent decision-makers, both in the judiciary and the political branches, to authorise and approve warrantless and suspicionless national security surveillance. By suggesting the possibility of a foreign intelligence exception to the warrant clause, the *Keith* Court laid the legal foundations of these actions. When Congress adopted FISA, it regulated electronic surveillance powers for foreign intelligence gathering differently, and in certain respects more permissively, than ordinary law enforcement surveillance. According to several commentators and human rights organisations, the PATRIOT Act amendments to FISA now allow the government to sidestep the traditional Fourth Amendment requirements by using the more lenient FISA procedures to obtain surveillance orders in counter-terrorism investigations. Nevertheless, FISA, both in its original form and as amended by the PATRIOT Act, has been upheld against constitutional challenges. In lower court opinions the FISA framework has been described as 'a constitutional adequate balance' between the need of the government to protect against national security threats and the rights of citizens.[240] In adopting a reasonableness balancing approach, the courts have accepted that certain types of security surveillance must not be based on criminal probable cause, must not satisfy the traditional particularity requirement, may be ordered for long periods of time, and are not subject to the normal requirements of notice. Yet at the same time, when considering these relaxed surveillance standards, the courts have placed emphasis on the strict procedural protections incorporated in FISA. Thus, for instance, in its reasonableness analysis the FISCR appears to have attached considerable importance to the fact that FISA requires prior judicial scrutiny, and that the special FISA courts satisfy the Fourth Amendment's requirement of a neutral and detached magistrate. Finally, the most blatant attempt of the executive to circumvent not only the Fourth Amendment requirements but also the more relaxed FISA standards was the NSA's secret surveillance programme secretly ordered by the Bush Administration.

[240] *United States v Duggan*, above n 196 at 73. See also *In re Sealed Case*, above n 213 at 742: 'Ultimately, the question becomes whether FISA, as amended by the Patriot Act, is a reasonable response based on a balance of the legitimate need of the government for foreign intelligence information to protect against national security threats with the protected rights of citizens.'

B. Physical Searches and Seizures

Physical searches and seizures are the archetypal intrusions on privacy by law enforcement authorities. Examples are house and body searches, the search of automobiles, the interception of letters and parcels and the seizure of physical evidence in connection with alleged offences. This section first examines the general standards associated with physical searches and seizures, and then turns to the exceptional standards applicable in the fight against terrorism.

i. Standards of the European Convention

The case law in this field is less developed than the Strasbourg organ's electronic surveillance jurisprudence. Most Convention cases concern house searches and interception of prisoners' correspondence. As regards the former, the European Court has taken the view that a physical entry and search in dwelling and other premises constitutes an interference with a person's private life and home.[241] The notions private life and home do not exclude activities of a professional nature, and may extend to professional and business premises such as a lawyer's office.[242] With respect to the legal basis of house searches, the court refers to the general requirements embodied in the expression 'in accordance with the law', ie a basis in domestic law, and accessibility and foreseeability of the law.[243] When considering physical searches of private premises, the court has primarily focused on the democratic necessity of such measures, for which it adopted the following general rule:

> The Contracting States may consider it necessary to resort to measures such as searches of residential premises and seizures in order to obtain physical evidence of certain offences. The Court will assess whether the reasons adduced to justify such measures were relevant and sufficient and whether the (…) proportionality principle has been adhered to.[244]

In particular, the court will concentrate on two points: (1) whether the relevant legislation and practice afford individuals adequate and effective safeguards against abuse; and (2) whether, given the particular circumstances of each case, the interference in question is proportionate to the

[241] See, eg, *Chappell v UK* Series A no A-152 (1989) para 51.
[242] *Niemietz v Germany*, above n 7 at paras 29–30.
[243] See, eg, *Camenzind v Switzerland* Reports 1997-VIII (1997) para 37.
[244] *Ibid* at para 45. See *also Funke v France* Series A no 256-A (1993) para 56; *Crémieux v France* Series A no 256-B (1993) para 39; *Miailhe v France* Series A no 256-C (1993) para 37; *Ernst and others v Belgium*, 15 July 2003, para 114; *Van Rossem v Belgium*, 9 December 2004, para 41.

aim pursued.[245] An important issue relating to the safeguards is the presence or absence of a judicial warrant. Article 8 contains no requirement that house searches and seizures should be judicially authorised in advance.[246] The court has nevertheless stated that it will be 'particularly vigilant where (…) the authorities are empowered under national law to order and effect searches without a judicial warrant'.[247] When the authorities are empowered to conduct warrantless searches, Article 8 requires 'a legal framework and very strict limits on such powers'.[248] Thus, for instance, in *Funke v France*, a search and seizure carried out by customs officers was in breach of Article 8 because, in the absence of a judicial warrant, the restrictions and conditions provided for in the French law were 'too lax and full of loopholes'.[249] In a similar case, the court took notice of the fact that the seizures made on the applicant's premises were

> wholesale and, above all, indiscriminate, to such an extent that the customs considered several thousand documents to be of no relevance to their inquiries and returned them to the applicants.[250]

By contrast, in *Camenzind v Switzerland*, the court decided that a search executed without judicial authorisation and supervision was a proportionate interference with the right to privacy, taking into consideration the detailed procedural safeguards in place and the limited scope of the interference.[251] In his partly dissenting opinion in this case, Judge De

[245] *Camenzind v Switzerland*, above n 243 at para 45.

[246] See JES Fawcett, *The Application of the European Convention on Human Rights* (Oxford, Oxford University Press, 1987) 226 (arguing that the protection of the home from entry or search by the police or other public authorities is largely nullified by the fact that the text of Art 8 appears to accommodate a general power of police search, without a warrant or specific statutory authority).

[247] *Camenzind v Switzerland*, above n 243 at para 45.

[248] *Ibid*.

[249] *Funke v France*, above n 244 at para 57 (observing that the customs authorities had the exclusive competence to assess the expediency, number, length and scale of inspections).

[250] *Miailhe v France*, above n 244 at para 39. See also *Niemietz v Germany*, above n 7 at para 37 (observing that 'the warrant was drawn in broad terms, in that it ordered a search for and seizure of 'documents', without any limitation, revealing the identity of the author of the offensive letter').

[251] *Camenzind v Switzerland*, above n 243 at para 46. With regard to the safeguards provided for in the Swiss law, the court noted, inter alia, that the search could only be effected under a written warrant issued by a limited number of designated senior public servants and carried out by officials specially trained for it, in places where the suspect is likely to hide or evidence is likely to be found, and not on Sundays, public holidays or at night. A further safeguard named by the court, was the notification requirement: under the Swiss law the investigating officials were required, at the beginning of the search, to produce evidence of their identity and inform the occupier of the premises of the purpose of the search. In addition, that person or, if he is absent, a relative or a member of the household was asked to attend the search. Finally, a record of the search was drawn up immediately in the presence of the person who attended.

Meyer reasoned that all searches without a prior court order violate the Convention.[252]

Although a judicial search warrant is an important safeguard, it may not be sufficient to satisfy the requirements of the democratic necessity standard. On several occasions, the court censured judicial warrants which were drafted in very broad language.[253] In *Ernst and others v Belgium*, the court took notice of the fact that the search warrant under review contained no information as to the cause of the investigation, the places to be searched and the objects to be seized.[254] Similarly, in *Van Rossem v Belgium*, the court held that a search warrant must be accompanied by certain limitations so that the interference it authorises is not potentially unlimited.[255] More precisely, a (judicial) warrant must contain 'minimal indications' ('des mentions minimales') allowing the verification of whether the police officers who enforced it complied with the scope of the investigation (judicially) authorised.[256]

A second series of search cases decided by the Convention organs relates to the interception of a prisoner's correspondence. The leading case here is *Golder v United Kingdom*.[257] In *Golder*, the court held that the necessity of an interference with a prisoner's right to respect for his correspondence 'must be appreciated having regard to the ordinary and reasonable requirements of imprisonment'.[258] It observed that in a prison context the prevention of disorder and crime may justify wider measures of interference than would be the case in normal circumstances. However, in subsequent decisions, the court found a violation of Article 8 because the censorship of a prisoner's correspondence did not meet the 'in accordance with the law' test. For example, in *Calogero v Italy*, the impugned legislation left too much latitude to the judge empowered to order the monitoring. In particular, it contained no rules as to the length of time for which prisoners' correspondence could be censored and the grounds on which such censorship could be ordered.[259] Finally, in several cases applicants complained against the monitoring of correspondence with defence counsel. In the court's view, such correspondence is specially

[252] *Ibid*.

[253] See, eg, *Niemietz v Germany*, above n 7 at para 37; *Roemen and Schmidt v Luxembourg* Reports 2003-IV (2003) para 70; *Ernst and others v Belgium*, above n 243 at para 116.

[254] *Ernst and others v Belgium*, above n 243 at para 116.

[255] *Van Rossem v Belgium*, above n 244 at para 45.

[256] *Ibid* at para 45. The court further observed that the determining element is whether the person or persons whose premises are being searched, or a third party, have sufficient information about the proceedings giving rise to the operation to enable them to identify, prevent and challenge any abuse (*ibid* at para 47).

[257] *Golder v UK*, above n 35.

[258] *Ibid* at para 45.

[259] *Calogero v Italy* Reports 1996-V (1996) para 32.

privileged under Article 8.[260] In *Campbell v United Kingdom*, the court held that the opening and reading of a prisoner's mail to and from a lawyer is permitted only in 'exceptional circumstances', if the authorities have

> reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature.[261]

What constitutes 'reasonable cause' 'will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused'.[262]

ii. Standards of the US Constitution

The Fourth Amendment was originally intended to protect private places against physical intrusion by the government.[263] As noted in part one, the Supreme Court for many years required a physical trespass into one of the constitutionally protected areas (persons, houses, papers and effects) to implicate the amendment's guarantees. One of the chief evils contemplated by the drafters was the violation of the sanctity of the home.[264] As the court put it in *Silverman v United States*: 'At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'.[265] The right to be secure in one's 'papers', for its part, includes the protection against unreasonable searches of letters and sealed packages.[266] Physical searches and seizures must comply with several constitutional commands. The prior involvement of a neutral and detached magistrate, and the probable cause standard were discussed in the preceding sub-section. The Fourth Amendment further provides that no warrants shall be issued except those 'particularly describing the place to be searched, and the persons or things to be seized'. The particularity requirement was included in the Amendment in response to the use of writs of assistance in the former British colonies. A writ of assistance was a

[260] See, eg, *Campbell v UK* Series A no 233 (1992) para 48.

[261] *Ibid*. The court further held that the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. However, the court emphasised that such a letter should only be opened and should not be read. In addition, suitable guarantees preventing the reading of the letter should be provided, such as, for instance, the opening of the letter in the presence of the prisoner (*ibid*).

[262] *Ibid*.

[263] Eg, *United States v United States District Court*, above n 168 at 313 ('physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed').

[264] *Boyd v United States*, above n 4 at 626–30.

[265] *Silverman v United States*, 365 US 505, 511 (1961).

[266] *Ex p Jackson*, 96 US 727, 733 (1877).

general search warrant, containing no specification of the premises to be searched or the property sought. There is extensive case law on the scope of the particularity requirement.[267] In the court's opinion, the obligation to describe the place to be searched is satisfied, 'if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended'.[268] Another protection grounded in the Fourth Amendment is the obligation on the part of the police to give notice prior to the execution of a search warrant.[269] However, there is no absolute rule requiring announcement under all circumstances.[270] Thus, in *Richards v Wisconsin*, the court held that entry without notice is justified when the police

> have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.[271]

In contrast to the protection accorded to a prisoners' privacy interests under Article 8, the Supreme Court categorically declined to extend the reach of the Fourth Amendment to prisons.[272] In the court's opinion, a prisoner does not have a legitimate expectation of privacy in his prison cell, because the loss of privacy is an inherent incident of confinement.[273] Interference with a prisoner' correspondence, however, has not been dealt with under the Fourth but under the First Amendment. The lower courts have taken a rather deferential stance upholding various kinds of censorship programs.[274] In *Thornburgh v Abbott*, the Supreme Court stated that regulations affecting the outgoing correspondence of a prisoner are constitutionally valid if they are 'reasonably related to legitimate penological interests'.[275]

[267] For a discussion and references, see, eg, LaFave, Israel and King, above n 14 at 168–72.
[268] *Steele v United States*, 267 US 498, 503 (1925).
[269] See *Wilson v Arkansas*, 514 US 927 (1995).
[270] *Ibid* at 934.
[271] *Richards v Wisconsin*, 520 US 385 (1997).
[272] For a discussion of the Convention case law, see Paul De Hert, 'Gedetineerden en de grondrechten vervat in artikel 8 EVRM' [Prisoners and the Rights Secured in Article 8] in Eva Brems *et al*, *Vrijheden en vrijheidsbenemig* [Liberties and the Deprivation of Liberty] (Antwerp, Intersentia, 2005) 151.
[273] *Hudson v Palmers*, 468 US 517, 528 (1984).
[274] LaFave, Israel and King, above n 14 at 242.
[275] *Thornburgh v Abbott*, 490 US 401, 409 (1989).

iii. Exceptional Standards in the Fight against Terrorism

The number of physical search and seizure cases with a nexus to combating terrorism is limited under both declarations of rights. In the few cases that reached the Strasbourg organs, the principles adopted in *Klass* with regard to electronic surveillance were applied mutatis mutandis to physical searches and seizures. A first example is *Erdem v Germany*, a case concerning the monitoring of written correspondence between an alleged member of the PKK and his defence counsel.[276] The interference was based on article 148 s 2 of the German Code of Criminal Procedure, a provision which required the examination by a judge of written or other documents send to or hand over to persons suspected of membership in a terrorist organisation.[277] Having recalled the general principles laid down in *Campbell*, the court moved on to consider the relevance of the counter-terrorist background of the impugned measures. Drawing on *Klass*, the court was prepared to accept that secret surveillance over the mail, post and telecommunications may, under exceptional conditions, be necessary in a democratic society for the aim of preventing terrorism. However, in view of the fundamental nature of lawyer–client privilege, the court added that the interception of correspondence between prisoners and their lawyers must be accompanied by 'adequate and sufficient guarantees against abuse'.[278] This requirement was met in the present case.[279] Firstly, the German statute under review was precisely drawn in that it applied only to those prisoners suspected of belonging to a terrorist organisation. Secondly, under the terms of the relevant statute the monitoring of the prisoner's correspondence was to be carried out by a judge independent of the prosecution, the latter being under the obligation to keep secret the information he received. Lastly, the interference with the lawyer–client privilege was limited, since prisoners remained free to discuss their cases orally with their defence counsel. The Strasbourg Court concluded that, having regard to the threat posed by terrorism, the margin of appreciation left to the Contracting States, and the aforementioned safeguards, the interference was not disproportionate to the aims served.[280]

When deciding on the proportionality of a physical search in dwelling and other private premises, the European Court looks at the particular circumstances of the case.[281] This may include the seriousness of the offence under investigation. A decision concerning house searches carried

[276] *Erdem v Germany* Reports 2001-VII (2001).
[277] *Ibid* at para 32.
[278] *Ibid* at para 65.
[279] *Ibid* at paras 67–9.
[280] *Ibid* at para 69.
[281] *Camenzind v Switzerland*, above n 243 at para 45.

out in the course of a counter-terrorist action is *Murray v United Kingdom*.[282] This case arose under section 14 of the Northern Ireland (Emergency Provisions) Act 1978, which conferred special powers of arrest without a warrant to the armed forces in Northern Ireland. Section 14 provided that, for the purpose of arresting a person suspected of being a terrorist, the army was allowed to enter and search the premises or places where that person was suspected of living. The six applicants were members of the same family. In order to effect the arrest of Mrs Murray, the first applicant, five armed soldiers entered their house and asked them to assemble in the living room. The soldiers made written notes as to the interior of the house and recorded personal details concerning the applicants. In Strasbourg, the applicants contended that the search of their family home by the military authorities breached their right to privacy. The court declined to find a violation of Article 8. Again reference was made to the approach taken in *Klass*. The court first observed that a certain margin of appreciation is left to the national authorities, and that it would not substitute its own assessment of what might be the best policy to battle terrorism, for the assessment of the national authorities. It further stated that a balance needs to be struck between the 'necessity to take effective measures for the prevention of terrorist crimes' and the privacy rights of the individual.[283] In striking this balance, regard was to be had to 'the responsibility of an elected government in a democratic society to protect its citizens and its institutions against the threats posed by organised terrorism' and 'the special problems involved in the arrest and detention of persons suspected of terrorist-linked offences'.[284] In the present case, the house search complained of was not disproportionate to the aim of arresting Mrs Murray, who had been 'reasonable suspected' of the commission of a terrorist-linked crime.[285] The court accepted that there was in principle a need both for the special search powers in section 14, and, in the case at hand, the entry into and search of the home of the Murray family.[286] As regards the manner in which the search was carried out, the court, in noting the 'conditions of extreme tension' in Northern Ireland, joined the opinion of Lord Griffiths in the House of Lords that

> [t]he search cannot be limited solely to looking for the person to be arrested and must also embrace a search whose object is to secure that the arrest should be peaceable.[287]

[282] *Murray v UK*, above n 9.
[283] *Ibid* at para 91.
[284] *Ibid*.
[285] *Ibid* para 92. With regard to the evidential standard for ordering the search, reference was made to the 'reasonable suspicion' test of Art 5 s 1 (c). For a comparison of 'reasonable suspicion' with 'probable cause', see ch 5, section III.
[286] *Ibid* at para 92.
[287] *Ibid*.

The Supreme Court has not taken a clear position as to whether the conventional constitutional safeguards associated with physical searches and seizures may be relaxed to meet the special needs of counter-terrorism. The issue was addressed by a small number of lower courts.[288] *United States v Ehrlichman* concerned a surreptitious search of a psychiatrist's office for the purpose of obtaining medical records relating to one of his patients who was suspected of disclosing secret documents (the Pentagon Papers).[289] According to the Columbia District Court, the warantless search of the doctor's office was illegal under the Fourth Amendment:

> [N]one of the traditional exceptions to the warrant requirement are claimed and none existed; however desirable the break-in may have appeared to its instigators, there is no indication that it had to be carried out quickly before a warrant could have been obtained.[290]

The proposition that the President has the authority to suspend the Fourth Amendment when exercising his responsibilities over foreign relations and national defence was squarely rejected.[291] The court was not willing to extend a Fourth Amendment exception that might exist for foreign intelligence wiretapping—'a relatively nonintrusive search'—to the physical entry of the home, 'the chief evil against which the wording of the Fourth Amendment is directed'.[292] Another case in which a warrantless physical search was at issue is *United States v Truong Dinh Hung*.[293] As noted in the preceding section (III.ii.b), this case is famous for articulating a warrant exception when secret surveillance is conducted primarily for foreign intelligence purposes. Although *Truong* was mainly concerned with electronic surveillance, the foreign intelligence exception was also applied to a warrantless search of a letter and a package.[294]

Commentators disagree over whether the foreign intelligence exception to the warrant requirement for electronic surveillance should equally apply to physical searches. Some argue that it may be reasonable to accept greater executive discretion to conduct physical searches than for the use of wire-taps, in light of the potentially greater intrusiveness of the latter category.[295] Others defend the opposite position, namely that a physical invasion is more threatening to an individual's privacy than electronic

[288] For an overview, see, eg, Banks and Bowman, above n 164 at 57–69: Dycus, Berney, Banks and Raven-Hansen, above n 212 at 628–38.
[289] *United States v Ehrlichman*, 376 F.Supp 29 (DDC 1974).
[290] *Ibid* at 32–3.
[291] *Ibid* at 33.
[292] *Ibid*.
[293] *United States v Truong Dinh Hung*, above n 186.
[294] See also Banks and Bowman, above n 164 at 63–5.
[295] *Ibid* at 67.

surveillance.[296] FISA, as originally passed, was exclusively concerned with electronic surveillance. After its adoption, physical national security searches continued to be approved by the executive branch without judicial supervision. In 1994, Congress amended FISA to permit physical searches for the purpose of collecting foreign intelligence information.[297] The procedures for physical searches mirror to a large extent those governing electronic FISA surveillance. For example, as regards the probable cause standard, FISA judges are empowered to issue a warrant if they find that there is probable cause to believe that 'the target of the physical search is a foreign power or an agent of a foreign power', and that 'the premises or property to be searched is owned, used, possessed by, or is in transit to or from an agent of a foreign power or a foreign power'.[298] FISA does not contain the same (Fourth Amendment) protections as those associated with ordinary criminal law enforcement searches. Besides the lesser standard of probable cause, there are no requirements in the Act to particularise the object of the search, to notify the targets of surveillance and to draw up an inventory of seized property. Despite the expansive powers and reduced safeguards, several authors have defended the FISA framework for physical searches on the ground that it strikes an adequate balance between the government's security interests and the protection of personal privacy.[299] Daniel Malooly concludes that

> FISA provides a forum in which government requests for warrants must be approved by a neutral judge and provides procedures for carrying out that warrant which are reasonable, given the unique nature of national security.[300]

As a final point, it can be noted that although the FISCR, in the above-mentioned *In re Sealed Case*, did not consider the constitutionality of the FISA physical search provisions, it noted in a footnote that '[a]lthough only electronic surveillance is at issue here, much of our statutory analysis applies to the FISA's provisions regarding physical searches'.[301]

[296] See, eg, *United States v Ehrlichman*, above n 289 at 937–8 (DC Cir 1976) (Leventhal, J., concurring).

[297] 50 USC ss 1821–9.

[298] 50 USC ss 1824.

[299] See, eg, Daniel J Malooly, 'Physical Searches Under FISA: A Constitutional Analysis' (1998) 35 *American Criminal Law Review* 411, 422 (reasoning that it is impossible to describe the object of a search with the same particularity where it is performed to gather foreign intelligence rather than the evidence of a particular crime); William F Brown and Americo R Cinquegrana, 'Warrantless Physical Searches for Foreign Intelligence Purposes' (1985) 35 *Catholic University Law Review* 97, 131 (claiming that the absence of the notice and inventory requirements is justified because the value of foreign intelligence often depends upon keeping the targets ignorant of the investigative measures).

[300] Malooly, previous n 299 at 420.

[301] *In re Sealed Case*, above n 213, at n 20.

To conclude the discussion of exceptional Fourth Amendment standards for physical searches and seizures, mention should be made of one of the 'special needs' exception to the warrant and probable cause requirements connected with the fight against terrorism. As has been seen, in 'special needs' cases the courts employ a balancing test, weighing the seriousness of the intrusion on the individual's privacy against the importance of the promotion of a legitimate governmental interest. The airport screening cases can serve as an example of this approach. Pre-boarding screening of passengers and their luggage by means of a magnetometer and X-ray qualifies as a physical search.[302] Nevertheless, the use of such devices has consistently been upheld against Fourth Amendment challenges as regulatory searches without the potential for arbitrariness.[303] Crucial elements are the great danger that such searches seek to prevent and their limited intrusiveness (each person is able to avoid pre-boarding screening by not boarding the plane). For instance, in upholding a warrantless pre-boarding search the Second Circuit Court of Appeal reasoned that:

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.[304]

iv. Concluding Remarks

The privacy rights enshrined in the European Convention and the Bill of Rights protect against arbitrary physical searches and seizures. In contrast to the Fourth Amendment, the text of Article 8 contains no requirements of probable cause, prior judicial authorisation and particularity. However, due to jurisprudential developments, there appears to be an ever-growing convergence of the safeguards in the two systems studied. Some of the requirements expressly provided for in the US Constitution have been read into Article 8 by the Strasbourg organs when considering the democratic necessity of the investigative practices of the Contracting States. For instance, the Fourth Amendment particularity requirement is clearly mirrored in the European Court's insistence that a warrant contain 'minimal indications' as to the scope of the investigation it authorises. While there is

[302] See see LaFave, Israel and King, above n 14 at 240–41.

[303] *Ibid* at 240. See also Dycus, Berney, Banks and Raven-Hansen, above n 212 at 613 (writing that in the post-September 11 era, efforts to defend warrantless pre-boarding airplane searches almost appears prosaic); John Rogers, 'Bombs, Borders, and Boarding: Combating International Terrorism at United States Airports and the Fourth Amendment' (1997) 20 *Suffolk Transnational Law Review* 501.

[304] *United States v Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

no general rule under Article 8 demanding that a physical search or seizure be ordered by a neutral and detached judge or magistrate, the court's case law clearly suggests a preference for judicial supervision. Finally, the court does not regard prior notice as an indispensable element of Article 8. Yet, reference was made to a statutory notification requirement as a factor limiting the interference with privacy, thereby indicating the relevance of this issue in the court's overall proportionality assessment.[305] More generally, it can be said that in reviewing physical searches and seizures the Strasbourg organs reach a conclusion on the basis of an overall assessment of the safeguards provided for in domestic law and the specific circumstances surrounding the case, whereas American courts are more inclined to focus on the presence or absence of the specific conditions listed in the text of the Fourth Amendment.

The Article 8 case law in this field demonstrates a tendency on the part of the Convention organs to accord the domestic authorities a wide margin of appreciation to accommodate the special difficulties involved in the struggle against terrorism. The assertion of counter-terrorist interests clearly affects the balance struck between conflicting privacy and law enforcement claims. In other words, what constitutes 'adequate and effective safeguards against abuse' will not remain static, and may be substantially less if the investigative measures are part of an anti-terrorism campaign than in other circumstances. The prime example of this flexible and deferential approach is *Murray*, in which the court upheld a rather broadly conceived warrantless house search by the military in Northern Ireland, on the mere reasonable suspicion that one of the inhabitants was suspected of the commission of a terrorist-linked crime. A similar readiness to balance privacy safeguards against the need to fight terrorism is absent in Fourth Amendment jurisprudence. Lower courts have held the amendment's requirements to be fully applicable to searches conducted for national security purposes. This is not to say that no Fourth Amendment exceptions exist. Besides the possible application of the foreign intelligence exception for electronic surveillance to physical privacy intrusions, the 'special needs' doctrine may serve to justify exceptions to the warrant and probable cause requirements for terrorism-related physical searches and seizures (eg, the airport screening cases).

C. Undercover Agents

The use of undercover agents or informers is a widespread intelligence gathering technique. Besides their value for ordinary law enforcement purposes, undercover agents are often employed in national security

[305] *Camenzind v Switzerland*, above n 243 at para 46.

investigations. For example, informers can be used to infiltrate violent groups or subversive political organisations. Moreover, electronic surveillance or physical searches and seizures are often effectuated with the help of covert agents (eg, the installation of a listening device on private premises or the wearing of electronic equipment to transmit conversations with the target).[306]

The discussion of this investigative technique can be brief, as neither Article 8 nor the Fourth Amendment bar the use of undercover agents in normal criminal investigations, let alone in the national security context. The leading Convention case is *Lüdi v Switzerland*.[307] It concerned an undercover action that took place within the context of an important drugs deal. A specially selected and sworn undercover agent infiltrated in what was believed to be a large network of drugs traffickers. He contacted the applicant who told the agent that he was prepared to sell him 2 kg of cocaine. Contrary to the European Commission, the European Court believed that the activities of the undercover agent did not affect the applicant's private life within the meaning of Article 8. The court reasoned that a person who engages in criminal conduct runs the risk of being exposed to undercover activity:

> Mr. Lüdi must therefore have been aware from then on that he was engaged in a criminal act punishable under Article 19 of the Drugs Law and that consequently he was running the risk of encountering an undercover police officer whose task would in fact be to expose him.[308]

For much the same reasons the Supreme Court refused to apply the Fourth Amendment requirements of prior judicial authorisation and probable cause to the use of under cover agents. In *Hoffa v United States*, a case in which an informer had furnished evidence for a criminal prosecution, the court stated that 'no interest legitimately protected by the Fourth Amendment is involved'.[309] It held that the Fourth Amendment affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it'.[310] The same approach was taken in a case concerning evidence gathered by an undercover agent wearing a transmitter. In the court's view, the defendant's privacy expectations were not constitutionally justifiable under the principles announced in *Katz*:

> Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their

[306] Cameron, above n 1 at 86.
[307] *Lüdi v Switzerland* Series A no 238 (1992).
[308] *Ibid* at para 40.
[309] *Hoffa v United States*, 385 US 293, 302 (1966).
[310] *Ibid*.

trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his.[311]

IV. GENERAL CONCLUSION

The conclusions of the preceding sub-sections, both with regard to electronic surveillance and physical searches and seizures, can be summarised as follows. Whereas the Fourth Amendment to the United States Constitution contains a number of rule-like safeguards that must in principle always be satisfied for there to be a valid search or seizure (most notably a judicial warrant, probable cause and particularity), no similar set of clearly fixed rules has been developed in the Strasbourg organs case law on Article 8 of the Convention. Although over time the European Court and Commission have articulated standards mirroring the Fourth Amendment protections, be it under the rubric of 'in accordance with the law' or pursuant to the democratic necessity test, those standards were never imposed as categorical rules indispensable for the purpose of Article 8. Rather, the outcome of an Article 8 review of investigative measures interfering with privacy depends on an overall assessment of the procedures and safeguards provided for in domestic law, and the circumstances presented in a specific case.

This approach transpires in the context of counter-terrorism. The flexible reading of Article 8 allows the Convention organs to modify privacy standards developed in the context of traditional criminal law enforcement to accommodate the Contracting States' efforts in combating terrorism. Underlying these attempts is the central proposition, reiterated in several Article 8 cases, that a 'compromise' is to be found between the state's obligation to fight terrorism effectively on the one hand, and its equally compelling obligation to protect the privacy rights of the individual on the other hand. Such flexibility may be fertile ground for generating well-balanced trade-offs between liberty and security, however, it is not without danger in the present context. Indeed, another feature of the Convention jurisprudence examined in this chapter is the wide margin of appreciation left to the domestic authorities when considerations of national security are involved. While this deferential review does not mean an unquestioning approval of privacy interfering measures, the joint operation of an open-ended balancing approach and the wide margin of appreciation may result in the under-protection of privacy rights at the benefit of the government's security concerns. Although second-order reflections on the propriety of solutions reached on particular issues is beyond the scope of this inquiry, this risk seems to materialise in the

[311] *United States v White*, above 20 at 752.

Commission's approach in the national security surveillance cases, and the court's approval of broadly conceived warrantless house search in cases such as *Murray*.

The Supreme Court has thus far not been willing to adopt a general reasonableness interpretation of the Fourth Amendment when reviewing counter-terrorist action interfering with privacy interests. In some instances, a 'special needs' exception to the amendment's safeguards has allowed courts and other decision-makers to weigh the intrusion on the individual's privacy against the state's obligation to prosecute and prevent terrorist offences (eg, the airport screening cases). Yet in *Keith*, the major Supreme Court decision in the area of domestic security surveillance, the justices remained faithful to the conventional, bright-line model of Fourth Amendment reasoning, at least as far as the central requirements of a judicial warrant and probable cause are concerned. While the court in *Keith* was prepared to accept some different rules and procedures for domestic security surveillance, it affirmed that the warrant clause is fully applicable to domestic national security investigations, the latter not being 'an inconvenience to be somehow "weighed" against the claims of police efficiency'.[312]

The formulation of categorical rules has not prevented decision-makers, both in the judicial and political branches, to authorise warrantless and suspicionless national security searches and seizures when deemed necessary to meet emergency needs. In recognising a foreign intelligence exception to the traditional Fourth Amendment strictures, Congress and the courts have created a somewhat different framework for certain types of national security surveillance. It is important to observe that even though FISA regulates foreign intelligence searches more permissively as compared to ordinary law enforcement surveillance, FISA procedures still appear more protective of privacy than the Article 8 standards discernable in the Strasbourg organs' jurisprudence. For instance, while FISA requires prior judicial approval—a factor the courts have taken into account in reviewing the constitutionality of FISA searches—no similar requirement was ever read into Article 8. Finally, the inability of categorical rules to constrain government action in crisis situations was illustrated by the Bush administration's wholesale circumvention of Fourth Amendment safeguards in the aftermath of the September 11 terrorist attacks.

[312] *United States v United States District Court*, above n 168 at 315.

7

The Right to a Fair Trial

I. INTRODUCTION

THE CRIMINAL PROSECUTION of terrorists is obviously an important counter-terrorist tool. Many terrorism-related activities will be criminal offences either under ordinary criminal provisions or special antiterrorism laws. At the same time, however, it has often been suggested that the traditional criminal justice system may be ill-suited to the trying and punishment of terrorist suspects. In view of the complexities of the fight against terrorism, full adherence to the fair trial rights offered in 'normal' criminal prosecutions would be impossible. Amongst the many reasons advanced to justify exceptional trial procedures are the need to protect witnesses, judges and juries against intimidation and retaliation by terrorist organisations, the need to maintain the confidentiality of sensitive and classified information, and the need to interrogate terrorist suspects more effectively. Generally speaking, these concerns have been addressed in two ways. A first option, examined in section III, is the modification of the ordinary criminal justice system to accommodate the special difficulties of adjudicating terrorist charges. The second strategy is a more drastic one: states may choose to discard the traditional criminal justice framework and resort to special (military) justice regimes to deal with terrorist violence. Such measures are typically associated with war and emergency situations and will be dealt with in section IV.

II. THE RIGHT TO A FAIR TRIAL: BASIC NOTIONS

A. Introduction

The principle of a fair trial is an umbrella notion covering a wide ranger of procedural safeguards, the common goal of which is to secure the fair administration of justice. The right to a fair trial occupies a central place in both the American and European declarations of rights. It is recurring dicta in the Strasbourg Court's case law that the right to a fair administration of justice performs a role so prominent in a democratic society that a

restrictive interpretation of that right would not correspond to the aim and the purpose of the Convention.[1] Likewise, the United States Supreme Court has adopted expansive interpretations of the procedural safeguards in the Bill of Rights, a process which reached its height in the 1960s under the leadership of Chief Justice Earl Warren. The court accepts that most of these rights are so fundamental that they are applicable to the states through the Fourteenth Amendment. In one of his opinions on the court, Justice Douglas stressed the significance of fair trial rights in the following terms:

> It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.[2]

There are many differences in the way fair trial rights are stipulated in the two jurisdictions, but both follow a similar pattern, namely that of a general requirement of a fair procedure supplemented with a number of more specific safeguards, particularly for those charged with a criminal offence.[3] Article 6 section 1 of the Convention provides that in the determination of an individual's civil rights and obligations, or the criminal charges against him, everyone is entitled to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. The first paragraph of Article 6 further guarantees the right to a public pronouncement of judgment. Article 6 sections 2 and 3 goes on to set out a number of 'minimum rights' applicable only in the context of the criminal law process: the presumption of innocence, the right to be informed promptly of the accusation, the right to adequate time and facilities for the preparation of his defence, the right to defend oneself or to legal assistance, the right to call and cross-examine witnesses, and the right to the free assistance of an interpreter.

In the Bill of Rights, the basic guarantee of procedural fairness is found in the due process clauses of the Fifth and Fourteenth Amendments, which proclaim that:

> [n]o person shall be (…) deprived of life, liberty, or property, without due process of law (…).[4]

[1] *Delcourt v Belgium* Series A no 11 (1970) para 25.

[2] *Joint Anti-Fascist Refugee Committee v McGrath*, 341 US 123, 179 (1951) (concurring opinion).

[3] See Mark Janis, Richard Kay and Anthony Bradley, *European Human Rights Law, Text and Materials* (Oxford, Oxford University Press, 2000) 403.

[4] The Fifth Amendment is applicable only to actions of the federal government, whereas the Fourteenth Amendment extends the due process guarantee to the states. See, eg, John E Nowak and Ronald D Rotunda, *Constitutional Law* (St Paul, West Group, 2000) 544–631.

In addition to the requirements of due process, several amendments deal with particular aspects of criminal procedure: the right to grand jury indictment, the protection against double jeopardy, and the privilege against self-incrimination (Fifth Amendment); the right to a speedy and public trial, the right to an impartial jury, the right to notice of the accused, the right to call and confront witnesses and the right to counsel (Sixth Amendment); and the right to bail and the prohibition against cruel and unusual punishment (Eighth Amendment).[5]

B. Scope and Content of the Right to a Fair Trial

It would be beyond the purpose of this introductory section to give a comprehensive account of all the elements of the right to a fair trial recognised in both systems, and the following is intended only to provide an overview of some general principles concerning the content and the scope of the right to a fair trial. Taking the Convention as a starting point, it is to be noted that the content of the right to a fair trial is not limited to the guarantees explicitly mentioned in Article 6. In addition to the rights listed therein, the Convention organs have interpreted Article 6 as encompassing a number of implied guarantees. A typical example is the court's holding, in *Golder v United Kingdom*, that Article 6 s 1 contains an inherent right of access to a court.[6] Most fair trial rights implied in the Convention have been placed under the rubric of a 'fair hearing' in Article 6 s 1. Examples include the right of the accused in criminal cases to be present at and to take part in oral hearings,[7] the principle of equality of arms,[8] freedom from self-incrimination[9] and the right to a reasoned judgment.[10] Another component of the requirement of a fair hearing involves the presentation of evidence. Although the court refrains from reading into the Convention any particular rules of evidence, it has made it clear that the Contracting States' discretion in this respect is not unlimited, and that the use of a particular form of evidence may, in certain circumstances, amount to a violation of the right to a fair hearing. The

[5] As regards civil proceedings, the Seventh Amendment requires the federal government to organise jury trials for cases of a certain importance. However, the Seventh Amendment right is not applicable to state court proceedings. See *Minneapolis and St Louis R Co v Bombolis*, 241 US 211 (1919).

[6] *Golder v UK* Series A no 18 (1975) para 36.

[7] See, eg, *Colozza v Italy* Series A no 89 (1985) para 27.

[8] See, eg, *Neumeister v Austria* Series A no 8 (1968) para 22. The principle of equality of arms 'requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'. See, eg, De Haes and *Gijsels v Belgium* Reports 1997-I (1997) para 53.

[9] See, eg, *Funke v France* Series A no 256-A (1993) para 44.

[10] See, eg, *Hadjianastassiou v Greece* Series A no 252 (1992) para 33.

court has stated as a general principle that a decision as to the fairness of a hearing will be taken after an assessment of the proceedings 'as a whole'.[11]

The scope of Article 6 is restricted by its limited field of application. Article 6 s 1 applies only to the 'determination' of 'civil rights and obligations' and 'criminal charges', and Article 6 s 2 and s 3 provides for specific rights for those 'charged with a criminal offence'. The nature of these concepts is a complex doctrinal problem and the subject of an extensive body of case law. Suffice it to note that the concepts 'civil' and 'criminal' have an autonomous Convention meaning, independent of the categorisations employed in the legal systems of the Contracting States. To determine whether an offence qualifies as 'criminal' for the purpose of the Convention, the court has established three criteria: the domestic classification (whether or not the offence belongs to the criminal law in the legal system of the respondent State), the nature of the offence and the nature and degree of severity of the penalty.[12] The penalty of imprisonment, for example, is typically considered to be of a criminal nature. Thus, in *Engel and others v the Netherlands*, the court stated that deprivations of liberty belong to the criminal sphere, 'except those which by their nature, duration or manner of execution cannot be appreciably detrimental'.[13]

As to the meaning of the notion of 'civil rights and obligations', the Strasbourg organs have not elaborated a fixed set of criteria comparable to those developed for the interpretation of the notion 'criminal offence'. The issue is decided on a case-by-case basis. The court will take into account, inter alia, the character of the right at issue, the existence of a European consensus and the classification of the right in the domestic law of the respondent state.[14] A recurring issue is whether Article 6 s 1 applies to those rights which an individual may assert against the state and which in some legal systems fall under administrative law rather than private law. While there is no general rule to decide such matters, important factors will be whether the applicant's financial interests are at stake, and whether the competent government body possess a discretionary power. Examples of

[11] See, eg, *Kostovski v the Netherlands* Series A no 166 (1989) para 39.

[12] See *Engel and others v the Netherlands* Series A no 22 (1976) para 82. For a more recent articulation of the three criteria, See, eg, *Kadubec v Slovakia* Reports 1998-VI (1998) para 50. If a matter is considered as criminal under domestic law, the Strasbourg Court will, in the light of the stigma attributable to a criminal charge, subject it to the safeguards of Art 6. If not, it will go on to consider the nature of the offence and the severity of the penalty. These criteria are alternative and not cumulative: it suffices that the offence is 'criminal', or that the sanction attached to it belongs to the 'criminal' sphere. However, a cumulative approach may be adopted where the separate analysis of each criterion does not make it possible to reach a clear conclusion. *Ibid* at para 51.

[13] *Engel and Others v the Netherlands*, previous n at para 82.

[14] For an examination of these issues and references to case law, see, eg, DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995) 176; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford, Oxford University Press, 2000) 627.

disputes excluded from the scope of Article 6 include immigration proceedings, claims connected with employment in the public sector and various fiscal matters.[15]

Under the United States Constitution, the general due process clauses of the Fifth and Fourteenth Amendments have functioned as a vehicle for the development of a variety of procedural safeguards governing different areas of the law. With regard to criminal prosecutions, the Supreme Court has placed additional limitations on the criminal justice system, apart from those rights explicitly listed in the Constitution.[16] Two of the many examples are the requirement to establish guilt under a standard of 'proof beyond a reasonable doubt',[17] and the right to an impartial judge (the right to an impartial jury figures in the Sixth Amendment).[18] In other fields of law, such as administrative and civil procedure, the court has likewise developed procedural standards that need to be complied with in order to meet the due process guarantees. Although the exact nature of the procedures required varies from case to case, the following elements typically emerge: (1) the right to adequate notice of the basis of government action; (2) the right to a neutral and detached decision-maker; and (3) the right to a (personal) hearing.[19]

As has been seen in previous chapters, the required level of due process for the resolution of a particular dispute concerning a deprivation of life, liberty or property, is established on the basis of an ad hoc balancing test, in which the worth of the procedure to the individual is weighed against its costs to society as a whole.[20] Thus, in *Mathews v Eldridge*, the court announced that the identification of the proper procedures requires consideration of the following three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[21]

[15] For references, see *ibid*.

[16] See Wayne R LaFave, Jerold H Israel and Nancy J King, *Criminal Procedure* (St Paul, West Group, 2000) 48–87.

[17] *In re Winship*, 397 US 358 (1970).

[18] Eg, *Tumey v Ohio*, 273 US 510 (1927).

[19] See, eg, Nowak and Rotunda, above n 4 at 582–92.

[20] See, eg, ch 2. For a critical appraisal of due process balancing, see references in ch 5 fn 31.

[21] *Mathews v Eldridge*, 424 US 319, 335 (1976). It is to be noted that the *Mathews* balancing test is inapplicable in criminal procedures. In *Medina v California*, 505 US 437 (1992), the court declined to extend the reach of the *Mathews* standard—developed in a case concerning administrative procedures relating to public benefits—to the criminal sphere. In criminal cases the court applies its more narrow inquiry announced in *Patterson v New York*.

Like Article 6 of the Convention, the fair trial amendments in the Bill of Rights have a limited field of application. A number of protections only relate to the criminal justice system. For instance, the guarantees of the Sixth Amendment govern 'criminal prosecutions', and some of the Fifth Amendment rights come in to play only when a 'crime' or a 'criminal case' is involved. In order to classify a particular proceeding as 'criminal' for the purpose of these provisions, the court primarily looks at the nature of the sanction that may be incurred. If the latter has a 'punitive' character, the procedural safeguards required for criminal prosecutions will apply.[22] The nature of a sanction is primary a question of legislative intent.[23] The court disregards the legislature's labelling only if the party challenging it can provide 'the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil'.[24]

The scope of the due process clauses of the Fifth and Fourteenth Amendments hinges on the interpretation of the terms 'life', 'liberty' and 'property', for due process is required only for those government actions that deprive a person of one of these interests. The effect of the case law defining the three concepts is to distinguish between constitutionally protected interests and unprotected interests or 'mere expectations'.[25] Like the determination of the scope of Article 6, the judicial definition of life, liberty and property is a complicated issue that falls outside the ambit of this introduction.[26] The term 'liberty' obviously encompasses freedom from imprisonment. It is not limited to the criminal justice system and covers all forms of government deprivation of physical freedom. As regards the notion of property, the discussion has focused on whether different types of government benefits fall within the definition. As a general rule, a property interest implicates due process guarantees if the person concerned

In this case, the court held that the power of a state to regulate criminal proceedings is not subject to proscription under the due process clause unless 'it offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental'. See *Patterson v New York*, 432 US 197, 201–2 (1977). For a detailed discussion of due process analysis in the criminal law context, see, eg, LaFave, Israel and King, above n 16 at 80–87.

[22] *Kennedy v Mendoza-Martinez*, 372 US 144, 167 (1963).

[23] *Allen v Illinois*, 478 US 364, 368 (1986). Absent conclusive evidence of congressional intent as to the penal nature of a statute, the following factors will be considered: '[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.' See *Kennedy v Mendoza-Martinez*, above n 22 at 168–9.

[24] *Kansas v Hendricks*, 521 US 346, 361 (1997).

[25] Nowak and Rotunda, *Constitutional Law*, above n 4 at 547.

[26] For more information, see *ibid* at 545–82.

can be said to be 'entitled' to it, ie when the law defines the interest in such a way that he should continue to receive it under the terms of the law.[27]

C. Limitations of the Right to a Fair Trial

In contrast to the common limitation clauses of Articles 8 to 11, the fair trial rights enshrined in Article 6 of the Convention are not generally subject to express restrictions. One important exception to this is the specific limitation clause embodied in Article 6 s 1. The latter explicitly qualifies the right to a public hearing, by stipulating that

> the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

One would be wrong to conclude that the absence of express restrictions on other Article 6 guarantees implies that these rights are absolute. Quite the contrary, the Convention organs have constantly limited fair trial rights in the furtherance of other legitimate interests. To begin with, the safeguards implied in Article 6 are subject to inherent limitations. Thus, in *Golder v United Kingdom*, the court was quick to point out that the implied right of access to a court is not absolute, and calls for state regulations which 'may vary in time and place according to the needs and resources of the community and of individuals'.[28] In *Ashingdane v United Kingdom*, the court added that restrictions on the right of access to a court must have a legitimate aim and must be reasonably proportionate to that aim.[29] This test clearly resembles the justification process developed under Articles 8 to 11. Similarly, the specific rights following from the overall requirement of a fair hearing are subject to inherent limitation, in the sense that an interference with any of these rights does not necessarily amount to a violation of Article 6.[30] As noted, a decision as to the fairness of a trial is based on an assessment of the proceedings as a whole. This may involve the balancing of the interest of the individual against other legitimate societal aims.

Limitations of the rights explicitly mentioned in Article 6 do not appear to be permitted as such. Nevertheless, inherent restrictions in the broader sense flow from a restrictive interpretation of the scope and content of

[27] *Ibid* at 572. See, eg, *Perry v Sindermann*, 408 US 593 (1972) (public employment); *Goldberg v Kelly*, 397 US 254 (1970) (public welfare benefits).

[28] *Golder v UK*, above n 6 at para 38.

[29] *Ashingdane v UK* Series A no 93 (1985) para 57.

[30] Clayton and Tomlinson, above n 14 at 637.

these rights at the definitional stage.[31] This too may be the product of a balancing exercise in which conflicting interests of the individual and society as a whole are weighed against each other. An illustration of government interest analysis at the definitional prong, can be found in the court's interpretation of the right to the public pronouncement of judgment in Article 6 s 1. Contrary to the right to a public trial, this requirement is not subject to any explicit exceptions, yet the court has rejected a literal reading requiring an oral reading in open court in all circumstances. Rather,

> in each case the form of publicity to be given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1.[32]

As a final matter, it may be observed that Article 6 is not included in the list of Article 15 s 2 of the Convention. Accordingly, restrictions on the right to a fair trial may also be imposed pursuant to an emergency derogation under Article 15 s 1.

Although the fair trial safeguards in the Bill of Rights are drafted in unqualified terms, they are not absolute and may yield to governmental interests and law enforcement considerations. In imposing inherent limitations on the various constitutional fair trial guarantees, the Supreme Court has oscillated between categorisation and balancing. As these methods are explored in more detail in sections III and IV below, a few examples suffice here. A first example concerns the right to a public trial. In contrast to the Convention, the Sixth Amendment does not provide for explicit restrictions on the publicity of a trial, but closure of a trial may be justified in certain situations. Acknowledging that the value of a public trial must be weighed against other public interests, the court established the following test:

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[33]

An example of a more categorical approach can be found in certain readings of the Sixth Amendment's Confrontation Clause. The latter amendment provides, in relevant part, that in all criminal prosecutions, 'the accused shall enjoy the right (…) to be confronted with the witnesses against him'. Although in some cases the court has recognised exceptions

[31] See generally ch 2 above.
[32] *Pretto v Italy* Series A no 71 (1983) para 26.
[33] *Waller v Georgia*, 467 US 39, 48 (1984).

to the right to actual face-to-face confrontations on the basis of a flexible balancing test,[34] on other occasions it has formulated bright-line rules to delineate the scope of the Confrontation Clause. Thus, for instance, in *Crawford v Washington*, the court held that all out-of-court testimonial statements by witnesses are barred under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses.[35]

Finally, as noted before, the court employs a balancing test to determine the contours of the general due process guarantees.[36] The *Mathews* three-prong balancing test not only serves the purpose of defining the scope and content of due process; at the same time it functions as a means of limiting the application of due process.[37] Due process is commonly regarded as a flexible concept. Justice Frankfurter expressed this idea most eloquently:

> [Due process], unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis, respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. (…) Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.[38]

D. Concluding Remarks

The two declarations of rights share certain notable features as far as the right to a fair trial is concerned. One important similarity is the fact that both the Convention and the Bill of Rights contain a general, open-ended requirement of procedural fairness on the basis of which a variety of procedural rights have been developed. In addition to this basic guarantee, the Constitution and the Convention particularise a number of fair trial rights governing the criminal justice system. A second common feature is the limited field of application of the procedural guarantees and the

[34] See, eg, *Maryland v Craig*, 497 US 836, 850 (1990) (Holding that an exception to the right to a physical confrontation at the trial will be justified 'where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured').

[35] *Crawford v Washington*, 541 US 36 (2004).

[36] *Mathews v Eldridge*, above n 21 at 335.

[37] See David L Faigman, 'Reconciling Individual Rights and Government Interests: Madisonian Principles versus Supreme Court Practice' (1992) 78 *Virginia Law Review* 1521, 1573 (observing that the purpose of the *Mathews* balancing test is to assess the government's justification for an infringement of the Constitution).

[38] *Joint Anti-Fascist Refugee Committee v McGrath*, above n 2 at 162–3.

difficulty of judicially defining it. Finally, in neither of the two systems does the absence of explicit restrictions on most of the fair trial rights imply absolute protection.

Turning to an examination of the specific rights, a number of differences become apparent. As will be seen in the discussion to follow, certain aspects of a fair trial receive stronger protection in one or the other jurisdiction, and some rights are unique to a particular system (eg, there is no right to a jury trial in the Convention). These dissimilarities may partly be explained by the different nature of the two declarations of rights. Article 6 provides a framework for a great variety of European legal systems—there are indeed large variations between the Contracting States as to many issues of evidence and procedure (eg, the difference between 'inquisitorial' and 'accusatorial' systems in criminal cases). Given the diverse national backgrounds, the European Commission and the European Court have sought to resist the temptation to impose detailed procedural rules in interpreting Article 6. Rather than establishing fixed, common safeguards, the Strasbourg organs tend to focus on the fairness of the procedure as a whole. Conversely, in the United States fair trial rights are rooted in one specific national legal practice, and constitutional regulation of process has become very extensive in certain areas.[39]

III. THE RIGHT TO A FAIR TRIAL AND COUNTER-TERRORISM MEASURES

A. The Right to an Independent and Impartial Judge and Jury

i. General Standards

Article 6 s 1 of the Convention secures the right to a trial before 'an independent and impartial tribunal' in all disputes covered by Article 6. The requirements of independence and impartiality have similar aims and are often considered together by the Strasbourg organs. The notion of independence primarily refers to independence of the judge from the executive and the parties.[40] In determining whether a tribunal meets the independence test, the Convention organs will have regard to such issues as the manner of appointment of the members of the tribunal and the duration of their term in office, the existence of guarantees against outside pressures, and the question of whether the tribunal presents an appearance

[39] See LaFave, Israel and King, above n 16 at 48 (noting that one can speak of a 'constitutional code of criminal procedure').

[40] See, eg, *Ringeisen v Austria* Series A no 13 (1971) para 95.

of independence.[41] The notion of impartiality involves two tests.[42] Under a subjective test, the court considers the personal conviction of a particular judge in a given case. Subjective impartiality is presumed unless the applicant proves that the judge holds personal prejudice or bias against him or with respect to the case on trial.[43] The second test is an objective one, requiring the court to ask whether a judge offers sufficient guarantees to exclude any legitimate doubt as to his impartiality, irrespective of his personal conduct. Thus, for instance, a judge's previous involvement in a case—eg as an investigating judge—may create a legitimate doubt as to his impartiality at the trial stage.[44] The court has held that even appearances may be of some importance in this connection. Yet, in deciding whether in a given case there is a 'legitimate reason' to fear that a particular judge lacks impartiality, the applicant's personal perceptions are not decisive; what is decisive is whether these perceptions can be held to be 'objectively justified'.[45] In marked contrast to the Bill of Rights, Article 6 contains no right to trial by jury. However, the Strasbourg Court has emphasised that where the Contracting States provide for jury trials, the principles of independence and impartiality apply as much to jurors as they do to professional judges and lay judges.[46]

No similar, overall requirement of an independent and impartial judge and jury is written in the United States Constitution. As far as criminal prosecutions are concerned, the Constitution sets forth two provisions relating to the subject. Article III, s 2, commands that

> [t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.

In addition, the Sixth Amendment provides that

> [i]n all criminal prosecutions, the accused shall enjoy the right to (…) an impartial jury of the State and district wherein the crime shall have been committed.

Although the right to trial by jury serves many different purposes, it is inextricably linked to the concept of impartiality. Expanding on the rationale of jury trials, the Supreme Court in *Duncan v Louisiana* observed that

[41] See, eg, *Campbell and Fell v the UK* Series A no 80 (1984) para 78.

[42] See generally Harris, O'Boyle and Warbrick, above n 14 at 234–9; Pieter van Dijk, 'Article 6 § 1 of the Convention and the Concept of "Objective Impartiality"' in Paul Mahoney *et al* (eds), *Protecting human rights: the European perspective* (Cologne, Carl Heymanns, 2000) 1495.

[43] van Dijk, previous n at 1500.

[44] See, eg, *De Cubber v Belgium* Series A no 86 (1984).

[45] See, eg, *Castillo Algar v Spain* Reports 1998-VIII (1998) para 45.

[46] *Holm v Sweden* Series A no 279-A (1993) para 30.

> [t]he framers of the Constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.[47]

The court held that the right to trial by a jury in criminal cases is fundamental to the American scheme of justice, and accordingly applies to the states through the Fourteenth Amendment.[48] The language of the Sixth Amendment does not seem to permit any departures from the right to a jury trial, and none were recognised by the courts.[49] The only exception is the exclusion of so-called 'petty' offences from the jury trial guarantee. The line between petty and serious offences is drawn either by the maximum punishment available or by the nature of the offence. Thus, for example, the court adopted the bright-line rule that no offence can be deemed petty for purposes of the right to trial by jury where imprisonment for more than six months is authorised.[50]

Juries must be, by the terms of the Sixth Amendment, impartial. This notion has been interpreted as including two separate requirements.[51] The first relates to the list (also referred to as 'panel' or 'venire') from which the jurors in a particular case are selected. It is a well-established constitutional principle that the latter must correspond to 'a representative cross-section of the community'.[52] Secondly, impartiality requires that the individual jurors chosen are unbiased. During the process of selecting the jurors who will actually serve in a given case (so-called 'voir dire'), the defence and the prosecution are given the opportunity to examine potential jurors to determine possible grounds for bias and prejudice. In *Wood v United States*, the court ruled that the Sixth Amendment prescribes no specific test of impartiality.[53] It further distinguished between two situations: 'The bias

[47] *Duncan v Louisiana*, 391 US 145, 156 (1968).

[48] *Ibid* at 149.

[49] There is, however, a considerable amount of case law concerning the attributes and functions of the jury, which includes issues such as the size of the jury and the requirement of unanimity. For a discussion and references, see LaFave, Israel and King, above n 16 at 1024–52.

[50] *Baldwin v New York*, 399 US 66, 69 (1970).

[51] See generally LaFave, Israel and King, above n 16 at 1032–5.

[52] See, eg, *Taylor v Louisiana*, 419 US 522, 528 (1975). In order to establish a prima facie violation of the fair-cross-section rule, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in the list from which the jury is selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process. See *Duren v Missouri*, 439 US 357, 364 (1979).

[53] *United States v Wood*, 299 US 123, 145–6 (1936): 'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular test and procedure is not chained to any ancient and artificial formula.'

of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law.'[54] Impartiality does not require that the jurors are totally ignorant of the facts and issues involved: 'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in the court.'[55] Whereas the Sixth Amendment is concerned with the impartiality of the jury, the Fifth and Fourteenth Amendments' due process clauses have been interpreted to require an impartial judge in criminal cases.[56] More in general, due process embraces the right to some form of 'neutral and detached decision-maker' in all procedures covered by it.[57] In the court's opinion, 'a fair trial in a fair tribunal is a basic requirement of due process', and fairness 'requires an absence of actual bias in the trial of cases'.[58] Not only evidence of 'actual bias' but also the 'probability of unfairness' may amount to a violation of this requirement.[59] Thus, for instance, impartiality may be lacking if the decision-maker has a personal monetary interest in the outcome of the adjudication, irrespective of his personal state of mind.[60]

ii. Exceptional Standards in the Fight against Terrorism

The present sub-section is not concerned with the establishment of a separate system of (military) justice to try terrorist suspects.[61] This problem will be dealt with in section IV. In what follows the focus will be on whether limited institutional adjustments to ordinary civilian courts to hear terrorism-related cases—for instance the appointment of specialised judges or the exclusion of juries from terrorist trials—may be reconciled with the right to an independent and impartial judge and jury as protected in both systems studied.

[54] *Ibid* at 133.
[55] *Irvin v Dowd*, 366 US 717, 723 (1961).
[56] *Tumey v Ohio*, above n 18.
[57] Nowak and Rotunda, above n 4 at 586.
[58] See, eg, *In re Murchison et al,* 349 US 133, 136 (1955).
[59] *Ibid* noting that '[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties, [but that] to perform its high function in the best way "justice must satisfy the appearance of justice".'
[60] See, eg, *Gibson v Berryhill*, 411 US 564, 579 (1973).
[61] Nor does this sub-section deal with the question of the use of military or police courts to try members of the military or police. For a discussion of these issues, see, eg, Frederico Andreu-Guzmán, *Military Jurisdiction and International Law* (Geneva, International Commission of Jurists, 2004).

a. The European Convention

The cases discussed below demonstrate that several Members States of the Council of Europe have resorted to extra-ordinarily constituted courts or tribunals to try suspected terrorists.[62] A well-publicised example of the modification of the ordinary criminal justice system is the British departure from jury trials in Northern Ireland. The so-called 'Diplock' courts—named after the chairman of the Commission that recommend them[63]—were introduced by the Northern Ireland (Emergency Provisions) Act 1973.[64] The reason for the establishment of these courts—composed of a single judge, sitting without a jury—was to avoid the possible intimidation of jurors and the bias of jurors deriving from communal loyalties.[65] While no fair trial complaints concerning the Diplock courts have reached the Strasbourg organs, the use of special courts in other Member States gave rise to a considerable body of case law.

The Special Criminal Court in Ireland

The European Commission first confronted the issue of specially adapted national security courts in a number of admissibility decisions against Ireland.[66] The applicants in these cases challenged their convictions by the Special Criminal Court, which was established pursuant to Part V of the Offences against the State Act 1939.[67] The 1939 Act allowed the government to set up Special Criminal Courts when it was satisfied

[62] For an extensive survey of legislation, see, eg, Christian Walter, Silja Vönkey, Volker Röben and Frank Schorkopf (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin, Springer, 2004).

[63] See Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland (Cmnd 5185, London, 1972).

[64] For a discussion of the Diplock courts and further references, see Laura K Donohue, *Counter-Terrorist Law and Emergency Powers in the UK 1922–2000* (Dublin, Irish Academic Press, 2001) 123 *ff*; Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford, Oxford University Press, 2002) 187–93.

[65] Donohue, previous n at 124.

[66] See *X and Y v Ireland* Application no 8299/78, 22 *DR* 51 (1980); *Eccles and others v Ireland* Application no 12839/87, 59 *DR* 212 (1988). For a discussion of the Irish legislation, see, eg, Gerard Hogan and Clive Walker, *Political Violence and the Law in Ireland* (Manchester, Manchester University Press, 1989); Dermot Walsh, 'Irish Experiences and Perspectives' in Marianne van Leeuwen (ed), *Confronting Terrorism, European Experiences, Threat Perceptions and Policies* (The Hague/London/Boston: Kluwer Law International, 2003) 45–8.

[67] The following account of the Offences against the State Act 139 is based on *Eccles and others v Ireland*, previous n. The provisions of the Act dealing with the establishment of the Special Criminal Court were enacted pursuant to Art 38.3 of the Irish Constitution: '1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order. 2° The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.'

> that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and publishes a Proclamation to this effect.[68]

This power was brought into operation in 1972 in the wake of another campaign of terrorist violence in Northern Ireland. Whereas trial for serious offences in the ordinary Irish criminal courts is by a single judge sitting with a twelve-member jury, the Special Criminal Courts consisted of three professional judges who reached a decision by majority vote. The members of the Special Criminal Courts—appointed by the government—were selected from serving or formal judges, barristers and senior military officers. The Act further provided that convictions or sentences of a Special Criminal Court were subject to appeal to the court of Criminal Appeal in the same way as convictions or sentences of the ordinary criminal codes. Trials in the Special Criminal Courts were public, in accordance with the rules of procedure adopted by the court.

In two inadmissibility decisions the Commission ruled that the Special Criminal Courts satisfied the requirements of independence and impartiality embodied in Article 6 s 1.[69] The decision in *X and Y v Ireland* is important, in that the Commission held that the safeguards contained in Article 6 s 1 do not forbid the bringing of an accused before a special court. In the Commission's view, the Convention does not guarantee an individual the right to a trial in any specific domestic court, or the right to a trial by jury in criminal cases.[70] What is decisive is whether any given court offers sufficient guarantees as to its independence and impartiality. The latter issue was considered in more detail in *Eccles and others v Ireland*.[71] The applicants in this case were convicted by the Special Criminal Court in Dublin for murder and robbery. They contested the court's independence, arguing that its members were, at the time of their trials, removable at the will of the government, and their salaries diminishable at the will of the Minister for Finance. While the Commission acknowledged that the applicants gave a correct account of the text of the impugned legislation, it proceeded to look at the 'realities of the situation' to conclude that there had not been a violation of Article 6.[72] The members

[68] *Ibid*.

[69] The Irish Special Criminal Court was also the subject of a Communication of the United Nations Human Rights Committee. See *Kavanagh v Ireland*, Communication No (CCPR/C/71/D/819/1998) [2001] UNHRC 5 (26 April 2001). The Commission accepted as a general principle that trial before courts other than the ordinary courts is not necessarily a violation of the entitlement to a fair hearing in Art 14 of the International Covenant on Civil and Political Rights (para 10.1). However, the Commission also decided that a decision to try a person before a special court must be based upon reasonable and objective grounds communicated to the individual (para 10.2).

[70] *X and Y v Ireland*, above n 66 at 73.

[71] *Eccles and others v Ireland*, above n 66.

[72] *Ibid* at 218.

of the Commission began by observing that the irremovability of judges by the executive during their terms of office is an important corollary of the independence of a tribunal. However, regard was to be had to the Irish Supreme Court's decision that, notwithstanding the statutory power of the government to remove judges, any attempt to interfere with the judicial independence of the Special Criminal Courts would amount to a violation of the constitutional right to a fair trial, and accordingly be prevented or corrected by the ordinary courts.[73] The Commission further observed that since the Special Criminal Courts were not permanent courts, it necessarily followed that their members could not enjoy the same judicial tenure as judges of the ordinary courts.[74] Finally, the Commission took into account a number of safeguards: only persons with a judicial background were sitting on the special court; its judgments could be appealed to the ordinary courts of appeal; and in the case before it there was no evidence of any executive interference with the court in the performance of its functioning.[75]

The Spanish Audiencia Nacional

Since 1977, the Audiencia Nacional, a special court sitting in Madrid, has jurisdiction over a number of serious crimes, including terrorism-related offences.[76] The proceedings before this court were scrutinised by the Convention organs in *Barberà, Messegué and Jabardo v Spain*.[77] It suffices to note here that, as far the alleged violation of the impartiality requirement of Article 6 is concerned, the Strasbourg Court agreed with the Commission that the Audiencia Nacional is a normal civilian court, the composition of which raises no separate fair trial issues.[78] Significance was attached to the fact that the members of the court are ordinary judges appointed by the High Council of the Judiciary (*Consejo General del Poder Judicial*).[79]

The Turkish State Security Courts

In a considerable number of cases against Turkey, the Convention organs examined concerns raised by applicants over the participation of military

[73] *Ibid*.
[74] *Ibid*.
[75] *Ibid* at 219.
[76] For further detail and references, see, eg, José Martínez Soria, 'Country Report on Spain', in Christian Walter *et al* (eds), above n 62 at 517, 539.
[77] *Barberà, Messegué and Jabardo v Spain* Series A no 146 (1988).
[78] *Ibid* at para 53.
[79] See the Report of the Commission in *Barberà, Messegué and Jabardo v Spain*, 16 October 1986, para 94.

personnel in the criminal justice system. The State Security Courts were set up in accordance with the Turkish Constitution to hear cases concerning a limited number of offences against the existence and the stability of the state.[80] Although conceived as non-military tribunals, the State Security Courts were composed of three judges, one of which was a military officer. According to the respondent government, the experience of the military in the anti-terrorism campaign justified the inclusion of the military judge so as to provide the court with the necessary expertise and knowledge to deal with the terrorist threat.[81] The first case in which the European Court confronted the issue whether the State Security Courts satisfy the Convention standards of independence and impartiality was *Incal v Turkey*.[82] *Incal* concerned a conviction for the distribution of a leaflet containing terrorist and separatist propaganda. However, the court's approach in this case has been confirmed in several subsequent judgments, relating to a wide variety of alleged terrorist offences.[83] In each of these cases the court examined the requirements of impartiality and independence together. As the status of the two civilian judges sitting in the State Security Courts was not disputed by the parties, the argument turned on the participation of the military judge. In this connection, the Strasbourg Court noted at the outset that, 'being aware of the problems caused by terrorism', it would not determine in abstracto the necessity of the creation of courts partially composed of members of the armed forces to cope with the problem of terrorism.[84] Its task was limited to deciding whether the manner in which the State Security Court had functioned in the specific case before it infringed the applicant's fair trial rights.

In a first step, the court observed that the professional status of the military judges of the State Security Courts provided 'certain guarantees of independence and impartiality'.[85] The military judges were 'career members' of the Military Legal Service, who received the same legal training as their civilian counterparts; they enjoyed constitutional safeguards identical

[80] See, eg, *Incal v Turkey* Reports 1998-IV (1998) para 52. For further detail and references, see, eg, Necla Güney, 'Country Report on Turkey', in Christian Walter *et al* (eds), above n 62 at 558, 580–81.

[81] *Incal v Turkey*, previous n at para 70.

[82] *Incal v Turkey*, above n 80.

[83] See, amongst many other authorities, *Ciraklar v Turkey* Reports 1998-VII (1998) (conviction for participation in an unauthorised demonstration and violence against the police); *Karatas v Turkey* Reports 1999-IV (1999) (conviction for the dissemination of separatist propaganda); *Baskaya and Okçuoglu v Turkey* Reports 1999-IV (1999) (conviction for the dissemination of separatist propaganda); *Yakis v Turkey*, 25 September 2001 (conviction for membership of an illegal organisation); *Algür v Turkey*, 22 October 2002 (conviction for membership of an illegal organisation); *Öcalan v Turkey*, 12 March 2003 (First Section); *Öcalan v Turkey*, 15 May 2005 (Grand Chamber) (death penalty for involvement in various violent terrorist offences).

[84] *Incal v Turkey*, above n 80 at para 70.

[85] *Ibid* at para 67.

to those of civilian judges; they could not be removed from office or made to retire without their consent; and the public authorities were barred by the Constitution from giving instructions to the military judges concerning their judicial activities or influencing them in the performance of their duties.[86] The court added, however, that other aspects of the military judges' status made their independence and impartiality 'questionable':

> Firstly, they are servicemen who still belong to the army, which in turn takes its orders from the executive. Secondly, they remain subject to military discipline and assessment reports are compiled on them by the army for that purpose. Decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army. Lastly, their term of office as National Security Court judges is only four years and can be renewed.[87]

Against the background of these elements, and given the nature of the charges against the applicant and the fact that he was a civilian, the court concluded that the applicant could hold legitimate doubts as to the independence and impartiality of the military judge.[88]

The decisive factor in *Incal* and its progeny is the fact that a civilian was tried by a court (partially) composed of members of the armed forces.[89] As to the nature of the charges against the applicant, the court in *Incal* remarked that it had not discerned anything in the leaflet distributed by the applicant that might be regarded as incitement to violence, and that the State Security Court had refused to apply the Prevention of Terrorism Act.[90] With this statement, the court seems to indicate a certain willingness to take into account the background of the case, suggesting that a different result could have been reached if the applicant would have been charged with more serious terrorist crimes. However, subsequent cases contradict this proposition.[91] *Öcalan v Turkey* makes it clear that the presence of a military judge may be even more problematic in a case concerning a high-profile terrorist leader:

> Moreover, the exceptional nature of the trial itself concerning a high-profile accused who had been engaged in a lengthy armed conflict with the Turkish military authorities and who faced the death penalty are factors which cannot be

[86] *Ibid*.

[87] *Ibid* at para 68.

[88] *Ibid* at para 72, holding that 'the applicant could legitimately fear that because one of the judges of the İzmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case.'

[89] *Ibid*.

[90] *Ibid*.

[91] For references to cases involving more serious offences, see above n 83. See also Hélène Tigroudja, 'L'équité du procès pénal et la lutte international contre le terrorisme. Réflexions autour de décisions internes et internationales récentes' (2006) 69 *Revue trimestrielle des droits de l'homme* 3 (arguing that the requirements of Art 6 do not vary in accordance with the alleged dangerousness of the accused).

> overlooked in this assessment. The presence of a military judge—undoubtedly considered necessary because of his competence and experience in military matters—can only have served to raise doubts in the accused's mind as to the independence and impartiality of the court.[92]

Incal was a twelve to eight majority decision. In a joint opinion, the dissenting judges argued that specialised criminal courts with 'expert' members are not per se irreconcilable with the requirements of independence and impartiality within the meaning of Article 6 s 1. Reference was made to the widespread European practice of using tribunals in which professional judges sit alongside specialists in a particular sphere—for example commercial law—and whose knowledge is necessary in deciding cases on that particular subject matter. As regards the State Security Courts, the dissenting judges found the applicant's doubts about their impartiality and independence not to be objectively justified. In their view, the concerns raised by the majority as to the professional status of the military judges could equally be applied to ordinary judges. They too are sometimes subject to assessment and disciplinary rules, and to decisions taken by administrative authorities pertaining to their appointment. With respect to the military judges' limited term of office—a renewable period of four years—the minority pointed out that in other cases the court has found sufficient even terms of office of three years. Moreover, even if their term of office as State Security Court judges was not renewed, the judges in question remained military judges for the rest of their careers. The reasoning of the dissenting judges in *Incal* has been reiterated in subsequent judgments by dissenting Judge Gölcüklü. The Turkish judge has further emphasised that the State Security Courts are not military courts but civilian courts, whose judgments can be overturned by the ordinary civil Court of Cassation.[93]

b. The US Constitution

The United States has no comparable experience with institutionally adjusted civilian courts trying suspected terrorists. Hence, the Supreme Court's case law contains no examples of cases testing the compatibility of such modifications with the constitutional right to an impartial judge and jury. One possible explanation of the non-existence of special courts may be the rigid nature of the jury requirement in criminal proceedings. As previously noted, the absolute language of the Sixth Amendment does not appear to allow any national security exceptions to the constitutional right

[92] *Öcalan v Turkey* (First Section), above n 83 at para 120.

[93] See, however, *Incal v Turkey*, above n 80 at para 72 (holding that the Court of Cassation does not have full jurisdiction, and could therefore not dispel the applicant's legitimate doubts as to the independence and impartiality of the State Security Courts).

to trial by jury. An illustration can be found in the early case of *Ex parte Milligan*.[94] In *Milligan*, which arose out of President Lincoln's suspension of the writ of habeas corpus during the Civil War, the Supreme Court held that the conviction of a civilian by a military commission violated the Sixth Amendment jury guarantee. Justice Davis, writing for the court, inferred from the clear language of the Amendment that the right to trial by an impartial jury 'is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service'.[95] The *Milligan* Court was thus prepared to recognise only one exception to trial by jury, namely that of a duly constituted court-martial.[96] Every other deprivation of the right to trial by jury would be in breach of the Constitution:

> All other persons, (…), if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity.[97]

One way to circumvent the constitutional obstacles of modifying the civilian court system to accommodate security concerns is to subject terrorist suspects to a separate system of military justice. This option was contemplated in President Bush's Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism (hereinafter the 'Military Order'),[98] and later approved by Congress in the Military Commissions Act of 2006.[99] Some of the constitutional questions raised by the Military Order will be further examined in section IV. It suffices to note here, that one of the rights suspended by the Order is the Sixth Amendment's right to trial by jury. Under the Order, the Secretary of Defence was instructed to create 'military commissions' for the trial of certain categories of international terrorist.[100] Each commission consists of between three to seven military officers and a president who is a military

[94] *Ex p Milligan*, 71 US 2 (1866). See also below section IV.

[95] *Ibid* at 123.

[96] *Ibid*. According to the court, the discipline and efficiency of the military necessitates 'other and swifter modes of trial than trial by jury' (*ibid*). The constitutional bases for this exception was found in the Fifth Amendment, which requires a presentment or indictment of a Grand Jury before one can be held to answer for high crimes, 'except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger'. In the court's opinion, the framers of the Constitution intended to limit the right to trial by jury to those persons who were subject to indictment or presentment under the Fifth Amendment.

[97] *Ibid* at 123.

[98] Military Order of November 13, 2001, 66 Fed. Reg. 57,831 (2001).

[99] Military Commissions Act of 2006, Pub.L. No. 109–366, 120 Stat. 2600 (2006).

[100] On 21 March 2002 the Department of Defense promulgated Military Commission Order No. 1, which outlines, inter alia, the composition and structure of the commissions. See US Dep't of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism (Mar 21, 2002), 32 C.F.R. ss 9.1–9.12 (2004).

lawyer.[101] The members of the commissions are appointed by the 'Appointing Authority' (the Secretary of Defence or a designee). The decisions of the commissions are subject to review only by a 'review panel' (which also consists of military officers) and, in last resort, by the President or the Secretary of State.[102] Commentators have censured the government's proposal for dispensing with the jury guarantee and for its lack of an impartial and independent decision-maker.[103] As two prominent constitutional scholars put it:

> [T]he tribunals would by design eschew both grand jury presentment and jury trial, and would employ—as the triers of fact and law—military officers who lack the insulation of Article III judges, being wholly dependent on the discretion of their military superiors for promotions and indeed for their livelihood.[104]

Following the Supreme Court's decision in *Hamdan v Rumsfeld*, which held that the President had not been authorised by Congress to establish the military commissions in question (see below), Congress adopted the Military Commissions Act of 2006.[105] The latter's provisions concerning the appointment (the Secretary of Defence or a designee) and composition (military officers and judges) of the military commissions mirror the Military Order, thus raising the same concerns with regard to the impartiality and independence of the military commissions.[106]

c. Concluding Remarks

Article 6 s 1 allows the establishment of specially modified civilian courts to try terrorist suspects. Bringing those allegedly involved in terrorism before courts other than the ordinary courts does not necessarily implicate an infringement of the right to an independent and impartial tribunal. Furthermore, since the Convention does not guarantee a right to a trial by jury in criminal cases, the substitution of the jury with a professional judge in terrorism-related cases will not raise separate Article 6 issues. The flexibility inherent in Article 6 is not unlimited, however. Although the participation of military personnel in terrorist trials is not excluded per se,

[101] *Ibid*, s 4(2).

[102] *Ibid*, s 6(H)(4), (5) and (6). The review panel may include commissioned civilians. At least one of the members of each panel must have experience as a judge.

[103] See, eg, Diane Marie, 'Guantánamo' (2004) 42 *Columbia Journal of Transnational Law* 263, 347, describing the decision-making process as follows: 'By dint of a plan drafted by the executive branch with no legislative input, the military, the executive arm most affected by events since September 11, is to act as prosecutor and primary defender, as judge and jury, as custodian and, potentially, as executioner.' For other critical comments, see below n 420.

[104] Neal K Katyal and Laurence H Tribe, 'Waging War, Deciding Guilt: Trying the Military Tribunals' (2002) 111 *Yale Law Journal* 1259, 1262.

[105] *Hamdan v Rumsfeld*, 126 S Ct 2749 (2006).

[106] Military Commissions Act of 2006, above n 99 at s 948h–948j.

the court takes a rather rigorous approach with regard to the presence of military judges, at least in the absence of a valid Article 15 derogation. The court in *Incal* and its progeny may well have declined to determine in abstracto the necessity for the establishment of courts partially composed of military officers to try civilians suspected of terrorism, but it is not clear from these cases if, and under what circumstances, such courts will ever be justified. If one looks at the concerns raised in respect of the Turkish State Security Courts (eg, the connection between the army and the executive), it becomes clear that the involvement of military personnel will pose nearly insurmountable Article 6 obstacles. Under the fair trial provisions of the Bill of Rights, the use of specially adapted courts is even more problematic. In addition to the independence and impartiality requirements, the Sixth Amendment's unqualified right to a jury trial precludes the establishment of special criminal courts to try terrorist suspects.

B. The Right to a Public Trial

i. General Standards

The right to a public trial is safeguarded in the Convention and the Bill of Rights. Article 6 s 1 provides that in the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a 'public hearing'. Similarly, the Sixth Amendment guarantees a 'public trial' to the accused in all criminal prosecutions. Courts in both jurisdictions agree that publicity constitutes a fundamental principle of the justice system, the public nature of a trial being in the mutual interest of the individual and society as a whole. On the one hand, publicity protects litigants against the arbitrariness of decisions with no public scrutiny; on the other hand, it is a means to maintain confidence in the courts by enabling the public to see justice being done.[107] However, the right to a public trial is not absolute. Article 6 s 1 contains a list of legitimate grounds for excluding the press and the public from all or part of the trial: the protection of morals, public order or national security, the rights of juveniles, the right to privacy and the interests of justice. Despite the absence of the words 'necessary in a democratic society', the interpretation of the limitation clause of Article 6 s 1 is in line with the approach taken under the common limitation clauses of Articles 8 to 11.[108] Likewise, the Sixth Amendment requirement that trials be public is subject to implied

[107] Cp, eg, *Pretto v Italy*, above n 32 at para 21 with *Richmond Newspapers, Inc v Virginia*, 448 US 555, 569–73 (1980).

[108] Harris, O'Boyle and Warbrick, above n 14 at 219.

limitations. The Supreme Court has made it clear that the right to an open trial must sometimes give way to competing interests, such as the defendant's right to a fair trial or the public interest in inhibiting disclosure of sensitive information. For a closure to be justified, the

> party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[109]

ii. Exceptional Standards in the Fight against Terrorism

There are numerous reasons as to why the government may want to restrict the right to a public hearing in terrorism-related cases. Justifications for closure include the protection of witnesses, intelligence and law enforcement sources and classified information. Another argument to exclude the public and press from terrorist trials is to prevent the accused from using open court proceedings as a forum to disseminate terrorist propaganda or to incite to further acts of violence.

In only a few cases did the Convention organs consider measures restricting public and press access to a trial on national security grounds. *Engel and others v Netherlands* involved disciplinary proceedings against members of the armed forces which took place in camera in a military court.[110] In the court's opinion, these measures breached the Convention due to the government's failure to justify the closure on any of the grounds listed in Article 6.[111] In *Campbell and Fell v United Kingdom*, by contrast, the court held that prison disciplinary proceedings could be conducted in camera in the interest of public order and national security. According to the court, to require the state to organise such proceedings in public, 'would impose a disproportionate burden on the authorities'.[112] In a case concerning ordinary criminal proceedings against a prisoner—as opposed to disciplinary proceedings—the court found no justification for conducting the trial in a special prison hearing room which was not sufficiently accessible to the public. It stated in general terms that 'security problems are a common feature of many criminal proceedings, but cases in which security concerns justify excluding the public from a trial are nevertheless rare'.[113] Concerns as to the applicant's escape plans were not serious enough to convince the court. The court in this case also examined the

[109] *Waller v Georgia*, above n 33 at 48.
[110] See *Engel and others v the Netherlands*, above n 12.
[111] *Ibid* at para 89.
[112] *Campbell and Fell v the UK*, above n 41 at para 87 (reasoning that the difficulties over admitting the public to the prison precincts were 'obvious', and that security problems would equally arise when convicted prisoners would have to be transported to a court).
[113] *Riepan v Austria* Reports 2000-XII (2000) para 34.

scope of the publicity requirement. Although the public was not formally excluded from the special prison hearing room, hindrance in fact could equally amount to a violation of Article 6. It was observed that a trial would comply with the requirement of publicity only if the public is able to obtain information about its date and place, and if this place is easily accessible to the public.[114] Therefore, if a trial is held outside a regular courtroom, in particularly in places such as a prison, the Contracting States are under the obligation to take compensatory measures in order to ensure that the public and media are duly informed and granted effective access.[115]

To date, neither the Commission nor the European Court has dealt with terrorist trials conducted behind closed doors. Nonetheless, the above cases suggest that even in terrorism-related cases total exclusion of the public and the press will not easily be justified. A wholly secret trial would very likely be considered a disproportionate response to the security concerns associated with terrorism.[116] This is certainly true when there are less far-reaching alternatives such as witness protection.[117] It is to be noted, however, that shielding the identity of witnesses from the public does not necessarily constitute a violation of the publicity requirement of Article 6 s 1. In *AM v United Kingdom*, the Commission was faced with a terrorist trial in Northern Ireland in which the witnesses were screened from the public and the accused. No Convention violation was found:

> Moreover, to the extent that the public were not able to see the screened witnesses, the Commission notes that the interference with the right to publicity was kept to a minimum by the fact that the public were not excluded from the proceedings, but could hear all questions put to and answers given by those witnesses. The Commission finds that screening was 'in the interest of (…) public

[114] *Ibid* at para 29.

[115] *Ibid*.

[116] It has been argued that the practice of certain Latin American countries to allow judges to cover their faces so as to guarantee their anonymity and prevent retaliation by terrorist groups would be difficult to square with the publicity requirement of Art 6. The United Nations Human Rights Committee decided that the conviction of the leader of the terrorist organisation 'Revolutionary Movement Túpac Amaru' in Peru by a trial composed of 'faceless judges' violated Art 14 of the International Covenant on Civil and Political Rights. It stated that 'the very nature of the system of trials by "faceless judges" in a remote prison is predicated on the exclusion of the public from the proceedings'. See *Polay Campos v Peru*, Communication No (CCPR/C/61/D/577/1994) [1998] UNHRC 1 (9 January, 1994). According to Iain Cameron, the use of 'faceless judges' would also violate the separate right to the public pronouncement of the judgment in Art 6 s 1. See Iain Cameron, *National Security and the European Convention on Human Rights* (The Hague/London/Boston, Kluwer Law International, 2000) 302.

[117] See also C Warbrick, 'The Principles of the European Convention on Human Rights and the Response of States to Terrorism' (2002) 3 *European Human Rights Law Review* 287, 303.

> order or national security' and 'to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'[118]

There are no Supreme Court precedents applying the Sixth Amendment standard for the closure of trials to cases involving terrorist suspects. Just as in the Convention context, total exclusion of the press and the public from a trial would not easily pass constitutional muster. Under the test announced in *Waller v Georgia*, such restrictions may not be broader than necessary to protect an overriding interest, and the trial court is required to consider reasonable alternatives to closing the proceeding.[119] In national security cases, such a reasonable alternative to wholly secret trials might consist of the limited exclusion of the pubic during the questioning of certain witnesses or the testimony of undercover agents.[120]

One of the reasons commonly advanced to justify a special regime of military justice to try terrorist offences is that it can be provided that military commissions need not sit in public or can be closed to the public more easily than the civilian courts. The rules regarding the publicity of prosecutions before the military commissions set up in accordance with President Bush's Military Order, were laid down in a separate set of regulations issued by the Department of Defence,[121] and later incorporated in the Military Commissions Act of 2006.[122] These provide that the accused shall be afforded a trial open to the public except where otherwise decided by the president of the commission. Grounds for closure include: the protection of information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities, and the physical safety of individuals.

C. The Right to Call and Confront Witnesses

i. General Standards

The Convention and the Bill of Rights secure the right to call and confront witnesses. Article 6 s 3 (d) of the Convention provides that everyone charged with a criminal offence has the right

[118] *AM v UK* Application no 20657/92 (1992), 15 *EHRR* 113.
[119] *Waller v Georgia*, above n 33 at 48.
[120] Such limited restrictions on the publicity requirement are permitted under the Sixth Amendment. See LaFave, Israel and King, above n 16 at 1091.
[121] US Dep't of Defense, Military Commission Order No. 1, above n 100.
[122] Military Commissions Act of 2006, above n 99 at s 949d.(d).

> to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The Sixth Amendment confers upon the criminal defendant the right

> to be confronted with the witnesses against him

(the so-called 'Confrontation Clause') and

> to have compulsory process for obtaining witnesses in his favor

(the so-called 'Compulsory Process Clause'). The general objective of these principles is similar in both jurisdiction, namely to enhance the truth-finding function of a trial. A criminal defendant's right to call witnesses in his favour allows him to establish a defence and present his own version of the facts.[123] The right of the accused to confront the witnesses against him generally serves two purposes. It offers the finder of fact (the judge or the jury) the opportunity to observe the witness' demeanour as an aid to ascertaining his trustworthiness, and it gives the defendant and his counsel the possibility to cross-examine the witness so as to test his credibility.[124] A recurring issue in this last respect is the admissibility and use of out-of-court statements (also referred to as hearsay) as evidence in a criminal trial.

a. The European Convention

Neither the right of the accused to cross-examine witnesses against him nor to call his own witnesses are protected absolutely by Article 6. As to the cross-examination of witnesses, the Strasbourg Court takes as a starting point the rule that 'all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument'.[125] Exceptions to this principle may be justified provided that the rights of the defence have been respected.[126] It follows that the use of out-of-court statements as evidence—for instance testimony obtained during police inquiries—is not in itself incompatible with Article 6 s 3 (d). What is decisive, in the court's opinion, is whether the defendant was given an 'adequate and proper opportunity' to challenge and question the witness, either when he makes his statement or at a later stage.[127] The corollary of this rule is that a conviction must not 'solely or to a decisive extent' be based on depositions that have been made by a person whom the accused

[123] See, eg, *Washington v Texas*, 388 US 14, 19 (1967).
[124] Cp, eg, *Mattox v United States*, 156 US 237, 242–243 (1895) and *Kostovski v the Netherlands*, above n 11 at para 43.
[125] See, eg, *Kostovski v the Netherlands*, above n 11 at para 41.
[126] *Ibid*.
[127] *Ibid*.

was unable to examine or have examined at some stage of the procedure.[128] Hence, the use of statements by anonymous witnesses to secure a conviction is not incompatible with the Convention under all circumstances. In *Doorson v the Netherlands*, the court stated that in certain procedures the interests of the defence need to be balanced against those of the witnesses called upon to testify.[129] It held that the Contracting States are under the obligation to organise their criminal proceedings in such a way that the life, liberty or security of the witnesses is not unjustifiably imperilled.[130] In practice, the court uses a three-prong test to judge the compatibility of anonymous witnesses with Article 6. First, it will consider whether the circumstances of the case justify reliance on statements by anonymous witnesses. If that is the case, it will continue to examine whether the applicant's conviction was not based exclusively or to a decisive extent on those statements. Only if that question can be answered in the negative, will it come to the final issue, namely whether 'the handicaps under which the defence labours [due to the use of anonymous statements] are sufficiently counterbalanced by the procedures followed by the judicial authorities'.[131] In *Van Mechelen and other v the Netherlands*, the court indicated that the outcome of this balancing exercise may vary according to whether the witnesses in question are members of the police force (eg, undercover agents) or not.[132]

Turning finally to the right to obtain the attendance of witnesses, it should be observed that the text of Article 6 s 3 (d) does not confer upon the accused an unlimited right to call witnesses for his own defence, but merely requires that the witnesses of the accused be examined under the same conditions as those of the prosecution. The essential aim of this provision is to secure equality of arms between the parties.[133] The Strasbourg organs have consistently held that the national courts have a wide discretion to decide whether it is necessary to call a witness.[134]

[128] See, eg, *Doorson v the Netherlands* Reports 1996-II (1996) para 76.

[129] *Ibid* at para 70. See also *Van Mechelen and other v the Netherlands* Reports 1997-III (1997) para 58 (holding that measures restricting the rights of the defence should be strictly necessary, and that '[i]f a less restrictive measure can suffice then that measure should be applied').

[130] *Ibid*.

[131] See, eg, *Doorson v the Netherlands*, above n 128 at para 72.

[132] *Van Mechelen and other v the Netherlands*, above n 129 at para 56–7. The court saw two reasons for this. On the one hand, the use of anonymous statements by police officers should be treated with special care because of their general duty of obedience to the executive authorities and their connection with the prosecution. On the other hand, it may be legitimate for the police authorities to preserve the anonymity of an agent deployed in undercover activities, for his own or his family's protection and so as not to impair his usefulness for future operations. See also *Lüdi v Switzerland* Series A no 238 (1992).

[133] See, eg, *Vidal v Belgium* Series A no 235-B (1992) para 33.

[134] *Ibid*.

b. The US Constitution

Like the European Court, the Supreme Court has been called upon to reconcile the mandates of the Sixth Amendment's Confrontation Clause with competing interests. In doing so, the Justices have moved back and forth between categorical and balancing approaches.[135] The primary aim of the Confrontation Clause is to prevent the admission as evidence of testimonial hearsay. As Justice Scalia explained in his 2004 majority opinion in *Crawford v Washington*, the chief evil at which the Sixth Amendment was originally directed is the 'civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused'.[136] In accordance with the framework established in *Crawford*, a distinction must be drawn between testimonial and non-testimonial hearsay.[137] Testimonial statements obtained at the pre-trial stage (of a witness who did not appear at trial) are admissible only if (1) the witness is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine him.[138] By adopting this categorical rule, the court overruled the more open-ended test for the admission of pre-trial statements developed in previous cases. Prior to *Crawford*, hearsay evidence—including an unavailable witness's out-of-court testimony—was admissible so long as it fell within a 'firmly rooted hearsay exception' or bore 'particularized guarantees of trustworthiness'.[139] In *Crawford*, the majority firmly disapproved of such case-by-case reliability determinations. Justice Scalia commented that '[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design'.[140] Further,

> Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward

[135] See generally, Ruth L Friedman, 'The Confrontation Clause in Search of a Paradigm: Has Public Policy Trumped the Constitution?' (2002) 22 *Pace Law Review* 455; Cornelius M Murphy, 'Justice Scalia and the Confrontation Clause: A Case Study in Originalist Adjudication of Individual Rights' (1997) 34 *American Criminal Law Review* 1243.

[136] *Crawford v Washington*, above n 35. See Sarah J Summers, 'The Right to Confrontation after Crawford v. Washington: A "Continental European" Perspective', 2 *International Commentary on Evidence* 1, Art 3, 2, at <http://www.bepress.com/ice/vol2/iss1/art3> accessed 10 October 2007 (arguing that references in *Crawford* to the 'continental civil law' model are based on a stereotypical and outdated view of the inquisitorial system).

[137] The court declined to define what constitutes a 'testimonial' statement, but it provided some guidance: 'Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.' See *Crawford v Washington*, above n 35 at 68.

[138] *Ibid*. Critics regret that the court left doubt as to what constitutes a prior opportunity to cross-examine unavailable witnesses, and what is the scope of the unavailability requirement. See, eg, Margaret M O'Neil, 'Crawford v. Washington: Implications for the War on Terrorism' (2005) 54 *Catholic University Law Review* 1077, 1079.

[139] *Ohio v Roberts*, 448 US 56, 66 (1980).

[140] *Crawford v Washington*, above n 35 at 67–8.

> politically charged cases (…)—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear.[141]

Statements by witnesses who testify anonymously at trial are not admissible under the Sixth Amendment. In *Smith v Illinois*, petitioner was denied the right to ask the principal prosecution witness—who testified under a false name—his (real) name and address.[142] While the court acknowledged that this was not a complete denial of the right to cross-examination, it nevertheless found a violation of the Confrontation Clause. It observed that the very starting point for testing the credibility of a witness is his identity:

> The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.[143]

In addition, a number of cases deal with other measures protective of witnesses, such as the placing of a one-way screen between the witness and the defendant,[144] and the use of one-way closed circuit television.[145] In *Maryland v Craig*, a case concerning the testimony of a child sex abuse victim, the court held that the Sixth Amendment does not grant the accused an absolute right to a face-to-face confrontation with the witnesses against him.[146] Exceptions to the right to physically confront accusatory witnesses were held to be justifiable where they are 'necessary to further an important public policy and (…) where the reliability of the testimony is otherwise assured'.[147] In dissent, Justice Scalia denounced what he called the majority's 'interest-balancing' analysis.[148] In his opinion, the plain meaning of the words 'to confront' is a face-to-face encounter, and the court should refrain itself from conducting 'a cost–benefit analysis of clear and explicit constitutional guarantees'.[149]

Finally, the Sixth Amendment's Compulsory Process Clause confers upon the accused a right to call favourable witnesses, and requires that he be afforded the government's assistance in compelling those witnesses to appear in court. The Supreme Court has made it clear that the Sixth

[141] *Ibid* at 68.
[142] *Smith v Illinois*, 390 US 129 (1968).
[143] *Ibid* at 131.
[144] *Coy v Iowa*, 487 US 1012 (1988).
[145] *Maryland v Craig*, above n 34.
[146] *Ibid* at 844.
[147] *Ibid* at 850. In the case under consideration, the court found that a state's interest in the physical and psychological well-being of child victims may be sufficiently important to outweigh a defendant's right to face his or her accusers in court. It further observed that the reliability of the testimony was assured by the other elements of confrontation (oath, cross-examination and observation of demeanour by the trier of fact).
[148] *Ibid* at 870.
[149] *Ibid*.

Amendment does not grant the accused the right to call any and all witnesses, but guarantees him only the right to call 'witnesses in his favour'.[150] For a violation of the Compulsory Process Clause to be found, the criminal defendant must at least 'make some plausible showing of how their testimony would have been both material and favourable to his defense'.[151] A related issue is whether the Sixth Amendment includes a right to compel the government to reveal the identity of possible witnesses. The court has chosen to evaluate such claims not under the Compulsory Process Clause but under the due process standards for the disclosure of evidence.[152] This issue will be discussed in the next section.

c. Concluding Remarks

Although the right to call and confront witnesses has common aims in both jurisdictions, important differences between the two systems exist. Some of these discrepancies flow from the different textual framework (eg, the formulation of the right to call favourable witnesses), as well as from the fact that, unlike the Supreme Court, the Strasbourg Court is faced with a diversity of national systems of criminal procedure and evidence. While a detailed comparative analysis is not within the scope of this work, it is interesting to draw attention to some of the major issues.[153] One remarkable contrast concerns the use or admissibility of hearsay evidence. Under Article 6 s 3 (d) there is no right for the accused to cross-examine every witness against him at the trial. The Strasbourg Court evaluates reliance on out-of-court statements on the basis of a rather flexible standard: the defendant must be given 'an adequate and proper' opportunity to challenge and question witnesses at 'some stage of the proceedings', and a conviction may not be based 'solely or to a decisive extent' on untested witness statements. The Supreme Court's approach is a more demanding and categorical one, in two respects. First, it includes an absolute bar to out-of-court statements that are testimonial, absent prior opportunity to cross-examine. Second, the use of such statements is possible only if the witness is unavailable for cross-examination at trial. Other important differences relate to the use of anonymous witnesses. Whereas the use of anonymous testimony is never allowed under the Sixth Amendment, the Strasbourg organs' approach is to balance the competing interests at stake.

[150] *United States v Valenzuela-Bernal*, 458 US 858, 867 (1982).

[151] *Ibid*.

[152] See *Pennsylvania v Ritchie*, 480 US 39, 56 (1987) (observing that 'compulsory process provides no greater protections in this area than those afforded by due process').

[153] For some general comparative reflections in this respect, see also Summers, above n 136.

ii. Exceptional Standards in the Fight against Terrorism

a. The European Convention

The possible interests served by a restriction of the right to call and confront witnesses in terrorism cases are obvious, be it only the protection of witnesses against retaliation by the terrorist group. The question accordingly arises as to whether there is any room for security exceptions to the general principles governing the right to call and confront witnesses. The Article 6 standards on the use as evidence of out-of-court statements have been applied in several cases with a counter-terrorist aspect. In *Sadak and others v Turkey (No 1)*, the applicants challenged their convictions by the Ankara National Security Court for belonging to a terrorist organisation (PKK).[154] The convictions were to a significant degree based on depositions by witnesses—made to the prosecution during the preliminary investigations—which the applicants had never been able to cross-examine. The Turkish government maintained that the domestic court's refusal to call and examine the witnesses in question was justified on several security grounds (eg, death threats against the witnesses by the PKK). This danger was exemplified by the fact that another witness against one of the applicants' co-defendants was killed in prison by PKK inmates.[155] The European Court nevertheless found a violation of Article 6 s 3 (d). Applying its settled case law, the court attached decisive weight to the fact that neither during the investigation nor during the trial the applicants had been offered any opportunity to cross-examine the witnesses and test their credibility.[156] As regards the perceived security threats, the court merely observed that the respondent government failed to explain how the witnesses in question—whose situation was different from that of the witness killed in prison—would have exposed themselves to any danger by appearing before court.[157]

The applicant in the second case, *Hulki Günes v Turkey*, served a life sentence for his part in two terrorist attacks, one of which caused the death of a member of the security forces.[158] In Strasbourg, he complained that his conviction was based on statements by the police officers who identified him as one of the terrorists, without having had the opportunity to cross-examine the officers. The National Security Court declined to summon the police officers to testify because of the 'poor level of road safety'.[159] As an alternative, it took evidence from the witnesses on

[154] *Sadak and others v Turkey (No 1)* Reports 2001-VIII (2001).
[155] *Ibid* at para 61.
[156] *Ibid* at paras 66–8.
[157] *Ibid* at para 67.
[158] *Hulki Günes v Turkey* Reports 2003-VII (2003).
[159] *Ibid* at para 88.

commission: it sent two photographs of the applicant, together with the relevant reports, to a court delegated to record the depositions of the police officers in question. In the European Court's opinion, this approach did not satisfy the requirements of Article 6 s 3 (d). Having ascertained that the applicant's conviction was based on the statements made by the officers, the court went on to examine whether at any stage of the proceedings the applicant had been given an adequate and proper opportunity to question and challenge the officers.[160] This was not the case. Neither during the initial police investigation, nor on commission, was the applicant or his lawyer present. It was further observed that the applicant was not assisted by a lawyer during the investigation, at which stage the main evidence was obtained.[161] Finally, the court remarked that since the witnesses did not appear before the trial court, the domestic judges were unable to observe their demeanour under questioning and thus form their own impression of their reliability. The court concluded that the importance of combating terrorism could not justify so serious a departure form Article 6 s 1 (d):

> Accordingly, the statements in issue formed the fundamental basis for the conviction, yet neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation before the trial court deprived him in certain respects of a fair trial. The Court is fully aware of the undeniable difficulties of combating terrorism—in particular with regard to obtaining and producing evidence—and of the ravages caused to society by this problem, but considers that such factors cannot justify restricting to this extent the rights of the defence of any person charged with a criminal offence.[162]

These cases leave no room for a security exception to the rule that a conviction cannot solely or mainly be based on the testimony of a witness whom the defence had no opportunity to cross-examine. This is not to say that no measures can be taken to accommodate the security interest of witnesses in terrorism related cases. What is required is 'an adequate and proper opportunity' for the accused to question and confront the witnesses against him. In this connection, the court may have regard to the special features of the case. An illustration of this is found in *SN v Sweden*, a case concerning the sexual abuse of minors.[163] Having noted the difficulty for the victim to be confronted with the defendant in such proceedings, the court observed that

[160] *Ibid* at paras 89–95.
[161] *Ibid* at para 92.
[162] *Ibid* at para 96. See also *Saïdï v France* Series A no 261-C (1993) para 44 (concerning drugs-related crime); *Mentes v Turkey*, 6 February 2007, paras 27–34 (conviction for association with the PKK).
[163] See, eg, *SN v Sweden* Reports 2002-V (2002) para 47.

> [i]n the assessment of the question whether or not (…) an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim'.[164]

Therefore, the court went on, certain measures may be taken for the purpose of protecting the victim, provided that they can be reconciled with the rights of the defence. In *SN v Sweden* the witness did not appear before the trial court. Instead, a videotape of the first police interview with the victim was shown during the trial and the record of the second interview was read out in court. Moreover, the applicant's counsel had been able to attend the second interview, and put questions to the witness through the police officer conducting the interview. The court concluded that, 'in the circumstances of the case', these measures were sufficient to enable the applicant to challenge the victims' statements.[165] The approach taken in *SN* suggests that in cases where the prosecution of terrorist suspects entails specific security risks for the witnesses involved, this circumstance would be very likely to justify the taking of protective measures.

Finally, as far as reliance on anonymous witnesses is concerned, it may be recalled that the first step in the Strasbourg Court's inquiry is to determine whether the circumstances of the case justify the use of anonymous evidence. The reasonableness of the domestic authorities' decision to keep secret the identity of a witness will, inter alia, be assessed in the light of the 'nature of the offence',[166] and the likelihood that the accused (or the members of a criminal organisation linked to the accused) will resort to threats or actual violence against persons testifying against him.[167] Thus, for instance, in *Kok v the Netherlands* the court reasoned that in a case in which the applicant was suspected of membership in a criminal organisation involved in serious drugs and firearms crime, the authorities did not act unreasonably by refusing to release any information concerning the identity of a police informant.[168] It would seem that these considerations apply mutatis mutandis to cases in which the accused is suspected of involvement in terrorist offences. Yet, the background of terrorism cannot justify any choice of means. As has been seen, Article 6 s 3 (d) excludes convictions based solely or to a decisive extent on anonymous witnesses, whatever the circumstances may be. In the hypothesis that an anonymous

[164] *Ibid*.

[165] *Ibid* at para 52.

[166] See, eg, *Birutis and others v Lithuania*, 28 March 2002, para 30: '[G]iven the nature of the offence alleged against the applicants, ie a prison riot, the authorities were justified in protecting anonymous witnesses, possibly the applicants' co-detainees.'

[167] See, eg, *Doorson v the Netherlands*, above n 128 at para 71: 'Regard must be had to the fact, as established by the domestic courts and not contested by the applicant, that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them.'

[168] *Kok v the Netherlands* Reports 2000-VI (2000).

statement is only one of the grounds upon which a conviction is based, the requirements of Article 6 s 3 (d) will be satisfied only if the difficulties faced by the defence have been sufficiently counterbalanced by the procedures followed by the domestic authorities.[169] In *Kostovski v the Netherlands* the court explained that '[t]he right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency'.[170]

b. The US Constitution

Few examples were found of cases considering the tension between the Sixth Amendment guarantee to call and confront witnesses and the need to fight terrorism.[171] One notable case is the Fourth Circuit Court of Appeals' decision in *United States v Moussaoui*.[172] The case stems from the prosecution of Zacarias Moussaoui for several terrorism-related offences, which allegedly contributed to the 11 September attacks. In a series of pre-trial motions, Moussaoui moved the court to grant him access to al Qaeda members who were being held as enemy combatants in military custody. Moussaoui argued that the witnesses in question had knowledge of the 11 September plans and would provide exculpatory information if allowed to testify. The government opposed the granting of access to the requested witnesses, claiming, inter alia, that they were beyond the reach of the Compulsory Process Clause, and that an order to produce the witnesses would infringe the war-making authority of the Executive, in violation of the separation of powers principles. In the first part of its judgment, the Court of Appeals rebutted the government's reasoning. Having decided that the al Qaeda witnesses' overseas location did not place them outside the reach of the Compulsory Process Clause,[173] it went on to reject the government's reliance on a purported national security exception to the Sixth Amendment. Although the court acknowledged that Moussaoui's fair trial rights 'must be balanced against the Government's

[169] Such compensatory measures may consist of a system in which the anonymous witness is questioned by an investigation judge, and the accused or his counsel is put in a position to ask the witness questions through the investigation judge or via sound-link. See, eg, *Doorson v the Netherlands*, above n 128 at para 73; *Kok v the Netherlands*, previous n at 20.

[170] *Kostovski v the Netherlands*, above n 11 at para 44.

[171] For a discussion of the application of the Confrontation Clause in terrorism cases, see, eg, O'Neil, above n 138.

[172] *United States v Moussaoui*, 382 F.3d 453 (4th Cir 2004).

[173] *Ibid* at 463–6. In this respect, the Circuit Court reasoned that a writ of habeas corpus *ad testificandum* (testimonial writ) could properly be served on the Secretary of Defence as their 'ultimate custodian', as the witnesses was in United States military custody.

legitimate interest in preventing disruption of the enemy combatant witnesses',[174] it in fact merely applied the case law established outside the national security context:

> In view of these authorities, it is clear that when an evidentiary privilege—even one that involves national security—is asserted by the Government in the context of its prosecution of a criminal offense, the 'balancing' we must conduct is primarily, if not solely, an examination of whether the district court correctly determined that the information the Government seeks to withhold is material to the defense.[175]

First, the Circuit Court determined whether the enemy combatant witnesses could provide testimony which would be material and favourable to the defence.[176] This being the case, it continued to examine whether Moussaoui's Sixth Amendment right to obtain the witnesses' testimony was somehow outweighed by the government's national security interests. In answering this question, it relied on the Supreme Court's settled jurisprudence on the right to access to evidence. In the Circuit Court's opinion, it followed from this jurisprudence that 'the defendant's right to a trial that comports with the Fifth and Sixth Amendments prevails over the governmental [national security] privilege'.[177] The Circuit Court accordingly concluded that, as a general rule, the district court must order the production of the witnesses' testimony and, if the government refuses to comply with that order, dismiss the action.

However, in the second part of its judgment, the Circuit Court proposed 'a more measured approach' than dismissal, and directed the District Court to compile written 'substitutions' for the witnesses' potential testimony, using portions of summaries—designated by Moussaoui—of reports of the witnesses statements.[178] In the court's opinion, the use of such substitutions to replace the witnesses' testimony constituted an adequate remedy to protect Moussaoui's constitutional rights, if it would not 'materially disadvantage the defendant'.[179] In this connection, the court placed confidence in the witnesses' statements because those interrogating them sought information to prevent further terrorist violence, not specifically to further

[174] *Ibid* at 468. The court stated, inter alia, that 'we must defer to the Government's assertion that interruption (…) of these witnesses will have devastating effects on the ability to gather information from them' and that 'it is not unreasonable to suppose that interruption (…) could result in the loss of information that might prevent future terrorist attacks.' (*Ibid* at 470).

[175] *Ibid* at 476.

[176] *Ibid* at 471 *ff*. It was sufficient for Moussaoui to make a 'plausible showing' of materiality. The court held that since Moussaoui did not receive direct access to any of the witnesses, he could not be required to show materiality with the degree of specificity that applies in ordinary cases. *Ibid* at 472.

[177] *Ibid* at 474.

[178] *Ibid* at 476.

[179] *Ibid* at 477.

prosecution.[180] This solution was criticised in dissent by Circuit Judge Roger L Gregory, who opined that 'substitutions cannot be considered a functional equivalent of live (or deposition) testimony, nor are they adequate or sufficient to substitute for testimony'.[181] The dissenting Judge observed that 'the summaries are not responses to the questions that Moussaoui would ask if given the opportunity to depose the witnesses', and 'the jury will not be able to see the witnesses and judge their credibility'.[182]

Another lower-court decision touching upon the meaning of the Confrontation Clause in a counter-terrorist context is *Hamdan v Rumsfeld*.[183] Hamdan, who was captured in Afghanistan and allegedly served as Osama bin Ladens's driver, was the first Guantánamo Bay prisoner to be tried by a military commission set up pursuant to the 2001 Military Order. Hamdan's counsel filed a petition for habeas corpus challenging the lawfulness of the military justice scheme, which was heard by the District Court of Columbia. Amongst several other issues, the District Judge reviewed the procedural rules laid down by the Department of Defence in Military Commission Order No 1.[184] These regulations provided, inter alia, that the accused and his civilian defence counsel could be excluded from all or part of the proceedings to protect sensitive information or for other unspecified 'national security' reasons—and accordingly be denied the right to confront witnesses testifying during these proceedings.[185] Although the court did not rule on the constitutionality of the procedures, it indicated that the questioning of witnesses and the presentation of evidence in the absence of the accused and his counsel raises serious Sixth Amendment questions:

> [T]estimony may be received from a confidential informant, and Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts. (…) It is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court, particularly after Justice Scalia's extensive opinion in his decision this year in *Crawford v Washington* (…).[186]

As has been seen, the *Hamdan* case ultimately reached the Supreme Court.[187] Although the 2006 decision was primarily decided on narrow

[180] *Ibid* at 478.
[181] *Ibid* at 486.
[182] *Ibid*.
[183] *Hamdan v Rumsfeld*, 344 F Supp 2d 152 (DDC 2004).
[184] US Dep't of Defense, Military Commission Order No. 1, above n 100.
[185] *Ibid* s 6(b)(3) and (d)(5).
[186] *Hamdan v Rumsfeld*, above n 183 at 168.
[187] *Hamdan v Rumsfeld*, above n 105.

statutory grounds, and contains no constitutional analysis of Sixth Amendment fair trial rights in relation to terrorism, Justice Stevens' majority opinion raised serious questions regarding the abovementioned Department of Defense regulations. The majority reasoned that, absent a more specific congressional authorisation, the President is authorised to convene military commissions only to the extent that the military commissions comply with the American common law of war, including the rules and procedures set forward in the Uniform Code of Military Justice (UCMJ). The court went on to observe that the regulations governing Hamdan's commission deviated in many significant respects from the procedures governing courts-martial under the UCMJ. Although not all departures from courts-martial procedures violate the UCMJ, the latter provides that the President must demonstrate that it would be 'impracticable' to apply courts-martial rules. This requirement was not satisfied in *Hamdan*: 'There is no suggestion (…) for any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility.'[188] The absence of any showing of impracticability is 'particularly disturbing', the court concluded, 'when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded (…) by the UCMJ (…): the right to be present'.[189] This defect was remedied by the Military Commissions Act of 2006, which grants the accused a right to be present at all sessions of the military commissions.[190]

iii. Concluding Remarks

The Convention standards governing the right to call and confront witnesses are in various respects more flexible than those found in the Sixth Amendment. As a result, the Strasbourg organs have more leeway to take into consideration the difficulties of fighting terrorism than do decision-makers labouring under the strictures of the Sixth Amendment. The fact that there is no total ban on the use of out-of-court testimony or anonymous witnesses, and the deferential approach with regard to the right to call favourable witnesses, allows the European Court to balance the rights of the accused against the security interests of potential witnesses or other counter-terrorist considerations. However, the accommodation of security interests can never come at the cost of denying the accused a fair trial. This approach of limited flexibility is perhaps best captured by the court's statement in *Hulki Günes* that 'the undeniable difficulties of

[188] *Hamdan v Rumsfeld*, above n 105 at 2792.
[189] *Ibid*.
[190] Military Commissions Act of 2006, above n 99 at s 949a(b)(1)(B).

combating terrorism (…) cannot justify restricting to *this extent* the rights of the defence of any person charged with a criminal offence'.[191] By contrast, the Supreme Court's more rigid Sixth Amendment standards and its preference for bright-line rules, limits judicial discretion and prevents courts and other decision-makers from taking into account the background of terrorism. Commentators have already pointed at the difficulties of reconciling the categorical *Crawford* test for the admission of hearsay evidence with national security concerns. As one author cautioned:

> Crawford appears to provide no avenue to protect legitimate national security concerns when the Government seeks to use out-of-court statements to detain an American citizen as an 'enemy combatant' or to try a suspected terrorist in a civilian court.[192]

However, rather than seeking a security responsive interpretation of the Confrontation Clause, the Bush administration has sought to circumvent the Sixth Amendment by establishing a separate system of military justice. It is telling that when reviewing the preventive detentions and military commissions at Guantánamo Bay, the Supreme Court has not relied on any of the Sixth Amendment requirements. When it considered the due process rights of enemy combatants in *Hamdi v Rumsfeld*, the court wrote that '[h]earsay (…) may need to be accepted as the most reliable available evidence from the Government in such a proceeding'.[193] Under Justice O'Conner's flexible due process approach, it was sufficient that 'a knowledgeable affiant' summarise reports already collected 'in the ordinary course of military affairs'.[194] In *Hamdan v Rumsfeld* the focus was on statutory interpretation rather than on fair trial rights.[195] The constitutionally significant aspects of the case concern the division of power between Congress and the President, not the Bill of Rights.[196]

[191] *Hulki Günes v Turkey*, above n 158 at para 96.
[192] O'Neil, above n 138 at 1104.
[193] *Hamdi v Rumsfeld*, 542 US 507, 534 (2004).
[194] *Ibid*.
[195] *Hamdan v Rumsfeld*, above n 105.
[196] It was part of the defence's strategy to focus on statutory rather than constitutional interpretation. See Neal Kumar Katyal, 'Hamdan v. Rumsfeld: the Legal Academy Goes to Practice' (2006) 120 *Harvard Law Review* 65.

D. The Right to Disclosure of Evidence (Criminal Proceedings)

i. General Standards

Article 6 does not include any specific set of evidentiary rules and the Strasbourg organs have declined to lay down such rules.[197] Moreover, the assessment of evidence in a given case is primarily a matter for the national courts.[198] Nonetheless, the Convention contains some guidelines as regards the presentation of evidence, and the case law indicates that the use of certain rules of evidence will render a trial unfair. One particular field in which the Strasbourg organs have limited the Contracting State's discretion is that of the defendant's right to access to evidence. In the court's view, the concept of fairness in Article 6 s 1 requires that 'both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party'.[199] Furthermore, 'all material evidence' for or against the accused must be disclosed by the prosecution to the defence.[200] Both rules are expressions of the right to adversarial proceedings and the principle of equality of arms.[201]

The right to disclosure of 'relevant evidence' is not an absolute right. The court accepts that it may be necessary to withhold certain evidence from the defence, so as to preserve the rights of other individuals or to safeguard important public interests.[202] In the court's opinion, the rights of the criminal defendant must be weighed against competing interests, including national security, the safety of witnesses and the importance to keep secret police methods for the investigation of crime.[203] However, measures restricting the rights of the defence must be 'strictly necessary' and 'sufficiently counterbalanced' by the procedures in place.[204] The supervisory role of the Strasbourg Court is limited: it will not itself review whether in a given case a proper balance was attained between the public interest in non-disclosure and the rights of the accused. Instead, it will examine the decision-making procedure to ensure that it complied with the Convention requirements of adversarial proceedings and equality of arms.[205] While different decision-making procedures may be compatible with Article 6 s 1, the case law suggests that certain minimum standards will under all

[197] *Schenk v Switzerland* Series A no 140 (1988) para 46.
[198] See, eg, *Barberà, Messegué and Jabardo v Spain*, above n 77 at para 68.
[199] See, eg, *Rowe and Davis v UK* Reports 2000-II (2000) para 60.
[200] See, eg, *Edwards v UK* Series A no 247-B (1992) para 36.
[201] See, eg, *Rowe and Davis v UK*, above n 199 at para 159.
[202] *Ibid* at para 61.
[203] *Ibid*.
[204] *Ibid*.
[205] *Ibid* at 62.

circumstances need to be satisfied. Of crucial importance, for instance, is the involvement of a judicial body at some stage of the proceedings. The prosecution cannot itself decide whether or not to withhold certain relevant evidence on grounds of public interest.[206] On the other hand, if the undisclosed material does not form part of the prosecution case and is not put to the jury, ex parte proceedings may be sufficient to evaluate a prosecution's request for non-disclosure. If this is the case, it is necessary that the defence is kept informed of such proceedings and is permitted to make submissions and participate in the process, 'as far as [is] possible without revealing to them the material which the prosecution [seeks] to keep secret on public interest grounds'.[207] A factor that has been taken into account in those circumstances is the power of the judge to assess throughout the trial the need to disclose the evidence kept secret.[208]

In the United States, the right to disclosure of evidence has both statutory and constitutional foundations. The present sub-section is limited to a brief overview of the constitutional framework.[209] From the various fair trial guarantees in the Bill of Rights, the Supreme Court fashioned 'what might loosely be called an area of constitutionally guaranteed access to evidence'.[210] One important aspect of the constitutional standards is the prosecution's duty to disclose, under certain conditions, evidence within its possession. While some judicial opinions associate this obligation with the Sixth Amendment Compulsory Process Clause, the court has based the right to disclosure of evidence on the due process requirements.[211] In the central case of *Brady v Maryland*, the court stated that

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.[212]

Although the court did not expand upon the rationale of prosecutorial disclosure in this case, *Brady* and its progeny indicate that the obligation to disclose evidence serves various purposes, ranging from the preservation of

[206] *Ibid* at 63.

[207] See, eg, *Jasper v UK*, 16 February 2000, para 55. Art 6 does not as such require the appointment of a 'special counsel' in this context. (*ibid*) See, however, the dissenting opinion of Judges Palm, Fischbach, Vajic, Thomassen, Tsatsa-Nikolovska en Traja.

[208] *Ibid*.

[209] The two main statutory instruments are the Jencks Act (18 USC s 3500) and Federal Rule of Criminal Procedure 16(a)(1). The former was named after the Supreme Court's decision in *Jencks v United States*, 353 US 657 (1957), and requires the prosecution to produce witness statements in its possession of those witnesses who testify at trial. The latter allows the defendant to obtain his own statements and other items material to the defence.

[210] *United States v Valenzuela-Bernal*, above n 150 at 867.

[211] See LaFave, Israel and King, above n 16 at 1096–118.

[212] *Brady v Maryland*, 373 US 83, 87 (1963).

the adversarial system to the prevention of prosecutorial misconduct.[213] The court examined the different components of the *Brady* standard in more detail in subsequent cases. In *United States v Agurs*, it held that the duty to disclose evidence is applicable even though there has been no request by the accused.[214] It is required, however, that the evidence is 'favourable to the accused, either because it is exculpatory, or because it is impeaching'.[215] An important issue is the standard of materiality required for disclosure. For there to be a violation of the *Brady* rule, it is not sufficient that the suppressed evidence is exculpatory. Non-disclosure requires reversal of the conviction only if the evidence is material in the sense that its suppression might have affected the outcome of the trial. The currently accepted standard of materiality was announced by Justice Blackmun in *United States v Bagley*:

> [E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.[216]

Another recurring issue is the extent to which the prosecution is obliged to search for '*Brady* material' which is neither possessed nor controlled by it (eg, classified information held back by intelligence agencies). In this respect, the court stated that the 'prosecutor has a duty to learn of any favourable evidence known to the others acting on the government's behalf in the case, including the police'.[217] Finally, in *Pennsylvania v Ritchie*, the court considered the appropriate method of assessing claims to grant access to evidence.[218] It ruled that a defendant's right to discover exculpatory evidence does not include a constitutional right for the defence counsel to search through the State's files. In the court's opinion, the defence rights are sufficiently protected by requiring that the requested evidence be submitted to the trial court for in camera review.[219] If the defendant is aware of specific information, the court added, he is free to request it directly from the court, and argue in favour of its materiality. Emphasis was also placed on the fact that the trial court has an ongoing duty to disclose *Brady* material: information that may be deemed immaterial upon original examination may become more important as the proceedings progress.[220]

[213] See Mark D Villaverde, 'structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material' (2003) 88 *Cornell Law Review* 1471, 1487.
[214] See, eg, *United States v Agurs*, 427 US 97, 107 (1976).
[215] *Strickler v Greene*, 527 US 263, 263 (1999).
[216] *United States v Bagley*, 473 US 667, 682 (1985).
[217] *Kyles v Whitley*, 514 US 419, 437 (1995).
[218] *Pennsylvania v Ritchie*, above n 152.
[219] *Ibid* at 59–60.
[220] *Ibid*.

The foregoing illustrates that this right to disclosure of evidence is limited in both jurisdictions. The prosecution's duty to disclose evidence in its possession is triggered only where the evidence concerned is material. Whereas the Strasbourg organs have not expanded on the materiality requirement, the meaning of materiality has received considerable attention in the Supreme Court's jurisprudence. When a court in the United States determines that evidence is material, the government should either disclose it or dismiss the action. No comparable rule exists in the Convention system. Under Article 6, the right to disclosure of 'relevant' evidence is not absolute.[221] The interest of the accused in the disclosure of relevant evidence must be weighed against competing interests such as national security. Moreover, instead of assessing the evidence adduced before the national courts, the European Court focuses primarily on the decision-making procedure. It will see to it that the procedure in place allows the domestic court to reach a proper balance between the public interest in non-disclosure and the rights of the defendant.

ii. Exceptional Standards in the Fight against Terrorism

A problem often associated with the criminal prosecution of alleged terrorists is the potential disclosure of classified or otherwise secret information. The use of such information in criminal proceedings may not only compromise the information itself, it may also jeopardise future intelligence-gathering operations by revealing the sources and methods used for collecting intelligence. In criminal prosecutions, at least two different scenarios may result in disclosure of classified information.[222] First, the prosecution itself may need to introduce classified or secret evidence against a terrorist suspect. Second, the accused may seek access to classified information or may want to use such information already in his possession to establish his defence.[223]

The non-disclosure of relevant evidence for or against a person accused of terrorist offences has not yet been the subject of an application before the Strasbourg organs. However, the principles set out above give a clear picture of how such cases would be dealt with under Article 6. In line with

[221] Whether 'relevant' should be accorded the same meaning as 'material' is not clear, as the European Court has clarified neither of the terms.

[222] See Stephen Dycus, Arthur L Berney, William C Banks and Peter Raven-Hansen, *National Security Law* (New York, Aspen Law & Business, 2002) 886–7.

[223] As regards this last hypothesis, the prosecution is sometimes confronted with the problem of 'graymail', ie the practice whereby the accused threatens to reveal classified information during his trial in the hope of forcing the prosecution to drop the charges against him.

the court's balancing approach, the Contracting State's interest in effectively fighting terrorism will need to be weighed against the applicant's fair trial assertions. While it is to be expected that the court would accept that it might be necessary to withhold certain evidence from the defendant in a terrorist case, it would be likely to insist that the difficulties caused to the defence by such non-disclosure are sufficiently counterbalanced by the procedures followed by the judicial authorities. In this respect, certain procedural minimum standards may need to be satisfied, such as, for instance, judicial control of the prosecution's decision to withhold the sensitive information in question.

The Supreme Court has not had the opportunity to examine the prosecution's obligations under *Brady* to disclose material evidence in national security cases. However, the lower courts have dealt with closely related questions in a series of cases concerning the Classified Information Procedures Act (CIPA), many of which involved terrorist prosecutions.[224] A discussion of the Act is not within the scope of the present work. Suffice it to note that CIPA establishes a procedural framework for the discovery and admission of classified information in criminal trials.[225] It permits the government to argue in camera and ex parte against the disclosure of classified information,[226] it requires pre-trial notice of what classified information the defendant seeks to introduce at trial,[227] and it allows the trial court to determine whether relevant information must retain its classified form or may be reworked in unclassified 'substitutions'.[228]

Although CIPA was not intended to change the existing rules of evidence, there has been some uncertainty as to the appropriate standard for disclosure of the evidence it seeks to protect. To resolve the issue, a number of lower courts have resorted to the Supreme Court's decision in

[224] 18 USC App ss 1 *ff*.

[225] CIPA was enacted by Congress in 1980 in an effort to combat the problem of 'graymail'. For a general discussion of CIPA, see, eg, Brian Z Tamanaha, 'A Critical Review of the Classified Information Procedures Act' (1986) 13 *American Journal of Criminal Law* 277; Saul M Pilchen, 'Using the Classified Information Act in Criminal Cases: A Primer for Defense Counsel' (1994) 31 *American Criminal Law Review* 191.

[226] S 4: 'Discovery of classified information by defendants' provides, inter alia, that '[t]he court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove.'

[227] S 5: 'Notice of defendant's intentions to disclose classified information' provides, inter alia, that '[i]f the defendant reasonably expects to disclose or to cause disclosure of classified information in any manner in connection with any trial or pretrial proceedings involving the criminal prosecution of such defendant, the defendant shall (…) notify the attorney for the United States and the court in writing.'

[228] See above n 218.

Roviaro v United States.[229] At issue in *Roviaro* was the tension between the public interest in protecting the identity of a confidential informant and the defendant's right to present his case. The petitioner challenged the government's refusal to disclose the identity of an undercover informer who took a material part in bringing about the petitioner's possession of drugs. The court first expanded on the rationale of what is usually referred to as the 'informer's privilege':

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognises the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.[230]

The privilege is a qualified one, however, and is limited by 'the fundamental requirements of justice'.[231] Thus, 'where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way'.[232] In such a case the trial court must order the disclosure and, if the government withholds the information, dismiss the action. The court in *Roviaro* declined to lay down 'a fixed rule' with respect to disclosure.[233] Rather, it instructed the trial courts to weigh the public interest in non-disclosure against the defendant's right to prepare his defence. The result of such balancing necessarily depends on 'the particular circumstance of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors'.[234]

As noted, the court's reasoning in *Roviaro* inspired several lower courts in drafting a standard for the disclosure of classified information under CIPA. A representative example of this approach can be found in *United States v Yunis*.[235] The defendant in that case was a Lebanese citizen charged with air piracy, conspiracy and hostage taking. He sought discovery of transcripts of taped conversations between himself and a confidential informant, which the government claimed to be classified information under CIPA. According to the court of Appeals that reviewed the case, CIPA establishes a government privilege in classified information similar to

[229] *Roviaro v United States*, 353 US 53 (1957). Although the court in *Roviaro* did not rely on any of the fair trial provisions in the Constitution, it is generally accepted that the decision was constitutionally compelled. See LaFave, Israel and King, above n 16 at 1116.

[230] *Roviaro v United States*, previous n at 59.

[231] *Ibid* at 60.

[232] *Ibid* at 60–61.

[233] *Ibid* at 62.

[234] *Ibid* at 62.

[235] *United States v Yunis*, 867 F.2d 617 (DC Cir 1989).

the informant's privilege identified in *Rovario*.[236] Relying on that case, it decided that classified information is not discoverable on a mere showing of 'theoretical relevance': the defendant must also show that the classified information will at least be 'helpful' to his defence.[237] In the opinion of the court, considerations similar to the ones asserted in *Roviaro* underlie the classified information privilege. Quoting the Supreme Court's holding in a related civil case,[238] it wrote that

> [t]he government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.[239]

After reviewing the information in question ex parte and in camera, the court in *Yunis* decided that its relevance was no more than theoretical and that as a result disclosure was not warranted. The principles announced in *Yunis* have been applied in a number of other CIPA cases, some of which involved terrorist crimes.[240]

The CIPA procedures—including its authorisation to substitute classified information following ex parte, in camera proceedings—have been upheld against constitutional challenges, and have been described by scholars as 'likely [to strike] a constitutionally permissible balance between the government's need to protect classified information and the defendant's need to access information to put on a complete defense'.[241] In rejecting constitutional challenges to the CIPA framework, courts have relied on the rules of evidence established in Supreme Court jurisprudence.[242] Thus, for instance, in *United States v Pringle*, the First Circuit Court of Appeals rejected the defendant's contention that non-disclosure violated their due process rights. Citing *Brady*, it held:

> We have reviewed the classified information and agree with the district court that it was not relevant to the determination of the guilt or innocence of the defendants, was not helpful to the defense and was not essential to a fair administration of the cause.[243]

[236] *Ibid* at 623.
[237] *Ibid*.
[238] *CIA v Sims*, 471 US 159, 175 (1985).
[239] *United States v Yunis*, above n 235 at 623.
[240] See, eg, *United States v Rezaq*, 134 F.3d 1121 (DCCir1998) (involving aircraft piracy). Some courts appear to engage in a further balancing of the public interest in non-disclosure against the defendant's right to prepare a defence. See, eg, *United States v Sarkissian*, 841 F.2d 959 (9th Cir 1988); *United States v Fernandez*, 913 F.2d 148 (4th Cir 1990); *United States v Smith*, 780 F.2d 1102 (4th Cir 1985).
[241] 'Note: Secret Evidence in the War on Terror' (2005) 118 *Harvard Law Review* 1962, 1966.
[242] For an overview of the constitutional challenges see Timothy J Shea, 'CIPA Under Siege: the Use and Abuse of Classified Information in Criminal Trials' (1990) 27 *American Criminal Law Review* 657.
[243] *United States v Pringle*, 751 F.2d 419, 427–428 (1st Cir 1984).

In *United States v Jolliff*, the use of ex parte in camera proceedings was found not to raise Sixth Amendment concerns.[244]

As noted, the Supreme Court has imposed on the prosecution an obligation to learn of any favourable evidence known to others acting on the government's behalf in a particular case.[245] The lower courts disagree as to the exact boundaries of this obligation, more precisely with regard to the prosecution's duty to search records retained by intelligence agencies.[246] Commentators have argued that if the ordinary criminal courts are to serve as a viable forum for the prosecution of terrorist suspects, the prosecution's duty to produce information which is in the custody of intelligence agencies should be circumscribed.[247]

Finally, the government may seek to avoid the constitutional and statutory rules governing access to evidence in ordinary criminal trials through the establishment of a separate system of military justice. It is to be noted, in this respect, that the procedural rules issued by the Department of Defense pursuant to the 2001 Military Order initially allowed for the use of secret evidence.[248] Both courts and commentators indicated that such a system would be likely to violate constitutional fair trial guarantees.[249] The Military Commissions Act of 2006, adopted in response to the *Hamdan* judgment, codifies a right to obtain evidence but still provides for the protection of classified information and limits the government's obligation to fully disclose classified exculpatory evidence to the accused.[250]

[244] *United States v Jolliff*, 548 F Supp 229, 232 (D Md 1981) ('noting that the Supreme Court has repeatedly upheld the use of ex parte, in camera examinations prior to disclosure').

[245] *Kyles v Whitley*, above n 217.

[246] For an overview of cases see, eg, Jonathan M Fredman, 'Intelligence Agencies, Law Enforcement, and the Prosecution Team' (1998) 16 *Yale Law and Policy Review* 331; Villaverde, above n 213.

[247] Villaverde, above n 213 at 1478–9. Villaverde characterises the risk of too broad a search requirement as follows: '[T]he effective investigation of international terrorism requires extensive cooperation among government agencies. Because disclosure of intelligence community files to suspected international terrorists could undermine the government's ability to monitor and penetrate terrorist networks, imposing on prosecutors the duty to search for and disclose Brady material within intelligence community files, regardless of the nature of the intelligence community's relationship to the prosecution, could eviscerate the government's already limited ability to investigate international terrorism effectively.' (*ibid* at 1545). The author proposes a very limited prosecutorial duty to search for *Brady* material in international terrorist prosecutions. The proposed standard would impose an obligation to search only 'if a defendant requests the material with enough specificity to indicate both its location within government and its nature' and it 'would require a prosecutor to search only those files that are the product of law enforcement activities conducted, under his direction and control and in relation to a specific criminal investigation' (*ibid* at 1546).

[248] US Dep't of Defense, Military Commission Order No. 1, above n 100 at s 6(b)(3) and (d)(5).

[249] See, eg, *Hamdan v Rumsfeld*, above n 183 at 168 and 'Note: Secret Evidence in the War on Terror', above n 241 at 1971 *ff*. (arguing that the military commission rules of secret evidence violate the due process standard under the *Mathews* balancing test).

[250] Military Commissions Act of 2006, above n 99 at s 949j.

iii. Concluding Remarks

Courts on both sides of the Atlantic acknowledge the national security risks associated with the possible disclosure of classified or otherwise secret information during a criminal trial. The standards announced by the European Court allow the domestic authorities to weigh the rights of the accused against counter-terrorist concerns, while at the same time requiring that certain procedural minimum safeguards be observed. A similar balancing approach is mirrored in the due process analysis of the prosecution's obligation to disclose evidence in the United States. Here too, however, the flexibility is limited. Reliance on counter-terrorist or other national security concerns does not seem to justify a departure from the rule that when the government decides to hold back material evidence the case should be dismissed. 'Although dubbed a balancing test', one commentator wrote, the *Rovario–Yunis* line of cases 'more closely resembles a threshold that the defendant must cross'.[251]

E. The Right to Disclosure of Evidence (Immigration Proceedings)

i. General Standards

The controversy over the use of undisclosed evidence is not limited to the criminal law context. Secret evidence may, for instance, also be used in immigration proceedings. This practice is particularly relevant to the fight against terrorism, as immigration authorities may choose to introduce classified information to prove an alien's involvement in terrorist activity or his association with a terrorist organisation so as to exclude, deport or detain him. The justifications and problems associated with the use of secret evidence in criminal proceedings also apply in the immigration context. However, a primarily question here is whether the fair trial guarantees apply to immigration proceedings at all.

According to the Strasbourg organs, decisions regarding the entry, stay and deportation of aliens are not determinative of an applicant's 'civil rights or obligations or of a criminal charge against him'.[252] Consequently,

[251] Kelley Brooke Snyder, 'A Clash of Values: Classified Information in Immigration Proceedings' (2002) 88 *Virginia Law Review* 447, 481.

[252] See, eg, *Maaouia v France*, Reports 2000-X (2000) para 40. A number of procedural safeguards relating to expulsion of aliens are contained in Art 1 of Protocol No. 7 to the Convention. The first para of Art 1 provides as follows: 'An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.' Art 1 s 2 continues that '[a]n

immigration proceedings are excluded from the protective ambit of Article 6. However, the issue of undisclosed evidence in immigration proceedings may also arise in Article 5 cases. As has been seen in chapter five, Article 5 s 1, f permits the detention of aliens in exclusion, deportation or extradition proceedings. And, in accordance with Article 5 s 4, aliens deprived of their liberty must be able to challenge the lawfulness of their detention speedily before a court. The court has extrapolated the Article 6 concept of an adversarial trial and equality of arms, to proceedings brought under the habeas corpus provision. In the court's opinion, 'proceedings conducted under Article 5 s 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure'.[253]

For a good understanding of the Supreme Courts jurispruence regarding the use of secret evidence in immigration proceedings, it is necessary to briefly sketch the applicability of the Fifth and Fourteenth Amendment's due process clauses in the immigration context.[254] The due process rights accorded to aliens depend upon their stage in the immigration proceedings. The court distinguishes between two categories of aliens: those outside the country—'excludable aliens'—and those present in the country—'deportable aliens'.[255] Aliens not yet in the country receive very limited due process protection: '[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'[256] Conversely, aliens who enter the country receive more extensive due process protections. On various occasions, the court has emphasised that the due process rights apply to all persons within the country, including aliens, whether their presence is lawful, unlawful, temporary or permanent.[257]

Non-disclosure of information in immigration proceedings must be viewed against this background. As far as excludable aliens are concerned, the Supreme Court has consistently denied to censure the government's reliance on undisclosed material on constitutional grounds. The two major cases were decided during the Cold War era. In *Knauff v Shaughnessy*, the applicant was denied admission to the country on the basis of confidential

alien may be expelled before the exercise of his rights under paragraph 1, a, b and c of this Article, when such expulsion is necessary in the interest of public order or is grounded on reasons of national security.'

[253] See, eg, *Schöps v Germany* Reports 2001-I (2001) para 44.

[254] See generally, eg Snyder, above n 251; Charles D Weisselberg, 'The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei' (1995) 143 *University of Pennsylvania Law Review* 933, 936–937.

[255] For and overview, see, eg, Weisselberg, previous n at 936–7.

[256] See, eg, *Knauff v Shaughnessy*, 338 US 537, 544 (1950).

[257] See, eg, *Zadvydas v Davis*, 533 US 678, 693 (2001).

information the disclosure of which would, in the government's submission, jeopardise national security interests.[258] The majority upheld the impugned legislation, emphasising, inter alia, the national emergency situation in which it was adopted.[259] A similar conclusion was reached in *Shaughnessy v Mezei*.[260] The applicant in this case had lived in the United States for twenty-five years, but was refused entry into the country upon returning from a visit to Romania. The court held that the decision to keep secret the evidence upon which this decision was based raised no constitutional problems.[261] The majority's reasoning in both cases invited forceful dissents. In *Knauff*, Justice Jackson denounced the use of secret evidence in the following words:

> In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.[262]

The only Supreme Court precedent concerning the use of secret evidence in deportation proceedings is *Jay v Boyd*.[263] The petitioner was a resident alien who was found to be deportable for his association with the Communist Party. His application for 'discretionary relief' was rejected on the basis of confidential information not disclosed to him.[264] While the court recognised that resident aliens in deportation proceedings have constitutional protections unavailable to excludable aliens, the use of confidential information was nevertheless upheld. Although the court's analysis was based on statutory grounds, the majority stated in a footnote that the constitutionality of the relevant statute 'gives us no difficulty'.[265]

[258] *Knauff v Shaughnessy*, above n 256.
[259] *Ibid* at 544.
[260] *Shaughnessy v Mezei*, 345 US 206 (1953).
[261] *Ibid* at 215.
[262] *Ibid* at 551.
[263] *Jay v Boyd*, 351 US 345 (1956).
[264] Discretionary relief may be granted to aliens who have already been found deportable but meet certain statutory requirements. According to the court in *Jay* discretionary relief is not a matter of right but a matter of grace, like probation or suspension of criminal sentence (*ibid* at 354). For a discussion of the doctrinal framework, see, eg, 'Note: Secret Evidence in the War on Terror', above n 241 at 1968–9.
[265] *Jay v Boyd*, above n 263 at 357, n 21. The majority's disposal of the constitutional questions was criticised by Justice Black, one of the dissenting Justices: 'No amount of legal reasoning by the Court and no rationalization that can be devised can disguise the fact that the use of anonymous information to banish people is not consistent with the principles of a free country. Unfortunately there are some who think that the way to save freedom in this country is to adopt the techniques of tyranny. One technique which is always used to maintain absolute power in totalitarian government is the use of anonymous information by the government against those who are obnoxious to the rulers.' (*ibid* at 367).

Several commentators observed that the holding in *Jay* suggests that the use of confidential information in deportation proceedings is constitutionally permissible in at least some circumstances.[266] Those opposing the use of secret evidence in immigration proceedings have sought to limit the impact of the judgment on various grounds.[267]

ii. Exceptional Standards in the Fight against Terrorism

The European Court reviewed the use of secret evidence in immigration proceedings in *Chahal v United Kingdom*, a case which was already mentioned in chapter five in relation to the habeas corpus provision in Article 5 s 4.[268] Mr Chahal was suspected of involvement in Sikh terrorist activities in India, including an assassination attempt on the Indian Prime Minister, and was detained for deportation purposes. The Strasbourg Court held that the domestic procedures to appeal the detention and deportation order did not satisfy the standards of Article 5 s 4 for a variety of reasons.[269] One of the shortcomings was the non-disclosure of confidential information. In the British system under review, appeals against deportation decisions in national security cases were submitted to an advisory panel. Although all the relevant material, including secret material, was examined by the panel, the government alone decided how much of that information was to be communicated to the person involved.[270] The respondent government claimed that this procedure was designed to ensure that sensitive information would not be publicly disclosed, while simultaneously guaranteeing a system of independent, quasi-judicial scrutiny. However, in the European Court's opinion, the non-disclosure of relevant information was difficult to reconcile with the requirements of adversarial proceedings:

> The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the

[266] See, eg, Snyder, above n 251 at 461; 'Note: Secret Evidence in the War on Terror', above n 241 at 1969.

[267] See, eg, David Cole, 'Guilt by Association, and the Terrorist Profile' (2000–2001) 15 *Journal of Law and Religion* 267, 280–81. For further references, see Matthew R Hall, 'Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings' (2002) 35 *Cornell International Law Journal* 515, 521, n 39. For arguments against the use of secret evidence in immigration proceedings, see, eg, Susan M Akram, 'Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion' (1999) 14 *Georgetown Immigration Law Journal* 51 (arguing that secret evidence is often based on biased and unreliable sources, deliberately or mistakenly falsified translations, and foreign governments pressure).

[268] *Chahal v UK* Reports 1996-V (1996).

[269] See ch 5, section III.

[270] *Chahal v UK*, above n 268 at para 60.

> national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved.[271]

In finding a breach of Article 5 s 4, the court took into consideration similar procedures applied in Canadian immigration law, which, in its opinion, 'both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice'.[272] The Canadian system was drawn to the court's attention by amicus curiae briefs from Liberty and Amnesty International.[273] In the Canadian system, sensitive evidence is examined in camera by a federal court judge in the absence of the applicant and his representative. However, a security-cleared counsel is appointed to take their place and watch over the applicant's interests. The security-cleared counsel is allowed to cross-examine the witnesses and assist the court to test the strength of the state's case. Furthermore, a summary of the evidence obtained by this procedure, with the necessary deletions, is given to the applicant.[274] According to the Strasbourg Court, Canada's attempt to maintain the confidentiality of sensitive security information offered a 'more effective form of judicial control' than the British system under review in *Chahal*.[275]

In the United States, the use of secret evidence pertaining to an alien's involvement in terrorism is authorised in several distinct contexts: during expedited removal proceedings of an inadmissible arriving alien; during consideration of an alien's application for discretionary relief; during proceedings before the Alien Terrorist Removal Court; and as a basis for detaining an alien pending the resolution of his immigration proceedings.[276] Thus far, the Supreme Court has not decided an immigration case involving the use of secret evidence in a terrorism-related case. In view of its decisions in *Knauff* and *Mezei*, the use of undisclosed evidence against non-resident (excludable) aliens suspected of involvement in terrorism or other national security threats is not considered to pose any due process problems.[277] More controversial is the government's reliance on secret

[271] *Ibid* at 131.
[272] *Ibid*.
[273] *Ibid* at para 144.
[274] For further information on the Canadian system see, eg, I Leigh, 'Secret Proceedings in Canada' (1996) 34 *Osgoode Hall Law Journal* 112.
[275] *Chahal v UK*, above n 268 at 131.
[276] For a discussion of the statutory framework, see, eg, 'Note: Secret Evidence in the War on Terror', above n 241 at 1966–71.
[277] *Ibid* at 168.

evidence in proceedings involving resident aliens. In several lower court decisions this practice was held to raise due process concerns under the *Mathews* balancing test.[278]

Most cases concerned aliens suspected of membership of, or association with, a terrorist organisation.[279] For instance, in *Rafeedie v INS*, a permanent resident alien was prevented re-entry in the country by reason of his alleged high-ranking membership of the Popular Front for the Liberation of Palestine (PFLP).[280] The information on which the decision was founded was not disclosed to the plaintiff. Concluding its *Mathews* balancing exercise, the District Court stated that the proceedings did not satisfy the basic and fundamental standard of due process. The issue in the instant case, the court said, is not whether the government has an interest in protecting national security, 'but whether that interest is so all-encompassing that it requires that Rafeedie be denied virtually every fundamental feature of due process'.[281]

A similar conclusion was reached by the Ninth Circuit Court of Appeals in *American-Arab Anti-Discrimination Committee v Reno*.[282] In this case, two alleged members of the PFLP were denied legalisation of their status under the immigration laws on the basis of undisclosed classified information. The court again applied the *Mathews* test. As regards the private interest affected, it found that after more than ten years in the United States, aliens have a strong liberty interest in remaining in their homes and at their work, even though they have committed technical visa violations.[283] Turning to the next step of the test—the risk of erroneous deprivation of the private interest and the value of additional safeguards—the court discussed the importance of disclosure in adversary proceedings. It held that 'the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error'.[284] Finally, with respect to the governmental interest, the evidence adduced by the government to demonstrate that the aliens concerned threatened national security was found to be lacking. The government relied solely on general statements in two State Department publications about the PFLP's involvement in global terrorism. The court took judicial notice of these documents, yet it considered them insufficient 'to tip the *Mathews* scale towards the Government'.[285] It concluded that the due process provisions had been violated:

[278] See above.
[279] See generally, eg Snyder, above n 251.
[280] *Rafeedie v INS*, 795 F.Supp. 13 (DDC 1992).
[281] *Ibid* at 19.
[282] *American-Arab Anti-Discrimination Committee v Reno*, 70 F.3d 1045 (9th Cir1995).
[283] *Ibid* at 1068–9.
[284] *Ibid* at 1069.
[285] *Ibid* at 1070.

> Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the *Mathews* balancing suggests that use of undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process. We cannot in good conscience find that the President's broad generalization regarding a distant foreign policy concern and a related national security threat suffices to support a process that is inherently unfair because of the enormous risk of error and the substantial personal interests involved.[286]

The *Mathews* test was also applied in two notable District Court decisions addressing the government's use of secret evidence in detention determinations in the immigration context. In *Najjar v Reno*, the court held that an alien's due process rights were violated by ex parte presentation and reliance on classified information—pertaining to his alleged association with a terrorist organisation—in proceedings for re-determination of custody status.[287] The district judge noted, inter alia, that the use of classified evidence compromises the right to notice and to confront and rebut evidence.[288] Interestingly, the court in *Najjar* suggested that the procedures used in criminal proceedings under the Classified Information Procedures Act (see above), would in some cases provide a reasonable mechanism to properly balance due process interests and the government's security concerns in immigration proceedings.[289] A comparable approach was taken in *Kiareldeen v Reno*.[290]

iii. Concluding Remarks

Immigration proceedings are excluded from the scope of Article 6. The only Strasbourg case concerning the reliance on secret evidence in the immigration context so far relates to the habeas corpus provision of Article 5 s 4. In *Chahal v United Kingdom*, the court sought to accommodate the government's interest in relying on sensitive evidence and the applicant's fair trial rights. The court's discussion of the Canadian system in *Chahal*, suggests that it is prepared to accept exceptional rules for hearing confidential information, even to the extent of excluding the applicant and/or his lawyer from the proceedings.[291] Yet, that case also makes clear that the resulting handicap for the person challenging his detention must be sufficiently counterbalanced by compensatory procedural measures. Under the Bill of Rights, the due process protections accorded to aliens depend to

[286] *Ibid* at 1070.
[287] *Najjar v Reno*, 97 F Supp 2d 1329 (SD Fla 2000).
[288] *Ibid* at 1357.
[289] *Ibid* at 1358–9.
[290] *Kiareldeen v Reno*, 71 F.Supp 2d 402 (DNJ 1999).
[291] Cameron, above n 116 at 286–7.

a large extent on their status in the immigration process. Excludable aliens traditionally have only limited due process rights and are accordingly not protected against the use of undisclosed information in immigration proceedings. As far as deportable aliens are concerned, the situation is less clear. Despite the Supreme Court's holding in *Jay v Boyd*, several lower courts have held that the use of secret evidence in immigration proceedings does not survive scrutiny under the *Mathews* test.

F. The Right to Counsel

i. General Standards

Professional legal assistance is a fundamental feature of a fair trial in the two declarations of rights under consideration. Article 6 s 3 (c) of the Convention confers on any person charged with a criminal offence the right

> to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

The corresponding provision in the United States Constitution, is found in the Sixth Amendment, which secures the right of the criminally accused

> to have the assistance of counsel for his defence.

While the right to be defended by counsel of 'his own choosing' is not absolute under the Convention, the defendant's personal wishes should generally be respected.[292] If the accused prefers legal assistance he cannot be forced to defend himself in person.[293] Article 6 s 3 (c) also applies to pre-trial proceedings, 'if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provision'.[294] Thus, for instance, the court has indicated that the Convention normally requires that the accused be allowed to consult with a lawyer at the initial stage of a police interrogation.[295] However, the right of access to a lawyer

[292] See *Croissant v Germany* Series A no 237-B (1992) para 29 :'It [the right to choose a defence counsel] is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them.'

[293] *Pakelli v Germany* Series A no 64 (1983) para 31.

[294] *Imbrioscia v Switzerland* Series A no 275 (1993) para 36.

[295] *Murray v the UK* Reports 1996-I (1996) para 63. See, however, *Brennan v UK* Reports 2001-X (2001) para 53 (holding that the attendance of the suspect's lawyer during police interrogations, while providing a safeguard against police misconduct, is not an indispensable precondition of fairness within the meaning of Art 6 of the Convention).

may be subject to restrictions for good cause.[296] In each case, the court will determine 'whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing'.[297] Although not explicitly mentioned in Article 6 s 3 (c), that provision subsumes a right to be free from intrusion into lawyer–client communications. In the court's opinion, the right of an accused to communicate with his advocate in private is part of the basic requirements of a fair trial.[298] The confidentiality of lawyer–client consultations is required both at the pre-trial and the trial stage. Here too, however, restrictions are permitted if good cause exists.[299] Again, the question will be whether 'the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing'.[300] While it is not necessary for the defendant to prove that the restriction had a prejudicial effect on the course of the trial, he must have been directly affected by the restriction in the exercise of the rights of the defence.[301]

The Sixth Amendment right to counsel has been interpreted as conferring on the defendant not only the right to be represented by counsel at his own expense, but also the right to appointed counsel if he is indigent.[302] Furthermore, the defendant may represent himself.[303] The court has held that the right to counsel of his own choosing is 'comprehended' by the Sixth Amendment, but can be circumscribed by an overriding interest of the judicial system.[304] In addition, in certain proceedings not encompassed by the Sixth Amendment, the right to counsel is grounded on the due process guarantees.[305] It is important to observe that the Sixth Amendments right to counsel is secured at every 'critical' stage of the criminal process, including numerous pre-trial proceedings.[306] Besides the protections afforded by the Sixth Amendment, the Fifth Amendment privilege against self-incrimination has been read to provide a separate right to legal

[296] *Murray v the UK*, previous n at para 63.

[297] *Ibid*.

[298] See *S v Switzerland* Series A no 220 (1991) para 48: 'If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.'

[299] Eg, *Brennan v UK*, above n 295 at para 58. In its report in *Can v Austria*, the Commission stated that any restrictions on the right to free contact with the defence counsel 'must remain an exception to the general rule, and therefore need to be justified by the special circumstances of the case'. See *Can v Austria* Series A no 96 (1984) para 57.

[300] *Brennan v UK*, above n 295 at para 58.

[301] *Ibid*.

[302] *Gideon v Wainwright*, 372 US 335 (1963).

[303] See *Faretta v California*, 422 US 806 (1975).

[304] *Ibid* at 584. See, eg, *Wheat v United States*, 486 US 153 (1988).

[305] Eg, *Powell v Alabama*, 287 US 45 (1932). See LaFave, Israel and King, above n 16 at 557 *ff*.

[306] In *Powell v Alabama*, previous n at 57, noting that 'during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their

assistance at the initial stage of police questioning. In *Miranda v Arizona*, the Supreme Court stated that the right to have counsel present at custodial interrogation is 'indispensable' to the self-incrimination privilege.[307] Moreover, the person in custody must be clearly informed that he has the right to consult with a lawyer and to have a lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.[308]

The court has never explicitly held that the confidentiality of lawyer–client communications is included within the Sixth Amendment. Interference with the common law lawyer–client privilege may, however, amount to a Sixth Amendment violation where it has an adverse impact upon defence counsel's performances.[309] The leading precedent with respect to government invasions on the lawyer–client relationship is *Weatherford v Bursey*.[310] That case concerned the presence of a government informant during conversations between the defendant and his lawyer. The court refused to find a Sixth Amendment violation because there was no prejudice to the defendant.[311] Finally, the lawyer–client privilege is subject to the 'crime-fraud' exception: communications used to further future illegal conduct are not protected.[312]

It may be concluded that, despite textual differences, the scope and content of the right to counsel are very similar in both systems. For example, the right to appointed counsel and to represent oneself, two features explicitly mentioned in Article 6, were read into the Sixth Amendment by the courts. Other points of similarity include the applicability of the right to legal assistance at the pre-trial stage, the possibility to limit the defendant's personal preference in the choice of a lawyer, and the

arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.'

[307] *Miranda v Arizona*, 384 US 436, 469 (1966). The *Miranda* procedural safeguards were adopted to protect persons in police custody from intimidating police interrogation proceedings: 'It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.' (*ibid* at 457–8). For more information on the right to counsel during interrogation, see LaFave, Israel and King, above n 16 at 321–37.

[308] *Ibid* at 471–3.

[309] See LaFave, Israel and King, above n 16 at 608–9.

[310] *Weatherford v Bursey*, 429 US 545 (1977).

[311] *Ibid* at 558. The court observed that in the case at hand there was no tainted evidence, no communication of defence strategy to the prosecution, and no purposeful intrusion.

[312] See, eg, *United States v Zolin*, 491 US 554, 556 (1989).

privileged nature of lawyer–client communications. The most striking difference is perhaps the categorical approach in *Miranda*, which has no counterpart in Convention law. *Miranda* not only promises the defendant the seemingly unqualified right to consult with counsel prior to questioning, but also to have his lawyer present during any questioning.[313] Moreover, if the defendant states that he wishes to contact a lawyer, the interrogation must cease until a lawyer is present.[314] Under Article 6, by contrast, the attendance of a suspect's lawyer during police interrogations is not viewed as 'an indispensable precondition' of a fair hearing, and the necessity of pre-trial access to defence counsel is assessed 'in the light of the entirety of the proceedings'.[315]

ii. Exceptional Standards in the Fight against Terrorism

It needs no explanation that effective interrogation of persons allegedly involved in terrorism is a crucial tool for the prevention and prosecution of terrorist offences. Experience indicates that interrogation, not only for prosecutorial purposes but also for obtaining intelligence, is a highly effective means of combating terrorism.[316] It is therefore not surprising that intelligence and law enforcement authorities responsible for investigating terrorist offences, demand and often receive extraordinary powers interfering with otherwise protected rights of access to and assistance of counsel in the pre-trail stage (eg, prolonged incommunicado detention and the monitoring of lawyer–client communications). The question accordingly arises whether such measures are consistent with the right to counsel as protected by the Convention and the Bill of Rights.

a. The European Convention

In the Convention system, neither the right to legal assistance in the pre-trial stage nor the right to communicate with defence counsel without hindrance are absolute, and restrictions to these rights are permitted if good cause exists. According to the established case law, the requirements of Article 6 s 3 (c) depend on the 'the circumstances of the case', and the fairness of restrictions must be assessed in the light of the 'entirety of the proceedings'.[317] The Strasbourg organs have applied these standards in terrorism cases on various occasions. A first group of judgments deals with

[313] *Miranda v Arizona*, above n 307 at 470.
[314] *Ibid* at 474.
[315] *Brennan v UK*, above n 295 at paras 53 and 58.
[316] See Philip B Heymann, *Terrorism and America. A Commonsense Strategy for a Democratic Society* (Cambridge, Mass., MIT Press, 1998) 124.
[317] Eg, *Murray v the UK*, above n 295 at para 63.

restrictions on legal assistance during initial police interrogations.[318] Several cases involved applicants whose right to access to defence counsel was restricted pursuant to Section 15 of the Northern Ireland Emergency Provisions Act. That provision authorised a 48 hours delay in granting a person in police detention access to a lawyer if such access would, inter alia, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent such acts.[319] The first section 15 case to reach the court was *Murray v United Kingdom*.[320] Immediately after his arrest, Mr Murray, who was later convicted for activities related to the IRA, was cautioned by the police that he had the right to remain silent but that adverse interferences could be drawn from his silence by the trial judge.[321] The court observed that the applicant was thus faced with a 'fundamental dilemma' relating to his defence: if he opted to remain silent, adverse interferences could be drawn against him, and if he chose to speak, he ran the risk of prejudicing his defence in any subsequent criminal proceedings.[322] Therefore, the court reasoned, defendants placed in such a situation must be granted instant access to legal assistance. The decision to refuse the applicant to contact a lawyer for the first 48 hours of police questioning accordingly breached Article 6 s 3 (c):

> To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is—whatever the justifications for such denial—incompatible with the rights of the accused under Article 6.[323]

Similar conclusions were reached in the cases *Magee v United Kingdom* and *Averill v United Kingdom*.[324] The applicant in *Magee* confessed his involvement in a bomb plot after 48 hours of police interrogation without access to legal advice. Unlike Mr Murray, Mr Magee decided not to remain silent and no adverse inferences were drawn from his prior behaviour by

[318] Another counter-terrorist interference is to restrict the right of terrorist suspects to choose their own defence counsel. The court in Strasbourg has not confronted this issue yet. Since the right to be defended by a counsel of 'his own choosing' is not absolute, it can be expected that certain limitations (eg, a security clearance requirement) will not be held incompatible with the Convention. However, a provision that negates the freedom to choose one's own counsel all together (for instance by forcing the accused to accept a lawyer designated by the government) may be difficult to reconcile with Art 6 s 3 (c). In this respect, see, eg, Concluding Observation of the Human Rights Committee: Spain, CCPR/C/79/Add.61, para 18: 'The Committee recommends that the legislative provisions, which state that persons accused of acts of terrorism or suspected of collaborating with such persons may not choose their own lawyer, should be rescinded.'

[319] *Murray v the UK*, above n 295 at para 33.

[320] *Murray v the UK*, above n 295.

[321] The drawing of adverse interferences raised separate issues with respect to the right to remain silent and the privilege against self-incrimination. *Ibid* at paras 41–58.

[322] *Ibid* at para 66.

[323] *Ibid*.

[324] *Magee v UK* Reports 2000-VI (2000); *Averill v UK* Reports 2000-VI (2000).

the trial judge. The central issue was therefore not so much the dilemma caused by the police caution but the applicant's complaint that he had been forced to incriminate himself in a coercive environment. Having examined the circumstances in which the applicant was questioned, the court concluded that he should have been given access to a lawyer at the initial stages of the questioning, 'as a counterweight to the intimidating atmosphere specifically devised to sap his will to make him confess to his interrogators'.[325] The circumstances were the following: Mr Murray was interviewed on five occasions by skilled police officers for prolonged periods interrupted by breaks, and, apart from two contacts with a doctor, he was kept incommunicado during the breaks in austere conditions of detention.[326] The facts in *Averill* were very similar to those found in *Murray*. The only difference was the shorter initial period in which the applicant could not consult with his defence counsel, namely 24 hours instead of 48 hours. This did not alter the court's conclusion: on account of the above-mentioned dilemma the applicant still found himself in a situation in which his rights could be 'irretrievably prejudiced'.[327]

The approach taken in *Murray* and its progeny has been confirmed in a series of cases against Turkey.[328] For example, in *Öcalan v Turkey* the court considered the questioning by security forces of the leader of the PKK for almost seven days without legal assistance.[329] Both the Chamber and the Grand Chamber found a violation of Article 6 s 1 (3).[330] In the court's opinion, the long period of questioning during which the applicant made several self-incriminating statements had irretrievably prejudiced the rights of the defence.

As regards the confidentiality of lawyer–client communications, few cases were found in which the need to fight terrorism was held to justify special surveillance measures.[331] In fact, the central case regarding the

[325] *Magee v UK*, previous n at para 43.

[326] *Ibid*.

[327] *Averill v UK*, above n 324 at para 60. See, however, *Brennan v UK*, above n 295 (24 hour deferral period did not violate Art 6 s 3 (c) because the applicant made no incriminating admissions during that period).

[328] See, eg, *Mamaç and others v Turkey*, 20 April 2004, paras 46 *ff*. (no violation of Art 6 s 3 (c) in light of the entirety of the proceedings); *Sarikay v Turkey*, 22 April 2004, paras 64 *ff* (no violation of Art 6 s 3 (c) in light of the entirety of the proceedings); *Ahmet Mete v Turkey*, 25 April 2006, paras 23 *ff* (no violation of Art 6 s 3 (c) because interrogation minutes indicated that applicant was reminded of his right to have legal assistance during his questioning by the police).

[329] *Öcalan v Turkey* (First Section), above n 83; *Öcalan v Turkey* (Grand Chamber), above n 83.

[330] *Öcalan v Turkey* (First Section), above n 83 at paras 141–3; *Öcalan v Turkey* (Grand Chamber), above n 83 at para 131.

[331] It may be recalled that the confidentiality of lawyer–client communications was also considered under Art 8 of the Convention (see ch 6 above). In *Erdem v Germany*, the monitoring of all written correspondence between an alleged member of the PKK and his defence counsel was held to be necessary in a democratic society for the aim of combating

privacy of the lawyer–client relationship involved alleged acts of terrorism. In *S v Switzerland*, the respondent government sought to justify the surveillance of the applicant's meetings and correspondence with his counsel on national security grounds.[332] Besides the risk of collusion, the government invoked the 'extraordinarily dangerous' character of the accused, 'whose methods had features in common with those of terrorists'.[333] The Strasbourg Court considered the risk of collusion but found it insufficient to justify restricting the defendant's right to communicate with defence counsel without hindrance.[334] Remarkably, the court did not examine the respondent government's arguments derived from the nature of the offences under investigation, holding that 'no other reason has been adduced cogent enough to [justify the surveillance measures]'.[335]

In several subsequent terrorism-related cases concerning lawyer–client communications the court took a comparable approach. *Brennan v United Kingdom* involved the trial and conviction of a member of the IRA for, inter alia, murder, possession of explosives, and membership of a proscribed organisation.[336] The applicant complained that his right under Article 6 s 3 (c) was violated by the presence of a police officer attending within sight and hearing of the first consultation with his lawyer. These measures were necessary, according to the domestic authorities, to prevent information being passed on to two suspects still at large. The court in Strasbourg was not convinced by this argumentation. It saw no 'compelling reason' for the imposition of the surveillance measures.[337] Firstly, there was no reason to assume that the applicant's defence counsel would in fact collaborate in attempts to pass on information. Secondly, it was unclear as to what extent the police officer present during the interrogation would have been able to detect a coded message if one was in fact passed. There had accordingly been a breach of the Convention.[338] Similarly, in *Öcalan v Turkey*, neither the Chamber nor the Grand Chamber had any difficulty in holding that the continued surveillance at all stages of the proceedings of the prominent terrorist leader's consultations with his lawyer by the security forces violated Article 6 s 3 (c).[339]

terrorism (*Erdem v Germany* Reports 2001-VII (2001)). A decisive element in *Erdem* was the fact that the interference with the lawyer–client privilege was limited, in that prisoners were free to discuss their cases orally with their defence counsels (*ibid* at para 67).

[332] *S v Switzerland*, above n 298.

[333] *Ibid* at para 47.

[334] *Ibid* at para 49.

[335] *Ibid*.

[336] *Brennan v UK*, above n 295.

[337] *Ibid* at para 59.

[338] *Ibid* at paras 61–3.

[339] *Öcalan v Turkey* (First Section), above n 83 at para 147; *Öcalan v Turkey* (Grand Chamber), above n 83 at para 133.

b. The US Constitution

There is little jurisprudence specifically dealing with the Fifth and Sixth Amendments right to counsel of persons suspected of terrorism. It may be observed that several post-September 11 measures interfere with the right to legal assistance. Some of these provisions invited strong opposition by academics and civil right organisations.[340] Most controversial is a regulation issued by the Attorney General with respect to the monitoring of communications between persons in federal detention and their defence counsel.[341] It authorises the Department of Justice to order the Director of the Bureau of Prisons to monitor and review the communications between an inmate and his attorney for the purpose of deterring future act of terrorism. The required standard is 'reasonable suspicion' to believe that 'a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism'.[342] Unless the Director receives prior court authorisation, he must notify the inmate and his lawyer in writing of the intended monitoring.[343] In addition, the regulation puts into place procedures for the review of the information obtained to determine whether it is privileged and confidential, or whether it should be disclosed to the law enforcement authorities.[344] According to its critics, the regulation is inconsistent with the attorney–client privilege, and violates the Sixth Amendment right to counsel and the Fourth Amendment protection against unreasonable searches and seizures.[345] The government, on its behalf, claims that the measures strike a proper balance between the rights of the accused and the interest in preventing terrorism.[346] It is submitted

[340] See, eg, ACLU, Coalition Comments Regarding Eavesdropping on Confidential Attorney-Client Communications (20 December 2001); Akhil Reed Amar and Vikmar David Amar, 'The New Regulation Allowing Federal Agents to Monitor Attorney-client Conversations: Why It Threatens Fourth Amendment Values' (2002) 34 *Connecticut Law Review* 1163; Avidan Y Cover, 'A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment' (2002) 87 *Cornell Law Review* 1233; Wesley Hall, 'Government Surveillance of Attorney-Client Communications: Invoked in the Name of Fighting Terrorism' (2003) 17 *Georgetown Journal of Legal Ethics* 145.

[341] Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (31 October 2001). Codified at 28 C.F.R. s 501.3(d).

[342] 28 C.F.R. s 501.3(d).

[343] *Ibid* s 501.3(d)(2).

[344] *Ibid* s 501.3(d)(3).

[345] See, eg, ACLU, above n 340 at 3–6; Cover, above n 340 at 1237 and 1258 (arguing, amongst other things, that the monitoring (and the prior notification) inhibits the free communication of information between a suspect and his lawyer, indispensable for an effective defence); Amar and Amar, above n 340 (reasoning that interception without warrant and probable cause is unreasonable, even tough traditionally the Fourth Amendment rights of prisoners are diminished).

[346] Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,064 (31 October 2001).

that the regulation raises no Sixth Amendment issues under *Weatherford v Bursey* because the procedures in place protect the confidentiality of intercepted information.[347]

Another measure interfering with the right to legal assistance is the imposition of the requirement on defence counsel of obtaining security clearance.[348] The constitutionality of such an obligation was briefly touched upon in a district court opinion in *United States v Bin Laden*, a case decided before September 11.[349] To begin with, the district judge observed that the Sixth Amendment, rather than providing an unlimited choice of counsel, aims to guarantee that the accused receives effective legal assistance.[350] While the court agreed with the defendants that it would be unconstitutional to grant the government an unfettered power to remove any counsel chosen by the defendants, the Sixth Amendment had not been violated in the present case. The reason was that the government's conduct gave no rise to a concern that the clearance requirement was designed to interfere with any counsel's ability to meaningfully represent his client.[351]

The various attributes of the Fifth and Sixth Amendment right to counsel are not, or only to a limited extent, enjoyed by those imprisoned as enemy combatants under the 2001 Military Order. In its 2002 Memorandum on the rights of people in US custody in Afghanistan and Guantánamo Bay, Amnesty International observed that

> [a]t the time of writing, none of the detainees, either in Afghanistan or Guantánamo Bay, had been granted access to legal counsel despite the fact that interrogation by US agents, and in some cases by agents of other governments, had been continuing for over two months in both locations.[352]

Some concerns as to the enemy combatant's access to counsel were allayed by the procedural rules issued by the Department of Defense to be used in the military commissions. The regulations provide for the designation of a military counsel ('Detailed Defence Counsel') to conduct the defence for

[347] See also Frank Kearns, 'Attorney-Client Privilege for Suspected Terrorists: Impacts of the New Federal Regulation on Suspected Terrorists in Federal Custody' (2003) 27 *Nova Law Review* 475.

[348] See, eg, Brian Z Tamanaha, above n 225 at 288, noting that '[t]he greatest danger of [a] (…) clearance requirement is that it gives the Department of Justice the ability to control who will work on classified matters for the defense. To eliminate a particularly troublesome opponent, the Justice Department may deny a security clearance to a specific attorney, investigator, or expert witness retained by the defendant, who needs access to classified information to be effective.'

[349] *United States v Bin Laden*, 58 F Supp 2d 113 (SDNY 1999).

[350] *Ibid* at 119.

[351] *Ibid*.

[352] Amnesty International, United States of America: Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantánamo Bay (Apr 14, 2002).

each person brought before a commission.[353] In addition, the accused may retain the services of a civilian attorney of his own choosing and at the expense of the United States.[354] However, civilian counsel will need to satisfy a number of requirements, including that they be United States citizens and obtain security clearance.[355] Civilian counsel will also be subject to Defense Department monitoring of communications with their clients and will be barred from speaking about the proceedings with others.[356] Critics have warned that these restrictions, in addition to the practical and financial problems of representing clients tried at Guantánamo Bay, may have a considerable 'chilling effect' on the right to instruct counsel of one's own choosing.[357]

iii. Concluding Remarks

The European Court's 'totality of the circumstances' approach in assessing restrictions on pre-trial access to counsel and lawyer–client communications would seem to allow decision-makers to give considerable latitude to the importance and difficulties of battling terrorism. However, most cases decided in this context suggest that room for specific counter-terrorist considerations is rather limited. Indeed, in the *Murray* line of cases no separate weight was attached to the specific problems associated with terrorism. The interest of national security so far has hardly played a part, if at all, in the Strasbourg case law with respect to the right to counsel. Once it is established that a restriction may 'irretrievably' prejudice the rights of the defence, the court will find a violation of the Convention, 'whatever the justifications for such denial'.[358] Under the Bill of Rights, a certain flexibility is evidenced in the application of some aspects of the right to counsel, such as the right to retain counsel of one's own choosing. Thus, for instance, the requirement of obtaining security clearance would not seem to raise insurmountable constitutional obstacles. Other features

[353] US Dep't of Defense, Military Commission Order No. 1, above n 100 at s 4(c)(2).
[354] *Ibid*, s 4(c)(3).
[355] *Ibid*.
[356] See US Dep't of Defense, Military Commission Order No. 3, Special Administrative Measures for Certain Communications Subject to Monitoring (5 February 2004) and US Dep't of Defense, Military Instruction No. 5, Qualification of Civilian Defense Counsel (30 April 2003).
[357] Eric Metcalfe, 'Inequality of Arms: The Right to a Fair Trial in Guantanamo Bay' (2003) 6 *European Human Rights Law Review* 573, 583. See also David Glazier, 'Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission' (2003) 89 *Virginia Law Review* 2005, 2019.
[358] *Murray v the UK*, above n 295 at para 66.

of the right to counsel, most notably the categorical *Miranda* ruling, allow no scope for recourse to abnormal measures without violating the Constitution.

IV. LIMITATIONS OF THE RIGHT TO A FAIR TRIAL IN WAR AND EMERGENCY SITUATIONS

A. Introduction

The previous part examined the extent to which the interest in fighting terrorism permits a departure from the rules and standards generally applicable in criminal and immigration law proceedings. Another line of response to terrorism is through the establishment of an alternative system of military justice. In addition to complying with the principles of international humanitarian law—a subject not further pursued here—such a special regime would have to conform to international human rights law.[359] The impact such a system would have on the rights of the individual may be such as to necessitate recourse to extraordinary war or emergency powers.[360] The fair trial concerns associated with the creation of a separate system of military justice are twofold. Firstly, it typically involves the use of special tribunals (eg, courts-martial or military commission), the composition and organisation of which inevitably raises questions of independence and impartiality. Secondly, a trial before a military tribunal is usually conducted in a manner that differs significantly from ordinary criminal trials, which entails that the procedural safeguards accorded to defendants may fall far short of the minimum requirements of a fair trial in 'normal' circumstances.[361]

[359] See, eg, Colin Warbrick, 'The European Response to Terrorism in an Age of Human Rights' (2004) 15 *European Journal of International Law* 989, 990 (arguing that human rights law applies to special regimes established to deal with terrorist crime, the latter possibly modified within its own terms to accommodate the special circumstances of terrorism). On the importance of distinguishing between an ordinary human rights response to terrorism and the application of international humanitarian law, see, eg, Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, NJ, Princeton University Press, 2004).

[360] A related matter, not further examined here, is the use of military or police courts to try members of the military or police. For a discussion of these issues, see, eg, Andreu-Guzmán, above n 61. See also Emmanuel Decaux, 'Administration of Justice, Rule of Law and Democracy. Issue of the Administration of Justice through Military Tribunals', UN Doc E/CN.4/Sub.2/2005/9 (2005).

[361] In a General Comment to Art 14 of the Covenant of Civil and Political Rights, the United Nations Human Rights Committee observed that '[q]uite often the reason for the establishment of (…) [military] courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice' (UN Human Rights Commissioner, General Comment no 13: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (Art 14) para 4, UN Doc HRI/GEN/1/Rev 1 (1984).

B. Standards of the European Convention

Article 6 does not figure in the list of the non-derogable rights in Article 15 of the Convention. Thus far, the Strasbourg organs have not been faced with a derogation from one of the fair trial guarantees secured in Article 6. It emerges from the cases discussed in section III above that such a derogation would be a necessary precondition for any attempt by the Contracting States to bring an alternative system of military justice into line with the requirements of the Convention. Leaving aside the potential procedural deficiencies of such a system, the use of tribunals composed of military personnel to try suspected terrorists would be irreconcilable with the Convention standards of independence and impartiality, in the absence of a valid Article 15 derogation.[362]

As illustrated by theTurkish National Security Court cases, the bringing of a civilian before a court (partially) composed of members of the armed forces, raises serious Article 6 issues.[363] These concerns are amplified where the civilian courts are replaced by tribunals firmly integrated in the armed forces. This was first acknowledged by the Commission in *Mitap and Müftüoglu v Turkey*, and confirmed by the court in a series of similar cases.[364] At issue in *Mitap and Müftüoglu* was the determination of criminal charges by a military tribunal against persons accused of being founding members and leaders of an extremist and violent left-wing organisation. Despite their civilian status, the applicants were convicted and sentenced to life imprisonment by the Ankara Martial Law Court. Besides two civilian judges, the latter was composed of two military judges and an army officer. The trial of civilians by courts-martial was part of a number of extraordinary measures adopted to guarantee internal security in portions of the Turkish territory placed under stage of siege.[365] At the outset, the Commission indicated that it would not rule in abstracto on the necessity to establish courts-martial in a Contracting States.[366] It restricted its task to deciding whether the court-martial system under review violated Article 6. In the present case, the Commission continued, it was beyond doubt that the Ankara Martial Law Court did not satisfy the standards of independence and impartiality set by Article 6 s 1.[367] To begin with, the

[362] See also Cameron, above n 116 at 300.

[363] See above section III.

[364] *Mitap and Müftüoglu v Turkey* Application nos 15530/89 and 15531/89 (1994). The Art 6 complaints in *Mitap and Müftüoglu* were not considered by the court due to lack of temporal jurisdiction. See *Mitap and Müftüoglu v Turkey* Reports 1996-II (1996). However, the court adopted the approach taken by the Commission in *Mitap and Müftüoglu* in a group of cases decided on 25 September 2001. See, eg, *Sahiner v Turkey* Reports 2001-IX (2001), paras 33–47.

[365] *Mitap and Müftüoglu v Turkey* (Commission), previous n at para 98.

[366] *Ibid* at para 99.

[367] *Ibid* at para 108.

Army Command and the Department of Defence had an important part in the appointment of the two military judges and the army officer.[368] As regards the court-martial members' term of office, the Commission noted that the Minister of Defence could establish and abolish courts-martial and subject their members to disciplinary proceedings.[369] Finally, the guarantees against outside pressure were held to be insufficient: the army complied assessment reports on the military judges that could possibly influence their future careers, and the army officer was accountable to the commander of the state of siege.[370] In numerous subsequent cases, the court censured comparable Turkish efforts to try civilians before similarly composed courts-martial for a variety of security-related offences.[371]

Where a civilian has to stand trial before a court composed exclusively of military personnel, the Strasbourg Court takes an even more rigorous position. This was illustrated in the case of *Ergin v Turkey*.[372] The applicant in this case was a newspaper editor who was convicted for incitement to evade military service by the Turkish General Staff Court, which was composed solely of military judges. Drawing on developments in international human rights law—'which confirms the existence of a trend towards excluding the criminal jurisdiction of military courts over civilians'[373]—the court held that the determination of criminal charges against civilians by military courts will be justified only in 'very exceptional circumstances', and should be subjected to 'particular careful scrutiny'.[374] In this respect, the court further indicated that the existence of

[368] *Ibid* at paras 101–2.
[369] *Ibid* at para 103.
[370] *Ibid* at paras 104–6.
[371] See, amongst many other examples, *Sahiner v Turkey*, above n 364 at 33–47 (membership in an illegal organisation); *Kizilöz v Turkey*, 25 September 2001, paras 35–49 (participating in illegal demonstrations and membership of an illegal armed organisation); *Günes v Turkey*, 25 September 2001, paras 35–49 (membership in illegal organisation and involvement in the killing and wounding of several persons).
[372] *Ergin v Turkey (No 6)*, 4 May 2006.
[373] *Ibid* at para 45. Reference was made, inter alia, to the report on the issue of the administration of justice through military tribunals, submitted to the Commission on Human Rights (Emmanuel Decaux, 'Administration of Justice, Rule of Law and Democracy. Issue of the Administration of Justice through Military Tribunals', UN Doc E/CN.4/Sub.2/2005/9 (2005)). Principle No 4 of this report states: 'Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.' The European Court also drew inspiration from the settled case law of the Inter-American Court of Human Rights, which excludes civilians from the jurisdiction of military courts in the following terms: 'In a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order.' (IACtHR, *Durand and Ugarte v Peru* Series C no 68 (2000) para 117).
[374] *Ergin v Turkey (No 6)*, above n 372 at paras 44 and 41.

compelling reasons justifying military jurisdiction must be substantiated in each specific case and that it would not be sufficient for the national legislation to allocate certain categories of offences to military courts in abstracto.[375] This position was explained as follows:

> The Court notes the particular position occupied by the army in the constitutional order of democratic States, which must be limited to the field of national security, since judicial power is in principle an attribute of civil society.[376]

Finally, it should be noted that the use of courts-martial, absent a derogation pursuant to Article 15, has been criticised by the Strasbourg organs even with respect to the trial of members of the armed forces. Article 6 does not exclude the determination by courts-martial of criminal charges against service personnel per se.[377] Nonetheless, in each case the court will determine whether a particular court-martial accords with the principles of independence and impartiality.[378] For example, in *Findlay v United Kingdom*, the court upheld a complaint in relation to the United Kingdom court-martial system.[379] The main defect of the system was the central role played by the 'convening officer'.[380] This senior officer combined several functions and responsibilities: he decided whether a person under his command should be tried by court-martial; he determined the charges; he appointed the president and members of the tribunal (many of whom were subordinate in rank and fell within his chain of command); he appointed the prosecuting and defending officers; he took important decisions regarding the evidence; and he confirmed the conviction and sentence after the trial.[381] Hence, the court had little difficulty to find that the applicant's concerns as to the independence and impartiality of the tribunal were objectively justified.[382]

[375] *Ibid* at para 47.
[376] *Ibid* at para 46.
[377] See, eg, *Cooper v UK* Reports 2003-XII (2003) para 110.
[378] *Ibid*.
[379] *Findlay v UK* Reports 1997-I (1997). See also APV Rogers, 'The Use of Military Courts to Try Suspects' (2002) 51 *International and Comparative Law Quarterly* 967, 976–979.
[380] *Findlay v UK*, above n 379 at paras 74–77.
[381] This last aspect, the court observed, 'is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of 'tribunal' and can also be seen as a component of the 'independence' requirement by Article 6 § 1.'(*ibid* at para 77).
[382] *Ibid* at para 80.

C. Standards of the US Constitution

The Constitution contains no general derogation provision comparable to Article 15 of the Convention.[383] Yet, it is a recurring theme in the history of the United States to subject certain categories of persons to a separate system of military justice in time of emergency or war. This practice typically involves trial before so-called 'military commissions'. That term is used to describe special tribunals composed of military personnel sitting without a civilian judge or jury. The organisation of such commissions as well as the rules of procedure and evidence, penalties and principles of substantive law to be applied by them, are usually determined by executive order. Military commissions have been established for different purposes, varying from the prosecution of 'enemy combatants' for violations of the laws of war to the administration of justice in occupied territory.[384] A military commission is to be distinguished from a court-martial in that the latter is a trial of a member of the United States armed forces, governed by the Uniform Code of Military Justice (UCMJ).[385] Before considering the government's reliance on military commissions in the current fight against terrorism, the present sub-section examines the major Supreme Court precedents.

i. Historical Examples of Trial by Military Commission

The first time the Supreme Court weighed in on the constitutionality of trial by military commission was in the Civil War case *Ex parte Milligan*.[386] The petitioner was a critic of President Lincoln, accused of planning an armed uprising in the State of Indiana. After having been sentenced to death by a military commission for conspiracy against the United States, Milligan filed a habeas corpus petition challenging the jurisdiction of the commission and claiming his Sixth Amendment right to trial by jury. The opinion of the court was delivered by Justice Davis, who wrote that '[n]o graver question was ever considered by this court' than whether petitioner, 'not a resident of one of the rebellious states, or a

[383] See generally, ch 1, section III. For a general discussion of the suspension of constitutional rights in emergencies, see, eg, Developments in the Law, 'The National Security Interest and Civil Liberties' (1972) 85 *Harvard Law Review* 1130, 1284–1326; William H Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York, Vintage Books, 1998); Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, NJ, Princeton University Press, 1948) 207–315.

[384] See Curtis A Bradley and Jack L Goldsmith, 'The Constitutional Validity of Military Commissions' (2002) 5 *Green Bag* 2d 249, 250. For an extensive examination of the historical use of military tribunals, see, eg, Glazier, above n 357.

[385] 10 USC s 836.

[386] *Ex p Milligan*, above n 94.

prisoner of war, but a citizen', could be brought before a military commission.[387] A bare majority of the court answered this question in the negative. According to Davis' opinion, neither the President nor Congress can authorise the trial of civilians by military commissions 'in states which have upheld the authority of the government, and where the courts are open and their process unobstructed'.[388]

Not only was there no constitutional authority to set up the military commission, the trial of Milligan was also a violation of his right to trial by jury. The court refused to recognise a national security exception to the Sixth Amendment:

> All (…) citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity.[389]

The majority opinion stressed that constitutional fair trial guarantees and the right to trial by jury are expressed is such 'plain and direct' words that they do not leave room for 'misconstruction or doubt of their true meaning'.[390]

In more general terms, the majority in *Milligan* indicated that it would not accept any emergency derogations from the rights secured in the Constitution. Except for the privilege of the writ of habeas corpus, none of the provisions of the Bill of Rights can be suspended in time of war or rebellion: '[The framers] limited the suspension to one great right, and left the rest to remain forever inviolable.'[391] Justice Davis eloquently rejected the idea of an emergency exception to constitutional rights in the following oft-quoted paragraph:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of

[387] *Ibid* at 118.
[388] *Ibid* at 121–2 (observing that a military commission is not a court ordained and established by Congress under Art III of the Constitution (composed of life-tenured judges), that establishing a military commission goes beyond the President's executive authority, and that a commission's jurisdiction cannot be based on the 'laws and usages of war').
[389] *Ibid* at 123.
[390] *Ibid* at. 119.
[391] *Ibid* at 126.

> necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.[392]

In concurrence, Chief Justice Chase, joined by three other Justices, rejected the absolutist majority view that Congress could under no circumstances authorise the use of military commissions.[393] According to the concurring Justices, occasions exist in which trial and punishment by military commissions can be provided for by Congress under its war powers, even in states where the civil courts are open.[394] They warned that courts which are open and undisturbed in the execution of their functions may still be 'wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators'.[395] The four concurring Justices would nevertheless have quashed President Lincoln's order setting up the military commissions, because, they argued, it was for Congress and not the President to decide whether a civilian can be tried by a military commission.

A second major case where the Supreme Court considered a trial by military commission is *Ex parte Quirin*.[396] This World War II decision involved eight Nazi saboteurs, one of whom was a citizen, who entered the United States in 1942 in the midst of the war. They were trained in a sabotage school near Berlin and instructed to destroy war industries and war facilities in the United States. Immediately after landing from a German submarine, the saboteurs buried their marine infantry uniforms and proceeded in civilian dress. Following their arrest, President Roosevelt issued an order establishing a military commission to try the saboteurs for offences against the laws of war. After a secret eighteen-day trial, the commission sentenced the eight saboteurs to death. The Supreme Court accepted to hear the case despite language in the President's order that sought to foreclose access to civilian courts.[397] Chief Justice Stone delivered a per curiam opinion upholding the constitutionality of the trial. The

[392] *Ibid* at 120–21.

[393] See also Samuel Issacharoff and Richard H Pildes, 'Emergency Contexts without Emergency Powers: The United States' Constitutional Approach to Rights during Wartime' (2004) 2 *International Journal of Constitutional Law* 296, 300–10 (distinguishing between the majority's rigid rights-based approach and the dissenting Justices' process-based approach).

[394] *Ex p Milligan*, above n 94 at 137: 'Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns.'

[395] *Ibid* at 141.

[396] *Ex p Quirin*, 317 US 1 (1942).

[397] *Ibid* at 25.

court held that it was within the constitutional power of the government to place petitioners on trial before a military commission for the specific offences for which they were charged. It declined to rule on the President's independent constitutional power as Commander in Chief to set up military commissions, holding that the establishment of such commissions was explicitly authorised by Congress.[398] In the court's opinion, petitioners, who passed surreptitiously from enemy territory into the country for the commission of hostile acts, discarding their uniforms upon entry, were to be treated as 'unlawful combatants'. Such unlawful combatants, the court continued, are punishable by military commissions:

> By universal agreement and practice the law of war draws a distinction (…) between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[399]

The *Quirin* court disagreed with petitioners' contention that they were entitled to a jury trial. It interpreted the jury guarantees in Article III, s 2 of the Constitution and the Sixth Amendment so as to exclude trials by military commission from their respective scopes: 'No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms.'[400] In other words, it requires no 'express exception' from the aforementioned constitutional clauses, to 'continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war'.[401] The court also distinguished the facts before it from those found in *Milligan*. Petitioners, one of whom was an American citizen, argued that it followed from *Milligan* that the laws of war could not be applied to citizens in states where the courts are open and their process unobstructed. In the court's view, however, the *Milligan* holding did not apply as that case was not concerned with unlawful combatants:

> [T]he Court [in *Milligan*] was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents.

[398] *Ibid* at 27–9.
[399] *Ibid* at 30–31.
[400] *Ibid* at 41.
[401] *Ibid*. The court concluded that 'the Fifth and Sixth Amendment did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.' (*ibid* at 45).

> We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as (…) martial law might be constitutionally established.[402]

Application of Yamashita, another World War II case, is important because the court in this case took the occasion to consider the procedural safeguards accorded to persons tried before a military commission.[403] Petitioner was the commanding general of the Japanese army in the Philippines. He was sentenced to death by a military commission for failure to prevent army atrocities committed by soldiers under his command. After his conviction, Yamashita sought habeas corpus review from the Supreme Court. Having decided that the military commission was lawfully created and had jurisdiction to try petitioner for war crimes, the Justices went on to examine the procedures governing the trial. It was not contested that the procedures did not conform to the fair trial guarantees protected by the Bill of Rights, and to the statutory rules for courts-martial laid down in the Articles of War. For example, the procedures permitted the use of hearsay evidence and limited the right to cross-examination. Moreover, the petitioner complained that he was given insufficient time and facilities to prepare his defence.

Chief Justice Stone delivered the majority opinion and Justices Murphy and Rutledge filed two forceful dissents. The majority refused to review 'the commission's rulings on evidence and on the mode of conducting these proceedings' and found it 'unnecessary to consider what, in other situations, the Fifth Amendment might require'.[404] It further interpreted the procedural safeguards in the Articles of War as not applying to the petitioner's trial.[405] The dissenting Justices criticised the majority's disregard of the procedural rights guaranteed by the Constitution. According to Justice Murphy, the petitioner was an individual protected by the due process clause of the Fifth Amendment and accordingly entitled to all the guarantees of a fair trial.[406] The Constitution, Justice Murphy explained, is 'applicable in both war and peace', and cannot be ignored by any branch of the government, not even the military, 'except under the most extreme and urgent circumstances'.[407] Consequently, Murphy stressed that military commissions should not be exempted from the requirements of the Fifth Amendment:

[402] *Ibid* at 45.
[403] Application of Yamashita, 327 US 1 (1946).
[404] *Ibid* at 23.
[405] *Ibid* at 20.
[406] *Ibid* at 27.
[407] *Ibid* at 41 and 27.

> The Fifth Amendment guarantee of due process of law applies to 'any person' who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color, or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them.[408]

ii. The Use of Military Commissions to Try Suspected Terrorists

One of the purposes of President Bush's 2001 Military Order on 'Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism', was to place certain international terrorists on trial before military commissions.[409] The President's findings leading to the order are set forth in Section 1, which stipulates that to protect the United States, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary that trials be conducted by military commissions.[410] It further determines that

> [g]iven the danger to the safety of the United States and the nature of internationals terrorism (…) it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.[411]

Section 4 directs the Secretary of Defense to create military commissions to try anyone subject to the order.[412] A person becomes subject to the order by a written statement of the President that there is 'reason to believe' that he was a member of 'the organisation known as al Qaeda', engaged in acts

[408] *Ibid* at 26. See also Justice Rutledge's dissenting opinion, in which he regretted the majority's avoidance of due process questions and warned that placing individuals beyond the protection of the Fifth Amendment's fair trial guarantees is a dangerous door to open: 'I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.' (*ibid* at 79).

[409] Military Order of November 13, 2001, above n 98.

[410] *Ibid* s 1(e).

[411] *Ibid* s 1(f). See also Art 36 of the Uniform Code of Military Justice, which allows the President to limit the application of the principles of law and the rules of evidence generally recognised in the trial of criminal cases in the United States district courts 'so far as he considers practicable'.

[412] Military Order of November 13, 2001, above n 98 at s 4(b).

of international terrorism against the United States, or knowingly harboured such terrorists.[413] The order further stipulates that military commissions shall have 'exclusive jurisdiction' with respect to 'all offenses triable by military commission'. It does not apply to United States citizens.[414]

Although the Secretary of Defense is instructed to issue the evidentiary and procedural rules, the order provides guidance on several matters pertaining to the conduct of the proceedings.[415] For example, the order permits death penalties, allows the admission of such evidence that would have 'probative value to a reasonable person', lays down sentencing rules[416] and excludes remedies in the civilian courts.[417] The Secretary of Defense must provide 'a full and fair trial'.[418] In the months following the order, the Department of Defense promulgated a series of regulations which outline the procedural rules under which military commission are to operate.[419] As has been seen in previous sections, these regulations address a number of fair trial guarantees, including the right to counsel, the presumption of innocence, the standard of proof, the privilege against self-incrimination, the right to a public hearing and the right to access to evidence and to cross-examine witnesses.

Both the original proposal to use military commissions to try foreign terrorist suspects and the subsequent procedural rules issued by the Department of Defense generated a great deal of public and academic commentary. Critics maintain that the commissions are illegal under the Constitution and a number of human rights and humanitarian law treaties.[420] They also point to a variety of policy considerations militating

[413] *Ibid* s 2(a).

[414] *Ibid* ss 4(a) and 7(b)(1).

[415] *Ibid* s 4(c).

[416] *Ibid* s 4(c)(6) and (7) requires conviction and sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present.

[417] *Ibid* s 4(c)(8) provides for review of the record of the trial and final decision only by the President or the Secretary of Defense.

[418] *Ibid* s 4(c)(2).

[419] See, eg, US Dep't of Defense, Military Commission Order No. 1, above n 100. Secretary of Defense Donald H Rumsfeld commented on these regulations as follows: 'Let there be no doubt that these commissions will conduct trials that are honest, fair and impartial (…). While ensuring just outcomes, they will also give us the flexibility we need to ensure the safety and security of the American people in the midst of a difficult and dangerous war.' (DOD News: Secretary Rumsfeld Announces Military Commission Rules, quoted in Emanuel Gross, 'Trying Terrorists: Justification for Differing Trial Rules: the Balance between Security Considerations and Human Rights' (2002) 13 *Indiana International and Comparative Law Review* 1, 66).

[420] See, eg, Amann, above n 103; Laura A Dickinson, 'Using Legal Process to Fight Terrorism: Detention, Military Commissions, International Tribunals, and the Rule of Law' (2002) 75 *Southern California Law Review* 1407; Ronald Dworkin, 'The Trouble with Tribunals', *The New York Review of Books* (25 April 2002); Joan Fitzpatrick, 'Jurisdiction of Military Commissions and the Ambiguous War on Terrorism' (2002) 96 *American Journal of*

against the use of the commissions. The main constitutional argument against the commissions is that they offend the principle of the separation of powers in so far as they are not explicitly authorised by Congress. Criticism is also directed against the lack of fair trial guarantees on a par with those provided in the Bill of Rights, the Uniform Code of Military Justice and the International Covenant on Civil and Political Rights. In this last respect, it is argued that the proposed commissions do not conform to the derogation standards of the Covenant.[421] Others raise equality concerns over the fact that the presidential order is applicable only to non-citizens. Still another objection against the commissions is that they contravene the requirements of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No III).[422] In addition to these legal issues, opponents of the government's policy question the opportunity of using military commissions in the fight against terrorism. A frequently heard policy argument is that the military commissions erode the United States' commitment to human rights and its 'moral leadership' in the world.[423] Military commissions could possibly undermine international co-operation (eg, extradition of suspects) and the United States' ability to criticise other countries for their use of such tribunals, which would, in turn, endanger United States citizens living overseas.

Those who support the use of military commissions in the 'war' on terrorism reject the opponent's legal argumentation and put forward numerous pragmatic justifications.[424] Their central claim is that international terrorist attacks such as the September 11 events violate the laws of war, and that the perpetrators of these acts are enemy combatants falling

International Law 345; George P Fletcher, 'Bush's Military Tribunals Haven't Got a Legal Leg to Stand On', *The American Prospect* (1–14 January 2002); Glazier, above n 357; Emanuel Gross, previous n; Harold Hongju Koh, 'The Case against Military Commissions' (2002) 96 *American Journal of International Law* 337; Katyal and Tribe, above n 104; Metcalfe, above n 357; Daryl A Mundis, 'The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts' (2002) 96 *American Journal of International Law* 320.

[421] See, eg, Fitzpatrick, 'Jurisdiction of Military Commissions', previous n at 350–53; Amann, above n 103 at 337–46 (positing that the Government's policy 'fails to satisfy derogation's quintessential criteria, necessity and proportionality' (*ibid* at 337)). It may be interesting to n that the United States has not formally announced an intention to derogate from the International Covenant on Civil and Political Rights.

[422] The central issue is whether persons subject to trial by military commissions fall within the ambit of the definition of prisoner of war in Art 4 of the Convention, and are accordingly entitled to the protections afforded by that Convention. Opponents of the commissions argue that the government's decision to deny prisoner of war status to captured Taliban and al Qaeda members violates Art 5 of the Convention, which requires a 'competent tribunal' to determine whether 'persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4'.

[423] Koh, 'The Case against Military Commissions', above n 420 at 342.

[424] See, eg, Curtis A Bradley and Jack L Goldsmith, 'The Constitutional Validity of Military Commissions' above n 384; Curtis A Bradley and Jack L Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 *Harvard Law Review* 2047; Spencer J Crona and Neal A Richardson, 'Justice For War Criminals of Invisible Armies: A New Legal

within the jurisdiction of military commissions.[425] In their view, the President has independent constitutional authority as Commander in Chief of the Armed Forces to establish commissions and, in any event, President Bush had statutory authority to issue the November 2001 order.[426] Likewise, Geneva Convention No III would not preclude military commission to try enemy combatants.[427] The proponents of the commissions further maintain that the fair trail protections afforded to defendants in the criminal justice system are impractical and dangerously ineffectual when dealing with international terrorists. National security interests would be better served by trying terrorist suspects in military commissions. Thus, for example, using military commissions would make it easier to protect classified or otherwise sensitive information, to close a trial to the press and public, to circumvent the strict evidentiary requirements in criminal trials, and to protect civilian prosecutors, judges and juries from threats and reprisals by terrorist groups. Some authors go as far as to contend that in light of the potential harm of terrorist acts, society must accept a greater risk that innocent people will be convicted. A departure from generally applicable fair trial standards would be justified in the name of efficiency, swiftness and deterrence.[428]

As has been seen, the use of military commissions under the 2001 Military Order was ultimately tested by the Supreme Court in *Hamdan v Rumsfeld*.[429] For those who would have expected the court to take a position on the compatibility of the Bush Administration's military justice

and Military Approach to Terrorism' (1996) 21 *Oklahoma City University Law Review* 349; Ruth Wedgwood, 'Al Qaeda, Terrorism, and Military Commissions' (2002) 96 *American Journal of International Law* 328.

[425] As Crona and Richardson, previous n at 354 put it: 'The strategy of treating terrorists as ordinary criminals, and placing them into the slow mill of our criminal justice system, for acts that far transcend ordinary criminal acts, overlooks the essential difference in the nature of their crimes.'

[426] Proponents refer to Congress' Joint Resolution authorising the President to 'use all necessary force' against, inter alia, those responsible for the September 11 attacks, and to the common law jurisdiction of military commissions explicitly preserved in Art 21 of the Uniform Code of Military Justice (before Art 15 of the Articles of War).

[427] It is contended that those subject to President Bush's military order are 'unlawful' or 'unprivileged' combatants, not entitled to prisoner of war status and the Convention's concomitant legal protections. See, eg, Wedgwood, above n 424 at 335: 'Al Qaeda has failed to fulfil four prerequisites of lawful belligerency. These require a responsible commander, a distinctive and visible insignia, bearing arms openly, and generally observing the laws and customs of war.'

[428] Crona and Richardson, above n 424 at 379: 'The civilian justice system, which entails a trial to a jury of twelve persons who must unanimously agree that a particular defendant is guilty beyond a reasonable doubt, is designed to err on the side of letting the guilty go free rather than convicting the innocent. However, when this nation is faced with terrorist attacks that inflicts mass murder or hundreds of millions of dollars of damage in single instance, we can no longer afford procedures that err so heavily on the side of freeing the guilty. Protection of society and the lives of thousands of potential victims becomes paramount.'

[429] *Hamdan v Rumsfeld*, above n 105.

system with the fair trial rights secured in the Bill of Right and the international human rights treaties (eg, whether the proposed commissions conform to the derogation standards of the International Covenant on Civil and Political Rights),[430] the *Hamdan* decision may have come as a disappointment. The court avoided these matters by primarily focusing on separation of powers arguments and technical questions concerning statutory interpretation (see above).[431] With regard to the issue of the separation of powers, the court drew on language in *Quirin* to affirm that, whatever independent power the President may possess to convene military commissions in cases of 'controlling necessity', Congress had limited this power by intervening in this area and conditioning the use of military commissions on compliance with certain statutory and international law requirements.[432] As these conditions were not met, the military commission at issue could not proceed. Besides violations of the UCMJ, the court found a breach of Common Article 3 of the Geneva Conventions of 1949—incorporated in domestic through the UCMJ—on the basis that the military commission under review was not a 'regularly constituted court'.[433] In the court's opinion, even assuming that Hamdan is 'a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians', the executive was nevertheless bound to comply with the prevailing rule of law.[434]

[430] Arguments derived from the fail trial and derogation provisions in the International Covenant on Civil and Political Rights were raised in several Amicus Curiae Briefs filed with the court. See, eg, Brief of Amicus Curiae of the American Civil Liberties Union in Support of Petitioner and Brief of Amicus Curiae of Louise Doswald-Beck, Guy S Goodwin-Gill, Frits Kalshoven, Vaughan Lowe, Marco Sassoli and the Center for International Human Rights of Northwestern Univesity School of Law in Support of Petitioner.

[431] The *Hamdan* approach may be characterised as an exercise of the 'passive virtues' of the court, ie an attempt to promote comity between the different branches of government. See Katyal, above n 196 at 84–94.

[432] *Hamdan v Rumsfeld*, above n 105 at 2774. In reaching this conclusion, the court relied on the three-part test used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co v Sawyer* to determine whether executive action is constitutionally authorised. See *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952). The test runs as follows: 'When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.' (*Ibid* at 635). 'When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.' (*Ibid* at 637). 'When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.' (*Ibid*.) The present case fell within the third category because Congress, by enacting rules and procedures governing courts-martial and military commissions in the UCMJ, had intervened in this area. Hence, the President's authority was at its 'lowest ebb'.

[433] *Hamdan v Rumsfeld*, above n 105 at 2797.

[434] *Ibid* at 2798.

However, the court left open the possibility that Congress would intervene to specifically authorise a system of military justice to try prisoners like Hamdan. As Justice Breyer, one of the members of the majority, made clear:

> Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.[435]

And so he did. Within just a few months after the *Hamdan* decision, Congress adopted the Military Commissions Act which approves the use of military commissions to try detainees held as enemy combatants.[436] While some of the procedural protections improve on the President's original plan, the Act in fact legalises the executive's policy on military commissions.[437] Not surprisingly, commentators have deplored the limited scope of the *Hamdan* decision and the court's apparent failure to constrain the political branches' over-reaction to the national security threat.[438]

D. Concluding Remarks

Although Article 6 is not listed among the non-derogable rights of Article 15, the European Convention practice contains no instances of derogations from one or more of the fair trial guarantees designed to deal with the problem of terrorism. The case law on institutionally adjusted civilian courts and military tribunals, examined in sections III and IV respectively, abundantly illustrates that such derogations would be indispensable if Contracting States were to introduce an alternative military system of criminal justice for terrorist suspects. Despite the flexibility inherent in many of the Article 6 concepts, the creation of a special military judicial forum for terrorist offences would be so drastic a departure from the ordinary fair trial protections that it would fall below the minimum standards as set out in Article 6. Moreover, it is to be expected that, given the fundamental nature of most due process rights, the Strasbourg Court will take an active stance if called upon to review the strict necessity of derogating measures in this area, requiring for instance, detailed and

[435] *Ibid* at 2799. See also Justice Kennedy's concurrence: 'If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.' (*Ibid* at 2800).

[436] Military Commissions Act of 2006, above n 99.

[437] In addition, the Act contains several other restrictions on fundamental rights, such as the elimination of habeas corpus review for aliens. See ch 5.

[438] See, eg, Ida L Bostian, 'One Step Forward, Two Steps Back: Hamdan v. Rumsfeld and the Military Commissions Act of 2006' (2006) 5 *Santa Clara Journal of International Law* 217; Michael C Dorf, 'The Orwellian Military Commissions Act of 2006' (2007) 5 *Journal of International Criminal Justice* 10.

case-specific reasons for the measures and 'adequate and effective' safeguards against abuse. Such non-deferential review would be in line with the Strasbourg Court's contemporary approach to Article 5 derogations and the developments in international human rights law.[439]

Notwithstanding the absence of an express constitutional basis for war and emergency restrictions on fundamental rights, the United States government established separate courts, operating special rules of procedures and evidence that differ from those applicable in the civilian legal system, to try certain categories of terrorist suspects. The Bush Administration's decision to introduce a separate regime of military justice in the course of its antiterrorist campaign is not without precedent. In the past, military commissions have been used to try a variety of security-related offences in crisis situations. Although military commissions dispense with several of the fair trial guarantees enumerated in the Bill of Rights—even if it were only the protection of a civil jury—the Supreme Court has not always been consistent in its response to these measures. The *Milligan* approach, on one side of the spectrum, stands for the view that the Constitution permits no deviation whatsoever from the guarantees traditionally associated with the criminal process, thus leaving no discretion to accommodate specific security needs that may arise in emergencies. Yet this wholly inflexible reading of the Constitution did not preclude political decision-makers and the judiciary from resorting to and approving of alternative systems of military justice.[440] Indeed, on the opposite side of the spectrum there is the Supreme Court's decision in *Ex parte Quirin*. Having

[439] See, eg, Human Rights Committee, General Comment 29, States of Emergency (article 4), UN Doc CCPR/C/21/Rev 1/Add.11 (2001) para 16: 'As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence.' Emmanuel Decaux, 'Administration of Justice, Rule of Law and Democracy. Issue of the Administration of Justice through Military Tribunals', UN Doc E/CN.4/Sub.2/2005/9 (2005), principle No 2: 'Military tribunals must in all circumstances apply the standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.'

[440] Various commentators have underscored the minimal practical impact of *Milligan*. See, eg, Edward S Crowin, *The President: Offices and Powers: History and analysis of Practice and Opinion* (New York, New York University Press, 1940) 166: 'To suppose that such fustian would be of greater influence in determining presidential procedure in a future great emergency than precedents backed by the monumental reputation of Lincoln would be merely childish.' Issacharoff and Pildes, above n 393 at 306: 'Milligan had almost no practical effect at the time on even the narrow issue it addressed, military trials for civilians, nor has it had any practical effect since on issues of liberty during wartime.' Rossiter, above n 383 at 238–9 ('What Lincoln did, not what the Supreme Court said, is the precedent of the Constitution in the matter of presidential emergency power.').

distinguished the facts in issue from those in *Milligan*, the court categorically declined to apply the Fifth and Sixth Amendments' safeguards to the trial of enemy combatants by military commissions. Similarly, in *Yamashita* the court refused to extend the constitutional rights guaranteed in ordinary criminal procedures to petitioner's trial before a military commission. Finally, in *Hamdan*, the court sidestepped the issue of whether the use of military commissions to try certain terrorist suspects can be squared with the fair trial rights set forth in the Constitution, giving Congress a free hand to legislate in this domain.

V. GENERAL CONCLUSION

It is agreed that in criminal proceedings against individuals allegedly involved in terrorism, full adherence to the fair trial safeguards offered in ordinary criminal prosecutions may unduly hinder efforts to effectively respond to terrorism and may jeopardise a variety of legitimate security interests. Council of Europe Member States confronted with terrorist violence have generally sought to meet such counter-terrorist concerns within the existing judicial system. Such an approach is clearly in line with the Convention approach analysed in this chapter. The global conclusion of the preceding examination of Article 6 jurisprudence is that the Strasbourg organs' reading of most of the fair trial rights embodied in that provision is sufficiently flexible to accommodate national security concerns. This balancing-oriented approach is seen in most areas discussed in this chapter, examples of which include the context-dependency of the requirements of independence and impartiality, the possibility of security exceptions to the rights to call and confront witness, and the 'totality of the circumstances' approach for reviewing restrictions on pre-trail access to counsel and on lawyer client-communications. However, the Convention approach is one of limited flexibility. The court will see to it that certain procedural minimum safeguards are observed and that the handicaps for the defence are sufficiently counterbalanced by compensatory measures. Nevertheless, as the discussion in section IV demonstrates, none of the Contracting States has so far found the need to have recourse to a war or emergency derogation from Article 6 in accordance with Article 15.

A different picture emerges from the discussion of the fair trial safeguards contained in the Constitution of the United States. Although the courts have adopted flexible balancing approaches in important areas considered in this chapter (eg, due process analysis), many of the constitutional fair trial rights and principles are protected in absolutist terms and interpreted by the Supreme Court in a categorical fashion. Two notable examples of the latter approach are the *Crawford* test for the admission of hearsay evidence and the *Miranda* rules concerning different aspects of the

right to counsel. Under the strict rules announced in these and other judgments, decision-makers both in the judiciary and the political branches of government have little leeway to accommodate the special needs of counter-terrorism.

A second distinguishing factor (possibly linked to the first), is the use of what some have described as a 'shadow criminal justice system', created especially to deal with the problem of terrorism.[441] In the war against terrorism, as in past crises, the government has authorised trials by military commission. Rather than confronting the terrorist threat from within the criminal justice system, possibly modified within its own terms, military commissions appear to be designed to evade the basic procedural guarantees required by the Bill of Rights. With the exception of its early *Milligan* decision, the Supreme Court has failed to enforce the basic fair trial rights of those brought before such commission, either adopting a highly deferential level of scrutiny (eg, *Application of Yamashita*) or sidestepping the human rights concerns implicated by the use of military commissions (eg, *Hamdan*).

[441] Jim Oliphant, 'Justice During Wartime, Order on Military Trials Final Piece of Sept. 11 Response', *Legal Times* (19 November 2001) 1 (quoted in Emanuel Gross, above n 419 at 17).

8

Conclusion

FOR DEMOCRACIES THROUGHOUT the world, terrorism may be the single most pressing human rights challenge of the 21st century. Terrorism seriously jeopardises the enjoyment of human rights and the democratic system as a whole; the fight against terrorism, for its part, is liable to erode important individual rights and freedoms. Taking as a starting point the widely accepted view that states confronted with terrorism must find a just and equitable equilibrium between their respective obligations of preserving individual rights and fighting terrorism effectively, this book has sought to show how the design and enforcement of a human rights instrument may influence the result of that exercise. More precisely, an attempt was made to answer the question how a legal order's approach to the limitation of fundamental rights may shape decision-making trade-offs between the demands of liberty and the need to protect individual and collective security. This problem was approached through a comparative analysis of the models of limitation of rights under the European Convention and the US Constitution. While the choice of limitation methodology may be only one of the factors determining how well a system performs in reconciling counter-terrorist action and the protection of rights, this study hopes to show that its impact may nevertheless be significant enough to warrant attention.

It is a widespread view, advanced by many, mainly North American, constitutional scholars, that courts and other decision-makers applying loose limitation standards are prone to overvalue security concerns at the cost of liberty interests, ultimately resulting in the under-protection of fundamental rights in times of stress or crisis. This would serve terrorist objectives, which are often aimed at provoking the government to overreact to the security threat by embracing oppressive counter-terrorist strategies. To overcome this tendency, it would be preferable to adopt a categorical model of limitation. By formulating bright-line rules, cast so as to allow no exceptions, those factors that are likely to induce misjudgment by decision-makers would be eliminated from consideration. To quote just one prominent commentator, discussing restrictions on freedom of speech:

> Categorical rules (…) tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties.[1]

The thesis defended in this work contests this commonly held belief. It is submitted that an appropriate balance between competing claims of liberty and security is most likely to emerge in systems that have flexible balancing models of limitation in place, provided, however, that courts responsible for reviewing national security or emergency restrictions are able and willing to engage in independent non-deferential review. The notion of flexibility has been used throughout the preceding chapters to indicate both a specific style of adjudication (ie a balancing approach versus more rigid categorical limitations), and a particular approach to the limitation of rights in war and emergency situations (ie the possibility of emergency derogations versus the prohibition of emergency suspensions).

Before proceeding to see how the thesis put forward is substantiated by the conclusions reached in the foregoing chapters, it must be remembered that no attempts have been undertaken to make second-order reflections on the propriety of the results reached with respect to the many controversial issues examined in this study. Rather than determining how to balance competing interests of liberty and security in any particular case, the attention was directed to the characteristics of a human rights instrument that may affect the resolution of such conflicts. Within the ambit of this study, it would not have been possible to give due consideration to the variety of legal, normative and empirical arguments that may be advanced to justify one approach over another. Nevertheless, it is submitted—at a more global level—that the jurisprudence and practices examined in this work reveal that flexible styles of limitation, combined with non-deferential judicial review, provide fertile ground for generating well-balanced trade-offs between liberty and security in the context of terrorism.

The comparative study of the counter-terrorist restrictions on five fundamental rights presented in chapters three to seven strongly suggests that courts engaging in non-deferential balancing have generally been able to provide a meaningful degree of human rights protection, while at the same time allowing the state to respond effectively to the specific dangers and difficulties posed by terrorism. It has been shown that the discretion inherent in flexible limitation models permits courts and other decision-makers to simultaneously accommodate legitimate security concerns and maintain an important level of human rights protection. This is evidenced

[1] Laurence H Tribe, *American Constitutional Law* (Westbury, Foundation Press, 1988) 794.

by numerous cases coming from both sides of the Atlantic, pertaining to the limitation of rights in ordinary circumstances as well as in war and emergency situations.

Under the European Convention, successful strategies of accommodation can readily be discerned in all major areas examined in the previous chapters. In the context of freedom of expression, the context-sensitive 'incitement to violence' standard, developed to assess interference with subversive or violent-conductive speech, allows decision-makers to take into account all the circumstances surrounding the expression, including the difficulties associated with the fight against terrorism (chapter three). In the context of freedom of association, the multifaceted *Refah* test, designed to review drastic measures against anti-democratic organisations, is sufficiently flexible to leave room for specific counter-terrorist considerations (chapter four). In the area of personal liberty and security, the contextualised interpretation of the liberty guarantees associated with criminal and immigration law proceedings, allows the Strasbourg organs and the responsible domestic authorities to give considerable latitude to the special circumstance of terrorism (chapter five). In the context of the right to a fair trial, safeguards such as the publicity of a trial and the right to call and confront witnesses are sufficiently adaptable so as to accommodate counter-terrorist needs. In a similar vein, the 'totality of the circumstances' test for reviewing restrictions on pre-trail access to counsel or on lawyer–client communications permit courts to take into consideration the exigencies of fighting terrorism (chapter 7). Finally, successful strategies of accommodation can be found in the Convention organ's current approach to evaluating the proportionality of measures derogating from the liberty guarantees enshrined in the Convention (Article 15). What all these approaches have in common is that they have allowed courts to censure unwarranted infringements on rights, while providing sufficient leeway to the authorities to respond effectively to terrorism, thereby inducing decision-makers to unfold their counter-terrorist strategies within the existing human rights framework.

While this style of adjudication is less customary in the United States, similar attempts to strike a suitable balance between the duty of the government to protect against terrorism and the rights of the individual can be discerned in certain areas of constitutional rights litigation. Most instances discussed in this work either arose under the Supreme Court's flexible framework for determining an individual's due process rights under the Fifth and Fourteenth Amendments, or under the Court's general reasonableness interpretation of the Fourth Amendment's privacy safeguards. The balancing review of the government's campaign of preventive detention of enemy combatants in *Hamdi* may serve to illustrate the former (chapter five), whereas several of the lower court decisions pertaining to national security surveillance may serve to illustrate the latter (chapter six).

A flexible limitation methodology is not without its dangers, however. The competing demands of liberty and security require courts to engage in independent non-deferential review of executive and legislative action. There is ample evidence that when judges uncritically defer to executive or legislative judgments, the solutions reached often place too much weight on security and too little on liberty. Under the European Convention, this risk is most likely to materialise in those areas where the Strasbourg organs combine balancing standards with a broad margin of appreciation for the domestic authorities. For instance, the joint-operation of judicial balancing and a wide margin of appreciation produced results that were arguably under-protective of liberty in several judgments and decisions concerning national security surveillance and other privacy-related issues (chapter six), and in the early Convention jurisprudence on Article 15 derogations (chapter seven). Similarly, the United States history includes many instances of judicial deference which were later seen as a failure to maintain a sufficient degree of human rights protection. Examples here include the Supreme Court's early applications of the 'clear and present danger' test (chapter three) and its World War II jurisprudence concerning wartime liberty-depriving measures (chapter five). A more contemporary illustration can be seen in the opposing circuit court rulings regarding access to closed immigration hearings (chapter three).

Whereas case-specific balancing is the pre-eminent method of adjudication practiced by the Convention organs, in the United States many constitutional disputes are resolved in a categorical fashion. Categorical limitations have been identified extensively throughout the preceding chapters: the three-part *Brandenburg* test to judge interferences with subversive and violent-conductive speech (chapter one); the *Scales* 'specific intent' requirement to guard against guilt by association (chapter two); the conventional interpretation of the Fourth Amendment safeguards for full-scale searches and arrests (chapters five and six); and many of the Sixth Amendment fair trial rights accorded to the criminal defendant (chapter seven). Characteristic of the categorical limitation methodology is the adoption of bright-line rules, cast in such a way as to rule out any consideration of specific counter-terrorist concerns. In addition to the predominance of categorical reasoning, constitutional inflexibility is also evidenced by the all-or-nothing approach adopted in certain Supreme Court cases relating to war and emergency departures from fundamental rights. Thus, in *Milligan* the Court squarely refused to modify the constitutional liberty and fair trial guarantees to meet wartime exigencies, whereas in cases such as *Quirin* it categorically declined to extend the Fifth and Sixth Amendments' safeguards to the trial of enemy combatants by military commissions, leaving the latter with no constitutional protection whatsoever (chapters five and seven).

It is not the intention of this project to take sides in the categorisation/balancing debate in general. As noted in chapter two, there is a host of arguments for and against the adoption of bright-line rules and balancing standards. Moreover, the strength of these arguments may vary with respect to the nature of the declaration of rights involved (eg, a national constitution as opposed to an international convention). Besides the traditional virtues of rule-based decision-making (eg, predictability, certainty, and consistency), bright-line rules have been praised for their perceived ability to constrain decision-makers from balancing away essential liberty interests in conditions of crisis. Yet, the formulation of categorical limitations has two major drawbacks in the present context.

First, adherence to unchangeable rights may impede effective counter-terrorist action. Categorical approaches may be too rigid in the context of the fight against terrorism, and possibly result in the overprotection of individual rights at the cost of important security concerns. Indeed, the question may be posed whether full adherence to many of the categorical rules mentioned in the previous paragraph, would not unwarrantedly frustrate the state's (human rights) obligation to combat terrorism effectively. Whatever its virtues in shielding dissident political expression from suppression, the *Brandenburg* incitement test may perhaps rightly be conceived as too inflexible a tool to tackle the problem of terrorist speech on Internet, or the regulation of terrorism-related media reporting (chapter three). Similarly, the Fourth Amendment probable cause, warrant and particularity requirements may unduly hinder effective counter-terrorist investigations (chapters five and six), just as the *Crawford* test for the admission of hearsay evidence may be criticised as being unworkable in the national security context (chapter seven).

This brings us to the second point. While it is always hazardous to attempt generalisations about the impact of judicial opinions on future courts and governmental practice—demonstrating the actual impact of a legal order's system of limitation on judicial and politcial decision-making would require empirical research, which is nearly impossible to achieve in this context—the foregoing study strongly suggests that brave statements of unchangeable rights have rarely prevented decision-makers, both in the judicial and political branches, to circumvent existing rules when they are deemed inappropriate in a particular context. Whereas flexible limitation models encourage decision-makers to respond to the terrorist threat from within the human rights framework, reducing, where justified, the level of protection to further legitimate security interests, decision-makers labouring under categorical approaches may find the need to leave the human rights system altogether. Throughout this work, attention has been drawn to several strategies which were arguably designed to avoid existing constitutional safeguards, examples of which include: the Bush Administration's efforts to impose informal censorship on the media reporting of

terrorism in the aftermath of the September 11 attacks (chapter three); the material support provisions which were (supposedly) introduced to circumvent the requirements erected in response to the Cold War guilt by association cases (chapter four); the pre-textual use of immigration law and the preventive detention of so-called 'enemy combatants' designed to evade traditional liberty rights (chapter five); the foreign intelligence exception to the traditional Fourth Amendment strictures (chapter six); the Bush Administration's executive secret surveillance programme (chapter six); and the use of military commissions to try certain categories of terrorist suspects unhindered by the procedural rights associated with the criminal law process (chapter seven). Such strategies of avoidance tend to create—be it only temporarily—a human rights vacuum, leaving those involved with barely any protection. It needs no arguing that in those circumstances the balance tilts too heavily towards the side of security, leading to arbitrary behaviour and unacceptable infringements of fundamental rights. Categorical methods typically result in all-or-nothing solutions, and in situations of stress or crisis the outcome tends to be nothing at all.

In the quotation that opened the present study, Justice Davis wrote that '[w]hen peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty'.[2] It is in times of fear and crisis that a legal order's true commitment to human rights is tested. In those circumstances, Davis concluded, individual rights 'need, and should receive, the watchful care of those entrusted with the guardianship of the Constitution and laws'.[3] If we agree that grave security threats are the supreme test of a democracies' ability to abide by its human rights obligations, flexible balancing approaches deserve preference over categorical methods of limitation. Although Davis' majority opinion in the *Milligan* case, from which these words were taken, was an example of constitutional inflexibility in the face of a security crisis, there is much wisdom in his warning. It is not difficult for courts to formulate or for a people to live by high standards of justice in times of peace and quiet. Yet it takes a lot more courage to respond to the evil of terrorism by striking an appropriate balance between the often competing demands of liberty and security. Then again, one could argue that a human rights system's response to crisis situations is not the ultimate touchstone by which to measure its value. That, of course, is a different question all together, one I have not sought to answer.

[2] *Ex p Milligan*, 71 US 2, 123–4 (1866).
[3] *Ibid* at 124.

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