

2007

The European Court of Human Rights: The Past, The Present, The Future

Luzius Wildhaber

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Wildhaber, Luzius. "The European Court of Human Rights: The Past, The Present, The Future." *American University International Law Review* 22, no. 4 (2007): 521-538.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

ESSAY

THE EUROPEAN COURT OF HUMAN RIGHTS: THE PAST, THE PRESENT, THE FUTURE*

LUZIUS WILDHABER**

INTRODUCTION	521
I. PAST	521
II. PRESENT	523
III. RECENT CASELAW	529
IV. HUMAN RIGHTS AND TERRORISM.....	534
CONCLUSION	537

INTRODUCTION

Today, I wish to introduce you to the European Court of Human Rights. I shall first offer some remarks about the history of the Court, the changing perceptions, the underlying theories, and the way the Court has shaped European reality. Then I shall discuss a few recent cases as specific illustrations of the Court's work. Towards the end, I shall add a few remarks about the difficult relationship between terrorism and human rights.

I. PAST

We began the 20th century with an international law that viewed only sovereign States as actors, unbridled and uncontrolled, entitled to go to war, and also entitled to treat citizens and foreigners alike as

* This piece is based on remarks given by President Wildhaber at the American University Washington College of Law on April 21, 2006.

** Mr. Luzius Wildhaber, President of the European Court of Human Rights 1997–2007, Doctor of Law, Basel, 1961; LL.M. Yale, 1965; J.S.D., Yale, 1968; Dres.h.c., LL.D.h.c.

objects, whose legal status and whose human rights were defined solely by national law. We end the 20th and begin the 21st century with individuals who have become subjects of international law and a European Court of Human Rights which is the most spectacular illustration of this change in paradigms.¹ In the same vein, modern sovereignty should be understood as requiring respect for, rather than the breach of human rights, minority rights, democracy, and the rule of law.

One of the founding fathers of the European Convention on Human Rights, the Frenchman Pierre-Henri Teitgen, explained this in 1949 in moving words. He spoke about the time when he was in the Gestapo prisons while one of his brothers was at Dachau and one of his brothers-in-law was dying at Mauthausen.² He said: "I think we can now . . . confront 'reasons of State' with the only sovereignty worth dying for, worthy in all circumstances of being defended, respected and safeguarded—the sovereignty of justice and of law."³

Let us look even farther back into history. Already in ancient and medieval times, European political theories endeavoured to moderate the power of the rulers and to realise justice. Bracton demanded in 1250 the rule of law and the restriction of the unbridled State and the King. Even the King, he said, was subject to God and the law, because only the law made him King (*quia lex facit regem*). For there was no King, where arbitrariness and not the law ruled.⁴

Let me now bring you back to the year of 1950 and the signing ceremony of the European Convention on Human Rights in Rome.⁵ A small group of far-sighted, idealistic lawyers, determined to

1. See Luzius Wildhaber, *Sovereignty and International Law*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 425, 438 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983) (describing the evolution of international law from that dealing with relations between states to law relating to a wide range of issues, including human rights).

2. 1 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" 48–50 (1975).

3. *Id.* at 50.

4. See 2 BRACTON (HENRY OF BRATTON), DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 33 (G.E. Woodbine & S.E. Thorne eds., Cambridge/Massachusetts 1968), cited by LUZIUS WILDHABER, MENSCHEN- UND MINDERHEITENRECHTE IN DER MODERNEN DEMOKRATIE 4 (1992).

5. COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES," *supra* note 2, at XXII.

prevent the recurrence of the devastation of war and the attendant horrendous crimes, argued that the best way to achieve that end was to guarantee respect for democracy and the rule of law at the national level. They believed that only by the collective enforcement of fundamental rights was it possible to secure the common minimum standards that form the basis of democratic society. It was Churchill himself who had referred first to a “European Court before which the violation of [human] rights . . . might be brought to the judgment of the civilised world.”⁶ Lord Layton, a member of the British delegation, saw the Convention as “a means of strengthening the resistance in all our countries against insidious attempts to undermine our democratic way of life, and thus to give to Western Europe as a whole a greater political stability.”⁷ For the first time individuals could challenge the actions of Governments before an international mechanism under a procedure leading to a binding judicial decision. The mandate which the founders of the Convention intended to entrust to the Court was eminently, even surprisingly, political.⁸ The Court was to constitute a collective insurance policy against the relapse of democracies into dictatorships. What is nowadays identified as the hallmark of the Court, i.e. a generalised right of individual application for all sorts of possible victims, does not figure prominently in the original discussions on the Convention.

II. PRESENT

Now we move fifty years ahead, to 1998, when the Convention system underwent a major reform.⁹ The original institutions, the European Court and the Commission of Human Rights, were replaced by a single Court functioning on a full-time basis.¹⁰ The optional elements of the earlier system, the right to individual petition and the acceptance of the Court’s jurisdiction, were

6. *Id.* at 34.

7. *Id.* at 30.

8. *See id.* (describing the Convention’s goal of upholding democracy by preventing the destruction of democracy by dictatorships).

9. *See* EUROPEAN COURT OF HUMAN RIGHTS, HISTORICAL BACKGROUND, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> (last visited Jan. 20, 2007).

10. *See id.*

eliminated; so was the Committee of Ministers' adjudicative role.¹¹ The Convention process, directly accessible to individuals, became fully judicial in character. The two initial bodies, the Commission from 1954 and the Court from 1959, gave life to the Convention, through their pioneering case-law.¹² Their purposive, autonomous, and at times creative interpretation of the Convention enhanced the rights protected to ensure that they had practical effect. Just to take one example, the right of access to a court, a right that lies at the heart of the Convention and a key element of the rule of law, was not expressly mentioned in the due process provision, Article 6, Section 1.¹³ The Court's observation was of beautiful simplicity: "[t]he fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings."¹⁴ To this the Court later added that the right of access "would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party."¹⁵ On the basis of such case-law, the Court established the principle that the Convention is to be interpreted as a living instrument, to be construed in the light of present day conditions.

Let me add a few personal remarks on the doctrine of the Convention as a living instrument. Our Court has of course followed precedent, except where cogent reasons impelled it to adjust the interpretation of the Convention to changes in societal values or in present-day conditions. And it has followed precedent not only with respect to judgments against a respondent State, but it recognises that the same European minimal standards should be observed in all member States. It is indeed in the interests of legal certainty, of a coherent development of the Convention case-law, of equality before

11. *See id.*

12. *See id.* (explaining the respective roles of the Commission, which made initial determinations on the admissibility of applications, and the Court, which could issue binding judgments).

13. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter European Convention on Human Rights] (establishing the right to a "fair and public hearing").

14. *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) 1, 17–18 (1975).

15. *Hornsby v. Greece*, 1997-II Eur. Ct. H.R. 495, 510.

the law, of the rule of law, and of the separation of powers for the Court to follow in principle a moderated doctrine of precedent.¹⁶

Obviously in describing the Court's tasks in this way, I espouse a certain image of what the role of a European quasi-constitutional Judge should be. Our Court is to a certain extent a law-making body. How could it be otherwise? How is it possible to give shape to Convention guarantees such as the prohibition of torture, equality of arms, freedom of expression or private and family life, if—like Montesquieu—you see in the judge only the mouthpiece of the law? Such guarantees are programmatic formulations, open to the future, to be unfolded and developed in the light of changing conditions. My personal philosophy of the task of judges is that they should find their way gradually, in a way experimentally, inspired by the facts of the cases that reach a court. As you will realise, I do not believe in closed theoretical systems that are presented as sacrosanct on the basis of speculative hypotheses or ideologies. Such mono-causal explanations ignore the complex and often contradictory manner in which societies and international relations (and incidentally also individual human beings) evolve. Conversely, it has to be acknowledged that in developing the law it is difficult to avoid value judgments, whether on domestic or on international law. This applies especially to human rights, which, anchored as they are in the concepts of constitutionalism, democracy and the rule of law, are value judgments *par excellence*.

I might emphasise that I do not plead for a “Gouvernement des Juges.”¹⁷ Giving broad answers which are in no way called for by the facts of a case is to confuse a judicial mandate with that of the legislature or of the executive, and cannot and should not be the role of courts. In the famous “Federalist” Papers, Alexander Hamilton, the great theoretician of the American Constitution, wrote that the

16. See Luzius Wildhaber, *Precedent in the European Court of Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 1529 (Paul Mahoney, Franz Matscher, Herbert Petzold, Luzius Wildhaber eds., 2000).

17. See *Un gouvernement des juges est-il à craindre?*, <http://www.oboulo.com/expose/gouvernement-juges-est-il-craindre.html> (last visited Jan. 26, 2007) (describing that “Gouvernement des Juges” is a shift of power to the judiciary to make arbitrary decisions at the expense of the balance of powers found in modern day democratic governments; namely the Executive and Legislative branches of government).

government holds the sword, the legislature holds the money box, and the only thing the courts hold for themselves is their independence.¹⁸ It is that independence which places us in a position to watch over fairness and justice within governments.

Let me also add that whereas international human rights judges should do what is fair and fear no one, as the puritans would have put it, they should at the same time have regard for the context in which they live and for the aims they are serving. Human rights are our common responsibility. First and foremost they must be respected by the national parliaments, governments, courts and civil society at large. Only if they fail does our Court come in. The subsidiary aspect I describe and advocate here is more than pragmatic realism; it is also a way of paying respect to democratic processes (always provided they are indeed democratic); and I am firmly convinced that it is the best means of translating the “human rights-law-in-the-books” not only into a “human rights-law-in-the-court”, but into a “human rights-law-in-action” and—hopefully—in reality in all of our member States.

The full-time European Court of Human Rights which was set up in 1998 under Protocol No. 11 to the European Convention on Human Rights is the biggest international Court that has ever existed.¹⁹ It is composed of a number of judges equal to that of the Contracting States.²⁰ With the sole exception of Belarus, all European States are today members of the Council of Europe and have ratified the European Convention on Human Rights, whose protection now stretches from Iceland to Turkey, from Lisbon to Władówostok, from Riga to Malta, but also from Chechnya to the

18. THE FEDERALIST NO. 78, at 378 (Alexander Hamilton) (Terence Ball ed., 2003) (asserting that of the three branches, the judiciary poses the least threat to individual liberties).

19. See Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter Protocol 11]; see also European Court of Human Rights – Description, <http://www.worldlii.org/int/other/PICTRes/2003/10.html> (last visited Jan. 27, 2007) (recounting that over the years the ECHR has grown into the largest international bench and into one of the biggest and most respected international judicial bodies).

20. See Protocol 11, *supra* note 19, art. 20.

Basque region, from Northern Ireland to Cyprus and Nagorno-Karabach.²¹

Whereas the official languages of the Court are English and French, applications may be drafted in any one of the official languages of the Contracting States, and there are at present 41 official languages in these States.

The Court receives around 900 letters per day and some 250 international telephone calls a day. Its internet site was visited by 57 million hits in 2005. From 1998 to 2003, the number of applications has increased by about 15% in comparison with each preceding year.²² In 2005, there was only an increase of 2%.²³ We now have some 81,000 pending applications before us.²⁴ In the past two years, we received some 45,000 applications.²⁵ The highest number of cases have come from Russia, Poland, Turkey and Romania (the so-called "big four"), which account for some 50% of all applications that reach our Court.²⁶ Some 63% of all cases have in recent years come from the 21 new member states of Central and Eastern Europe (at present about 18% come from Russia), some 11% from Turkey and only some 26% from the traditional Western European States.²⁷ Future historians might well argue that one of the biggest achievements of the Convention system was to be present and active when the Iron Curtain fell in 1989, so that the new member states had a whole body of case-law of which they could avail themselves.

21. *See generally* The Council of Europe's Member States, http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp (last visited Jan. 21, 2007).

22. *See* EUROPEAN COURT OF HUMAN RIGHTS, SURVEY OF ACTIVITIES 2005, at 33 *available at* http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/2005_SURVEY__COURT_.pdf [hereinafter SURVEY OF ACTIVITIES 2005].

23. *See* EUROPEAN COURT OF HUMAN RIGHTS, STATISTICS 2005, *available at* <http://www.echr.coe.int/NR/rdonlyres/5211CDBA-8208-47DE-A9CA-AE8B8FD13872/0/stats2005.pdf> (noting that 45,000 applications were filed in 2005, compared to 44,100 in 2004) [hereinafter STATISTICS 2005].

24. *See id.* (reporting a 4% increase in pending applications from Jan. 1 through Dec. 31, 2005).

25. *See id.*

26. *See* SURVEY OF ACTIVITIES 2005, *supra* note 22, at 35.

27. *See id.*

All sorts of cases reach our Court. Issues of the Communist nationalizations of property in Czechoslovakia, Slovakia and Eastern Germany and the question of whether the Czech Republic after the fall of the Iron Curtain could restrict the restitution of nationalized goods to Czech nationals only were declared inadmissible.²⁸ Two applicants elected to the parliament of San Marino refused to take the required oath on the Holy Gospels and were disqualified from sitting in the parliament, which our Court qualified as a violation of the freedom of religion in the *Buscarini* case.²⁹ A French-Moroccan drug trafficker held in custody was beaten up so severely by the police that medical certificates listed about 40 visible injuries all over his body, for which no plausible explanation was given, so our Court had to decide in the *Selmouni* case that he had been tortured.³⁰ The Swiss Animal Protection Society wanted to run an ad on TV, showing piglets and encouraging people to “eat less meat”; the TV refused saying this was “political” speech, whereas, if people had been invited to “eat more meat”, this would have been “commercial” speech and therefore permissible; our Court saw in this a violation of the freedom of expression in the case of *Vereinigung gegen Tierfabriken*.³¹ An imaginative applicant complained that the right to marriage of Article 12 must mean that the State was under an obligation to provide him with a suitable wife; unfortunately for him, the applicant was turned down.³²

Functionally speaking, the European Court of Human Rights is becoming a European quasi-Constitutional Court. It is less handling the exceptional cases which captivated the attention of the founders of the Convention, but is becoming more and more a broad-based, “normal” institution, although a very symbolic one. Let me now discuss a few recent cases as illustrations.

28. See generally *Malhous v. Czech Republic*, 2000-XII Eur. Ct. H.R. 533; *Gratzinger & Gratzingerova v. Czech Republic*, 2002-VII Eur. Ct. H.R. 399; *Kopecký v. Slovakia*, 2004-IX Eur. Ct. H.R. 131.

29. *Buscarini v. San Marino*, 1999-I Eur. Ct. H.R. 605, 616.

30. *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, 183.

31. *VgT Verein gegen Tierfabriken v. Switzerland*, 2001-VI Eur. Ct. H.R. 243, 266.

32. European Convention on Human Rights, *supra* note 13, art. 12.

III. RECENT CASELAW

In a series of important judgments over the past few years, the Court has sought to explain the implications the Convention has for the political systems of the Contracting States and, in particular, the notion that pluralist democracy is the only political system that is compatible with the Convention. In an earlier judgment in 1998, in the *Turkish Communist Party* case the Court had found that democracy appeared to be the sole political model contemplated by the Convention and, consequently, the only one that was compatible with it.³³ But this raised the question of what that concept meant.

It is here that the Court has a role to play in identifying the constituent elements of democracy and in reminding us of the minimum essential requirements of a political system where human rights are respected. In the *Refah Partisi (Welfare Party) v. Turkey* judgment,³⁴ it carried out a thorough examination of the relationship between the Convention, democracy, political parties, and religion. The case concerned the dissolution, by the Turkish Constitutional Court, of a political party, the Welfare Party, on the grounds that it wanted to introduce sharia law and a theocratic regime.³⁵ A Grand Chamber of the Court found unanimously that there had been no violation of Article 11 of the Convention, which protects freedom of association.³⁶ The judgment provides some elements of an answer to the question which we have raised today concerning the dimensions of the New Europe.

The Court first noted that freedom of thought, religion, expression, and association as guaranteed by the Convention could not deprive the authorities of a State in which an association jeopardized that State's institutions, of the right to protect those institutions.³⁷ It necessarily followed that a political party whose leaders incited to violence, or put forward a policy which failed to respect democracy, or which was aimed at the destruction of democracy and the flouting

33. *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R. 1, 22.

34. *Refah Partisi v. Turkey*, 2003-II Eur. Ct. H.R. 267, 300–03.

35. See *id.* at 269–70.

36. See *id.* at 316 (reasoning that Refah's dissolution, restricting the freedom of assembly and association guaranteed in Article 11, was necessary to protect the rights and freedoms of others).

37. *Id.* at 303.

of the rights and freedoms recognised in a democracy, could not invoke the protection of the Convention.³⁸ Penalties imposed on those grounds could even, where there was a “sufficiently established and imminent” danger for democracy, take the form of preventive intervention.³⁹

The Court noted that the leaders of the Welfare Party had pledged to set up a regime based on sharia law.⁴⁰ It found that sharia, as defined by the leaders of the Welfare Party, was incompatible with the fundamental principles of democracy as set forth in the Convention.⁴¹ It considered that “sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable.⁴² Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it.”⁴³ According to the Court, it was difficult to declare one’s respect for democracy and human rights, while at the same time supporting a regime based on such a sharia.⁴⁴ Such a regime clearly diverged from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women, and the way it intervened in all spheres of private and public life in accordance with religious precepts.⁴⁵

Next, let me describe the case of *Ilaşcu, Ivanţoc, Leşco and Petrov-Popa v. Moldova and Russia* which concerned events that occurred in the “Moldavian Republic of Transdniestria” (“MRT”), the region of Moldova to the East of the river Dniester known as Transdniestria.⁴⁶ This region declared its independence in 1991, which in turn led to a civil war and to the self-proclamation of a breakaway regime. This regime is not recognized by the international community. The case concerned the unlawful detention of the four applicants, following their arrest in 1992 and their subsequent trial

38. *Id.* at 303–04.

39. *See id.* at 305 (recognizing the possibility of a preventative intervention where “the national courts, after detailed scrutiny subjected to rigorous European supervision,” identify an imminent danger).

40. *Id.* at 310–11.

41. *Id.* at 312.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *See Ilaşcu v. Moldova & Russia*, 2004-VII Eur. Ct. H.R. 179.

by the so-called “Supreme Court of the MRT” and the ill-treatment, inhuman prison conditions and torture inflicted on them during their detention, as well as the death penalty imposed on Mr. Ilaşcu and the mock executions to which he was subjected.⁴⁷

The European Court of Human Rights established the responsibility of both respondent States (that of Moldova for the period after 2001) and found a violation of Articles 3, 5 and 34 of the Convention.⁴⁸ The Court ordered the immediate release of the applicants still in detention.⁴⁹ It emphasised the urgency of this measure in the following terms: “any continuation of the unlawful and arbitrary detention of the . . . applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States’ obligation under Article 46 § 1 of the Convention to abide by the Court’s judgment.”⁵⁰

Only two of the four applicants have been released to date. Mr. Ilaşcu was released in May 2001 and Mr. Leşco at the expiry of the sentence imposed on him by the “Supreme Court of the MRT” in June 2004.⁵¹ The other two applicants, Mr. Ivanţoc and Mr. Petrov-Popa, are still in custody.⁵²

States have to report to the Committee of Ministers of the Council of Europe on the execution of judgments.⁵³ During the first examination of the case before the Committee of Ministers, the Moldovan authorities considered that, for the time being, their influence on the separatists was minimal or even non-existent.⁵⁴ As regards just satisfaction, the Ministry of Finance had ordered its

47. See generally *id.* at 232–45 (discussing in depth the arrest, detention, and conviction of the applicants as well as the events occurring after their convictions including actions taken to secure their release).

48. *Id.* at 303–05.

49. *Id.* at 302.

50. *Id.*

51. Press Release, European Court of Human Rights, Forthcoming Judgments (June 25, 2004).

52. *Ilaşcu*, 2004-VII Eur. Ct. H.R. at 302.

53. See European Convention on Human Rights, *supra* note 32, art. 46(2) (granting the Committee of Ministers the power to supervise the execution of final judgments of the Court).

54. Meeting of the Comm. of Ministers, 896th Sess., Notes on the Agenda ¶ 9 (2004).

payment.⁵⁵ The Representative of the Russian Federation in the Committee of Ministers emphasised the Russian authorities' disagreement with the judgment on both the legal and political levels and their view that since the applicants' lives were not in danger, the Convention was not pertinent.⁵⁶ Concerning possible execution measures or measures already taken, the Russian authorities considered that they were not in a position to execute the judgment, since the use of force to release the applicants was out of the question.⁵⁷ Furthermore, the Representative informed the Committee that he had been instructed not to participate in its examination of the case until directed otherwise.⁵⁸ He said that the Court's judgment was "inconsistent, controversial, subjective, politically and legally wrong and based on double standards."⁵⁹ It should therefore be noted that the Court's judgment in the *Ilascu* case has yet to be fully complied with.⁶⁰ In the meantime, Russia has paid the just satisfaction sums awarded by the Court.⁶¹

Next I wish to describe the case of *Broniowski v. Poland*.⁶² The *Broniowski* case concerned the Polish State's continued failure to implement the applicant's "right to credit" under Polish legislation. This "right to credit" furnished compensation with respect to property abandoned by his family at the end of the Second World War in the territories "beyond the Bug River", as a result of the change of boundary between the former USSR and Poland.⁶³ The *Broniowski* application was chosen as a "pilot case" since at that time many similar applications were already pending before the

55. *See id.* ¶ 10.

56. *See id.* ¶ 15.

57. *See id.*

58. *See id.*

59. Press Release, European Court of Human Rights, Grand Chamber Judgement in the Case of *Ilascu and Others v. Moldova and Russia* (Jul. 8, 2004) <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=800708&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

60. Council of Europe Adopts New Resolution in *Ilascu* Case (March 3, 2006), <http://politicom.moldova.org/stiri/eng/10221/>.

61. *See id.* (noting that the new resolution was an attempt to achieve progress in releasing the prisoners and thereby adhere to the Court's ruling).

62. *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1.

63. *Id.* ¶¶ 11-12.

Court.⁶⁴ The Section relinquished jurisdiction in favour of the Grand Chamber and adjourned the remaining applications pending the outcome of the leading case.⁶⁵

By adopting both the 1985 and 1997 Land Administration Acts, the Polish State reaffirmed its obligation to compensate the “Bug River claimants” and to incorporate into domestic law obligations it had taken upon itself by virtue of international treaties concluded in 1944.⁶⁶ However, the Polish authorities, by imposing successive limitations on the exercise of the applicant’s right to compensation, and by resorting to practices which made it unenforceable in concrete terms, rendered that right illusory, and destroyed its very essence.⁶⁷ Moreover, the right was extinguished by legislation of December 2003 under which claimants in the applicant’s position who had been awarded partial compensation (2% of the value of the property, in the applicant’s case) lost their entitlement to additional compensation, whereas those who had never received any compensation were awarded an amount representing 15% of their entitlement.⁶⁸ This obviously raised an issue of discrimination.⁶⁹ In the light of these considerations, the European Court concluded that the applicant “had to bear a disproportionate and excessive burden which cannot be justified in terms of the legitimate general community interest pursued by the authorities.”⁷⁰

The Court was informed that there were roughly 80,000 potential applicants with analogous claims.⁷¹ It concluded in the operative provisions of the judgment that the violation found had

originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the “right to credit” of Bug River claimants; . . . the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the

64. *Id.* ¶ 5.

65. *Id.*

66. *Id.* ¶ 162.

67. *Id.* ¶ 173.

68. *Id.* ¶ 186.

69. *Id.* ¶ 110.

70. *Id.* ¶ 187.

71. *Id.* ¶ 193.

property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1.⁷²

The Court reiterated that the violation of Article 1 of Protocol No.1 had originated in a widespread problem which resulted from deficiencies in the domestic legal order which affected a large number of people, and which might give rise in future to numerous, subsequent well-founded applications.⁷³ It decided to indicate the measures that the Polish State should take, under the supervision of the Committee of Ministers, and in accordance with the subsidiary character of the Convention, so as to avoid a large number of additional cases being referred to it.⁷⁴ It also decided that all similar applications—including future applications—should be adjourned pending the outcome of the leading case and the adoption of measures at the national level.⁷⁵ This is the first time that the Court has ruled in the operative provisions of a judgment on the general measures that a respondent State should take to remedy a systemic defect at the origin of the violation found.⁷⁶

IV. HUMAN RIGHTS AND TERRORISM

Allow me now to briefly address the topical question of human rights and terrorism. Let me say first of all that I hope that it will have been obvious from what I have said that human rights law does not operate in a vacuum, but in a given context. It is an integral part of democratic society and a threat to that society will impact the way in which it is applied. The majority of the rights set out in the Convention are not absolute in that they may be curtailed in the wider interest of the community, to the extent strictly necessary and provided that this does not impose an excessive and disproportionate burden on individuals or a sector of the population. This could be formulated the other way round, that is that the individual exercising his civil liberties cannot be allowed to impose a disproportionate burden on the

72. *Id.* ¶ 200.

73. *Id.* ¶ 189.

74. *Id.* ¶ 190.

75. *Id.* ¶ 5.

76. *Id.* ¶ 193.

community. So essentially the Convention guarantees are applied in a context defined by the democratic society in which they function. This is just common sense. Human rights cannot be and should not be divorced from the practical day-to-day functioning of society.

The Strasbourg Court has consistently recognised the particular difficulties which combating terrorism creates for democratic societies.⁷⁷ It has accepted that the use of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives of citizens and democratic society.⁷⁸ This does not mean however that the investigating authorities should be given *carte blanche* under Article 5 of the Convention to arrest suspects for questioning free from effective control by the domestic courts or by the Convention supervisory mechanism.⁷⁹ Again, in the context of Article 5 of the Convention, “the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity”.⁸⁰ But the exigencies of the situation cannot justify stretching the notion of reasonableness to the point where the essence of the safeguard secured by Article 5, Section 1 (c) (requiring among other things “reasonable suspicion” of having committed an offence) is impaired.⁸¹

Democratic society acting in full conformity with the Convention is therefore not defenceless in the face of terrorism. It would run counter to the fundamental object and purpose of the Convention, for national authorities to be prevented from making a proportionate response to such threats in the interests of the safety of the community as a whole.

In saying this, one should never forget that the insidious undermining of fundamental rights is one of the dangers of terrorism. Limitations which may be possible within the margin of appreciation granted under the Convention must not be so broad as to impair the

77. *Chadhal v. United Kingdom*, 1996-V Eur. Ct. H.R. ¶ 79.

78. *Id.* ¶ 131.

79. *See id.*; *see also Murray v. United Kingdom*, 300 Eur. Ct. H.R. (ser. A) 1, 27 (1996).

80. *Fox, Campbell & Hartley v. United Kingdom*, 182 Eur. Ct. H.R. (ser. A) 1, 17 (1990).

81. *See id.* at 16–18.

very essence of the right in question; they must, in Strasbourg terms, also pursue a legitimate aim and bear a reasonable relationship of proportionality between the means employed and the aims sought to be achieved.⁸² One question that needs to be asked in connection with exceptional measures taken to combat terrorism is whether there are techniques that can be employed which both accommodate legitimate security concerns and yet accord the individual a substantial measure of procedural justice.⁸³ Nor should it be possible for the national authorities to free themselves from effective control by the domestic courts, or ultimately international jurisdiction, simply by asserting that national security and terrorism are involved. At the same time “the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism.”⁸⁴

There are moreover Convention rights which are absolute in nature and in respect of which no derogation is possible under Article 15 of the Convention.⁸⁵ Thus Article 3 prohibiting torture and inhuman or degrading treatment enshrines one of the most fundamental values of democratic society.⁸⁶ While the Strasbourg Court is well aware of the immense difficulties faced by States in protecting their communities from terrorist violence, even in these circumstances the Convention prohibits torture or inhuman or degrading treatment or punishment. Where substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to a particular receiving State, the responsibility of the Contracting State to safeguard him or her against such treatment may be engaged in the event of expulsion.

Let me turn to two other courts for a moment. In rendering his court's decision of September 1999 that physical interrogation

82. See generally *Chadhal v. United Kingdom*, 1996-V Eur. Ct. H.R. ¶¶ 135, 136.

83. See, e.g., *id.* ¶ 131 (illustrating that there are ways to both accommodate concerns about the security of intelligence information and give the individual procedural justice).

84. *Fox, Campbell & Hartley*, 182 Eur. Ct. H.R. (ser A.) at 17.

85. European Convention on Human Rights, *supra* note 13, art. 15.

86. *Id.* art. 3.

techniques were unlawful even in ticking-bomb situations, Justice Aharon Barak, the President of the Israeli Supreme Court, said this:

We are aware that this decision does not ease dealing with [the harsh] reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices are open to it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day they strengthen its spirit and strength and allow it to overcome its difficulties.⁸⁷

Given the particular context existing in Israel, at the time and unfortunately still today, his words carry special weight.

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

[The] challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to 'terrorism'. That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves.⁸⁸

CONCLUSION

So my conclusion is that human rights are not anti-democratic; terrorism is anti-democratic; arbitrary interference with individual rights and freedoms is anti-democratic; democracy without the rule of law is anti-democratic as is, self-evidently, the rule of law without democracy. In their wisdom the authors of the European Convention on Human Rights over fifty-five years ago constructed a framework for the effective operation of democracy and the rule of law based on minimum standards that are now in principle shared throughout

87. HCJ 5100/94 Public Committee Against Torture v. Israel [1999] IsrSC 37, http://www.hamoked.org.il/items/260_eng.pdf.

88. Shri D.K. Basu v. State of West Bengal (1997) 1 S.C.C. 416, 418.

forty-six European States. That framework, evolving as it has done through the Strasbourg case-law, remains as relevant today as it was then. It still represents a more long-term but ultimately more effective means of protecting democracy than short-term, disproportionately repressive measures which may purport to do the same, but which in the end court the risk of undermining the foundations of democratic society. In the *Klass* case in 1978, the Court warned against the danger of undermining or even destroying democracy on the ground of defending it.⁸⁹ That is a warning that we would all do well to keep in sight, if we wish to preserve a living democracy, one which is neither under-protected nor over-protected.

89. *Klass v. Germany*, 28 Eur. Ct. H.R. (ser. A) 1, 23 (1978).