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# Human Rights in a Time of Terror: Comparison between Treatment in the European Courts of Human Rights and the United States

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# HUMAN RIGHTS IN A TIME OF TERROR: COMPARISON BETWEEN TREATMENT IN THE EUROPEAN COURTS OF HUMAN RIGHTS AND THE UNITED STATES

*Prof. Allen Shoenberger\**

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Do human rights change in times of terror? Such matters may be judged in a number of different arenas. How do nations treat their own citizens in such times? How do nations treat suspected terrorists, or those that aid and assist terrorists, or those who may be potential sources of information about terrorist activities? Is it permissible for governments to employ extraordinary methods, from prolonged detention, assertive investigative techniques, rendition, torture, disappearances, wiretapping, surveillance, and confiscation of property? Is compensation due from a nation state to its own citizens who are harmed by terrorist actions that the state was unable to prevent? Is that duty attributable to a general concern with the freedom from want? Do the anti-terrorist actions of a nation state inspire confidence or concern (bordering on terror) in the citizens of that nation state?

One yardstick for potentially measuring such changes is the Four Freedoms Speech of President Roosevelt, delivered in 1941 as the horrendous atrocities of the Second World War were unfolding in Europe and Asia.<sup>1</sup> His

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1. The President delivered his Four Freedoms Speech to a joint session of Congress his statement of the union on January 6, 1941. He was attempting to justify assistance to Great

four freedoms: Freedom of Speech, Freedom of Religion, Freedom from Want, and Freedom From Fear are a decent, though broad, set of values against which legal systems may be judged. In particular, freedom of speech, religion, and freedom from fear are trenchant areas for consideration. Freedom from Want is seldom considered as a constitutional value, yet it is certainly a very basic value, a value commented upon by John Locke when he described property as something that allowed a person to assert his or her independence.<sup>2</sup> This article explores in a preliminary manner some of these complex questions with particular attention to the jurisprudence of the European Court of Human Rights,<sup>3</sup> a court which has rendered scores of decisions in the last decades about terrorism related matters. When relevant, the jurisprudence of the European Court of Justice<sup>4</sup> is also discussed. Although that court primarily deals with economic issues, when doing so it must often consider matters involving human rights. When possible, comparisons are attempted to the Constitution of the United States. Some of the European Court of Human Rights cases are of minor import; others involve impact on a grand scale.

### Freedom from Fear

#### I. Rendition of Suspected Terrorists to Facilitate Torture

The sharpest difference between the constitutional system in the United States and that prevalent in the European states is probably the sharp disparate treatment of rendition. The European Court of Human Rights decided the case of *Al Nashiri v. Poland* in 2014.<sup>5</sup> The United States Supreme Court in 2017 held that there could be no civil liability for conduct related to rendition under its narrow reading of United States Constitutional law and statutory law.

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Britain through Lend-Lease and other measures. Eleven months and a day later, The Republic of Japan attacked Pearl Harbor.

2. See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 141 (Thomas I. Cook ed., 1947) “[S]upposing the world given as it was to the Children of Men in common, we see how labor could make Men distinct titles to several parcels of it, for their private uses wherein there could be no doubt of Right, no room for quarrel.”

3. This court sits as a supranational court interpreting the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 213 U.N.T.S. 211 [hereinafter Convention], for the forty-seven countries that are members of the Council of Europe (including Russia and Turkey).

4. This court sits as a supranational court for matters within the competence of the European Union, currently twenty-eight member states, all of whom are also members of the Council of Europe.

5. *Al Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-146044>.

The applicant, Al Nashiri, was detained at the time of the court's hearing by the United States at the Internment Facility in Guantanamo Bay Naval Base in Cuba.<sup>6</sup> He was suspected of being involved in the attack on the U.S.S. Cole destroyer on 12 October 2000 and a similar attack on a French oil tanker, the MV Lindberg, on 6 October 2002.<sup>7</sup> Al Nashiri was subjected to "Enhanced Interrogation Techniques" under the United States "High-Value Detainees Program".<sup>8</sup> Those techniques included wall standing, that had decades earlier been ruled cruel and inhumane by the European Court of Human Rights.<sup>9</sup> Al Nashiri was captured in Dubai and turned over to the CIA in November of 2002.<sup>10</sup> He was subsequently transferred to Afghanistan where he was confined in a camp known as the Salt Pit,<sup>11</sup> and then transferred to Bangkok, Thailand where he was confined in the Cat's Eye detention center.<sup>12</sup> After transfer to another site he was transferred to Poland.<sup>13</sup> After the interrogation there, he was transferred to Rabat, Morocco and thence to Guantanamo Naval Base detention center.<sup>14</sup> At each of these sites he was subjected to a variety of Enhanced Interrogation Techniques, including ten listed techniques and others, such as using an unloaded pistol to the head!<sup>15</sup> However, Al Nashiri's saga was not yet over, for from Guantanamo Bay he was transferred to Rabat, Morocco on March 27, 2004, and thence to a secret detention facility in Bucharest, Romania, and then finally back to Guantanamo Bay by September 6, 2006.<sup>16</sup>

After consideration of extensive material, the court proceeded to decide the merits. It first held that the prolonged investigation by Poland of the matter failed to meet the requirements of "prompt", 'thorough' and 'effective' investigation" of an Article 3 complaint.<sup>17</sup> The court went on to determine that the ill-treatment complained about met the minimum level of

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6. *Id.* ¶ 41.

7. *Id.* ¶¶ 45-46.

8. *See id.* ¶¶ 47-48, 53-54. One of the techniques involved sleep deprivation but for no longer than eleven days at a time. *Id.* ¶ 54.

9. *Id.* ¶ 54 (referencing *Ireland v. United Kingdom*, App. No. 5310/71, 25 Eur. Ct. H.R. (ser. A) (1978)). The court also found these practices in violation of the Convention. *Al Nashiri* at ¶ 594.

10. *Al Nashiri v. Poland*, App. No. 28761/11 at ¶ 83.

11. *Id.* ¶ 84.

12. *Id.* ¶ 85.

13. *Id.* ¶¶ 87, 91.

14. *Id.* ¶ 107.

15. *Id.* ¶ 100. (These techniques include waterboarding, cramped confinement for up to eighteen hours, confinement in a box with harmless insects inside, facial holds, facial or insult slaps, and others.).

16. *See id.* ¶¶ 108-109.

17. *Id.* ¶ 499.

severity to constitute inhuman and degrading treatment as prohibited by Article 3 of the Convention.<sup>18</sup>

The court then considered the lawfulness of the detention. First it considered that the secret detention of terrorist suspects without any legal safeguards was an essential element of the CIA rendition program, and that such detention violated Article 5 of the Convention.<sup>19</sup>

The court then considered whether holding the applicant incommunicado with his family violated Article 8 of the Convention which protects family and private life.<sup>20</sup> It held that the interference with Al Nashiri's family and private life amounted to a violation.<sup>21</sup>

The court then considered the availability of an effective remedy to complain of these violations as required by Article 13 of the Convention. The Court concluded that there was a violation of this requirement through the ineffective investigation carried out by Poland as found earlier in its opinion.<sup>22</sup>

The court then considered whether the transfer to another jurisdiction jeopardized the applicant's prospects of having a fair trial. At the time of the transfer from Poland in 2003, the military tribunals that had been established by the United States were found "neither independent nor objectively impartial", as required by Article 6 of the Convention.<sup>23</sup> The court found "in the light of publicly available information" any terrorist subject would be tried before a military commission and the procedure before those commissions raises serious worldwide concerns about the inability to obtain a fair trial.<sup>24</sup> The court concluded thus that it was impossible to have a fair trial.

The court then went on to consider whether the transfer of the applicant violated Article 2 of the Convention in that the death penalty was possible.<sup>25</sup> It found that at the time Poland transferred the applicant, a trial with a death penalty sanction was a real possibility violating fundamental human rights as recognized by the preamble to Protocol 13 of the Convention and as stated there, "everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of the right and for the full recognition of the inherent dignity of all human beings."<sup>26</sup> In an earlier decision, *Soering v. United Kingdom*, the Court

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18. See *id.* ¶¶ 515-519.

19. See *id.* ¶¶ 530-532.

20. *Id.* ¶ 533.

21. See *id.* ¶¶ 537-540.

22. See *id.* ¶¶ 542- 551.

23. See *id.* ¶ 555.

24. *Id.* ¶ 568

25. *Id.* ¶¶ 576-578.

26. *Id.* ¶ 578 (citing pmbl. Protocol 13 of the Convention, *supra* note 5).

prohibited the U.K. from deporting two U.S. citizens accused of murder to the United States because of the “death row phenomenon.”<sup>27</sup>

The court awarded 100,000 euros to the applicant even though the applicant had not requested pecuniary damages, and also ordered Poland to seek assurances from the United States that the death penalty will not be applied to the applicant.<sup>28</sup>

There is no decision of the United States Supreme Court that directly addresses the matter of rendition and ill-treatment of terrorist detainees. The case most on point, *Ziglar v. Abassi*,<sup>29</sup> deals with Muslims who were detained shortly after the attacks of 9/11. Initially over 700 were arrested and detained on immigration charges, but that number decreased to 84 aliens who were deemed eligible for a “hold until cleared policy.”<sup>30</sup> These 84 individuals were detained at the Metropolitan Detention Center (MDC) in Brooklyn, New York.<sup>31</sup>

In accordance with official Bureau of Prisons policy, detainees were confined in “tiny cells for over 23 hours a day.”<sup>32</sup> Furthermore, the detainees were subjected to the following:

Lights in the cells were left on 24 hours. Detainees had little opportunity for exercise or recreation. They were forbidden to keep anything in the cells, even basic hygiene products such as soap or a toothbrush. When removed from the cells for any reason, they were shackled and escorted by four guards. They were denied access to most forms of communication with the outside world. They were strip searched often – any time they were moved, as well as at random in their cells.<sup>33</sup>

Some of the conditions imposed, however, were not inflicted pursuant to official policy.<sup>34</sup> The complaint alleged “prison guards engaged in a pattern of ‘physical and verbal abuse.’”<sup>35</sup> Additionally, the “[g]uards allegedly slammed detainees into walls; twisted their arms, wrists and fingers; broke their bones; referred to them as terrorists; threatened them with violence;

27. *Soering v. United Kingdom*, 14038/88 Eur. Ct. H.R. ¶¶ 81, 111 (1989), <http://hudoc.echr.coe.int/eng?i=001-57619>

28. *Al Nashiri v. Poland*, ¶¶ 589, 594.

29. *See Ziglar v. Abassi*, 582 U.S. \_\_\_, Nos. 15-1358, 15-1359, and 15-1363, slip op. 1, 3 (June 19, 2017) (*Ashcroft v. Iqbal* and *Hasty v. Iqbal* were both consolidated and decided in the same opinion.) Three justices recused themselves, so a majority of the six participating justices, by a four-justice majority, rendered the decision with two justices in dissent. *See id.* at 33.

30. *Id.* at 3.

31. *Id.*, at 3-4.

32. *Id.*, at 4.

33. *Id.*

34. *Id.*

35. *Id.*

subjected them to humiliating sexual comments; and insulted their religion.”<sup>36</sup> It was also alleged that the Warden Hasty, allowed the guards to abuse the detainees.<sup>37</sup> It was also alleged that the Warden referred to the detainees as terrorists and prevented the use of normal grievance procedures.<sup>38</sup> The Warden allegedly stayed away from the unit so as not to see the abuse, but it was maintained that “he was made aware of the abuse via ‘inmate complaints, staff complaints, hunger strikes, and suicide attempts[,]’” and ignored official logs and other records.<sup>39</sup>

The six detainees who brought suit were all eventually released and deported.<sup>40</sup>

Suits were brought against the former Attorney General, John Ashcroft, former head of the Federal Bureau of Investigation, Robert Mueller, and the former head of the Immigration and Naturalization Service, Commissioner James Ziglar, (the Executive Officials), and the warden and assistant warden of the detention facility, Dennis Hasty and James Sherman (Wardens).<sup>41</sup>

The suits were brought under a theory that the actions of the Executive Officials were constitutional torts under the authority of *Bivens v. Six Unnamed Fed. Narcotics Agents*.<sup>42</sup> The claims of the respondents are as follows:

First, Respondents alleged that petitioners detained them in harsh pretrial conditions for a punitive purpose in violation of the substantive due process component of the Fifth Amendment. Second, respondents alleged that petitioners detained them in harsh conditions because of their actual or apparent race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment. Third, respondents alleged that the Wardens subjected them to punitive strip searches unrelated to any legitimate penological interest, in violation of the Fourth Amendment and the substantive due process component of the Fifth Amendment. Fourth, respondents alleged that the Wardens knowingly allowed the guards to abuse respondents in violation of the substantive due process component of the Fifth Amendment.<sup>43</sup>

The opinion for the court by Justice Kennedy never examined whether the actions complained of violated the constitutional rights alleged, but

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36. *Id.*

37. *See id.* at 14.

38. *Id.* at 23.

39. *Id.*

40. *Id.* at 4. (The government had no evidence that any of these six detainees were actually terrorists- the harms continued until eight months after September 11, 2001 by which time “the defendants knew the plaintiffs had no connection to terrorism.”) *Id.* at 13 (Breyer, J., dissenting).

41. *Id.* at 6.

42. *Bivens v. Six Unnamed Fed. Narcotics Agents*, 403 U.S. 388 (1971).

43. *Ziglar v. Abassi*, 582 U.S. \_\_\_\_ at 5.

instead held that no *Bivens* actions were possible in this case, i.e. that no constitutional tort remedy was available against the Executive Officials for the conduct alleged.<sup>44</sup> The basic theory supporting the Court's opinion was that the application of these constitutional rights to the conduct alleged would have been an extension of the *Bivens* remedy into heretofore unrecognized areas.<sup>45</sup>

The dissenting opinion by Justice Breyer disagrees with that conclusion. In part he stated, "If I may paraphrase Justice Harlan, concurring in *Bivens*: In wartime as well as in peacetime, 'it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy for the most flagrant and patently unjustified, unconstitutional, abuses of official power.'"<sup>46</sup> Earlier in his opinion he stated: "[T]hese claims are well-pleaded, state violations of clearly established law, and fall within the scope of longstanding *Bivens* law."<sup>47</sup>

Perhaps the most fundamental right of an individual is that of liberty. In that context, the seizure of suspected terrorists, enemy combatants, and/or sympathizers, presents issues at the core of human rights.

## II. Internment of Suspected Enemy Combatants or Sympathizers

In reaction to the 9/11 airplane attacks, both the United Kingdom and the United States seized various persons suspected of connections to terrorist activities. Comparison of the treatment of those two groups of persons seized provides an interesting contrast. The United States seized individuals and for many years refused to provide even the most minimal of legal proceedings to examine whether there existed a justification for the detention. In contrast, the United Kingdom made legal remedies available, remedies that were tested by resort to the European Court of Human Rights, and found acceptable. Yet the United Kingdom was able to continue the detention of most of the persons detained for a number of years. Not only did the domestic courts of the United Kingdom condone the detentions, the European Court of Human Rights examined the legal process and determined that it was adequate under the European Convention on Human Rights. Moreover, the conditions of confinement were subject to scrutiny through domestic remedies in the United Kingdom. Since the applicants had failed to exhaust these remedies the ECHR declined to examine the conditions of confinement. In a much earlier decision by the ECHR, conditions of confinement were examined in the context of the United Kingdom's difficulties in Northern Ireland.<sup>48</sup> In that

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44. See *id.* at 29.

45. See *id.* at 17-25.

46. *Id.* at 3 (citing *Bivens*, 403 U.S. at 410-411 (Harlan, J. concurring in the judgment)).

47. *Id.* at 2-3.

48. *Ireland v. United Kingdom*, App. No. 5310/71, 25 Eur. Ct. H.R. (ser. A) (1978).



case, various, specific confinement modalities denominated the five techniques that were found to be in violation of the European Convention on Human Rights.<sup>49</sup>

### **Prolonged Detention of Suspected Terrorists**

Both the United States and the United Kingdom detained for substantial periods of time persons alleged to be connected to terrorism. Guantanamo detainees are well known. In each case litigation that ensued reached the highest courts.

Eleven individuals brought suit in the United Kingdom regarding their detention.<sup>50</sup> The claims eventually were heard in the ECHR in the case of *A. and Others v. The United Kingdom*.<sup>51</sup> These eleven individuals were from a total of sixteen who had been detained under emergency legislation after the United Kingdom filed a derogation notice because of the events of September 11, 2001.<sup>52</sup> None of these individuals were British, and all were supposedly detained because of suspected links to terrorism.<sup>53</sup> The detention was for the purpose of deporting them pursuant to the Anti-terrorism, Crime and Security Act 2001.<sup>54</sup> Under the legislation, if any of them agreed to be deported, the detention would end.<sup>55</sup> The statute provided for hearings before the Special Immigration Appeals Commission (SIAC) and subsequent appeals on points of law to the Court of Appeal.<sup>56</sup> Appeals to the House of Lords was also possible.<sup>57</sup>

Obviously, citizens of Britain had little to fear from these actions of the government, moreover, since relatively few individuals were targeted; thus the contrast with the actions of the United States is quite sharp.

The ECHR rejected consideration of the cases of two of the detainees, one because he was deported within three days, the other deported to France within three months, of the commencement of their detentions.<sup>58</sup> The remaining cases were considered on their merits.

The first issue the SIAC considered was whether the detentions were justified by the facts of the individual cases.<sup>59</sup> Such scrutiny was complicated

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49. *Id.* at ¶ 167.

50. *See A. And Others v. United Kingdom*, 2009-II Eur. Ct. H.R. 137, 152.

51. *Id.*

52. *See id.* at 149-152.

53. *Id.* at 150.

54. *Id.* at 150-151.

55. *See id.* at 150.

56. *See id.*

57. *See id.* at 155.

58. *Id.* at 216-17.

59. *See id.* at 152.

because for each of the individuals the files included openly disclosed facts, and also closed facts.<sup>60</sup> After consideration of both open and closed material, the SIAC determined that adequate justifications had been made for the detentions.<sup>61</sup> However the SIAC refused to consider the detentions under the special legislation because it considered the derogation from some of the provisions of the European Convention of Human Rights invalid.<sup>62</sup> The SIAC determined that the situation was serious enough to justify derogation since the threat did threaten the life of the nation, but the derogation could not be applied since the statute distinguished between nationals and non-nationals and no derogation was made from the non-discrimination principle of Article 14 of the Convention.<sup>63</sup> Only if the threat came almost exclusively from non-nationals could the statute be valid.<sup>64</sup> However, that was patently false in these circumstances.<sup>65</sup> The SIAC therefore “quashed the derogation order[. . .] and issued a declaration of incompatibility” with respect to part of the 2001 Act.<sup>66</sup>

The Court of Appeal, however, disagreed with the SIAC. That court found that the different treatment between nationals and non-nationals was not contrary to the prohibition of discrimination in Article 14 of the Convention, because “[t]here was a rational connection between the detention of non-nationals who could not be deported because of fears for their safety.”<sup>67</sup>

The Law Lords took a different approach. The Law Lords did not find that the detentions under the 2001 Act fell “within the exception to the general right of liberty set out in Article 5 § 1 (f) of the Convention.”<sup>68</sup> The Law Lords did agree that there was a public emergency threatening the life of the nation (one Lord dissenting),<sup>69</sup> but also held that the detention scheme was neither a proportionate response to the emergency, nor did the detentions rationally address the problem at hand!<sup>70</sup> The Law Lords reasoned that evidence indicated that nearly one-thousand individuals from the U.K. had attended training camps in Afghanistan in the last five years.<sup>71</sup> Even if the threat were somewhat less from such persons, the scheme does not apply to U.K. inhabitants, and to permit a person who poses a specific danger to leave the

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60. *See id.*

61. *Id.* at 152-53.

62. *Id.* at 153.

63. *Id.*

64. *See Id.*

65. *See Id.*

66. *Id.* at 154.

67. *Id.* at 16.

68. *Id.* at 155.

69. *See id.*

70. *Id.* at 157.

71. *Id.*

country to someplace as close as France (as one did) “is hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of this country.”<sup>72</sup> The Law Lords also considered that the Act was too broad and thus could apply to individuals not within the scope of the derogation.<sup>73</sup>

The Law Lords also held that the Act was discriminatory and inconsistent with Article 14 of the Convention (non-discrimination principle) from which there had been no derogation.<sup>74</sup> The Law Lords then granted an order quashing the derogation order and “a declaration under section 4 of the 1998 Act [ . . . ] that section 23 of the 2001 Act was incompatible with Articles 5 § 1 and 14 of the Convention in so far as it was disproportionate and permitted discriminatory detention of suspected international terrorists.”<sup>75</sup>

Meanwhile the SIAC, on remand from the Court of Appeal, essentially affirmed its earlier decision regarding the propriety of the detentions and the use of both open and closed evidence (some apparently obtained by torture).<sup>76</sup> The court of Appeal upheld the convictions, but the House of Lords unanimously held that the evidence obtained by torture could not be employed as such evidence had long been believed to be “inherently unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles on which courts should administer justice.”<sup>77</sup> All of the appeals were allowed, the convictions were quashed, and the cases remanded to the SIAC.<sup>78</sup>

However, before the December 8, 2005 decisions of the House of Lords, all the applicants had lodged appeals with the ECHR on January 24, 2005.<sup>79</sup> The ECHR ruled that the cases of all eleven applicants were admissible even though all the applicants had been discharged from custody by the time of the decision.<sup>80</sup> The ECHR held that the detention of nine of the applicants did not fall within the scope of detention for purposes of deportation and thus violated the right to liberty of Article 5 § 1 of the Convention.<sup>81</sup> For two of the applicants, the one deported within three days of detention and the other deported within three months of detention, this did not apply.<sup>82</sup> However, for the remainder of the applicants, deportation was not possible without fear of ill-treatment in violation of Article 3 of the Convention.<sup>83</sup> Indeed, one of the

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72. *Id.* (quoting *A. v. Secretary of St. for the Home Dep't*, (2004) UKHL 56, ¶ 33).

73. *Id.*

74. *Id.* at 158-59.

75. *Id.* at 159.

76. *See id.*

77. *Id.* at 160-61.

78. *See id.* at 161.

79. *See id.* at 147.

80. *See id.* at 218.

81. *See id.*

82. *See id.* at 217.

83. *Id.*

detainees was stateless and no State indicated willingness to accept that person.<sup>84</sup>

The ECHR did agree that there was an adequate case presented that derogation from the right to liberty would be possible.<sup>85</sup> However, in parallel to the House of Lords, the ECHR held that the instant detentions for the nine applicants who were detained upwards of three years, were disproportionate and thus a violation of article 5 § 1 of the Convention.<sup>86</sup> This was unjustifiable discrimination between nationals and non-nationals.<sup>87</sup>

The court then went on to consider the assertions that Article 5 § 4 (speedy determination by a court to determine lawfulness of the detention) was violated.<sup>88</sup> The ECHR focused on the relative importance of open material versus closed material (that was not disclosed to the detainees).<sup>89</sup> It held that if there was adequate information to support detention in the open material, and it was sufficiently specific so as to permit the detainee to have an opportunity to contest the charges, then the determinations to detain were lawful.<sup>90</sup> However, for two detainees who were accused of transmitting large amounts of money to terrorist groups linked to al-Qaeda, there was no evidence in the open material indicating why the authorities thought the money went to such groups, and hence the detainees were unable to effectively challenge the charges, and thus Article 5 § 4 had been violated.<sup>91</sup> For two other detainees, the open material was of a general nature that the detainees were members of named extremist groups linked to al-Qaeda.<sup>92</sup> However, evidence of such links was largely found in the closed material; and thus the detainees could not effectively challenge the allegations.<sup>93</sup> For these two detainees, the court also found a violation of Article 5 § 4.<sup>94</sup> In the court's view, the balance between what was in the open material and the closed material was an essential consideration.<sup>95</sup>

The court then considered claims for monetary compensation for the detainees.<sup>96</sup> For nine of the detainees it determined to award compensation,

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84. *See id.*

85. *Id.*

86. *Id.* at 224.

87. *See id.* (The government submitted no evidence that nationals were significantly more likely to react negatively to detention than foreign Muslims suspected of connections to al-Qaeda).

88. *See id.* at 233.

89. *See id.* at 233-34.

90. *See id.* at 234.

91. *See id.* at 235.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* at 232-34.

96. *Id.* at 240.

but to limit the amounts to a range of between 1,7000 euros and 3,900 euros because of the special factors at play in these cases.<sup>97</sup> These factors include: the lengthy nature of the detentions that occurred in the aftermath of the 9/11 attacks by al-Qaeda, the fact that the authorities acted in good faith to protect the British people from terrorist attacks, and the replacement of this detention scheme by a series of control orders under the Prevention of Terrorism Act of 2005, which would possibly have subjected the detainees to some restrictions on their liberty.<sup>98</sup>

### **The Ability of the State to Detain Suspected Terrorists without Presenting them to a Judge**

The ECHR has decided cases that constrain the rights of States to detain suspected terrorists without bringing them before a court, even detention for quite brief periods of time. In *Saracoglu and others v. Turkey*,<sup>99</sup> the ECHR found that detention for eight days without bringing individuals before a judge violated Article 5 § 3 of the European Convention on Human Rights.<sup>100</sup> The applicants had been taken into custody by police officers of the Anti-Terrorism Branch of the Diyarbakir Security Directorate who considered that they were involved in the activities of the Revolutionary People's Liberation Party at the university.<sup>101</sup> Eight days later, when they were brought before a judge for the first time, three individuals were detained on remand, the remainder were released.<sup>102</sup> The ECHR held that, even supposing the applicants stood accused of serious offenses, it was unnecessary to detain them for eight days without bringing them before a judge.<sup>103</sup>

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97. See *id.* at 241.

98. See *Id.*

99. *Saraçoğlu and Others v. Turkey*, App. No. 4489/02 Eur. Ct. H.R. (2007), <http://hudoc.echr.coe.int/eng?i=001-83619>.

100. *Id.* ¶¶ 37-39, see also The Convention, *supra* note 5, at art. 5 § 3 ("Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be . . . entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.").

101. *Saraçoğlu and Others v. Turkey*, App. No. 4489/02 at ¶ 5.

102. *Id.* ¶¶ 9-10.

103. *Id.* ¶¶ 37-38. The ECHR cited *Brogan and Others v. United Kingdom*, App. No. 11209/84 Eur. Ct. H.R. (1989), <http://hudoc.echr.coe.int/eng?i=001-57449>, (holding that detention for four days and six hours, without judicial control was impermissible.) As of November 11, 2009, the *Brogan* decision, itself, had been cited in more than 70 subsequent opinions by the ECHR; *accord*, *Boke and Another v. Turkey*, App. No. 71912/01 Eur. Ct. H.R. ¶ 62 (2009), <http://hudoc.echr.coe.int/eng?i=001-91636>, (holding that detention for seven days to be excessive despite serious activities by detained person). See generally, Allen Shoenberger, *Change in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Precedent into the Civil Law System*, 55 LOY. L. REV 5 (2009) (Citations to precedents in European jurisprudence are becoming common.).

### The Ability to Try a Terrorist before a Military Court

The ECHR has issued repeated decisions prohibiting the trial of a civilian before a military court.<sup>104</sup> Such determinations have been made under Article 6 § 1 of the Convention which reads: “In the determination of . . . any criminal charge against him, everyone is entitled to a fair . . . hearing . . . by an independent and impartial tribunal established by law.”<sup>105</sup>

Indeed, the ECHR held in 2007, that the presence of a military judge on the judicial panel who was replaced during the last stage of the proceeding<sup>106</sup> still amounted to a violation of Article 6 of the Convention.<sup>107</sup> The ECHR considered that since guilt had already been determined, the three civilian judges were only able to decide the re-qualification of the offense (membership in an illegal organization), and impose the final sentence.<sup>108</sup> Two panels of the Istanbul State Security Court had already acquitted the applicant of the charges against her, and both times the Court of Cassation quashed the judgment, first in a regular panel, then in a Plenary Chamber decision.<sup>109</sup> The third time the applicant was tried, it was by three civilian judges, who adhered to the last Court of Cassation’s judgment and “convicted the applicant of membership in an illegal armed organization”, and sentenced the defendant to twelve years and six months imprisonment.<sup>110</sup> The court stated, “the military judge’s replacement by a civilian judge . . . failed to dissipate the applicant’s reasonably held concern about the trial court’s independence and impartiality.”<sup>111</sup> Replacing a military judge only at the last stage of the proceeding distinguished this case from another case in which “three civilian judges made a full re-examination of the fact of the case and a re-assessment of the evidence, before [. . .] again convicting the applicant.”<sup>112</sup>

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104. See *Özel v. Turkey*, App. No. 42739/98 Eur. Ct. H.R. ¶ 33-34 (2002) <http://hudoc.echr.coe.int/eng?i=001-60475>; see also *Özdemir v. Turkey*, App. No. 59659/00 Eur. Ct. H.R. ¶¶ 35-36 (2003), <http://hudoc.echr.coe.int/eng?i=001-60921>.

105. See Convention, *supra* note 5.

106. See *Kenar v. Turkey*, App. No. 67215/01 Eur. Ct. H.R. ¶ 38 (2007), <http://hudoc.echr.coe.int/eng?i=001-83955>.

107. *Id.* ¶¶ 40-41.

108. *Id.* ¶¶ 26, 38. It must be noted however, that the final panel of civilian judges “acquitted the applicant of the charges of throwing a petrol bomb at a lorry and burning down a cash dispenser belonging to a bank.” *Id.* ¶ 26. The court still sentenced the applicant to twelve years and six months for membership in an illegal organization and “disbarred him from public service”). *Id.*

109. See *Id.* ¶¶ 12-15, 20-25.

110. *Id.* ¶ 26. Two years later the applicant was released from prison following a decision to suspend the execution of his sentence. See *id.* at ¶ 27.

111. *Id.* ¶ 37.

112. *Id.* ¶ 39 (distinguishing *Yasar v. Turkey*, App. No. 46412/99 Eur. Ct. H.R. (2005), <http://hudoc.echr.coe.int/eng?i=001-72160>.)

In another case, *Birdal v. Turkey*,<sup>113</sup> the ECHR stated:

It is understandable that the applicant who was prosecuted in a State Security Court for disseminating propaganda in support of an armed, illegal organi[z]ation should have been apprehensive about being tried by a bench which included a regular army officer and member of the Military Legal ServiceFalse [H]e could legitimately fear that the...Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fear as to the State Security Court's lack of independence and impartiality can be regarded as objectively justified.<sup>114</sup>

It is quite clear that the ECHR does not consider that military courts are appropriate to try alleged terrorists.

### **The Right of Alleged Terrorists to Legal Representation**

The European Convention on Human Rights explicitly addresses the right to legal representation. Article 6 §§ 1 and 3 of the Convention provides:<sup>115</sup>

1. In the determination of... any criminal charge against him, everyone is entitled to a fair... hearing... by an independent and impartial tribunal established by law

...

3. Everyone charged with a criminal offence has the following minimum rights:...

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113. *Birdal v. Turkey*, App. No. 53047/99 Eur. Ct. H.R. (2007), <http://hudoc.echr.coe.int/eng?i=001-82503>.

114. *Id.* ¶30 (citing *Incal v. Turkey*, App. No. 22678/93 Eur. Ct. H.R. (1998), <http://hudoc.echr.coe.int/eng?i=001-58197>). (The ECHR also found a violation of the applicant's right to freedom of expression under Art. 10 of the Convention. *Id.* at ¶39. By the date of the ECHR decision, the applicant had already served his sentence; consequently the ECHR awarded €5,000.00 in respect to non-pecuniary damages. *Id.* ¶¶ 38, 43. Virtually identical language appears in the decision of *Tezcan Uzunhasanoglu v. Turkey*, Eur. Ct. H.R. at ¶ 21 (2004), <http://hudoc.echr.coe.int/eng?i=001-61712>, with the only change a substitution of "for aiding and abetting an illegal organization" for the words "for disseminating propaganda in support of an armed, illegal organization." The ECHR, however, awarded nothing in the nature of non-pecuniary damages, stating instead that the finding of a violation constitutes in itself sufficient compensation for any non-pecuniary damage, but the court did state that in principle the most appropriate form of relief would be to ensure a retrial by an independent and impartial tribunal. *Id.* ¶¶ 23, 28.

115. See Convention, *supra* note 5.

(c) to defend himself in person or through legal assistance of his own choosing. . .

It should also be noted that in Article 6 §§ 1 and 3, no reference is made to “citizens,” instead the word “everyone” is included in each provision.<sup>116</sup>

In *Tagaç & Others v. Turkey*<sup>117</sup>, the applicants had been arrested on suspicion of membership in an illegal armed organization and of organizing illegal demonstrations on behalf of that organization.<sup>118</sup> The applicants complained that they were able to meet with their attorneys, “without privacy, for [five] and [twenty] minutes respectively”, and that they, thus, were not effectively assisted by counsel.<sup>119</sup> The ECHR agreed, stating that the Convention is not designed to “guarantee . . . rights that are theoretical or illusory but rights that are practical and effective.”<sup>120</sup>

In *Kehayov v. Bulgaria*<sup>121</sup>, the ECHR found that the refusal of an attorney’s access to the case file and denial of the ability to represent his client in one hearing violated Article 5 § 4 of the Convention.<sup>122</sup> In particular the court noted that the reason cited for not allowing the attorney to represent the defendant, failure to have the case number on the written authorization signed by the defendant and handed to the court, “was of such a minor nature that it could not possibly justify . . . a decision to deprive the applicant of the benefit of legal representation. . . . the judge could have asked the applicant whether or not the authorization form concerned the case under examination.”<sup>123</sup>

Access to a lawyer in the initial stages of an investigation is not explicitly set out in the Convention, but is normally permitted; and such access may be restricted for good cause.<sup>124</sup> The ECHR stated that the question was “whether the restriction . . . , in light of the entirety of the proceedings, . . . deprived the accused of a fair hearing . . . .”<sup>125</sup> The ECHR observed that the applicant was represented both at trial and appeal by a lawyer, and the statement obtained by the police during his pre-trial detention “was not the sole basis for his

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116. *See id.*

117. *See Tagaç v. Turkey*, App. No. 71864/01 Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng?i=001-93446>.

118. *Id.* ¶ 5.

119. *Id.* ¶ 36.

120. *Id.* (citing *Brennan v. the United Kingdom*, 2001-X Eur. Ct. H.R. 211, 231). The court awarded €1,500.00 in non-pecuniary damages and also indicated that the most appropriate redress would be retrial of the applicants should they so request. *Tagaç v. Turkey* ¶¶ 44-45.

121. *See Kehayov v. Bulgaria*, App. No. 41035/98 Eur. Ct. H.R. (2005), <http://hudoc.echr.coe.int/eng?i=001-67982>.

122. *Id.* ¶ 87.

123. *Id.* ¶ 86.

124. *Id.* at 52.

125. *Id.* at 52.



conviction.”<sup>126</sup> In rendering the decision, the ECHR cited its earlier decision in *Brennan v. United Kingdom*, a case in which the initial consultation with a lawyer was delayed by twenty-four hours, and the initial interview with the lawyer was conducted with a police officer present.<sup>127</sup> In that case, the justification for the delay was to prevent alerting persons suspected of involvement in the offense who had not yet been arrested.<sup>128</sup> The ECHR concluded that the denial of access during this brief period did not infringe the applicant’s rights under Article 6 §§ 1 or 3 (c) of the Convention.<sup>129</sup>

Two weeks after London train and bus bombings killed fifty-two persons and injured hundreds, four persons were arrested for detonating four additional bombs on three underground trains and a bus.<sup>130</sup> All of these subsequent bombs were apparently duds.<sup>131</sup> These arrests resulted in a Grand Chamber decision of the ECHR in *Ibrahim v. United Kingdom*.<sup>132</sup> The four defendants included three who were involved in making the devices, and a fourth individual accused of aiding and abetting the attempt.<sup>133</sup> The case squarely presents questions of the right to representation upon questioning, the ability of the authorities to question without such representation when immediate public safety concerns are involved, and the eventual use of statements at trial made by the accused before they received legal representation.<sup>134</sup> The cases presented a stark look at the dilemma of the police. They were legitimately concerned that additional bombings might be attempted, and thus were urgently concerned with uncovering any such efforts.<sup>135</sup>

The police employed a modified caution when they interrogated suspects as permitted by British law.<sup>136</sup> This caution neither mentions an advocate,

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126. *Id.* at 57. The court noted that an expert opinion was advanced at trial that the handwriting on the illegal placard was that of the applicants (although the Criminal Police laborator expert opinion failed to confirm that the handwriting was in fact the applicants. *See id.* at 15, 23.

127. *Brennan v. the United Kingdom*, 2001-X Eur. Ct. H.R. 211, 213.

128. *See id.* at 222.

129. *Id.* at 230.

130. *Ibrahim v. United Kingdom*, App. Nos. 50541/08, 50571/08, 50573/08, and 40351/09 Eur. Ct. H.R. ¶¶ 14-17 (2016), <http://hudoc.echr.coe.int/eng?i=001-166680>.

131. *See id.* ¶ 16.

132. *See id.* ¶ 1. In 2014, a chamber of the court held that the complaints were admissible but denied relief. *See id.* ¶ 8. A reference to a en banc decision then occurred, which resulted in the decision of 13 September 2016 (seven or eight years after the original complaints were lodged with the court).

133. *See id.* ¶¶ 17-18.

134. *See id.* ¶¶ 234-38.

135. *See Ibrahim v. United Kingdom*, App. Nos. 50541/08, 50571/08, 50573/08, and 40351/09 Eur. Ct. H.R. ¶¶ 8-9 (2016) (Hajiyev, J. joint partly dissenting opinion).

136. *Ibrahim v. United Kingdom*, ¶¶ 182-184. This is referenced as the “new style caution” in the opinion. *Id.* That caution states: “You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court.

nor that one can be supplied without charge.<sup>137</sup> For three of the persons prosecuted after this modified warning, the jury was permitted to draw adverse inferences both from what was not said, as well as from the multiple lies that were told.<sup>138</sup> The jury was instructed that it should give consideration that no consultation with an advocate had taken place when it evaluated these matters, but both the trial court and the appellate court sustained the convictions as properly obtained.<sup>139</sup>

The court considered two primary questions: whether it was permissible to permit questioning under the new style caution, and whether results from statements so obtained could be admissible against the defendants.<sup>140</sup> On the matter of the second issue, the court's opinion referenced the decision of the 1984 United States Supreme Court in *New York v. Quarles*.<sup>141</sup> In that case, a "public safety" exception was created to the requirement that a defendant's statements obtained without a prior "Miranda" warning, and permitting the use of such statements at trial, as an exception from the normal rule barring such use.<sup>142</sup> This was seen as independent of the motivations of the individual officers involved when "reasonably prompted by a concern for public safety."

<sup>143</sup> The ECHR agreed with this position under its global fairness consideration.<sup>144</sup>

However, the court reached a different conclusion regarding the fourth defendant. That defendant was not one of the bomb makers, but rather was accused of aiding after the fact.<sup>145</sup> The police failed to make a lawyer available to that person after they concluded that he was potentially culpable of an offense, and also did not adequately warn the suspect.<sup>146</sup> However, unlike the three other defendants, there was no documentation of a public safety rationale by the police investigating that individual.<sup>147</sup> Consequently, the

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Anything you do say may be given in evidence." *Id.* ¶ 84. This new style caution was authorized by the Criminal Justice and Public Order Act 1994. *Id.* "Section 34 of the 1994 Act permits adverse inferences to be drawn by a jury where a defendant fails to mention during police questioning any fact relied upon in his defence in subsequent criminal proceedings." *Id.* ¶ 183.

137. *See id.* ¶ 184.

138. *See id.* ¶¶ 108, 183, 292.

139. *See id.* ¶¶ 126, 183, 292.

140. *See id.* ¶¶ 74, 76-77.

141. *Id.* ¶ 230 (citing *New York v. Quarles*, 467 U.S. 649 (1984)).

142. *See New York v. Quarles*, 467 U.S. 649, 655-56. (1984)

143. *Id.* at 656.

144. *See Ibrahim v. United Kingdom*, ¶ 294.

145. *Id.* ¶ 18.

146. *See id.* ¶¶ 139-40, 147-48, 155.

147. *See Ibrahim v. United Kingdom*, App. Nos. 50541/08, 50571/08, 50573/08, and 40351/09, Eur. Ct. H.R. ¶ 32 (2016), (Sajo, J. joint partly dissenting, partly concurring in opinion).

court found a violation of the suspect's right to remain silent and in restricting his right of access to an attorney.<sup>148</sup>

The remedy ordered, however, did not greatly assist that defendant because the court could not conclude that the conviction had been wrongful.<sup>149</sup> The court went on to reject any award of damages, although it did instruct that the applicant could make a submission to the Criminal Cases Review Commission in the United Kingdom to have the proceedings reopened.<sup>150</sup> The court did, however, order an award of 16,000 euros in costs.<sup>151</sup>

The United States case cited by the ECHR was not a case concerning terrorism, but rather involved an alleged rape, when within minutes of the incident the police were informed that the perpetrator had just gone into a supermarket and that he was carrying a gun.<sup>152</sup> The police entered the supermarket, and when the accused saw them, he ran towards the back of the store.<sup>153</sup> He was apprehended a short time later, but had no gun.<sup>154</sup> Without cautioning him, the police asked where the gun was.<sup>155</sup> He told them where he put it, and the gun was retrieved.<sup>156</sup> In the subsequent prosecution for criminal possession of the gun, both the weapon and the statement were suppressed.<sup>157</sup> The United States Supreme Court held that this suppression of evidence was improper because of the emergency nature of the situation as a "public safety" exception to the Miranda requirement.<sup>158</sup>

### Fear of Your Own Government: Overreaction to Terrorism

During World War II, the United States interned thousands of Japanese persons, both citizens and non-citizens, for fear of an invasion of the west coast of the United States. That was a clear overreaction, since it became known years later that the military did not believe such an invasion was possible.<sup>159</sup> The United States is not alone in overreacting to events that

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148. See *id.* ¶ 311. The court found a violation of Articles §§ 1 and 3(c). *Id.*

149. *Id.* ¶ 315.

150. See *id.*

151. *Id.* ¶ 318.

152. *New York v. Quarles*, 467 U.S. 649, 649 (1984).

153. *Id.*

154. See *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 659-60. The statement and the gun were both held admissible despite the New York court's ruling that evidence of the gun was inadmissible because it was the "illegal [fruit] of a *Miranda* violation." *Id.* at 660.

159. See, e.g., Hanson W. Baldwin, *The Myth of Security*, 26 FOREIGN AFF. 253, 263 (1948).

inspire fear. In the case of *Finogenov v. Russia*,<sup>160</sup> the ECHR considered the violent ending of a hostage event in a Moscow theater by the Chechen separatist movement. Over 900 hostages were taken and held for days at gun-point in the theater's auditorium.<sup>161</sup> The separatists had guns and explosives, intermixed eighteen suicide bombers with the hostages, and booby trapped the theater.<sup>162</sup>

After several of the hostages had been executed, an unknown narcotics gas was introduced into the theater, putting all inside to sleep, and the theater was stormed.<sup>163</sup> All eighteen suicide bombers were shot and most of the hostages were freed.<sup>164</sup> However, over 102 of the hostages died on the spot as a result of the operation, and 129 hostages died in all.<sup>165</sup> Many of the scantily clad hostages were piled face up outside in 1.8 degree weather and apparently suffocated as a result of their own vomit or tongues.<sup>166</sup> Medical treatment included injections of Nalaxone and "symptomatic therapy" (which included artificial lung ventilation).<sup>167</sup> The hostages were transported by ambulances or city buses to hospitals.<sup>168</sup> The Russian government characterized the most serious cases by the following symptoms:

[D]isorder of the central nervous system; impairment of consciousness, from torpor to deep coma; loss of tendon, pupillary and corneal reflexes; central breathing disorder with a frequency of 8-10 times per minute, as well as [manifestations] of mechanical asphyxia and airway and aspiration obstruction, [and] glotidospasm. These symptoms were accompanied by cyanosis of the visible parts of the airway mucus, and of the skin.<sup>169</sup>

According to the Russian government, seven of the 656 hostages who were hospitalized died; three of those deaths resulted from causes unrelated to the use of the gas.<sup>170</sup>

Many of the hostages rescued from the theater were barely clothed, so some may have simply died from exposure. In the end, Russian authorities estimated over 730 hostages were rescued alive.<sup>171</sup> A chief emergency doctor at one of the hospitals testified they were not informed about the gas used in

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160. *Finogenov v. Russia*, App. Nos 18299/03, 27311/03 Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-108231>.

161. *Id.* ¶ 8.

162. *Id.*

163. *Id.* ¶¶ 22-23.

164. *See id.* ¶¶ 22, 24.

165. *Id.* ¶ 24.

166. *Id.* ¶ 25.

167. *Id.* ¶ 26.

168. *Id.*

169. *Id.* ¶ 27.

170. *Id.* ¶ 29.

171. *See id.* ¶ 24 ("The exact number is unknown since, following their release, not all of the hostages reported to the authorities.").

the rescue operation, “but realized that the victims had been exposed to a narcotic gas and so decided to use Nalaxone as an antidote.”<sup>172</sup>

Prosecutors in Moscow opened a criminal investigation, examining the hostage situation at the theater.<sup>173</sup> A year after beginning their investigation, prosecutors decided not to pursue further questioning of the planning of the rescue operation and the conduct of the security forces.<sup>174</sup> The exact nature of the gas was never revealed to the investigators as a state secret (for national security reasons).<sup>175</sup> The investigation, however, concluded the hostage deaths were not directly caused by the unidentified gas, and instead were a result of a combination of factors, including physical and emotional conditions induced by prolonged captivity, as well as the unidentified gas.<sup>176</sup> Thus, “[a]s a result of the attack, [forty] terrorists were killed, either because they resisted and fired back at the special-squad officers, or because there was a real danger that they would activate the explosive devices which they had planted in the building.”<sup>177</sup>

A toxicologist specializing in chemical weapons examined the autopsy report for the son of an applicant to the court.<sup>178</sup> The toxicologist also reviewed various official reports, including a forensic histological study from November 2002, and a repeat study report.<sup>179</sup> He concluded the reports were contradictory, and pointed out the three autopsy reports, as well as the histological reports, all contained similar findings of chronic encephalitis and chronic meningitis.<sup>180</sup> The toxicologist “said these were very uncommon diseases, and it was a rare coincidence that three persons attending the same theatre on the same date suffered from them.”<sup>181</sup> In his report, the toxicologist noted there were no deaths for three days during the hostage situation, and then “scores [of deaths] within minutes” following the release of the gas, strongly implicating the gas in those subsequent deaths and disabilities.<sup>182</sup> The “multi-factor” findings in the official autopsy report reviewed by the toxicologist could not, in his opinion, have contributed to the victim’s death, because of an absence of changes in the body that would have been apparent; indeed, he concluded none of the “multi-factor” findings in the official report

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172. See *id.* ¶ 60.

173. *Id.* ¶ 30. At the time of its decision, the Court noted Russian authorities had apparently not concluded their investigation. *Id.* ¶ 103.

174. See *id.* ¶ 98.

175. *Id.* ¶ 101.

176. See *id.* ¶ 99.

177. *Id.* ¶ 100.

178. *Id.* ¶ 110.

179. *Id.* ¶ 112.

180. *Id.*

181. *Id.*

182. *Id.* ¶ 114

would have significantly affected the victim's chances of survival.<sup>183</sup> The toxicologist's report concluded the victim's death was "caused solely by an overdose of an opiate . . . received from an aerosol delivery during the special operation."<sup>184</sup>

Another participant in the rescue, an ambulance doctor, stated in an interview that medical responders were told to give the hostages injections of Nalaxone, but those hostages who already received the injections were not marked, and some of them had been given "two or three shots of Nalaxone, which is a fatal dose."<sup>185</sup> The doctor also said the bus drivers, who were mostly from outside of Moscow, did not know where to go.<sup>186</sup> According to him, when the first ambulance arrived at one hospital, "there had been nobody waiting to meet the ambulance team and dispatch the patients to the appropriate departments."<sup>187</sup> One person had been mistakenly identified as dead.<sup>188</sup>

Various individuals, including a member of parliament complaining directly to the prosecutor's office in charge of the investigation, lodged criminal complaints about the operation and its aftermath, but all were rejected by the Russian courts both at the first level and on appeal.<sup>189</sup> Civil complaints were also lodged with various district courts, but each of these complaints were dismissed, and the dismissals were all affirmed on appeal.<sup>190</sup>

The applicants complained in the ECHR "their relatives had suffered as a result of the storming conducted by the Russian security forces."<sup>191</sup> The ECHR examined the claims under Article 2 of the Convention, which deals with the right to life.<sup>192</sup>

Specific charges were made about the use of the gas in the operation. The applicants contended that the "former chief of the KGB military counter-intelligence department, warned in an interview during the siege that the use of the gas might cause human losses, especially amongst asthmatics and children."<sup>193</sup> The applicants also referred to the hostage-taking crisis in Peru in 1997 during which the use of gas was considered.<sup>194</sup> However "[t]he American authorities answered in the negative because the use of such a gas would require a simultaneous deployment of 1[,]000 doctors in order to

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183. *Id.* ¶ 111

184. *Id.* ¶ 114

185. *Id.* ¶ 116

186. *Id.*

187. *Id.*

188. *Id.*

189. *See id.* ¶¶ 120-42 (detailing procedural history of various criminal complaints).

190. *See id.* ¶¶ 145-55 (detailing procedural history of various civil complaints).

191. *Id.* ¶ 165.

192. *See id.*

193. *Id.* ¶ 171

194. *Id.* ¶ 172

provide quick medical assistance to 400 hostages.<sup>195</sup> Since it was not possible to “organi[z]e such massive medical assistance, the Peruvian authorities decided not to use the gas.”<sup>196</sup> The applicants also alleged that the press officer of the crisis cell had said that several of the terrorists had been arrested.<sup>197</sup> However, the allegation turned out not to be true, and it is assumed that the remaining terrorists either fled or were executed after arrest.<sup>198</sup>

The ECHR found it “unthinkable that 125 people of different ages and physical conditions died almost simultaneously and in the same place because of various pre-existing health problems[,]” particularly since none had died in the preceding three days of captivity, “despite prolonged food and water deprivation.”<sup>199</sup> The Court accepted that the authorities probably did not intend to cause the deaths of hostages or terrorists through the use of the gas.<sup>200</sup> Nevertheless, the court unanimously concluded that the investigation was not effective because it “was neither thorough nor independent,” which constituted a breach of the State’s obligation under Article 2 of the Convention.<sup>201</sup> The court also held that there was a violation of Article 2 in the inadequate planning and conduct of the rescue operation.<sup>202</sup> However, the court found that the decision to storm the theater did not violate Article 2.<sup>203</sup>

The court ordered compensation to sixty-three petitioners in amounts ranging from 8,800 to 66,000 euros.<sup>204</sup> The total non-pecuniary compensation exceeded 1.2 million euros.<sup>205</sup> The smallest compensation amount was for loss of a husband; the largest was to a hostage who lost her partner and daughter.<sup>206</sup> By United States standards these awards are modest amounts for loss of a life, but they are not unusually modest in the jurisprudence of the ECHR. Are they enough to account for the fear of government action in such situations? That is unclear.

The closest analogue to a siege in the United States involved the Branch Davidian cult. While attempting to enforce a search warrant for alleged sexual abuse charges and weapons violations, a siege ensued in which four Bureau of Alcohol, Tobacco, and Firearms agents were killed, sixteen injured, and

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195. *Id.*

196. *Id.*

197. *Id.* ¶ 174

198. *Id.*

199. *Id.* ¶ 201.

200. *Id.* ¶ 202.

201. *Id.* ¶ 282.

202. *Id.* ¶ 266.

203. *Id.* ¶ 226, (“[T]he authorities had every reason to believe that a forced intervention was the ‘lesser evil’ in the circumstances.”).

204. *See id.* (annex).

205. *See id.*

206. *See id.*

eighty-two Branch Davidians were killed – seventy-six in the final conflagration involving the use of tear gas and the destruction of the compound by fire.<sup>207</sup> Eventually eight Branch Davidians were convicted of weapons violations, five were convicted of aiding and abetting voluntary manslaughter, and four were acquitted on all counts.<sup>208</sup> Twelve Branch Davidians survived the fifty-one day siege.<sup>209</sup> None of the civil cases brought against the authorities were successful, and no case ever reached the Supreme Court on appeal.<sup>210</sup>

### Freedom of Religion

Relatively few cases regarding freedom of religion and terrorism have reached the highest courts. However, there have been a few of interest, including several cases in Europe regarding the wearing of headscarves. One such case is *Asma Bounaoui v. Micropole*.<sup>211</sup> The case came to the European Court of Justice on reference from the Cour de cassation of France for a preliminary ruling under the Treaty on European Union and Article 4 § 1 of Council Directive 2000/78/EC of November 27, 2000, “establishing a general framework for equal treatment in employment and occupation.”<sup>212</sup>

Ms. Boungaoui was discharged from employment when she wore an Islamic headscarf, which conflicted with the wishes of one of her employer’s customers.<sup>213</sup> The court considered “the right to freedom of conscience and religion enshrined in Article 10 § 1 of the Charter”, which included the right “to manifest religion or belief in worship, teaching, practice and observance.”<sup>214</sup> The court explained that “it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement.”<sup>215</sup> “Such a characteristic may constitute such a requirement only ‘by reason of the nature of the particular occupational activities concerned or of the context in which

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207. U.S. Dep’t of Justice, *Report to the Deputy Attorney General on the Events at Waco, Texas: The Aftermath of the April 19 Fire* (1993), <https://www.justice.gov/publications/waco/report-deputy-attorney-general-events-waco-texas-aftermath-april-19-fire>.

208. See *United States v. Branch*, 91 F.3d 699, 711 (5th Cir. 1996).

209. *Id.* at 710 XXX (need to check above the line to ensure it was 12 that survived)

210. See *Andrade v. Chojnacki*, 338 F.3d 448 (5th Cir. 2003), *cert. denied*, 591 U.S. 935 (2004).

211. Case C-188/15, *Boungaoui v. Micropole SA*, Judgment (Grand Chamber March 14, 2017).

212. *Id.* ¶¶ 1, 3 (The Treaty was “founded on principles of liberty, democracy, respect for human rights, and fundamental freedoms . . . as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . .”). xxx (maybe more in parenthetical)

213. *Id.* ¶¶ 14, 19.

214. *Id.* ¶ 29.

215. *Id.* ¶ 38 (citing recital 23 of Directive 2000/78).



they are carried out.”<sup>216</sup> These requirements “cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.”<sup>217</sup> “[T]he services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.”<sup>218</sup>

The court’s opinion was informed by an extensive opinion by Advocate General Sharpston, delivered on July 13, 2016.<sup>219</sup> The nuanced opinion concluded that the Directive “should be construed so as to recognize that the interests of the employer’s business will constitute a legitimate aim for the purposes of that provision. . . [and] [s]uch discrimination is nevertheless justified only if it is proportionate to that aim.”<sup>220</sup> In the jurisprudence of the European Court of Justice, which does not permit dissents, the opinion of an Advocate General is the closest analogue to a dissenting opinion from a United States court.

Advocate General Sharpston’s opinion references a decision of the Cour d’appel de Saint-Denis-de-la-Réunion which found unfair dismissal of an employee for wearing a headscarf, “which she had worn since the beginning of her employment and which had not caused any problems with the customers of the business with whom she was in contact.”<sup>221</sup> In contrast, the opinion referenced decisions of courts in Belgium, Denmark, and Netherlands, which upheld employers’ ability to discharge an employee because his or her dress conflicted with the commercial image of the business.<sup>222</sup> The Advocate General also pointed to the decision of the ECHR about wearing a discrete cross<sup>223</sup> and also considered whether the practice was mandatory in the religion (Sikh turban)<sup>224</sup> or optional (headscarf).<sup>225</sup> The opinion also noted that in certain European jurisdictions, restrictions on wearing religious apparel may be imposed for health and safety reasons or hygiene, but there may also “be a justification where the proper functioning of the business so requires.”<sup>226</sup>

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216. *Id.* ¶ 39 (citing Article 4 § 1 of Directive 2000/78).

217. *Id.* ¶ 40.

218. *Id.* ¶ 41.

219. Case C-188/15, *Bouguenou v. Micropole SA*, 2016 EUR-Lex CELEX LEXIS 553 (July 13, 2016) (opinion of Advocate General Sharpston).

220. *Id.* ¶ 135(2) (Conclusion).

221. *Id.* ¶ 42, n.32.

222. *Id.* ¶ 44, n.36.

223. *Id.* ¶ 33 (citing *Eweida and Others v. United Kingdom*, 2013-1 (extracts) Eur. Ct. H.R. 215, 257, <http://hudoc.echr.coe.int/eng?i=001-115881>).

224. *See Id.* ¶¶ 30, 33.

225. *See Id.* ¶ 32.

226. *See id.* ¶¶ 42-44.

In the United States, no similar case has risen to the level of the United States Supreme Court. The closest case is *Tinker v. Des Moines Independent School District*, in which the Court held that wearing a black arm band to protest the war in Vietnam was not grounds for suspending a public school student.<sup>227</sup> Most recently, Linda Tisby, a female jail employee, was fired for wearing a head scarf, and a New Jersey appellate court upheld the firing because of overriding safety concerns, the potential safety risk, and potential for concealment of contraband.<sup>228</sup>

However, one cannot ignore the travel bans adopted by President Trump for people from Muslim countries. In *Trump v. International Refugee Assistance Project*, the Supreme Court stayed the preliminary injunctions in two cases to the extent that they prevented enforcement of the 90-day or 120-day suspension of entry with respect to foreign nationals who lacked any bona fide relationship with a person or entity in the United States.<sup>229</sup> The cases were based, in part, upon an argument that the Establishment Clause of the First Amendment was violated in that the travel bans were concerned not with national security but with anti-Muslim bias.<sup>230</sup>

### Freedom of Speech

Free speech flourishes when unimpaired and unregulated. Government surveillance is anathema to free speech. Thus, government programs that monitor speech are most pernicious. Both in Europe and in the United States such programs exist. One program in Germany dates back to the allied occupation after WWII. The ECHR considered an aspect of a surveillance program in *Klass and Others v. Germany*.<sup>231</sup> The program was challenged as a violation of the right to private life, and whether it included adequate safeguards against abuse.<sup>232</sup> The court concluded after an elaborate analysis that there were adequate safeguards in general, but noted that the German Constitutional Court's judgment of December 15, 1970 required that the subject of surveillance be notified after surveillance has been terminated as soon as practical without jeopardizing the purpose of the surveillance.<sup>233</sup> In

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227. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 514 (1969).

228. *Tisby v. Camden Cty. Corr. Facility*, 448 N.J. Super. 241, 249, 152 A.3d 975, 981 (N.J. Super. Ct. App. Div., 2017).

229. *Trump v. International Refugee Assistance Project* 137 S. Ct. 2080, 2088 (2017).

230. *Id.* at 2084-85.

231. *Klass v. Germany*, App. No. 5029/71, 28 Eur. Ct. H.R. (ser. A) (1978).

232. *See Id.* at 16-23; *see also* Shoenberger, *Privacy Wars: EU versus US: Scattered Skirmishes, Storm Clouds Ahead*, 17 IND. INT'L & COMP. L. REV. 355, 370-73 (2007).

233. *Klass*, App. No. 5029/71, 28 Eur. Ct. H.R. (ser. A) ¶¶ 60, 58 (1978).)

that way, German citizens are able to scrutinize the conduct of their government, albeit after the fact when surveillance no longer was occurring.

In contrast, the U.S. Supreme Court in *Clapper v. Amnesty International USA*,<sup>234</sup> prevented such review by finding that attorneys, who claimed they were representing individuals who were subject to surveillance under the Foreign Intelligence Surveillance Act (FISA) were unable to raise a challenge to the Act because they had failed to demonstrate that future injury was certainly impending.<sup>235</sup> The attorneys alleged, inter alia, that they could not communicate electronically with persons who they were representing, who were often outside the United States, and thus were required to incur costs to travel outside the U.S. to confer with their clients.<sup>236</sup> The court concluded in a 5-4 decision that the plaintiffs lacked standing because harm was too speculative and they voluntarily incurred the travel expenses.<sup>237</sup> Instead of any examination of the constitutional propriety of the FISA program's substance in the face of First and Fourth Amendment challenges, the plaintiffs were barred from court. The contrast between the intense scrutiny of the German program by the ECHR and the U.S. Supreme Court's bar of the litigation could not be more sharp.

## Conclusion

Our examination of three of the freedoms from President Roosevelt's Four Freedom Speech (Freedom from Fear, Freedom of Religion, and Freedom of Speech) in times of terror lead to an uncomfortable set of comparisons. While religious freedom may be more recognized in the United States, it is quite unclear that free speech, particularly freedom from government surveillance, is as protected in the United States. With respect to freedom from fear, particularly fear of one's own government, the comparison is more complex. There are no examples of the use of brute force in the United States against terrorists that compare with the Russian episode in the theater siege. On the other hand, the United States' treatment of foreigners detained in Guantanamo Bay and elsewhere leave much to be desired. Recognition of a right to fair trial, with adequate representation by counsel, have certainly not been given great protection.

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234. 558 U.S. 398 (2013).

235. *Id.* at 408-409XXX (cited to syllabus and not decision)

236. *Id.* at 438 (Breyer, J. dissenting).

237. *Id.* at 422.