THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE IRISH CRIMINAL JUSTICE SYSTEM

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I. DEMOCRACY AND CRIME CONTROL

The dramatic events of the 11 September 2001 have forged, in the most painful way imaginable, a new, or perhaps a renewed, consciousness of fundamental matters. The immediate impact of the three doomed airplanes was a tragedy of death and destruction; hardly less immediately, they left in their wake a host of dilemmas as to how the United States and the international community should respond to this act of violence. In the international debate now taking place as to what responsive measures are appropriate, one can discern a number of themes. There is undoubtedly a strong and urgent desire for effective, deterrent, and retaliatory action. However, there is a strong counter-current that any action taken should be informed by certain basic imperatives of democratic society about how we treat people, what actions may be resorted to, and who to treat as responsible. In this great moral challenge of our times, we see a theme that is echoed at a more local level in every democracy racked by the problem of crime. Democracy is a certain type of society, built on the bedrock of certain types of individual freedom. Criminal behaviour threatens those freedoms. The paradox is, then, how to respond to criminal behaviour in a way that is effective and yet does not undermine the very freedoms that constitute the democracy itself. In seeking to protect democracy, we might destroy it. There is a tension between taking effective steps and taking morally acceptable steps; it is a tension between democracy and crime control.

This tension is fundamental to any modern criminal justice system in a democracy. It is real. It is not an abstract concept

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dreamed up from the comfort of a well-heated office. On the contrary, the framers of the European Convention on Human Rights and Fundamental Freedoms were inspired by the very real horrors witnessed during the first half of this century; we should give some serious reflection to the thought that they chose to respond to those horrors by constructing a Bill of Rights.

In Ireland, we are already much familiar with the difficulties created by the twin demands of crime control and justice. We have grappled with them for decades in the shadow of our own Constitution. What then, does the European Convention have to offer to us, assuming its provisions do come closer to home *via* the Human Rights Bill, in the near future? A comprehensive answer to this question is far beyond the scope of this article, and indeed, beyond this writer's expertise. But of course before we can even begin to analyse the effect of the Convention jurisprudence, we have to know what it is. Perhaps a good place to start is to look at how the Convention deals with small number of topics of key interest to Irish criminal lawyers. Through these examples, selected primarily for their topicality, I hope merely to give a flavour of the large and complex jurisprudence of the European Court in the area of criminal law.

II. PROSECUTION DISCLOSURE OF SENSITIVE INFORMATION TO THE DEFENCE

The issue of prosecution disclosure of sensitive information to the defence acutely reflects the tension between the fairness of trial procedures to the accused, on the one hand, and the need to maintain effective law enforcement, which includes protecting informers, on the other. In this area there are a number of recent European Court decisions of interest. This is of particular importance in light of our own recent attempts to deal with this complex and difficult issue, as evidenced for example in the Paul Ward case.[1] In this case, the prosecution wished to withhold from the defence a number of documents on the grounds of sensitivity and/or

[1] *Ward v. Special Criminal Court* {1998} 1I.L.R.M. 493 (S.C.)

danger to specific individuals arising out of disclosure of the documents. The Special Criminal Court put forward an option: that either the Court would be shown the documents and would rule on disclosure, or that the defence lawyers (but not their client) would be shown the documents. Subsequently the High Court and Supreme Court on appeal concluded that the latter option, driving a wedge as it did between the defence lawyer and his client, was not available as an option. The resultant position in this jurisdiction is therefore that there is judicial scrutiny of the relevant documents prior to a judicial decision on disclosure. We may note, for reasons that will become apparent, that this decision is undertaken in a context where the judicial authority making the decision has, at the time of the initial decision on disclosure, no knowledge of the defence that will be put forward at the trial.

The legal position in the United Kingdom on the issue of disclosure has in recent years been undergoing a process of evolution. Following the Judith Ward decision,[2] the Attorney General Guidelines on Disclosure of Information to the Defence in cases to be tried on Indictment, and, more recently the Crown Court (Criminal Procedure and Investigations) Act, 1996, the position may be summarised as follows:

> (i) in some cases, the defence are told what the category of information is and are given an opportunity to address the court in respect of whether disclosure should be ordered;
> (ii) in other cases, the defence are not told what the category of information is and the prosecution application is made *ex parte*; and
> (iii) in rare cases, where even to notify the defence that the application is being made would be too sensitive, the prosecution may apply *ex parte* to the Court without notice to the defence that the application is even being made.

These arrangements, at various stages of their evolution, have come under scrutiny by the European Court. The right to disclosure

[2] [1993] 1 W.L.R. 619 (C.C.A.).

of information in the possession of the prosecuting authorities is embedded in the right to a fair trial in Article 6(1) of the Convention. From this general principle, a number of subsidiary principles emerge from the jurisprudence. First, while there is a general right of disclosure pursuant to Article 6(1), this right of disclosure is not absolute and is subject to competing rights such as national security, the need to protect witnesses who are at risk of reprisals, and the need to keep secret police methods of investigating crime. Secondly, only such measures restricting the rights of the defence as are strictly necessary will be permissible. Thirdly, any difficulties caused to the defence by a limitation on its rights must be counterbalanced as far as possible by appropriate procedural measures.

It is perhaps important to emphasise that in such applications, the European Court does not attempt to second-guess the domestic court as to whether disclosure should have been ordered or not on the particular facts of the case. What is, however, of concern to the European Court is whether the procedures comply with the principle of equality of arms envisaged by Article 6(1). It may help to think of the Court's examination as being one directed to 'process' rather than 'outcome' in this context.

In *Rowe and Davis v. United Kingdom*[3] the European Court held invalid the "old regime" under which the prosecution alone decided whether or not to disclose materials, without any court intervention. Interestingly, the disclosure issue had been dealt with on appeal in the domestic courts, but the European Court held that appellate procedures were not sufficient to cure the defect in trial procedures, because the only court in a position to assess the question of disclosure meaningfully was the trial court. Similarly, in the more recent case of *Atlan v. United Kingdom*[4] the Court held that there had been a violation of Article 6(1) where the prosecution had failed to disclose the existence of certain information to the defence until after their convictions for drug smuggling and pending their appeals. Again the Court emphasised that the appellate attempts to remedy the defect in disclosure were too late as disclosure was a matter for the trial judge. Accordingly, the legal position in Ireland, insofar as

[3] (2000) 30 E.H.R.R. 1.
[4] European Court of Human Rights, unreported, 19 June 2001.

it provides for judicial intervention in the disclosure process, would appear to be a step in the right direction as far as the Convention is concerned. Whether some further steps are necessary is a question that may need to be addressed in the light of the following cases.

In the case of *Jasper v. United Kingdom*[5] (a drug smuggling case) the defence were not told what the category of information was, but were informed that an *ex parte* application would be made to the Court concerning the issue of disclosure. The defence were then allowed, at a separate hearing, to address the Court as to the nature of their defence. A bare majority of the European Court upheld this procedure as being within the parameters of Article 6(1). In *Fitt v. United Kingdom*[6] (an armed robbery case in which the police had been lying in wait for the accused), the defence were told, as regards one application, that the material related to sources of information, while as regards another application, that the category of information was too sensitive even to describe. The trial judge again heard separately from the defence as to the nature of the defence. These procedures were again upheld by a bare majority of the Court. In a recent decision, *P.G. and J.H. v. United Kingdom*[7] the Court held that there had been no violation of Article 6(1) where the trial judge had put questions to a prosecuting officer in chambers on oath concerning the obtaining of a covert listening device, although the defence were not permitted to be present at that application.

As we can see from the above cases, one method by which the procedural imbalance in sought to be recalibrated in favour of the defence is by means of the defence revealing to the trial judge what the defence is going to be. The concept of advance signalling of one's defence is already used in the United Kingdom for 'ordinary' disclosure, and therefore its employment in 'sensitive' cases is less controversial than might first appear. An alternative method of addressing the problem, discussed in the cases mentioned above is the use of a 'special counsel' who would be utilised only for the disclosure aspect of the case. Such a procedure has already been introduced in the United Kingdom in immigration, telephone interception and certain other cases. From the Convention

[5] (2000) 30 E.H.R.R. 441.
[6] (2000) 30 E.H.R.R. 441.
[7] European Court of Human Rights, unreported, 25 September 2001.

jurisprudence, therefore, one can see that a number of different models of dealing with the root problem are both possible and permissible, but there are certain minimum standards to be maintained.

III. THE RIGHT TO SILENCE

The right to silence presents recurring headaches for any criminal justice system seeking to reconcile the need for effective criminal law investigation, on the one hand, and the need to avoid resort to methods which undermine the basic rights of the individual, on the other. The right to silence issue arises in many forms, one of which is the model enabling adverse inferences to be drawn from a suspect's silence in the face of police questioning. There are a number of European Court decisions on this point. The overall position avoids extremes and opts for a middle ground.

Certainly, there is no complete ban on the use of inferences at the subsequent trial. The Court has held that the permissibility of drawing an adverse inference in a particular case depends on a number of factors, identified repeatedly by the Court as the particular situation in question, the weight attached to the inference by the national court when assessing the evidence, and the degree of compulsion inherent in the situation. The Court has also emphasised that a conviction should not be based solely or mainly on silence. However, it has said on a number of occasions that the right to silence should not prevent a person's silence, in situations that clearly call for an explanation from him, to be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. The question of the right to silence is also closely linked with the question of access to legal advice while in policy custody, as can be seen from the following cases.

In *Murray v. United Kingdom*[8] the Court held that, while the right to silence was at the heart of the process protected by Article 6, it was not an absolute right. It held that the drawing of an adverse inference was not prohibited in all circumstances, and each case

[8] (1996) 22 E.H.R.R. 29.

would depend on its own facts. In light of the facts of that case, and in particular the weight of evidence against the accused, it was not inherently unreasonable for the domestic trial court to draw an inference against the accused. However, the Court went on to hold that there was a violation of Article 6 in a different respect. The applicant had maintained silence both in police custody, before and after legal advice, and during trial. His access to legal advice while in police custody had been delayed for 48 hours. The Court held that where domestic legislation permits the drawing of inferences from a decision not to answer questions in policy custody, the right of access to a solicitor is of "paramount importance" such that a substantial delay on any ground will breach the right to a fair trial. Accordingly, while the drawing of an adverse inference per se did not violate Article 6 the denial of access to a lawyer in a situation where the inference might drawn from silence constituted such a violation.

In *Averill v. United Kingdom*[9] it was again held that the drawing of the inference in itself was not unreasonable or in breach of Article 6(1) on the facts of the particular case. Again, however, there was a violation of Article 6(1) insofar as his silence during a time prior to his having seen a solicitor had been relied on to draw an inference. Here the applicant's access to legal advice was delayed for 24 hours, a shorter period than in Murray. He continued to maintain silence during police custody after such legal advice, and only later gave evidence at his trial.

In contrast, in *Condron v. United Kingdom*[10] it was held that Article 6(1) had been violated because of the terms in which the trial judge had directed the jury about drawing inferences. In essence the flaw in the direction was that it enabled the jury to draw the adverse inference even if the jury were satisfied that the explanation for maintaining silence was plausible. Unlike *Murray* and *Averill*, which concerned terrorist crime, this was a drug smuggling case in which the applicants were heroin addicts. A doctor had declared them fit for interview, although they were showing symptoms of withdrawal, but their solicitor disagreed and advised them to remain silent in view of their condition. They maintained silence in custody and

[9] (2001) 31 E.H.R.R. 36; 8 B.H.R.C. 430.
[10] (2001) 31 E.H.R.R. 1; 8 B.H.R.C. 290.
[11] European Court of Human Rights, unreported, 11 May 2000.

subsequently gave evidence at the trial, not only as to their defence, but also as to their reason for silence in police custody, namely the advice of their solicitor.

It is interesting to note also that the Commission has declared inadmissible a challenge to the "inference provisions" of the Criminal Justice Act, 1984; see *Rock v. Ireland*.[11] This was on the basis that following an unsuccessful constitutional challenge to the provisions, the applicant had pleaded guilty; the Court will not review cases *in vacuo* where there has been not trial at which inferences were actually drawn. Clearly there will be no pronouncement from Europe that such statutory provisions are automatically in breach of the Convention; all depends on their application to the facts of a particular case.

A second aspect of the right to silence, distinct from the issue of drawing inferences from silence, is the issue of criminalizing silence during a police investigation. In this context, *Heaney and McGuinness v. Ireland*[12] and *Quinn v. Ireland*[13] are of significance. The Court held that a conviction for a refusal to answer questions pursuant to section 52 of the Offences Against the State Act, 1939 violated Article 6(1) in circumstances where the domestic law at the time of the refusal to answer was unclear as to whether an answer given under compulsion could be admitted into evidence at a criminal trial or not. At the time the applicants in these cases had refused to provide information, the Supreme Court decision in *Re N.I.B.*[14] had not yet been delivered. The terms of the European Court judgment appear to suggest that the use of section 52 now, *i.e.*, in the legal landscape post-*N.I.B.*, would not violate Article 6(1) given that the answers made could not be admitted into evidence at a criminal trial for another matter.

A closely related aspect of the right to silence is the use during a criminal trial of testimony that the accused supplied under compulsion in another forum *e.g.* a tribunal or a company law investigation. This was addressed in some detail in *Saunders v. United Kingdom*.[15] This celebrated case concerned the use in a criminal trial for illegal share-support arrangements of information

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[11] European Court of Human Rights, unreported, 11 May 2000.
[12] European Court of Human Rights, unreported, 21 December 2000.
[13] European Court of Human Rights, unreported, 21 December 2000.
[14] [1999] 3 I.R. 145 (H.C. & S.C.).
[15] (1996) 23 E.H.R.R. 313.

provided by the applicant, under legal compulsion, to DTI inspectors. The Court held that such use of the evidence, compulsorily obtained elsewhere, at his criminal trial was not permissible under Article 6(1). We have already seen the impact of this decision in the Supreme Court decision in *Re N.I.B.*[16] This area again illustrates the tension between a democracy's need for effective law enforcement and the repugnance for self-compelled criminal conviction referred to at the outset. While compelling testimony in a DTI investigation is permissible, using that testimony in a criminal trial is not. The respect for individual rights of expression, silence, autonomy and whatever other rights are engaged, must yield to some degree, but only so far. The line is drawn at criminal trials.

An interesting and extremely practical question following the *Saunders* and *N.I.B.* decisions is whether information "derived" from the compelled testimony, for example, by following up "leads" supplied by the testimony, can be used at a subsequent criminal trial. Neither the European Court nor the Irish Supreme Court has yet addressed this "derivative evidence" issue, although it has been discussed many times by the Supreme Courts of the United States and Canada. In light of the number of tribunals and investigative bodies currently operating with powers to compel testimony in Ireland, a determination of the law in this area must surely only be a matter of time and will have major repercussions for the prosecuting authorities.

IV. INTRUSIVE SURVEILLANCE

This might indeed be the topic that most exemplifies the dilemmas referred to at the outset of this talk. Clearly there is a very real risk that arbitrary or unrestricted use of intrusive surveillance techniques, done in the name of criminal investigations, could constitute a serious threat to fundamental democratic freedoms. As one might expect, there is a considerable European Convention jurisprudence in this area, particularly in the last decade: *Malone v. United Kingdom*;[17] *Huvig v. France*;[18] *Kruslin v. France*;[19] *Hewitt and*

[16] [1999] 3 I.R. 145 (H.C. & S.C.).
[17] (1985) 7 E.H.R.R. 14.
[18] (1990) 12 E.H.R.R. 528.
[19] (1990) 12 E.H.R.R. 547.

Harman v. United Kingdom;[20] *Valenzuela Contreras v. Spain*;[21] *Khan v. United Kingdom*.[22] Most of the cases have concerned telephone tapping, although one of the most recent cases, the *Khan* case, concerned the 'bugging' of premises in the course of an investigation into drugs offences. So far, the Court's main concern has been to ensure that States have detailed and publicly accessible procedures concerning the use of this type of investigative method. This does not mean, of course, that a person is entitled to notice of his being the object of intrusive surveillance, but rather whether in general terms domestic law adequately regulates matters such as the type of offence in respect of which the surveillance might be used, the categories of persons who might be targeted, the duration of the surveillance, and the destruction of records, particularly after the discharge or acquittal of the person concerned.

The law of a significant number of countries has been found to fall short of Convention standards in this area, including the United Kingdom, France, Switzerland and Germany. The United Kingdom, for example, has enacted at least six major pieces of legislation since 1984 to respond to European Court judgments in this area. The most recent piece of legislation introduced by Ireland would appear to be the Interception of Postal Packets and Telephonic Communications Act, 1993, which amends the Postal and Telecommunications Services Act, 1983. One would have to have serious doubts that this sole piece of legislation meets the stringent and comprehensive requirements laid down by the European Court in this area.

V. MEDIA REPORTING OF CRIMINAL TRIALS

Turning to a different kind of conflict between democratic principles and criminal justice, the Convention has some interesting things to say about media reporting of and about criminal trials and criminal investigations. The Convention posits a balancing of rights of freedom of expression and right to a fair trial similar to that

[20] (1992) 14 E.H.R.R. 657.
[21] (1999) 28 E.H.R.R. 483.
[22] (2001) 31 E.H.R.R. 45; (2000) 8 B.H.R.C. 310.

necessitated by Ireland's domestic Constitutional provisions. In recent years, this conflict of rights has been increasingly put to the test by an increased hunger on the part of the media to exercise its rights to report, comment and photograph in relation to criminal trials to the fullest extent possible, and perhaps even beyond. Increasingly in Ireland we are witnessing the phenomenon of media organs making representation to criminal courts concerning the extent of permissible coverage of individual trials.

Convention jurisprudence may be helpful in this regard, particularly the formulation of the relevant test, which is whether the relevant restriction on freedom of expression is necessary in a democratic society, the phrase 'necessary' encompassing the concepts both of legitimacy of aim and proportionality of measure. An application of this test can be seen in the interesting decision in *News Verlags v. Austria*[23] which presents an interesting foil to the decision of Carroll J. in the Catherine Nevin trial. Both cases feature a trial judge issuing a total prohibition to the print media on the publication of photographs of an accused standing trial. At issue in *Newsverlags* was a court prohibition on the publication of any photographs of a suspect who was being tried in respect of a letter bomb campaign. Both the individual and the event were notorious, and some of the media comment was very far-reaching. However, the Court held that while a combination of photographs and text had interfered with the suspect's rights to a fair trial, a restriction banning all photographs was a disproportionate measure and therefore violated Article 10. In addition to this excellent demonstration of the strength of the proportionality test, this case contains an interesting statement of principle by the Court concerning editorial freedom and what aspects of this freedom Article 10 of the Convention protects.

VI. PROTECTION OF WITNESSES

In a democratic society, one would expect that it is not only the rights of the accused that are respected in the criminal justice system.

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[23] (2001) 31 E.H.R.R. 246; 9 B.H.C.R. 625.

After all, it is the rights of ordinary citizens that the criminal justice system seeks ultimately to protect. Some commentators believe that the Convention jurisprudence actually, and potentially, offers better protection to witnesses and victims of crime than traditional common law systems. Indeed, the Court in *Van Mechelen v. Netherlands*[24] specifically referred to rights of witnesses/victims as attracting the protection of certain Convention rights. On the other hand, it may be that the Convention jurisprudence here in particular shows the influence of civil law procedures and concepts concerning the limits of the accused's right to a fair trial, and in particularly the necessity for oral evidence and confrontation by way of cross-examination of a witness. In other words, it may not be a particularly pro-victim slant but rather a different conception of what fair trial procedures require.

One can see that a variety of 'pro-witness' factors are seen as legitimate reasons why a witness may not have given evidence in the usual way, including (a) fear of reprisals in *Doorson v. Netherlands*[25] (where the court held that the trial was not unfair when two prosecution witnesses remained anonymous and were questioned by the judge in the presence of counsel, but not the accused); (b) reluctance to testify in a domestic violence case in *Asch v. Austria*;[26] and (c) physical or mental condition. Where such factors are present, the eliciting or presentation of a witness' evidence other than in the usual oral adversarial form may be permitted.

However, these witness considerations are not dominant, and the Court will weigh them in the balance with other factors, such as the degree to which the conviction was based on the specific evidence of that witness and the degree to which the restriction of the rights of the defence were counterbalanced by other protective measures. So, for example, in *Kostovski v. Netherlands*[27] the conviction was based "to a decisive extent" on the statements of two anonymous witnesses who gave evidence but who neither the defendant, nor defence counsel, nor the trial judge was able to observe. The defence were allowed to submit questions to a magistrate who then put them to the witnesses, but this was held insufficient to counterbalance the

[24] [1998] 25 E.H.R.R. 647.
[25] (1996) 22 E.H.R.R. 330.
[26] (1993) 15 E.H.R.R. 597.
[27] (1990) 12 E.H.R.R. 434.

unfairness of the procedures. In contrast, in *Doorson* above, where there was held to be no violation of Article 6, the evidence in question was considered to be "not decisive". More recently, in *Van Mechelen v. Netherlands*[28] the trial was held to be unfair where eleven anonymous police officers gave evidence for the prosecution in a room separate from the court but connected by sound link, with the questioning being done by the judge only. Again a relevant consideration was a fear of reprisals, but ultimately the procedures were held to be unfair to the accused.

VII. THE MENTALLY ILL OFFENDER

A somewhat different aspect of the tension between crime control and democratic freedoms arises in the context of the mentally ill offender. Here, there is always a serious danger that the emphasis on protecting the public from a person perceived as dangerous will result in that person being short-changed regarding his rights, particularly the right to liberty. The leading European Court decision on the detention/hospitalisation of the mentally ill is *Winterwerp v. Netherlands*.[29] The principles set out in this seminal judgment must cause serious concern that Ireland is in serious breach of the Convention as regards both the insanity defence and the issue of fitness to plead in criminal trials. The *Winterwerp* principles include the following requirements:

(a) there must be a proper test of insanity, which is flexible and closely linked with current psychiatric concepts;
(b) there must be a proper consideration, at the time of detention, of whether there is a need for such detention/hospitalisation;
(c) there must be provision for periodic review of such detention/hospitalisation;
(d) the test operated by the review body must be whether the conditions which warranted the original detention continue to exist;

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[28] (1998) 25 E.H.R.R. 647.
[29] (1979) 2 E.H.R.R. 387.

(e) the procedures operated by the review body must be fair to the detainee;
(f) the review body must be sufficiently independent to have the power to order the release of the person if the previous condition is no longer satisfied; and
(g) reviews must be dealt with speedily.

Without setting out a litany of possible shortcomings in this area of the criminal law, suffice it to say that many, if not all, of the *Winterwerp* requirements are ignored by seriously outdated Irish legal provisions concerning fitness to plead and insanity.

VIII. POSITIVE DUTIES IMPOSED ON CONVENTION STATES

Perhaps one of the most interesting aspects of Convention jurisprudence is that in addition to imposing negative obligations on States to restrain from interfering with Convention rights, it also places certain positive burdens on States to respect and vindicate Convention rights. As has been seen from a number of the above areas, it is not only when a domestic law positively conflicts with Convention rights that there will be a problem, but also where a domestic law is found lacking by failing to measure up to Convention standards. These positive obligations are particularly onerous as regards rights under Article 2 (right to life) or Article 3 (freedom from torture, and inhuman or degrading treatment). The steps required of States can range from creating criminal law offences, circumscribing defences to existing criminal law offences, various procedural steps within the criminal justice process, and maintaining adequate models of official investigation or inquiry to address alleged violations of Convention rights.

In *X. and Y. v. Netherlands*[30] the Court found the Netherlands to be in breach of Article 8 where a lacuna in the law prevented a criminal prosecution from being brought on behalf of a woman who was mentally impaired and who complained of being raped. Here the substantive criminal law was "inadequate" rather than "in

[30] (1985) 8 E.H.R.R. 235.

conflict" with Convention rights. In *A. v. United Kingdom*[31] the U.K. was found to have violated Article 3 when a jury acquitted a stepfather of assaulting his stepson, on the basis that if the law (which included the defence of reasonable chastisement) permitted an acquittal in circumstances which, in Convention terms, amounted to inhuman and degrading treatment of the boy, the domestic legal protection of the boy's rights was inadequate. This case illustrates in particular that potential breach of Convention rights may be lurking in the range or scope of defences as distinct from offence-definition in the more conventional sense. The case of *McCann v. United Kingdom*[32] arose out of the shooting in Gibraltar of three I.R.A. suspects. The court emphasised that the appropriate test where the State is alleged to have been responsible for killing citizens is one of 'absolute necessity' rather than 'necessary in a democratic society', the less rigorous test under Articles 8 to 11. This might well have implications for Irish domestic law of homicide, at least in cases where the State is involved. In addition, the Court examined the planning of the operation in question as well as the actions on the ground of the officers who actually carried out the killing, thus adopting a broadly focused inquiry. The court held that while the soldiers themselves had not violated Article 2, because on the information given to them they had good reason for the beliefs that led them to fire the shots, the Government had violated Article 2 through a failure to ensure that the operation was planned so as to minimise the risk of death. Accordingly the case contains discussions of a number of different positive obligations imposed on States, including the parameters of defences and the questions of "system" response to infringements or potential infringements of basic human rights.

In *Osman v. United Kingdom*[33] there had been some warning signs that a teacher who had become infatuated with a pupil could constitute a danger to the pupil; in the event, he shot and killed the boy's father at their home, and injured the boy. Although on the facts the Court held that the police response to the threats was not so inadequate as to involve a breach of Article 2, it is interesting to note

[31] (1999) 27 E.H.R.R. 611.
[32] (1996) 21 E.H.R.R. 97.
[33] (2000) 29 E.H.R.R. 245; [1998] E.C.H.R. 23452/94.

the Court's willingness to engage in a review of the police operation in question. The appropriate test, regarding appropriate police response, was whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party. However, the Court acknowledged that any preventive measures taken must have due regard to the rights of others who may be affected, and that police powers must be exercised in a manner which respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice. In this case, the police could not be criticised for failing to arrest the individual, because the evidence did not satisfy the test of suspicion that would have been required for a valid arrest. The Court went on to find that there had been a violation of Article 6 on the basis that access to the courts had been denied. The family had brought a civil action in the courts against the police, but this had been refused on the ground of a total immunity against negligence suits. The Court held that such a complete immunity was not sustainable. This case well illustrates the complexities of reconciling and balancing the different rights at issue in such a situation.

More recently, in *Kelly v. United Kingdom*[34] the Court considered the range of official responses and investigations into killings by agents of the State in a case where no prosecution ensued. The Court identified the necessary characteristics of an acceptable form of investigation following a killing by agents of the State as being (a) independence of the inquiry, together with (b) the capability of the inquiry to lead to a determination whether the force used was justified, and therefore to the identification and punishment of those responsible. Here, the police investigation was criticised for lack of sufficient independence; the decision not to prosecute was accompanied by, in the view of the Court, a wrongful lack of public scrutiny and information for the next of kin as to the reasons of the D.P.P. not to prosecute; and the inquest procedure was held to be defective in a number of respects.

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[34] European Court of Human Rights, unreported, 4 May 2001.

Such cases illustrate that states need to be wary of inaction as much as action, as the obligations placed upon them by the Convention, as interpreted by the European Court, can be of a complex and affirmative nature, and are not satisfied by a simple non-interventionist approach.

IX. CONCLUSION

Given that we already protect fundamental rights under the Constitution of Ireland and given that there are existing obligations under international law on Irish courts to have regard to Convention law, some commentators would see the rapprochement of Convention jurisprudence, through the mechanisms in the Human Rights Bill as currently formulated or otherwise, as unlikely to have any major impact on Irish criminal law. Time alone will tell, although my own feeling is that this important legal development will have significant effects in the long run. Although there are specific areas where human rights within our criminal justice system would be strengthened by the direct application of Convention law, more generally I would see general and transforming effects being diffused or permeated in a more subtle way throughout the system as a whole. One message that came through the Convention jurisprudence loud and clear for me, as an Irish criminal lawyer, was that respecting human rights in an effective criminal justice system is complex, difficult and requires ongoing serious commitment. There are no simple answers and there is no running away from these issues. The more frequently we remind ourselves that this is so, the better. After all, it is our democracy itself that is at stake.