

Kurdish Human Rights Project

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LEGAL REVIEW

Kurdish Human Rights Project

**KHRP**

Established 1992

(2010) 18 KHRP LR







## **The Kurdish Human Rights Project**

The Kurdish Human Rights Project (KHRP) is a UK registered charity committed to the promotion and protection of the human rights of all persons living within the Kurdish regions. Its innovative and strategic approach to international human rights practice, combined with a long-term and consistent presence in the region, enables it to secure redress for survivors of human rights violations and prevent abuse in the future.

### **AIMS**

- To raise awareness of the human rights situation in the Kurdish regions of Iran, Iraq, Syria, Turkey and the Caucasus;
- To bring an end to the violation of the rights of everybody who lives in the Kurdish regions;
- To promote the protection of the rights of Kurdish people wherever they may live; and
- To eradicate torture both in the Kurdish regions and across the globe.

### **METHODS**

- Monitoring legislation and its application;
- Conducting investigations and producing reports on the human rights situation of Kurds in Iran, Iraq, Syria, Turkey, and in the countries of the former Soviet Union by, amongst other methods, sending trial observers and engaging in fact-finding missions;
- Using such reports to promote awareness of the plight of the Kurds on the part of committees established under human rights treaties to monitor compliance of states;
- Using such reports to promote awareness of the plight of the Kurds on the part of the European Parliament, the Parliamentary Assembly of the Council of Europe, national parliamentary bodies and inter-governmental organisations including the United Nations;
- Liaising with other independent human rights organisations working in the same field and co-operating with lawyers, journalists and others concerned with human rights;
- Assisting individuals with their applications before the European Court of Human Rights; and
- Offering assistance to indigenous human rights groups and lawyers in the form of advice and training seminars on international human rights mechanisms.



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## Abbreviations

CESCR	Committee on Economic Social Cultural Rights
CoE	Council of Europe
CPCS	Commission on the Prosecution of Civil Servants
CPJ	Committee to Protect Journalists
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
KHRP	Kurdish Human Rights Project
KRG	Kurdistan Regional Government
LTTE	Liberation Tigers of Tamil Eelam
OSCE	Organisation for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PKK	Kurdistan Workers' Party
UNHCR	United Nations High Commissioner on Refugees



# Relevant Articles of the European Convention on Human Rights

Article 1:	Obligation to respect human rights
Article 2:	Right to life
Article 3:	Prohibition of torture and ill-treatment
Article 4:	Prohibition of slavery and forced labour
Article 5:	Right to liberty and security
Article 6:	Right to fair trial
Article 7:	No punishment without law
Article 8:	Right to respect for private and family life
Article 9:	Freedom of thought, conscience and religion
Article 10:	Freedom of expression
Article 11:	Freedom of assembly and association
Article 12:	Right to marry
Article 13:	Right to an effective remedy
Article 14:	Prohibition of discrimination
Article 35:	Admissibility criteria
Article 38:	Examination of the case and friendly settlement proceedings
Article 41:	Just satisfaction to the injured party in the event of a breach of the Convention
Article 43:	Referral to the Grand Chamber
Article 44:	Final judgments

## **Protocol No. 1 to the Convention**

Article 1:	Protection of property
Article 2:	Right to education
Article 3:	Right to free elections

## **Protocol No. 4 to the Convention**

Article 2:	Right to freedom of movement and liberty to choose one's residence
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## **Protocol No. 6 to the Convention**

Article 1:	Abolition of the death penalty
Article 2:	Death penalty in time of war
Article 3:	Prohibition of derogations
Article 4:	Prohibition of reservations

**Protocol No. 7 to the Convention**

- Article 1: Procedural safeguards relating to expulsion of aliens
- Article 2: Right of appeal in criminal matters
- Article 3: Compensation for wrongful conviction
- Article 4: Right not to be tried or punished twice

**Protocol No. 11 to the Convention**

- Article 19: Establishment of the Court
- Article 20: Number of judges
- Article 21: Criteria for office
- Article 22: Election of judges
- Article 23: Terms of office

**Protocol No. 12 to the Convention**

- Article 1: General prohibition of discrimination

## Section 1: Legal Developments and News



## Criticism of extreme penalties for stone-throwing children

Earlier this year, the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, severely criticised Turkey's practice of prosecuting minors for participating in alleged terrorist demonstrations in south-east Anatolia, saying the Government's treatment of children who throw stones violates international standards.

The issue of children being subjected to severe sentences for throwing stones at police forces during demonstrations in south-east Anatolia has been on Turkey's agenda for some time. Following criticism that children were being tried as adults, the Government had intended to amend the relevant law to reduce the applicable penalties but had to shelve the bill in the wake of increasing perceived terrorist uprisings and protests in the region.

However, in July 2010, the bill was finally approved, with the new law reducing or waiving jail sentences for young people convicted of throwing stones at police during demonstrations. Although penalties have since been reduced, criticism of penalties towards children and of their access to justice still remains.

## UN creates single entity to promote women's empowerment

The UN General Assembly voted unanimously on 2 July 2010 to create a new entity merging four UN offices focusing on gender equality. The new UN Entity for Gender Equality and the Empowerment of Women, to be known as UN Women, will merge four existing agencies and offices: UN Development Fund for Women (UNIFEM); the Division for the Advancement of Women (DAW); the Office of the Special Adviser on Gender Issues; and the UN International Research and Training Institute for the Advancement of Women (UN-INSTRAW).

UN Women is the result of years of negotiations among Member States and advocacy by the global women's movement. Set to become operational in January 2011, it aims to 'drive the world's efforts to promote women's rights,' with an annual budget of at least US\$500 million – double the current combined resources of the four entities it will consolidate.

One of its primary responsibilities is to support the Commission on the Status of Women (CSW) and other inter-governmental bodies in devising policy. The new body is also meant to help Member States implement relevant standards, provide technical and financial support to countries which request it, and forge partnerships with civil society. It will also hold the UN accountable for its own commitments on gender equality.

## Annual OSCE, UN and CoE meeting: Gender and Comprehensive Security focus

During a meeting on 14 June 2010 between the OSCE, the Council of Europe (CoE) and the UN, the OSCE Secretary General, Marc Perrin de Brichambaut, confirmed that achieving peace and stability requires the equal inclusion of both women and men. Gender and comprehensive security was the topic of the annual tripartite meeting. The OSCE, the UN and the CoE issued a Joint Communiqué that reaffirmed the vital role of women in the prevention and resolution of conflicts, in peacemaking, and in the promotion of sustainable peace and security.

## EU accession to the ECHR

On 6 July 2010, official talks began on the EU's accession to the ECHR.

'The European Convention on Human Rights is the essential reference for human rights protection for all of Europe. By accepting to submit the work of its institutions to the same human rights rules and the same scrutiny which apply to all European democracies, the European Union is sending a very powerful message – that Europe is changing – and that the most influential and the most powerful are ready to accept their part of responsibility for that change and in that change', said the Secretary General of the CoE Thorbjørn Jagland.

With accession, the EU will become the 48<sup>th</sup> signatory of the ECHR, and will place the EU on the same footing as its Member States with regard to the system of fundamental rights protection supervised by the ECtHR in Strasbourg. It will allow for the EU's voice to be heard when cases come before the ECtHR and the EU will also have the opportunity to nominate a judge at the ECtHR. Accession will provide a new possibility of remedies for individuals regarding violations of the ECHR by the EU.

## Media freedoms under threat in OSCE States

In her first report, the new OSCE representative of freedom and media releases, Dunja Mijatovic, had stated that media freedoms, whilst improved in certain circumstances, still remain a problem in many OSCE states. In particular, Turkey continues to violate the right to freedom of expression by detaining journalists as well as placing a ban on Google, YouTube and other related services.

Access to the video-sharing site YouTube has been banned in Turkey since May 2008, with the ban based on the law relating to Internet crimes. Although the ban was lifted in October 2010, it was reinstated in November 2010, and extends to Google services such as email, documentation and translation.

In December 2009, the Society for Internet Technology, based in Ankara, lodged an application with the ECtHR challenging the YouTube blocking order issued by Ankara's First Criminal Court of Peace. In a joint statement published on 22 June 2010, 36 institutions, organisations and initiatives protested against the Internet access ban. The statement pointed to the fact that Internet censorship violates freedom of thought and the right to access information, leading to economic disadvantage, and demanded that Law 5651 be retracted. It also noted that the ban breaches international agreements as well as the Turkish constitution.

## Lack of human rights progress in Syria

NGOs are marking President of Syria Bashar al-Assad's ten years in power by highlighting his lack of progress in respect of human rights.

Human Rights Watch (HRW) published the report 'A Wasted Decade', which highlights Syria's failure to meet basic human rights demands. Even though President al-Assad spoke about the need for 'constructive criticism', 'transparency' and 'democracy' in his inaugural address in 2000, there has been little real change to the human rights situation in the country. In its

report, HRW urges President al-Assad to, among other things, stop government censorship of local and foreign publications, and to remove government control over newspapers and other publications. Further, in an open letter to President al-Assad, the Committee to Protect Journalists (CPJ) has urged him to ensure the amendment of Syria's press law and to end the use of anti-state provisions in the Penal code against journalists. Of particular concern to the CPJ is the fact that journalists are often charged on the basis of loosely worded provisions in the Penal code.

Lord Avebury recently spoke on behalf of KHRP at a seminar at the UK House of Commons on the increased and ongoing repression of Kurds in Syria over the last three years.

## Journalists under pressure from Kurdish Regional Government

There are increasing reports of intimidation of journalists in the Kurdistan Region of Iraq. Recently, the Committee to Protect Journalists issued a report concerning threats against journalists connected with criticism of Mustafa Barzani, the father of the current president of the KRG, Masoud Barzani, and leader of the Kurdistan Democratic Party (KDP). In addition it has been reported that several government officials have made defamation charges against journalists. Further, the UN Assistance Mission for Iraq has documented eight separate incidents of 'journalist[s] arrested or harassed by governmental authorities in Erbil, usually following the broadcast of material perceived to be critical of the government or allegedly against public moral'.

## Police officers accused of beating and arresting journalist in Turkey

After taking pictures of police officers beating a child in Nusaybin in south-east Turkey, journalist Vahap İş claims he was beaten and arrested by the police.

The incident happened during a demonstration on 25 July 2010 concerning the alleged torture of now dead members of the PKK. While documenting the beating of a child with his camera, the journalist was confronted by the police and asked to hand over his footage. As he refused to do so without being ordered to do so by a prosecutor, several police officers took him into a side street. He claims that they hit and kicked him, also breaking one of his fingers in order to make him let go of the camera. He was then taken to the District Police Directorate. The journalist has now filed a complaint at the prosecutor's office against the police officers involved.

The incident highlights the difficult working conditions for Turkey's journalists. According to figures from the International Press Institute's Turkish National Committee, 40 Turkish journalists are currently imprisoned awaiting trial. In addition, 700 journalists are facing lawsuits under the Penal code, press laws and Anti-Terror laws, contributing to restrictions on free speech in Turkey.

## Freedom of expression in Azerbaijan

Freedom of expression remains one of the most pressing human rights issues in Azerbaijan today, with journalists and bloggers frequently facing violence and imprisonment by the authorities on the basis of their expression of critical opinion.

The Council of Europe Commissioner for Human Rights, Thomas Hammarberg, visited Azerbaijan between 1-5 March 2010, one of the main reasons for the visit being to evaluate the enjoyment of the right to freedom of expression. He took note of the concerns expressed by various interlocutors regarding recent changes to the legislative framework, which could have a negative impact on journalists' activities. Relevant issues also include the decriminalisation of defamation – an essential step for the protection of freedom of expression – and the need to ensure that criminal law provisions are not applied selectively against journalists or other persons due to the views or opinions expressed by them.

In a recent statement, the Secretary General of the CoE, Thorbjørn Jagland, reiterated that 'the authorities should very critically review their attitude towards media and civil society and public criticism in general, and bring it in line with their obligations as a member of the Council of Europe and a party of the European Convention on Human Rights. The freedom of expression is a vital precondition of democracy. Without it there is no freedom, no creativity, no good ideas, no good solutions and no social progress.'

Ahead of the 7 November 2010 parliamentary elections in Azerbaijan, the NGO *Article 19* has launched a new report on freedom of expression in the country, which analyses trends and cases of concern from the perspective of freedom of political expression.

## British Government launches torture inquiry

In an announcement made on 6 July 2010, the UK Prime Minister David Cameron said that the Government would be making an inquiry into torture allegations. He insisted that the inquiry could not restore the reputation of the British security services unless its findings are made public, and that the inquiry must address the official policy under which the intelligence agents were working.

The inquiry into the allegations of torture complicity by the British intelligence services will be judge-led, and will look at the official policy and rules under which British agents were operating. Although a new version of the rules has been published, the Government has refused to publish the old rules, suggesting the possibility that some of the policies were illegal.

## Ban on burqa-wearing in public

On 23 June 2010, the Parliamentary Assembly of the Council of Europe (PACE) said that there should be no general prohibition on wearing the burqa and the niqab or other religious clothing, though it added that legal restrictions may be justified 'for security purposes, or where the public or professional functions of individuals require their religious neutrality, or that their face can be seen.'

France is one of the first European countries to ban the wearing of the full-face veil in public despite the unanimous opposition from PACE. The proposed law prohibits the wearing, anywhere in public, of any form of clothing intended to conceal one's face. There are estimated to be about 2,000 women wearing the full veil in France and the law is opposed by many of France's five million Muslims.

The Council of State, France's highest administrative body, warned in March 2010 that the law could be found unconstitutional. If the bill passes the Senate in September, it will be sent immediately to France's Constitutional Council watchdog for a ruling.

## **CESCR List of Issues regarding Turkey**

During its meeting from 25-28 May 2010, the Pre-Sessional Working Group of the CESCR drew up a list of issues to be taken up in connection with the initial report on Turkey, concerning articles 1-15 of the ICESCR.

In relation to the general framework in which the ICESCR is implemented, the Working Group noted that, according to information provided by Turkey, the ICESCR has direct effect in its domestic legal order.

The Working Group requested information about the protection of national, ethnic and religious minorities from discrimination, as well as disaggregated data on the results achieved in respect of groups addressed in the 1923 Treaty of Lausanne and other minorities. The Working Group also asked for information about the positive measures taken by the Turkish Government to accelerate women's participation in public life. It raised issues of gender equality and the measures taken by the Government to combat gender based violence and honour killings. In particular the Working Group requested specific information on whether or not these acts, and spousal rape, are criminal offences under domestic legislation in Turkey.



## Section 2: Articles

The opinions expressed in the following articles are those of the authors and do not necessarily represent the views of KHRP.



John R. Crook<sup>1</sup>

## The Abyei Arbitration: A Model for Other Situations?

### Abstract

*This comment offers some reflections on the 2009 arbitration between the Government of Sudan and the Sudan People's Liberation Movement/Army regarding the boundary of the Abyei region as a possible model for other situations involving territorial or other disputes between a state and a constituent region or people. The comment summarizes the origins of the Abyei dispute and the conclusions reached by the arbitral tribunal. It then considers the advantages and limitations of resorting to third party settlement based on legal principles in such a dispute. The Abyei arbitration shows that, with mutual agreement and large expenditures of effort and money, a state and a constituent region or people can seek to resolve some types of questions by referring them to a third party for binding decision. However, the case also shows the limitations of these processes. Not every question is susceptible to legal resolution. And, each party must be truly committed to seeing the process through, including the risk that it might not win.*

### INTRODUCTION<sup>2</sup>

This comment offers some reflections on the 2009 Abyei arbitration as a possible model for other situations involving territorial or other disputes between a state and a constituent region or people.

States often use litigation or arbitration<sup>3</sup> in forums like the International Court of Justice<sup>4</sup> and the Permanent Court of Arbitration (PCA)<sup>5</sup> to settle disputes between them. There is a rich tra-

1 Professorial Lecturer in Law, George Washington University Law School.

2 Parts of this comment originally appeared in Volume 48, Issue No. 6 of *International Legal Materials* and Volume 13, Issue No. 15 of *ASIL Insights* and are reproduced with permission from the American Society of International Law© 2010. All rights reserved.

3 Both litigation and arbitration involve referring a dispute for binding resolution by an independent and impartial third person or body. Litigation involves the settlement of a dispute utilizing courts and procedures established by a state or -- in the case of international courts -- by treaty or action by the United Nations Security Council. Arbitration is based on the consent of the parties to a dispute, and gives them substantial autonomy to create by agreement the forum and procedures for resolving the dispute.

4 See <http://www.icj-cij.org>. The International Court of Justice's jurisdiction in contentious cases is limited to disputes between states.

5 See <http://www.pca-cpa.org>. The Permanent Court of Arbitration provides services to support arbitrations involving various combinations of states, state entities, intergovernmental organizations, and private parties.

dition of using these processes to settle disputes between states over land or maritime boundaries, and the number of such cases is growing, particularly as states seek to determine the limits of their respective exclusive economic zones. These processes are also used at the sub-state level. In federal states like the United States, territorial, environmental and other disputes between constituent entities in the federation can be addressed through the national court system.<sup>6</sup> In recent years in Canada, a dispute between provinces over maritime jurisdiction was resolved through arbitration between them.<sup>7</sup>

However, there have been few uses of litigation or arbitration to address significant legal issues between states and their constituent regions or peoples. The Abyei case suggests that in an appropriate case, third-party legal mechanisms can play a role in the peaceful settlement of such intra-state disputes. However, the case also illustrates important limitations of these mechanisms. At the most fundamental level, they rest on mutual agreement. Both parties must agree to resort to third-party settlement and be prepared to respect and implement the judges' or arbitrators' decisions. Substantial ongoing cooperation may be required to organize and carry through the proceedings. And, the preparation and presentation of cases can be complex and expensive.

## BACKGROUND: THE ABYEI ARBITRATION

On July 22, 2009, a five-member Tribunal rendered an award in a complex arbitration between the Government of Sudan and the Sudan People's Liberation Movement/Army ('SPLM/A' together 'the Parties').<sup>8</sup> The award determines the boundaries of the Abyei region, which is to conduct a referendum in 2011 to determine whether to join south Sudan. As established by the Tribunal, Abyei's borders contain a population mainly composed of Ngok Dinka, a politically powerful tribe sympathetic to the south. They exclude a large Chinese-run oil field at Heglig

6 Under Article III, § 2, cl. 2 of the U.S. Constitution, the U.S. Supreme Court has jurisdiction over cases involving 'Controversies between two or more States.' The Court often appoints a special master to develop a factual record in such cases. See, e.g., *New Jersey v. New York*, 523 U.S. 767 (1998) (adjudicating rival claims by the states of New York and New Jersey to 24.5 acres of filled lands on Ellis Island in New York harbor).

7 In 2000, Canada's Minister of Natural Resources established an arbitration tribunal to resolve a dispute regarding the respective offshore areas of the Province of Nova Scotia and the Province of Newfoundland and Labrador. See <http://www.unbf.ca/law/library/Boundaryarbitration.php>.

8 Final Award in the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 5 of the Arbitration Agreement between the Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area and the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, between the Government of Sudan and the Sudan People's Liberation Movement/Army (July 22, 2009), available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1306](http://www.pca-cpa.org/showpage.asp?pag_id=1306) [hereinafter *Award*].

and other fields, but include at least one working field. Many observers see the Award as a necessary, if not sufficient, step in ending the Parties' long-running conflict.<sup>9</sup>

The Abyei arbitration is an important use of arbitration shaped by international law to address a major dispute between a state and a region seeking to end a profound internal conflict. The proceedings were unusually rapid and transparent.<sup>10</sup> Both Parties accepted and initially undertook to respect the outcome (although as of the time of this writing in late September 2010, the prospects for peaceful implementation of the ruling may be fading). Thus, the case offers an interesting, if qualified, model for other situations involving disputes involving the interests of a state and of a constituent region.

### Origins of the Dispute

Sudan's history has been marked by conflict between the desert north (largely Muslim and culturally Arabic<sup>11</sup>) and the tropical south, (largely Christian or animist and culturally sub-Saharan<sup>12</sup>). Divisions were heightened in colonial times, when the Anglo-Egyptian administration governed the regions separately. As colonial rule ended in 1956, the First Sudanese Civil War erupted between the central government and rebel southern forces seeking greater autonomy. Half a million people died in the war, which ended with the 1972 Addis Ababa Agreement granting considerable autonomy to the south. In 1983, government efforts to increase control over the south and to enforce Shari'a there led to the Second Sudanese Civil War, which claimed more than two million lives.<sup>13</sup>

In 2002, the Parties concluded the Machakos Protocol, providing for progressive implementation of a peace agreement and an eventual referendum to determine whether southern Sudan should become independent.<sup>14</sup> In 2005 they concluded a comprehensive peace agreement. However, they could not agree on the border of the oil-rich Abyei area, located where north and south meet,<sup>15</sup> with 'three major oilfields in the area, whose 2005 to 2007 revenues were estimated in the region of US \$1.8 billion.'<sup>16</sup>

9 Sharon Otterman, *Ruling Redraws Disputed Zone in Sudan in Effort to Keep North and South at Peace*, N.Y. TIMES, July 23, 2009, at A6; Stephanie McCrummen, *Ruling Signals Compromise in Border Dispute in Sudan*, WASH. POST, July 23, 2009, at A12, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/22/AR2009072202063.html>.

10 The pleadings, transcripts and other documents are available on the website of the Permanent Court of Arbitration (PCA), at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1306](http://www.pca-cpa.org/showpage.asp?pag_id=1306). Also, the April 2009 hearings were web-streamed live on the PCA's website, and remain available for viewing.

11 *Award*, *supra* note 7, ¶ 100.

12 *Id.* ¶ 98.

13 *Id.* ¶ 109.

14 *Id.* ¶ 110-112.

15 *Id.* ¶ 102.

16 *Id.* ¶ 104.

## The Abyei Protocol and the Abyei Boundaries Commission

In 2004, with the assistance of international mediators, the Parties agreed on the Abyei Protocol, creating a special transitional regime for Abyei, and defining it as 'the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.'<sup>17</sup> According to the Tribunal, the reference to the nine chiefdoms reflected that the agro-pastoralist Ngok Dinka people were intended as the Protocol's principal beneficiaries.<sup>18</sup>

To delimit Abyei, the Parties agreed to create the Abyei Boundaries Commission, which included a body of Experts. Following extensive hearings and research,<sup>19</sup> the Experts reported in July 2005 that Abyei encompassed a large area extending well to the north of the Bahr el-Arab River,<sup>20</sup> and including Heglig and other producing oilfields to the east. Sudan attacked and rejected the report. In its view, the Experts significantly exceeded their mandate, and Abyei included only a narrow strip of land south of the Bahr el-Arab with no oil fields.<sup>21</sup>

## The Arbitration under PCA's Optional Rules

In July 2008, following violence that included the burning of Abyei Town, the Parties agreed to settle their dispute regarding the Experts' report and Abyei's delimitation through final and binding arbitration by an *ad hoc* tribunal of five arbitrators.<sup>22</sup> Their agreement provided that if the tribunal determined that the Experts did not exceed their mandate under the Abyei Protocol and other specified documents, it should so state and call for immediate implementation of the borders the Experts identified. If it found excess of mandate, it was to 'proceed to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 . . . '<sup>23</sup>

The arbitration was conducted using the Permanent Court of Arbitration's Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State.<sup>24</sup> As provided in the

17 *Id.* ¶ 113.

18 *Id.* ¶¶ 262-263, 266-269, 595. Before 1905, the Ngok Dinka fell under the colonial southern administration; Kordofan was in the northern administration. The tribe's transfer to Kordofan was primarily intended to better protect its members from raids by other tribes in Kordofan. *Id.* pp. 636-639.

19 *Id.* ¶¶ 123-127.

20 *Id.* ¶ 132.

21 *Id.* ¶¶ 37-38, 213 n.71.

22 Arbitration Agreement between the Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area, July 7, 2008, available at [http://www.pca-cpa.org/showfile.asp?fil\\_id=1117](http://www.pca-cpa.org/showfile.asp?fil_id=1117) [hereinafter *Arbitration Agreement*].

23 *Award*, *supra* note 7, ¶ 6.

24 These are a slight modification of the UNCITRAL Arbitration Rules, which were designed for private commercial arbitrations, but have proved effective in the Iran-U.S. Claims Tribunal and many other settings. The Parties also agreed that the PCA's International Bureau would serve as Registry and provide administrative support. They designated the PCA's Secretary-General to serve as appointing authority. *Arbitration Agreement*, *supra* note 7, ¶ 1.4.

Arbitration Agreement, each party appointed two arbitrators.<sup>25</sup> The four were then to seek to select a presiding arbitrator, utilizing a list procedure. This procedure was unsuccessful and, the PCA Secretary General appointed the fifth and presiding arbitrator.<sup>26</sup> The Tribunal set a tight schedule, leading to oral hearings held April 18-23, 2009 at the Peace Palace in The Hague. The Arbitration Agreement required the Tribunal to render its final Award no later than ninety days later, i.e., on July 22, 2009, and it did so – a remarkable achievement, given the length and complexity of the Award.

## THE ARBITRATION AWARD

The Award summarizes Sudan's extensive objections to the Experts' work and the SPLM/A's responses,<sup>27</sup> and shows that both Parties' arguments reflected high legal skill. Sudan's critiques often involved the idea that the Parties had defined Abyei in a territorial sense, to mean a clearly delimited area transferred in 1905. For Sudan, the definition did not (as the SPLM/A and the Experts believed) refer to the transfer of administration of a tribe, the Ngok Dinka, and the larger areas they occupied or used for grazing.<sup>28</sup> Thus, for Sudan, but not for the SPLM/A, the Experts' inquiries into the locations of the Ngok Dinka's settlements and grazing areas exceeded their mandate and were irrelevant. The Parties and the Tribunal described these rival interpretations as 'territorial' and 'tribal'.<sup>29</sup>

Much of the Tribunal's legal analysis concerned the extent to which it could review the Experts' work.<sup>30</sup> It began by considering whether the Experts had exceeded their mandate, viewing the Experts' task as having two components: 'interpreting' the mandate, and 'implementing' it. It considered that the applicable law incorporated relevant principles of public international law.<sup>31</sup> In the Tribunal's view, these confirmed that the controlling legal standard was whether the Experts' interpretation of their mandate was 'reasonable,' not whether it was ultimately 'correct.'

The Tribunal drew on the rich store of learning and practice in arbitration teaching that the task of an institution charged with reviewing an arbitral or other decision-making process is not to assure the correctness of the outcome, but is instead to confirm the integrity of the underlying

25 Sudan appointed Judge Awn Al-Khasawneh and Professor Dr. Gerhard Hafner. The SPLM/A appointed Professor Michael Reisman and Judge Stephen Schwebel.

26 *Award*, *supra* note 7, ¶¶ 9-15. The four arbitrators identified five candidates and presented them to the Parties; either or both of the Parties struck all five. Accordingly, the PCA Secretary General appointed Professor Pierre-Marie Dupuy as the fifth and presiding arbitrator.

27 *Id.* ¶¶ 136-394.

28 *Id.* ¶¶ 168-169, 233-240.

29 *Id.* ¶¶ 544-545.

30 See W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS (1971) & SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR (1992).

31 The Arbitration Agreement provided that dispute was to be decided on the basis of the 2005 Comprehensive Peace Agreement, the Abyei Protocol and Appendix, Sudan's 2005 Interim National Constitution, general principles of law and practices that the Tribunal deemed relevant, and the Arbitration Agreement itself.

ing process.<sup>32</sup> The Tribunal found support for this approach in the Arbitration Agreement's structure, which authorized inquiry into delimitation issues only if it first found an excess of mandate.<sup>33</sup> It also concluded that, should it find excess of mandate affecting only some of the Experts' conclusions, it could nullify just those, leaving the rest intact.<sup>34</sup> Based on the wording of the relevant agreement, its object and purpose and the underlying historical circumstances, the Tribunal concluded that the Experts' primarily tribal interpretation of their mandate was reasonable and not an excess of mandate.<sup>35</sup>

The Tribunal was less forgiving regarding the Experts' implementation of their mandate. It again found that the standard of review was 'reasonableness,' not the correctness of the Experts' decisions.<sup>36</sup> However, it found that failure to state sufficient reasons can be an excess of mandate. Weighing the terms of the Experts' mandate and the circumstances of its creation in light of International Court of Justice jurisprudence and arbitration practice, the Tribunal concluded that the Experts were obliged to provide explanations sufficient to allow readers to understand how their decisions were reached.<sup>37</sup> It found that the Experts failed adequately to explain adoption of the northern limit of the area where the Ngok Dinka and the adjoining Misseriya people exercised shared rights, and that they failed sufficiently to explain their selections of the eastern and western boundary lines.

Having found an excess of mandate in the Experts' failure to explain key boundaries, the Tribunal proceeded to make its own determinations. It concluded that the evidence showed the Ngok Dinka's permanent settlements in 1905 were concentrated between longitudes 27°50'00"E and 29°00'00"E, up to latitude 10°10'00"N. While the Tribunal stressed the limited evidence regarding these eastern and western boundaries, including the lack of maps indicating coordinates, it nevertheless concluded that it had a duty to render a decision. In doing so, the Tribunal relied on accounts by District Commissioner Howell and Professor Cunnison, reinforced by other observations and evidence, including oral traditions<sup>38</sup> and ecological evidence.<sup>39</sup> (Although not mentioned in the Award, the Tribunal's change of the eastern boundary places the Heglig and other oil fields outside of Abyei.)<sup>40</sup>

32 *Award, supra* note 7, ¶¶ 400-411, 504-510.

33 *Id.* ¶ 398.

34 *Id.* ¶ 412-424.

35 *Id.* ¶¶ 537-672. Professor Hafner believed that the territorial interpretation of the mandate advocated by Sudan was correct, but agreed that tribal interpretation adopted by the Experts satisfied the controlling test of reasonableness. *Id.* p. 666.

36 *Id.* ¶¶ 493.

37 *Id.* ¶¶ 519-535. The Tribunal upheld the southern boundary of the area (which was not disputed), and found that the Experts provided a 'comprehensible and complete' explanation of their adoption of latitude 10°10'N as the northern limit of Ngok Dinka's permanent settlements in 1905. *Id.* p. 696. However, it also found that the Experts failed adequately to explain adoption of 10°35'N as the northern limit of the area where the Ngok Dinka and the adjoining Misseriya people exercised shared rights. *Id.* pp. 674, 683. The Tribunal also found that the Experts failed to sufficiently explain their selections of the eastern and western boundary lines. *Id.* pp. 702-708.

38 *Id.* ¶ 742.

39 *Id.* ¶ 727, 729.

40 McCrummen, *supra* note 8; Otterman, *supra* note 8.

The Tribunal emphasized that the boundaries it determined did not affect the grazing rights of the Misseriya,<sup>41</sup> the Ngok Dinka, and other tribes. Instead, both under the Parties' agreements and general principles of law, the territorial delimitations did not affect traditional grazing and other traditional rights.<sup>42</sup>

Judge Awn Al-Khasawneh lodged a vigorous dissent, finding his colleagues' conclusions 'singularly unpersuasive . . . self-contradicting, result-oriented . . . cavalier, insufficiently critical and unsupported by evidence, and indeed flying in the face of overwhelming contrary evidence.'<sup>43</sup> He believed that the Abyei Protocol had to be interpreted in the territorial sense urged by Sudan, making consideration of the actual location of the Ngok Dinka in 1905 irrelevant. Judge Al-Khasawneh parsed the evidence in detail, charging the majority with frequently misquoting or mischaracterizing it. He also accused the majority of its own excesses of mandate, by only partially nullifying the Experts' decision,<sup>44</sup> and by adopting boundaries that were not sufficiently explained and conflicted with his understanding of the evidence.<sup>45</sup>

Notwithstanding Judge Al-Khasawneh's concerns, the Parties' initial reactions to the Award were positive. Both the government in Khartoum and the SPLM/A quickly announced that they would accept the ruling, and the European Union and United States urged its immediate and peaceful implementation.<sup>46</sup>

## LESSONS FROM THE CASE

### The Central Role of Agreement

Arbitration is based on the consent of the parties. The Abyei case was possible only because two parties with a tortured political relationship – Sudan and the SPLM/A – agreed to resort to third party processes to define Abyei's territorial extent.

Indeed, the process of defining Abyei's limits involved two agreed uses of third-party mechanisms. The parties first agreed to create the Abyei Boundaries Commission and its body of technical Experts to inquire into and report on Abyei's boundaries. The Experts inquired and reported, but Sudan rejected their conclusions. This led to a second agreement, in which the parties agreed to resort to arbitration to determine whether the Experts performed their function under the first agreement correctly, and if not, to determine the relevant boundaries. Neither agreement came easily; both involved substantial participation by international mediators.

41 The Misseriya are Arabic speaking nomads who live north of the Ngok Dinka. *Id.* ¶ 107.

42 *Id.* ¶ ¶ 753-760.

43 *Award*, *supra* note 7 at 1 (Al-Khasawneh, J., dissenting).

44 *Id.* ¶ ¶ 43-51.

45 *Id.* ¶ ¶ 6-39.

46 McCrummen, *supra* note 8; Otterman, *supra* note 8; Press Release, U.S. Dep't of State, U.S.-European Union Joint Declaration on the Boundaries of the Abyei Area (July 22, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/july/126300.htm>.

As this and other cases show, the need for mutual consent need not preclude recourse to arbitration by parties with difficult political relations. Parties at loggerheads may find it to be in their interests to go to arbitration to resolve a dispute. At a low point of their relations, the United States and Iran agreed to create the Iran-U.S. Claims Tribunal as part of their agreements to end the 1979-1981 hostage crisis. That tribunal has resolved thousands of claims<sup>47</sup> and remains in operation today (albeit at a low level of activity), even as official relations between Iran and the United States remain contentious. In the 1980s, the United States initiated arbitration against the Soviet Union regarding defects in the construction of a new U.S. chancery building in Moscow, pursuant to dispute settlement arrangements previously agreed between them.<sup>48</sup> India and Pakistan recently have embarked upon an arbitral process to address their dispute over India's Kishanganga hydropower project.<sup>49</sup> Thus, parties may assess that it is better to have a solution than to leave a matter unresolved, even if the cost of getting one is a substantial degree of engagement with a perceived rival or adversary.

More is required than just agreement on the questions to be decided and on the process for deciding them. The point of arbitration is to produce a solution. Accordingly, both parties must be prepared to live with the outcome, even if it is seen as a loss. As part of their agreements to end their 1998-2000 war, Eritrea and Ethiopia agreed to create an arbitral tribunal to determine their land boundary.<sup>50</sup> Ethiopia's objections to the tribunal's ruling regarding a hotly disputed area have prevented the boundary from being physically demarcated, and have worsened the already poor state of the parties' relations.

Agreements to arbitrate often do not come easily. Some international lawyers extol arbitration or other third-party dispute settlement as good things in their own right. Policymakers, though, are usually less enthusiastic. They must assess whether referring a dispute to third-party decision makers is worth the uncertainties and costs, including the risks of a loss, that may have large domestic political costs.

A final point must be emphasized. The Abyei case involved questions that could be framed in legal terms, and for which international law offered relevant rules. There is a rich store of jurisprudence on boundary delimitation and on the legal scope of one body's review of decisions made by another body. The Abyei arbitrators were familiar with these principles, and drew on them in the majority and dissenting opinions.

Not all questions lend themselves readily to definition and resolution as legal questions. Moreover, potentially relevant legal rules may be much less settled. The International Court of Justice recently rendered an advisory opinion on the legality of Kosovo's declaration of independence

47 See CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (19098).

48 Elaine Sciolino, *Reagan Decides to Raze New Moscow Embassy*, N.Y. TIMES, Oct. 28, 1988, at <http://www.nytimes.com/1988/10/28/world/reagan-decides-to-raze-new-moscow-embassy.html>; Thomas L. Freidman, *Deal Made on Bugged U.S. Moscow Embassy*, N.Y. TIMES, June 20, 1992, at <http://www.nytimes.com/1992/06/20/world/deal-made-on-bugged-us-moscow-embassy.html>.

49 Tom Wright, *Pakistan Seeks Resolution of India Water Dispute*, May 20, 2010, at <http://online.wsj.com/article/SB10001424052748704513104575256314241294450.html>.

50 See [http://www.pca-cpa.org/showpage.asp?pag\\_id=1150](http://www.pca-cpa.org/showpage.asp?pag_id=1150).

that carefully avoided analysis of international law relating to self-determination.<sup>51</sup> This has led to criticism by some observers and even some members of the Court who believe that the Court should have used the case to address important and unsettled questions of international law.<sup>52</sup>

### **Possible Sources of Assistance**

If there is agreement between a state and a non-state entity to refer a given question to third party settlement, the Abyei case shows that it can be done, and that existing international machinery can provide important assistance.

Arbitration, particularly in complex, high-stakes cases, is a complex process. Many decisions and actions are required before a case is put before the arbitrators for decision. The services of an established institution with clear rules and expertise in administering cases can significantly help to move matters along. It is possible to conduct important arbitration cases without extensive institutional support (as Egypt and Israel did with their territorial dispute over Taba in the 1980s), but most parties in high-stakes complex international cases seek and benefit from institutional support.

In the Abyei case, the Permanent Court of Arbitration in The Hague played this role to general satisfaction. The PCA has over a century of experience in administering international cases. As noted above, the Abyei parties agreed to use a set of procedural rules previously developed by the PCA for arbitrations between states and non-state parties, and these seem to have functioned well. The PCA also provided the services of its skillful and dedicated staff, as well as impressive physical facilities at the Peace Palace in The Hague.

The PCA's Secretary-General also performed the key role of appointing authority. The appointing authority is a person or institution identified by agreement of the parties early in the arbitration process (indeed, ideally before a dispute arises). The appointing authority serves the crucial function of appointing arbitrators (usually the tribunal chairman) if the selection process established by the parties is not successful. In the Abyei case, the PCA's Secretary-General appointed a distinguished arbitrator to serve as tribunal president when the members appointed by the parties could not agree.

Effective preparation and presentation of large and complex cases like those in the Abyei arbitration typically require massive human and financial resources. Such cases typically involve the exchange of at least two rounds of written pleadings, often running to hundreds of pages, supported by multiple volumes of evidence. The group of international counsel experienced in assembling and managing these cases is small, and they normally charge large hourly fees. Developing the supporting evidence often requires huge investments of time by lawyers, paralegals and researchers; the advice of historians, cartographers or other specialized experts; and extensive (and expensive) international travel. Legal translation is expensive, and can add significant costs in cases conducted in two (or more) languages. With the fees and expenses of the

51 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ REP \_\_\_\_ (July 22).

52 See, e.g., the Declaration of Judge Simma, in *id.*

arbitrators and of a supporting institution, the expenses of mounting large-scale international arbitrations often run to millions of dollars.

Depending on the circumstances, it may be possible to obtain some assistance, including the services of counsel on a reduced cost or *pro bono publico* basis. In the Abyei arbitration, the SPLM/A was well represented without charge by leading arbitration lawyers and a supporting team from WilmerHale, a prominent international law firm, and by volunteers from the Public International Law & Policy Group, a non-profit public-interest group in the United States. These entities provided thousands of unpaid hours of skilled professional and paralegal work. The WilmerHale firm also reportedly absorbed substantial disbursements that would have been billed to a client in a normal matter. However, particularly in a time of straitened law firm budgets, it may be unrealistic to expect this sort of large-scale uncompensated support in future cases.

The PCA has a financial assistance fund intended to assist developing countries 'meet part of the costs involved in international arbitration or other means of dispute settlement offered by the PCA.'<sup>53</sup> Sudan received some financial support from this fund in connection with the Abyei case. However, the fund is available only to states, and the amount available is limited and dependent upon contributions by donor states.<sup>54</sup>

## Concluding Thoughts

The Abyei case shows that, with mutual agreement and significant expenditures of effort and money, it is possible for a state and a constituent region or people to seek to resolve some types of questions by referring them to an agreed third party for binding decision. It can be done. However, the case also shows the limitations of these third party processes. Not every question is susceptible to legal resolution. And, both parties must be truly committed to seeing the process through, including the possibility that they might not win. A dispute settlement process that produces a result that is rejected by the losing party becomes part of the problem, not part of the solution.

53 [http://www.pca-cpa.org/showpage.asp?pag\\_id=1179](http://www.pca-cpa.org/showpage.asp?pag_id=1179).

54 See PCA ANNUAL REPORT 2009 at p. 3, available at [http://www.pca-cpa.org/upload/files/03%20Report%201-17\(1\).pdf](http://www.pca-cpa.org/upload/files/03%20Report%201-17(1).pdf).

Antoine Buyse<sup>1</sup>

## The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges<sup>2</sup>

### Abstract

*The fiftieth anniversary of the European Court of Human Rights this year is an occasion for both celebration and apprehension. From a timid beginning the Court has grown into a full-time institution successfully dealing with thousands of cases each year. Its case law is generally perceived to be among the most developed and extensive of all international human rights institutions and most of its judgments are routinely implemented by the state parties to the European Convention on Human Rights.*

*However, for over a decade dark clouds have been gathering over Strasbourg. The number of applications has been rising so sharply – partly due to the accession of a large number of new state parties to the ECHR – that the very work and survival of the Court seems to be at risk. It is precisely because of these high numbers that the Court has started to deal creatively with large-scale violations of human rights by way of so-called pilot judgments. This article will assess this new phenomenon which holds the promise of being the most creative tool the Court has developed in its first fifty years of its existence.*

### Introduction

The fiftieth anniversary of the European Court of Human Rights (Court) this year is an occasion for both celebration and apprehension. The Court started functioning in 1959 at the heart of the Council of Europe, an organisation set up after World War II to protect democracy against dictatorship and thereby to avoid the recurrence of the massive human rights violations of the war. From a timid beginning the Court has grown into a full-time institution successfully dealing with thousands of cases each year. Its case law is generally perceived to be among the most developed and extensive of all international human rights institutions and most of its judgments are routinely implemented by the state parties to the European Convention on Human Rights (ECHR or Convention).

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However, for over a decade dark clouds have been gathering over Strasbourg. The number of applications has been rising so sharply – partly due to the accession of a large number of new state parties to the ECHR – that the very work and survival of the Court seems to be at risk. Or, as one scholar has put it, the Court is fighting with its back to the wall.<sup>3</sup> It is precisely because of these high numbers that the Court has started to deal creatively with large-scale violations of human rights by way of so-called pilot judgments. This article will assess this new phenomenon which holds the promise of being the most creative tool the Court has developed in its first 50 years of its existence. First, it will look at what pilot judgments are and in which cases the Court has applied the pilot methodology. Secondly, the main reasons for setting up the pilot judgment procedure will be considered. Finally, this article will analyse the challenges the pilot judgment procedure faces, such as its legal basis and the position of applicants in comparable cases.

### **Pilot Judgments: Combining Individual and General Redress**

A pilot judgment could be said to address a general problem by adjudicating a specific case. This is done by going beyond the mere determination that the ECHR has been violated: in a pilot judgment the Court also gives general indications on how a state should remedy the underlying problem. Often this will involve legislative changes, for example when a national remedy is non-existent or insufficient. In doing so, the state concerned is called upon to resolve comparable cases. The Court's former President, Luzius Wildhaber, has identified up to eight different features of a pilot judgment.<sup>4</sup> I will enumerate them here, since they provide an overview of what a pilot judgment includes in its full-fledged form: (1) the finding of a violation by the Grand Chamber which reveals that within the state concerned there is a problem which affects an entire group of individuals; (2) a connected conclusion that that problem has caused or may cause many other applications to be lodged in Strasbourg with the Court; (3) giving guidance to the state on the general measures that need to be taken to solve the problem; (4) indicating that such domestic measures work retroactively in order to deal with existing comparable cases; (5) adjourning by the Court of all pending cases on the same issue; (6) using the operative part of the pilot judgment to 'reinforce the obligation to take legal and administrative measures', as Wildhaber phrased it; (7) deferring any decision on the issue of just satisfaction until the state undertakes action; (8) informing the main Council of Europe organs concerned of progress in the pilot case. The latter would include the Committee of Ministers, as the responsible organ for the Supervision on the execution of the Court's judgments, the Parliamentary Assembly, and the Human Rights Commissioner.

3 Stéphanie Lagoutte, 'The Future of the European Human Rights Control System: Fighting with Its Back to the Wall', in: Lagoutte a.o. (eds.), *Human Rights in Turmoil. Facing Threats, Consolidating Achievements* (Leiden: Martinus Nijhoff Publishers 2007).

4 Luzius Wildhaber, 'Pilot Judgments in Cases of Structural or Systemic Problems on the National Level', in: Rüdiger Wolfrum & Ulrike Deutsch (eds.), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Berlin: Springer Verlag 2009) pp. 69-75, at p. 71.

The first time the Court tested the pilot judgment procedure was in the Polish case of *Broniowski* – which is the judgment on which Wildhaber based his enumeration of characteristics.<sup>5</sup> The case had its origins in one of the legacies of World War II, when the Polish state was moved westwards. Large parts of the east of Poland were incorporated into the Soviet Union, in what today are the states of Ukraine, Belarus, and Lithuania. The Polish inhabitants of those areas were forced to move westwards and under so-called ‘Republican Agreements’ between the Polish authorities and the Soviet republics, Poland undertook to compensate the more than one million displaced persons. This was mostly done by giving them land in the newly acquired western parts of Poland. However, a group of around 100,000 people did not receive any compensation. Since they came from the territories beyond Poland’s new eastern border, the Bug River, their claims for compensation were called the Bug River claims. Broniowski was the heir of one of those people. Although, as a lawful heir, he had a right to compensation, he did not receive it. Polish Courts, including the Supreme Court and the Constitutional Court, found the state’s actions and regulatory framework, which heavily reduced the possibility of receiving any compensation, contrary to the constitution. These judicial findings did not improve Broniowski’s situation. Therefore, he brought his case to Strasbourg, where the Court found a violation of the right to peaceful enjoyment of one’s possessions.

Broniowski’s case could simply have ended up on the long list of property restitution cases which the Court has been dealing with over the past decade. The Grand Chamber decided, however, to specifically acknowledge that the applicant’s case was part of a wider problem. The Chamber held that the violation ‘originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons’<sup>6</sup>, namely the identifiable group of the Bug River claimants. This could lead to many new and well-founded applications by applicants placed in a similar situation as Broniowski. The Court even specifically referred to the 167 cases of Bug River claimants pending at that moment and the over 80,000 people affected by the lack of compensation. It assessed that this did not only imperil the effectiveness of the supervisory mechanism of the ECHR, but also that it was ‘an aggravating factor as regards the State’s responsibility under the Convention for an existing or past state of affairs.’<sup>7</sup> It is at that point that the Court went beyond its established case law. Until then it had always held that when it found a violation of the Convention, it was, in principle, upon the state party to choose the manner of remedying a situation.<sup>8</sup> But in *Broniowski* the Grand Chamber concluded that the state had to take general measures which would deal with the whole group of affected Bug River claimants. Thus, not only the individual case, but also the broader problem had to be tackled. The Court even specified the following about such measures:

5 ECtHR, *Broniowski v. Poland*, 19 December 2002 (admissibility), Appl.no. 31443/96. The decisions on the merits and on the friendly settlement reached were decided on 22 June 2004 and 28 September 2005 respectively. The facts described here are taken from the Court’s decisions and judgments in this case.

6 *Broniowski* (merits) para. 189.

7 *Ibid.*, para. 193.

8 See, for a fuller overview of the Court’s case-law on this issue, my ‘Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* vol. 1 (2008) pp. 129-153.

[T]he Court considers that the respondent State must, primarily, either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found, in respect of the applicant, to have been in breach of the Convention, or provide equivalent redress in lieu. As to the former option, the respondent State should, therefore, through appropriate legal and administrative measures, secure the effective and expeditious realisation of the entitlement in question in respect of the remaining Bug River claimants, in accordance with the principles for the protection of property rights laid down in Article 1 of Protocol No. 1, having particular regard to the principles relating to compensation.<sup>9</sup>

The duty to take general measures then innovatively reappeared in the operative part of the judgment which summarizes the holdings and decisions the Court takes in a particular judgment. This reappearance truly shows that the Court broke new ground in *Broniowski*. Of course, in earlier cases the Court also regularly had to acknowledge that a violation did not follow just from an act or omission by a state party, but was a result of national legislation. The early *Marckx* judgment<sup>10</sup> on inheritance discrimination is a case in point in which the Court indicated such an underlying problem. Sometimes, the Court even made suggestions for actions to be undertaken by the state<sup>11</sup> – but never in the operative part of the judgment until *Broniowski*.

In *Broniowski*, the Court relegated the matter back to the Polish authorities in order to encourage them to take such general measures and to reach a friendly settlement with the applicant on just satisfaction. In addition, the Court decided to adjourn consideration of other Bug River cases. A friendly settlement between Broniowski and Poland was indeed reached on his particular case in September 2005. More importantly, changes happened on the domestic level. Just a few months after the Grand Chamber's judgment, the Polish Constitutional Court declared the newest version of the Bug River compensation law unconstitutional. Early in 2005 the government then drafted a new bill, which *inter alia* made pecuniary compensation possible for all remaining claimants, up to a maximum of 15 per cent of the original value of their property. Following debate in parliament, the ceiling was raised to 20 per cent and the law was approved in the summer of the same year. In September, the Court then decided to strike Broniowski's case out of the list.

In this friendly settlement judgment the Court itself first used the wording 'pilot judgment' to refer to the judgment on the merits. The Court stressed that it was important 'to have regard not only to the applicant's individual situation but also to measures aimed at resolving the underlying general defect in the Polish legal order identified in the principal judgment as the source of the violation found.'<sup>12</sup> The Court accepted that the new 2005 law was designed to take away practical and legal obstacles for the Bug River claimants and that it addressed both the situations of existing claimants and of the future functioning of compensation for this group.

9 *Broniowski* (merits) para. 194.

10 ECtHR, *Marckx v. Belgium*, 13 June 1979 (Appl.no. 6833/74).

11 E.g. ECtHR, *Scozzari and Giunta*, 13 July 2000 (Appl.nos. 39221/98 & 41963/98). For these and other cases, see: Lech Garlicki, 'Broniowski and After: On the Dual Nature of 'Pilot Judgments'', in: Lucius Cafilisch a.o. (eds.), *Human Rights – Strasbourg Views. Liber Amicorum Luzius Wildhaber* (Kehl am Rhein: Engel Verlag 2007) pp. 177-192, at pp. 182-183.

12 *Broniowski* (friendly settlement), para. 37.

The government had indicated that the Polish system also offered possibilities for people whose cases were pending before the Court to seek compensation as a result of the damage flowing from the systemic violation as established by the Court in its judgment on the merits. The Court thus concluded that there was an 'active commitment'<sup>13</sup> by Poland to remedy the systemic problem. Interestingly, it commented that it was eventually for the Committee of Ministers to evaluate the Polish measures and their actual implementation, but for its own decision-making evaluated the measures as a 'positive factor'.<sup>14</sup> One may note at this point that the division of tasks between the Court (adjudication) and the Committee of Ministers (supervision of implementation) thus slightly shifted towards the Court. The Court seems to make a *prima facie* assessment based on national reforms undertaken and a positive commitment by the state concerned, without testing in detail how this works out in practice. That latter and essential task still remains for the Committee of Ministers.

The *Broniowski* saga does not end here, however. On 4 December 2007 the Court decided in the *Wolkenberg and others*<sup>15</sup> decision to strike out of its list a number of the cases of Bug River claimants whose applications it had adjourned during the pilot procedure. A large group of these applicants had been offered compensation by Poland under an accelerated procedure in 2006. But many of them were not satisfied with the amount (20 per cent of the original value) they received<sup>16</sup> and indicated that they wished to pursue their application in Strasbourg. In *Wolkenberg* the Court evaluated the 20 per cent compensation ceiling and found it not to be unreasonable. The Court also assessed, once again, the broader issue: it evaluated how the compensation scheme had functioned since its introduction in 2005 and held that the system seemed to function satisfactorily, although improvements in its efficiency were still necessary. It concluded by further clarifying its own function in a pilot procedure: 'the Court's role after the delivery of the pilot judgment and after the State has implemented the general measures in conformity with the Convention cannot be converted into providing individualised financial relief in repetitive cases arising from the same systemic situation'.<sup>17</sup> The pilot procedure cycle finally ended in October 2008 when the Court struck out the last 176 Bug River claimant cases.<sup>18</sup>

The trickle of fresh water caused by the first pilot procedure quickly turned into a small stream when from the autumn of 2005 onwards various sections of the Court started to issue pilot judgments. In addition, the Grand Chamber also issued new pilot judgments. All of these can be characterised as variations on a theme: although they display some features of a full-fledged pilot procedure, they mostly do not reflect all eight features as identified by Wildhaber.

In *Lukenda*, a judgment concerning the length of proceedings in Slovenia, the Third Section of the Court noted that 'that the violation of the applicant's right to a trial within a reasonable time is not an isolated incident, but rather a systemic problem that has resulted from inadequate legislation and inefficiency in the administration of justice. The problem continues to

13 Ibid., para. 42.

14 Ibid.

15 ECtHR, *Wolkenberg and others*, 4 December 2007 (Appl.no. 50003/99).

16 Wildhaber (2009) p. 72.

17 *Wolkenberg*, para. 76.

18 ECtHR, *Press Release First 'pilot judgment' procedure brought to a successful conclusion Bug River cases closed*, 6 October 2008.

present a danger affecting every person seeking judicial protection of their rights.<sup>19</sup> The Court ‘encourage[d]’ Slovenia to put in place effective remedies at the domestic level.<sup>20</sup> The other 500 pending Slovenian cases on the same issue were not adjourned, but the Court held in the operative part of the judgment that Slovenia ‘must, through appropriate legal measures and administrative practices, secure the right to a trial within a reasonable time.’ In the ensuing months the Court dealt with around 200 comparable Slovenian cases,<sup>21</sup> perhaps as a way to keep up the pressure on Slovenia. The state party, meanwhile, introduced legislation to deal with the problem. Since this new national scheme for acceleration of procedures and for compensation also covered those applicants whose cases were already pending in Strasbourg, the Court declared such cases inadmissible once the domestic scheme was in place and operational.<sup>22</sup>

In a dissenting opinion in *Lukenda*, judge Zagrebelsky qualified the Court’s call for ‘appropriate legal measures and administrative practices’ as both too far-reaching and too general. He convincingly argued that such a Court order without further specification of the context in Slovenia did not help the country itself nor the Committee of Ministers in its supervisory task. He also indicated that in his view pilot judgments should only be issued by the Grand Chamber – and there he is in line with former Court president Wildhaber. Zagrebelsky underlined that this was important for reasons of coherence of case-law and also because it would be the best way to discuss the systemic problems. One could add that it would be wise for an additional reason: by dealing with a case through the Grand Chamber, the Court gives a clear signal that it takes a systemic problem seriously, which might help the respondent state to do the same.

In spite of these doubts as to the appropriateness of having sections of the Court issue pilot judgments, it has happened several times. In *Xenides-Arestis*,<sup>23</sup> the Third Section of the Court dealt with a case of denial of access to property in northern Cyprus, occupied by Turkey, and the lack of remedies on the national level. The judgment reflected that this was a problem affecting a large number of people. The Court held in the operative part of its judgment that Turkey, as the respondent state, had to ‘introduce a remedy which secures the effective protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 in relation to the present applicant as well as in respect of all similar applications pending before the Court. Such a remedy should be available within three months from the date on which the present judgment is delivered and redress should be afforded three months thereafter.’ As in *Broniowski*, consideration of all other cases (around 1,400) was adjourned. A year later the Court decided to award the applicant a large sum in terms of just satisfaction, since the applicant and the state had failed to reach a friendly settlement. Nevertheless, on the broader problem the Court did give the state the benefit of the doubt. It took note of the fact that the new compensation and restitution mechanism set up in Northern Cyprus in the intermediate time had ‘in principle’

19 ECtHR, *Lukenda v. Slovenia*, 6 October 2005 (Appl.no. 23032/02) para. 93.

20 *Ibid.*, para. 98.

21 Erik Fribergh, ‘Pilot Judgments from the Court’s Perspective’, in: Council of Europe, *Towards Stronger Implementation of the European Convention on Human Rights. Proceedings of the Colloquy organised under the Swedish Chairmanship of the Committee of Ministers of the Council of Europe* (Strasbourg: Council of Europe 2008) pp. 86-93, at p. 91.

22 ECtHR, *Korenjak v. Slovenia*, 15 May 2007 (Appl.no. 463/03).

23 ECtHR, *Xenides-Arestis v. Turkey* (merits), 22 December 2005 (Appl.no. 46347/99).

lived up to the standards indicated in the Court's earlier judgments and decisions.<sup>24</sup> One should note, however, that in subsequent years the Court continued to find violations of the Convention in similar cases of applicants whose cases had been already lodged in Strasbourg before the judgment in *Xenides-Arestis*.<sup>25</sup>

The Court even started to label judgments retroactively as pilot judgments. In the January 2006 decision in the case of *İçyer*<sup>26</sup> it declared a petition in one of the many cases of internally displaced persons in eastern Turkey inadmissible, because of failure to exhaust a new domestic remedy: a compensation mechanism. In that decision the Court referred back to its judgment in the comparable case of *Doğan and others*<sup>27</sup> of 29 June 2004 – that is exactly a week after the *Broniowski* judgment on the merits. That judgment had been the incentive for Turkey to set up the new mechanism. Consequently, approximately 1,500 cases were dismissed in Strasbourg for failure to exhaust this domestic remedy.<sup>28</sup>

Then there are cases which started at the Chamber level, but at the request of one of the parties were referred to the Grand Chamber. In the Polish case of *Hutten-Czapska*<sup>29</sup> the Grand Chamber did follow the Chamber's lead in holding that a full pilot procedure was the appropriate way to deal with the issue – contrary to what the Polish government had contended. The case concerned the system of rent restrictions which were meant to protect tenants against extreme rent increases. These restrictions were so tight that landlords could not increase the rent on their property sufficiently and were in effect making losses. The issue affected around 100,000 landlords and even more tenants. Although only 18 comparable cases were pending when the Grand Chamber dealt with the case, it held that:

[T]he identification of a 'systemic situation' justifying the application of the pilot-judgment procedure does not necessarily have to be linked to, or based on, a given number of similar applications already pending. In the context of systemic or structural violations the potential inflow of future cases is also an important consideration in terms of preventing the accumulation of repetitive cases on the Court's docket, which hinders the effective processing of other cases giving rise to violations, sometimes serious, of the rights it is responsible for safeguarding.<sup>30</sup>

24 ECtHR, *Xenides-Arestis v. Turkey* (just satisfaction), 7 December 2006 (Appl.no. 46347/99) para. 37.

25 See e.g. *Kyriakou v. Turkey* (merits), 27 January 2009 (Appl.no. 18407/91). Note specifically the dissenting opinions of the Turkish judge Karakaş in this and similar judgments on the particular issue of the newly created domestic remedy.

26 ECtHR, *İçyer v. Turkey*, 12 January 2006 (Appl.no. 18888/02).

27 ECtHR, *Doğan and others v. Turkey*, 29 June 2004 (Appl.nos. 8803-8811/02 a.o.)

28 Costas Paraskeva, 'Human Rights Protection Begins and Ends at Home: The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights', *Human Rights Law Commentary* vol. 3 (2007).

29 ECtHR, *Hutten-Czapska v. Poland* (Grand Chamber), 19 June 2006 (Appl.no. 35014/97). The Chamber judgment of the Fourth Section was delivered on 22 February 2005. For a detailed analysis of the interplay between the European Court and the domestic courts in this case, see: Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments', *Sydney Law School Legal Studies Research Paper* No. 08/135 (2008). At: [ssrn.com/abstract=1295652](http://ssrn.com/abstract=1295652).

30 *Ibid.*, para. 236.

In the operative part of the judgment, the Grand Chamber ordered the Polish government to put an end to the systemic violation and to establish and guarantee a fair balance between 'the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention.' Two years later, in 2008, the Grand Chamber struck the case off the list, after the applicant and the government had reached a friendly settlement and after Poland had shown an 'active commitment' by taking various steps to reform the rent control system.<sup>31</sup> Again, specific supervision was left to the Committee of Ministers.

In the Italian case of *Sejdovic*<sup>32</sup> the Court found a violation of the right to a fair trial in the context of *in absentia* convictions. In the operative part of the judgment, the Court found that this violation originated in systemic problems in domestic law and practice and that the state party thus had to take general measures, going beyond the facts of the particular case. After the Chamber's judgment, Italy did initiate legal reforms in order to bring its practice in line with the Convention. The new laws did not have retroactive effect on the case of *Sejdovic*, however. This Italian willingness to undertake action led to an interesting reaction by the Grand Chamber. Although it acknowledged the systemic nature of the problem, it did not call for general measures, but only noted the reforms. In the operative part of the judgment it limited itself to the finding of a violation in the specific case.<sup>33</sup>

In a similar vein, the Grand Chamber in *Scordino v Italy*<sup>34</sup> found a double systemic problem. This concerned on the one hand systemic failures in the system of compensation after expropriation and on the other hand in the operation of the so-called *Pinto Act* which offered a remedy for excessively long judicial proceedings. Although Italy was requested to address the broader problem within a fixed time limit of six months, the Court did not mention this in the operative part of the judgment nor did it adjourn similar cases. This seemed to be part of a wider pattern of caution by the Grand Chamber. In all its cases concerning Italy in the spring of 2006, the Grand Chamber discussed systematic problems in the merits and not in the operative part of its judgments.<sup>35</sup>

All of the above shows that a variety of pilot or quasi-pilot judgments has evolved over the years. How does this variety reflect the eight features of the pilot procedure identified by Wildhaber? The clearest way to establish a typology is to think of the range of pilot-like judgments as a continuum. At the most traditional end of the continuum are those judgments which, like *Marcxk*, point to a broader issue underlying a particular violation, for example domestic laws. At the other extreme is *Broniowski* which reflects all eight features. In some judgments the Court has only pointed at broader or systemic problems, in others it has taken a further step by indicating – in varying degrees of precision – what kind of action a state party to the Convention needs to take. These two elements are indeed the core of a pilot judgment: (1) the identification of a

31 ECtHR, *Hutten-Czapska v. Poland* (friendly settlement), 28 April 2008 (Appl.no. 35014/97) para. 43.

32 ECtHR, *Sejdovic v. Italy* (Chamber judgment), 10 November 2004 (Appl.no. 56581/00).

33 The Grand Chamber judgment was rendered on 1 March 2006.

34 ECtHR, *Scordino v. Italy* (Grand Chamber), 29 March 2006 (Appl.no. 36813/97).

35 Garlicki (2007) p. 187.

systemic problem<sup>36</sup> and (2) explicit guidance given by the Court to the state concerned.<sup>37</sup> This implies that a situation could lead to many applications in Strasbourg. Whether such a judgment is pronounced by a Grand Chamber or not does not alter, in my view, the qualification as a pilot judgment. Of course, as indicated above, it would be very commendable if only the Grand Chamber would deliver pilot judgments. It adds to the authority of the procedure. The same goes for the choice between including the indications for state action only in the merits of the judgment or also in its operative provisions. This choice does not influence the character of the judgment as a pilot judgment, but of course inclusion in the operative provisions does increase its legal authority and persuasive effect.<sup>38</sup> A final way to put pressure on the respondent state is to include a time limit within which the state has to effect domestic changes.<sup>39</sup> This is to a certain extent a risky step that could backfire, since the authority of the Court is explicitly challenged if the state does not comply with such a time limit.

Interestingly, the pilot judgment procedure is both forward-looking and backward-looking. On the one hand it requests state parties to remedy past injustice to the person affected in the particular case and to those in a similar situation. On the other hand it is also future-oriented by indicating, albeit often in broad strokes of the legal brush, the actions a state should pursue in order to take away the underlying cause of the violation.<sup>40</sup> This Janus-faced feature of a pilot procedure fits in well with general public international law. When an international obligation has been violated by a state, there is not only a duty to repair, but also a duty of non-repetition. The future-oriented aspect of the general measures ordered in pilot judgments relates to this latter duty.<sup>41</sup>

### **Underlying reasons for the creation of the pilot judgment procedure**

The pilot procedure originated in the discussions on the drafting of Protocol 14 of the ECHR which was meant to reform the supervisory mechanisms of the Convention.<sup>42</sup> The procedure was the result of discussions and cooperation between the Court, the state parties to the Convention, and the Steering Committee on Human Rights of the Committee of Ministers. In spite of the Court's urging, the Steering Committee decided not to include the pilot judgment procedure in the Protocol. It was of the opinion that pilot judgments could be issued even within the existing legal framework.<sup>43</sup> The Committee of Ministers, at the moment of adopting Protocol

36 The existence of which can often be assumed if a large group of people is affected, which can – but not necessarily so – be reflected in the number of applications pending in Strasbourg.

37 Fribergh (2008) p. 91.

38 Garlicki (2007) p. 190.

39 See e.g. ECtHR, *Burdov v. Russia* (No. 2), 15 January 2009 (Appl.no. 33509/04).

40 Paul Mahoney in the discussion following the Presentation by Luzius Wildhaber, in: Wolfrum & Deutsch (2009) pp. 77-92, at p. 84.

41 Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures', *Human Rights Law Review* vol. 7 (2007) pp. 396-411, at pp. 408-410.

42 This Protocol entered into force on 1 June 2010.

43 Costas Paraskeva, 'Returning the Protection of Human Rights to Where They Belong, At home', *The International Journal of Human Rights* vol. 12 (2008) pp. 415-448, at p. 434, including references to the relevant Council of Europe documents.

14 in May 2004,<sup>44</sup> urged the Court to start using the pilot procedure – without using the word ‘pilot’ as such. It invited the Court to:

I. as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments;

II. to specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the Court.<sup>45</sup>

In the resolution, two underlying reasons for this are mentioned. The first is to safeguard the effectiveness in the long run of the Convention’s supervisory mechanism – a clear reference to the Court’s overwhelming workload. The Court has not been able to keep pace with the influx of new cases. This has led to an increasing backlog and eventually will indeed threaten its entire supervisory function. The number of pending cases was almost at 100,000 at the end of 2008.<sup>46</sup> Since many of the cases which are declared admissible – in themselves a small minority of the total amount of applications – are cases concerning comparable situations, there seemed to be room for improvements in efficiency. Undoubtedly the pilot judgment procedure can serve as part of the solution to deal with states which are ‘repeat offenders’.<sup>47</sup> It is obvious, that if the Court could help to solve a large-scale or systemic problem, this may prevent numerous new applications and even make it possible for the Court to strike a large number of comparable cases out of its list.

The second underlying problem mentioned in the Committee of Minister’s resolution is the states’ need to receive guidance in identifying systemic problems and in tackling them. The more clearly the Court can indicate which parts of a country’s laws or practice are contrary to the Convention, the easier it becomes for a state to bring the national situation in line with ECHR standards.<sup>48</sup> If the Court finds a violation only, there is a risk that an unreformed situation in a particular country will lead to new violations of the Convention. Potentially, this would be the start of an endless and time-consuming process of trial and error, which serves neither the Strasbourg institutions nor the state concerned. In this sense, the pilot procedure

44 Of course Protocol 14 itself and the later Protocol 14-bis were both meant to increase the Court’s efficiency as well. Among other matters, they enable three-judge panels – instead of seven judges – to deal with repetitive cases.

45 Committee of Ministers, resolution Res(2004)3 on judgments revealing an underlying systemic problem, 12 May 2004.

46 ECtHR, *Annual Report 2008*, to be found on [www.echr.coe.int](http://www.echr.coe.int).

47 The term is used by Philip Leach in his ‘Beyond the Bug River – A New Dawn For Redress Before the European Court of Human Rights’, *European Human Rights Law Review* (2005) pp. 148-164, at p. 159.

48 **The British government raised this problem in:** ECtHR, *Hirst v. the United Kingdom (no.2)* (Grand Chamber), 6 October 2005 (Appl.no. 74025/01) paras. 83-84.

includes a pedagogical element: not only indicating what is wrong, but also shedding some light on the correct path to be taken.

The Court responded very quickly to the Committee of Minister's call: the *Broniowski* judgment was issued within a few weeks after the resolution. One could add that the friendly settlement decision of the Court in that case explicitly reflects the two underlying reasons for the pilot procedure.<sup>49</sup> The two reasons are closely connected to the third and most important underlying reason to create the pilot procedure: the presence and accession of a number of states with large-scale problems of human rights. The end of the Cold War at the start of the 1990s marked the starting point for a massive eastward expansion of the reach of the ECHR, with the number of state parties doubling in a bit more than a decade. Obviously, this in itself eventually led to a large increase in applications in Strasbourg. Most of the newly acceding countries were grappling with large-scale reforms in the transition from authoritarian communist states to free-market democracies based on the rule of law. Issues ranging from the implementation of judgments to large-scale restitution and compensation schemes for properties nationalised in the communist era all surfaced. This partially changed the role of the Court from fine-tuning the situation in relatively stable and functioning societies to having to deal with large-scale and systemic human rights problems.<sup>50</sup>

However, it would be a misunderstanding to solely ascribe the rise of the pilot procedure to the accession of these middle and eastern European states. The earliest example of a truly large-scale problem reaching Strasbourg was the range of Italian complaints about excessively long domestic judicial proceedings.<sup>51</sup> Another long-time state party to the Convention, Turkey, was equally a source of numerous repetitive applications. One the one hand this was due to problems arising from the Turkish occupation of Northern Cyprus, on the other hand from the internal armed conflict in Eastern Turkey between Turkish security forces and Kurdish opponents. Both situations led to larger-scale displacement and loss of housing and property. Since Turkey accepted the Court's jurisdiction only from 1990 onwards, cases related to these issues started reaching the Court in the same decade as the eastern European ones. In addition, violent conflicts broke out or endured not only in eastern Turkey, but also in the Balkans and the Caucasus. The legacy of those wars, among many other sad effects, has compounded Strasbourg's caseload problem.

The pilot procedure has thus arisen out of necessity. From the perspective of the Court, this necessity was the incoming flow of applications that became too large to handle efficiently. For the states parties, united in the Committee of Ministers, this was a call for more clarity on how to bring their laws and policies in line with the Convention. Both problems arose from three kinds of large-scale human rights violations: systemic problems with the rule of law and/or the functioning of the judiciary (Italy), problems of transition (most of middle and eastern Europe), and legacies of recent armed conflict (Turkey, Russia, states of the former Yugoslavia) and combinations of these.

49 See specifically para. 35 of *Broniowski* (friendly settlement).

50 For more on this shift, see Sadurski (2008).

51 See e.g. the Italian case in which the Court for the first time concluded that the extent of the issue was not a series of isolated incidents, but could be labelled as a 'practice': ECtHR, *Botazzi v. Italy*, 28 July 1999 (Appl.no. 34884/97) para. 22.

## Challenges for the Pilot Procedure

The pilot procedure has now been tested in a number of different situations. This has occurred under rather widespread enthusiasm. Both Lord Woolfe (2005) and the Committee of Wise Persons (2006) have, in their respective reports on reforming the Court, recommended that the Court continue to use the procedure.<sup>52</sup> Nevertheless, this testing period has led to a number of doubts and concerns about the procedure. The first is of a legal character: the legal basis of the pilot judgments is contested and has been called ‘fragile’ by one of the current judges.<sup>53</sup> As we have seen above, the Committee of Ministers – and one may thus assume most member states – did not in principle consider that any treaty change was needed to start using the pilot judgment procedure. Indeed, from the beginning the Court has based its pilot judgments on an existing ECHR provision: Article 46. ‘This Article provides that state parties are legally bound ‘to abide by the final judgment of the Court in any case to which they are parties.’ Traditionally, the Court had restricted itself to finding violations and sometimes ordering just satisfaction under Article 41 of the ECHR in the form of monetary compensation to be paid by the state to the victim. This was in line with the intention of the drafters of the ECHR who purposefully left out of the Convention’s text any powers for the Court to order broader measures such as the annulment or amendment of national legislation.<sup>54</sup> In *Broniowski* the Court summarised its interpretation of Article 46 by holding that it included the obligation:

[N]ot just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment.<sup>55</sup>

Arguably, the latter enables the Court to give indications to the state concerned. As judge Zupančič argued in a concurring opinion to *Broniowski* this should be justified not so much by pragmatism and efficiency, but rather by logic and justice.<sup>56</sup> He contended that it logically follows from the system of the Convention that in some situations it does not make sense to afford only monetary compensation. If for example a violation is ongoing, any compensation can only remedy the violation up to that point, but does not change the future. Likewise, he argued, in cases of structural violations, individual compensation does not solve the problems

52 Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, December 2005, p. 6 and p. 40; *Report of the Group of Wise Persons to the Committee of Ministers*, 15 November 2006, CM(2006)203, para. 105.

53 Garlicki (2007) p. 191.

54 Buyse (2008) p. 144.

55 *Broniowski* (merits), para. 192. This in itself was a quotation from an earlier case: ECtHR, *Scozzari and Giunta v. Italy*, 13 July 2000 (Appl.nos. 39221/98 and 41963/98) para. 249.

56 It should be noted that later on, in a partly dissenting opinion in the case of *Hutten-Czapska* (merits), he argued almost the exact opposite, by holding that *Broniowski*, *Hutten-Czapska* and *Lukenda* are ‘pragmatic decisions that avert an increase in the quantity of cases.’

of people in comparable situations. Whereas the first example indeed represents strong legal logic to make the Convention effective, the second example (which reflects the situation in *Broniowski*) is more of a moral justification. The strongest *legal* justification is indeed that of making the Convention practical and effective in the state parties on the domestic level. This can only be done if the state party indeed accepts guidance from the Court on how to make its laws and policies more 'ECHR-proof'. Judge Zagrebelsky, in a partly dissenting opinion in *Hutten-Czapska*, argued against the use of ordering general measures in the operative part of the Court's judgments. He took the position that the Court went 'outside its own sphere of competence' and entered 'the realm of politics'. He pointed to the fact that the pilot procedure was not included in Protocol 14. As a counter-argument one may argue that the state parties themselves, through the Committee of Ministers, have asked the Court for clearer directions. Thus the consent of states with the Court's functioning seems to be there. This does not rule out that practical problems may arise if a state, more specifically the executive, in a *particular* case – such as *Hutten-Czapska* – is not keen to cooperate. I will return to that issue below.

The Court as a whole has now taken a pragmatic approach in the controversy about the legal basis. In reaction to the *Report of the Group of Wise Persons*, the Court has stated that more experience is needed in practice before undertaking any new treaty changes.<sup>57</sup> This would also entail, in the Court's view, evaluating how efficient the pilot procedure is in helping state parties to deal with systemic problems.<sup>58</sup> Put differently, the Court wants to test whether the key fits the lock before asking for a brand new door. It is also in this sense that the wording 'pilot' in 'pilot procedure' is probably best understood.<sup>59</sup> As the difficulties with the ratification of reform Protocol 14 have shown, this seems wise.

A second concern about the pilot judgment procedure is the situation of applicants in comparable situations whose cases are already pending in Strasbourg. If, as in some pilot judgments, a large number of parallel applications are frozen, this obviously affects the interests of those applicants. Especially when it concerns complaints about trials that have taken too long, freezing an application at the international level would be ironic, to say the least. Such a measure seems only to benefit the Court itself, as the defendant state will in all probability not feel the 'freeze' as pressure. Thus, caution is called for: such decision requires a careful balancing between the interests of such parallel applicants and the efficiency of the Court. This is indeed the path that the Court generally seems to take: only in some pilot judgments has it frozen pending cases. As to the referral of cases back to the domestic level in case of the creation of a new remedial mechanism, the Court has declined to do that for those applications where it has already decided on the merits, but not yet on just satisfaction.<sup>60</sup> One could add, that – in the best interests of the

57 One may note that this is a completely opposite position from the stance taken years earlier by the Court when Protocol 14 was discussed. See 'Underlying Reasons for the Creation of the Pilot Judgment Procedure' above.

58 *Opinion of the Court on the Wise Persons' Report*, 2 April 2007, p. 5.

59 Another explanation is that the single case serves as a test case or 'pilot' to try and solve the broader issue. However, such an interpretation does not set pilot cases apart from other many other cases involving larger problems. See also Sadurski (2008) p. 16, for a short discussion on the opaqueness of the word 'pilot' in this context.

60 E.g. ECtHR, *Demades v. Turkey* (just satisfaction), 22 April 2008 (Appl.no. 16219/90) para. 23; *Xenides-Arestis* (just satisfaction) para. 37.

parallel applicants and to put sufficient pressure on the state – freezing of cases should only be done if the request to take general measures is accompanied by a specific time-limit.<sup>61</sup>

Another concern is whether the consideration of a particular case enables the Court to address the underlying general or systemic problem to a sufficient extent. Each application has its particularities and some applications will only address one or a few aspects of a larger issue. For example, one application may be a complaint about the excessive time a national restitution mechanism takes to handle cases, whereas a second one may only concern the height of the compensation. Ideally, the Court would in such a case choose an application as a pilot case which concerns both issues. This requires particular care by the Court's registry in the selection process of a 'suitable' application.

Crucially, the whole pilot judgment procedure depends to a large extent on the defendant state's willingness to cooperate. Since a pilot judgment by its very character addresses a broader situation than the predicament of an individual applicant, state cooperation could be called its Achilles' heel. The first two full pilot procedures, *Broniowski* and *Hutten-Czapska*, show how different a state's attitude can be. Whereas in *Broniowski* the Polish government was fully willing to cooperate, in *Hutten-Czapska* the same state contested that a pilot procedure should be used at all. This can be explained by the fact that in *Hutten-Czapska* the underlying issue led to a wide divergence of views between the highest Polish courts on the one hand and the executive and the legislative on the other hand. The Court in this case operated in alignment with the Polish judiciary, both of which defended the rule of law.<sup>62</sup> Eventually, the pilot procedure in the case did lead to reforms. One may question, however, how willing a state is to cooperate when it concerns issues with even higher state interests at stake, such as large scale violations of the right to life in the context of an armed conflict.

State cooperation is linked to a final concern about pilot judgments: enforcement and implementation. The execution of a pilot judgment requires much more from a state than simply paying compensation in an individual case: very often domestic legal changes are necessary and in all cases changes in policy and practice. This means that it becomes more complex to assess state progress.<sup>63</sup> Traditionally, the Committee of Ministers of the Council of Europe performs this task. Nevertheless, as described above, the Court in its judgments on just satisfaction sometimes assesses whether the state has *prima facie* shown willingness to undertake reforms. In their dissenting opinion in *Hutten-Czapska* (friendly settlement), judges Jaeger and – once again – Zagrebelsky argue that the Court is hardly equipped to 'express a view in the abstract and in advance on the consequences of the reforms already introduced in Poland and to give a vague positive assessment of a legislative development whose practical application might subsequently be challenged by new applicants.' In addition, they point to the need to exercise caution in order not to prejudice future proceedings concerning applications by people who are not satisfied with any newly created domestic remedy. Finally, they refer to the danger of disturbing the balance between the roles of the Court and of the Committee of Ministers. They have a point: domestic reforms could stagnate and then parallel applications which have

61 For the most refined time-limit indications to date, see *Burdov* (No.2).

62 For a full account, see Sadurski (2008).

63 Michael O'Boyle, 'On Reforming the operation of the European Court of Human Rights', *European Human Rights Law Review* (2008) pp. 1-1, at p. 7.

been sent back to the national level are to a certain extent left out in the cold. On the other hand, large-scale reforms necessarily always require time. In any event, it is clear that strong and efficient supervision by the Committee of Ministers becomes crucial in the case of a pilot judgment procedure.<sup>64</sup>

## Conclusion

The pilot judgment procedure is a legal novelty which builds on an older trend to look beyond the facts of a particular case and into the underlying systemic problems. What used to be a question of mere rigorous analysis, has now become a necessity for the Court. The rising number of applications concerning systemic or large-scale violations of human rights and the states' call for guidance by the Court have led to experiments with pilot judgments. The pilot judgment can be perceived as part of three larger processes. First, efforts at increasing the efficiency of dealing with applications within the Court itself – the most important part of which are the reforms of Protocol 14 and 14-bis.<sup>65</sup> Secondly, pilot judgments reflect a wider trend of constitutionalization of the Court's work. Through a pilot judgment the Court, to a certain extent, reviews whether laws and policies conform with the ECHR instead of just assessing whether national authorities have or have not violated human rights in an individual case.<sup>66</sup> Finally, it fits in the broader development of increasing the Convention's effectiveness on the national level. As seen in the Polish cases, the Court can help to get situations to a tipping point of conformity with the ECHR. The pilot procedure is a promising way to channel the cooperation between national and Strasbourg institutions to improve compliance with the ECHR. Obviously, this depends on a more active role by the primary organ supervising the implementation of the Court's judgments. It is a welcome step that the Committee of Ministers decided in May 2006 to 'give priority to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem.'<sup>67</sup> In addition, the Parliamentary Assembly has started to prioritize the examination of major structural problems concerning cases in which unacceptable delays of implementation have arisen. This is done *inter alia* by way of visits by Assembly rapporteurs to the countries concerned. All of this shows a commitment by the Council of Europe's institutions to take the issue of structural problems seriously. This support will be crucial for the Court in the years to come.

The pilot judgment procedure is still in its early years and more experience is necessary. Nevertheless – and bearing in mind the concerns about legal basis, the interests of applicants in parallel cases, the choice of the right case as a pilot and other matters – it would be commendable if the Court would devise clear guidelines for itself on how it will deal with the whole process of

64 See also: Amnesty International and others, 'Council of Europe: Comments on Reflection Group Discussions on Enhancing the Long-term Effectiveness of the Convention System', IOR 61/002/2009 (2009) paras. 27-37.

65 For further suggestions on efficiency reforms, see also: ECtHR, *Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference*, 3 July 2009.

66 For a more extensive analysis of this issue, see Sadurski (2008).

67 **Committee of Ministers**, *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*, adopted 10 May 2006, CM(2006)90.

a pilot judgment from beginning to end, including the selection of pilot cases and the possible freezing of comparable applications. This would serve both the interests of potential applicants and of the state parties to the Convention. If this 'pilot' keeps flying, the Court at the very respectable age of 50 will be able to continue to function as the ultimate guardian of human rights throughout Europe.

## Section 3: Case Summaries and Commentaries



## A. ECHR Case News: Admissibility Decisions and Communicated Decisions

### Right to life

#### *Babar Ahmad and Others v United Kingdom*

(24027/07)

**European Court of Human Rights:** Admissibility decision dated 6 July 2010

*Extradition – Article 2 (right to life) – Article 3 (prohibition of torture) – Article 5 (right to liberty and security) – Article 6 (right to a fair trial) – Article 8 (right to respect for private and family life) – Article 14 (prohibition of discrimination)*

#### Facts

The first Applicant, Babar Ahmad, and the second Applicant, Haroon Rashin, are both British nationals born in 1974. The third Applicant, Syed Tahla Ahsan, is a British national who was born in 1979. The fourth Applicant, Abu Hamza, whose nationality is in dispute, was born in 1958.

Following the indictment of each of the Applicants on several charges of terrorism in the United States, the US government requested each Applicant's extradition from the United Kingdom. The Applicants contested the proposed extradition in the English courts but were unsuccessful on the basis that extradition was found to be compatible with their ECHR rights. In effect, the UK government signed the Applicants' extradition orders after the US government gave diplomatic assurances that their human rights would be respected.

#### Complaints

The Applicants complained that the extradition would give rise to violations of Articles 2, 3, 5, 6, 8 and 14 of the ECHR. They argued that the diplomatic assurances provided by the US government were not sufficient to remove the risk of them being designated as enemy combatants at the conclusion of the criminal proceedings pending against them. Further, they asserted that those assurances were not sufficient to prevent them being subject to extraordinary rendition or being designated as enemy combatants, which would place them at risk of being subject to the death penalty in violation of Articles 2 and 3.

All the Applicants complained that they would be subject to special administrative measures in violation of Articles 3, 6, 8 and 14. Relying on the same Articles, the Applicants claimed that, if they were extradited, there was a real risk of them being detained in a 'supermax' prison, that they would face life-long imprisonment without parole and/or extremely long sentences of indeterminate length, in violation of Articles 3 and 8. They also claimed that standing trial in the US would violate Article 6 due to possible use of evidence obtained through treatment or threat of treatment of third parties. In addition, they argued that a US jury would be prejudiced towards them because of extensive publicity of US counter terrorism efforts.

The fourth Applicant further alleged that extradition would disproportionately affect his private and family life under Article 8.

### Held

#### *Article 2*

The Court rejected this claim on the basis that the Diplomatic notes stated that the death penalty would not be sought or imposed and that the Applicants would not be tried before Military Commissions. For the same reasons that it found that there is no real risk the Applicants would be designated as enemy combatants or subject to extraordinary rendition, the Court considered that there is no real risk that they would be subjected to the death penalty as a result of the superseding indictment or trial by the Military Commission.

#### *Article 3*

In relation to the special administrative measures, the Court found that these would not violate Article 3. Apart from the absence of natural light in certain cells at the Metropolitan Correction Centre, the Applicants do not submit that their physical conditions of pre-trial detention would be in violation of Article 3. None of the first three Applicants were deprived of human contact during their time in the prison and, whilst subject to the special administrative measures, they enjoyed regular access to their attorneys.

The Court declared admissible the Applicants' Article 3 complaints regarding their possible detention at ADX Florence (a supermax prison). It noted that the first three Applicants were at real risk of detention at this prison, which raised serious questions of fact and law, which are of such complexity that their determination should depend on an examination on the merits. To the extent that their conditions of detention may be made stricter by the imposition of special administrative measures, this aspect of the complaint was also declared admissible.

The Court considers that in respect of the first, third and fourth Applicants, there is a possibility that life sentences will be imposed if they are convicted. While the second Applicant is at no real risk of a life sentence, the sentence he faces also raises an issue under Article 3. The Court considers that this part of each application raises serious questions of fact and law, which are of such complexity that their determination should depend on an examination of the merits. It therefore declared the Applicants' complaint admissible.

#### *Article 6*

The Court determined that it would be incompatible with ECHR obligations for the UK to extradite someone into circumstances where they would face a real risk of rendition, on the basis that extraordinary rendition is a deliberate circumvention of due process. However, for the same reasons for its findings in respect of enemy combatants, the Court was satisfied that none of the Applicants were at risk of rendition, and therefore rejected this part of the application.

Further, the Court found no evidence to support the contention that special administrative measures are coercive. It considered that the trial judges in the Applicants' trials would ensure proper respect for their rights under the Eighth amendment, which is similar to Article 6 (3)(c) of the ECHR. Therefore, the Applicants' claims of flagrant denial of justice did not support a violation of Article 6.

### *Article 8*

The Court ruled that only in exceptional circumstances will the fourth Applicant's private or family life outweigh the legitimate aim pursued by his extradition. This is particularly so given the gravity of the offences with which the fourth Applicant is charged. As there are no such exceptional circumstance in his case, the Court rejected his Article 8 complaint.

### *Article 14*

The Applicants maintained that special administrative measures are only made against Muslims. The fourth Applicant argued that he would be detained at ADX Florence solely on the basis that the US government considered him to be a global terrorist, a designation that only applies to foreigners. However, as there was no evidence of a difference in treatment, the Court held that no Article 14 issue arises.

## **Right to fair trial**

### ***Adrian Mihai Ionescu v Romania***

(36659/04)

**European Court of Human Rights:** First Application by the Court of the New Admissibility Criterion Introduced by Protocol No. 14

*Article 6 (right to a fair trial) – Article 35 (admissibility criteria)*

#### Facts

The Applicant, Adrian Mihai Ionescu, is a Romanian national born in 1974 and lives in Bucharest.

He brought an action before the Bucharest Court of first-instance seeking damages in the amount of €90 from a road transport company, with which he had traveled, claiming that the company had failed to observe safety and comfort requirements as set out in the advertising material.

He requested the production of the relevant transport documents held by the defendant company. On 7 January 2004, the Court dismissed his action on the grounds that none of the clauses referred to by the Applicant were covered in the contract of carriage. It did not rule on the Applicant's request for the production of certain items of evidence by the company. The Applicant subsequently appealed on points of law to the same Court, but was referred to the High Court of Cassation and Justice, where he argued that his claim should be declared admissible as the substantive and procedural conditions were satisfied.

On 2 April 2004, the High Court declared the appeal null and void in a final judgment under Article 302-1(3) of the Code of Civil Procedure as then in force on the ground that the Applicant had not stated the reasons why the first-instance Court's decision was alleged to be unlaw-

ful. The application to have the judgment set aside was dismissed on 26 January 2005 on the grounds that no appeal lay against the judgment of 2 April 2004.

### Complaints

Relying on Article 6(1) of the ECHR, the Applicant complained that the District Court had failed to rule on his request for the production of evidence, that the proceedings in the High Court had not been public, and finally that he had not had access to the High Court for the purpose of appealing against the 7 January 2004 judgment. Relying on Article 13, he further complained that the appeal against the above-mentioned judgment had not constituted an effective remedy and that there had been no remedy by which to challenge the 2 April 2004 judgment.

### Held

The Court clarified that the admissibility of evidence is primarily a matter for regulation by national law and that it is for the national Courts to assess whether or not it is appropriate to take evidence. It also noted that it was not for the Court to examine an application concerning errors of fact or law allegedly committed by domestic Courts.

The Court found that the district Court had carried out an independent assessment of all the circumstances and the evidence and consequently given both adequate reasons for its judgment and the possibility to the Applicant to present his observations and legal grounds. It concluded that the proceedings had not violated the requirements of fairness under Article 6(1) of the Convention and that the complaint therefore had to be rejected as manifestly ill-founded in accordance with Article 35(3)(a) and (4).

Secondly, the Court found that the complaints about the proceedings before the High Court underlie those concerning the annulment of the Applicant's appeal and should be seen in the context of his right of access to a Court. It found that the complaint under Article 6 was not incompatible with the provisions of the ECHR or its Protocols nor was it manifestly ill-founded or an abuse of the right of application within the meaning of Article 35(3)(a) as amended by Protocol 14.

However, the Court found it necessary to examine whether the new inadmissibility criterion of Article 35(3)(b) should be applied. It noted that the main aspect of the new criterion was whether the Applicant had suffered any 'significant disadvantage'. In the present case, the Court found that the Applicant's alleged financial loss was limited, as there was no evidence that the amount in question (€90) would have any significant impact on the Applicant's financial circumstances. With respect to the second element of Article 35(3)(b), whether respect for human rights requires an examination of the application on the merits, the Court noted that it had already held that the continuance of an examination was not required when, for example, the relevant law had changed. As in the present case the provisions relating to the preliminary examination of the admissibility of appeals on points of law had been repealed and such appeals were now examined according to the ordinary procedure as set out in the Code of Civil procedure, the issue before the Court was of historical interest only and there was no need to continue the examination of this complaint. With respect to the third element of Article 35(3)(b), that the case must have been duly considered by a domestic tribunal, the Court held that the Applicant's action was examined on the merits by the Bucharest District Court.

With the three components of the inadmissibility criterion having therefore been satisfied, the Court held that the complaint must be declared inadmissible under Article 35(3)(b) and (4) of the ECHR.

***Van Anraat v the Netherlands***  
(65389/09)

**European Court of Human Rights:** Admissibility decision dated 20 July 2010

*Article 6 (right to a fair trial)*

Facts

The Applicant, Frans Cornelis Adrianus Van Anraat, was born in 1942. He is a national of the Netherlands, where he is currently serving a sentence of imprisonment.

The Applicant, a businessman, purchased quantities in excess of 1,100 metric tons of the chemical thiodiglycol in the United States and Japan between April 1984 and August 1988. He supplied the chemicals to the Government of Iraq through several companies based in a variety of countries. After 1984 he was the Government of Iraq's only supplier of this substance.

One of a group of compounds of thiodiglycol is known as sulphur mustards, or mustard gas, and causes severe and potentially lethal chemical harm and an increased risk of cancer. Mustard gas is known to have been used by the Iraqi military, along with other chemical weapons, against Iranian armed forces and civilians during the Iran-Iraq War (1980-1988) and in attacks against the Kurdish population of northern Iraq (1988).

On 23 December 2005, the Applicant was convicted and sentenced to 15 years' imprisonment by the Regional Court in the Netherlands for several crimes, which included:

- 1) aiding and abetting genocide against the Kurdish population of northern Iraq in a number of places including Halabja,
- 2) aiding and abetting violations of the laws and customs of war as regards gas attacks on the territory of Iran,

committed by named individuals including Saddam Hussein and Ali Hassan al-Majid (commonly known as 'Chemical Ali') by supplying various chemicals to the Republic of Iraq and providing materials and advice for the manufacture of chemical weapons in violation of international law.

The charges referred to several provisions of domestic legislation including, as relevant to the case before the Court, section 8 of the War Crimes Act, taken together with Article 48 of the Criminal Code.

Both prosecution and the Applicant appealed against the decision.

The Netherlands Court of Appeal convicted the Applicant of being an accessory to war crimes proscribed by section 8 of the War Crimes Act, for violations of the 'laws and customs of war' committed by Saddam Hussein, 'Chemical Ali' and others in (a) a non-international or inter-

national conflict, as regards gas attacks on the Kurdish population of northern Iraq in Halabja and elsewhere and (b) in an international conflict, as regards gas attacks on Iran and in border areas of Iraq adjoining Iran. It defined 'laws and customs of war' as customary international law, particularly the prohibition of the use of chemical weapons, poison or poisonous weapons, the use of asphyxiating or poisonous gases, and the prohibition of the infliction of unnecessary suffering as well as the prohibition of attacks targeting civilians and combatants indiscriminately. Taking the Geneva Gas Protocol of 1925 and the four 1949 Geneva Conventions into consideration it consequently sentenced the Applicant to 17 years in prison.

The Applicant lodged an appeal with the Supreme Court. He also argued, in response to an advisory opinion submitted by the Procurator General to the Supreme Court, that Saddam Hussein and 'Chemical Ali' were members of the government of a sovereign state and, as such, protected by the principle of sovereign immunity and since they were beyond the jurisdiction of the Netherlands Courts, he should not have been tried as an accessory.

On 30 June 2009 the Supreme Court dismissed the appeal on points of law.

### Complaints

The Applicant complained under Article 6 (right to a fair hearing) of the ECHR that the Supreme Court had failed to answer his argument that he ought not to have been convicted as an accessory. He also complained under Article 6 or Article 7 (no punishment without law) of the ECHR that section 8 of the War Crimes Act referring to international law did not comply with the requirement that criminal acts be described with sufficient precision (*lex certa*). He argued that the Supreme Court should not have found that the vagueness of section 8 was 'inevitable' and claimed further that 'customs of war' was a too general and imprecise term and that the 1925 Geneva Protocol no longer reflected the reality of contemporary warfare; the use by Iraq of mustard gas as a weapon of war could not be seen as morally or legally different from the use of napalm by United States forces during the Vietnam War. He argued that he could not have been expected to realise at the time of the Iran-Iraq war that his business activities were illegal.

### Held

#### *Article 6*

The Court found that the Applicant's argument about sovereign immunity was not contained in his statement of grounds of appeal as it had been made for the first time at the final stage of the proceedings before the Supreme Court. It held that it was not a requirement of 'adversarial proceedings' for a defendant to be allowed to submit fresh arguments that had no bearing on any point contained in the advisory opinion itself. With the Applicant making use of the opportunity offered to submit an entirely new argument at the latest possible stage of proceedings, Article 6(1) did not compel the Supreme Court to provide a reasoned response.

In addition, if the Applicant had wanted the Supreme Court to reconsider or refine its case-law, there had been nothing to prevent him from raising that issue at an earlier stage. The Court therefore declared that part of the complaint manifestly ill-founded.

### Article 7

With respect to the Applicant's claim that the vagueness of section 8 was not 'inevitable', that 'customs of war' was too general and imprecise a term, and that he could not have been expected to realise at the time of the Iran-Iraq war that his business activities were illegal, the Court noted that incendiary and nuclear weapons were subject to separate regimes not relevant to the Applicant's case; his comparison of mustard gas with napalm and nuclear weapons was therefore irrelevant to the case before the Court. The Court could consider only whether the Applicant was held guilty of a 'criminal offence' on account of acts which constituted a 'criminal offence under national or international law' at the time when they were committed.

The Court found that, at the time when the Applicant supplied the Iraqi government with triodiglycol, a norm of customary international law existed prohibiting the use of mustard gas as a weapon of war in an international conflict. It held that at the time that the Applicant was committing the acts which ultimately led to his prosecution, there was nothing unclear about the criminal nature of the use of mustard gas either against an enemy in an international conflict or against a civilian population in border areas affected by an international conflict. Therefore, the Applicant could reasonably have been expected to be aware of the state of the law and, if need be, to take appropriate advice.

The Court therefore declared the complaint to be manifestly ill-founded.

### ***Öcalan v Turkey***

(5980/07)

**European Court of Human Rights:** Admissibility decision dated 6 July 2010.

*Abdullah Öcalan - reopening of proceedings – compliance with the Court's judgment – Article (right to a fair trial) – Article 13 (right to an effective remedy) – Article 14 (prohibition of discrimination) – Article 46 (binding force and execution of judgments)*

#### Facts

The Applicant, Abdullah Öcalan, is a Turkish national born in 1949 and is currently held in İmralı prison, Turkey. He was the leader of the Kurdistan Workers' Party (PKK).

In a judgment by the ECtHR on 12 May 2005, the Court found that the proceedings before the Turkish Courts concerning Mr. Öcalan constituted a breach of Article 6 of the ECHR. Mr Öcalan's application for the reopening of the proceedings was finally rejected by the Istanbul Assize Court on the grounds that no investigative measure or additional hearing was necessary in order to reach a decision.

#### Complaints

Relying on Articles 6, 13, 14 and 46, the Applicant complained about the Turkish Courts' refusal to reopen the criminal proceedings that had led to his conviction and sentence following the finding of a violation by the Court. He further alleged that the procedure for the execution of the Court's judgment in Turkey breached Article 6.

### Held

The complaint that the judgment of the Court was not properly executed was declared inadmissible. The Court was not able to examine the complaint without encroaching upon the powers of the Committee of Ministers, as it is the task of the Committee of Ministers to examine whether States comply with the Court's judgments. In this case the Committee of Ministers had concluded that the re-examination of the Turkish Court was sufficient to fulfill the obligations arising from Article 46, and had closed its examination.

The complaint that the Turkish proceedings for the execution of the Court's judgment had breached Article 6 was also declared inadmissible. The Court found that Article 6 was not applicable on the basis that a person who applies for his or her case to be reopened, and whose sentence had become final, was not 'charged with a criminal offence' within the meaning of Article 6. The proceedings concerning the Applicant's application for retrial, following the finding of a violation by the Court, were equivalent to proceedings for the reopening or review of criminal proceedings under Turkish law.

## **Application concerning a claim for less than 1 Euro inadmissible**

*Korolev (II) v Russia*

(25551/05)

**European Court of Human Rights:** Admissibility decision dated 29 July 2010

*Article 35 (admissibility criteria)*

### Facts

The Applicant, Vladimir Petrovich Korolev, is a Russian national who was born in 1954 and lives in Orenburg, Russia. He sued the Head of the Passport and Visa Department at the Regional Directorate of the Interior for preventing him from having access to documents related to a delay in issuing his new foreign passport. The courts found in the Applicant's favour and ordered that access be given to him to all documents related to the issuing of his passport and that he be paid RUB 22.50 (equivalent to less than €1) in compensation for court fees.

All of the Applicant's subsequent actions were solely aimed at recovering the RUB 22.50. In July 2002, a writ of execution was issued to him and in April 2003 the bailiffs commenced enforcement proceedings. When the Applicant challenged, a few months' later, the bailiffs' inactivity in court, his complaint was dismissed as unsubstantiated.

### Complaints

The Applicant complained about the failure of the Russian authorities to pay him the RUB 22.50 awarded by the domestic courts. He relied on Article 6 (right to a fair trial) and on Article 1 of Protocol No. 1 (right to the protection of property).

### Held

The Court found it appropriate to examine at the outset whether the Applicant's complaint complied with the new admissibility criterion, introduced with the entry into force of Protocol No. 14 to the Convention on 1 June 2010, which provided that applications were inadmissible where *'the Applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.'*

The Court examined firstly whether the Applicant had suffered any significant disadvantage. It bore in mind that the purpose of the new admissibility criterion was to enable more rapid disposal by the Court of unmeritorious cases and thus to allow it to concentrate on its central mission of providing legal protection of human rights at European level. As regards the term 'significant disadvantage,' the Court noted that it could not be given an exhaustive definition, and it was up to the Court to establish objective criteria for the application of the new rule.

The Court then observed that a violation of a right, however real from a purely legal point of view, had to attain a minimum level of severity to warrant consideration by an international Court. The assessment of that minimum level was relative and depended on all the circumstances of the case. The Court was struck by the fact that the Applicant's grievances had been explicitly limited to the failure to pay him a sum equivalent to less than €1. The Court accepted that even a modest financial award might be significant for some people because of their personal circumstances or the economic situation of the country or region in which they lived. However, less than €1 was clearly of negligible value and of minimal significance for the Applicant.

Conscious that an ECHR violation might concern an important question of principle and thus cause a significant disadvantage without affecting pecuniary interest, the Court noted that the Applicant had only complained of the failure to pay him less than €1 in dues. He had not complained of his legitimate right to consult his file at the Passport and Visa Department, nor had he challenged the execution of the domestic court judgment as regards his access to that file. The Court concluded that the Applicant had not suffered a significant disadvantage.

## B. Substantive ECHR Cases

### Right to life

#### *Carabulea v Romania*

(45661/99)

**European Court of Human Rights:** Judgment dated 13 July 2010

*Article 2 (right to life) – Article 3 (prohibition of torture) – Article 13 (right to an effective remedy)*

#### Facts

The Applicant, Viorel Carabulea, is a Romanian national who was born in 1963 and lives in Bucharest. The case concerned his allegation that his 27 year-old brother, Gabriel, died after being tortured in police custody.

Gabriel Carabulea was arrested on 13 April 1996 and taken to a police station in Bucharest for questioning about a robbery. He was not examined by a doctor but, according to the Government, was in good health when placed in police lock-up; the claim was corroborated by his wife who visited him on the same day. However, on 15 April 1996 his wife noticed that he had difficulty walking. On 16 April 1996 he was taken to the Ministry of the Interior Hospital. Medical records there noted that he was in a state of shock, vomiting blood and in great pain upon arrival. He was admitted to Jilava Penitentiary Hospital that afternoon, and was transferred on 17 April 1996 to intensive care in Fundeni Hospital, where he died on 3 May 1996.

An autopsy report issued on 4 May 1996 concluded that the cause of death was acute cardio-respiratory insufficiency and bronchopneumonia. All of the autopsies and expert reports, submitted by both parties, also noted a bruise at the front of Gabriel's right hip 'resulting from violence' and internal bleeding on the liver sustained by 'blunt force trauma.'

The Applicant alleges that, after his brother's admission to Fundeni hospital, the authorities refused all visits on the ground that he was under arrest. Doctors were not forthcoming about his state of health. The Applicant, family and a friend did manage to gain access to Gabriel once by negotiating with a police officer. Gabriel told his wife and a friend that, after refusing to admit to the robbery, he had been hung by handcuffs from a locker and beaten and, rolled up in a wet carpet, had also been jumped on and beaten with sticks.

Gabriel's wife filed a complaint in May 1996 requesting that a murder investigation be opened into her husband's death. The investigation by the military was ultimately dropped in March 1998 with a decision not to press charges against the accused police officers.

#### Complaints

The Applicant alleged that his brother had died as a result of ill-treatment by the police. He also complained about the inadequacy of the medical care provided by the police to his brother fol-

lowing his arrest, as well as the ensuing investigation into his death. He further complained that his brother had been deprived of all contact with his family while in the police hospitals. He relied on Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment), 6 (right to a fair hearing) and 13 (right to an effective remedy). Lastly, he alleged that his brother's ill-treatment and death, as well as the authorities' refusal to launch a murder investigation into the incident, had been due to his Roma origin, in breach of Article 14 (prohibition of discrimination).

#### Held

The Court found it unacceptable that the Applicant's brother had not had a medical examination upon being arrested on 13 April 1996. The Government did not provide any convincing explanations for Gabriel's state on arrival at the hospital on 16 April 1996, or for the injuries on his body. The Court concluded that the authorities had not only failed to provide timely medical care to the Applicant's brother but also any satisfactory explanation for the death of a perfectly healthy 27 year-old man placed in police custody. It therefore held that there had been a violation of Article 2. The Court also concluded, based on significant failings in post mortem examinations, that the authorities had failed to carry out an effective investigation into the circumstances surrounding Gabriel's death, in further violation of Article 2.

There was no doubt in the Court's mind that the ill-treatment to which the Applicant's brother had been subjected to had been particularly cruel and severe since it had resulted in his death. The authorities' refusal to allow family members to be with their relative prior to his death, as well as their failure to provide them with any information concerning his condition, had also been excessively unfair and cruel. The Court therefore concluded that the treatment to which Gabriel had been subjected had amounted to torture, in violation of Article 3. Referring to its findings under Article 2 as to the alleged inadequacy of the investigation, it found, on the same grounds, that there had been a further violation of Article 3.

Referring to other similar cases against Romania, the Court held that the Applicant had been denied an effective remedy in respect to the death of his brother, including any claim for compensation, in violation of Article 13.

The Court found it unnecessary to determine separately the Applicant's complaints under Article 6 or 14. It awarded the Applicant €3,030 in pecuniary damages and €10,000 in non-pecuniary damages. A further €35,000 was awarded to Gabriel's daughter to be held in trust for her until she reaches the age of majority. €15,000 was awarded for costs and expenses.

#### ***Fadime and Turan Karabulut v Turkey***

(23872/04)

**European Court of Human Rights:** Judgment dated 27 May 2010

*Article 2 (right to life)*

#### Facts

The Applicants were born in 1963 and 1950 respectively and live in Sivas. They had two daughters, Nermin Karabulut and Serap Karabulut.

On 29 July 1998, the two girls were hitchhiking to Sivas when a military vehicle stopped and soldiers got out and started shooting at them. Nermin, 14 years old, was shot and died later in a hospital. Serap, 16, was beaten by the soldiers before being taken to a gendarmerie station. She was released the same evening.

An autopsy was conducted on Nermin on 30 July 1998. According to the report, Nermin had died as a result of internal bleeding caused by a single bullet which had entered from the back and exited at the front.

On 12 August 1998, the Applicants lodged a complaint with the Sivas prosecutor. However, on 22 December 1998, the CPCS decided to decline permission to prosecute the gendarmerie personnel who had killed Nermin. The CPCS's decision was quashed by the Council of State on 26 June 2002.

On 22 August 2002, the Sivas prosecutor filed a bill of indictment with the Sivas Assize Court and charged six gendarmerie personnel with unintentional homicide, contrary to Article 452 of the Turkish Criminal Code. On 28 January 2004, the Sivas Assize Court issued a decision of non-jurisdiction on the ground that the act complained of had taken place in the course of the defendants' military duties. The case file was sent to the Sivas Military Court.

On 14 April 2005, the Sivas Military Court also issued a decision of non-jurisdiction. The case was sent back to the Sivas Assize Court, where a new trial was conducted. On 7 December 2007, the Sivas Assize Court considered that the gendarmeries had exceeded their powers on the use of firearms by firing at Nermin's back rather than at non-vital parts of her body. It found the gendarmeries guilty of manslaughter and sentenced them to one year and eight months' imprisonment. However, the sentences were then suspended pursuant to Article 51 of the Criminal Code, which gave criminal Courts discretion to suspend prison sentences shorter than two years.

The Applicants and defendants appealed. On 22 December 2008, the Court of Cassation upheld the judgment insofar as it concerned its conclusion concerning the finding of guilt. Nevertheless, it quashed the sentencing part of the judgment insofar as it concerned five of the six gendarmeries, and remitted the case to the Sivas Assize Court so that the provisions of a new law which had entered into force in the meantime could be applied.

A new trial was conducted by the Sivas Assize Court which reiterated on 17 December 2009 its previous conclusion, and found five of the gendarmeries guilty of the offence of manslaughter. They were sentenced to one year and eight months' imprisonment but the execution of the sentences was suspended.

### Complaints

The Applicants complained that the force used by the gendarmerie officers against their daughter had not been absolutely necessary and that the excessive nature of the use of force showed that the officers had in fact intended to kill her. They further added that the investigation into the killing of their daughter had neither been impartial or adequate for the purposes of Article 2.

### Held

The Court observed that it was established by the Sivas Assize Court that the gendarmes had exceeded the limits of their powers and had unlawfully caused the death of Nermin. Moreover, the gendarmes had failed to resort to alternative methods to catch her. There had therefore been a breach of Article 2.

In ascertaining whether or not the national authorities afforded appropriate redress, the Court noted that although the gendarmes who killed Nermin were found guilty of causing an unlawful death, they were only sentenced to one year and eight months' imprisonment which, in any event, was suspended. Although the domestic law permitted the trial court to mete out higher sentences – up to a maximum of 6 years – it handed down the minimum sentence under the Criminal Code for the offence of manslaughter and then suspended these sentences. By imposing such disproportionate sentences, the trial court had used its power of discretion to lessen the consequences of a serious criminal act. Thus, the Court ruled that the criminal law system had proved to be far from adequate and would have had little dissuasive effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the Applicants. Therefore, it held that there had also been a procedural violation of Article 2.

### *Perişan and Others v Turkey*

(12336/03)

**European Court of Human Rights:** Judgment dated 20 May 2010

*Disproportionate use of force to quell disturbances in a prison – Article 2 (right to life) – Article 3 (prohibition of torture)*

### Facts

The Applicants were 46 Turkish nationals, of which 34 were acting both in their own name and on behalf of eight of their relatives, prisoners who died during a security forces operation at Diyarbakır Prison on 24 September 1996. The remaining 12 Applicants, prisoners who were injured during the events, were acting in their own name.

According to the Applicants, following scuffles between two prisoners and the chief warden, police officers and gendarmes armed with truncheons and batons had beaten the offending prisoners and their fellow inmates, killing some of them. According to the Government, a riot had taken place that morning and prisoners armed with metal objects had attacked the wardens. The operation left 33 prisoners injured and 27 gendarmes with minor injuries. Eight prisoners died shortly afterwards, having sustained serious injuries including fractured skulls.

In December 1996, criminal proceedings began against various members of the prison staff and against 65 gendarmes and police officers. On 27 February 2006, the Assize Court acquitted three of the accused, declared the prosecution of seven others time-barred and found 62 gendarmes and police officers guilty of causing death by the use of excessive and unnecessary force. It sentenced each of them to 18 years imprisonment, reduced to five years on account of extenuating circumstances and good conduct, and to a three-year ban on holding public office.

The case was referred to the Court of Cassation, which quashed the judgment on 15 May 2007, citing a number of irregularities. The case is currently pending before the Assize Court.

### Complaints

Relying on Articles 2 and 3, the Applicants complained of the killing of their relatives and the ill-treatment inflicted by the security forces. The relatives of those who died also considered that their own suffering resulting from the deaths amounted to a separate violation of Article 3. The Applicants further complained of shortcomings in the preliminary investigation and of the dilatory attitude of the Assize Court, which in their view were in breach of the procedural obligations under Articles 2 and 3 and of Article 6(1) and Article 13. Under Article 14, the Applicants further complained that they had been subjected to discriminatory treatment on account of their ethnic origin and their political views. Lastly, the relatives of the prisoners who died claimed to be the victims of a violation of Article 8.

### Held

The Court first examined whether Turkey was responsible for a breach of the right to life in respect of the eight prisoners who had died. Although the security forces had been ordered not to strike prisoners on the head, the Court could not overlook that eight individuals who had been entirely under the authority and responsibility of the State had died from injuries inflicted by weapons. Further, the minor injuries sustained by the gendarmes undermined their argument, and in the Court's view, demonstrated the absence of a system of adequate and effective safeguards against the abuse of force. The force used against the prisoners had not been 'absolutely necessary' within the meaning of Article 2. There had therefore been a breach Article 2.

As to the six Applicants who sustained life-threatening injuries, the Court ruled that they too had been the victims of violence placing their lives in danger, notwithstanding the fact that they had ultimately survived. Accordingly, there had been a violation of Article 2 in respect of these Applicants.

Regarding the six other Applicants who had been injured, the Court examined the issue from the standpoint of Article 3. It was not in dispute that the six Applicants concerned had been seriously injured while they had been under the authority and responsibility of the State. It was equally clear that they had suffered physical pain and a deep sense of anxiety in the face of indiscriminate lethal violence of such intensity that they could not have been sure whether they would survive. The treatment to which they had been subjected was therefore sufficiently severe to fall within the scope of Article 3.

With regard to the 34 relatives of the prisoners who died, the Court could not discern the existence of a sufficient number of special factors giving their suffering a dimension and character distinct from the emotional distress inevitably caused to relatives of a victim of a serious human rights violation. There were therefore no grounds for finding a separate violation of Article 3.

Concerning the complaints under Articles 2 and 3 for the alleged lack of an effective investigation into the events, the Court noted that in cases of this type, the Turkish State was bound by the requirements of promptness and reasonable expedition. At the present time (over 13 years and seven months after the events), the criminal proceedings against the officers concerned remained pending before the first-instance Court without progress of the establishment

of responsibility. That was therefore sufficient for the Court to conclude that the proceedings in question could not be said to satisfy the requirements of Articles 2 and 3, which had been breached (in their procedural aspect) in respect of all the Applicants.

***Vasil Sashov Petrov v Bulgaria***  
(63106/00)

**European Court of Human Rights:** Admissibility and Judgment on Merits and Just Satisfaction dated 10 June 2010

*Article 2 (right to life) – Article 13 (right to an effective remedy) - Article 14 (prohibition of discrimination)*

Facts

The Applicant, Vasil Sashov Petrov, was born in 1980 and lives in Velingrad, Bulgaria. He is of Roma ethnicity. On 14 January 1999, the Applicant went to a vacant yard in Velingrad to intoxicate himself when two police officers saw him. They called at the Applicant who they believed was trying to steal hens, and he subsequently attempted to flee the scene. The officers fired shots, and when the officers approached him they saw that he was wounded in the stomach. They immediately took him to the hospital. Shortly afterwards he was discharged, but soon returned as his wound was more serious than initially thought. Consequently, he had to undergo a surgical operation resulting in part of his liver and kidney having to be removed.

Following this, an investigation was opened against the two officers; however, upon the investigator recommendations, the investigation was stopped. The Applicant appealed this decision successfully and the case was assigned to another investigator.

The new investigation revealed medical evidence, which determined that the bullet shot from one of the officers caused the Applicant's injuries. The owner of the yard adjacent to where the Applicant was shot gave evidence saying that the Applicant had previously stolen hens from him and as a result, the investigator proposed a discontinuance. He determined that the Applicant was trying to steal hens and therefore the officer acted within Section 80(1)(4) of the 1997 Ministry of Internal Affairs Act. This was confirmed by the Military Prosecutor's Office and Court of Appeal.

Later in 2000, the Applicant brought a tort claim against the two officers. The Court of Appeal upheld its judgment, and the Applicant's appeal at the Supreme Court of Cassation in 2003 was rejected. The court held that the shooting was a result of the Applicant's own actions and failure to comply with the lawful instructions of the officers. As the officer that caused his injury acted in line with the relevant domestic legislation, the Applicant was not entitled to compensation.

Complaints

Relying on Article 2, the Applicant complained that life threatening force had been used against him where not absolutely necessary. The Applicant also complained that he did not have an effective domestic remedy in respect of the breaches of Article 2, under Article 13.

Finally the Applicant complained that the police used excessive force against him because of his ethnic origin and that the authorities failed to investigate the matter properly under Article 14.

### Held

#### *Article 2*

The domestic law was fundamentally insufficient to protect those concerned against unjustified and arbitrary encroachments on their right to life. Thus, the Applicant was shot in circumstances in which the use of firearms was incompatible with Article 2(2)(b).

#### *Article 13*

In the context of an alleged Article 2 violation, Article 13 requires a thorough investigation and the availability of compensation for non pecuniary damage. The approach of the civil courts and the Military Prosecuting authorities fell short of the standards stemming from the Court's case law; therefore, there has been a violation of Article 13.

#### *Article 14*

This part of the application was considered admissible as the Applicant claimed that his ethnicity was a primary factor in the officers' actions. With regards to the substantive aspect of this provision, the evidence in the present case suggests that the officers were not aware of the Applicant's ethnic origin when they fired at him, and only discovered his Roma origin when he was detained. Thus, there was been no violation of the substantive aspect of Article 14.

Regarding the procedural aspect of this provision, the Court noted that the Applicant did not make allegations of racial bias at any point during the investigation. Thus, there was no violation of this provision.

#### *Article 41*

Under Article 41 the Court awarded the Applicant just satisfaction in respect of the Article 2 and 13 violations (being €15,000 in non pecuniary damages and €3,000 plus tax for legal expenses).

### ***Shakhabova v Russia***

(39685/06)

**European Court of Human Rights:** Judgment dated 12 May 2010

*Article 2 (right to life) – Article 13 (right to an effective remedy) – Article 14 (prohibition of discrimination)*

### Facts

The Applicant was born in 1942 and lives in Urs-Martan in the Chechen Republic of Russia. She is the mother of Adam Khurayez, born in 1978.

On 23 November 2002, whilst Mr Khurayez went to the courtyard of his aunt's home to use the bathroom, a group of armed masked men in camouflage uniforms broke into the house.

The intruders pointed guns at the family and ordered everyone to stay in their rooms. After an unwarranted search of the house, the intruders left. Shortly afterwards, family members heard the sound of heavy military vehicles in the street, and a neighbour witnessed an armoured personnel carrier and two military UAZ vehicles parked in the street. After the servicemen left, the Applicant's family realised that Adam had disappeared. The Government submitted that Mr Khurayez had been abducted by unidentified persons.

At various points from 2002 to 2006, the Applicant complained to the authorities about her son's disappearance as well as the ineffectiveness of the investigations.

On 3 March 2006, the Applicant complained to the Urus-Martanovski Town Court about the ineffectiveness of the investigation into her son's abduction. The court held that the district prosecutor's office had unlawfully withheld information, ordered access to the case file for the Applicant, and declared unlawful the decision to suspend the investigation. On 5 July 2006, the Supreme Court of the Chechen Republic upheld the decision on appeal.

### Complaints

The Applicant complained under Article 2 of the Convention that her son had disappeared after being detained by State agents and that the investigation into his disappearance had not been effective. As a result of her son's disappearance and that State's failure to investigate it properly, she had endured mental suffering in breach of Article 3.

Additionally, the Applicant complained that her son had been detained in violation of the guarantees contained in Article 5 and that she had been deprived of effective remedies under Article 13

Under Article 14, the Applicant claimed that she had been discriminated against in the enjoyment of her ECHR rights because she was resident in Chechnya and because of her ethnic background as a Chechen.

### Held

#### *Article 2*

The Court found that in the context of the conflict in Chechnya, detention by unidentified servicemen without any subsequent acknowledgement of the detention can be regarded as life-threatening. The disappearance of Mr Khurayez for five years confirmed the Court's establishment that the Applicant's son must be presumed dead following unacknowledged detention by Russian State servicemen. Liability for his presumed death was attributable to the respondent government because it does not rely on any justifications for use of lethal force by its agents. There was therefore a violation of Article 2.

#### *Article 3*

In cases of disappearances, close relatives of the victims may be subject to an Article 3 violation depending on the authorities' reactions and attitudes to the situations. Having made numerous enquires to the authorities without any explanation indicated a violation of the Applicant's Article 3 rights.

*Article 5*

Unacknowledged detention is a complete negation of the guarantees embodied in this provision, therefore there has been a very grave violation of Article 5.

*Article 13*

There was a violation of Article 13 as the investigation was ineffective.

*Article 14*

This part of the application was inadmissible as there was no evidence to suggest that the Applicant had been treated differently because of her residence or ethnicity. Additionally, the Applicant has never raised this complaint before the domestic courts. The complaint was therefore unsubstantiated.

*Article 41*

The Court awarded the Applicant €2,000 in pecuniary damages plus tax; €60,000 in non-pecuniary damages; and €4,000 plus tax for costs and legal expenses.

## **Prohibition of torture and inhuman and degrading treatment**

*Arpat v Turkey*

(15916/09)

**European Court of Human Rights:** Judgment dated 13 July 2010

*Article 3 (prohibition of torture) – Article 5 (right to liberty and security) – Article 11 (freedom of assembly and association) – Article 13 (right to an effective remedy)*

Facts

The Applicant, Müjgan Süheyla Arpat, was born in 1957 and lives in Istanbul, Turkey.

On 19 June 2003, the Applicant and members of several NGOs attempted to assemble in Bingöl, Turkey, for a campaign entitled ‘A call for women to discuss the Kurdish question’. The police intersected their bus outside of the city centre, and forbade the group to meet at the town centre. When they subsequently started to gather, many, including the Applicant, were arrested.

While detained, the Applicant complained of bad treatment including cramped prison space, food and water deprivation, and rejected requests to use the toilet.

On 17 June 2003, the defendant was transferred to a hospital in Bingöl where, according to medical records, there were no traces of violent abuse on her body. However, on 18 June 2003, she was examined by three doctors after making a complaint to the Human Rights Foundation of Turkey (*Türkiye İnsan Hakları Vakfı*). The resulting reports mentioned a claim of psychological abuse, and noted various signs of injury including large bruises, scabbing, and pain.

The Applicant proceeded to make a complaint against the policemen to the Public Prosecutor in Bingöl, however on 6 August 2003, her charges were dismissed. On 5 July 2004, the dismissal

of charges was cancelled by the criminal court of Muş. However, the charges were dismissed once again on 4 October 2004 for reasons excluding the second medical report and dismissing a discussion concerning maltreatment of the Applicant.

On 12 August 2003, the Applicant was convicted under the penal code, law no. 2911, allowing police intervention by force to dispel illegal meetings and public protests.

### Complaints

The Applicant relied on Articles 3, 5 and 13 of the ECHR. She alleged that under Article 3 she had been subjected to inhuman and degrading treatment. Further, the Applicant stated that due to the absence of an internal method of appeal allowing her to raise allegations of mistreatment, she was unable to exercise her right to an effective remedy under Article 13. Additionally, the Applicant complained that under Article 5 she had not been informed of the appropriate reasons for her detention and was unable to challenge its lawfulness.

### Held

#### *Article 3*

The Court held that the Government had failed to furnish convincing or credible arguments, which would provide a basis to explain or justify the degree of force emphasised by the second medical report. As a result, the injuries sustained by the Applicant were the result of treatment for which the Turkish State bears responsibility; therefore, there had been a violation of Article 3 under its substantive limb.

Further, the Court held that the proceedings by judicial authorities did not take into consideration the second medical report nor did they judge it necessary to hear the Applicant and the other protestors. This failure to take into account evidence during the Applicant's proceedings does not constitute an effective remedy within the meaning of Article 13 and therefore there had been a violation of Article 3 under its procedural limb.

#### *Article 11*

The Court maintained that the protesting group presented no danger to public order, and that the action of the police disproportionately restricted the Applicant's right to be involved in peaceful activities. The measures taken by the authorities were not necessary in defence of public order and therefore there had been a violation of the Applicant's rights under Article 11.

***Ahmadpour v Turkey***

(12717/08)

**European Court of Human Rights:** Judgment dated 15 June 2010

*Weight of UNHCRs conclusion - Article 3 (prohibition of torture) – Article 5 (right to liberty and security)*

Facts

The Applicant, Latife Ahmadpour, is an Iranian national born in 1974 and lives in Kırklareli, Turkey.

On an unspecified date the Applicant was divorced from her husband in Iran. Her ex-husband was appointed legal guardian of their children. Later, without the consent of her ex-husband, she left Iran with her children. Soon after her arrival in Turkey on 2 October 2005, she requested the national authorities and the UNHCR to grant her temporary and permanent asylum in Turkey.

On 28 September 2006, the Applicant married an Iranian national who had converted to Christianity. In October 2006, she also converted to Christianity.

On an unspecified date the UNHCR dismissed the Applicant's asylum request. On 22 December 2006, the Ministry of Interior rejected the Applicant's and her husband's asylum request for temporary asylum. On 7 November 2007, the Applicant was informed that she would be deported. She was also granted a residence permit for 15 days in order to facilitate her departure.

On 18 February 2008, the Applicant was placed in the Kumkapı Foreigner's Admission and Accommodation Centre. On 10 April 2008, after having reopened her file, the UNHCR recognised the Applicant as a refugee. The UNHCR found the Applicant's claims credible, and found that she had a well-founded fear of persecution on the grounds of her political opinion, her membership of a particular social group and her religion. Following the indication of the interim measure under Rule 39 of the Rules of Court, the Applicant was transferred to the Kırklareli Foreigners' Admission and Accommodation Centre. The Applicant and her children were released following the granting of a six-month residence permit on 7 October 2009.

After having lodged a case with the Ankara Administrative Court on 15 November 2007, the proceedings before the administrative Court were still pending at the time of the Court's judgment.

Complaints

The Applicant asserted that a removal to Iran would violate her rights under Articles 2 and 3 of the ECHR. She also asserted that her detention had been unlawful, violating her rights under Article 5(1).

Held

*Article 3*

The Court held that removing the Applicant to Iran would constitute a violation of Article 3. The Court noted that the alleged risks were imminent as the residence permit given to the Applicant was valid for only a short time and was not given due to a pending examination of the Applicant's claim of the alleged risk. Further, the Court was not persuaded by the Government's claim that the national authorities had conducted a meaningful assessment of the Applicant's claim. For example, nothing in her case file showed that she had been interviewed or that her request had been examined. Giving due weight to UNHCR's conclusion on the risk that the Applicant would face upon removal to Iran, the Court found that there were substantial grounds for accepting that a removal would violate her right under Article 3.

*Article 5(1)*

The Court found a violation of Article 5(1) as to her detention between 18 February and 7 October 2009. The Court referred to its ruling in the case of *Abdolkhani and Karimnia v Turkey*, where detention in the Kırklareli Foreigners' Admission and Accommodation Centre was found to be unlawful for the purposes of Article 5(1). As the Court found no particular circumstances which would require it to depart from its findings in the aforementioned judgment, it held that there had been a violation of the Applicant's rights under Article 5(1).

***Baran and Hun v Turkey***

(30685/05)

**European Court of Human Rights:** Judgment dated 20 May 2010

*Article 3 (prohibition of torture) – Article 6 (right to a fair trial)*

Facts

Gülderen Baran (the 'First Applicant') and Hacı Aziz Hun (the 'Second Applicant') were born in 1973 and 1965 respectively. At the time of lodging the application, they were in Bayrampaşa and Edirne prisons respectively

On 21 July 1995, around 15 police officers were injured from a hand grenade thrown in the Gaziosmanpaşa district of Istanbul. An illegal armed organisation, the Turkish Revolutionary Party (TDP), took responsibility for the incident.

On 4 and 5 August 1995, the Applicants were arrested and taken into custody on suspicion of their involvement with the TDP. At various times in August 1995, the Applicants were questioned by police officers at the Anti-Terrorist Branch of the Istanbul Security Headquarters.

The Applicants subsequently complained that they had been subjected to torture while they were being held in police custody. They maintained that they were put in a dirty and unventilated cell, deprived of sleep, food and water, blindfolded, sworn at and threatened, made to listen to loud music, beaten, stripped, hosed with water from a high-pressure hose, made to stand in front of a fan and suspended. The First Applicant further claimed to have been subjected to

sexual harassment, stripped and suspended, and that her hair and fingers had been pulled and a weight put on her feet.

In August 1995, the First Applicant was examined by doctors at the Forensic Medicine Institute at the State Security Court, and by the prison doctor, who all noted various signs of physical trauma. On 30 October 1995, doctors at the Third Section of Expertise of the Forensic Medicine Institute concluded that she was suffering from damage to nerves. On 18 December 1998, the Third Section of Expertise (*İhtisas Kurulu*) submitted their opinion, in which they considered that her right arm was irreversibly paralysed and that this constituted a permanent invalidity (*uzuv zaafı*).

On 17 August 1995, the Second Applicant was examined by a doctor at the Forensic Medicine Institute at the State Security Court, who noted pain, and pins and needles. On 2 July 1998, he was diagnosed by a doctor at the Medical Faculty of Istanbul University as suffering from a permanent cervical herniated disc syndrome.

At a hearing held on 19 December 1995, the Applicants' lawyer asked Istanbul State Security Court to initiate a criminal investigation into allegations of torture. The court dismissed this request, stating that the Applicants could lodge their complaints themselves with the Public Prosecutor's office.

On 2 March 2000, the Istanbul State Security Court sentenced the First Applicant to life imprisonment under Article 146 of the Criminal Code despite her allegations of ill-treatment pending before the domestic courts. The court sentenced the Second Applicant to 12 years and six months imprisonment under Article 168 of the Criminal Code. The Applicants appealed; however, in January 2001, the Court of Cassation upheld the convictions.

On 18 June 1996, following investigation, the Istanbul Public Prosecutor filed a bill of indictment against five officers for ill-treatment of the First Applicant. However, on 19 February 2004, the Court of Cassation upheld the Istanbul Assize Court's decision to discontinue proceedings as a result of time limitations.

### Complaints

The Applicants complained under Articles 3 and 13 of the ECHR that they had been subjected to ill-treatment while in police custody and that the domestic authorities had failed to conduct an effective investigation into their allegations. They complained that their convictions were based on statements given under torture and ill-treatment, and without the assistance of a lawyer, while being held in police custody. They further complained that they had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge on the bench of the Istanbul State Security Court and that the written opinion of the principal Public Prosecutor at the Court of Cassation had not been notified to them.

### Held

In regards to the Articles 3 and Article 13, the Court found that the ill-treatment involved very serious and cruel suffering that could only be characterised as torture. Consequently, there had been a violation of Article 3 of the Convention. The Court also found a breach of the State's procedural obligations under Article 3 of the Convention.

The Court found that the use of statements obtained under torture/ill-treatment, in the absence of a lawyer, rendered their trial unjust. Therefore, there had been a violation of Article 6(3)(c) of the ECHR in conjunction with Article 6(1).

***Biçici v Turkey***

(30357/05)

**European Court of Human Rights:** Judgment dated 27 May 2010

*Article 3 (prohibition of torture) – Article 11 (freedom of assembly and association)*

Facts

The Applicant, Kiraz Biçici, was born in 1955 and lives in Istanbul. On 29 October 2003, while attempting to participate in a demonstration in the form of ‘a press conference’ held on İstiklal Street in the Beyoğlu district of Istanbul, the Applicant was arrested, together with some 50 to 60 other participants. The Applicant alleged that police officers had used disproportionate force to disperse the crowd and to arrest the demonstrators, whereas the Government claimed that the demonstrators had resisted the police and had refused to disperse.

Following her arrest, the Applicant was taken to hospital for medical examination and, although the Applicant complained of pain in her right upper arm, the doctor reported no signs of physical injury.

On the same date, the Applicant was questioned by the Beyoğlu Public Prosecutor. She claimed that she had attended the meeting as the President of the Istanbul Human Rights Association, that she had been arrested by the police for no reason, and that she had been subjected to ill-treatment. The Applicant was released from police custody that day.

On 6 November 2003, the Applicant lodged a complaint with the Beyoğlu Public Prosecutor against the police authorities, and was referred to the Istanbul branch of the Forensic Medical Institute. The doctor who examined her noted a 2 x 6 cm ecchymosis on the back of her left leg and that the Applicant was suffering from pain in her right shoulder and arm.

However, on 12 November 2003, the Beyoğlu Public Prosecutor issued a decision not to prosecute the police officers. In the Public Prosecutor’s opinion, the Applicant’s injuries were the result of a proportionate use of force which did not amount to ill-treatment or abuse of authority. On 23 December 2004, the Applicant lodged an appeal with the Istanbul Assize Court against this decision. On 30 December 2004, the Istanbul Assize Court dismissed the applicant’s appeal.

In the meantime, on 7 November 2003, the Beyoğlu Public Prosecutor brought charges against thirteen demonstrators, including the Applicant, for violation of the Meetings and Demonstration Marches Act. The Applicant and her co-accused were convicted on 19 December 2006.

Complaints

The Applicant complained that she had been subjected to ill-treatment during her arrest and that the national authorities had failed to conduct an effective investigation into her complaints, in violation of Articles 3, 6 and 13 of the Convention.

The Applicant also alleged that the intervention of the police at the meeting constituted a violation of her right to freedom of assembly protected by Article 11 of the ECHR.

#### Held

The Court noted that the Public Prosecutor did not hesitate to accept the second medical report as evidence of the Applicant's allegations, did not refer to the discrepancy between the two reports, and did not question the causal link between the injury and the alleged ill-treatment. The Court noted further that the police had been informed of the planned demonstration and had not acted without prior preparation.

In light of these findings, the Court ruled that the Government had failed to furnish convincing or credible arguments, which would provide a basis to explain or justify the degree or force used against the Applicant. As a result, the injuries sustained by the Applicant were the result of treatment for which the Turkish State bears responsibility; therefore, there had been a violation of Article 3 under its substantive limb.

The Court went on to confirm that Article 3 also requires authorities to investigate allegations of ill-treatment when they are 'arguable' and 'raise a reasonable suspicion.' The Court pointed out that there were serious shortcomings in the way the investigation was conducted by the Public Prosecutor. The Court concluded that the national authorities failed to carry out an effective and independent investigation into the Applicant's allegations of ill-treatment; therefore, there was a procedural violation of Article 3.

The Court also reiterated that an interference with the right of peaceful assembly will constitute a breach of Article 11 unless it is 'prescribed by law,' pursues one or more legitimate aims under paragraph 2 of that provision and is 'necessary in a democratic society' for the achievement of those aims. Having regard to the findings of the Beyoğlu Assize Court, the Court observed that the Applicant and the other demonstrators did not breach the Meetings and Demonstration Marches Act. The group did not present a danger to the public, or engage in acts of violence. The forceful intervention of the police officers was disproportionate and unnecessary for the prevention of disorder within the meaning of Article 11(2) of the Convention, and the Court held that this Article had been violated.

#### **Çelik v Turkey (No 2)** (39326/02)

**European Court of Human Rights:** Judgment dated 27 May 2010

*Article 3 (prohibition of torture)*

#### Facts

The Applicant, Murat Çelik, was born in 1966 and lives in Istanbul. He was a member of the board of directors of the Istanbul Bar Association at the time of lodging the application, and was the Istanbul department director of the Contemporary Lawyers' Association at the time of the events. The Applicant also pursued various activities for the furtherance of human rights protection in Turkey.

On 21 April 1998, the Applicant was injured during a commotion which took place at the Aydın Assize Court following the delivery of a verdict convicting six police officers of torturing and killing a detainee. The Applicant maintained that as soon as the sentence of the defendant police officers was read out, off-duty police officers in civilian clothes and the defendant police officers started to verbally and physically attack the plaintiffs, their lawyers and the victims' relatives. Later, the rapid reaction police force entered the Court room and started to beat and drag people out of the room.

Five people, including the Applicant, were injured in the course of the commotion and were transferred to a doctor for medical treatment. The Applicant was examined by a doctor at the Aydın State Hospital, who noted grazes on the right side of the Applicant's neck, a cut on his chin and widespread redness on the upper side of his right leg.

On 22 April 1998, the Applicant filed an official complaint with the Bakırköy Public Prosecutor's office about the events and requested the prosecution of the plain clothes police officers working at the Anti-Terrorism branch of the Aydın Security Directorate. On 27 November 1998, the Aydın Public Prosecutor filed an indictment against 13 people, which included two journalists, a local politician and seven police officers at the Aydın Security Directorate on account of, among other things, causing bodily harm within the meaning of Article 456 of the Criminal Code. On 2 April 2001 the Aydın Criminal Court of first-instance decided, in accordance with the relevant provisions of Law no. 4616, that the criminal proceedings should be suspended and subsequently discontinued if no offence of the same or a more serious kind was committed by the offenders within a five-year period.

### Complaints

The Applicant complained under Articles 3 and 13 of the ECHR about the treatment he had received at the Aydın Courthouse on 21 April 1998 and about the manner in which the investigation and the ensuing criminal proceedings had been conducted by the authorities, resulting in impunity.

### Held

The Court found that the evidence submitted by the parties did not allow it to conclude beyond reasonable doubt that the Applicant was subjected by the police officers to the type of severe ill-treatment proscribed by Article 3. Moreover, since the plain clothes police officers present at the Courthouse were off duty and were acting in their private capacity when they allegedly beat up the Applicant, the Court considered that no direct responsibility could be attached to the respondent Government under the ECHR for their acts as private individuals. In addition, the Court found no indication that State authorities had failed to take effective steps to protect the Applicant from ill-treatment.

However, the Court reiterated that Article 3 requires that States put into place effective criminal law provisions to deter the commission of offences against personal integrity, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions, and this requirement also extends to ill-treatment administered by private individuals. Moreover, the national courts should not under any circumstances be prepared to allow possibly serious attacks on physical and moral integrity to go unpunished.

The Court reiterated that the Turkish criminal law system as applied in this case has proved to be far from rigorous and would have had no dissuasive effect capable of ensuring the effective prevention of unlawful acts perpetrated by State agents or private individuals when the criminal proceedings brought against them are suspended due to the application of Law no. 4616. The Court considered that the criminal proceedings in the present case could not be said to have had a sufficient deterrent effect on the individuals concerned, or to have been capable of ensuring the effective prevention of unlawful acts such as those complained of by the Applicant. Therefore, there had been a procedural violation of Article 3.

***Davydov and Others v Ukraine***  
(17674/02)

**European Court of Human Rights:** Judgment dated 1 July 2010

*Article 3 (prohibition of torture) – Article 8 (right to respect for private and family life) – Article 13 (right to an effective remedy) – Article 34 (individual applications) – Article 38 (examination of the case)*

Facts

The judgment concerned three Applicants who, at the time of the events, were serving their sentences at Zamkova correctional colony. All three are Ukrainian nationals who were born in 1963, 1975 and 1967 respectively.

According to the Applicants, on two occasions while serving their prison sentences, they were severely ill-treated by special police forces taking part in training exercises in the prison. The Applicants complained that they were not warned about those exercises nor asked if they were willing to take part in them. They were beaten, struck, stepped on, forced to strip naked, humiliated, and received no medical assistance for their injuries. They maintained that their complaints were not investigated adequately. Further, they complained that their correspondence to the ECtHR was censored and that some of them had received solitary confinement punishments for having written to the Court. Finally, the Applicants also complained about their detention conditions.

Given that the Ukrainian Government disputed the circumstances related to the above complaints and denied that any of the prisoners were injured during the exercises, the Court carried out a fact-finding mission in June 2007, during which three of the Court's judges heard witnesses at the premises of the Khmelnytsky Regional Court of Appeal. Evidence was also taken from three of the Applicants and 13 witnesses at the Zamkova prison. The Court also examined documents submitted by the parties concerning the training exercises, including training plans and relevant regulations on prisoners' supervision and the establishment of special rapid response units of the State Department for Enforcement of Sentences for dealing with extraordinary situations.

Complaints

Relying on Articles 3, 8, 13 and 34, the Applicants submitted numerous complaints related in particular to their suffering during and after the special forces' training exercises.

### Held

Having examined the Government's conduct in assisting the Court to establish the facts of the case, the Court concluded that the Ukrainian authorities had failed to discharge their obligations under Article 38(1)(a).

Based on the evidence it gathered, the Court found that, in the context of the training events, Article 3 had been violated on four counts. First, the Applicants had been ill-treated, and had experienced fear and humiliation during the training exercises which had been conducted without the prisoners' consent, nor any legal justification. Second, no effective investigation into the Applicants' complaints had been conducted, and the investigations actually carried out were deficient. The Court concluded that the authorities had never intended to undertake any meaningful steps to carry out an investigation that would be prompt, independent and could lead to tangible results. Third, it had not been established that the Applicants had ever been examined by a medical officer in relation to their complaints; no medical treatment had been provided to them for the injuries sustained during the exercises, and no proper registration system had existed for medical complaints. Last, the cells in which the Applicants had been held had been consistently overcrowded.

The Court recalled its earlier case law in which it had found that no effective remedy existed in Ukraine in respect of complaints concerning ill-treatment, lack of effective investigation into allegations of ill-treatment and failure to provide medical assistance and conditions of detention. It concluded that there had been a violation of Article 13.

The Court found that the Applicants' letters had been illegally checked and censored, in violation of Article 8(1). It also held that the Applicants' right under Article 34 (right to individual petition) had been violated in view of the pressure exercised on them by the authorities to withdraw their applications to the Court.

The Court held that Ukraine had to pay to the first and second Applicants separately €20,000, and to the third Applicant €15,000 in non-pecuniary damages.

### ***Dbouba v Turkey***

(15916/09)

**European Court of Human Rights:** Judgment dated 13 July 2010.

*Article 3 (prohibition of torture) – Article 5 (right to liberty and security) – Article 13 (right to an effective remedy)*

### Facts

The Applicant, Saafi Ben Fraj Dbouba, is a Tunisian national, born in 1967. He is currently being held in the Gaziosmanpaşa Foreigners' Admission and Accommodation Centre in Kırklareli, Turkey.

In 1986, the Applicant became an active sympathiser of the Islamic Tendency Movement (later renamed *Ennahda*) in Tunisia. As a result of persecution by Tunisian security forces, the Applicant left Tunisia in 1990, lived in Syria, and subsequently arrived in Turkey.

On 19 June 2007, the Applicant was arrested during a police operation conducted against al-Qaeda. A bill of indictment was filed on 9 August 2007 by the Istanbul Assize Court, charging the Applicant with membership of al-Qaeda.

During the first hearing on the merits of the case in January 2008, the Applicant maintained that he had not been involved in al-Qaeda activities and that he could not return to Tunisia because of the risk of ill-treatment and the death penalty. The Court decided to release the Applicant pending trial, yet banned the Applicant from leaving the country. The criminal proceedings against the Applicant are still pending before the first-instance Court.

In March 2008, the deputy director of the Kocaeli police headquarters requested the Istanbul Assize Court to annul its decision banning the Applicant from leaving the country and noted that the Applicant was a person liable to be deported under Article 19 of Law no. 5683. On 22 January 2009, the Istanbul Assize Court set aside its previous decision banning the Applicant from leaving Turkey, and the Turkish Government rejected his request for temporary asylum on the grounds that he was a suspected al-Qaeda member.

On 11 March 2008, the Applicant was transferred to the Kırklareli Foreigners' Admission and Accommodation Centre, where he is currently being held. The Applicant has submitted details as regards to the poor conditions in which he was kept in both the Kocaeli and Kırklareli facilities.

### Complaints

The Applicant relied on Articles 3, 5 and 13 of the ECHR. He alleged that, under Article 3, his removal to Tunisia would expose him to a real risk of torture and other forms of ill-treatment on account of his affiliation with *Ennahda*. Under Article 13, the Applicant stated that with regards to his asylum request, he had not been informed of the outcome of an interview by competent authorities dated November 2009, and was therefore unable to challenge the decision to deport him. Additionally, the Applicant complained that under Article 5, he had not been informed of the reasons for his detention and was unable to challenge its lawfulness.

### Held

#### *Article 3*

The Court concluded that the Applicant would be at risk of imprisonment and torture if returned to Tunisia. The Court was not persuaded that the national authorities examined his claims and took into account the requirements of Article 3 before planning his deportation. Thus, there would be a violation of Article 3 if the Applicant were to be removed to Tunisia. Regarding the Applicant's complaint about the conditions of his detention in the Kocaeli Police Headquarters and Kırklareli Foreigners' Admission and Accommodation Centre, the Court found that the material conditions in the centres were not so severe as to bring them within the scope of Article 3. The Court thus rejected this part of the application.

#### *Article 13*

The Court found that the Applicant was not afforded an effective and accessible remedy in relation to his allegations of the risk of ill-treatment in Tunisia, and that there had therefore been a violation of Article 13.

### Article 5

The Court found a violation of Article 5 as the Applicant's detention in the absence of clear legal provisions establishing the procedure and time limits for ordering and extending detention with a view to deportation meant that the deprivation of liberty to which the Applicants were subjected was not 'lawful' for the purposes of Article 5.

The Court awarded the Applicant EUR 11,000 for non-pecuniary damages and EUR 4,000 in legal costs. The Court also considered the urgent need to put an end to the violation of Article 5 of the Convention, and stated that the respondent State must secure the Applicant's release at the earliest possible date.

### **Garayev v Azerbaijan**

(53688/08)

**European Court of Human Rights:** Judgment dated 10 June 2010.

*Extradition – Article 3 (prohibition of torture) – Article 5 (right to liberty and security) – Article 13 (right to an effective remedy)*

#### Facts

The Applicant, Shaig Garayev, was born to an Uzbek mother and an Azerbaijani father and was born in Bukhara, Uzbekistan in 1981. He holds a valid Uzbek passport and is considered to be an Uzbekistan national by both the Uzbek and Azerbaijani authorities. However, he also considers himself an Azerbaijani national.

On 21 December 2000, the Applicant and his family were arrested on suspicion of killing six people and mutilating their corpses. After being released without charge, he and his sister left Uzbekistan for Azerbaijan on 27 November 2001 and have been there since. In the meantime, on 20 November 2001 the Applicant was charged with these crimes by the Bukhara Regional Court.

Despite entering Azerbaijan legally, the Applicant was only permitted to stay for 90 days. On 9 April 2008, the Applicant was arrested in Beylagan, Azerbaijan on the basis of a search warrant issued by the Uzbek authorities. It was decided that the Applicant would be detained until an extradition decision was made, meaning no fixed term was set. On 18 June 2008, it was decided that the Applicant would be extradited to Uzbekistan and assurances were made that the Applicant would not be subjected to torture.

The Applicant attempted to have the extradition order quashed. The Applicant first attempted to gain an Azerbaijani national's identity card, but this was rejected by the court. The second proceedings alleged that his detention had no basis under domestic law as it was for an indefinite period, and that if returned to Uzbekistan he faced the threat of torture. The Baku Court of Appeal held that he was not an Azerbaijani national but remained silent on the threat of torture.

### Complaints

The Applicant alleged that if extradited he would face a threat of torture which would breach his rights under Article 3 of the ECHR. Despite assurances from the authorities, he maintained that torture and other practices are widely used in the Uzbek law-enforcement agencies. In addition, evidence was submitted of the torture his family members had received.

The Applicant also alleged that his Article 13 rights had been breached as there was no effective remedy by which to challenge his extradition.

The Applicant's final allegation was that, as his sentence was indefinite, it had breached Article 5(1)(f) and the fact he could not challenge his detention meant Article 5(4) had been breached.

### Held

#### *Article 3*

The Court declared that no consideration of the receiving country need be taken and instead it must be concluded whether the extraditing country was subjecting the Applicant to a real risk of torture. The Court did not believe there was credible evidence to suggest the Applicant would be tortured due to his non-Uzbek origin but did conclude that any person held in custody there faces a serious risk of being subjected to torture. Various international reports and consistent evidence from the Applicant's family supported this. The assurances made were also no guarantee that torture would not occur and consequently the Court found a breach of Article 3.

#### *Article 13*

The Court noted that Article 13 guarantees that an effective remedy is available in national law, and that this remedy must be effective in practice as well as law. Whilst the scope of Article 13 varies depending on the nature of the Applicant's complaint, when torture is alleged the severity of the harm requires independent and rigorous scrutiny of the claim and, in the event of extradition, an effective means of suspending the treatment. The fact that the Applicant complained of a threat of torture and the domestic courts did not consider these allegations meant a breach of Article 13 had occurred.

#### *Article 5*

In relation to Article 5(1)(f), the Court observed that in ordinary criminal proceedings a time limit is set for the pre-trial detention of defendants. However, no such provision exists in relation to detention with a view to extradition. In addition, national legislation requires periodic review of a suspect's detention, which had also failed to take place in the present case. Accordingly, there had been a breach of Article 5(1)(f).

The purpose of Article 5(4) is to allow a detainee to challenge the legality of his or her detention, leading to release if appropriate. The Court found that there was no legal framework by which to challenge his detention, and therefore a breach had occurred.

The Applicant's claim for pecuniary damages for loss of earnings whilst in detention was rejected due to a lack of documentation. However, the Court decided that he had non-pecuniary damage that could not be compensated solely by the findings of violations, and he was awarded €16,000 in damage.

### ***Lopata v Russia***

(72250/01)

**European Court of Human Rights:** Judgment dated 13 July 2010

*Article 3 (prohibition of torture) – Article 6 (right to a fair trial) – Article 34 (individual applications) – Article 35 (admissibility criteria)*

#### Facts

The Applicant, Aleksandr Konstantinovich Lopata, is a Russian national who was convicted of murder in 2001. He alleged that during the course of the investigation he had been subject to torture, was convicted on the basis of a forced confession, that the investigation into the alleged torture had not been effective, and that authorities had interfered with his right of individual petition.

#### Complaints

The Applicant complained that, contrary to Article 3, police officers involved in his investigation had ill-treated him and had subsequently failed to conduct an effective investigation. The respondent State argued that the accusations regarding ill-treatment were unfounded and that the Applicant had not exhausted domestic remedies because he had not appealed the domestic prosecutor's refusal to institute criminal proceedings against the police officers.

The Applicant complained that contrary to Articles 6(1), (2), (3), he had been convicted on the basis of a confession obtained under duress and in the absence of legal counsel. Further, he argued that the Courts had not elucidated all the relevant facts. Russia argued that a lawyer's presence at a confession is not mandatory under domestic law.

The Court raised the issue whether the Applicant had been subjected to intimidation which had prevented the effective exercise of his right of individual petition, in breach of Article 34.

#### Held

##### *Article 3*

As the Court was satisfied that the authorities promptly launched the investigation, the key question was whether the investigation was effective. In the Court's view, many shortcomings critically undermined the effectiveness of the investigation and its ability to establish the relevant facts. It further noted that although the trial court interviewed the Applicant and some of the police officers about the circumstances of the alleged ill-treatment and examined the materials of the prosecutor's inquiry, it did not rectify most of the shortcomings entrenched in this investigation. Moreover, there were serious contradictions in the police officers' statements

to the prosecutor and the trial court. Therefore, the Court held that there had been a procedural violation of Article 3.

The Court considered that the evidence before it did not enable it to find beyond all reasonable doubt that the Applicant was subjected to treatment contrary to Article 3, as alleged. In this respect it particularly emphasised that its inability to reach any conclusions derived in a considerable part from the failure of the domestic authorities to react effectively to the Applicant's complaints at the relevant time. Consequently, the Court could not establish a substantive violation of Article 3.

#### *Article 6*

The Court reiterated that its only role is to assess whether the requirements of Article 6 have been complied with. The circumstances under which the confession was obtained cast doubt on its reliability. The Court held that there had been a violation of Article 6(3)(c) taken in conjunction with Article 6(1).

#### *Article 34*

'Any form of pressure' includes indirect acts or those designed to dissuade or having a 'chilling effect'. The Applicant can be reasonably considered to have felt intimidated following his conversation with officers as well as by his ensuing repeated questioning by State officials, and could have experienced a legitimate fear of reprisals. The respondent State therefore failed to comply with its obligations under Article 34.

#### *Article 41*

The Court held that after finding three violations of the ECHR, the Applicant's suffering and frustration cannot be compensated by the mere finding of a violation. The Court awarded €15,000 plus any relevant tax to the Applicant.

## **Right to liberty and security**

### ***D.B. v Turkey***

(33526/08)

**European Court of Human Rights:** Judgment dated 13 July 2010

*Article 5 (right to liberty and security) – Article 34 (individual applications)*

#### Facts

The Applicant, D.B., is an Iranian national who was born in 1984 and lives in Sweden. He was an active member of the Communist Worker's Party of Iran and the Freedom and Equality Seeking Students Movement in Iran. He was also on the board of editors of a well-known student journal. He submitted that numerous students involved in similar activities were arrested and imprisoned in 2007. Early in 2008, he arrived illegally in Turkey.

On 5 April 2008 the Applicant was arrested by Turkish security forces and placed in the Edirne Foreigners' Admission and Accommodation Centre. On 24 July 2008, his application for

temporary asylum was rejected on the grounds of his ties with another Iranian national who presented a risk for national security. On the same day, he was informed that, unless he lodged an objection within two days, he would be deported to his home country. He lodged such an objection on 25 July 2008. On 9 September 2008 his objection was rejected by the Ministry of the Interior, which considered that, in the light of his militant background, there was a real risk that he would be taken to the United States where he would undergo military training and that he would be part of military operations targeting Iran. On 20 March 2009 he was granted refugee status under the UNHCR's mandate.

In April 2009, the Applicant's lawyer brought administrative proceedings asking for his release. He submitted that the Government of Sweden had accepted D.B. within the refugee quota for Sweden and that a plane ticket to Sweden was booked for him for 27 May 2009. His request was rejected on 6 May 2009 by the Ankara Administrative Court, which was upheld by the Ankara Regional Administrative Court. On 26 June 2009, D.B.'s lawyer renewed his request before Ankara Administrative Court, which ordered his release. On 24 November 2009, D.B. escaped from the Kırklareli Centre, but then surrendered to the police in order to be released, which was finally done on 3 February 2010.

D.B. left Turkey on 4 March 2010 and arrived in Sweden where he was granted refugee status.

### Complaints

Relying on Article 5 (right to liberty and security), the Applicant alleged that his detention pending extradition in Turkey had been unlawful, and that he did not have access to an effective remedy by which he could have challenged it. Relying on Article 3 (prohibition of ill-treatment) he complained, in particular, of having been held in solitary confinement for eight months during his detention.

The application was lodged with the ECtHR on 17 July 2008. On the same day, the President of the Chamber indicated to Turkey that the Applicant should not be deported to Iran until 29 August 2008. His representative was also asked to submit a power of attorney authorising him to lodge an application with the Court on behalf of D.B. However, D.B.'s lawyer was prevented by the Edirne Foreigners' Admission and Accommodation Centre administration from visiting his client. The Chamber President prolonged the interim measure. He also requested Turkey to allow D.B.'s lawyer - or any lawyer - to have access to him. On 8 October 2008, the Court's interim measure was extended until further notice. Finally on 21 October 2008, a lawyer was allowed to meet D.B., who signed a power of attorney. In view of those circumstances, the Court raised the question of Turkey's compliance with its obligation under Article 34 (individual applications).

### Held

The Court observed that the circumstances in the present case were almost the same as a previous case in which it had found that the placement of the relevant applicants in the Kırklareli Foreigners' Admission and Accommodation Centre constituted a deprivation of liberty. Further, by submitting that the Applicant had escaped from the Kırklareli Centre, the Government had implicitly accepted that he had been deprived of his liberty. There had therefore been a violation of Article 5(1).

The Court noted that the Applicant's lawyer had requested the annulment of the decision not to release D.B. on 26 June 2009 and that Ankara Administrative Court's decision ordering D.B.'s release was only adopted on 19 November 2009. Having regard to the time which elapsed between these dates, the Court found that the judicial review could not be regarded as a 'speedy' reply to D.B.'s petition. Since the Turkish legal system had not provided D.B. with a remedy whereby he could obtain speedy judicial review of the lawfulness of his detention, there had therefore been a violation of Article 5(4).

The Court underlined that the Government had failed to comply with the interim measure requested under Rule 39 of the Rules of Court. It rejected the Government's argument that D.B. could not meet a lawyer in order to provide a power of attorney for the Court because that lawyer did not have a power of attorney to meet D.B. in the first place. As a result of that initial administrative obtuseness, the Court considered that the application had been put in jeopardy, since D.B. had been prevented from providing more detailed information concerning the alleged risks that he would face in Iran.

The Court concluded that D.B.'s effective representation before the Court had been seriously hampered. In the Court's view, the fact that he had subsequently been able to meet a lawyer, sign the authority form and provide the information regarding his situation in Iran had not altered the lack of timely action by the authorities, which had been incompatible with Turkey's obligations. There had therefore been a violation of Article 34.

The Court ordered Turkey to pay the Applicant €11,000 for non-pecuniary damage and €158 for costs and expenses.

## Right to a fair trial

### *Hakimi v Belgium*

(665/08)

**European Court of Human Rights:** Judgment dated 29 June 2010

*Article 6 (right to a fair trial)*

#### Facts

The Applicant is a Moroccan national who was born in 1965 and is currently in prison in Andenne, Belgium. On 15 September 2006 he was convicted in his absence by the Brussels Court of Appeal to eight years imprisonment and a fine of €2,500 for participation in the activities of a terrorist group.

The judgment was served on the Applicant the same day in Saint-Gilles Prison by the prison's deputy governor, in French, without an interpreter, and without any reference being made to the period of 15 days during which he could apply to have the judgment set aside.

Almost a month and a half later on 29 October 2006, the Applicant lodged an application to have the Court of Appeal judgment set aside. He complained, among other things, of not having had the services of an interpreter when the judgment was served on him and of the refusal

of the prison authorities to provide him with information concerning the possibilities of appeal.

On 9 March 2007, the Court of Appeal rejected the Applicant's request to set aside the judgment on the basis that it was out of time. Based on a Court of Cassation ruling, it held that there was no domestic or international norm directly applicable in Belgian law requiring convicted persons to be informed of the avenues of appeal open to them, the authorities competent to hear such appeals, or the time-limits with which to be complied. On 27 June 2007, the Court of Cassation upheld the judgment, ruling that neither the ECHR nor the applicable legal provisions required the record of service of a conviction handed down in the person's absence to mention the right to appeal or the time allowed in which to exercise that right.

Following the court's judgment in a similar case in 2007, the Belgian authorities adopted a series of measures to ensure that appeal possibilities are now systematically explained when judgments are served on persons in the Applicant's situation.

#### Complaints

Relying on Article 6(1), the Applicant complained that his application to set aside the judgment convicting him in his absence had been rejected as being out of time. He stressed the fact that he had not been informed by the prison authorities of the time-limit for applying to have the judgment set aside.

#### Held

The Applicant expressly indicated that his application to the Court was aimed at securing the reopening of the criminal proceedings against him in Belgium, which in principle had been fully concluded. A measure of this kind could indeed be envisaged at the stage of execution of a Court judgment finding a violation of the ECHR. Belgian law allowed the Court of Cassation to agree to the reopening of criminal proceedings 'if it [had] been established by a final judgment of the European Court of Human Rights that there [had] been a violation of [the Convention] or one of the additional Protocols.' However, it was not clear whether it was possible to accede to such a request following a unilateral declaration by the Government. In the present case, the Belgian authorities had proposed acknowledging unilaterally that there had been a violation of Article 6 (1) and paying the Applicant €10,000. However, the Court rejected the proposal and decided to give judgment on the merits of the application.

As to the merits, the Court referred to a previous, analogous judgment. In that case, the Court held that the refusal by the Court of Appeal to reopen the proceedings, which had been conducted in the Applicant's absence, and the rejection of the Applicant's application to set aside his conviction as being out of time, had deprived him of his right of access to a Court. The Court therefore reached the same conclusion in the case at hand, finding an Article 6(1) violation.

Lastly, the Court noted that it was clear from the Applicant's observations that he was waiving any claim for compensation for the damage alleged; the Court held that the violation itself constituted sufficient just satisfaction. It reiterated that when it found that an applicant had been convicted in breach of one of the guarantees of a fair trial, as in the present case, the most appropriate form of redress was for the individual concerned to be retried or for the proceedings to be reopened in due course and in accordance with the requirements of Article 6.

***Karadağ v Turkey***

(12976/05)

**European Court of Human Rights:** Judgment dated 29 June 2010

*Article 6 (right to a fair trial)*

Facts

The Applicant is a Turkish national who was born in 1974. At the time of lodging the application, he was in detention in Sinop prison.

Criminal proceedings were opened against him following the murder of a mobile phone shop owner found stabbed to death. On 5 January 2002, the Applicant was taken into police custody. According to the transcript of his statement to the police on that day, he confessed to the murder, and there was a tick in the box marked 'lawyer present during examination of witness.' On two subsequent occasions – during a reconstruction of the events and when giving evidence to the military authorities – the Applicant was not assisted by a lawyer. He was charged with the murder in February 2002.

On 30 May 2002, a television programme about the case was aired, which showed the Applicant's character stabbing the shopkeeper. It also included commentary about the Applicant's state of mind, among other things. Following the broadcast, the Applicant was hospitalised with severe depression.

On 26 September 2002, an investigation was opened regarding the person who had initially acted as the Applicant's court-appointed counsel during his trial, there being some doubt as to whether she was a qualified lawyer. At that time, the Applicant was represented by a new lawyer, who requested that all the procedural steps taken when the Applicant was not properly represented be taken afresh. His request was rejected.

On 1 November 2002, the Assize Court found the Applicant guilty of murder and sentenced him to life imprisonment. That judgment was set aside by the Court of Cassation and the case was remitted. On 18 December 2003, the Assize Court found the Applicant guilty of murder based, among other things, on statements made by witnesses. On 7 October 2004, the Court of Cassation rejected the Applicant's appeal against the judgment.

In 2007, the person who had represented the Applicant during part of his trial was found guilty by the Assize Court of illegally practising law; she had opened a law firm, drawn up notarised documents and taken part in trials and enforcement proceedings.

Complaints

Relying on Article 6(1), (2) and (3), the Applicant complained that he had not been assisted by a lawyer while in police custody, that the proceedings against him had been unfair for various reasons (statements made under duress, lack of legal representation), and that his right to be presumed innocent had been violated by the television programme about his case at the time of his trial.

### Held

The Court reiterated that in order for a trial to be fair, the accused must have access to the full range of services provided by counsel, and that the absence of legal representation during the investigation constituted a breach of the requirements of Article 6. In this case, although the Applicant had been represented by counsel during part of his time in police custody, he had no counsel when he was taken to the scene of the crime for the reconstruction, or during his questioning by the military authorities. The Court accordingly found a violation of Article 6(3)(c) in conjunction with Article 6(1).

Article 6(1) and (3)(d) provide for an accused person to be able to challenge statements made by witnesses against him and to question the witnesses concerned. In this case, the Applicant had not been represented by a qualified lawyer up until the hearing preceding the one at which the sentence was pronounced. His subsequent lawyer's request for the procedural steps taken when his client had not been properly represented to be taken again had been rejected. The Court considered that the examination and remittal of the case by the Court of Cassation had not remedied the unfairness connected with the initial proceedings. The failure to hear witnesses at the only stage in the judicial proceedings when the Applicant had been represented by a bona fide lawyer had deprived him of the possibility of presenting his case in keeping with the principle of equality of arms and the adversarial principle. The Court accordingly found a violation of Article 6(3)(d) in conjunction with Article 6(1).

The television programme about the Applicant's case had been interspersed with witness accounts, including that of a police investigator, and left no doubt as to the Applicant's guilt. While the authorities had the right to inform the public about progress in criminal investigations, they had to respect the presumption of innocence. This had not been the case here, as the police had taken no such precautions and had depicted the Applicant as a criminal. Furthermore, the Turkish Government had provided no explanation as to how the press had been able to access the crime scene and film reconstruction in which the Applicant had taken part. The Court accordingly found a violation of Article 6(2).

The Court held that Turkey was to pay the Applicant €7,200 in non-pecuniary damages, and €629 for costs and expenses.

## Right to respect for private and family life

### *Kuric and Others v Slovenia*

(26828/06)

**European Court of Human Rights:** Judgment dated 13 July 2010

*Article 8 (right to respect of private and family life) – Article 13 (right to an effective remedy)*

#### Facts

The case concerned the Applicants' complaints that the Slovenian authorities prevented them from acquiring citizenship of the newly established Slovenian State in 1991, and/or from preserving their status as permanent residents, as a result of which they have faced almost 20 years of extreme hardship.

Of the 11 Applicants, four are stateless; two are Croatian nationals; two are citizens of Bosnia and Herzegovina; and three are Serbian nationals. They belong to a group of people known as the 'erased' (which, at present, potentially comprises thousands of people). They are mainly former citizens of the Socialist Federal Republic of Yugoslavia (the 'SFRY') who obtained their permanent residence in Slovenia following the declaration of independence by Slovenia in 1991. They either did not request Slovenian citizenship within the prescribed time-limit, or their request was not granted. As a result, their names were 'erased' from the Slovenian Register of Permanent Residents on 26 February 1992.

According to the Government, people were informed about the change through the media, notices, and were even contacted personally in some municipalities. The Applicants denied ever receiving notification of their names being removed and claim that the erasure of their names from the Register of Permanent Residents had serious and enduring negative consequences, such as eviction from their homes and inability to work or travel.

In 1999 the Constitutional Court found unconstitutional the provisions of the law applicable as from the day of 'the erasure' (the Aliens Act) as it did not regulate the status of the 'erased' who had not received an official notification about the change of their status. Following this decision, the Legal Status Act was passed in order to regulate the situation of 'the erased'. However, in 2003, the court reiterated its 1999 ruling. It further held that the Legal Status Act was unconstitutional, in particular since it failed to grant 'the erased' retroactive permanent residence permits and to regulate the situation of those deported.

#### Complaints

The Applicants complained that they were arbitrarily deprived of the possibility of acquiring citizenship of the newly-established Slovenian State in 1991 and/or of preserving their status as permanent residents. They relied in particular on: Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination).

## Held

The Court noted that the Applicants, who had all spent a substantial part of their lives in Slovenia and had developed personal, social, cultural, linguistic and economic relations there. Therefore, at the relevant time, they had enjoyed a private life in Slovenia within the meaning of Article 8. It further found that the Slovenian authorities had persistently refused to regulate the Applicants' situation in line with the Constitutional Court's decisions. In particular, they had failed to pass appropriate legislation and issue permanent residence permits to individual Applicants and therefore interfered with the Applicants' rights to respect for their private and/or family life, especially where the Applicants were stateless.

Examining further whether the interference was justified, the Court observed that the Slovenian Constitutional Court had declared a portion of the Aliens Act unconstitutional. In addition, the other law regulating the status of those people, the Legal Status Act, had also been declared unconstitutional.

The Court saw no reason for departing from the Constitutional Court's decisions. It found that the unlawful situation, resulting from the lack of legal basis at the moment of the entry into force of the Convention in respect of Slovenia, had persisted for more than 15 years afterwards for the majority of the Applicants given that the legislative and administrative authorities had not complied with judicial decisions. Accordingly, there had been a violation of Article 8.

The Court reiterated that in spite of the legislative and administrative endeavours made in order to comply with the Constitutional Court's leading decisions of 1999 and 2003, those had not yet been fully implemented. Consequently, Slovenia had not shown that the remedies at the Applicants' disposal could be regarded as effective. Accordingly, there had also been a violation of Article 13.

The Court recalled that it was in principle not for it to determine what remedial measures might be appropriate to satisfy Slovenia's obligations to execute the Court's judgment. However, it observed that the violation found clearly indicated that appropriate general and individual measures needed to be adopted in Slovenia so that the violations could be remedied. The Court concluded that it was necessary to legislate and regulate adequately the situation of the individual Applicants by issuing them with retroactive permanent residence permits.

## ***Turán v Hungary***

(33068/05)

**European Court of Human Rights:** Judgment dated 6 July 2010.

*Article 8 (right to respect for private and family life)*

## Facts

The Applicant, Tünde Turán, is a Hungarian national born in 1963 and lives in Budapest, Hungary.

The Applicant is a lawyer. In September 2004, the Buda Surrounding District Court ordered the search of her office under section 149(4) and (5) of The Code on Criminal Procedure, and the

seizure of documents concerning one of her clients who was suspected of having been engaged in illegal financial activities.

On 20 October 2004 from 9.45 am until 12.55 pm, the police searched the Applicant's office in the presence of a Public Prosecutor. The Applicant herself did not arrive on the premises until 10.25 am.

The Government claimed that until the Applicant's arrival, another lawyer, Dr M, had been present. However, according to documents submitted, Dr M was not formally appointed to defend the Applicant's interests, nor did she sign the minutes of the search. Moreover, the police seized documents from the office, which were unrelated to the Applicant's client.

On 5 November 2004, the Public Prosecutor's Office dismissed the Applicant's complaint concerning the alleged unlawfulness of the search. On 25 November 2004, the District Court ordered the restoration of the documents unrelated to the suspect's case.

On 19 May 2005, the Pest County Public Prosecutor's Office reversed its decision of 5 November 2004 and established that the search had been unlawful in that neither the Applicant nor a representative had been present. However, the Office was of the view that the lawfulness had been restored by virtue of the District Court's decision of 25 November 2004.

### Complaints

Under Article 8, the Applicant complained that the search of her office was unlawful, unjustified, and in breach of her right to respect for private and family life.

### Held

#### *Article 8*

The Court observed that under section 149(4) and (5) of The Code on Criminal Procedure, a house search must be carried out in the presence of the person concerned and, in the absence of the latter, a person must be appointed with sufficient certainty to represent the interests of the person concerned. As neither the Applicant nor a person representing her interests was present for the crucial phase of the search, and the Government had not submitted any evidence that Dr M was a person appointed to defend the Applicant's interests, the Court concluded that the measure was carried out in a manner violating Hungarian law and held that there had been a violation of Article 8.

#### *Article 41*

The Court awarded the Applicant €3,000 for non-pecuniary damages and €1,500 for costs.

## Freedom of expression

### *Andreescu v Romania*

(19452/02)

**European Court of Human Rights:** Judgment dated 8 June 2010

*Article 6 (right to a fair trial) – Article 10 (freedom of expression)*

#### Facts

The Applicant, Gabriel Andreescu, is a Romanian national who was born in 1952 and lives in Bucharest. He is a well-known human rights activist in Romania and is a founding member of the Romanian Helsinki Committee, among other organisations. He is also a senior lecturer in ethics and political science and a regular contributor to a number of publications. During the communist period before 1989, he was persecuted, arrested and placed under house arrest for criticising the regime for human rights violations, giving an interview to western press, and participating in peaceful protest actions.

The Applicant was among those who campaigned for the introduction of Law No. 187/1999. This Law gave all Romanian citizens the right to inspect the personal files held on them by the *Securitate*, a Romanian intelligence service, and allowed access to information of public interest relating to persons in public office who may have been *Securitate* agents or collaborators.

In 2000, the Applicant submitted two requests to the CNSAS: one to be allowed access to the intelligence file on him and the other seeking to ascertain whether or not the members of the Synod of the Romanian Orthodox Church had collaborated with the *Securitate*. He received no reply.

In 2001, the Applicant organised a press conference to voice his concern about the effectiveness of the remedy afforded by Law No. 187/1999 and in particular his suspicions regarding the links between the former regime and A.P., a member of the college of CNSAS who was named Minister of Culture after the revolution. The Applicant made reference, among other things, to some of A.P.'s past activities. The Applicant's remarks received widespread media coverage.

On 27 February 2001, A.P. filed a criminal complaint against the Applicant, accusing him of insult and defamation. On 13 July 2001, the Bucharest District Court acquitted the Applicant on the ground that the substantive and intentional elements of the offences had not been made out. The court observed that the value judgments expressed by the Applicant, which were not insulting, had not overstepped the limits of acceptable criticism of public figures, had been made in the context of a debate on a matter of public interest, and had not included injurious expressions. The Applicant had merely voiced suspicions in good faith, had stressed the subjectivity of his views and the absence of absolute proof, and had advised the public to use their own judgment based on the existing evidence.

When A.P. appealed to the Bucharest County Court on points of law, the court did not hear any evidence from the Applicant. On 29 October 2001, the Applicant was ordered to pay a criminal fine of ROL 5,000,000 and ROL 50,000,000 in compensation for non-pecuniary damage.

No reference was made to the findings of the first-instance Court in favour of the Applicant's acquittal.

### Complaints

Relying on Article 10, the Applicant complained about his conviction for defamation in criminal and civil proceedings. Under Article 6(1), he complained that the appellate court had found him guilty without hearing evidence from him, after he had been acquitted by the first-instance court.

### Held

#### *Article 6(1)*

The Court considered that the appellate court had been required to hear evidence from the Applicant, even in the absence of an express request from him, or to at least afford him the opportunity of adding to the conclusions of his counsel, particularly since he had displayed an interest in the trial from the outset. There was a breach of Article 6(1) in this respect.

#### *Article 10*

The Court noted that the Applicant had acted in good faith in an attempt to inform the public. The remarks had been made orally at a press conference, giving the Applicant no opportunity of rephrasing, refining or withdrawing them. Further, the Court noted that there were no 'relevant and sufficient' reasons for concluding that the Applicant had damaged A.P.'s reputation. Additionally, the Court noted the particularly high level of damages – representing more than 15 times the average salary in Romania at the relevant time.

As the interference with the Applicant's freedom of expression had not been justified by relevant and sufficient reasons, the Court held that there had been a violation of Article 10.

#### *Article 41*

The Court ordered Romania to pay the Applicant €3,500 for pecuniary damage, €5,000 for non-pecuniary damage and €1,180 for costs and expenses.

### ***Bingöl v Turkey***

(36141/04)

**European Court of Human Rights:** Judgment dated 22 June 2010

#### *Article 10 (freedom of expression)*

### Facts

The Applicant, Abdulkерim Bingöl, is a Turkish national who was born in 1968 and lives in Muş. At the material time he was a committee member in the former Democratic People's Party (DEHAP) and took part in political activities in that capacity. On 28 February 2003, during a DEHAP congress, the Applicant gave a speech in which he criticised the Turkish State over the Kurdish question.

On 25 March 2003, the Public Prosecutor in the State Security Court of Erzurum called for his conviction under the former Article 169 of the Criminal Code for supporting an illegal organisation. The Applicant was sentenced under the Criminal Code (Article 312(2)) to 18 months' imprisonment for open incitement to racial hatred and hostility in society on the basis of a distinction between social classes, races, and regions. He appealed to the Court of Cassation. In a judgment on 16 February 2004, the Court of Cassation affirmed the judgment of the State Security Court.

After serving seven months of his prison sentence, the Applicant was released. He requested his reinstatement, as State employee, to the post of imam from which he had resigned in order to stand for election. This request, as well as his candidacy for election to Parliament in 2007, was denied because of his criminal conviction. His request for withdrawal of the sentence from the Court of Cassation was equally dismissed.

### Complaints

Invoking Articles 9 and 10 of the ECHR, the Applicant complained of having been harshly sentenced for expressing himself as a politician. Further he asserted that his conviction constitutes discrimination based on his Kurdish identity, in violation of Article 14.

### Held

The Court first pointed out that the nature of the offending remarks was by no means comparable to those examined in the case of *Garaudy v France* (No. 65831/01), to which the Turkish Government had referred. In that case the Court had found that the remarks fell outside the protection of Article 10 – in accordance with Article 17 of the ECHR – taking the view that they were markedly revisionist and therefore ran counter to the fundamental ECHR values of justice and peace.

In the present case it was not in dispute that the interference with the Applicant's freedom of expression had been prescribed by the Criminal Code. The Court expressed serious doubt, however, as to the existence of any of the legitimate aims mentioned by the Government.

As to the question of 'necessity of the interference in democratic society' the Court stressed that it had already dealt with cases concerning similar questions, in which it had taken account of difficulties related to the fight against terrorism. In the present case, the remarks corresponded to an analysis of the Kurdish question by a vigorous critic of the Turkish State's policies since the foundation of the Republic, and the State Security Court had taken the view that the terms used had incited people to hatred and hostility. The Court found that those reasons were insufficient to justify the interference of the Applicant's freedom of expression. The Court observed that while some parts of the disputed remarks portray the Turkish state in a negative light, it held that they did not advocate the use of violence, armed resistance, or uprising. The remarks did not seek to arouse deep or irrational hatred against those who were presented as responsible for the situation at issue.

The Court noted that the Applicant had received a particularly severe punishment for his remarks. His criminal sentence also brought significant restriction on his life as a public servant, barring him from standing for election and from public service, even though he had been a politician prior to the criminal sentence. The Court held that the remarks had been made in

the context of a debate of legitimate public interest and that there was no evidence to justify a prison sentence in those circumstances.

Furthermore, the interference did not meet any compelling social need and was not therefore 'necessary in a democratic society.' Accordingly, the Court found that there had been a violation of Article 10. After this finding, the Court did not separately examine the complaint submitted under Article 14.

### ***Cox v Turkey***

(2933/03)

**European Court of Human Rights:** Judgment dated 20 May 2010

*Article 10 (freedom of expression)*

#### Facts

The Applicant, Norma Jeanne Cox, was born in 1944 and lives in Philadelphia, United States. The Applicant lived and studied in Turkey at various times from 1972 onwards. In 1984 she started working as a lecturer at the Middle East Technical University (*Ortadoğu Teknik Üniversitesi*) in Turkey.

On 23 September 1985, the deputy governor of Gaziantep sent a letter to the Ministry of the Interior, recommending that the Applicant be expelled from Turkey on account of her 'harmful activities.' According to the deputy governor, the Applicant had said to her students and colleagues at the university that the Turks had expelled the Armenians and had massacred them. Moreover, the Turks had assimilated the Kurds and exploited their culture. In January 1986, the Applicant's contract of employment was terminated by the university. On 4 April 1986, the National Intelligence Service also recommended that the Applicant be expelled from Turkey. On 12 August 1986, the Ministry of the Interior ordered that the Applicant be expelled and a ban imposed on her return. The Applicant left Turkey in 1986.

The Applicant later returned to Turkey, where she was arrested in 1989 while distributing leaflets protesting against the film *The Last Temptation of Christ*. The Applicant was subsequently expelled from Turkey.

In 1996, the Applicant entered Turkey again, and on 31 August 1996, while she was leaving Turkey, an entry was made into her passport by the authorities, stating that she was banned from entering Turkey. She was urged by the authorities not to return.

On 14 October 1996, the Applicant, with the assistance of her lawyer in Turkey, brought proceedings against the Ministry of the Interior before the Ankara Administrative Court and asked for the ban to be lifted. She maintained that the reason for the decision adopted by the Ministry of the Interior had been her religion, and that this was in breach of domestic legislation, the Constitution and international conventions, including Article 9 of the ECHR.

On 17 October 1997, the Ankara Administrative Court rejected the Applicant's claim. It considered that the opinions expressed by the Applicant at the university in Gaziantep had been on

issues concerning terrorism. Such opinions were incompatible with national security and also with political imperatives.

The Applicant appealed, maintaining that she had been subject to unjust treatment because of her religion. The appeal was dismissed by the Supreme Administrative Court on 20 January 2000.

The Applicant requested a rectification of the decision of 17 October 1997. She argued, among other things, that the entire case had revolved around her having expressed opinions on certain subjects. The Ministry's action and the courts' decisions had restricted her freedom of expression. Her request for rectification was rejected by the Supreme Administrative Court.

### Complaints

The Applicant alleged that she had been subjected to unjustified treatment on account of her religion, in violation of Article 9 of the ECHR. She submitted that she had been expelled from Turkey after having protested against the film *The Last Temptation of Christ* and after her protests had been given media coverage. She further argued that expressing opinions on Kurdish and Armenian issues at a university, where freedom of expression should be unlimited, could not be used as a justification for any sanctions, such as the ban on her re-entry into Turkey.

### Held

As the Applicant failed to substantiate her allegations under Article 9 of the ECHR by failing to submit to the Court a copy of the reports mentioned by her in her application form, the Court considered it appropriate to examine the complaints solely from the standpoint of Article 10 of the ECHR (freedom of expression).

The Court held that the considerations applicable in the context of freedom of religion are also relevant in the context of freedom of expression. The Court considered that the ban on the Applicant's re-entry was materially related to her right to freedom of expression, stating that Article 10 rights are enshrined 'regardless of frontiers' and no distinction could be drawn between the protected freedom of expression of nationals and that of foreigners. The Court reiterated that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment, and is not only applicable to 'information' or 'ideas' which are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. The Court held that there had been a violation of Article 10.

***Gül and Others v Turkey***

(4870/02)

**European Court of Human Rights:** Judgment dated 8 June 2010

*Article 10 (freedom of expression)*

Facts

The Applicants were four Turkish nationals. In November 1999, they were arrested by police officers from the Anti-Terrorism Branch of the Ankara Police Headquarters for alleged affiliation with the Turkish Communist Party/Marxist-Leninist – Turkish Workers and Peasants’ Liberation Army – Marxist-Leninist Youth Union of Turkey (the ‘TKP/ML-TIKKO-TMLGB’). The Public Prosecutor informed the Applicants’ representatives that, under the relevant provisions of criminal law, the Applicants were not entitled to legal assistance during police custody. Three days later, the prosecutor of the Ankara State Security Court questioned the Applicants about their alleged affiliation with the armed illegal organisation, which they all denied. All four Applicants contended that they had participated in demonstrations, and two of them stated they had done so as members of a trade union.

Three weeks later the prosecutor of the Ankara State Security Court charged one of the Applicants with membership of an illegal organisation and the other Applicants with aiding and abetting members of an illegal organisation under the relevant provision of the Criminal Code in force at the time. The Applicants were convicted of aiding and abetting members of an illegal organisation and sentenced to three years and nine months’ imprisonment in a judgment upheld by the Court of Cassation in April 2001.

The case was reopened in August 2003 following an amendment of the Criminal Code. In June 2004, the State Security Courts in Turkey were abolished and the case was subsequently transferred to the Assize Court. In July 2004, the court decided not to convict the Applicant who was found to be a member of the illegal organisation and she was consequently released from prison. The other three Applicants were sentenced to ten months’ imprisonment for disseminating propaganda related to an illegal armed organisation under the Prevention of Terrorism Act. Two of the Applicants appealed and the proceedings are still pending.

Complaints

Relying on Article 10 (freedom of expression) and 11 (freedom of assembly), the Applicants complained about their conviction for reading certain periodicals, participating in demonstrations and shouting slogans. Under Article 6, they complained that they were deprived of legal assistance during their police custody.

Held

The Court determined that the Applicants’ complaints had to be examined exclusively under Article 10, noting that there had been an interference with the Applicants’ freedom of expression, by which the authorities had pursued the legitimate aim of protecting national security and public order in accordance with the former Criminal Code and with the Prevention of Terrorism Act.

As to the question of whether the interference had been proportionate to this aim, the Court observed that the Applicants had shouted the slogans in question during lawful, non-violent demonstrations. Although, taken literally, some of the phrases had a violent tone; they were stereotyped slogans, which could not be interpreted as a call for violence or an uprising.

The Court reiterated that in a pluralist democratic society, tolerance was required in relation to ideas that offended or shocked. Given that the Applicants had not advocated violence, injury or harm to any person, it found that the initial prison sentence and the lengthy criminal proceedings had been disproportionate. Further, the Applicants' conduct could not be considered to have had an impact on national security or public order.

In light of the findings, the Court concluded that there had been a violation of Article 10, and ordered Turkey to pay each of the Applicants €3,000 for non-pecuniary damages.

### ***Gözel and Özer v Turkey***

(43453/04 and 31098/05)

**European Court of Human Rights:** Judgment dated 6 July 2010

*Article 10 (freedom of expression)*

#### Facts

The First Applicant, Aylin Gözel, and the Second Applicant, Aziz Özer, were born in 1978 and 1964 respectively, and live in Istanbul, Turkey. Both Applicants are editors-in-chief of monthly publications.

Both Applicants published articles referring to hunger strikes led by detainees following an intervention by security forces on 19 December 2000 in 20 prisons, leading in violent clashes, injuries and deaths.

On 13 March 2003, the First Applicant was charged with propaganda against the State's unity and the printing of ideas related to an illegal armed organisation under Law No. 3713. On 19 June 2002, the Second Applicant was charged with the printing of ideas, opinions and declarations of an illegal organisation under Law No. 3713.

#### Complaints

The Applicants alleged violations of Articles 10, 6 and 7 of the ECHR and of Article 1 of Protocol No. 1

#### Held

*Article 10*

In the light of the examination of the legislation in question, the Court concluded that the interference which resulted in the condemnation of the Applicants under Law No. 3713 and the measures of banning publication cannot be considered as 'necessary in a democratic society' and were not necessary for the end goal. Accordingly, there was a violation of Article 10. The Court did not consider separately the other articles alleged to have been violated.

***Sanoma Uitgevers B.V. v the Netherlands***

(38224/03)

**European Court of Human Rights:** Grand Chamber judgment dated 14 September 2010

*Journalistic source confidentiality - Article 10 (freedom of expression)*

Facts

The Applicant, *Sanoma Uitgevers*, is a company publishing magazines, including Dutch magazine *Autoweek*.

In 2002, journalists of *Autoweek* attended an illegal street race. They were given the opportunity to take photographs on condition that the participants' identities remained undisclosed.

Later, police and prosecuting authorities were led to suspect that one of the cars participating in the race had been used as a getaway car in a ram raid in 2001. Subsequently, the police and a Public Prosecutor summoned *Autoweek* to surrender the photographic materials concerning the street race. When the company refused, the magazine editor was threatened with detention and with the seal and search of the whole of the company's premises; an act which would have threatened the publishing of several of the company's other magazines. At this point an investigating judge was asked to express his view on the matter although the judge recognised from the outset that he lacked competence in law to do so. Under protest, the company then surrendered the photographic material to the Public Prosecutor.

Complaints

The Applicant complained that they had been compelled to disclose information to the police that would have enabled their journalistic sources to have been revealed in violation of their right to receive and impart information, as guaranteed by Article 10. The Applicant further alleged that this violation was not 'prescribed by law' within the meaning of Article 10 (2).

Held

*Article 10*

The Grand Chamber found that the order to compulsory surrender journalistic material capable of identifying journalistic sources constituted an interference with the freedom to receive and impart information under Article 10. Even though the order to surrender the photographic material was not intended to identify the journalists' sources in connection with the street race, this was not a crucial distinction to the Court. The threat to seal and search company property was a credible one and it would potentially delay the publishing of news and current events, potentially endangering the value and interest of such news. The Court noted that this danger was not limited to publications dealing with issues of current affairs. Although the threat was not carried out, the Court emphasised that a 'chilling effect' would arise wherever journalists are seen to assist in the identification of anonymous sources.

The Grand Chamber also found that the interference with Article 10 was not 'prescribed by law': as the quality of the law was deficient due to inadequate legal safeguards for the company to be able to make an independent assessment as to the balance between the criminal investigation and public interest. Thus, the Court held that there had been a violation of Article 10. The

Court emphasised the need for independent review in cases regarding the confidentiality of journalistic sources; such review taking place at the very least prior to the access and use of the obtained materials. In the Netherlands, such review was entrusted a Public Prosecutor rather than an independent judge. As the prosecutor was a 'party' in the case, he was neither objective nor impartial. The fact that an investigating judge had intervened in the case did not affect the Court's conclusion as the judge had no legal basis for his involvement and had an advisory role only.

### ***Sapan v Turkey***

(44102/04)

**European Court of Human Rights:** Judgment dated 8 June 2010

*Article 10 (freedom of expression) – Article 1 of Protocol No. 1 (protection of property)*

#### Facts

The Applicant, Özcan Sapan, is a Turkish national born in 1960 who lives in Istanbul. He is the owner of a publishing house which in 2001 published a book entitled *Tarkan – Star Phenomenon*. The book consists of a partial reproduction of a doctoral thesis. The first part concerns the emergence of the celebrity phenomenon in Turkey and the second part focuses on the singer, Tarkan.

On 17 September 2001, the singer brought an action against the Applicant, seeking seizure of the book and prohibition of its dissemination, arguing that it had an alleged negative impact on his public image. On 24 September 2001, the Istanbul Court of first-instance ordered seizure of the book without specifying the reasons. On 3 October 2001, the singer brought an action for damages against the Applicant in the same Court for infringement of his right to privacy.

On 22 October 2001, the Applicant requested that the seizure of the books be lifted, arguing lack of sufficient reasoning and stressing the importance of freedom of expression. On 13 December 2001, the judge dismissed his application without reason. The Applicant twice renewed this request, but his claims were rejected, despite two expert reports favourable to the Applicant. On 13 May 2004, the judge rejected the singer's request for damages and ordered the lifting of the seizure. However, on 22 November 2005 the Court of Cassation quashed this decision on the basis of infringement of the right to privacy. These proceedings are still ongoing in the Turkish courts.

#### Complaints

The Applicant argues that Articles 9 and 10 have been violated, but the Court considered it appropriate to examine the complaint solely in terms of Article 10.

#### Held

##### *Article 10*

The Court held that there had been a violation of freedom of expression in relation to the seizure of the work. It noted that the book reproduced part of a doctoral thesis and emphasised

the importance of academic freedom. As to the use of photographs in the book, the Court noted that all images had been published previously, and therefore were already in the public domain. It argued that the seizure and rejection of subsequent requests for it to be lifted were not based on relevant and sufficient reasons.

The Court awarded the Applicant €2,000 for non-pecuniary damages and €1,000 in legal costs.

### *Turgay and Others v Turkey*

(8306/08)

**European Court of Human Rights:** Judgment dated 15 June 2010

*Article 10 (freedom of expression)*

#### Facts

The Applicants are 12 Turkish nationals, who, at the time, were the owners, executive directors, editors-in-chief, news directors and journalists of two weekly newspapers published in Turkey: *Yedinci Gün* and *Toplumsal Demokrasi*. The publication of the newspapers was suspended in January 2008 on the basis of a law for the prevention of terrorism (Law No. 3713). The Applicants were criminally prosecuted for disseminating terrorist-aligned propaganda. The proceedings in their cases are still pending at first-instance.

#### Complaints

Relying on Article 10, the Applicants complained about the suspension of the publication and distribution of the newspapers concerned, which they claimed amounted to censorship. Further, relying on Articles 6 (right to a fair hearing), 7 (no punishment without law), 13 (right to an effective remedy) and Article 1 of Protocol 1 (protection of property), the Applicants complained about the unfairness of the proceedings before the first-instance court.

#### Held

The Court noted that it had recently examined an identical complaint in which it had found a violation of Article 10 (*Ürper and Others v Turkey*), and found no reason to depart from its previous conclusions. The Court observed that the suspension of the publication and distribution had not been imposed on concrete news reports or articles, but on the future publication of entire newspapers, whose content had been unknown at the time of the national court's decision. Therefore, the Court concluded that the preventive effect sought with that suspension had resulted in implicit sanctions on the Applicants to dissuade them from publishing similar articles in the future and thus hinder their professional activities.

The Court found that less draconian measures could have been considered, such as the confiscation of particular issues of the newspapers or the restriction on the publication of specific articles. By suspending the publication and distribution of the newspapers, even for a short period of time, the domestic courts had unjustifiably restricted the essential role of the press as a public watchdog in a democratic society. In addition, the practice of banning the future publication of entire periodicals on the basis of domestic law had gone beyond any notion of

'necessary' restraint in a democratic society and, instead, had amounted to censorship. Thus, there had been a violation of Article 10.

The Court considered that there was no need to make a separate ruling on the complaints under the other Articles, since it had examined the main legal question raised under Article 10. The Court ordered Turkey to pay each Applicant €1,800 for non-pecuniary damage and €1,000 jointly for costs and expenses.

## Freedom of assembly and association

*Çerikçi v Turkey*  
(33322/07)

**European Court of Human Rights:** Judgment dated 13 July 2010

*Article 11 (freedom of assembly and association) – Article 13 (right to an effective remedy)*

### Facts

The Applicant, Turan Çerikçi, is a Turkish citizen who was born in 1958 and lives in Istanbul, Turkey. The Applicant was a municipal official of Beyoğlu and a member of the trade union Tüm Bel - Sen., which is linked to KESK (the public sector trade-union confederation).

On 1 May 2007, the Applicant participated in a day of national strike. Subsequently, he received a notification of disciplinary sanction due to his abandonment of his post. The Applicant's complaint over this decision was dismissed.

### Complaints

The Applicant alleged that his right to freedom of assembly and association under Article 11 had been violated, as well as the right to an effective remedy under Article 13.

### Held

*Article 11 and 13*

The Court found that there had been a violation of Article 11 and 13. The Court had earlier found a violation of the aforementioned articles in the case of *Karaçay v Turkey* (6615/03). In the present case, the Turkish government had not given any proof or convincing argument in order for the Court to reach a different decision.

## Right to free elections

### *Sitaropoulos and Others v Greece*

(42202/07)

**European Court of Human Rights:** Judgment dated 8 July 2010

*Article 3 of Protocol 1 (right to free elections)*

#### Facts

The Applicants are Greek nationals living as permanent residents in Strasbourg, France, where they are officials of the Council of Europe. On 18 August 2007, by the presidential decree No. 154/2007, the National Assembly was dissolved and Greek general elections were set for 16 September 2007. In a fax sent to the Greek ambassador to France on 10 September 2007, the Applicants expressed their desire to exercise their right to vote in the Greek parliamentary elections.

On 12 September 2007, pursuant to instructions of the interior minister, the Greek ambassador responded that their request could not be granted 'for objective reasons,' namely the absence of the legislative regulation that was required to provide for 'special measures...for the setting up of polling stations in Embassies and Consulates.' Therefore, the Applicants could not exercise their voting rights in the 16 September 2007 elections.

#### Complaints

Relying on Article 3 of Protocol 1, the Applicants alleged that they had been unable to exercise their right to vote at their place of residence, as they were living abroad.

#### Held

The Court held that Article 3 of Protocol 1 is significant because it consecrates a principle, which is fundamental to truly democratic regimes. The Court has established that this article contains implied subjective rights, including the right to vote.

The Court emphasised that Article 3 was more significant with respect to the 'active' aspect of the rights guaranteed by the article (restrictions on voting rights), rather than the 'passive' aspect (the right to stand for election). Greece could not rely on the broad margin of appreciation usually afforded to States in such matters under that provision.

Article 51(4) of the Greek Constitution authorised the legislature to establish the conditions for the exercise of voting rights for expatriate voters. While Article 3 of Protocol 1 does not require States to secure voting rights in parliamentary elections for voters living abroad, Article 51(4) of the Constitution cannot remain inapplicable indefinitely, otherwise its content and the intention of its drafters would be deprived of any normative value. The role of the Court does not lie in suggesting to national authorities when and how they should implement a given constitutional provision, but rather in ensuring that the provision does not become obsolete. The Court noted that 35 years had passed since the adoption of Article 51(4). Notwithstanding the unsuccessful 19 February 2009 bill entitled 'Exercise of Expatriates' Right to Vote in Legislative Elections,' the Court held that the lack of implementation of the provision in Article 51(4) of the

Constitution signifies the unwillingness of the Greek Government to recognise and implement Greek expatriates' right to vote from their place of residence.

While the Applicants could have travelled to Greece in order to vote, the obligation to travel considerably complicated the exercise of their right to vote because it would have entailed expenses and disturbance to their professional and family life, making travel to Greece for the elections impossible in practice. The difficulties are amplified for other Greek citizens, who, because of their financial situation or because of distance, are deprived in practice of their right to vote. As a result, the lack of legislative implementation regarding expatriates' voting rights may constitute unfair treatment towards Greek expatriates compared to those living in Greece. This is contrary to the CoE's resolutions urging member States to enable their non-resident citizens to participate to the fullest extent possible in elections.

On the basis of a comparative study of the domestic law of 33 Member States of the CoE, the Court observed that the vast majority (29 states) had implemented procedures for allowing expatriate citizens to vote in legislative elections, and concluded that Greece fell below the common denominator in such matters.

While recognising the autonomy of Member States in establishing the terms of the right to vote, the Court held that the lack of legislative implementation of Article 51(4) for over three decades, in addition to the positive changes that other Member States have made regarding expatriates' right to vote, provides a sufficient basis for the liability of the respondent State under Article 3 of Protocol 1.

## Prohibition of discrimination

### *Aksu v Turkey*

(4149/04)

**European Court of Human Rights:** Judgment dated 27 July 2010

*Article 8 (right to respect for private and family life) – Article 14 (prohibition of discrimination)*

#### Facts

The Applicant is a Turkish national of Roma origin who was born in 1931 and lives in Ankara.

He alleged that two government-funded publications included remarks and expressions that reflect anti-Roma sentiment. Informed by the Ministry of Culture that the first publication reflected scientific research, and that the author would not allow any amendments, the Applicant brought civil proceedings against the Ministry and the author of the book. In September 2002, the Ankara Civil Court dismissed the requests in so far as they concerned the author and decided that it lacked jurisdiction as regards the case against the Ministry. The Court of Cassation upheld the judgment and the Administrative Court dismissed the complaint subsequently lodged by the Applicant against the ministry.

The second publication concerned a dictionary for school pupils, which had been published by a language association and funded by the Ministry of Culture. In April 2002, the Applicant

sent a letter to the language association on behalf of the Confederation of Gypsy Cultural Associations, alleging that certain entries in the publication, such as 'gypsy-ness' for stinginess and greediness, were insulting and discriminatory against Gypsies. He asked the association to remove a number of expressions from the dictionary.

Having received no reply, the Applicant brought civil proceedings against the association. The Civil Court dismissed the case, holding that the definitions in the dictionary were based on historical and sociological facts and that there had been no intention to humiliate or debase an ethnic group. The judgment was upheld by the Court of Cassation in March 2004.

### Complaints

The Applicant complained, in two separate applications, that certain passages and expressions included in the two publications reflected clear anti-Roma sentiment and that the refusal of the domestic courts to award compensation demonstrated a bias against Roma. He relied on Article 14 (prohibition of discrimination) and Article 6 (right to a fair trial).

### Held

As regards the book 'The Gypsies of Turkey,' the Court noted that the passages cited by the Applicant, when read on their own, appeared to be discriminatory or insulting. It was made clear in the conclusion of the book that it was an academic study, which conducted a comparative analysis and focused on the history and socio-economic living conditions of the Roma people in Turkey. The Court observed that the author referred to the biased portrayal of the Roma and gave examples of their stereotyped image. It was important to note that the passages referred to by the Applicant were not the author's comments but examples of the perception of Roma people in Turkish society.

As regards the dictionary, the Court observed that the expressions and definitions in question were prefaced with the comment that they were of a metaphorical nature. The Court therefore found no reason to depart from the domestic courts' findings that the Applicant had not been subjected to discriminatory treatment because of the expressions listed.

The Court concluded, by four votes to three, that it could not be said that the Applicant had been discriminated against on account of his ethnic identity as a Roma, or that there had been a failure on the part of the authorities to take the necessary measures to secure respect for the Applicant's private life.

### Dissent: Judges Tulkens, Tsotsoria and Pardalos

The dissenting judges believed that there had been a violation of Article 14 in conjunction with Article 8, pointing out that both cases concerned the question of prejudice against the Roma people. In their view, this prejudice 'is the breeding-ground of discrimination and exclusion.'

While the first case concerned a work that was written by an academic, there was still a certain grey area regarding the effects of the book: it was published by the Ministry of Culture, which, according to the Government, was taking steps to promote Roma culture and tradition. With that in mind, the dissenting judges felt that various passages from the book that had been identified by the Applicant conveyed a series of highly discriminatory prejudices and stereotypes that should have given rise to serious explanation by the author. Lastly, it was difficult for the

dissenting judges to accept that the offending passages should not be regarded in isolation but in context of the book as a whole. This contrasts with the Court's judgment in *Lindon, Otchakovsky-Laurens and July v France*, where it found that there had been no violation of Article 10 merely on the basis of three offending passages, without taking into account the general context of the novel in question.

Regarding the second application (the dictionary published by the Language Association), the dissenting judges found great significance in the fact that the dictionary was intended for pupils. While the government argued that the words and expressions used were based on the historical and sociological reality and that there had been no intention to humiliate a particular ethnic group, the dissenting judges found that explanation insufficient to remove or lessen the seriously discriminatory character of the descriptions in question. In a publication financed by the Ministry of Culture and intended for pupils, the national authorities had an obligation to take all measures to ensure respect for Roma identity and to avoid any stigmatisation.

## C. International Cases

### International Court of Justice

#### *Unilateral Declaration of Independence in Respect of Kosovo*

General List No. 141

**International Court of Justice:** Advisory Opinion dated 22 July 2010

#### Facts

On 17 February 2008 in an extraordinary meeting of a newly elected assembly of Kosovo (an organ established under constitutional framework) a declaration of independence was adopted. This case focused on whether or not the unilateral declaration of independence violates international law. Between 1999 and 2008, the UN has had an international civil presence in Kosovo (UNMIK), regulated through a series of Security Council Resolutions, the most significant being resolution 1244.

Following the declaration of independence, a statement was issued by Republic of Serbia informing the UN Secretary-General that it proclaimed the declaration null and void both in the territory of Serbia and in international legal order.

#### Request

The UN General Assembly requested the ICJ's opinion on whether or not the declaration of independence was in accordance with international law. It did not ask about the legal consequences of that declaration. Moreover, it did not ask the ICJ to interpret the extent of the principle of self-determination and the existence of any right to 'remedial secession' in international law.

Therefore, the only question before the ICJ was whether or not the unilateral declaration of independence violated either general international law or its *lex specialis* Security Council resolution 1244.

### Held

With regards to compliance with general international law, the ICJ stressed that although there were particular declarations of independence condemned by the UN Security Council, in all of those instances the UN Security Council was making a determination regarding the situation that existed at the time that those declarations of independence were made. The illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of general international law, in particular those laws of a peremptory character (*jus cogens*). In the context of Kosovo, the UN Security Council has never taken this position. The exceptional character of the resolutions enumerated above appeared to the ICJ to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the UN Security Council.

Regarding the question of compatibility with UN Security Council resolution 1244, the ICJ held that the resolution does not preclude the declaration of Independence of 17 February 2008. It was not intended to resolve the issue of the final status of Kosovo and was designed to create a transitional regime and facilitate the process of establishing Kosovo's future status. Further, the resolution does not contain an explicit ban on issuing a declaration of independence; neither can such prohibition can be inferred from the language of the resolution. Thus the declaration does not violate resolution 1244 because they operate in different levels.

Regarding the issue of compatibility of the declaration with the Constitutional Framework, the ICJ held that the declaration is not an act issued by the Provisional Institutions of Self Government acting under auspices of UNMIK and did not intend to take effect within a legal order in which those institutions operate. The ICJ established that the declaration was issued not by the Provisional Institutions of Self-Government within the Constitutional Framework, but rather by persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration. Thus the authors of the declaration were not bound by the Constitutional Framework established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the ICJ found that the declaration of independence did not violate the Constitutional Framework.

The final conclusion of the ICJ was that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework.

## European Court of Justice

*E & F*

C-550/09

**European Court of Justice:** Judgment dated 29 June 2010

*Legality of inclusion of an organisation on the list of persons, groups and entities implicated in acts of terrorism*

### Facts

On 27 December 2001, the Council of the EU adopted Common Position 2001/931/CFSP (Common Position) regarding the application of specific measures to combat and prevent the financing of terrorism, with Annex 1 listing persons, groups and entities involved in terrorist acts.

Council Regulation No. 2580/2001 (Regulation) enacts specific restrictive measures directed at certain persons and entities with a view to combating terrorism. Articles 2 and 3 of the Regulation prohibit the transfer of funds, financial assets or economic resources to organisations listed in Annex 1 of the Common Position.

The list (as subsequently amended) included the group *Devrimci Halk Kurtuluş Partisi-Cephesi* (DHKP-C), and this inclusion was maintained through a series of provisions dating from 2002. One of these provisions, Decision 2007/445/EC of 28 June 2007, stated that the Council provided all the persons, groups and entities for which this was practically possible with statements of reasons explaining the reasons why they were listed, and informed those on the list that they could request the Council's statement of reasons where this had not already been communicated to them.

In this context, the defendants had been detained and subjected to domestic criminal proceedings in Germany after being accused of being members of DHKP-C between 30 August 2001 and 5 November 2008, the date of their arrest, the aim of that organisation being, according to the indictment, to overthrow the Turkish political order by force. Due to doubts concerning the legality of the inclusion of the DHKP-C on the list of persons, groups and entities to which the Regulation applies, as well as the correct interpretation of the Regulation, the domestic proceedings were stayed and the Court of Justice approached for a preliminary ruling on these issues.

### Held

First the Court considered it necessary to determine whether, if the defendants had brought an action for annulment of the listing, the admissibility of their action would have been beyond doubt. The Court found that the defendants did not have an indisputable right to bring such an action as it was DHKP-C that had been placed on the list, not the defendants themselves, and because there was no information available to establish that the positions held by the defendants within DHKP-C would have conferred on them the power to represent that organisation in an action for annulment before the Court.

The Court noted that none of the provisions maintaining DHKP-C on the list, prior to that of Decision 2007/445/EC of 28 June 2007, was accompanied by a statement of reasons relating to the legal conditions for the inclusion of DHKP-C, or an explanation of the Council's actual and specific reasons for considering the inclusion to be, or remain, justified. The defendants were therefore denied the information necessary to enable them to verify whether the inclusion of DHKP-C on the list during the period prior to 29 June 2007 – in particular the accuracy and relevance of the evidence on which that listing was based – was well founded, despite the fact that it was one of the grounds of the indictment drawn up against them in the domestic criminal proceedings. The Court acknowledged that the right to know the evidence justifying such inclusion on the list extended to the defendants.

Further, the Court noted that the lack of a statement of reasons is also likely to prevent courts from assessing the substantive legality of the listing.

Accordingly, the Court concluded that, prior to 29 June 2007, the inclusion of DHKP-C on the list was illegal and therefore could not form any part of the basis for a criminal conviction linked to an alleged infringement of the Regulation, without infringing the non-retroactivity principle in connection with criminal proceedings.

## Court of Appeal of England and Wales

*Bisher Al Rawi and Others (Appellants) v The Security Service and Others (Respondent) 2009 EWHC 2959 (QB)*

**Court of Appeal (Civil Division):** Judgment dated 4 May 2010

*Closed material procedure – Open defence*

### Facts

The six claimants are individuals who were detained at various locations, including at Guantanamo Bay. Each contended that, as a result of their detention and alleged mistreatment, they have valid civil claims for damages in tort and breach of statutory duty.

In response, the Defendants filed an 'Open Defence' which noted that relevant material existed which had not been pleaded and which could not be included without causing real harm to the public interest, but that the Court should consider. The Defendants wanted the case to proceed with parallel open and closed pleadings, disclosure, inspection, witness statements and directions hearings.

In a case before the High Court, Silber J concluded that it is open to a court, in the absence of statutory authority, to order a closed material procedure for part of the trial of a civil claim for damages in tort and breach of statutory duty.

### Complaints

The Claimants object to the proposed closed material procedure and argue that, where necessary, public interest immunity (PII) may be claimed. The Defendants argue that there is a very substantial amount of potentially relevant information, which may be subject to PII.

### Held

Upon appeal, it was held that it is not open to a Court of England and Wales, in the absence of statutory authority, to order a closed material procedure in relation to the trial of an ordinary civil claim. The importance of trials being fair, the procedures of the Court being simple, and the rules of Court being clear are all of cardinal importance. The Court considered it would be wrong to introduce closed material procedure into ordinary civil trials for five reasons. Firstly, the procedure cuts across the right to fair trial and the right to know reasons for the outcome. Secondly, it is impossible to reconcile a closed material procedure with Civil Procedure Rules (CPR). Thirdly, such a procedure is for the legislature to introduce rather than the judiciary. Fourthly, a closed material procedure complicates the PII, a well-established procedure. Finally, it is likely to add to uncertainty, cost, complication and delay in initial, interlocutory stages of proceedings, the trial, judgment and any appeal.

Accordingly, the Claimants' appeal was allowed.

### Commentary

The case referred to a number of established legal principles. Firstly, a trial must be conducted on the basis that each party and his lawyer sees and hears all the evidence and argument seen and heard by the Court. In addition, any party to the case has a right to be confronted by their accuser. A party to litigation should also know the reasons why he has won or lost so that a judge's decision will be liable to be set aside should it contain insufficient reasons. Trials should be conducted in public and judgment should be given in public. A Court should sit in private only where justice necessitates. A party is entitled to understand the essentials of its opponent's case in advance in order to prepare; disclosure helps ensure no party is taken by surprise and neither party can rely on documents, which paint a misleading picture.

Court discretion must be exercised to ensure that the trial processes are fair. Finally, CPR Parts 15 and 16 (relating to filing a defence) require a defendant to set out his case. This runs contrary to the notion of a closed material procedure.

### Update

On 16 November 2010, the UK Government agreed to settle claims brought by, and pay compensation to, 16 former Guantanamo detainees.

## **Supreme Court of the United States**

### ***Holder v Humanitarian Law Project***

2010 WL 2471055

**US Supreme Court:** Judgment dated 21 June 2010

### Facts

This case arose in connection with human rights advice given by the Humanitarian Law Project (HLP), a California-based non-profit organisation, to two Kurdish and Tamil organisations

listed as terrorist groups in the US (the PKK and the Liberation Tigers of Tamil Eelam (LTTE) respectively).

Statute 18 U.S.C. §2339B prohibits the provision of any material support or resources to foreign terrorist organisations that engage in terrorist activity, regardless of whether or not such support and/or resources are non-violent and lawful. The Plaintiff sought an injunction to prohibit the enforcement of this ban.

The Plaintiff claimed that it wished to provide support for the humanitarian and political activities of the PKK and the LTTE in the form of monetary contributions, other tangible aid, legal training, and political activity, but that it could not do so under §2339B. It claimed that §2339B is invalid to the extent that it prohibited them from engaging in certain specified activities, namely: (1) training members of the PKK on how to use humanitarian and international law to peacefully resolve disputes; (2) engaging in political advocacy on behalf of the Kurds who live in Turkey; and (3) teaching PKK members how to petition various representative bodies such as the UN for relief. The Plaintiff also wished to provide similar services to the LTTE and engage in political advocacy on behalf of the Tamils who live in Sri Lanka. The Plaintiff did not intend to further unlawful conduct by the PKK or the LTTE.

### Complaints

The Plaintiffs contend that §2339B violated its freedom of speech and association under the First Amendment to the US Constitution because it criminalised its provision of material support to the PKK and LTTE, without requiring the Government to prove that the Plaintiff had a specific intent to further the unlawful activities of those organisations. It also argued that the statute was too vague, in violation of the Due Process Clause of the Fifth Amendment of the US Constitution.

### Held

The Court began by rejecting the Plaintiff's argument that the statute was unconstitutionally vague under the Due Process Clause of the Fifth Amendment, saying that most of the activities the Plaintiff sought to engage readily fell within the scope of the terms 'training' and 'expert advice or assistance' because the instruction on resolving disputes through international law falls within the statute's definition of 'training' – it imparts a 'specific skill', not 'general knowledge'. The Plaintiff's activities also fell comfortably within the scope of 'expert advice or assistance' as teaching the PKK how to petition for humanitarian relief before the UN involves advice derived from, as the statute put it, 'specialized knowledge'.

Regarding whether the statute violated the freedom of speech guaranteed by the First Amendment, the Court pointed out that under the statute, the Plaintiff could say anything it wished on the topic, and could advocate (independently) before the UN. If, however, the Plaintiff's speech to those groups imparts a 'specific skill' or communicates advice derived from 'specialized knowledge' – for example, training on the use of international law or advice petitioning the UN – it is then barred.

The Court reasoned that any support, even if non-violent, would further the terrorist activities of the PKK and LTTE because such support could free up other resources within the organisations that could be put to violent ends. It also believed that such support could help to lend

legitimacy to foreign terrorist groups, and could strain the US's relationship with its allies and undermine cooperative efforts between nations to prevent terrorist attacks.

The Court also rejected the Plaintiff's argument that the statute violated its freedom of association under the First Amendment, for the same reasons that they denied the Plaintiff's free speech challenge.

#### Dissent

Justices Breyer, Ginsburg, and Sotomayor dissented, saying they believed the activities the Plaintiff sought to engage in were of the kind that the First Amendment ordinarily protects, as all the activities involved the communication and advocacy of political ideas and lawful means of achieving political ends. Citing *Brandenburg v Ohio*, 395 U.S. 444, 447 (1969), Justice Breyer pointed out that the First Amendment protects advocacy even of 'unlawful' action so long as that advocacy is not 'directed to inciting or producing *imminent lawless action* and ... *likely to incite or produce* such action.'

Justice Breyer also failed to see the majority's correlation between the undertaking of advocacy for political change through peaceful means and teaching the PKK or LTTE how to petition the UN for political change was freely exchangeable or replaceable with other resources that might be 'put to more sinister ends.' He, along with Justices Ginsburg and Sotomayor, found it far from obvious how these advocacy activities could themselves be redirected, or how they would free up other resources that could be directed toward terrorist ends. In his view, the majority's arguments stretched the concept of 'fungibility' beyond constitutional limits.

Justice Breyer interpreted the statute as criminalising First Amendment protected pure speech and association only when the defendant knows or intends that those activities will assist the organisation's unlawful terrorist actions.









“Over the past decade the BHRC has had great pleasure in working with the KHRP. No organisation has had more impact both in Strasbourg at the European Court of Human Rights, and in Turkey’s political-legal configuration. The BHRC is proud of its close association with the KHRP.”

Stephen Solley QC, Former Bar Human Rights Committee President

“KHRP can count many achievements since its foundation ten years ago, but among these its contribution to the fight against torture and organised violence has been one of the most important. Through its litigation strategies, notably at the European Court of Human Rights, its reports and public advocacy, KHRP has helped expose continuing abuse against both Kurds and others, particularly in Turkey, and to raise hopes that victims and survivors of torture and other state violence may obtain recognition of their ordeal, compensation and justice.”

Malcolm Smart, Director of Amnesty International’s Middle East and North Africa Programme

“KHRP’s work in bringing cases to the European Court of Human Rights, seeking justice for the victims of human rights violations including torture and extra-judicial killings, has been groundbreaking. In many of these cases the European Court of Human Rights has concluded that the Turkish authorities have violated individual’s rights under the European Convention on Human Rights. Amnesty International salutes the work of this organisation over the last 10 years in defending human rights.”

Kate Allen, Director Amnesty International UK

“For more than a decade after the military coup, governments in Turkey committed the gravest of human rights abuses while blandly denying that the violations were taking place. By pioneering the use of the personal petition to the European Court of Human Rights in Turkey KHRP helped to make those violations a matter of record in the form of court judgments. This has added valuable leverage in the continuing struggle to bring abuses such as ‘disappearance’, forced displacement, torture and repression of free speech to an end.”

Jonathan Sugden, Turkey Researcher

“In my opinion, for a view on the KHRP one should ask the ancient cities it has saved from submersion, the villagers it has represented whose houses had been burnt and destroyed, prisoners of conscience and those who had been tortured, for they know the KHRP better.”

Can Dunder, Journalist in Turkey

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