

Kurdish Human Rights Project

LEGAL REVIEW

Kurdish Human Rights Project



Celebrating 15 Years 1992-2007

(2007) 12 KHRP LR

The Kurdish Human Rights Project

The Kurdish Human Rights Project (KHRP) is an independent, non-political, non- governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people.

AIMS

- To promote awareness of the situation of the Kurds in Iran, Iraq, Syria, Turkey and elsewhere
- To bring an end to the violation of the rights of the Kurds in these countries
- To promote the protection of human rights of Kurdish people everywhere

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
- Liaison 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
- 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

CAT	United Nations Committee against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
The Convention	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms
CPT	The Council of Europe's Committee for the Prevention of Torture
ECtHR	The European Court of Human Rights
The Court	The European Court of Human Rights
ECJ	The European Court of Justice
ICJ	International Court of Justice
HRA	Human Rights Act 1998
UNCAT	United Nations Convention Against Torture
UNAMI	United Nations Assistance Mission for Iraq

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 5:	Right to liberty and security
Article 6:	Right to a 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 13:	Right to an effective remedy
Article 14:	Prohibition of discrimination
Article 17:	Prohibition of abuse of rights
Article 18:	Restrictions under the Convention to only be applied for prescribed purposes
Article 34:	Application by individual, non-governmental organisations or groups of individuals (formerly Article 25)
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

Protocol No. 1 to the Convention

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

Protocol No 2 to the Convention

Article 7:	Right of appeal in criminal matters
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Section 1: Legal Developments and News

KRG publishes Kurdistan Region Oil and Gas Law

The Kurdistan Regional Government (KRG) has now approved the Kurdistan Oil and Gas Law that was first drafted and published in August 2006. Both Arabic and English versions have been approved by the National Assembly on 6 August 2007 and gained full approval by President Massoud Barzani on 9 August 2006. The Kurdish language version is to be published in the near future.

Together with Minister Hawrami, the Prime Minister executed seven new production sharing contracts (PSCs) on behalf of Kurdistan Region Council of Ministers, and five old contracts were reviewed. These PSCs will provide an estimated aggregate return/profit of over 85% to Iraq and around 15% to the contractors. Under the seven contracts, the KRG has the right to a participation interest of between 20% and 25%, and it has retained the right to assign third party participation interests of between 15% and 25% to qualified Iraqi and international companies to further stimulate the local economy.

However, the government in Baghdad has expressed its disapproval of the law and of the agreements that have been subsequently signed because not only does it underscore the decentralization of oil resources, but it constitutes another perceived step in the Kurds' move towards an autonomous state.

For further information about the law, please refer to the Legal Documents under the Government section on www.krg.org.

OSCE Parliamentary Assembly calls on OSCE countries to fulfil commitments in Kyiv Declaration

On 9 July 2007, the OSCE Parliamentary Assembly met in Kyiv, Ukraine and concluded its meeting with the adoption of a Declaration conveying disappointment at the slow movement towards resolving 'frozen conflicts' in the OSCE region and recommending increased support by member states for resolving the situations in countries like Moldova, Georgia and Belarus. The Declaration highlights areas such as migration, energy and environmental security including the signature and ratification of the Energy Charter Treaty and the Kyoto Protocol in support of free and democratic principles. In addition, the Declaration is an important step to furthering the credibility of the OSCE and its efforts to improve parliamentary institutions.

Council of Europe Anti-Torture Committee visits Turkey

On 20 May 2007 a delegation from the Council of Europe Committee visited Turkey for three days. Their time in Turkey included a two-day visit to Imrali Closed Prison to inspect the conditions under which the island's sole inmate, Abdullah Öcalan, is being held, and their final day concluded with a presentation of their preliminary observations to the Minister of Justice, Mr. Fahri Kasirga.

UN Convention on Disability Rights reaches milestone in signatories

On 11 July 2007 it was announced that Qatar became the 100th state to sign the Convention on the Rights of Persons with Disabilities. Thus far, Jamaica is the only state to ratify the treaty. It requires ratification by 20 countries before entering into force. The Convention intends to ensure that human rights standards are guaranteed to those estimated 650 million people with disabilities.

OSCE Office welcomes use of European Court of Human Rights opinions in case against Azerbaijani journalist

On 16 July 2007 the Yasamal District court in Azerbaijan referred to the European Court of Human Rights in its decision to dismiss criminal defamation charges against the editor-in-chief of the opposition newspaper *Azadiq*. The charges against Ganimat Zahid relate to an article entitled "Stone Comes Across Rock" published in May of this year. Welcoming the use of Strasbourg case law in Azerbaijani courts, the OSCE saw it as an avenue to balance protecting individual reputations and upholding freedom of expression in domestic court cases.

Turkish parliament approves military incursions into Iraq

On 18 October 2007 the Turkish parliament approved military incursions into Iraq by 507 votes to 19, despite international objections. This vote does not, however, guarantee that a 'full scale' military operation will take place. With key international relationships at stake, particularly the United States and European Union, Turkey's decision to act faces strong external resistance and pressure.

Kirkuk referendum postponed

The Kirkuk referendum scheduled for July 2007 was postponed for another two years during visit in February 2007 by Iraqi Vice President Adel Abdulmahdi to Ankara. It is widely thought that the postponement is linked to the visit. The

government of Turkey has threatened Iraq with military force if they followed through with plans to annex Kirkuk, a city rich in oil reserves. With a sizeable Turcoman population, Kirkuk includes many who reject the bid to join the Kurdistan Regional Government.

Prior to the postponement decision, Turkish Prime Minister Erdoğan stated that “...In light of demographic changes in Kirkuk, it is not right for a referendum to take place right now.” However, many contend that holding the referendum promises as many risks for the Iraqi leadership as cancelling it. Along with the Turkish government, Shi’ites, Sunnis, ethnic Turkmen and even Christian Arabs are also campaigning against efforts to incorporate the city into the Kurdistan Regional Government.

Genocide resolution approved by House Foreign Affairs Committee

Despite objections that it would offend a strategic ally and risk US security interests, the US House Foreign Affairs Committee approved a resolution recognizing the ‘systematic and deliberate annihilation of 1,500,000 Armenians as genocide’ in a 27-21 vote on 10 October of this year. The bill now goes to the Senate where it is backed by Senate Majority Leader Harry Reid (D-Nev) and Senator Hillary Rodham Clinton (D-NY). However, the bill faces strong opposition, and support falls well short of the votes needed to pass in into law.

UN adopts Declaration on Rights of Indigenous Peoples

On 13 September 2007 the United Nations General Assembly adopted the Declaration on the Rights of Indigenous People with a substantial majority of 143 votes in favour. The non-binding text has been under negotiation for more than 20 years. The chair of the International Indigenous People’s Caucus, Les Malezer, said, in a statement to the General Assembly, that the declaration was “a tool for peace and justice, based upon mutual recognition and mutual respect”. Some African states raised concerns with regard to the text of the document and were not prepared to adopt the declaration. In early September 2007 an agreement was reached with the African Group of States on an additional nine amendments which formed the basis for the draft resolution on adoption of the declaration. Four states – Canada, Australia, New Zealand and the US - voted against the Declaration. There were 11 abstentions. The text of the Declaration can be found in the Appendix.

YouTube access blocked by court order due to videos ‘insulting to the state’

On 18 September 2007 a Turkish court ruled to block YouTube access due to videos deemed ‘insulting’ to President Abdullah Gül, Prime Minister Recep Tayyip Erdoğan, the Turkish army, and the Turkish republic’s founder Mustafa Kemal Atatürk. Access to the site was also blocked in March of this year due to content regarded as ‘insulting’ Mustafa Kemal Atatürk. On that occasion the site was unblocked following of the removal of the offending material.

Council of Europe’s Anti Torture Committee denounces secret detention

On 14 September 2007 the European Committee for the Prevention of Torture (CPT) 17th General Report denounced secret detention, an illegal practice of particular concern in the context of anti-terror measures. Secret detention heightens the risk of ill-treatment as it removes customary safeguards against such practices. The CPT surveys prisons, juvenile detention centres, police stations, holding centres, and other places of detention to observe treatment of those concerned.

Iraqis prevented from entering Syria by new visa rules

On 10 September 2007 Syria imposed more restrictive visa requirements making it more difficult for Iraqis to seek refuge in the neighbouring country. In the past, Syria has been an important destination for Iraqis seeking safety, although visiting the Syrian Embassy in Baghdad to obtain a visa is considered unsafe. With limited possibilities to leave the country, Iraqis are left now with little opportunity to escape the worsening situation at home.

EU presses Turkey for quick progress on reform

Following the re-election of the AK party, the European Union has pressed Turkey on its freedom of expression and religion legislation. EU officials warned that if Turkey does not show swift progress towards reform, it will be reflected in its annual progress report (since published this November, see below). While the new administration has made EU accession and related reforms central to its platform, the Turkish Foreign Minister Ali Babacan would not entertain ideas of amending or abolishing a penal code clause used to prosecute intellectuals and journalists; rather, a new constitution is planned to address key issues of

reform. Article 301 of the penal code remains of particular concern to the EU as it proscribes ‘insulting Turkishness’ as a punishable offence. However, as KHRP has documented in its latest fact-finding mission report, *Reform and Regression: Freedom Of the Media in Turkey* (October 2007), other lesser-known articles of penal code (e.g. Articles 216, 217 and 220) are also having a deleterious effect on freedom of expression, particularly in the mainly Kurdish south-east region of the country.

2007 EU Turkey Progress Report published

The latest European Union Progress Report on Turkey was published in November 2007. In the report, the Commission appears to be more critical of Turkey than in previous years. In terms of fundamental rights it states that there is limited progress both in legislation and in practice. The Commission goes on to add that “no major issue had been addressed and significant problems persist”. It notes that the total number of new applications to the ECtHR increased on the previous year.

Concern is also expressed about the anti-terror law with respect to freedom of expression. The Commission observes that the number of persons prosecuted for non-violent expression almost doubled in 2006 compared with 2005, with a further increase in 2007. More than half of these prosecutions were under the Criminal Code.

The Commission reports that torture and ill-treatment are still being reported, particularly during arrest and outside official detention centres. There is no monitoring of places of detention by independent national bodies, as Turkey has failed to adopt the Optional Protocol to the UN Convention against Torture. Furthermore Turkey has failed to promptly investigate allegations of human rights violations by members of the security forces, and such investigations fail to be independent and impartial.

In terms of Internally Displaced Persons (IDPs) Turkey is accused of lacking an overall national strategy to address the issue. Moreover the implementation of the Compensation Law between provinces continues to be inequitable. One of the reasons for IDPs failing to return to their homes is the system of village guards. The Commission details how no progress has been made to abolish this system, and that instead, the Turkish Parliament recently made efforts to facilitate their recruitment.

Turkey's progress in the area of cultural rights is reported to be non-existent. This is illustrated by the ongoing failure to provide educational programs teaching the Kurdish language and the fact that court cases are opened against broadcasters for trivial reasons.

The Commission gives a far starker picture of minority rights than in previous reports. Turkey has made no progress on ensuring cultural diversity and promoting respect for and protection of minorities in accordance with European standards. The legal framework guaranteeing gender equality is also said to be in place but no efforts have been made to translate this into social reality.

In regards to the situation in south-east Turkey, the Commission states that no steps have been taken to develop a comprehensive strategy to achieve economic and social development in the region and to create the conditions required for the Kurdish population to enjoy full rights and freedoms. Overall, in comparison to previous progress reports the Commission is far more forthright in its criticism of the human rights situation in Turkey.

New law enhancing police powers comes into effect in Turkey

A new law in Turkey enhancing police powers allows authorities to use weapons without hesitation against people resisting arrest and to conduct preventative searches without a court order in security-related cases. Police can also fingerprint people who apply for passports or driving licenses. While the new law claims to be part of an international counter-terrorism strategy, it increases the power of the police and eases control mechanisms over them, potentially encouraging mistreatment of suspects in custody. Yavuz Önen, the head of the Turkey Human Rights Foundation (TİHV) has stated that "the law threatens the fundamental rights and freedoms along with the safety of life. [It is a law] that belongs to state of emergency conditions".

OSCE Representative on Freedom of Media publishes survey findings

In October 2007 the findings of a media laws survey by the Office of the Representative on Freedom of the Media of the Organisation for Security and Co-operation in Europe was published. The investigation looked into issues such as the accessibility of official information and the ability to protect the identity of sources, both vital for any democracy. The survey looked at the 56 countries

within the OSCE and found that States permit more access to information than in the past but weak laws and persecution against the media are still detrimental to investigative journalism. The survey was based on governmental reports, field missions, and the work of national NGOs and experts collected over the span of a year. These findings will be used by the OSCE to promote legislative change to improve conditions for investigative journalism. Although there have been improvements in the freedom of information policies of a number of states, these often remain on a theoretical level.

OSCE Representative on Freedom of the Media: developments in Armenia and Turkey

On 28 June 2007 the OSCE Representative on Freedom of the Media criticized legal amendments in Armenia that ban Armenian language foreign media programs on public service broadcast channels. As the only foreign outlet in Armenia and one of the few alternative sources of information in the country, Radio Free Europe / Radio Liberty is at risk of being banned and Armenian media's diversity of opinion becomes increasingly threatened.

On 18 October 2007 Miklos Haraszti, the representative on freedom of the media in the Organisation for Security and Co-operation in Europe called on Turkish Prime Minister Recep Tayyip Erdoğan to repeal Article 301. This article makes it an offence to "insult Turkish identity" under Turkey's Penal Code and is often used to target journalists and academics with dissenting views on Turkish history. Haraszti wrote to the Turkish Prime Minister regarding the suspended one-year gaol sentence of Arat Dink and Serkis Seropyan, the editor-in-chief and owner of Armenian-Turkish language weekly *Agos* respectively. They were convicted for reprinting remarks made by Arat Dink's father Hrant Dink, in which he referred to the 1915 killings of Armenians as "genocide". In the letter Haraszti said "The failure to abolish this provision potentially exposes dissenters to prosecution and violence." He went on to say article 301 "depicts unconventional thinkers as enemies of 'Turkishness', and turns them into an object of hatred in the eyes of fanatics and extremists."

Armenia and Azerbaijan offer view on Nagorno-Karabakh during UN debate

On 3 October 2007 at a UN debate in New York the Foreign Ministers of Armenia and Azerbaijan expressed their views on Nagorno-Karabakh. Vartan Oskanian, the Foreign Minister of Armenia, noted the inclusion of protracted

conflicts on the Assembly's agenda and stated that "the UN is not the place to address" Nagorno-Karabakh as the "issue is being addressed within the OSCE" - the Organisation for Security and Cooperation in Europe. Oskanian went on to say "we are negotiating with Azerbaijan and we're inching towards a resolution. At the core of the process lies the right of people to self-determination". Later the Foreign Minister of Azerbaijan, Elmar Mammadyarov, alleged that the issue of Nagorno-Karabakh posed the most serious challenge to the regions security. He went on to say that it was difficult to watch the Armenian leadership "destroy everything associated with the Azerbaijani legacy in these territories and carry out illegal activities thereon" and that the negotiations being held in the framework of the OSCE "have not yielded any results so far".

Torture still common in Turkey

The Kurdish Human Rights Project and Amnesty International have both recently published reports which emphasise the persistence of torture in Turkey. Both highlight how the Turkish government has made significant progress toward reform. However inadequate implementation, legislative loop-holes and a surviving mentality conducive to the practice, see the torture of detainees persist as systematic. The perpetrators are usually law enforcement officials and members of the security services. Amnesty International's report, *Turkey: The entrenched culture of impunity must end*, illustrates how no independent body exists to investigate human rights violations by state officials. They also noted that "torture, ill-treatment and killings continue to be met with persistent impunity for the security forces in Turkey".

KHRP's *An Ongoing Practice: Torture in Turkey* identifies a shift from flagrant to more subtle forms of ill-treatment, leaving few traces or long-term physical signs, as well as an increase in incidences of ill-treatment outside official detention centres, belying progress reflected by official figures. Secondly, it concludes that there is a 'two tier' criminal justice system, with increased procedural and custodial safeguards for those detained for 'regular' offences and the simultaneous erosion of custodial safeguards for those held under anti-terror legislation. Victims of torture also continue to face severe obstacles if they attempt to bring their complaints to court.

OSCE appoints new High Commissioner on National Minorities; UN appoints new GA president

On 5 July 2007 the Organization for Security and Co-operation in Europe appointed Ambassador Knut Vollebaek, a former Foreign Minister of Norway, as OSCE High Commissioner on National Minorities. The task of the High Commissioner is to identify and seek early resolution of ethnic tensions that might endanger peace, stability or friendly relations between OSCE participating States. The new High Commissioner will serve for a three-year term, succeeding Rolf Ekeus of Sweden.

On 24 May 2007 Srgjan Kerim was elected as the new President of the 62nd session of the UN General Assembly (GA). Mr Kerim was a former permanent representative to the UN and took over from President Sheika Haya Rashed Al Khalifa when the 62nd GA opened on 18 September 2007. Kerim was nominated by the Group of Eastern European States and was presented to the General Assembly as the sole candidate for election. Kerim called for the UN to be based on collaboration with Non-Governmental Organisations, civil society, public and private sectors, academics and the media. He also commented that the GA should deal “as much as possible with substance,” since “revitalization is much more than procedural improvements.” When asked about Security Council reform, Kerim said he perceived his role “to move the stone forward”. He also said that the UN exists to serve the public and should not hide agendas or “mystify” its activities. He said, “I can promise I’ll do my best to do it that way.”

Human Rights Council President calls for reform

On 29 September 2007 the president of the United Nations Human Rights Council, Doru Costea, called for reform of the Council, stating that its functioning ‘must be constantly improved’. He held that the changes were necessary following the Council’s failure in the Middle East. Mr Costea reiterated the words of President Bush where he criticised the Council for focusing too much attention on Israel and not enough on countries such as Cuba, Venezuela, North Korea and Iran. However, the President rejected the idea that the Council should be scrapped and stated that ‘the institution must be tested where it now stands’.

UN Human Rights Council selects nations for first universal periodic review

On 21 September the UN Human Rights Council selected the countries that are to be reviewed under the newly-established Universal Periodic Review mechanism. The countries that have been selected to undergo the Universal Periodic Review during the first session are Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, United

Kingdom, India, Brazil, Philippines, Algeria, Poland, Netherlands, South Africa, Czech Republic, and Argentina. The countries will be reviewed three at a time, by alphabetic order. The countries chosen to be under review were selected through the process of drawing lots by region to ensure full respect for equitable geographical distribution. The Human Rights Council decided during its fifth session to establish the various aspects of procedures, mechanism and structure that will be used during the process. It is through this mechanism that the Council will review on a periodic basis the degree of each country's fulfilment of its human rights obligations. The outcome of this review will consist of recommendations to be implemented mainly by the state concerned and when appropriate, other relevant stakeholders. The UN aims to have reviewed all of the member states by the end of 2011. Louise Arbour, UN High Commissioner for Human Rights, said "They say that the proof of the pudding is eating it; we have to see how it works". It will be the first time in the UN's history that all members come under the spotlight, without exception.

OSCE Human Dimension Implementation Meeting (HDIM) 2007

The 2007 OSCE Human Dimension Implementation Meeting took place in Warsaw, Poland, from 24 September to 5 October 2007. In its annual meeting, government and civil society representatives from 26 participating states will review the implementation of the OSCE's Human Dimension commitments, adopted by consensus at prior OSCE Summits or Ministerial Meetings. KHRP was in attendance and made a speech on the problems relating to freedom of expression in the Kurdish regions.

UNAMI releases Human Rights Report for 1 April-30 June 2007

The report notes its concern for the Human Rights situation in Iraq. Warning against the violation of the freedom of expression through arbitrary arrests of media professionals in the region of Kurdistan, UNAMI also urges the KRG (Kurdistan Regional Government) authorities to protect minorities, namely Assyrian and Turcoman groups but also the Arab population. In support and promotion of gender equality, the Report calls upon the KRG authorities to investigate and prosecute incidents of violence against women. The conditions of detention under the KRG, including a discussion on arrests made on suspicion of terror offences and abuse of detainees, are highlighted, as are the shortcomings in pre-trial and trial stages. The report calls for urgent

measures to ensure minimum fair trial standards and the rights of defendants, and even goes on to suggest judicial authorities refrain from implementing the death penalty. A final note on the activities implemented in the region relating to freedom of expression and IDPs is included. The also welcomes the positive steps taken in recent months by the KRG to address some of the issues raised. The KRG itself has responded by acknowledging some of the human rights abuses cited, but also points out the measures that have thus far been taken to deal with them.

Section 2: Articles

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

Gauthier de Beco*

Measuring Human Rights: Underlying Approach**

Abstract

This article relates to the measurement of human rights through the use of human rights indicators. It examines the purposes of measuring human rights, the obstacles in doing so, as well as the establishment of a cost-effective strategy for developing human rights indicators that would include the participation of various actors.

Introduction

This article concerns the possibility of measuring human rights through the use of human rights indicators. Human rights indicators are able to determine a state's progress in implementing human rights not only *in abstracto* by analysing legislation but also *in concreto* by examining human rights violations. Before developing human rights indicators, however, it is necessary to explore the advantages and the problems involved in doing so. As seen in this article, measuring human rights has different purposes. However, it can only be achieved to a limited extent, since measurement in the social sciences is prone to many hurdles. This is why a rational and participatory approach for the creation and use of human rights indicators needs to be developed.

The first chapter of this article will examine the purposes of measuring human rights. The second chapter will analyse the obstacles to developing human rights indicators for doing so. The third and last chapter will discuss the strategy to be established in order to create and use human rights indicators.

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The purposes of measuring human rights

As will be seen in this chapter, the purposes of measuring human rights are manifold. These include monitoring, adjudication, policy-making, documentation, accountability, and impact assessment. Human rights indicators are therefore an instrument that can contribute to the implementation of human rights in many ways by different actors.

Monitoring

One of the purposes of human rights indicators is to monitor the realisation of international human rights.¹ Human rights indicators are an instrument that could be used by different human rights actors, such as treaty bodies, UN agencies, non-governmental organisations (NGOs) and governments.² Treaty bodies could use human rights indicators created by states in order to monitor their compliance with international human rights treaties, as has been requested on several occasions by the Committee on Economic, Social and Cultural Rights, and to a lesser extent by the Committee on the Rights of the Child.³ These bodies, however, do not specify the indicators that states should establish for the state reporting process. In 1998, Paul Hunt, the future UN Special Rapporteur on the right to health, developed some right to education indicators, which had to be

1 States have the obligation to monitor the realisation of international human rights under international human rights law. With respect to monitoring the realisation of economic, social and cultural rights, see General Comment No.3 (1990), *The nature of States Parties obligations* (art.2, para.1), adopted at the fifth session of the Committee on Economic, Social and Cultural Rights, E/1991/23, para.11.

2 *Report of Turku Expert Meeting on Human Rights Indicators* (Turku/Åbo: March 10–13, 2005), p.8, www.abo.fi.

3 See General Comment No.18 (2005), *The right to work* (art.6), adopted at the twenty-fifth session of the Committee on Economic, Social and Cultural Rights, Geneva, November 7–25, 2005, E/C.12/GC/18, para.31(c); General Comment No.15 (2002), *The right to water* (arts 11–12), adopted at the twenty-ninth session of the Committee on Economic, Social and Cultural Rights, Geneva, November 11–29, 2002, E/C.12/2002/11, para.54; General Comment No.14 (2000), *The right to the highest attainable standard of health* (art.12), adopted at the twenty-second session of the Committee on Economic, Social and Cultural Rights, Geneva, April 25 to May 12, 2000, E/C.12/2000/4, paras 57–58; General Comment No.13 (1999), *The rights to education* (art.13), adopted at the twenty-first session of the Committee on Economic, Social and Cultural Rights, Geneva, November 15 to December 3, 1999, E/C.12/1999/10, para.52; General Comment No.12 (1999), *The Right to adequate food* (art. 11), adopted at the twentieth session of the Committee on Economic, Social and Cultural Rights, Geneva, April 26 to May 14, 1999, E/C.12/1999/5, para.29; General Comment No.7 (2005), *Implementing child rights in early childhood*, adopted at the forty-fifth session of the Committee on the Rights of the Child, Geneva, February 9–17, 2006, CRC/C/GC/7, para.39; General Comment No.5 (2003), *General measures of implementation of the Convention on the Rights of the Child* (arts 4, 42 and 44, para.6), adopted at the thirty-fourth session of the Committee on the Rights of the Child, Geneva, September 19 to October 3, 2003, CRC/GC/2003/5, para.48.

disaggregated into particular groups, as well as the benchmarks to be monitored by these indicators.⁴ Since then, there have been many other initiatives of this kind, including from Paul Hunt himself. However, despite the advantages that might be procured by the use of indicators by treaty bodies, it has been argued that these bodies currently do not have the time and experience to engage in such a process.⁵

Adjudication

Human rights indicators could also be useful in legal claims and could make the adjudication of human rights easier. Individuals, NGOs, and also governments could make use of indicators before the courts. Claimants could benefit from the information indicators provided when bringing cases against governments for human rights violations.⁶ This information could be particularly helpful in the case of economic, social and cultural rights violations, which often require statistical data to expose them.⁷ Information provided for by human rights indicators could also be used before international jurisdictions by NGOs, such as those that are entitled to make complaints regarding European Social Charter violations before the European Committee on Social Rights of the Council of Europe. Finally, states could use these indicators to exonerate themselves from their obligations, once they can be shown to have taken all reasonably expected measures to prevent human rights violations.

Policy-making

Human rights indicators and benchmarks could be used as a stepping-stone for further action. The drafting of human rights policies requires the preliminary assessment of the human rights situation. Measuring the extent to which human rights have been achieved will lead to a better understanding of the human rights problems of a state and give the latter a chance to respond accordingly. In order to be used for policy-making, however, human rights indicators must be part of

4 See Paul Hunt, *State obligations, indicators, benchmarks and the right to education*, CESCR, 19th Sess., E/C. 12/1998/11 (July 16, 1998).

5 A. Chapman, "The Status of Efforts to Monitor Economic, Social and Cultural Rights" in A. Minkler and S. Hertel (eds), *Economic Rights: Conceptual, Measurement, and Policy Issues* (CUP, Cambridge, forthcoming), p.19, www.humanrights.uconn.edu.

6 UNHRP Working Paper No.1, *Monitoring housing rights. Background paper for the 2003 expert group meeting on housing rights monitoring*, (UN-HABITAT and OHCHR, Nairobi, 2003), p.50, www.unchs.org. The UNHRP is the result of the collaboration between UN-HABITAT and the OHCHR.

7 C. Apodaca, "Measuring the Progressive Realization of Economic and Social Rights" in Minkler and Hertel (eds), fn.5 above, pp.7–8.

a general strategy. Such a strategy could be incorporated into a national human rights plan of action, a possibility that was raised by the Committee on Economic, Social and Cultural Rights.⁸ Measuring human rights also helps the international community understand which countries or regions are facing serious human rights problems,⁹ and enables it to direct international aid accordingly.¹⁰ Indicators used by donor states in the context of aid, however, are often politically loaded, and fail to support the promotion and protection of human rights.

Documentation

Measuring human rights can involve documenting both the nature and incidence of human rights violations.¹¹ Human rights indicators thus forge a culture of transparency and openness by allowing the general public to discuss the extent to which the state has fulfilled its human rights obligations. Documenting human rights violations through the use of indicators sheds light on those human rights problems that are both less visible and lower-profile albeit chronic, such as discrimination and domestic violence.¹² Human rights indicators could also help generate a greater understanding of the structural problems underlying individual violations and act as an early warning system to prevent international human rights violations. Human rights documentation would in this way provide considerable information supporting the claims made by NGOs or local organisations against governments.¹³ Such claims could also be diffused by the media to the general public. Finally, measuring human rights would generate a better understanding of international human rights law by confronting legal standards with reality.¹⁴

8 See General Comment No.15 (2002), fn.3 above, para.37(f); General Comment No.14 (2000), fn.3 above, para.53.

9 A. Hines, "What Human Rights Should Measure" (Background paper presented at the Conference on Measuring Progress, Assessing Impact Conference of the Carr Center for Human Rights Policy, Harvard, May 2005), p.3, www.ksg.harvard.edu.

10 See B. Rubin and P. Newberg, "Statistical Analysis for Implementing Human Rights Policy" in P. Newberg (ed.), *The Politics of Human Rights* (New York University Press, New York, 1980), pp.268–284.

11 T. Landman, "Measuring Human Rights: Principle, Practice, and Policy" (2004) 26 *Human Rights Quarterly* 906–931, p.909.

12 Hines, fn.9 above, p.4.

13 L. Farha, "Bringing Economic, Social and Cultural Rights Home: Palestinians in Occupied East Jerusalem and Israel" in I. Merali and V. Oosterveld, *Giving Meaning to Economic, Social and Cultural Rights* (University of Pennsylvania Press, Philadelphia, 2001), pp.160–179, p.177.

14 This is particularly the case with those rights that are not fully justiciable yet, as are most economic, social and cultural rights.

Accountability

Measuring the realisation of human rights provides accountability. By reflecting duties that are enshrined in human rights treaties, human rights indicators have the capacity to hold duty-bearers to account.¹⁵ Duty-bearers are mainly the states, but can also be international organisations or individuals.¹⁶ Measuring human rights ensures the control of governmental action. The regular assessment of state compliance with human rights as, for instance, Democratic Audit is doing in the United Kingdom, obliges government to account to the public.¹⁷ Accountability is probably the most important function of human rights indicators, as it helps to remove human rights from the realm of charity. Thanks to the evaluation of the human rights situation of a state, rights-holders can question the state in relation to its human rights obligations. Also, if a state fails to comply with these obligations, it will have the burden of proof that it had good reasons to do so.

Assessing impact

Human rights impact assessments aim to assess whether policies, programmes and projects contribute to the realisation of international human rights. Such impact assessments require human rights indicators in order to evaluate the human rights situation before, during, and after the period in which these assessments are being made. Human rights indicators can detect the positive and negative as well as direct and indirect impacts of policies, programmes and projects on the promotion and protection of human rights. Such indicators could be developed in a participatory way before activities are initiated by states (or international organisations), and be used during the whole impact assessment

15 R. Malhotra and N. Fasel, "Indicators for Monitoring the Implementation of Human Rights—A Conceptual Framework" (Background paper prepared for the OHCHR expert consultation on indicators for monitoring compliance with international human rights instruments, Geneva, August 29, 2005) [unpublished], p.15, on file with the authors; OHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (OHCHR, Geneva, 2002), pp.7–8, www.ohchr.org.

16 Human rights indicators, for instance, could evaluate programmes carried out by development agencies. See E. Filmer-Wilson, "An Introduction to the Use of Human Rights Indicators for Development Programmes" (2006) 24(1) *Netherlands Quarterly of Human Rights* 155–161; I. Byrne, "Mainstreaming of Human Rights: A Tentative Operational Approach to Monitoring and Enforcing Human Rights in MEDA Development Projects" (2004) 9(3) *Mediterranean Politics* 542–555; G. de Beco, "Accountability of Development Agencies through the Use of Human Rights Indicators" (Paper presented at the conference *Accountability for Human Rights Violations by International Organizations*, Brussels, March 16–17, 2007) [Forthcoming].

17 Democratic Audit has made several democratic audits of the UK, one of which provides for a Human Rights index. See F. Klug, K. Starmer and S. Stuart Weir, *The Three Pillars of Liberty: Political Rights and Freedom in the United Kingdom* (Routledge, London, 1996). It has also recently made an economic, social and cultural rights audit of the UK. See S. Stuart Weir, *Unequal Britain: Human Rights as a Route to Social Justice* (Politico's Publishing, London, 2006).

process.¹⁸ In this way measuring human rights may lead to policies, programmes and projects being adjusted, including those which do not *a priori* aim to implement international human rights.

Obstacles to measuring human rights

Despite the advantages that human rights indicators might offer in the implementation of international human rights, there are serious obstacles to measuring human rights, which can affect the different purposes for which these indicators were developed. The reason is that not only is it impractical to measure human rights fully but it is also impractical to ensure the validity of every single measurement. Also, measuring human rights can lead to unnecessary and potentially dangerous cross-national comparisons, which should therefore be avoided. The consequence of this is that human rights indicators only have a limited value, and are useless in the absence of other human rights implementation mechanisms.

Incompleteness of human rights measurements

Human rights indicators do not have the capacity to measure accurately the extent to which international human rights have been realised. They can only capture a “snapshot” of reality.¹⁹ This is mainly due to the fact that it is impossible to collect all the relevant human rights data to be used for human rights indicators. Attempting to do so is a waste of time and would create unbearable costs. It would therefore be preferable to select a few key indicators rather than to try and develop a complete set of indicators in order to evaluate comprehensively a state’s human rights situation. The lack of data is particularly problematic for civil and political rights, as states tend to hide their repressiveness. As shown by Kenneth Bollen, data on civil rights violations are filtered in various ways and in successive stages: some are simply unrecorded, some are recorded but not accessible, some are accessible but unreported, some are reported locally but not abroad.²⁰ As a

18 HOM, *Report of the Expert Meeting “Human Rights Impact Assessment—from Human Rights Analysis to Measuring Change”* (November 25–26, 2004) (Humanist Committee on Human Rights, Utrecht, 2004), p.10; HOM, *Human Rights Impact Assessment. Steps and Tools* (Introductory paper at the occasion of the EU Human Rights Discussion Forum, Workshop 4, Session 3, Copenhagen, December 20–21, 2002) (Humanist Committee on Human Rights, Utrecht, 2002); de Beco, fn.16 above.

19 M. Green, “What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Assessment” (2001) 23 *Human Rights Quarterly* 1062–1097, pp.1090–1091.

20 K.A. Bollen, “Political Rights and Political Liberties in Nations: An Evaluation of Human Rights Measures, 1950 to 1984” in T. Jabine and R. Claude (eds), *Human Rights and Statistics. Getting the Record Straight* (University of Pennsylvania Press, Philadelphia, 1991), pp.188–215, pp.198–201.

result, it is impossible to get to know the exact degree of civil rights violations in any given state. This is the case even with developed countries in Europe, where sometimes there are no updated statistics on the administration of justice, as is the case in Austria,²¹ or on every place of detention, as is the case in France. Data on economic, social and cultural rights violations, on the other hand, are more readily available. However, the entire spectrum of economic, social and cultural rights is much too broad to be explored fully. In addition, much of the data on economic and social issues collected by states and international organisations is not intended for measuring human rights and therefore cannot be used directly for that purpose.

Due to the fact that it is impossible to measure fully the status of a human rights situation, human rights indicators are not perfect as a measurement mechanism. The reason why they were developed in the first place was only to capture some of the reality of a given situation in order to understand it better, which provides at best a presumption of compliance or non-compliance with human rights standards.²² The consequences of human rights indicators only partially measuring the realisation of international human rights are threefold. First, human rights measurement only plays a limited role in that it represents only one of the available means in the implementation of international human rights. Secondly, human rights indicators inevitably distort the meaning of their object.²³ By using human rights indicators, human rights concepts are given a concrete meaning, which may turn out to be reductive, since these indicators only partially measure human rights. However, human rights measurements could in this way also contribute to the clarification of human rights concepts. As a consequence, human rights indicators, depending on the impartiality of those using them, could end up having the same role as jurisprudence, which also shapes the meaning of these human rights concepts. This is particularly the case for economic, social and cultural rights, whose long neglect and resultant non-justiciability has impeded their proper understanding. Thirdly, the results obtained from the evaluation of a human rights situation must not be oversold by implying that human rights indicators represent more than they really do. As is

21 V. Wagner and M. Novak, "Monitoring the Protection of Human Rights in the European Union: An Evaluation of Mechanisms and Tools" (Reflexive Governance in the Public Interest: Fundamental Rights. Working paper series: REFGOV-FR-9), p.51, <http://refgov.cpd.ucl.ac.be>.

22 *Report of Turku Expert Meeting on Human Rights Indicators*, fn.2 above, p.2.

23 R.L. Barsh, *The Fortunate Unmeasurability of Human Rights* (Paper presented at the Conference Towards an Indicators System in Human Rights, Oñati, Spain, International Institute for the Sociology of Law, September 16–17, 1999), p.21. See also N. Thede, "Human rights and statistics: Some reflections on the no-man's-land between concept and indicator" (2001) 18 *Statistical Journal of the United Nations Economic Commission for Europe* 259–273, p.266.

the case with statisticians, human rights actors who are working with indicators are actually only making estimates.²⁴ Indicators, therefore, must be interpreted carefully, and more importantly, limitedly. Additional information regarding a human rights situation, in the form of narrative reports, for instance, is necessary for a correct interpretation of human rights indicators.²⁵

The problem of measurement validity

Another difficulty encountered when measuring the extent to which human rights have been realised is measurement validity. A measurement is only valid if the indicators truly capture the ideas embodied in the concept being measured.²⁶ Measurement validity is more of a problem in the social than the exact sciences, as human behaviour cannot be described as objectively as scientific facts. Some aspects of human behaviour cannot simply be codified into indicators.

In order to examine whether a measurement is valid, the links between a concept and the indicators that measure this concept must be examined. According to Todd Landman, the process of measurement takes place in a three-step process establishing connections between four kinds of categories: background concepts, systematised concepts, indicators and scores.²⁷ First, background concepts have to be formulated in more specific terms so as to become systematised concepts, which are in fact particular human rights. Secondly, systematised concepts must be turned into indicators capable of measuring these concepts. Thirdly, indicators have to produce scores based on collected data. Measurement validity, as mentioned above, depends on whether a human rights concept has been correctly translated into human rights indicators, and therefore relates to the second step proposed by Landman. To do so requires that the strength of the links between systematised concepts and indicators be checked, failing which

24 H. Spierer, "Violations of Human Rights—How Many? The Statistical Problems of Measuring Such Infractions Are Tough, but Statistical Science is Equal to It" (1990) 49(2) *American Journal of Economics and Sociology* 199–210, p.203.

25 This has, for instance, been suggested by Vernor Munoz Villalobos, the UN Special Rapporteur on the right to education, in his report on the right to education where he proposes to create right to education indicators. See Vernor Munoz Villalobos, *Report of the Special Rapporteur of the Commission on Human Rights on the right to education*, UN Commission on Human Rights, 61st Sess., E/CN.4/2005/50 (December 17, 2004), p.14.

26 R. Adcock and D. Collier, "Measurement Validity: A Shared Standard for Qualitative and Quantitative Research" (2001) 3 *American Political Science Review* 529–546, p.530. See also Bollen, fn.20 above, pp.207–208.

27 T. Landman, "The Scope of Human Rights: From Background Concepts to Indicator" (Discussion paper presented at the Turku Expert Meeting on Human Rights Indicators, Turku/Åbo, March 10–13, 2005) (Human Rights Centre of the University of Essex, 2005), pp.10–13, www.abo.fi.

systematic errors might occur. Robert Adcock and David Collier endeavoured to do this by developing three measurement-validity analyses.²⁸ These analyses consist in examining the content of the systematised concepts, the results of different indicators measuring similar systematised concepts, and the results of different indicators measuring different systematised concepts having a causal relationship with each other. However, they admit that each of their measurement validity analyses has weaknesses, and that these analyses must be used together.²⁹ It is therefore possible to assess, to some extent, the validity of a measurement by examining whether the content and the results of human rights indicators are consistent.

The danger of comparability

Human rights indicators call for cross-national comparisons, which are made possible by the existence of internationally accepted standards. However, cross-national comparisons based on composite indices in order to achieve competition are not advisable, because these indices can only be obtained by weighing different variables against each other.³⁰ Doing so leads to moral relativism.³¹ For instance, is it possible to consider that two cases of torture amount to one of murder? The violation of the right to life cannot be compared with the violation of other human rights, as it puts an end to the enjoyment of any human right. The same problem applies to different indicators for a particular human right. With a view to establishing a composite index per state for the level of enjoyment of the right to adequate housing, for example, is it necessary to give weight to the different indicators that measure the individual elements of this right? Despite the fact that the UN Housing Rights Programme, which developed a set of 17 right to housing indicators, suggested doing so,³² such a move would result in good scores overshadowing bad scores, and ignore the fact that in order to be adequate, housing must be indiscriminately available, affordable, habitable, accessible, culturally adequate, and protected by law. Moreover, composite indexes do not

28 Adcock and Collier, fn.26 above, pp.538–543.

29 *ibid.*, p.543. These measurement validity analyses, however, are in any case flawed, taken together or not, because they assume that the remaining aspects of a measurement, such as the availability of data, remain equal. This is never the case in practice. See J. Foweraker and R. Krznaric, “Measuring Liberal Democratic Performance: an Empirical and Conceptual Critique” (2000) 48(4) *Political Studies* 759–787, p.769.

30 *ibid.*, p.766.

31 Landman, fn.11 above, p.910.

32 UNHRP Working Paper No.1, fn.6 above, pp.39–40. The UNHRP suggested developing a housing right index in which not only the different elements but also the individual indicators forming part of these elements should be weighed against each other.

take into account discrimination in the enjoyment of human rights. As a result, a comparison of states' average human rights achievements using composite indexes is not only meaningless but also dangerous. If states are to be compared, this should be done by comparing human rights indicators individually, without turning these indicators into average scores. In this case, it would be impossible to determine which state fared better or worse than other states in complying with its human rights obligations even with regard to particular human rights.

Several attempts have nonetheless been made to rank countries, especially with respect to civil and political rights, using composite indexes, such as the Humana Index and the Human Freedom index. States have also compared the human rights situation of foreign countries in order to define their aid strategies.³³ However, ranking, as a rule and, as previously mentioned, especially in the case of aid, is politically loaded and does not serve the purpose of promoting and protecting human rights. In contrast, as suggested above, a comparison of individual human rights indicators could serve this purpose, since by doing so states can obtain information on the specific human rights achievements of other states. States might then inquire about how other states managed to do so and try and act similarly. Thanks to human rights indicators, states might thus engage in a collective learning process leading to the imitation of best practices.

The limited role of measurement instruments

Because of the many problems with measuring human rights, indicators can only have a limited role in the implementation of international human rights.³⁴ As a result, efforts made to widen the scope of human rights indicators could rapidly become disproportionate compared to the benefits indicators might offer. There are other ways that could also be used to inform concerned actors regarding the human rights situation of a state, such as the shadow reports of NGOs as well as (individual or collective) complaints leading to interpretative judgments. Also, as already mentioned, measuring a human rights situation should only be a part of a wider human rights strategy comprising the use of other human rights instruments, which states should adopt to implement international human rights. Such a strategy would include human rights impact assessments and human rights national plans of action in which human rights indicators have a

33 See Rubin and Newberg, fn.10 above.

34 Practitioners themselves recognise that indicators have only a limited value. See Paul Hunt, *Interim report of the Special Rapporteur of the Commission on Human Rights on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN GA, 58th Sess., UN Doc. A/58/427 (October 10, 2003), para.38.

role to play. Indicators should therefore be used with their original purpose in mind. In other words, building human rights indicators must lead to action, and not be an end in itself.

Establishing a strategy for developing human rights indicators

Because of the problems related to the measurement of human rights, it is not possible to develop a perfect system whereby human rights indicators would automatically result in the violation or non-violation of human rights. Also, developing new indicators is extremely costly. In view of this, a cost-effective strategy in which different human rights actors are involved should be established for developing human rights indicators.

A cost-effective strategy for developing human rights indicators

There are two ways in which human rights indicators can be established so as to be cost-effective. The first way is to adapt existing measurement instruments for use as human rights indicators. This particularly concerns social, economic and cultural rights, as many international agencies, such as UNDP, the World Bank, the ILO, the IFM, UNESCO, and UNIFEM, collect information that indirectly relates to these rights with the co-operation of governments. Their purpose in their doing so is partly to monitor progress towards the Millennium Development Goals. However, as already mentioned, the information collected by these agencies does not directly concern human rights, but rather their respective mandates, leading to the creation of development indicators. Although the purpose of their creation, strictly speaking, is altogether different, they can nonetheless be used as proxy indicators to evaluate the level of the promotion and protection of human rights. It is also possible to add a human rights perspective to development indicators by linking them to international human rights standards, thereby converting them into human rights indicators.³⁵ Such a step involves disaggregating development indicators into particular groups in order to measure compliance with the principle of non-discrimination. Some international agencies have already attempted to do so. UNDP, for instance, created a Gender-Related Development Index, which refines the existing Human Development Index according to sex discrimination. It also created pro-poor and

35 T. Landman and J. Häuserman, "Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance" (Paper presented at the Turku Expert Meeting on Human Rights Indicators, Turku/Åbo, March 10–13, 2005), pp.18–19 and 35; K. Tomasevski, "Indicators" in A. Eide, C. Krause and A. Rossas (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers, Dordrecht, 2001), pp.389–403, p.391.

gender-sensitive indicators that can be obtained by further disaggregating data by poverty status and sex.³⁶ Adapting development indicators reduces the costs that would be created by developing new human rights indicators, and contributes to the integration of human rights concerns in the development area. This requires a cautious approach, however, as some data collected by international agencies cannot be used for human rights measurements.

The alternative to the above is to create new human rights indicators. This will generally be necessary for measuring civil and political rights, in relation to which data collection mechanisms are seriously lacking, as already mentioned. However, it is not the case that because these rights are justiciable that they can easily be measured. To the contrary, the content of civil and political rights remains subject to interpretation so that creating indicators to measure them is a difficult task. Reference should therefore be made to jurisprudential principles, such as those developed by the European Court of Human Rights, so as to know what data should be collected for such human rights indicators.³⁷ This would especially be helpful in relation to those rights on which restrictions are permissible, such as, for instance, the freedom of expression. Using jurisprudential principles for the creation of new human rights indicators would avoid misunderstandings about human rights concepts and collecting information that would turn out to be unnecessary.

Regarding economic, social and cultural rights, new human rights indicators could be created when available instruments do not capture certain aspects of a human right being measured. The UNHRP, for instance, noted that in relation to the right to adequate housing, information on the time taken to access services, such as drinking water and sanitation, was not available and had to be searched, particularly from a gender perspective.³⁸ However, new indicators should capture not only one but several attributes of a given right so as to limit their cost. Developing additional indicators, as the UNHRP is proposing, might as a result not be necessary if the outcome of these can be obtained from existing indicators. In most situations, it is in fact better to develop only a few key indicators, as the smaller the number of indicators, the easier it will be to use them over time and

36 UNDP, *Measuring Democratic Governance. A Framework for Selecting Pro-poor and Gender Sensitive Indicators* (UNDP, Oslo, 2006), www.undp.org.

37 *Blackstone's Human Rights Digest*, which identifies European Court of Human Rights principles, is one of the sources that could be used for this purpose. See K. Starmer and I. Byrne, *Blackstone's Human Rights Digest* (Blackstone Press, London, 2001).

38 UNHRP Working Paper No.1, fn.6 above, p.5.

measure the progressive realisation of international human rights.³⁹ A balance must therefore be found between using and adapting available indicators on the one hand, and developing new indicators on the other.⁴⁰ Human rights indicators should therefore rely on existing measurement instruments (these can always be supplemented with human rights data), and new indicators created only if the latter are absent, as is principally the case regarding civil and political rights. In any case, before creating new human rights indicators, the costs should be weighed up against the benefits that new indicators might bring.

Actors involved in the development and use of human rights indicators

Human rights indicators require the involvement of various actors, including human rights lawyers and statisticians as well as external human rights actors. While the former should help the different states to develop human rights indicators, the latter should approve them. It will be up to the states then to provide the necessary data for human rights indicators under the supervision of the external actors. The latter will also be able to use the human rights indicators for monitoring benchmarks.

Actors involved in the development of human rights indicators

The development of human rights indicators requires not only a knowledge of human rights but also statistical skills. Human rights lawyers should therefore work side by side with statisticians. Human rights activists, however, are generally reluctant to use statistics because of their dislike of having to quantify human suffering and because they often consider that as long as a person's human rights are violated there can be no progress in human rights. Instead of quantifying rights, human rights lawyers tend to prefer to focus on individual cases.⁴¹ The development of human rights indicators can nonetheless only be achieved with the involvement of statisticians who may familiarise human rights lawyers with their methods.⁴² Also, the human rights community should both convince statistical institutes to have human rights included in their mandates, and acquaint these institutions with human rights standards. The importance of such a multidisciplinary approach for human rights measurement was stressed

39 Apodaca, fn.7 above, p.14.

40 Wagner and Novak, fn.21 above, p.73.

41 The human rights community's disregard for statistics can, inter alia, be seen from the fact that the term "statistics" as opposed to the term "indicators" is not mentioned in Vienna Declaration and Programme of Action.

42 Spierer, fn.24 above, p.205.

at the Montreux Conference on Statistics, Development and Human Rights in 2001, where human rights lawyers and statisticians took part in addition to development experts.⁴³

Defining human rights indicators is a task for the state, since it is the state's responsibility to implement international human rights. However, the state should act in agreement with external human rights actors in order to validate these human rights indicators. An agreement on the human rights indicators to be used for evaluating progress towards the realisation of international human rights could be made with the treaty bodies. National human rights institutions, NGOs, and human rights experts could also develop human rights indicators outside the state reporting process. While NGOs could propose alternative and more challenging indicators, national human rights institutions are particularly well suited to establish human rights indicators at the national level, as they often work in close co-operation with both state and non-state actors.

Actors involved in the use of human rights indicators

Using human rights indicators for assessing state compliance with human rights also necessitates the involvement of various human rights actors, a step which enhances the integrity of this operation. In view of this, a distinction must be made between those providing human rights information and those using it.⁴⁴ Gathering data for human rights indicators is largely the responsibility of the state, since the latter possesses or is in the best position to collect such data, even if reluctant to do so. To that end, states should establish a data collection strategy to be implemented by the different ministerial departments, depending on the human right undergoing measurement. Other actors, such as UN agencies, are also gathering data on human rights issues. These agencies could work together as well as with governments in order to supplement data provided pursuant to existing measurement instruments.⁴⁵ In addition, UN agencies could assist states in strengthening their national statistical institutes, which should integrate human rights into their mandates. Despite their limited resources, NGOs also have reliable information on human rights violations and can examine the value of the data provided by states. To conclude, while states remain chiefly responsible for gathering data for the purpose of human rights indicators, UN

43 See *IAOS Conference Statistics, Development and Human Rights*, Montreux, Switzerland, September 4–8, 2000, www.portal-stat.admin.ch.

44 Malhotra and Fasel, fn.15 above, pp.14–15.

45 The UNHRP, for instance, suggested that adequate housing-rights data be incorporated into the UN Population and Housing Census. See UNHRP Working Paper No.1, fn.6 above, pp.42–43.

agencies as well as NGOs should exercise control by supplementing incomplete data and, where necessary, critically review the data collected by the states.

It is essential that information relating to human rights violations reaches the intended party. As a rule, this information must be used by those with whom the state has agreed to develop human rights indicators, such as the treaty bodies monitoring state compliance with human rights treaties. However, since states only report to these bodies every five years, indicators could be used more regularly at the national level by other human rights actors, such as national human rights institutions, which could interpret the data received from the government from a human rights point of view.⁴⁶ National human rights institutions could then invite representatives from civil society and from the public administration to discuss the state's failure to implement international human rights. In addition, NGOs could undertake their own separate monitoring activities and urge the government to improve its human rights record on the basis of the information furnished by human rights indicators.⁴⁷ Used in this way by different human rights actors, indicators would contribute to the creation of a common language with the aim of achieving better implementation of international human rights.

Conclusion

This article explored the purposes, obstacles and strategy relating to the creation of human rights indicators for measuring human rights. There are many purposes attached to the measurement of human rights; they are monitoring, adjudication, policy-making, documentation, accountability, and impact assessment. However, it is impossible to measure human rights situations fully and accurately. Caution must therefore be used when employing human rights indicators and their limits must be clearly established before their use. Also, the comparison of human rights indicators in the form of composite indexes should be avoided. As a result, measuring human rights remains only one of the means that can be used for implementing human rights, and should not become an end in itself. There are two ways in which human rights indicators for measuring human rights can be developed: one is to convert available indicators into human rights indicators and the second is to develop totally new indicators.

46 R. Malhotra and N. Fasel, "Quantitative Human Rights Indicators—A Survey of Major Initiatives" (Discussion paper presented at the Turku Expert Meeting on Human Rights Indicators, Turku/Åbo, March 10–13, 2005), p.25, www.abo.fi.

47 NGOs could also use indicators in order to evaluate and adapt their own programmes. See Thede, fn.23 above, p.269; F. Raine, "The measurement challenge in human rights" (2006) 4 *International Journal on Human Rights* 7–29, pp.23–24.

The latter should only take place where measurement instruments turn out to be insufficient, which will more often be the case with respect to civil and political than economic, social and cultural rights. This, however, should be done bearing in mind that it is better to reduce as much as possible the number of indicators to be used. Finally, different actors should be involved in the development and the use of human rights indicators. Developing human rights indicators requires an interdisciplinary approach. With regard to the information used for human rights indicators, the state should be responsible for collecting this information, and external actors should be responsible for interpreting it.

To conclude, despite its limits, measuring human rights can be a useful device for implementing human rights. They can help the parties involved both to understand a human rights situation and to adopt concrete measures to improve human rights protection and promotion.

Tim Otty QC*

Human Rights and Internal Armed Conflict

Oh, I don't know. You know, I thought about that last night, and just musing over the words, the phrase, and what constitutes it. If you think of our Civil War, this is really very different. If you think of civil wars in other countries, this is really quite different.

Observations of Secretary of State Donald Rumsfeld on the existence or otherwise of a civil war in Iraq,
2nd August 2006

1. Introduction and Historical Background

The law of internal armed conflict is, sadly, not a purely academic subject to be mused over. Between 1990 and 1995 alone, 73 States were involved in armed conflicts of some kind. Of those, 59 were involved in internal conflict or civil war.¹ In the twelve years since, the position has hardly improved with major conflicts in, amongst other places, the Democratic Republic of Congo, Chechnya, Iraq (in 1991 and again since 2003), Sierra Leone, Somalia, Sudan and Turkey. All of these conflicts – involving, as they have, egregious examples of abuse – provide the most brutal case studies for this area of law. The lesson of each is that not only is greater clarity required in this area of the law but also that far greater political will is required with regard to its respect and its enforcement.

The purpose of this paper will be to identify the legal framework governing the obligations of participants in such conflicts and the different enforcement mechanisms available at regional and international levels in the event of breaches of those obligations.

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³ These statistics were compiled by the International Peace Institute in Oslo, (see Dan Smith, *The State of War and Peace Atlas*, 3rd ed., (Penguin Non-Classics, London 1997), 90-95). They are also cited in Lindsay Moir, *The Law of Internal Armed Conflict*, (Cambridge: Cambridge University Press, 2002). An extremely useful survey of recent developments in this area of law is also provided by Anthony Cullen, "Key Developments affecting the scope of Internal Armed Conflict in International Humanitarian Law", 183 *Mil. L. Rev.* 66 (2005). This paper draws heavily on both of these works.

As will become apparent, the major developments in this area of law have all come in the sixty years since the end of the Second World War. This has been part of the process whereby, at the international level, the primacy of State interests has been replaced, or at least challenged by, the emergence of a dual principle underpinning both humanitarian law and human rights law – the recognition of the existence of absolute and inalienable rights attaching to each human being by virtue of their humanity and regardless of their nationality, culture, creed or colour coupled with a recognition that all States owe duties to uphold such rights.

Until 1949 and the agreement of Common Article 3 of the Geneva Conventions (considered in detail in the next section) the law of internal armed conflict involved consideration of three different categories of conflict: states of rebellion, states of insurgency and states of belligerency.

Rebellion

A state of rebellion was said to exist when there was a “sporadic challenge to the legitimate government” which seemed “susceptible to rapid suppression by normal procedures of internal security”.² Participants in rebellions enjoyed no protection under traditional international law because States regarded rebellions as “coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own jurisdiction”.³

Insurgency

If a situation of conflict was never considered to be so limited, or survived its anticipated “rapid suppression”, it could be characterised as a state of “insurgency” – a term which of course is used on a daily (and at least historically inaccurate) basis in reports of the situation in Iraq. This has been described as a “catch – all designation” about which all that can be said is that it is “supposed to constitute more sustained and substantial intrastate violence than is encountered if the internal war is treated as rebellion”.⁴ The reason the use of the term in modern Iraq may be said to be inaccurate – at least when compared with its historical use – is that it has generally been an “indication that the recognizing state regards the

2 Richard A Falk, *Janus Tormented: The International Law of Internal War*, in James N. Rosenau, *International Aspects of Civil Strife*, (1964), at 197-99

3 *Prosecutor v Dusko Tadic (aka Dule)*, No IT-94-I-AR72, 2 October 1995, at 96

4 See Falk, *supra* fn. 2, at 199

insurgents as legal contestants and not as mere lawbreakers”⁵ and has occurred through a desire to put a State’s relations with the insurgents on a regular basis for reasons of “convenience, of humanity and of economic interest”.⁶ That is clearly not how either the Iraqi Government or the coalition forces would regard those described as “insurgents” and launching violent attacks in Iraq today.

The significance of a recognition of a state of conflict as one of insurgency – as opposed to one of belligerency addressed below – meant that a State could avoid the risks involved in explicitly joining a conflict and would also avoid the constraints of neutrality. As Falk puts it, it permitted

third states to participate in an internal war without findings themselves ‘at war’, which would be the consequence of intervention on either side once the internal war had been identified as a state of belligerency. Intervention participation in an insurgency may arouse protest and hostile response, but it does not involve the hazards and inconveniences that arise if a state of war is established with one or the other factions.⁷

As with the state of rebellion, however, under traditional international law recognition of a state of insurgency did not carry with it any automatic application of humanitarian norms. As will be explained below, however, customary international law has now evolved to require respect for minimum humanitarian standards in all situations of insurgency.

Belligerency

Prior to 1949 this was “the only form of internal conflict considered to necessitate the application of humanitarian norms”.⁸ The distinction between insurgency and belligerency has been authoritatively explained as

clearly sovereignty-oriented and reflect[ing] the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.⁹

5 Rosalyn Higgins, “Internal War and International Law”, in CE Black & RA Falk, *The Future of the International Legal Order* 88, (Black and Falk eds., 1971)

6 Hersch Lauterpacht, *Recognition in International Law*, (1947), 276-277

7 Falk, *supra* fn. 2 at 200

8 Cullen, *supra* at fn. 1 at 74

9 See Tadic decision *supra* fn. 9 at paras 96-97

At least in its early days the recognition – or otherwise - of belligerency was reflected in the reality of conduct of a conflict. As Moir says

An examination of some major internal conflicts of the nineteenth and early twentieth centuries shows that, in those cases where the laws of war were accepted and applied by opposing forces, some form of recognition of belligerency had invariably taken place..... By contrast where recognition of belligerency was not afforded by the government, the laws of war tended not to be applied, leading to barbaric conduct by both sides.¹⁰

Satisfaction of at least four criteria was held to be necessary before a conflict could be said to have attained the status of belligerency: first it had to involve more than a small section of a State or its population; secondly the insurgents had to occupy and administer a substantial portion of territory; thirdly they had to themselves conduct hostilities in accordance with the laws of war through organised armed forces under a responsible authority and finally the hostilities had to have reached such a level that foreign states found it necessary to define their attitude to the contestant elements.¹¹

The significance of recognition of a state of belligerency lay in the fact that participants in such a conflict had to be treated as States at war. The obligation to ensure respect for humanitarian norms fell on each of them and rendered intervention on behalf of either by another State an act of war. There is a conflict of academic opinion as to whether – once the four criteria identified above were satisfied – a duty arose to recognise the existence of a state of belligerency. As a matter of historical fact – however – any such duty was either treated as not existing or as having fallen into disuse by the time of the Spanish Civil War. As Cullen says

10 Moir *supra* at fn. 1 at 12-13. Moir cites the American War of Independence (1774-1783), the Wars of Independence by the Spanish American Colonies (1810-1824), the American Civil War (1861-1865) and the Greek Insurrection (1846-1849) as examples of conflicts where some form of recognition did occur and the Greek revolt against the Ottoman Empire (1821-1829), the Hungarian Civil War (1848-1849), the Cuban Wars of Liberation against Spain (1868-1878 and 1895 – 1898) and, the Spanish Civil War (1936-1939) as examples of conflicts where it did not.

11 Lauterpacht, *supra*, at 176

For many commentators the non-recognition of the Spanish Civil War as a situation of belligerency by neighbouring states demonstrated the demise of the concept in traditional international law.¹²

It is against that historical background that the development of the law of internal armed conflict in modern times falls to be considered. Although the concepts of rebellion, insurgency and belligerency have now fallen into disuse their scope, achievements and failings inform any consideration of the current framework of law as it has developed since 1949.

2. The Legal Framework

Common Article 3

The cornerstone of the modern law governing internal armed conflict is Common Article 3 of the Geneva Conventions which was agreed in 1949 (see Dr Breau's article at p X of this volume for the text of Article 3).

There are to date 189 States party to the Geneva Conventions. All members of the United Nations are parties, and the only parties to the International Court of Justice Statute not also parties to the Geneva Conventions are The Marshall Islands and Nauru.

A number of important aspects of Common Article 3 are immediately apparent from consideration of its text. First and most obviously it contains no definition of an "armed conflict". This has been identified as both a strength – in allowing for an evolutionary and not overly rigid approach – and a weakness – as providing a ready passport to State denial and evasion of its impact. This is returned to in more detail below. Secondly it sets out a series of minimum standards precluding, for example, inhuman or degrading treatment of any kind. Thirdly, however, it does not extend any form of immunity to combatants such as those enjoyed by members of armed forces involved in international conflict, requiring simply that any trials be before a regularly constituted court affording all judicial guarantees recognised as "indispensable by civilized peoples". Fourthly the application of the Article's protections is not dependent on any form of reciprocity or upon the fulfilment of any technical definition of a civil war. It is also perhaps worth noting in passing that both the second and third features of the Article just referred

12 supra fn.1 at 78

to explain the reluctance of United States authorities to accept that the Geneva Conventions apply to any detainees held in the 'War on Terror.' Until very recently the United States Administration was seeking an express exemption for the CIA from the *McCain Amendment*¹³ prohibiting cruel and inhuman treatment of detainees, while the Military Commissions currently underway at Guantanamo Bay manifestly breach the requirement for trial before a regularly constituted Court providing all judicial guarantees.¹⁴

It has been suggested that some assistance can be gained in assessing the meaning of 'armed conflict' in Common Article 3 from the proposals for a set of criteria canvassed by the delegations to the Diplomatic Conference held prior to its agreement.¹⁵ These have been summarised in Pictet's commentary¹⁶ as follows:

(1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as a military and in possession of part of the national territory.

(3)

(a) That the de jure Government has recognized the insurgents as belligerents; or

(b) that it has claimed for itself the rights of a belligerent; or

(c) that it has accorded the insurgents recognition as belligerents only for the purposes of the present Convention; or

13 This amendment to a military munitions authorisation bill placed before Congress was known by this name as a result of its sponsorship by Senator John McCain. Notwithstanding the McCain Amendment's laudable intentions there is now concern that it has been rendered effectively toothless by the stripping of habeas corpus jurisdiction which the Administration now claims to have secured both retrospectively and prospectively by the "Graham - Levin" amendment to the same legislation.

14 These failings include the lack of confidential access to counsel, the inability to be represented by counsel of choice, the lack of access to material in the possession of or relied upon by the prosecution, the inability to cross-examine prosecution witnesses and the lack of structural independence in both the Commissions themselves and the appellate bodies overseeing them. See generally Amnesty International's report dated 13th May 2005 - *Guantanamo and beyond: The continuing pursuit of unchecked executive power* - for a detailed analysis of these issues.

15 Moir supra fn. 1 at pp. 34-35

16 Pictet, Commentary I 49-50

(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace or an act of aggression.

(4)

(a) That the insurgents have an organization purporting to have the characteristics of a State.

(b) That the insurgent civil authority exercises de facto authority over persons within a determinate territory.

(c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.

(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

Of the suggested criteria summarised by Pictet, Moir makes a powerful case to the effect that the requirements of a minimum level of organization on the part of parties to a conflict and the ability to comply with the obligations of the Protocol are pre-requisites to a conflict falling within the Article but that those relating to occupation or control of territory, use of a State's armed forces or recognition of belligerency may be no more than indicators.¹⁷ If correct this approach is important as broadening the scope of application of the Article.

As well as having been ratified by all current members of the United Nations, since at least 1986, Common Article 3 has also been recognised as representing customary international law. In the *Nicaragua* case the International Court of Justice (ICJ) said the following:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflict of a non-international character. There is no doubt that these rules also constitute a minimum yardstick and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity."¹⁸

This approach has since been followed by both the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). In the seminal *Tadic* decision – addressed in more detail below

17 Supra fn. 1 at 34-42

18 Case Concerning Military and Paramilitary Activities in and Against Nicaragua; *Nicaragua v. US*, 1986 ICJ 4, Judgment of 27 June, at 114 Merits

- it was described by the ICTY as a provision reflecting “certain minimum mandatory rules” and as imposing “criminal responsibility for serious violations of Common Article 3”.¹⁹ Similarly in the *Akayesu* case – also dealt with below - the ICTR said that

It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3.²⁰

Notwithstanding their significance, however, the application of the provisions of Article 3 has undoubtedly been rendered uncertain by the absence of any definition of what constitutes an “armed conflict not of an international character”. This has variously allowed the Governments of Israel, Iraq and Indonesia to deny the application of international humanitarian law to conflicts as serious as those in the West Bank, Kuwait and East Timor (for a discussion of the applicability of international humanitarian law to the conflict in south-east Turkey, please refer to Dr Breau’s article in this volume). More recently, as already pointed out, the United States authorities are denying its application to important aspects of the ‘War on Terror’ and are even describing provisions of the Conventions as “quaint” and out of date. As long ago as 1974 Professor Richard Baxter was to state “the first line of defence against international humanitarian law is to deny that it applies at all”²¹, and that line of defence is certainly not hindered by the wording of Article 3. Despite this limitation, it is nevertheless difficult to disagree with Professor Higgins’ categorisation of Common Article 3 as at least “a step in the right direction” or that by David A Elder of it as “an initial but very important step”.²² It is of undoubted importance in affirming that internal conflicts are not beyond the reach of international law and in establishing that each state party has the right to demand that its provisions are respected by any government engaged in a civil war.

19 Supra at paragraphs 102 and 134

20 *Prosecutor v Akayesu*, No. ICTR-96-4, 1998, 608

21 Richard R Baxter, *Some Existing Problems of Humanitarian Law*, (Proceedings of the International Symposium on Humanitarian Law, Brussels, 1974)

22 Rosalyn Higgins, “International Law and Civil Conflict”, in Evan Luard, *The International Regulation of Civil Wars* 183, 1972; David A Elder, “The Historical background of Common Article 3 of the Geneva Conventions of 1949”, *11 Case W Res. J. Int’l. L* 37, 1979, at 39

The Additional Protocols of 1977

The agreement of these protocols in 1977 represented the next major development in international humanitarian law after the agreement of Common Article 3.

Additional Protocol I

The significance of the first Additional Protocol in fact lies in its categorisation of one class of conflict – occurring within a State’s borders – as international and so covered by the Geneva Conventions relating to international conflicts. This is effected by Article 1(4) of the Protocol which provides that the term international armed conflict is to include:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.

Even this definition was, however, considered overly narrow by many and it has also been said to have had a negative effect in the development of the law relating to internal armed conflict by *internationalising* the colonial disputes of greatest concern to those in the Third World and so removing an incentive for those States to press for greater regulation of internal conflicts²³. Beyond its significance in this regard it is, in any event, outside the scope of this paper on its own terms.

Additional Protocol II

Additional Protocol II is, in contrast, central to any discussion of internal armed conflict and has been described as “going a long way to putting flesh on the bare bones of Common Article 3” and as constituting “the first attempt to regulate by treaty the methods and means of warfare in internal conflicts”²⁴. It entered into force on 7th December 1978 and there are currently 159 State parties.

The first aspect of the Protocol meriting attention is its mirroring of certain of the *Pictet criteria* referred to above in offering a more detailed description of the kind of conflict to which it applied. This is contained in Article 1(1) which states that the Protocol applies to armed conflicts

23 Moir supra fn. 1 at 89-90

24 Christopher Greenwood, “A Critique of the Additional Protocols to the Geneva Conventions of 1949 in Helen Durham & Timothy LH McCormack”, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* 3, 5, (1999)

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.²⁵

Further guidance as to the scope of the Protocol's application was then provided in Article 1(2) which described the conflicts falling outside its sphere as

situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

As these sub-paragraphs of Article 1 indicate, to meet the definition of an internal armed conflict covered by the Protocol, a conflict had to involve at least the following elements: use of arms, sufficient intensity to compel a government to use its armed forces, collective operations on the part of the insurgents and a minimum degree of organisation including the capacity for compliance with humanitarian requirements. The principal distinction with the concept of belligerency considered above is that there is no requirement for the exercise of quasi-governmental authority or administration on the part of a party to the conflict.

Two further aspects of the scope of the Protocol which have received considerable academic attention are the question of mutuality of obligations and the saving provision in Article 3 of the Protocol. As to the first, Moir and Cassese both argue persuasively that in order for a State's obligations to be maintained any insurgents must also be bound by the Protocol.²⁶ As to the second, Article 3 provides that

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State

25 The ICRC had in fact argued for a broader definition based on "the existence of a confrontation between armed forces or other organized groups under responsible command i.e. with a minimum degree of organization" but was unsuccessful in so doing. See Cullen fn. 1 *supra* at 93

26 Moir *supra* fn. 1 at 96-97; Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts", (1981) 30 ICLQ 416

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

This provision is of significance in emphasising the continued importance of sovereignty and gives rise to difficulties when the legitimacy of what is referred to as the *Kosovo doctrine* comes to be considered. This doctrine is addressed below in the section of this paper relating to enforcement.

As to the substance of the Protocol the following particular aspects of the rights and obligations set out merit attention:

- (a) Articles 4 to 6 set out the principal guarantees of human treatment for those not actively engaged in the conflict. These apply as much to those who have never been combatants as to those who have ceased to be so either through choice or compulsion. Article 4(3) provides a set of detailed protections applicable specifically to children drawn from the Fourth Geneva Convention. Article 5 regulates the protection of detainees and is based on the Third and Fourth Conventions. Article 6 establishes basic judicial guarantees deemed to be part of any fair legal system and Article 6(5) establishes an obligation at the end of hostilities to grant the “broadest possible amnesty to persons who have participated in the armed conflict”. It may be one provision explaining the reluctance of certain States to acknowledge serious conflicts as falling within the Protocol;²⁷
- (b) Articles 7 and 8 regulate the position of the “wounded, sick and shipwrecked” and include an obligation of search for victims of shipwrecks. They apply regardless of an individual’s participation in conflict;
- (c) Articles 9-12 provide a series of important protections specific to medical and religious personnel seeking to work in the context of an internal armed conflict;

27 The Turkish conflict with the PKK in South East Turkey in the early to mid - 1990s may be one example. There continues to be resistance to any suggestion that the senior leadership of the PKK should receive any form of Amnesty.

- (d) Articles 13 to 17 seek to provide enhanced protection for civilians in a conflict situation prohibiting attacks on civilians (Article 13), attacks on land or facilities indispensable to them (including water facilities, agricultural produce, land, livestock or foodstuffs (Article 14), attacks on dams or other installations containing dangerous forces (Article 15), attacks on places of worship (Article 16) or forced movement (Article 17);
- (e) Article 18 provides for the potential for humanitarian relief and although it is prefaced by a requirement for the High Contracting Party's consent to be provided it has been suggested in academic commentaries that the Party in question "has no unfettered discretion to refuse the agreement, it may only do so for valid reason, not for arbitrary or capricious ones"²⁸.

Customary international law and the jurisprudence of the International Tribunals

Prosecutor v Tadic, Case No. IT-94-1-AR72 35 ILM 32 (1996) & 36 ILM 908 (1997)

The jurisprudence of the ICTY in this case has been described as "the most innovative development"²⁹ since the 1977 Protocols and as affecting "many aspects of humanitarian law"³⁰.

Dusko Tadic was the former President of the Local Board of the Serb Democratic Party (SDS) in Kozarac. He was initially convicted on 9 counts and in part on 2 counts; combined, these 11 counts constituted both violations of the law or customs of war, including violations of Article 3 Common to the Geneva Conventions (Common Article 3), and crimes against humanity. The Trial Chamber also found Tadic not guilty on 20 counts, including 9 counts of murder (because of insufficient evidence) and 11 counts relating to grave breaches of the 1949 Geneva Conventions (because of non-applicability). Both the defence and prosecution filed appeals against these original verdicts. On July 15, 1999, in its first decision reviewing a trial chamber judgment after a trial on the merits, the Appeals Chamber rendered its judgment in the Tadic case, finding him guilty

28 Bothe, Partsch and Solf, Commentary on the 1977 Protocols, 696. Moir fn. 1 supra at 119.

29 Moir supra fn 1. at 134-160

30 Cullen supra fn. 1 at 98-102

on nine additional counts. In total he was convicted of seven counts of grave breaches of the 1949 Geneva Conventions, six counts of violations of the laws or customs of war, and seven counts of crimes against humanity. The crimes were committed in 1992 in the Prijedor District and more specifically at the Omarska, Keraterm, and Trnopolje detention camps, in Kozarac and in the area of Jaskici and Sivci. Tadic was sentenced to twenty years imprisonment.

At an earlier appeal on jurisdictional issues Tadic had argued that the Tribunal had no jurisdiction to try him for any offence as the conflict in which the alleged events had occurred was not an *armed conflict* and was not, in any event, an *international armed conflict*. The Appeals Chamber rejected these arguments and addressed the primary threshold question of the existence of an armed conflict as follows:

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.³¹

The Appeals Chamber went on to consider the scope of Article 3 of the ICTY's Statute which provided as follows:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

31 paragraph 70 Appeals Chamber decision

- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

The Appeals Chamber held that the Tribunal's jurisdiction extended to consideration of cases under Article 3 of the Statute whether the armed conflict in question was international or internal and in paragraphs 96 and 97 explained the increasing closeness of the regimes appropriate to regulation of international and internal armed conflicts in the following terms:

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency...

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict...A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law - *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) - has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted *only* within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

The Appeals Chamber then went on to consider the reach of customary international law and concluded that this too regulated internal armed conflict. At paragraph 117 it stated that:

Many provisions of [Additional Protocol II] can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles

And at paragraphs 119-120 it held that:

elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts.

The Appeals Chamber cited one example of such a rule as the prohibition on the use of chemical weapons whether the conflict was international or internal. It was however careful also to make clear that internal conflicts were not regulated by international law in *all* respects and stated that:

The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

Despite the qualification made, the Appeals Chamber's approach has been viewed as very far reaching by a number of commentators. Professor Greenwood describes it as endorsing rules for internal conflict "very close indeed to those rules contained in instruments regulating international conflict" and Warbrick and Rowe describe it as having driven "a coach and four through the traditional distinctions between an international and a non-international conflict".³²

The *Tadic* Trial Chamber – to which the case was then remitted following the decision on jurisdiction – summarised the Appeals Chamber's approach as follows:

The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.³³

The *Tadic* case also confirmed the customary law status of crimes against humanity and the fact that these could be committed in internal conflicts as much as international conflicts.³⁴ The Trial Chamber held that the requirement for a crime against humanity to be directed "against a civilian population" within the meaning of Article 5 of the Statute³⁵ would be met where the population was "predominantly civilian"³⁶ and where the attacks were "widespread" or "systematic" and the result of an official policy and even isolated acts could fall within the

32 Moir supra at fn. 1 p. 147; Greenwood, "International Humanitarian Law and the Tadic Case", *Eur J Int Law*, (1996), 7: 265-283; Warbrick and Rowe, "The International Criminal Tribunal For Yugoslavia: The Decision Of The Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadic Case", *Int Comp Law Q*, (1996), 45: 691-701

33 Paragraph 562 Trial Chamber judgment

34 See Appeals Chamber paragraph 141 and Trial Chamber paragraphs 623 and 627. Article 5 of the Tribunal Statute defines these crimes as "the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts."

35 While Article 5 is limited to attacks against civilians the prohibition on crimes such as torture against combatants is contained in Article 2 of the Statute.

36 Paragraph 638

definition provided the latter two criteria were met.³⁷ The concept of “policy” has also been addressed by the ICTY and it is clear that this need not be a State policy and need not be formalised in any sense provided it can be “deduced from the way in which the acts occur” (Tadic paragraphs 653, 655). As Moir has said this is “clearly of great importance to internal armed conflict, where crimes against humanity can therefore be equally well committed in furtherance of insurgent rather than government policy”.

Prosecutor v Akayesu ICTR-96-4-T 37 ILM 1399 (1998)

The *Akayesu* case is another of the most significant cases to be decided by any international tribunal in recent years. It was decided by the ICTY’s sister Tribunal the International Criminal Tribunal for Rwanda (the ICTR) and represented the first conviction for genocide by any international tribunal. The summary set out below, illustrating the extraordinary and fortuitous way in which part of the case emerged, was prepared by the Washington College of Law³⁸:

The original indictment brought against *Jean-Paul Akayesu*, the former bourgmestre (mayor) of the *Taba* commune in Rwanda, contained no charges of sexual violence, despite documentation from human rights and women’s rights organizations demonstrating that rape crimes were widespread throughout *Taba*. The initial indictment charged *Akayesu* with twelve counts of war crimes, crimes against humanity, and genocide for extermination, murder, torture, and cruel treatment committed in his commune.

In the midst of trial, a witness on the stand spontaneously testified about the gang rape of her 6-year-old daughter. A subsequent witness testified that she herself was raped and she witnessed or knew of other rapes. ... Judge Navanethem Pillay, was one of the three judges sitting on the case. Judge Pillay questioned the witnesses about these crimes. Suspecting that these were not isolated instances of rape, the judges invited the prosecution to consider investigating gender crimes in *Taba* and, if found to have been committed and if attributable to *Akayesu*,

37 Paragraphs 646-649; The final two elements of crimes against humanity identified by the Trial Chamber – that of discriminatory intent and that the act must not be undertaken for purely personal reasons unrelated to the conflict – were overturned by the Appeals Chamber (paragraphs 282-284 & 238-272)

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to consider amending the indictment to include charges for the rape crimes.

The trial was temporarily adjourned while the prosecution investigated the reports of rape in *Taba*. It found significant evidence of rape and forced nudity, often in the presence of *Akayesu* and with his encouragement or acquiescence. Indeed, many of the gender related crimes had been committed on the grounds of his office, where women and girls throughout the area had sought refuge. Consequently, an amended indictment was filed, charging *Akayesu* with three counts of rape and other inhumane acts as crimes against humanity. The genocide court in the amended indictment also referred to the alleged sexual violence. When the trial recommenced, several witnesses testified about pervasive rape and forced nudity committed under *Akayesu's* watchful gaze or with his encouragement. The Trial Chamber concluded that sexual violence was widespread and systematic in *Taba*, and committed by *Hutus* with intent to humiliate, harm, and ultimately destroy, physically or mentally, the *Tutsi* group. *Akayesu* was ultimately convicted of, among other crimes, rape as an instrument of genocide and as a crime against humanity. He was sentenced to life imprisonment. The Trial Chamber also noted that there was no definition of rape in international law, and it thus specified that rape could be defined as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”

Taking the same approach as was adopted in the *Tadic* case, the ICTR held that “Crimes against humanity ... are prohibited regardless of whether they are committed in an armed conflict, international or internal in nature”, (Judgment paragraph 565). The Tribunal also underscored the concept of individual responsibility for breaches of humanitarian law (again as the ICTY did in *Tadic*) stating (at paragraphs 611-617 of its judgment) that

the violation of [the norms reflected in Common Article 3 and Article 4 of Additional Protocol II] entails, as a matter of customary international law, individual responsibility for the perpetrator.

The Tribunal considered that the requirements of both Common Article 3 and Additional Protocol II were met by the nature of the conflict in Rwanda (see paragraphs 618-637) but *Akayesu's* defence was successful in resisting a finding of breach of those specific provisions. The Prosecutor was held to have failed

to have established the requisite link between the atrocities committed and the conflict. However, the success of *Akayesu's* Counsel in this matter was of course of no practical significance, given the guilty verdict and life sentence for the more serious crimes of genocide within the meaning of Article 2 of the ICTR Statute and for crimes against humanity.

The International Criminal Court

The establishment of the permanent International Criminal Court has the potential to be one of the great steps forward in the protection of human rights. If, however, it is not backed by a sufficient determination on the part of the most powerful States and of the United Nations then it also has the potential to bring the entire system of human rights protection into disrepute. It would be little short of disastrous for the laudable goal of ending impunity for gross violations of human rights if, in a world hardly lacking grave conflict and abuse – whether it be in Darfur, Uganda, Somalia or Iraq – the Court were to become a “white elephant” with no indictments, no defendants and no trials.

The principal jurisdictional provision relevant to the subject of this paper is Article 8 of the Statute establishing the Court. It provides as follows:

Article 8

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, *war crimes* means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949 ...
 - (b) Other serious violations of the laws and customs applicable in international armed conflict ...
 - (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual

- violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

As is apparent, the “Tadic formula” for identifying internal armed conflict as “protracted armed violence between governmental authorities and organized armed groups *and between such groups*” has been reflected in Article 8(2)(f). This has been welcomed by a number of commentators as reducing the chances of a conflict falling outside the definition of armed conflict and outside the jurisdiction of the Court because of the complete breakdown of Governmental institutions as has occurred in countries such as Liberia and Somalia in recent years.³⁹

39 Cullen fn. 1 at 103

The use of the term “governmental authorities” in Article 8(2)(f) has also been welcomed as including

not only regular armed forces of a State but all different kinds of armed personnel provided they participate in protracted violence, including, where applicable, units of national guards, the police forces, border police or other armed authorities of a similar nature.⁴⁰

Importantly Article 8(2)(f) also contains no requirement for the existence of responsible command, sustained and concerted military operations or effective control over territory nor any requirement for organised armed groups to have the ability to implement international humanitarian law.

As of today the International Criminal Court has of course yet to issue its first indictment but formal investigations are underway in relation to possible indictments arising out of the recent conflicts in the Democratic Republic of Congo, Uganda, Sudan and the Central African Republic.⁴¹

Human rights instruments

There are obviously very close parallels between a number of the rights guaranteed under humanitarian law and referred to above and those protected by the principal human rights instruments both at the international and regional level.

The guarantees provided by human rights law are applicable whatever the nature of a conflict, and indeed whether any conflict at all exists. They represent the essential regulation of the relationship between the individual and the State and impose obligations on the State in respect of all those who can be said to be under the State’s jurisdiction.

One of the principal distinctions which has been identified between humanitarian law and human rights law is that human rights treaties typically provide for derogation from certain rights in situations of public emergency threatening the life of the nation. The potential for derogation to be overused in the context of situations of conflict clearly exists and an extraordinarily important factor in

40 Andreas Zimmerman, “War Crimes Committed in an Armed Conflict not of an International Nature in Otto Triffterer”, *Commentary on Statute of the International Criminal Court*, at 286

41 See <http://www.icc-cpi.int/cases.html> (last accessed 6 December 2007)

assessing the efficacy of a human rights treaty will be the scrutiny applied by the judicial bodies (if any) charged with their regulation. Of these bodies the European Court of Human Rights probably has the most developed jurisprudence of any Human Rights tribunal and it has also had occasion to consider the impact of serious internal conflict on the protection of human rights in a number of different European jurisdictions. These include Northern Ireland, Greece, Cyprus, Turkey and, most recently, the Russian Federation. Some of the most important principles identified by the Court in cases concerned with those internal conflicts are set out below. The rights of particular importance in this context are the right to life, the right to freedom from torture, inhuman or degrading treatment, the right to liberty, the right to a fair trial and the right to peaceful enjoyment of possessions. Each is addressed briefly below by reference to cases concerned with serious conflicts as are the related concepts of derogations under States of emergency and jurisdictional reach.

States of emergency

Although a State will be the first to invoke a *state of emergency* and will have a wide margin of appreciation in doing so it will be for the Court to make its own assessment as to whether such an emergency truly exists.⁴²

Even if it is accepted that a state of emergency does exist, it will then fall to the Court to consider whether the measures taken by the State are “strictly required by the exigencies of the situation”. One example of its approach to this question came when the European Court held that the provision for 14 days incommunicado detention could not be justified notwithstanding the “state of emergency” accepted to be established in south-east Turkey as a result of the conflict between the Turkish armed forces and the PKK in the 1990s.⁴³

Thanks to the conflicts in Northern Ireland and Turkey – and now Chechnya – the Court has had many opportunities to consider submissions advanced by States seeking to justify conduct which might otherwise be unlawful by reference to the fight against terrorism. Despite this the Court has repeatedly made it clear that there are certain rights and standards which are absolute. In *Öcalan v. Turkey* (12th May 2005) the Grand Chamber of the Court had this to say in considering a complaint that the Applicant had been the victim of an unlawful deprivation of

42 see *Ireland v UK Series*, App. No. 5310/71, 18 January 1978

43 see *Aksoy v. Turkey*, App. No. 21987/93, 18 December 1996; see also *Demir and others v. Turkey*, App. No. 71/1997/855/1062–1064, 23 September 1998

liberty contrary to Article 5 of the Convention as a result of his incommunicado detention:

The Court has already noted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (*Brogan and Others v. the United Kingdom*, App. No. 11209/84; 11234/84; 11266/84; 11386/85, 30 May 1989 at 33, § 61; *Murray v. the United Kingdom*, App. No. 14310/88, 28 October 1994, at 27, § 58; and *Aksoy v. Turkey* cited above). This does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (*Sakık and Others v. Turkey*, cited above).

Jurisdictional reach

The primary obligation to ensure the enjoyment of rights of all within the jurisdiction of the State is *primarily* territorial in scope and referable to the State's borders but is not strictly limited to that extent. In *Ocalan v. Turkey* the Chamber of the Court held that the notion of jurisdiction extended even to Kenya where the Applicant was taken into custody by Turkish security forces.⁴⁴ Similarly in *Cyprus v. Turkey* (Application No. 25781/94, 10th May 2001 at paragraph 77) the Court found that as Turkey had effective overall control of Northern Cyprus its responsibilities were not confined to the acts of its own soldiers or officials but extended to the local administration which only operated thanks to Turkish military and other support. Interestingly the principles developed by the Court in cases such as these are now being used before English Courts to establish Convention rights on the part of those detained by United Kingdom authorities in Iraq, (see *R (Al Skeini) v. Secretary of State for Defence* [2005] EWCA Civ 1609, 21 December 2005 and [2007] UKHL 26, judgment of 13 June 2007, summarised in section 3 of this volume, page X).

The right to life

The Court has considered a number of cases involving the use of lethal force by State agents and the principles established there will clearly be of potential relevance in any assessment of rights and obligations in a situation of internal

⁴⁴ App. No. 46221/99, 12 March 2003; The Chamber's judgment was upheld in this and all other material respects by the Grand Chamber in its judgment of 12th May 2005.

armed conflict involving loss of life. The use of lethal force in such circumstances will always be the subject of close scrutiny and the planning and control of operations had to minimise reliance on lethal force “to the greatest extent possible”, (see *McCann and others v. UK*, App. No. 18984/91, 27 September 1995)⁴⁵. In a case concerned with military operations against a village said by the authorities to be harbouring PKK fighters the Court held that the decision of Turkish forces to open fire in response to shots fired at them was found to be justified but the subsequent failure to investigate whether civilian casualties had been caused was held to violate Article 2 of the Convention, (see *Ahmet Ozkan and Others v. Turkey*, App. No. 21689/93, 6 April 2004). A series of other Turkish cases relating to the conflict in south-east Turkey have resulted in findings of violations of the right to life by reason of the inadequate planning and execution of military operations involving lethal force and the subsequent failure to carry out proper investigations into the deaths caused.⁴⁶ The Court is also now starting to consider and determine a large number of cases arising out of the conflict in Chechnya raising similar issues.⁴⁷

The right to humane treatment

The right to be free from torture, inhuman or degrading treatment is obviously one of the main areas of overlap between humanitarian law and human rights law. The right is absolute and non-derogable. Like the right to life it also has a procedural aspect with the State being obliged to investigate all credible allegations of torture once it becomes aware of the same. Again cases concerned with conflict provide the leading Strasbourg case law in this area. In *Ireland v. UK* the Court considered five interrogation techniques used on IRA suspects (wall-standing, hooding, subjection to noise, sleep deprivation and deprivation of food and drink). These techniques were used in combination for hours at a time and the Court held that they constituted inhuman and degrading treatment. It is now generally accepted that, taking into account the higher standards of conduct now

45 The *McCann* case concerned the killing of three IRA terrorists by SAS forces operating in Gibraltar. A violation of the Convention was established as a result of the inadequate planning of the operation.

46 See eg. *Ogur v. Turkey*, App. No. 21594/93, 20 May 1999; *Ergi v. Turkey*, App. No. 23818/94, 28 July 1998; *Yilmaz v. Turkey*, App. No. 35875/97, 29th July 2004

47 See Chamber judgments of 24th February 2005 relating to unlawful killings, disproportionate use of aerial bombardment and inadequate investigation of allegations of State abuse. *Khashiyev and Akayeva v. Russia*, App. No. 57942/00 and 57945/00, 24 February 2005; *Isayeva, Yusupova and Bazayeva v. Russia*, App. No. 57947/00, 57948/00 and 57949/00, 24 February 2005 and *Isayeva v. Russia*, App. No. 57950/00, 24 February 2005

demanding of States in respect of human rights, the techniques would also be held to constitute torture.

To date however it is only Greece, Turkey and France⁴⁸ which have been held to have violated Article 3 by the deliberate commission of torture. In the *Greek Case* (1969) 12 Yearbook 1 the Athens police were held to have inflicted severe beatings on the body and feet of political detainees. Other treatment leading to the finding of a violation included the use of electric shocks and a vice. In *Aydin v. Turkey*⁴⁹ – another in the series of cases relating to south-east Turkey – the applicant was found to have been raped, beaten, blindfolded, paraded naked and pummelled with high pressure water while being spun in a tyre. The Court had little difficulty in finding this egregious abuse to amount to torture. In *Ozkan v. Turkey* – the village assault case referred to above in the context of the right to life – the male members of the village were subsequently rounded up, forced to lie face down on the ground, forced to walk long distances in very poor conditions leading to many of them contracting frostbite and then detained in overcrowded and insanitary conditions. A series of violations of Article 3 were found both as a result of the treatment held to have occurred and the failure to investigate yet more serious allegations of abuse.⁵⁰

The right to liberty

As the *Aksoy* case referred to above illustrates this is another of the rights which may be brought most directly into play in a situation of tension or conflict with the State taking greater powers in the interests of security. As the Court made clear in the passage referred to above, however, the existence of a human rights treaty will require the exercise of a supervisory jurisdiction over all such judgments.

The right to a fair trial

In respect of the right to a fair trial the European Court has had cause to consider *special courts* said by the authorities to be legitimate because of the particular security situation existing in a part of the territory of a signatory State. Turkey's

48 *Selmouni v. France*, App. No. 25803/94, 28 July 1999

49 See also *Aksoy v. Turkey*, App. No. 21987/93, 18 December 1996; *Akkoc v. Turkey*, App. No. 22947/93; 22948/93, 10 October 2000

50 Judgment 6th April 2004. See also *Akdeniz v. Turkey*, App. No. 23954/94, 31st May 2001 where the Court held that holding a group of men in the open for at least a week and subjecting them to beatings breached Article 3 of the Convention.

system of State Security Courts was established precisely to deal with serious criminal cases considered to be a “threat to the security of the State”. Each court had one military judge and two civilian judges. In *Incal v. Turkey*, App. No. 41/1997/825/1031, 9 June 1998 the Court first held that a Tribunal so constituted could not be considered to be independent and impartial in the structural sense. It took the *Öcalan* case referred to above to ultimately bring about the abolition of the State Security Courts in Turkey.

Another feature of due process is, of course, the right to proper representation and in *Elci v Turkey*⁵¹ - in an echo of the special protection afforded to religious and medical personnel in situations of crisis - the Court said the following by way of emphasis for the importance of the legal profession to the upholding of basic human rights:

669. The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers’ offices, will be subject to especially strict scrutiny by the Court.

The right to peaceful enjoyment of possessions

It has been estimated that as many as three million people suffered forced relocation as a result of the conflict between the Turkish military and the PKK in the south-east of Turkey in the 1990s. In a series of cases arising out of this situation the Turkish security forces have been found by the Court to be responsible for destroying the homes and possessions of applicants. This was described in some quarters at the time as a *scorched earth* policy aimed at draining the PKK of means of support, (see eg. *Akdivar v. Turkey*, App. No.

51 App. No. 23145/93 and 25091/94, 13 November 2003. This case concerned the unlawful detention and torture of 16 defence lawyers in South East Turkey. Violations of Articles 3, 5 and 8 of the Convention were found.

21893/93, 16 September 1996). In another Turkish case – *Dogan v. Turkey*, App. No. 8803-8811/02, 8813/02 and 8815-8819/02, 29 June 2004 – the Court found that the right to peaceful enjoyment of possessions had been violated as a result of the inability of the applicants to return to their village over a period of more than 10 years due to the conflict. The applicants had been living elsewhere in extreme poverty and had received no compensation or alternative state support. The Court held that the State had breached its

primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their homes or places of habitual residence or to resettle voluntarily in another part of the country.

3. Enforcement

If the appalling conflicts of the last century – and even the last decade of that century – illustrate anything it is that however clearly established humanitarian and human rights standards and principles are, far greater attention needs to be devoted to their enforcement. This is particularly the case in the context of internal armed conflict where even the theory of enforcement is frequently lacking. As Sandoz has observed

The system as a whole has been devised for international conflicts; it cannot simply be switched over to non-international conflicts, whose basic data are completely different.⁵²

International legal mechanisms

In this regard the greatest single breakthrough of recent times has been the establishment of international *fora* to establish individual responsibility and impose individual sanctions on wrongdoers in the form of the ICTY, the ICTR, the Special Court for Sierra Leone and now the International Criminal Court. Complacency should not however creep in. Progress has been slow. As Moir points out by September 2000 the ICTR had handed down only 8 judgments in

52 Sandoz, *Implementing international humanitarian law*, Henry Dunant Institute, Geneva, 1995,, at 259

the context of a crisis believed to have claimed up to a million lives⁵³. Similarly of the 94 individuals indicted in the ICTY only 18 had faced judgment.⁵⁴ As long ago as 1996 Judge Richard Goldstone warned that the failure to arrest Radovan Karadzic and Ratko Mladic could “prove a fatal blow to this tribunal and to the future of international justice”⁵⁵. Ten years on both men are still at large apparently protected by the sympathies of the local Serbian community. The next ten years will be of crucial importance as the ICC seeks to take on its first cases and respond to crises as grave as that currently occurring in the Darfur region of Sudan now said by many to be on the brink of becoming “another Rwanda”.

In addition to these Tribunals the United Nations Commission on Human Rights and the Human Rights Committee also have responsibility at the international level for promoting respect for human rights.⁵⁶

The Special Rapporteur system allows for specific and authoritative investigation of the human rights situation in individual States and this has included scrutiny of situations of internal armed conflict. This is a process which itself builds and draws upon the legal framework and jurisprudence referred to above. Examples of the use of this process in recent years have included scrutiny of Afghanistan, Yugoslavia, the Occupied Palestinian territories and Somalia.⁵⁷

The Human Rights Committee has been described as bound by a procedure which is “deeply flawed as regards the protection of human rights during internal conflict”⁵⁸. State reporting has often proved to be either partial or non-existent

53 By 2006 19 cases involving 25 accused had been completed by the ICTR with 22 convictions and 3 acquittals. By 2008 it is estimated that trials of between 65 and 70 accused will have been completed (see UN Completion Strategy of the ICTR December 2005 S/2005/782. The target date for the ICTR to complete its work is 2010. At the ICTY 161 individuals have been indicted and proceedings have so far been brought to a conclusion against 85. Of these 40 have been convicted, 6 acquitted, 4 transferred to national courts for trial, 25 have had their indictments withdrawn and 10 have died prior to the conclusion of their proceedings.

54 *Supra* at fn. 1 p. 233

55 Independent 17th September 1996

56 The International Court of Justice should of course also be mentioned in this context but given the limitation in its competence to Inter-State cases or, in the case of advisory opinions, to cases brought by designated International Organisations its practical utility in the context of enforcement of the laws of internal armed conflict is greatly restricted. Probably its most significant judgment in this area is that in the Nicaragua case already referred to at paragraph 18 above and addressed in more detail at paragraph 74 below.

57 UN Doc. A/49/650 (re Afghanistan) UN Doc A/56/440 (2001) (re Palestinian Territories) & UN Doc E/Cn.4/1997/88 (1997). Moir at 257-258; Cullen at 101

58 Moir *supra* fn. 1 at 259

and questions posed by the Committee are frequently left unanswered and there is no sanction for the inadequacy of this approach.

The Committee also has jurisdiction to accept inter-State and individual complaints. The problem with both mechanisms is that final decisions of the Committee are expressed in the form of *views* and are treated as non-binding with no enforcement or implementation mechanisms governing them.

Regional legal mechanisms

Europe

As the Strasbourg case law set out above has illustrated, the European Court has been able to at least provide declaratory relief, pecuniary compensation and (in some cases most significantly for individual victims) the simple recognition of the occurrence of human rights violations in a wide range of cases connected with internal conflict. Its judgments have also brought about real legislative and substantive change in the countries concerned. In Turkey for example, as a direct or indirect result of Strasbourg litigation, the death penalty has been abolished, detention periods have been cut from 30 days to 4 days, State Security Courts have been abolished, major steps have been taken towards the elimination of torture and prosecutions based on political speech have been dropped. Whether any of this would have occurred without the extra incentive to Turkey of potential European Union accession is, of course, another question.

The Americas

The Inter-American Commission and the Inter-American Court of Human Rights are the principal bodies of relevance in this area. They are charged with responsibility for the implementation of the American Convention on Human Rights.

Latin American States in particular have of course experienced a considerable number of internal conflicts involving serious human rights violations and the Inter-American Commission in particular has examined both human rights law and humanitarian law in its approach to cases arising out of these conflicts.⁵⁹ The Commission is entitled to receive both individual complaints and inter-State claims. As with the Human Rights Committee and the European system it is the

59 Moir *supra* fn. 1 at 266-267

mechanism for individual complaint which has proved to be by far the more frequently invoked. Outside the confines of individual cases the Commission also has jurisdiction to undertake investigations and produce country reports. These can provide a valuable and authoritative analysis of the facts underpinning a conflict and the legal issues arising in respect of them.

The Inter-American Court cannot receive individual petitions and is available only to the signatory States and to the Commission itself. However, it will seek to provide redress to the individual victims by identifying the amount of compensation which should be paid and by indicating that it will supervise compliance with its decisions. Examples of this process being applied to internal conflicts include cases arising out of the civil unrest in Honduras and Surinam.⁶⁰

Africa

The African system only came into force in 1986. It is based on four treaties of the African Union, the principal among which is the African Charter on Human and People's Rights. The Charter in turn established the African Commission which is responsible for ensuring the promotion and protection of human and people's rights throughout the continent. It was inaugurated in November 1987 and its Secretariat is based in The Gambia and is empowered to receive complaints of violations of Charter rights both from individuals and States.

A more recent development was the creation of the African Court of Human Rights. The Court was established in January 2004 following the coming into force of the 1998 Protocol to the Charter. It consists of 11 judges elected by the Member States of the Union and is empowered to act in both a judicial and an advisory capacity. Like the Inter-American Court, under its compulsory jurisdiction the African Court cannot receive individual petitions direct and is limited to considering cases brought either by the Commission or by signatory States. There is, however, also provision for States to accept the optional jurisdiction of the Court to consider individual complaints. In July 2004 the African Union determined that the Court should be merged with the African Court of Justice, the charter of which has not yet come into force. In July 2006 the eleven judges elected to serve on the African Court on Human and People's Rights swore the oath of office. Their inauguration was an important step in the

60 *Velasquez Rodriguez Case* (1988) 9 HRLJ 212; *Aloboetoe v. Surinam* (1993) 14 HRLJ 413

long-awaited establishment of the African Court and the seat of the Court has now been confirmed as Arusha in Tanzania.

Alternative compliance measures

Action by individual states

The rights and obligations of third party States concerned with internal armed conflicts are of some importance in this area. In the *Nicaragua case* referred to above the International Court of Justice held that the United States – though not a party to the conflict between the Nicaraguan Government and the insurgent Contras – was obliged to ensure respect for Common Article 3 by that party which it was supporting (i.e. the Contras). It was required not to encourage violations of humanitarian law – an obligation which it had breached by distributing a manual on methods of non-conventional warfare containing advice on conduct which would violate the basic rules of humanitarian law⁶¹, (see Judgment paragraphs 220 & 254-256).

Diplomatic representations and public expressions of concern represent the most frequently deployed methods of intervention in cases of internal armed conflict and as Moir points out the Liberian and Chechen conflicts have generated public statements from the European Union each of which were then referred to by way of background in the *Tadic* judgment (paragraphs 113 & 115).⁶²

The United Nations

Notwithstanding the prohibition on interference in the internal affairs of Member States contained in Article 2(7) of the UN Charter, the United Nations has power to intervene in situations of armed conflict under Chapter VII of the Charter where the conflict is considered by the Security Council to threaten international peace and security. The range of measures open to the United Nations includes directions for the severance of diplomatic relations, the imposition of economic sanctions and ultimately the use of armed force. One example of such intervention was that providing for protection for the Kurds of Northern Iraq following the first Gulf War (SC Resolution 68 of 5th April 1991). This resolution was then relied upon by the United States and United Kingdom as authorising the imposition

61 One striking passage in the manual advised on the desirability of “neutralizing” certain “carefully selected and planned targets including judges, police officers and State Security officials”.

62 Moir supra fn 1 at p. 248

of no-fly zones over Northern Iraq. Another example was the resolution the following year authorising the use of force for the protection of humanitarian aid in Somalia (SC Resolution 794 (1992)).

Use of force by regional and other organizations – the Kosovo doctrine

The 1999 Kosovo crisis arose out of widespread gross human rights violations perpetrated by Serbian authorities against the Kosovar population by the Federal Republic of Yugoslavia (Serbia and Montenegro). Faced with these abuses NATO decided to attack Yugoslavia without seeking Security Council authorisation (it being assumed that Russia would veto any such measure). At the time it was widely considered that this action was contrary to the United Nations Charter but another argument (advanced by, amongst others, the United States, the United Kingdom, France, Canada, Belgium, the Netherlands and Italy) contended that such intervention was legitimate under customary international law in order to avert an immediate threat of humanitarian catastrophe. Writing in 2005 Professor Cassese has reserved his position on the merits of this argument saying that it is

too early to determine whether there will emerge a customary rule legitimizing forcible intervention for humanitarian purposes without the need for formal Security Council authorisation.⁶³

4. Conclusion

In 1952 Sir Hersch Lauterpacht made the observation that

if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.⁶⁴

While the vagaries illustrated above indicate that there remains a considerable amount of truth in this proposition, the last thirty years have seen developments of potentially very great significance in this area: the agreement of the Additional Protocols, the establishment of the Special Courts for Former Yugoslavia, Rwanda and Sierra Leone, and potentially of the most far-reaching importance, the creation of the International Criminal Court. Other positive steps promise to be taken in the future, among them, the development of the African Court of Justice.

63 International Law, Second Edition (2005) at 351 & 373 fn. 29

64 The problem of the revision of the law of war, 29 BYIL (1952) at 382

A powerful legal framework now exists whereby perpetrators of grave human rights abuses may be brought to justice. Whether these positive signs are the beginning, or the end, now depends on political will.

Kurdish Human Rights Project

The Hrant Dink Murder Trial: the Ongoing Obstacles to Media Freedom and the Rule of Law in Turkey*

Abstract

On 19 January 2007, Hrant Dink, a journalist and editor of the bilingual Turkish-Armenian Newspaper Agos, was killed by three gunshots to the head and neck outside the Agos office in İstanbul. In July 2007 KHRP undertook a joint mission with representatives of BHRC, Index on Censorship and Article 19 to observe the opening of the trial of those accused of assassinating Dink. Although the public was not permitted to attend the hearings, as one of the defendants was a minor at the time of the murder, the mission members remained outside the court. During the trial observation mission, the delegates met with a number of people who had known or worked with Hrant Dink, including the Dink family's lawyer, Fethiye Çetin. The following is a summary of their findings, based on the report Freedom of the Media in Turkey and the Killing of Hrant Dink: Trial Observation Report (KHRP, London, 2007). This article also outlines some significant developments subsequent to the publication of that report. The next hearing is scheduled for 11 February 2008.

Prior to his murder, Hrant Dink was subjected to a number of legal challenges related to his work as a journalist. In 2005 Dink was convicted under the notorious Article 301 of the Turkish Penal Code for insulting Turkey's national identity. Further charges were being prosecuted under Article 301 and Article 288 of the Penal Code at the time of his death. The case under Article 288, which penalises interference with the judiciary, related to an article questioning Dink's earlier conviction under Article 301. The new Article 301 charge was based on a piece published in *Agos* in July 2006, which was entitled 'I vote against 301.' The article contained a quote from an interview that Hrant Dink gave to Reuters news agency in which he stated that he was certain that an Armenian genocide

* This summary was prepared with the invaluable assistance of KHRP intern Amy Pepper.

had occurred and he would not remain silent on the issue.¹ Although the case against Hrant Dink was dropped after his death, his co-defendants Arat Dink (Hrant Dink's son) and Serkis Seropyan were convicted.²

According to the indictment, Hrant Dink's murder was the result of a conspiracy between some nineteen people in Trabzon and İstanbul.³ Ogün Samast, who was seventeen years old at the time of the murder, confessed to shooting Hrant Dink. However, his involvement allegedly came quite late in the development of the plan to kill Hrant Dink. Yasin Hayal, who was previously convicted of bombing a McDonalds restaurant in Trabzon in 2004, allegedly planned the murder from January 2006. Other defendants include Zeynel Abidin Yavuz, the person allegedly first recruited to carry out the murder and Erhan Tuncel, who allegedly withheld information from the police and was involved in recruiting Ogün Samast. The Chairman and another member of the extreme right-wing Great Union Party (BBP) are alleged to have given financial support to Hayal's family after his arrest and are accused of involvement with a terrorist organisation. A further five people were accused of involvement in the murder, another was accused of membership of a terrorist organisation and seven more were accused of aiding a terrorist organisation and hiding a criminal.

The fact that one of Turkey's most prominent journalists could be killed for what he wrote is telling evidence of the disparity between rhetoric and reality in relation to freedom of the media in Turkey, particularly where ethnic minorities are involved. Allegations of state complicity in the murder of Hrant Dink and the failure of the Turkish authorities to provide appropriate protection are of particular concern. These allegations are supported in the first instance by evidence that Hrant Dink had experienced at least two prior threats to his life. On 26 February 2004, prior to his conviction under Article 301, a group of people who identified themselves as nationalist idealists (*Ülkü Ocakları*) gathered in front of the *Agos* office shouting threatening slogans and holding placards bearing the words "Be Careful," "You Will Be Held Accountable" and "Your Hand Will Be Broken."⁴ The lives of both Hrant Dink and Arat Dink were threatened in

1 See International Freedom of Expression Exchange, 'Court Case Against Agos Continues' 29 March 2007, available at <http://canada.ifex.org/en/content/view/full/82185> (last accessed, 31 August 2007).

2 See International Freedom of Expression Exchange, 'Editor, License owner of "Agos" magazine convicted of "insult to Turkishness"' 15 October 2007 <http://canada.ifex.org/en/content/view/full/86981> (last accessed 17 November 2007).

3 A translation of the indictment is available as an appendix to the full trial observation report.

4 See M Güç 'A Chronology: Hrant Dink's Murder', available at <http://www.bianet.org/bianet/kategori/english/98382/a-chronology-hrant-dinks-murder> (last accessed, 30 August 2007).

a letter received in 2006, which prompted Hrant Dink to apply to Şişli Public Prosecutor's Office.⁵ These public allegations, along with information contained in the indictment, clearly demonstrate that the authorities were aware that Hrant Dink's life was under threat prior to his murder. However, Mr Dink was not provided with the official protection or support that might be expected under such circumstances in any modern democracy.

Concerns of state complicity have also been raised as a result of events and revelations occurring after Hrant Dink's death. First, it has been alleged that police in Trabzon (where the murder was said to have been planned) knew of the plot to kill Hrant Dink and informed police in İstanbul of that threat. A report ordered by the Minister of the Interior found that the Chiefs of Police in İstanbul and Trabzon had failed to take the measures necessary to prevent the plot. The Governor of Trabzon was relocated, however, nobody was actually held accountable for those failings. It has also been reported that Oğün Samast, the youth who confessed to killing Hrant Dink, was photographed posing proudly behind a Turkish flag with members of the military and security police after his arrest. An investigation into that allegation found that official warnings were sufficient punishment for those involved, apart from prosecutions against the two police officials who were accused of giving the photographs to the media. This reflects a blatant disregard for the rule of law among those charged with its enforcement, which calls into question the capacity for independence among both the law enforcement authorities and the Government. Ms Çetin, the lawyer representing the Dink family, has further alleged that those who were actually responsible for planning the murder of Hrant Dink were not on trial. She alleged that illegal "deep-state" groups comprising ex-soldiers and members of the security forces were likely to have been involved in the plot and suggested that democracy can not be achieved in Turkey without acknowledging and dismantling these groups.⁶

According to Ms Çetin the possibility that Hrant Dink's murder was officially sanctioned was raised in evidence on the first day of the trial. She stated in a press conference attended by the mission participants on 3 July 2007 that Yasin Hayal had given evidence that responsibility for the murder lies with the State. She stated that he told the Court the main persons responsible for the murder were not on trial and that the 'main encouragers' of the crime were the police and security forces. In light of the discrepancies evident in the indictment,

5 Ibid.

6 TO Interview with Fethiye Çetin, lawyer for Hrant Dink's family, İstanbul, 3 July 2007.

investigation and trial, the Dink family has made a number of demands that the scope of the investigation and prosecution be extended, particularly to include the Head of Intelligence Services, gendarmes and soldiers, and the BBP.

The request to prosecute the Head of Intelligence Services was rejected by the Court. However, the Court agreed at the first hearing to collect further evidence and request that the records of the intelligence services be provided to the Court. The value of that decision is, however, likely to be limited by the refusal of the Trabzon Governor's Office to permit the questioning of its security officers in relation to Hrant Dink's murder. The Governor's refusal was based on the finding of the report ordered by the Minister of the Interior that the officers were not at fault.⁷ Regardless of whether the officers were at fault, it may be suggested that their cooperation should have been permitted in the interests of justice. Indeed, if they were not at fault, they should have little reason not to cooperate with the investigation. Further, without pre-empting the findings of the Court, it is probable that the failure to allow the participation of these officers could be found to constitute a breach of the requirement for a full and thorough investigation of controversial deaths pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁸ Since the first hearing in July 2007, the Regional Administrative Court has refused permission to try seven police officers from Trabzon, stating that they had no involvement in Hrant Dink's murder.⁹

As a signatory to most international human rights instruments, Turkey is bound to respect fundamental human rights such as the right to life and the right to freedom of expression.¹⁰ Although the right to life and freedom of expression are reflected in a number of the major international human rights treaties, the ECHR is arguably most significant in relation to Turkey, as it provides for an individual right of petition to the European Court of Human

7 T Korkut, 'Police Not to be Questioned in Dink Murder Trial', 31 August 2007, available at <http://www.bianet.org/english/kategori/english/101486/police-not-to-be-questioned-in-dink-murder-trial> (last accessed, 1 September 2007).

8 ECHR, Article 2; *McCann v United Kingdom* (1995) 21 European Human Rights Reports 97.

9 See Erol Önderoğlu 'Police Again Protected in Dink Murder Case' *Bianet* 29 October 2007.

10 Of the main international human rights agreements, Turkey signed the International Covenant on Economic Social and Cultural Rights (ICESCR) on 23 December 2003; the International Covenant on Civil and Political Rights (ICCPR) on 23 December 2003; the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on 16 October 2002; the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 19 January 1988; and the Convention Against Torture (CAT) on 1 September 1988. Turkey also ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on 18 May 1954.

Rights. While neither the right to freedom of expression nor the right to life are absolute, these instruments clearly require both substantive legal protection and significant procedural measures to ensure their effective implementation. The circumstances surrounding Hrant Dink's murder highlight the significant and continuing limitations upon freedom of expression and respect for the right to life in Turkey. These circumstances indicate both a failure to take appropriate measures to protect Hrant Dink's life and flaws in the investigation following his murder. The mission was particularly concerned that:

- (i) Some substantive issues were yet to be addressed, including allegations of participation in the conspiracy by the authorities, particularly the police, gendarmerie and intelligence services;
- (ii) There is strong evidence that the authorities were warned of the plot to kill Hrant Dink by more than one source and failed to take any action;
- (iii) The actions of the police in photographing the alleged murderer with themselves in front of a Turkish flag suggest endorsement of the crime, if not actual collusion;
- (iv) The Trabzon Governor's Office decision not to permit its security officers to be questioned in relation the murder, evinces a lack of commitment to the rule of law;
- (v) The prosecution of Hrant Dink under Articles 301 and 288 rendered him a target for ultra-nationalists.¹¹

The full trial observation report is available online at www.khrp.org

11 See MA Birand, '301 Killed Hrant Dink', Turkish Daily News, 23 January 2007.

Kurdish Human Rights Project

Reform and Regression in the Search for Media Freedom in Turkey *

Abstract

This article is derived from the KHRP fact-finding mission report Reform and Regression: Freedom of the Media in Turkey (KHRP, London, 2007). The joint mission in July 2007, which included representatives of KHRP, the Bar Human Rights Committee of England and Wales, Index on Censorship, Article 19, and the University of Limerick, visited Istanbul and the Kurdish cities of Diyarbakır and Batman in the Southeast to investigate the current situation of freedom of the media in Turkey. It focused on Kurdish, Socialist and Islamist-oriented media, reportedly the main targets of the new Turkish Anti-Terror, Press and Police Power Laws, and examined the impact of the harmonisation package within the EU-Turkey accession negotiations.

Introduction

Article 28 of the Constitution of the Republic of Turkey provides that:

The press is free, and shall not be censored. The establishment of a printing house shall not be subjected to prior permission or the deposit of a financial guarantee. The state shall take the necessary measures to ensure freedom of the press and freedom of information.

Thus, media freedom is enshrined in Turkey's constitution and legislation. However, despite this, freedom of expression and of the media has experienced restrictions which would not typically be associated with a modern Western democratic state. Following an earlier fact-finding mission in February 2007, KHRP observed that "legislative restrictions on freedom of expression, including publishing and the media, designed to prevent dissenting opinion, discussion of politically 'taboo' subjects,

* This article was prepared with the invaluable assistance of KHRP intern Sara Capogna.

and criticism of state institutions, have frequently been utilised in an effort to preserve *status quo*¹.

KHRP's fact-finding mission to Turkey in July 2007 found that journalists and human rights defenders are faced with far fewer extrajudicial killings or direct violations of the right to life than in the 'dark years' of the 1980s and 1990s. In that period, severe restrictions were placed on journalists working in Turkey, with the banning of political parties, trade unions and the imprisonment of countless people for the expression of their non-violent opinion. The mission also found that there is now a greater critical debate within Turkish society and the mainstream Turkish press of subjects previously considered taboo. These developments are largely due to the impact of the EU-Turkey accession process and in particular the package of reforms introduced during 2003 to 2004.

Nonetheless, the mission observed that the situation of media freedom in Turkey started to deteriorate in early 2005, prior to the commencement of formal EU-Turkey negotiations. This is evidenced by an increase in reports of harassment, arbitrary and pre-trial detention and criminalisation of journalists, publishers, political activists, and human rights defenders, with new legislation appearing to reintroduce former restrictions in different guises. Therefore, despite the greater ability of the mainstream press to discuss taboo issues, the opposition press, being open to prosecution and often denied official accreditation by the authorities, remains restricted.

Which factors have caused this regression? This article will evaluate the mission's findings in an attempt to answer this question. Thematic key findings observed by the mission, namely the introduction of retrogressive legislation and its effect on the media in Turkey, will be discussed. Further, the article will examine the impact of the increasing influence of the Turkish military and police, coupled with the arbitrary interpretation and discriminatory application of the law by the judiciary.

Legislative reforms

The EU accession process required Turkey to implement the Copenhagen Criteria aimed at achieving the stability of institutions guaranteeing

1 Publishers on Trial: Freedom of Expression in Turkey in the Context of EU Accession, KHRP, London, 2007, p13.

democracy, the rule of law, human rights and respect for and protection of minorities.

Despite these obligations having undoubtedly provided the impetus for many of the positive reforms in freedom of expression and the media, the consensus amongst many of those interviewed by the mission was that the recent regression is attributable to vague and poorly drafted legislation, that is further compounded by malicious and inconsistent interpretation by the judiciary and the prosecution.

It is useful to look at the effects of the legislation on three types of media: broadcasting, print and online.

Broadcasting media

The adoption of the Sixth Harmonisation Package relaxed the restrictions on broadcasting in the Kurdish language by amending Article 4 of the Act on the Establishment and Broadcasts of Radio and Television Stations, thereby allowing for the languages and dialects used by Turkish citizens traditionally in their daily lives to be broadcast on both private and public radio and television stations.

Nevertheless, the mission found that there are numerous limitations and conditions attached to this provision. For example, interviews carried out by the mission showed that the state Public Turkish Radio and Television Corporation (TRT) only provides limited Kurdish language broadcasting and that recently no applications for broadcasting in languages other than Turkish have been made by private broadcasters at the national level. An interview with Ahmet Birsen from Gün TV and Radio on 7 July 2007, confirmed the mission's belief that this mere aesthetic reform is a tactic used by Turkey to give the EU the impression that its citizens are allowed to enjoy their cultural and language rights.

Despite the reforms the 2004 Act on the Establishment and Broadcasts of Radio and Television Stations provides that Kurdish language broadcasting is not permitted during the weekends and that there are strict restrictions as to the maximum number of hours that is allowed during the weekdays. In an interview with Söz Newspaper and TV, the mission learnt that Kurdish language TV broadcasting is limited to

just forty-five minutes per day and a maximum of four hours per week. Similar restrictions apply to radio broadcasts.

Furthermore, with the exception of music, Kurdish language broadcasters remain under the obligation to provide simultaneous Turkish subtitles, or have an equivalent Turkish broadcast immediately following a Kurdish programme. The costs and infrastructure necessary to comply with this and the linguistic problems in the technical ability of Kurds to translate from Kurdish to Turkish, since Kurds have not been able to study Kurdish in school, render live broadcasts in Kurdish practicably impossible.

The mission was also concerned with RTÜK, the media regulatory body. It found that not only are its role and independence questionable, due to their lack expertise and ability to speak Kurdish, but also that the local police monitor broadcasts on their behalf. This was raised as an area of concern by the mission given that the police increasingly harass members of the opposition media.

The mission heard several accounts involving harassment of members of the opposition media by the police. The mission also noted that the general perception of those with whom it met was that police translations are less objective due to possible personal prejudices and lack of cultural awareness of Kurdish issues, which, as illustrated below, is a matter of concern in view of the recent amendments to the Police Powers Law.

Furthermore, the law provides that Kurdish language broadcasters need to inform RTÜK in advance of their content and preparation, by detailing the time, duration, speaker and producer of the broadcast, although this can be circumvented by agreeing to fulfil certain criteria, with regards to news and entertainment.

The mission was concerned to find out about the severe and disproportionate nature of the fines applied to Kurdish language broadcasters for failure to meet the strict restrictions placed upon them. An illustrative case is that of Gün TV and Radio, shut down in 1999 and then again in 2002 following which it changed its vision and mission and became Gün TV. It also started Gün Newspaper and Radio. However, due to pressure from officials and heavy fines forcing them into financial difficulties, they had to make a choice of keeping one or the other, or

risk losing both. The Newspaper was closed in 2004. In the meantime, following a change to Kurdish language broadcasting restrictions in 2003, it became the first private station to apply to RTÜK for permission to make a weekly Kurdish language series on culture and art. This was only granted in 2006.

Gün told the mission that following their broadcasting in Kurdish, they came under increasing pressure from the authorities. For example, they were investigated for played a song called 'Siya Save', containing the word 'Kurdistan'. This 100 year old song, written by an anonymous singer, was intended for Kurdish princes and has no political meaning. Most recently, Gün was fined 80 billion old Turkish Lira by RTÜK (approximately \$60,000) for inciting people against the police on the basis of a television report on the shutting down of shops in an area of Diyarbakır city centre, following an explosion in September 2006, in which ten people, including several children, were killed. The disproportionate nature of the fine forced the newspaper to borrow money in order to make small incremental payments and avoid being shut down.

The mission learned that the enforcement of such heavy fines has subsequently forced many Kurdish language broadcasters to either shut down or downsize their operations in the face of financial ruin. This was said to have left just three remaining local stations broadcasting in Kurdish: Gün TV and Radio, Söz TV and a station in Urfa.

Print media

In the 1990s, closure and confiscation notices against newspapers and broadcasters were subject to a visible legal process. Instead Article 6 of the new Anti-Terror Law means that, it is now possible for the prosecutor to stop a publication and issue confiscation notices without needing a Court decision, although notices are still issued in writing. The Editor of Gündem Newspaper, Yüksel Genç, told the mission that newspapers are no longer given the right to reply and their appeals against such decisions are commonly rejected, contrary to the new Press Law of 2004. As a result, the mission found that in March 2007 alone, five pro-Kurdish newspapers were shut down. Gündem Newspaper provides an illustrative example.

Gündem newspaper engages in hard-hitting reporting on the fighting between the military and the PKK in south-east Turkey. It has re-invented itself 17 times during its 17 years, for each of the occasions on which it has been faced with closure or suspension. Since its establishment it has experienced increasing numbers of investigations and court cases, and the deaths and the disappearances of many of its staff and friends. It also had its offices in İstanbul bombed on 4 December 1994.

Gündem's editor told the mission that from 1 March 2004, until its closure on 16 November 2006, there were over 700 cases brought against its editors, some journalists and correspondents had tens of thousands of issues confiscated, its offices were raided, it was fined approximately \$289,675 and was twice closed. Its second closure by İstanbul's 10th High Criminal Court in November 2006 was for allegedly conducting propaganda for the PKK and praising crimes committed by this group in 13 of its issues by published extracts from the diaries of the ex-soldiers allegedly involved in the Şemdinli incident.

The newspaper was subsequently forced to close on numerous other occasions under Article 25 of the Press Law for 'praise of a criminal' and 'propaganda for a terrorist organisation' due to a series of news reports on the alleged poisoning of Abdullah Öcalan. The mission found that its ordeal illustrates the failures and flaws of the new Press Law. As a result of one of the Harmonisation Packages, Turkey enacted a new Press Law in June 2004 aimed at bringing some substantive improvements to the freedom of the media, namely reinforcing the right to reply and correction, replacing penalties of prison sentences with fines, removing sanctions such as the closure of publications, halting distribution and confiscating printing machines and reducing the possibility to confiscate printed materials, such as books and periodicals.

With regard to the penalties imposed, the mission found that the heavy fines levied against local journalists and opposition newspapers, already considered to be the main targets of legal investigations for 'insult' and 'defamation', were viewed as a harsher punishment than imprisonment.

The rationale was that heavy and disproportionate fines are difficult to settle as the financial resources may not be available to them, creating long-term debts and forcing them to close permanently. Conversely,

prison sentences merely target individuals and the newspaper can likely continue to operate in the short-term.

This illustrates that changes to legislation subsequent to the promulgation of the Press Law have meant that it has made little or no impact on improving freedom of the media.

The mission found that another problem faced by the Turkish print media is the criminalisation of those who publish the speeches of others as news under Articles of the Penal Code, in particular under the infamous Article 301 which is often interpreted to the detriment of freedom of expression protections in Turkey and that has therefore attracted much criticism by the UN, the EC and countless NGOs. The new Penal Code entered into force on 1 June 2005, with Article 301 creating the criminal offence of 'insulting Turkishness'.

For example, the mission learnt of a case against the magazine *Esmer*, which covers Kurdish stories. The authors of two of its articles, its Editor in Chief and Executive were all being tried under Article 301. According to the magazine, the two articles on the Kurdish issue published in December 2005, were no different to those commonly published. However, they asserted that because the complaint had been initiated by the military, the case had been brought and was still ongoing. This was despite the four month time limit as set forth in Turkey's Press Law having lapsed.

Interestingly, in relation to reforms of the Penal Code, the mission noted that whilst the use of Article 301 has been the subject of much publicity and debate, there has been little or no discussion on the everyday common application of other equally controversial Articles, such as 220(8) or 216.

Article 216 provides that a person who 'incites groups of the population to breed enmity or hatred towards one another', can be sentenced for a period of one to three years; whilst under Article 220, a person who 'makes propaganda - through the medium of press and media - about the goals of an organisation which has been established in order to commit crimes', can be imprisoned for three to nine years.

Yet, at the time of the mission, the Diyarbakır Bar Association reported that there were six times more people on trial under Article 220 of the Penal Code in the Diyarbakır region alone, than those under Article 301 in the whole of Turkey. Further, Article 301 was being used to prosecute Turks, whilst Article 220 was being used against the Kurds. Similarly, Islamist Kurdish magazine, Mizgin, noted that for those living in the south-east, cases that could in fact be dealt with within the scope of 301, are instead being brought under others articles such as 216.

Online media

The Turkish government has also issued new legislation that curtails freedom of expression online despite its obligations as a member of the Organisation for Security and Economic Co-operation in Europe (OSCE) which provides 'that individuals can freely choose their sources of information.' Further, in this context OSCE members are expected to 'take every opportunity offered by modern means of communication...to increase the freer and wider dissemination of information of all kinds.'

Turkey passed the Internet Censorship Bill, targeting online publications, just months after Hrant Dink's death. The Bill provides for the criminal prosecution of anyone publishing materials online that are seen as insulting to the memory of Atatürk, or that seem to promote suicide, sexual abuse of children, prostitution or drug use. While the legislation appears to allow only a measured practice of censorship, its implementation procedures are vague and considered easily open to abuse. These provisions seem designed to induce self-censorship by websites as they hold Internet Service Providers and public internet cafes responsible for the availability of contentious content. The Bill has the potential to be used as a tool for discrimination in the way it will be applied, along with the way in which it will dramatically affect the media's ability to publicise material online.

The mission learnt that in many cities in Turkey the police produce a list of internet sites that are considered to be obscene. The list is then circulated to internet cafes, so that the listed sites can be blocked from public access. According to DİHA (Dicle News Agency), the list is intended to protect against child pornography and other illicit behaviour, yet with no central monitoring body, the nature and application of this practice is quite arbitrary, and is used as a means to block Kurdish websites and

those of other opposition media. The law also allows the government to block websites 'when there is sufficient evidence of the improper aspect of content', which is also a very vaguely worded provision that is open to abuse.

Thus far, we looked at the role and impact of the legislative reforms to ascertain whether these have contributed to the regression of the freedom of the media in Turkey. However, the mission noted that there are also other factors and trends that have undone and hindered Turkey's progress and undermined the optimism signalled by the reforms of 2003 and 2004.

The judiciary

As we have seen, the reforms in the legislation relating to freedom of the media have had a dramatic effect on the rights to freedom of expression and media in Turkey. However, it is also apparent from the mission's report that the manner in which these provisions are interpreted and applied by the state apparatus is a matter of great concern.

The mission discovered that the arbitrary application of legislation has also led to widespread distrust in the judicial system. It was particularly concerned to hear about how these continued disparities of interpretation were contingent on the personality or identity of the individual under investigation. Kurds were said to often be distinguished as 'the other' which thus made it easier for them to be made targets. For instance, it was suggested that if a Kurd makes a statement championing democracy and human rights, which bear similarities to the aims and goals of an illegal organisation, they risk prosecution for terrorism and propaganda under Article 220 (8). For example, the former owner of the newspaper *Azadiya Welat* published a statement entitled 'I accept Abdullah Öcalan as my political representative' signed by the 'Democratic People's Initiative' in August 2005. He was charged for making propaganda for an illegal organisation under Article 220 (8) of the Penal Code and Article 6 of the Anti-Terror Law. His sentencing to a total of four years in prison on 28 November 2006, forced Yilmaz to flee Turkey and seek asylum in Switzerland.

The influence of the military & the police

The pervading influence of the Turkish military in laying the parameters for freedom of expression and media, thus interfering with the democratic process and attempting to undermine the progress made, was repeatedly underlined to the mission.

The mission found that through inflammatory public statements and memorandums during press conferences and published on its website, the military frequently stirs nationalist sentiment and makes particular journalists, writers and opposition media the targets of the 'Turkish nation'. Those considered by the state apparatus to have dissenting opinions, especially those critical of the military and voicing suspicion of deep state activity such as with the Şemdinli incident, are at risk of being branded as terrorists and being treated as enemies of the state. Consequently, the mission found that some writers, journalists and media establishments are tempted to err on the side of caution so as to not 'push the military', in fear of recrimination from nationalists, as well as subsequent investigations and legal action by the police, prosecutors and the wider judiciary.

The mission also learned that reporting from the Kurdish provinces of Şırnak, Siirt, and Hakkari in south-east Turkey, declared temporary military zones in June 2007, is not permitted. Thus the ability of journalists to accurately report on the ongoing clashes and the current situation is compromised. The military serves as the only source of information and sends briefing reports to the press as to what they can and cannot write. The mission believes that this acts as a further impediment to Kurdish and other opposition media in reporting about the very incidents which are likely to be most pertinent to their readership.

With regard to the police, the mission observed their increasing presence as it reached the Kurdish cities of Diyarbakır and Batman in south-east Turkey as plain clothed security officials followed the mission to several of its meetings. Furthermore, in Batman security officials were conducting advance questioning of groups with whom the mission was scheduled to meet. This gives some indication as to the tense climate in which ordinary journalists and human rights defenders continue to operate, under the watchful eyes of the authorities.

The mission also heard common reports of journalists being subject to harassment, beatings, and being arrested and detained when attempting to travel to and from press conferences, trials and public demonstrations or rallies. Police accused them of carrying false identity cards as an excuse to delay and keep journalists waiting at checkpoints. The mission further heard several reports of journalists being arrested and arbitrarily detained, with some subject to mistreatment, and others having their fingerprints and photographs taken, although they were not officially held in custody. It was also expressed that while not legally obliged to divulge their sources, journalists are often pressured to hand over videos, cassettes and films to the police on demand. Refusal prompts more police harassment.

The Law on Police Duties and Authorities (PVSK) was amended in May 2007 to expand powers granted to the police to detain, question or physically restrain individuals being investigated by the government. This new law grants the police wide ranging stop and search powers as well as unprecedented discretion in the use of force,. This has allowed questioning in the streets, arrests without establishing identities, taking of fingerprints and preparing files on them, unlimited authorisation to search and the use of violence without warning; in short, the PVSK permits many practices that are inconsistent with principles of democracy.

Conclusion

The mission believes that changing laws on paper is meaningless without an overhaul of the overall legislative structure, and a change in the attitudes and mindset of those across all sections of Turkish society. Without so doing, the reform process will continue to falter and legislative change will carry on being dismissed internally and externally as a tactic employed by the Turkish government to merely appease EU demands. Moreover, the EU and wider international community must also continue to engage in dialogue with and provide support to Turkey to ensure that progressive reforms are introduced and implemented effectively, especially with regard to protecting the right to freedom of expression, which the mission observed was of ever growing concern.

The full fact-finding mission report is available to buy or download online at www.khrp.org

Dr. Susan C. Breau *

The situation in south-east Turkey: Is it an armed conflict for the purpose of international humanitarian law?

Abstract

This article aims to start an academic debate on the question of the insurgency in south-east Turkey and whether the clashes between the Turkish security forces and the Kurdistan Workers' Party (PKK) can be classified as an armed conflict. It looks at the roles of international, regional and domestic institutions such as the United Nations, the European Union and the Turkish Government in resolving the issues in the region. Against this backdrop, it considers the international law implications of past and future actions and the applicability of international humanitarian law in defining the situation in south-east Turkey as an armed conflict using the Geneva Conventions of 1949 and international customary law. This article does not attempt to find a solution to the conflict rather it suggests ways to move the debate forward.

Introduction

The purpose of this article is to begin an academic debate on whether the long-standing insurgency in south-east Turkey between the Turkish armed and security forces and the Kurdistan Workers' Party (PKK) could be classified as an armed conflict. This will be a very important debate as there are a number of international law implications from such a classification. Up until this point, the United Nations, the European Union and the Turkish government - and for that matter the world's media - have labelled the insurgency in south-east Turkey as a series of terrorist attacks. There is no legal bar to having both classifications, a group could be labelled terrorist but still be a participant in an armed conflict. There are two separate questions being examined in this article. Firstly, whether

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the conflict itself is at an intensity that results in it being an armed conflict and, secondly, what international legal rules might be applicable in that event.

This article can only contribute to a debate still in its infancy, and will certainly not provide a definitive answer to the question of whether the insurgency is an armed conflict but will suggest that the international law rules constituting international humanitarian law (or as known as *jus in bello*) might impact on those who are involved in the conflict. This article will be divided into two sections, first a brief description of the conflict in southeast Turkey since 1999 with an analysis of the questions that must be considered in whether this situation might be classified as an armed conflict. The second section will consider those rules of international humanitarian law that would or might apply if the situation were thus classified. The conclusion will suggest ways forward if the debate moves into the arena of solutions to armed conflict rather than the professed and disputed category of a 'war on terrorism'.

1. The situation in south-east Turkey – classification as armed conflict

The conflict between the Turkish government and the PKK dates from 1984 with 30000-40000 persons killed, three million displaced and over 3000 villages in the region destroyed.¹

It was initially argued that the conflict ended in 1999 with the arrest of Abdullah Öcalan and the declaration of a PKK ceasefire.² However, the conflict never truly ended, with skirmishes continuing since the ceasefire. Recently we have seen an increase in the level of severity to the point that the Turkish parliament voted overwhelmingly on 17 October 2007 to authorise sending troops into northern Iraq. This could potentially involve Turkey and Northern Iraq in an international armed conflict, but until that point the focus has to be on the events in south-east Turkey.

Project Ploughshares in its annual Armed Conflict report of 2003 traced the conflict back during the previous few years. It recounted that during 1999 armed clashes between government forces and Kurdish rebels continued in the Southeast and northern Iraq, though the intensity of the fighting decreased. The 1999 death toll was estimated at about 1,300 people killed, including civilians, a decline from the 1998 figure of 2,100. It was reported that in 2000 the Turkish

K. Yildiz, *The Kurds in Turkey*, (London, Pluto Press 2005) p.2 and 'Project Ploughshares', *Armed Conflict Report: Turkey 2003*
<http://www.ploughshares.ca/libraries/ACRText/ACR-Turkey.html> accessed 10 November 2007

2 Yidiz, p. 15.

forces, in dismissing the the PKK ceasefire as a terrorist ploy, pursued PKK rebels deeper into northern Iraq. During that campaign at least 100 people were killed. The report then reviewed the major Turkish military operation in January 2001 which was one of only a few incidents of violence reported for the year. There was a corresponding decline in the death toll for the year to an estimated 20.³

There was a similar situation reported by Project Ploughshares for 2002. The Turkish military and Kurdish rebels engaged in a number of skirmishes on Turkish and Iraqi soil. The Turkey-based Kurdistan Freedom and Democracy Congress (KADEK) deployed man-portable surface-to-air missiles (SAMs) on Turkey's border with Iraq in anticipation of a possible Turkish invasion in northern Iraq triggered by a US-led war in Iraq. It was alleged that the 'village guards' armed by Turkey against Kurdish rebel incursions were accused of raping, attacking and, in some cases, murdering villagers returning to their land through a resettlement program initiated by the government. On 27 May 2002 the Kurdistan Observer reported that 700 Turkish soldiers battled in northern Iraq with 500 Kurdish guerrillas of the People's Defence Force (HSK) an armed wing of KADEK. Even so, in December the government lifted its state of emergency in the Southeast. Due to the decrease in the actual death toll (estimated 20 for the year 2002) Project Ploughshares removed the situation from their annual armed conflict reports in 2004. This is in spite of the fact that on 1 June 2004, the PKK ended their ceasefire.⁴

The media began to report on an escalating conflict from 2004. The BBC reported that in 2004 the PKK resumed its violent campaign, which escalated steadily from 2004 to the present despite several other short-lived, unilateral ceasefires. It was stated that the Turkish government believed that the PKK had several thousand fighters based in the Qandil Mountains of northern Iraq.⁵ A major incident took place on 16 July 2005 when it was alleged that the PKK launched a bomb attack in Kuşadası. Five people including tourists from Britain and Ireland died and thirteen were wounded. The PKK denied responsibility and another group, the TAK (*Teyrenbaze Azadiya Kurdistan*, the Kurdistan Freedom Falcons), claimed responsibility for this and another attack earlier in the month which wounded 21

3 Project Ploughshares, *Armed Conflict Report: Turkey 2003* <http://www.ploughshares.ca/libraries/ACRText/ACR-Turkey.html> accessed 10 November 2007.

4 Ibid.

5 P. O'Toole, 'Profile: the PKK', BBC News 15 October 2007, <http://news.bbc.co.uk/2/hi/europe/7044760.stm> accessed 10 November 2007.

people including three foreign tourists in the Aegean coastal town of Çeşme.⁶ On 25 March 2006 fourteen PKK were killed during an armed attack by the Turkish security forces in the Şenyayla region. In the next month it was reported that at least a dozen people were killed in clashes between Kurdish protesters and security forces in the Southeast.⁷

The reports of violence escalated in 2007. On 30 September 2007 the Associated Press reported that according to a local official, Kurdish rebels ambushed a minibus carrying pro-government village guards and civilians in south-east Turkey and killed 12 people. It was stated that the rebels armed with automatic weapons attacked the minibus in Şırnak province near the border with Iraq, killing seven village guards and five civilians. Two people were wounded, but it was not clear whether they were village guards or civilians.⁸

Kurdistan TV reported that a land mine exploded on Sunday 7 October some 25 kilometres inside Turkey from the Iraq border in the south-eastern Şırnak Province. The mine killed 13 soldiers. It was also reported on Kurdistan TV that on Saturday, 20 October, a Kurdish attack killed 10 Turkish soldiers already massed at the frontier.⁹ On 21 October Canadian Broadcast Company news reported that Turkish artillery units shelled rebel positions in northern Iraq in retaliation for an ambush that killed at least 12 soldiers and injured 16 others. The Turkish military said its troops, backed by helicopter gunships, killed 32 rebels belonging to the PKK.¹⁰

Although these reports would have to have some independent verification for accuracy, especially with respect to death toll, there is no question of a serious escalation of violent clashes between the PKK and the Turkish military with thousand of combatants being involved on each side. However, one of the most controversial areas in international humanitarian law is whether or not a civil disturbance or insurgency can rise to the level of an armed conflict. It is the general practice of a sovereign state not to admit that they have an internal armed

6 BBC News, 'Turkish Resort Blast kills five, BBC News' 16 July 2005, <http://news.bbc.co.uk/2/hi/europe/4688575.stm> accessed 10 November 2007.

7 BBC News, 'Timeline Turkey' http://news.bbc.co.uk/1/low/world/europe/country_profiles/1023189.stm accessed 10 November 2007.

8 BBC News, 'Kurd Attack kills 12 in Turkey', as reported by Associated Press 30 September 2007, http://news.bbc.co.uk/2/hi/middle_east/7020360.stm accessed 11 November 2007.

9 Kurdistan TV reports at <http://www.kurdistantv.net/english.asp?ser=20> accessed 11 November 2007.

10 CBC News, 'Turkey considers response after deadly rebel ambush on soldiers', 21 October 2007 <http://www.cbc.ca/world/story/2007/10/21/turkey-kurds.html> accessed 11 November 2007.

conflict. Those who wish to secure a new political arrangement are classified as rebels, terrorists or insurgents - or as Margaret Thatcher famously said with respect to the IRA captives during the Northern Ireland Troubles – criminals.

There are two main legal difficulties. Firstly, due to disagreement among States, there was deliberate absence in the 1949 Geneva Conventions of a definition of what constitutes an armed conflict, as the provision for non-international armed conflict, Common Article 3 states simply that it applies to ‘an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. It should be noted that there is also not an agreed formula as to how to classify a conflict as international or non-international.¹¹ Secondly, there is also no definition of armed conflict that might constitute customary international law. States do express positions on whether a situation of violence amounts to an armed conflict in General Assembly or Security Council resolutions but the States involved in this type of insurgency rarely agree with this classification and tend to argue that the action of its military is for the purpose of law enforcement or counter-terrorism operations. Rather, it is left to the international community and often civil society to argue that the situation has escalated to that extent. An example given by Pejić is that the Russian Constitutional Court in 1995 indicated that Additional Protocol II was applicable to the fighting in Chechnya at that time, but when hostilities resumed in 1999 the Russian executive referred to the situation as a counter-terrorist action.¹²

This means that distinguishing between situations of non-international armed conflict which will trigger the operation of common Article 3 to the Geneva Conventions and Additional Protocol II of 1979 (if applicable), and situations of internal disturbance or tension is a very difficult task. The result of this lack of definition is that a series of criteria has been developed in the practice of States and in the legal literature, even though it might not be accepted as customary. The first and primary criterion is the existence of parties to the conflict. Common Article 3 is applicable to ‘each Party to the conflict’ and this means there must be in existence at least two parties. It is not difficult to determine the existence of the armed forces of one of the parties - the State but the non-State armed group is more difficult. It is widely recognised that an armed group has to have a ‘certain

11 J. Pejić, ‘Status of armed conflicts’ in E. Wilmshurst and S. Breau, *Perspectives on the iCRC Study on Customary International Law*, (Cambridge University Press 2007), p. 78.

12 Ibid. p.79.

level of organisation and command structure, as well as the ability to implement international humanitarian law.¹³

In addition there are other important criteria, including whether the government is obliged to use military force, the number of victims, the means used to deal with the opposing side, the duration and level of violence involved.¹⁴ In his lectures to “The Hague Academy of International Law”, Schindler came up with the following definition which will suffice for the purpose of examining the Kurdish Conflict. He stated:

Practice has set up the following criteria to delimit non-international armed conflicts from internal disturbances. In the first place, the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, that is, they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements. Accordingly, the conflict must show certain similarities to a war, without fulfilling all conditions necessary for the recognition of belligerency.¹⁵

One case that has considered this issue is the *Abella* case in the Inter-American Commission on Human Rights. In the view of the commissioners a conflict lasting 30 hours between a group of dissident officers and the Argentine military at the Tabalda military base qualified as an armed conflict and Common Article 3 was held to be applicable.¹⁶

The test is more stringent in Additional Protocol II to the Geneva Conventions. Article 1:

13 Ibid. pp. 85-86 and L. Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002) p.36.

14 J. Pejčić, ‘Status of armed conflicts’ in E. Wilmshurst and S. Breau, *Perspectives on the ICRC Study on Customary International Law*, (Cambridge University Press 2007), p. 86

15 D. Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’, *Recueil des cours, Volume 163/ii*, 1979, p. 147.

16 *Juan Carlos Abella v. Argentina*, Case 11.137, Report N° 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 - November 18, 1997.

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

The two key additional factors were territorial control and the ability to carry out sustained and concerted military operations. An explanation is that Additional Protocol II was negotiated in an atmosphere of determining the lowest common denominator in a situation of infringement of state sovereignty. Therefore, the scope of application is much narrower than Common Article 3 but the Protocol specifically states that it develops and supplements Common Article 3 without modifying its existing conditions of application. The Geneva Conventions are now universally ratified Conventions whereas many countries, including Turkey, are not party to Additional Protocol II. The International Court of Justice has declared that Common Article 3 represents customary international law in both international and non-international armed conflict.¹⁷

The Rome Statute of the International Criminal Court provides yet another definition of a non-international armed conflict. Article 8 2(f) provides a definition that is not as stringent as Additional Protocol II but not as general as Common Article 3. It states:

Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict

¹⁷ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v.USA.), Merits, 1986 ICJ Rep. 4, at paras. 118-120.

between governmental authorities and organized armed groups or between such groups.

The only criteria of an organised armed group and protracted conflict are also found in the Schindler summary of practice in the area.¹⁸

Pejić summarises the serious legal problem with this issue by stating:

Political considerations aside, there remains the difficulty of determining and analysing the various factual criteria to which legal conclusions can be pinned. Based on the facts, it can legitimately, if only hypothetically, be asked whether, for example, the situations in Northern Ireland, Turkey and Algeria, constituted internal disturbances or tensions or internal armed conflicts. The general conclusion to be drawn is not that a definition of internal armed conflict would solve the problem - the examples provided above would attest to the contrary - only that knowledge of the facts, careful analysis and a bona fide approach to the habitual criteria for assessment are required.¹⁹

If one carefully analyses and assesses the increase in violence in south-east Turkey and the history of the conflict we can see that there has been sustained violence between the military and security forces of Turkey and an organised group, the PKK since 1984. Secondly, the violence takes place within a sovereign State Turkey. Thirdly, the PKK has the level of organisation required and has a military command structure. Fourthly the PKK has expressed its agreement to abide by the laws of armed conflict. This was confirmed by a statement to the United Nations delivered in Geneva on 24 January 1995 which states:

In its conflict with the Turkish state forces, the PKK undertakes to respect the Geneva Conventions of 1949 and the First Protocol of 1977 regarding the conduct of hostilities and the protection of the victims of war and to treat those obligations as having the force of law within its own forces and the areas within its control.²⁰

Finally, the violence may be reaching the intensity of armed conflict. Only cautious analysis of each incident and a comprehensive review of the structure of the PKK will give a definitive answer but certainly an initial and careful view of the

18 See footnote 62

19 Pejić, *op cit*, p.89.

20 PKK Statement to the United Nations Geneva, 24 January, 1995.

criteria and facts of this conflict suggests to this author that a non-international armed conflict exists in south-east Turkey. Regardless of this answer it is clear that Turkey will probably not agree with this assessment.

Nevertheless, this conflict must be examined by the rest of the international community in light of these well established criteria. States who are members of the United Nations should not forget their obligations under international law to respond to situations of armed conflict including internal armed conflicts as threats to international peace and security.

2. The applicable international humanitarian law should the situation in south-east Turkey be classified as armed conflict

The Martens Clause has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land. It states:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.²¹

Notions of the 'laws of humanity' and 'the requirements of public conscience' have led to the development of a series of international humanitarian law instruments with a primary focus to prevent human suffering for persons who were 'hors de combat' and civilians. A specific example of such protection is Common Article 3 to all Four Geneva Conventions of 1949, which states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in

21 Hague Convention II Laws and Customs of War on Land, 29.07.1899.

all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.²²

As part of four universally ratified treaties, the Geneva Conventions can also constitute customary international law. Thus the provision is binding on the Turkish government and also binding by its own agreement, as discussed above, on the PKK.

In addition to these specific protections and many more outlined in various treaties, the rules of *jus in bello* have evolved into three primary rules: necessity, distinction and proportionality. It is accepted that human lives will be lost in an armed conflict but the primary goal is to limit the casualties to the actual belligerents. Armed conflict is to be directed against a state's military not their civilians. Attacks are to be against military targets not civilian ones such as hospitals, schools and churches and for that matter, villages, as has been the alleged practice by the Turkish forces in the course of this conflict.

The first general principle is the rule of necessity which prohibits destructive or harmful acts that are unnecessary to secure a military advantage. Before any military action commences, it must be established that a direct military advantage will result.²³ This is a primary rule of military targeting.

22 Geneva Conventions I-IV, 75 UNTS, 31, 85, 135 and 287.

23 M. Schmitt, "Clipped Wings" in Schmitt, (ed.), *International Law Studies Volume 72*, (1998) p.247.

The second principle distinction requires that a belligerent distinguishes between civilian and military objectives and between civilians and combatants. Article 48 of the First Additional Protocol to the Geneva Conventions sets out the basic rule of distinction:

In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.²⁴

Furthermore, Article 51 paragraph 2 of AP I prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'. In paragraph 4 and 5 of the same article, area bombardment is outlawed, which is defined as 'an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, (or) village.'²⁵

The third primary principle is the rule of proportionality. It means that in warfare, 'a belligerent may apply only that amount and kind of force necessary to defeat the enemy.'²⁶ The rule implies that the enemy should be defeated with a minimum loss of life or property. The use of any kind of force not required for the defeat of the enemy was prohibited. Even if a target was a military objective, it should be avoided if it might cause excessive civilian casualties. The first specific provision is Additional Protocol I Article 51(5) (b) which states:

An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.²⁷

The Protocol goes on in Article 57 to outline a series of precautionary measures to avoid civilian casualties:

24 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I) 8 June 1977 Article 48.

25 Ibid. Article 51.

26 C. Greenwood, 'Historical Development and Legal Basis' in D. Fleck, (ed.), *The Handbook of Humanitarian Law in Armed Conflict*, (Oxford University Press, 1995), p.30.

27 Protocol I 8 June 1977, Article 51

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
 - (a) Those who plan or decide upon an attack shall:
 - (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
 - (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - (iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.²⁸

This principle is further supported in the Advisory Opinion on Nuclear Weapons when it states ‘respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.’²⁹

These rules, are also argued to be customary, as is evidenced by the International Committee of the Red Cross study on customary international humanitarian law.³⁰ This influential study does much to clarify the rules of international humanitarian law in light of the fact that several countries have not ratified the more specific Additional Protocols I and II of 1977 to the Geneva Conventions. The first part of the rules, as may be expected set out the rules surrounding the three principles of distinction, proportionality and necessity:³¹

Rule 1

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

Rule 11

Indiscriminate attacks are prohibited.

Rule 12

Indiscriminate attacks are those:

- (a) which are not directed at a specific military objective;
- (b) which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Rule 14

28 Ibid. Article 57.

29 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 [1986] ICJ Reports 14, Para 140

30 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law (3 volumes)* (ICRC and Cambridge University Press, 2005)

31 *Ibid Volume I*, Part I, pp. 3-76 Rules 1-24 and see M. Schmitt, ‘The Law of Targeting’ in E. Wilmshurst and S. Breau, (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Chapter 6.

Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

The study contends that all these rules are applicable in internal armed conflict even though they are not specifically mentioned in either Common Article 3 or Additional Protocol II to the Geneva Conventions of 1977.

It has to be pointed out that these specific rules apply to both sides in this conflict. Allegations of terrorism on the part of insurgency groups often relate to the use of methods that target civilians. However, in armed conflict civilians might be killed if they are present at a military objective, for example civilians working in an arms factory or military base. The obligations expressed in the established rules of customary international law prohibit any targeting of civilians to spread terror. Notwithstanding a label of terrorist a belligerent can still be a participant in an armed conflict and bound by the customary and treaty rules of international humanitarian law.

There are many other rules of conflict that could be discussed but space does not permit. This would be particularly the case if the conflict becomes an international armed conflict if the Turkish forces invade northern Iraq. Nevertheless, the cardinal rules of distinction, proportionality and necessity will prevail regardless of the type of armed conflict that is pursued. There is also the assistance of the Declaration of Minimum Humanitarian Standards negotiated at Turku that merit examination in the context of any type of internal disturbance even if it does not rise to the level of armed conflict but it contains many of the same guarantees contained in Common Article 3 to the Geneva Conventions.³²

Conclusion

In the upcoming publication on this issue to be co-authored by myself and Kerim Yildiz of the Kurdish Human Rights Project, another important area in this debate will be canvassed, that of possible political solutions to the situation of the Kurds in south-east Turkey. If the situation rises to the level of a non-international armed conflict, as indeed seems likely, there is an international

32 Declaration of Minimum Humanitarian Standards, *reprinted in* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995) (Declaration of Turku).

obligation on the parties and the international community to seek an appropriate and long-lasting political arrangement that might prevent further conflict. The number of lives lost, properties destroyed and persons injured necessitates an urgent examination of possible solutions to this long-standing dispute.

Niraj Nathwani*

ISLAMIC HEADSCARVES AND HUMAN RIGHTS: A CRITICAL ANALYSIS OF THE RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS**

Abstract

This article will first present two cases at the European Court of Human Rights (ECtHR): Dahlab vs Switzerland and Leyla Sahin vs Turkey and then comment on these two decisions focusing on the following issues: State neutrality; negative freedom of religion; right to education; gender discrimination; discriminatory statements; religious discrimination; political extremism. This article will argue that the reasoning of the ECtHR in the cases Dahlab vs Switzerland and Leyla Sahin v Turkey is questionable and at odds with important principles developed in the established case law of the Court.

1. ISLAMIC HEADSCARVES AND THE EUROPEAN COURT OF HUMAN RIGHTS

1.1. DAHLAB VS SWITZERLAND

In the case *Dahlab vs Switzerland*,¹ the European Court of Human Rights (ECtHR) declared the application inadmissible. Ms Dahlab, a primary teacher in the canton of Geneva, had converted to Islam and started to wear the headscarf in 1991. In May 1995 the schools inspector for the Vernier district informed the Canton of Geneva

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¹ ECtHR, *Dahlab vs Switzerland*, Judgement of 15 February 2001, Application No. 42393/98, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=dahlab&sessionid=9750942&skin=hudoc-en> (accessed on 3 May 2007).

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Directorate General for Primary Education that the applicant regularly wore an Islamic headscarf at school; the inspector added that she had never had any comments from parents on the subject. In 1996, the Directorate General prohibited the applicant from wearing a headscarf in the performance of her professional duties on the grounds that such practice contravened section 6 of the Public Education Act and constituted 'an obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system'. The decision was confirmed by the Swiss Federal Court in a judgement of 12 November 1997.

The ECtHR accepted that the wearing of an Islamic headscarf is covered by the freedom of religion enshrined in Article 9 of the European Convention on Human Rights (ECHR).²

The ECtHR considered that the measure pursued aims that were legitimate for the purposes of Article 9(2) ECHR, namely the protection of the rights and freedoms of others, public safety and public order.³ The main arguments of the ECtHR were as follows. The Islamic headscarf is a powerful external symbol and it cannot be denied outright that it may have a proselytising effect on very young children aged between four and eight. The Islamic headscarf appears to be imposed on women by a precept which is laid down in the Qur'an which seemingly does not correspond to the principle of gender equality. The wearing of an Islamic headscarf is difficult to reconcile with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.

The Court accordingly considered that the Geneva authorities did not exceed their margin of appreciation.

1.2. LEYLA SAHIN VS TURKEY

In the case *Leyla Sahin vs Turkey*,⁴ the Chamber of the ECtHR dealt with the headscarf issue in a Turkish context. The applicant alleged that a ban on wearing the Islamic headscarf in higher-education institutions in Turkey violated her rights and freedoms under Articles 8, 9, 10 and 14 ECHR, and Article 2 of Protocol No. 1. The application was declared admissible.

² 'Article 9 – Freedom of thought, conscience and religion: 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

³ ECtHR, *Dahlab vs Switzerland*, *supra* note 1, para. 12.

⁴ ECtHR, *Leyla Sahin vs Turkey*, Judgement of 19 June 2004, Application No. 44774/98, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=leyla&sessionId=9750942&skin=hudoc-en> (accessed on 3 May 2007).

The facts of the case were as follows. The applicant spent four years studying medicine at the University of Bursa. She wore the Islamic headscarf during this time. On 26 August 1997, the applicant enrolled in the faculty of Medicine at the University of Istanbul. She continued wearing the Islamic headscarf until February 1998. On 23 February 1998 the Vice-Chancellor of Istanbul University issued a circular regulating students' admission to the university campus. It said that students who wear the Islamic headscarf and students with beards must not be admitted to lectures, courses or tutorials and threatened disciplinary measures if students with headscarves refuse to leave the university premises. In accordance with the aforementioned circular, the applicant was denied access to a written examination, enrolment in a course and admission to a lecture because she was wearing the Islamic headscarf. On 16 September 1999, the applicant had enrolled at Vienna University, where she pursued her university education.⁵

In its judgement on the merits the chamber of the ECtHR qualified the wearing of a headscarf as a manifestation of a religion.⁶ The court found that the impugned measure primarily pursued the legitimate aims of protecting the rights and freedoms of others and protecting public order.⁷

The ECtHR observed (while reviewing the reasoning of the Turkish Constitutional Court, who had held in 1989 that a legal permission to wear headscarves was contrary to the principles of secularism, equality before the law and freedom of religion⁸) that the interference was based, in particular, on two principles – secularism and equality.⁹ The ECtHR considered that when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. The issues at stake include the protection of the 'rights and freedoms of others' and the 'maintenance of public order' in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since this religious symbol has taken on political significance in Turkey in recent years.¹⁰

The Court stated also that it does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts. According to the

⁵ *Ibidem*, paras 11–16.

⁶ *Ibidem*, para. 71.

⁷ *Ibidem*, para. 84.

⁸ Constitutional Court of Turkey, Judgement of 7 March 1989, published in *Official Gazette*, 5 July 1989.

⁹ ECtHR, *Leyla Sahin vs Turkey*, *supra* note 4, para. 104.

¹⁰ *Ibidem*, para. 108.

Court, the regulations have to be viewed in that context and constitute a measure intended to preserve pluralism in the university.¹¹

Having regard to this background, it is the principle of secularism according to the ECtHR, which is the paramount consideration underlying the ban on the wearing of religious insignia in universities. It is understandable in such a context where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women, are being taught and applied in practice, that the relevant authorities would consider that it ran counter to the furtherance of such values to accept the wearing of religious insignia, including as in the present case, that women students cover their heads with a headscarf while on university premises.¹²

Finally, the ECtHR concluded that having regard in particular to the margin of appreciation left to the contracting States, there has been no breach of the European Convention of Human Rights.¹³

The Grand Chamber¹⁴ basically confirmed the ruling of the Chamber, but expanded its reasoning on the right of education with the same result that no violation of the right to education according to Article 2 of Protocol No. 1 was found. Judge Tulkens submitted a detailed dissenting opinion which will be presented and discussed later in the appropriate thematic sections. She was of the opinion that both Article 9 ECHR and Article 2 of Protocol No. 1 were violated in the *Leyla Sahin* Case.

2. ISLAMIC HEADSCARVES AND THE FREEDOM OF RELIGION

The preliminary question is if the practice of wearing Islamic headscarves falls under the freedom of religion at all. Article 9 ECHR¹⁵ explicitly protects the right to manifest one's religion. Although ordinary manifestations of religious belief such as worship and observance raise no serious difficulties, others are more controversial, whether in the case of teaching or in the case of certain types of practice. The European Commission of Human Rights (ECmHR) has held that when the actions of individuals do not actually express the belief concerned, even when they are motivated or influenced by it, they cannot be protected by Article 9. An act must be a direct manifestation of a belief.¹⁶

¹¹ *Ibidem*, para. 109.

¹² *Ibidem*, para. 110.

¹³ *Ibidem*, paras 114–117.

¹⁴ Grand Chamber of the ECtHR, *Leyla Sahin vs Turkey*, Judgement of 10 November 2005, Application No. 44774/98, <http://cmiskp.echr.coe.int/tkp197/view.asp?Item=1&portal=hbkm&action=html&highlight=leyla&sessionid=9750942&skin=hudoc-en> (accessed on 3 May 2007).

¹⁵ See *supra* note 2.

¹⁶ ECmHR, *Pat Arrowsmith vs the United Kingdom*, Judgement of 12 October 1978, D&R 19/5.

The ECtHR outlined the relevant principles in the *Pichon and Sajous* Case,¹⁷ in which pharmacists had refused to sell contraceptive pills because of their religious convictions. The main sphere protected by Article 9 is that of personal convictions and religious beliefs, in other words what are sometimes referred to as matters of individual conscience. It also protects acts that are closely linked to these matters such as acts of worship or devotion forming part of the practice of a religion or a belief in a generally accepted form. The ECtHR has also stated that Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance, whilst making it clear that this article does not always guarantee the right to behave in public in a manner governed by a belief. Not all opinions or convictions constitute beliefs in the sense protected by Article 9, even if they are deep-seated beliefs.¹⁸ Thus, the ECtHR did not qualify the refusal to sell contraceptive pills as a 'religious practice', but as an 'act or form of behaviour motivated or inspired by a religion'. In my view, the main distinction is that the relevant religious rule in Catholicism prohibits the use of contraceptive pills, but not the selling of such pills. It follows that the refusal of the pharmacists to sell contraceptive pills lacks a credible religious basis.

In fact, the ECtHR qualified the wearing of headscarves as a religious practice protected by Article 9 ECHR and departed from the earlier assessment of the ECmHR concerning Islamic headscarves. The ECmHR had decided in 1993 that the requirement of submitting a photograph without headscarf to obtain a university certificate did not raise an issue under the freedom of religion enshrined in Article 9 ECHR.¹⁹ In contrast, the ECtHR had decided in 2001 and later in 2004 and 2005 that the practice of wearing Islamic headscarves is a practice which enjoys in principle the protection of freedom of religion under Article 9 ECHR and based its decisions on the exception contained in Article 9(2) ECHR which is relevant only if a practice, in principle, falls under the freedom of religion.²⁰

The practice of wearing headscarves by women in Islam can be credibly based on authoritative religious sources of Islam like the Qur'an²¹ and is a consequence of the religious duty to dress modestly. Actually, *Hijab* is the Arabic term for barrier or dressing modestly.²² There appears to be no consensus amongst Islamic scholars which headscarves women in Islam should wear concretely and dress codes for Muslim

¹⁷ ECtHR, *Pichon and Sajous vs France*, Judgement of 2 October 2001, Reports 2001-X (decision on admissibility).

¹⁸ ECtHR, *Pretty vs the United Kingdom*, Judgement of 29 April 2002, Reports 2002-III, para. 82.

¹⁹ ECmHR, *Karaduman vs Turkey*, Judgement of 3 May 1993, Application No. 16278/90, D&R 74/93.

²⁰ *Dahlab vs Switzerland*, *supra* note 1, p. 11; *Leyla Sahin vs Turkey*, *supra* note 4, para. 71; Grand Chamber ECtHR, *Leyla Sahin vs Turkey*, *supra* note 14, para. 78.

²¹ See Verse 33.59 and Verse 24.31 of the Qur'an.

²² Dannenbaum, Tom, *Is There Anything More to Western Criticism of Veiling in Islamic Societies Than Cultural Imperialism*, unpublished thesis, Stanford University, Stanford, 2003, p. 75.

women differ from country to country.²³ Islam has no central religious authority authorised to give interpretations of the religious sources. It follows that differences in opinion and doctrines are quite common. However, from these differences in opinion and doctrine it cannot be deduced that the practice of wearing headscarves is not a religious practice.

If a practice follows from a religious rule according to a credible religious source, than it does not matter if differences of opinion persist concerning the interpretation of the rule. The ECtHR in its judgement in the case *Cha'are Shalom ve Tsedek vs France*²⁴ had to rule on a religious practice following from a religious rule considered to be mandatory by its believers: ritual slaughter of animals by an association of Jews, who wished to follow a stricter religious practice than the main group of Jews in France. The ECtHR stated that ritual slaughter constitutes a rite the purpose of which is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect of practice of the Jewish religion. Ritual slaughter must thus be considered to be covered by a right guaranteed by the Convention, namely the right to manifest one's religion in observance, within the meaning of Article 9. The court did not enter a theological debate about which interpretation of Jewish religious sources is the correct one.

The Convention's institutions do not have the authority to define religion.²⁵ It would be a violation of the principle of separation of State and religion and of religious neutrality, otherwise held up by the Convention's institutions, if they would enter a theological debate and attempt to support one interpretation of a religious prescription against another. The separation between State and religion works both ways: neither should religious views influence the State nor should the State (and I would add the Convention institutions created by States) influence religion.²⁶ The logic here is the following: if a practice is based on a credible religious prescription, it falls under the freedom of religion in Article 9 ECHR as observance of a religion. If the content of a religious prescription is disputed, all credible interpretations of the religious prescription enjoy the protection of Article 9 ECHR. Thus, theological disputes do not lead to the conclusion that a practice remains outside the scope of Article 9 ECHR.

²³ *Idem*.

²⁴ ECtHR, 27 June 2000, *Cha'are Shalom Ve Tsedek vs France*, Judgement of 27 June 2000, Application No. 27417/95, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696615&portal=hbk&source=externalbydocnumber&table=1132746FF1FE2A468ACBCD1763D4D8149> (accessed on 3 May 2007).

²⁵ Renucci, Jean-François, *Introduction to the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 2005, p. 31.

²⁶ Commission de réflexion sur l'application du principe de laïcité dans la république [Commission for the reflexion on the application of the principle of laicism in the republic], Rapport au Président de la République [Report to the president of the republic] (hereinafter: Laicism report), 11 December 2003, Paris, <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf> (accessed on 3 May 2007), p. 25.

The same logic also applies to the practice of wearing Islamic headscarves. In the case *SB vs Denbigh High School*²⁷ before the Court of Appeals of the UK the facts were the following: a school had a uniform policy for girls, which was culturally sensitive. Girls were permitted to wear a skirt, trousers or a *shalwar kameeze* (traditional dress worn by both women and men in Afghanistan, Bangladesh, India and Pakistan), and there were specifications for each. Girls were also permitted to wear headscarves so long as they comply with certain specifications. The applicant complained that in her view, the *shalwar kameeze* does not comply with the strict requirements of her religion for Muslim women who have started to menstruate. She insists that she should be allowed to wear the *jilbab*, which is a form of dress worn by Muslim women which effectively conceals the shape of her arms and legs. The school did not accept this reasoning and the applicant was asked to leave school and return only in proper school uniform.

The Court of Appeal of the UK criticised that the school did not respond to the request of the applicant by taking into account that she had a right to wear religious dress which meets her religious views, even if these religious views differ from the majority of believers of that religious group, and that the onus laid on the school to justify its interference with that right. Instead, the school started from the premise that its uniform policy was there to be obeyed: if the claimant did not like it, she could go to a different school. According to the court, this reaction of the school did not correspond to the freedom of religion guaranteed by law.

The decision of the Court of Appeal was reversed by the House of Lords.²⁸ The House of Lords held that schools in the UK have a right to introduce a uniform policy and the uniform policy in Denbigh High School accommodated as much as possible different cultural traditions. Also, it was possible for the complainant to choose another school which suited her dress preferences. Thus, the limitation of the freedom of religion by the school uniform policy in Denbigh High School was proportionate. However, the House of Lords did hold that the practice of wearing *jilbab* was covered by the freedom of religion.

²⁷ Court of Appeal, *The Queen on the application of SB vs Headteacher and Governors of Denbigh High School*, Judgement of 2 March 2005, [2005] England and Wales Court of Appeal civil division 199, by Lord Justice Brooke, Lord Justice Mummery and Lord Justice Scott Baker, www.hmcourts-service.gov.uk/judgmentsfiles/j3114/sb-v-denbigh_high_school.htm (accessed on 3 May 2007).

²⁸ See House of Lords, *R vs Headteacher and Governors of Denbigh High School*, Judgement of 22 March 2006, Session 2005–06[2006] United Kingdom House of Lords 15, www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060322/begum-1.htm (accessed on 3 May 2007).

3. ISLAMIC HEADSCARVES, STATE NEUTRALITY AND LAICISM

In the discussions in Europe, which concern mainly the wearing of Islamic headscarves by teachers and pupils in schools and by students in universities, the idea of State neutrality is of primary importance. Yet, the connection between the concept of State neutrality and the Islamic headscarf debate is not evident.

Neutrality of the State needs to be understood as the counterpart to the freedom of thought, conscience and religion of citizens.²⁹ Guaranteeing freedom of thought, conscience and religion assumes State neutrality.³⁰ Respect for different beliefs and convictions is a basic obligation for a State, which must accept that individuals may freely adopt convictions and, in some cases, change their minds subsequently and which must take care to avoid any interference with the exercise of the freedom of religion.³¹ The State can only credibly guarantee the religious freedom of citizens and religious non-discrimination, if the State does not identify with any religion and is neutral in religious matters. This neutrality needs to be distinguished from atheism. If a State promotes atheism, the State is not acting neutrally; the State is trying to impose its preferred philosophical or religious world view. This could violate the freedom of religion of religious believers. Neutrality means that the State refrains from steering the religious views of the citizens by suggesting religious views, including atheism.³² For schools, this means that all religious indoctrination is prohibited.³³

The problem is that it is not clear that State neutrality actually requires a ban of religious symbols from schools. The Constitutional Court of Germany in the *Ludin* Case explains that State neutrality in public schools could mean two things. Firstly, neutrality in schools could mean inclusive neutrality which implies that all religious symbols are permitted in schools side by side, but it is ensured that pluralism is a lived reality to educate pupils to be tolerant. Secondly, neutrality in schools could

²⁹ The German Constitutional Court deduced the duty of State neutrality from the freedom of religion guaranteed in the German Constitution. See decision of the German Constitutional Court in the case *Kirchenbausteuer*, 14 December 1965, Collection of Decisions of the German Constitutional Court (BVerfGE) 19, 206, p. 216.

³⁰ 'Nevertheless, the Court considers, like the Commission, that facts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention.' ECtHR, *Hasan and Chaush vs Bulgaria*, Judgement of 26 October 2000, Application No. 30985/96, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696798&portal=hbkm&source=externalbydocnumber&table=1132746FF1FE2A468ACBCD1763D4D8149> (accessed on 3 May 2007), at para. 78.

³¹ Renucci, Jean-François, *Article 9 of the European Convention on Human Rights*, Human Rights File No. 20, Council of Europe Publishing, Strasbourg, 2005, p. 22.

³² Laicism report, *op.cit.* (note 26), pp. 13–14.

³³ ECtHR, *Kjeldsen, Busk Madsen and Pedersen vs Denmark*, Judgement of 5 November 1976, Application Nos 5095/71, 5920/72 and 5926/72, Series A, No. 23, para. 53.

mean irreligious neutrality which attempts to separate public education and religion in order to avoid conflicts.³⁴ According to the Constitutional Court of Germany it is for the legislator to decide which version of State neutrality should be implemented in the public education system.

If neutrality could mean both, inclusive neutrality (which is compatible with freedom of religion of teachers or pupils) and irreligious neutrality (which would limit the freedom of religion of teachers or pupils), it is not clear in which sense neutrality requires a ban of religious symbols from schools which is ‘necessary in a democratic society’.

These two options are not equivalent from the point of view of the freedom of religion protected by Article 9 ECHR. From the point of view of religious freedom, the concept of inclusive neutrality in schools is to be preferred because it is less limiting. Under the principle of proportionality applicable to the ECHR as interpreted in the case-law of the ECtHR it is mandatory to choose an option which is respectful of a human right rather than an option which limits the human right in question if the options are equivalent otherwise.³⁵

Another problem in this respect concerns attribution. State neutrality concerns primarily a certain behaviour which is attributable to the State. This idea relates in the first place to public policy, including education policy, school programme and the school building. It is more problematic when applied to the behaviour of the teacher or other State agent. Everybody enjoys freedom of religion and this freedom of course includes teachers and other State agents. This line of thought stresses the argument of the German Constitutional Court, which affirmed that the religious dress of a teacher cannot be attributed to the State if the State did not order or require this dress.³⁶ This ruling of the German Constitutional Court is to be contrasted with another ruling of the Constitutional Court of Germany, when it said that crosses should be removed from schools in Bavaria, because these Christian crosses were put in school buildings as a State policy.³⁷

If teachers are public servants, a restriction of the freedom of religion could also be argued on the basis of restrictions of freedom of expression during the exercise of a public function.³⁸ Restrictions of freedom of expression and of religion are likelier

³⁴ German Constitutional Court (*Bundesverfassungsgericht*), *Ludin* Case, Judgement of 24 September 2003, 2 BvR 1436/02, www.bundesverfassungsgericht.de/entscheidungen/rs20030924_2bvr143602.html (accessed on 3 May 2007), paras 64–65.

³⁵ See Greer, Steven, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Human Rights Files No. 17, Council of Europe Publishing, Strasbourg, 2000, p. 20.

³⁶ *Ludin* Case, *supra* note 34, para. 54.

³⁷ German Constitutional Court, 16 May 1995, *Kruzifixentscheidung*, 1 BvR 1087/91, www.servat.unibe.ch/law/dfr/bv093001.html (accessed on 3 May 2007).

³⁸ The case-law on the possibility of limiting human rights of civil servants is quite vague and subject to historical evolution. In the case of *X vs the UK*, Application No. 8010/77, D&R 15/101, the European Human Rights Commission had found that the United Kingdom had acted legally in

to be acceptable for public servants than for private citizens.³⁹ Nevertheless, the ECtHR has stressed that also public servants enjoy human rights like the freedom of expression even though they are bound by the duty of loyalty towards the State.⁴⁰

This argument might be plausible in relation to teachers, but it remains difficult to envisage how this argument could be used against the Islamic headscarves of pupils or students. It is difficult to understand how the behaviour of pupils and students could even theoretically be attributed to the State and put doubt on the neutrality of the State. This is the crucial distinction between the decision of the ECtHR in the *Dahlab* Case which concerned an Islamic headscarf worn by a teacher in primary school and the *Leyla Sahin* Case which concerned an Islamic headscarf worn by a student in university. The crucial difference is that the Islamic headscarf worn by a teacher who is a civil servant can be attributed to the State under certain conditions under the international law doctrine of State responsibility,⁴¹ whereas headscarves worn by pupils and students cannot be attributed to the State. In this sense, secularism and State neutrality is more relevant for the *Dahlab* Case than the *Leyla Sahin* Case. Also, the argument loses much of its strength when schools traditionally display religious symbols (like crosses in class rooms) and/or leading representatives of the State like presidents or ministers display publicly their religious affiliation, as is routine practice in many European States. It is hypocritical to deny to a teacher the expression of his or her religious identity to protect the impression of the religious neutrality of the State, if leading representatives of the State are free to express their religious identity.

It is not clear why even the appearance of State neutrality in public education necessitates a ban of the Islamic headscarf of teachers. Indoctrination can be and needs

prohibiting a teacher of a non-religious school to use and demonstrate cult objects in lessons. In the case of *Engel vs the Netherlands*, 8 June 1976, Series A, No. 22, the ECtHR justified the State ban on the publication and dissemination by soldiers of materials criticising senior officers because 'public order in certain social groups plays a significant role'. These decisions contrast with more recent case-law of the ECtHR. In the case *Gubi vs Austria*, 19 December 1994, Series A, No. 302, the ECtHR found a violation of Article 10 (freedom of expression) in the refusal to permit the distribution to military conscripts of a publication critical of the administration of the military and noted that the publication at issue did not recommend any course of action that would threaten military discipline and did not overstep 'the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves'. The Court decided in the case *Vogt vs Germany*, 26 September 1995, Series A, No. 323, that the dismissal of a language teacher from her position on the grounds of her membership in the German Communist Party constituted a violation of Article 10. It is debatable if the mere risk that a statement could be misunderstood as being discriminatory against women is sufficient to limit the possibility of making such statements for civil servants.

³⁹ According to Judge Tulkens in her dissenting opinion, Grand Chamber ECtHR, *Leyla Sahin vs Turkey*, *supra* note 14, para. 7.

⁴⁰ ECtHR, *Vogt vs Germany*, Judgement of 26 September 1995, Series A, No. 323, para. 44.

⁴¹ See International Law Commission, 'Responsibility of States for Internationally Wrongful Acts', text appears in the annex to General Assembly Resolution 56/83 of 12 December 2001, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (accessed on 3 May 2007), at Article 4.

to be distinguished from the simple wearing of religious symbols. Another possibility to protect the appearance of State neutrality could be a public statement to be placed in all schools explaining State neutrality in public education as a policy goal, but explaining that teachers are permitted to exercise their freedom of religion with strict necessary limits (no missionary activity, no religious statements as part of teaching activity), which permits the freedom to wear their religious symbols. According to the principle of proportionality with regard to interferences with human rights, the possibilities which promise to achieve legitimate goals with as little interference with the freedom of religion as possible need to be explored first.

State neutrality implies that State organs refrain from making unsubstantiated negative value judgements of religious practices. As the ECtHR declared in the case *Manoussakis and Others vs Greece*, 'the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.'⁴² The same applies to Convention institutions. The ECtHR qualifies the Islamic headscarf as a 'powerful external symbol', which 'appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality' and that the practice could not easily be 'reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils'.⁴³ This statement needs to be contrasted with the statement of the German Constitutional Court that the wearing of headscarves cannot be understood simply as symbol of female submission.⁴⁴ Courts should refrain from assessing the significance of a religious practice which can be interpreted in a variety of ways and impose their viewpoint on the applicant, especially if their assessment is negative and dismissive.⁴⁵ The attempt of the ECtHR to forward a one sided interpretation of a religious practice open to a variety of interpretations could also be seen as an attempt of indoctrination which may be understood as a serious and unacceptable obstacle to the freedom to hold opinions.⁴⁶

The aspect of laicism was crucial in the French public debate concerning religious symbols in French schools. In France, the debate started in 1989. On 27 November 1989, the French *Conseil d'Etat* gave an opinion on request of the French minister of education on the issue of headscarves in public schools.⁴⁷

⁴² ECtHR, *Manoussakis and Others vs Greece*, Judgement of 26 September 1996, Application No. 18748/91, Reports 1996-IV, para. 47.

⁴³ Grand Chamber ECtHR, *Leyla Sahin vs Turkey*, *supra* note 14, para. 111.

⁴⁴ See *supra* note 34, para. 52.

⁴⁵ According to Judge Tulkens in her dissenting opinion to the judgement of the Grand Chamber of the ECtHR, *Leyla Sahin vs Turkey*, *supra* note 14, para. 12.

⁴⁶ Macovei, Monica, *A guide to the implementation of Article 10 of the ECHR*, Human rights handbooks No. 2, Council of Europe Publishing, Strasbourg, 2004 (2nd ed.), p. 8.

⁴⁷ Opinion of the Conseil d'Etat No. 346.893, session of 27 November 1989. See www.conseil-etat.fr/ce/rappor/index_ra_cg03_01.shtml (accessed on 3 May 2007).

After a review of the applicable rules of the French legal system, the *Conseil d'Etat* stated that the religious symbols in schools are not completely incompatible with laicism, but that freedom of religion does not permit pupils to wear religious symbols which, due to their ostentatious or vindictive character, could figure as acts of pressure, provocation, proselytism or propaganda.⁴⁸

In its decision of 2 November 1992, the *Conseil d'Etat* confirmed this view in its decision in the case *Kherouaa*.⁴⁹ The facts of the case were as follows. The internal rules of a college had been amended and prohibited any symbol or dressing of a religious, political or philosophical nature. Three Islamic girls who continued to wear Islamic headscarves were subsequently not allowed to enter the class room and the physical education class and later excluded from the school. The *Conseil d'Etat* observes that nobody even alleged or established that the modalities of the wearing of the headscarf by the girls constituted acts of pressure, provocation, proselytism or propaganda. In effect, the *Conseil d'Etat* is saying that the wearing of a Islamic headscarf does not automatically constitute an act of pressure, provocation, proselytism or propaganda which would violate the negative religious freedom of others and the principle of laicism in France.

On 20 September 1994, Mr Francois Bayrou, Minister of Education of France, addressed a note to all heads of schools in France which stated that the wearing of discreet religious symbols was acceptable, but ostentatious symbols which in themselves constitute elements of proselytism or discrimination were unacceptable.⁵⁰

In 2003, the president of France, Mr Jacques Chirac, asked Mr Bernard Stasi to preside over an independent commission which was established to reflect the application of the principle of laicism in France. The report of the Commission (henceforth referred to as 'laicism report') was submitted on 11 December 2003.⁵¹ Concerning universities, the laicism report notes that students should be able to express their religious, political or philosophical convictions. Universities should be open.⁵²

The French laicism report proposed that in primary schools, colleges and secondary schools symbols which manifest a religious or political affiliation are prohibited. Every sanction needs to be proportionate and taken after pupils have been invited to conform their behaviour to these obligations.⁵³ The report mentions as an explanatory note that only ostentatious symbols like a large cross, headscarf or kippa

⁴⁸ *Ibidem*, p. 5.

⁴⁹ Decision of the Conseil d'Etat No. 130394, 2 November 1992, www.rajf.org/article.php3?id_article=136 (accessed on 3 May 2007).

⁵⁰ Parekh, Bhikhu, *Rethinking Multiculturalism*, Palgrave, New York, 2000, p. 250.

⁵¹ Laicism report, *op.cit.* (note 26).

⁵² *Ibidem*, p. 60.

⁵³ *Ibidem*, p. 58.

are prohibited, discrete symbols like a médaillon, a small cross, a star of David, hand of Fatimah or little Qur'ans are permitted.⁵⁴

The laicism report proposed also to offer in schools, prisons, hospitals and companies more food options to accommodate members of different religions. It also calls for more efforts to accommodate members of different religions in the area of funeral rites. To honour the most important religions in France, the report proposes that the two most important holidays of the Jewish and of the Muslim faith are accepted as school holidays and that companies offer these two days as holidays to their employees in exchange for other days which are traditional public holidays in France.⁵⁵

On 17 December 2003, President Chirac held a speech on the principle of laicism. He partially took over the proposals of the laicism report: he distinguished between ostentatious and other religious symbols. He did not take over the proposal of the report to extend the prohibition of symbols to political symbols as well. He also did not take over the proposal to introduce the two most important holidays of the Jewish and Muslim faith as public holidays of the French republic.⁵⁶

On 15 March 2004, legislation to the effect of prohibiting the wearing of ostentatious religious symbols in public schools was adopted.⁵⁷ This legislation entered into force at the start of the school year in September 2004. By March 2005, 48 girls had been dismissed from public schools in France for their refusal to comply with the legislation.⁵⁸ The French law seems to imply that any ostentatious display of religion at school automatically constitutes improper proselytism and violates the principle of laicism in public schools. This view seems to be at odds with the ruling of the *Conseil d'Etat* in the case *Kherouaa*, where the *Conseil d'Etat* affirmed that a religious symbol like the Islamic headscarf becomes an act of pressure, provocation, proselytism or propaganda only by the modalities of its wearing and not automatically. The ruling of the *Conseil d'Etat* in the case *Kherouaa* demonstrates that the specific understanding that laicism in France prohibits the wearing of ostentatious religious symbols in School is a very recent development and does not correspond to the traditional understanding of laicism.

The Laicism report states that the principle of laicism goes beyond simple neutrality and demands also limits from the citizen. The citizen is guaranteed freedom of thought and this freedom is protected by laicism, but in exchange the citizen must

⁵⁴ *Ibidem*, p. 59.

⁵⁵ *Ibidem*, p. 65.

⁵⁶ www.elysee.fr/elysee/elysee.fr/francais/interventions/discours_et_declarations/2003/decembre/discours_prononce_par_m_jacques_chirac_president_de_la_republique_relatif_au_respect_du_principe_de_laicite_dans_la_republique-palais_de_l_elysee.2829.html (accessed on 3 May 2007).

⁵⁷ Loi [Law] No. 2004-228 of 15 March 2004, published in *Journal Officiel* [Official journal] of France of 17 March 2004, www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L (accessed on 3 May 2007).

⁵⁸ *Der Standard*, 28 March 2005.

respect the public sphere which all must be able to share.⁵⁹ Thus, this implies a certain automatic limitation of the freedom of religion in the public sphere. However, Article 9 ECHR covers explicitly also the public manifestation of religion in ‘worship, teaching, practice and observance’.

The ECHR does not touch upon the relationship between State and religion directly in as far as it permits a variety of systems of State-religion relationship:⁶⁰ laicism like in France and Turkey, systems of State recognition of certain religions like in Germany and Austria, one State religion like in the UK and Greece.⁶¹ As long as freedom of religion is guaranteed for everybody, States are free to adopt a system of State-religion relationship which they consider best suited and it is not the business of the Convention institutions to comment on this choice.⁶² The ECHR protects the individual freedom of religion and does not prescribe a specific model of State-religion relationship. Following from this logic, it appears strange that if a State chooses one possibility amongst this variety of models like laicism in France and Turkey, which signifies a certain distance between religion and State, this choice could be used to argue in favour of a limitation of the guaranteed level of protection of the right of freedom of human beings to express their religion in public as protected by Article 9 ECHR. The point is that the model of State-religion relationship at the discretion of States should not influence negatively the protection level of individuals. In its decision in the *Leyla Sahin* Case the ECtHR seems to give a lot of emphasis to the history and constitutional principles of the Turkish republic,⁶³ which actually are outside the ambit of the ECHR and should not influence its interpretation. In effect, the ECtHR waters down the protection of Article 9 ECHR, if it pays excessive respect to constitutional traditions of one State, which are actually irrelevant for the interpretation of the ECHR, which applies to all member States. As the Court stresses in the *Leyla Sahin* Case, the margin of appreciation granted to States by the Court cannot be unlimited, but needs to go hand in hand with a European supervision embracing both the law and the decision applying it.⁶⁴ The Court also declares that the Court’s task is to determine whether the measures taken at the national level were justified in principle and proportionate.⁶⁵ It would be circular reasoning if this European supervision again pays too much respect to national constitutional traditions. European supervision needs to be based on an autonomous interpretation of the ECHR by the ECtHR without recourse to restrictive national legal traditions if it is to be meaningful and serve the purpose of protecting individuals.

⁵⁹ Laicism report, *op.cit.* (note 26), p. 16.

⁶⁰ Grand Chamber ECtHR, *Leyla Sahin vs Turkey*, *supra* note 14, at para. 109.

⁶¹ Laicism report, *op.cit.* (note 26), p. 32.

⁶² *Idem.*

⁶³ See Grand Chamber ECtHR, *Leyla Sahin vs Turkey*, *supra* note 14, paras 30–41.

⁶⁴ *Ibidem*, at para. 110.

⁶⁵ *Idem.*

Steven Greer criticises that the ECtHR applies the doctrine of margin of appreciation (which the Convention institutions invented because it cannot be found in the text of the ECHR) in a casuistic, uneven, and largely unpredictable manner.⁶⁶ He proposes that the main purpose of the margin of appreciation is to give room to value judgements which were achieved through the democratic process and/or national judicial interpretation. This proposition is based on the understanding that the main purpose of the ECtHR is to function as a subsidiary review body rather than that of final court of appeal or 'fourth instance'. Greer stresses that there is no room for the margin of appreciation regarding absolute rights and regarding the resolution of conflicts between rights as these tasks require an autonomous interpretation of the ECHR by the ECtHR. In my view, based on the reasoning of Greer, there is not much room for the margin of appreciation regarding the issue of Islamic headscarves, because the issue essentially concerns the balancing of rights: the freedom of religion of the person wanting to wear the Islamic headscarf versus the negative freedom of religion of those who feel threatened by the Islamic headscarf.

4. ISLAMIC HEADSCARVES AND NEGATIVE FREEDOM OF RELIGION

Article 9(2) ECHR does refer to 'protection of rights and freedoms of others'. In this regard, the negative freedom of religion of others is of paramount importance. The question is whether the wearing of headscarves is an act of manifestation of religion at the core of Article 9 ECHR or an act of exerting pressure on others which could be limited by reference to Article 9(2) ECHR? How does the wearing of Islamic headscarves affect others?

This aspect of the protection of the rights of others was also crucial in the French public debate concerning religious symbols in French schools.⁶⁷

In Germany, the headscarf debate was triggered by Ms Ludin, a German citizen of muslim faith and of Afghan origin, who applied in the province of Baden-Württemberg to become a teacher in primary and certain secondary schools (*Hauptschulen*) after passing all required exams. The schooling authority in Stuttgart rejected the application due to lack of personal suitability. The reason for the rejection was that Ms Ludin insisted on wearing the headscarf during teaching. Ms Ludin appealed against this decision and the case finally, after all other appeal possibilities were exhausted, reached the constitutional court of Germany. Also the German Constitutional Court

⁶⁶ See Greer, *op.cit.* (note 35), p. 58. It is interesting to note that the French Commission on laicism in its report did highlight the margin of appreciation applied by the ECtHR, when discussing the human rights conformity of a ban of ostentatious religious symbols from schools. See Laicism report, *op.cit.* (note 26), p. 20.

⁶⁷ See section 3 *supra*.

discusses the negative freedom of religion of pupils and States that in general there is no right not to be confronted with religious symbols or religious actions in a society which permits a plurality of religions. However, an exception needs to be made for a situation which was created by the State in which the individual has no possibility of evading the influence of another religion. Thus, the Constitutional Court of Germany stresses that the negative religious freedom plays a crucial role in schools.⁶⁸

Two leading cases of the ECtHR deal with the negative freedom of religion: the cases of *Kokkinakis vs Greece* and the case *Larissis vs Greece*.

In the case *Kokkinakis vs Greece*,⁶⁹ the European Court of Human Rights deals with the case of a Jehovah's witness who called at the home of a lady and engaged in a discussion with her. For this he was arrested and prosecuted for proselytism. The Court then observes that freedom of religion 'includes in principle the right to try to convince one's neighbour, for example through teaching, failing which, moreover, freedom to change one's religion or belief, enshrined in Article 9, would be likely to remain a dead letter.'⁷⁰ The Court distinguished between bearing witness to a religion which is the core protected by Article 9 ECHR and improper proselytism, which may be prohibited as not compatible with respect for the freedom of thought, conscience and religion of others. According to the Court,

the former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.⁷¹

The Court effectively distinguished between proper proselytism which is protected and improper proselytism which may be prohibited.

The interpretation of the court given to Article 9 ECHR in *Kokkinakis vs Greece* is difficult to reconcile with the French position that all ostentatious symbols in schools constitute automatically improper proselytism and can be legally banned from schools. The point is that even ostentatious symbols can constitute true manifestations of religion without 'exerting improper pressure'.

⁶⁸ German Constitutional Court (*Bundesverfassungsgericht*), *Ludin* Case, 24 September 2003, 2 BvR 1436/02, www.bundesverfassungsgericht.de/entscheidungen/rs20030924_2bvri43602.html (accessed on 3 May 2007).

⁶⁹ ECtHR, *Kokkinakis vs Greece*, Judgement of 25 May 1993, Application No. 14307/88, Series A, No. 260-A.

⁷⁰ *Ibidem*, para. 32.

⁷¹ *Ibidem*, para. 48.

In the case *Larissis vs Greece*,⁷² the ECtHR dealt with the case of three officers of the Greek airforce who were all followers of the Pentecostal Church, a Protestant Christian denomination which adheres to the principle that it is the duty of all believers to engage in evangelism. These officers engaged in theological discussions with airmen serving under their command urging them to join their faith. The Court observes that

the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power. It must be emphasized that not every discussion about religion or other sensitive matters between individuals of unequal rank will fall within this category. Nonetheless, where the circumstances so require, States may be justified in taking special measures to protect the rights and freedoms of subordinate members of the armed forces.⁷³

The case also concerned civilians outside the military. Concerning these civilians, the Court confirmed its ruling in *Kokkinakis vs Greece* and stated that this did not constitute improper proselytism and is protected by Article 9 ECHR.⁷⁴

The case-law of the ECtHR shows its concern with the level of autonomy of recipients of religious messages. The negative freedom of religion is especially violated most of all by coercion and force, but it is questionable if the simple manifestation of somebody's freedom of religion can violate the negative freedom of religion of others. The headscarf debate in Europe is characterised by a very broad interpretation of negative freedom of religion. The negative freedom of religion is plausibly threatened only under conditions which amount to improper pressure or brainwashing as the ECtHR observed in the case *Kokkinakis vs Greece*.⁷⁵ In schools, of course, matters are more complicated. Mostly, pupils are obliged to be in school and they cannot choose who they share their classroom with. Another factor is the youth of pupils, which means that young pupils are more easily influenced. Also, teachers do have a model role for pupils and exercise considerable power over them and their future. Thus, there are reasons to give a higher level of protection to pupils than to other members of society following the reasoning of the ECtHR in the case *Larissis vs Greece*.⁷⁶ Following this reasoning, even simple attempts to convert pupils in a school

⁷² ECtHR, *Larissis and others vs Greece*, Judgement of 24 February 1998, Application Nos 23371/94, 26377/94 and 26378/94, Reports 1998-I.

⁷³ *Ibidem*, para. 51.

⁷⁴ *Ibidem*, para. 57.

⁷⁵ ECtHR, *Kokkinakis vs Greece*, *supra* note 69.

⁷⁶ Judgement of the ECtHR, *Larissis and others vs Greece*, *supra* note 72.

context by teachers will be objectionable because pupils might find it difficult to resist such conversion attempts in the hierarchical context of a school.

The general question is: What are the possibilities of pupils to resist the religious message of a Islamic headscarf? The wearing of a Islamic headscarf is quite different from an actual conversion effort by involving somebody in a religious discussion. In general, it is easier to ignore somebody's dress than somebody's efforts of starting a discussion. Another aspect is the suggestive force of the symbol. As the German Constitutional Court observed in a case concerning the legality of Christian crosses in schools in Bavaria, the Christian cross is a highly suggestive religious symbol in Bavaria.⁷⁷ It is a symbol with highly positive connotations and these positive connotations are reinforced by the religious climate in Bavaria. A headscarf in France has a quite different symbolic 'standing'. The majority of the Christian population of France is likely to associate a rather negative connotation with Islamic headscarves. It follows that the Islamic headscarf as a religious symbol is much reduced in its suggestive power and in its power to attract and convert individuals of a different faith. Amongst Muslim symbols, the Qur'an has a much higher suggestive power than the headscarf. The most important group for which the Islamic headscarf might have a positive connotation is the Muslim population. There might be a difference of the symbolic force of an Islamic headscarf in a predominantly Muslim country like Turkey and in a predominantly Christian country like France.

A difference needs to be made also between schools in which a pupil faces only one teacher and schools in which a pupil faces a multitude of teachers in different subjects. It is unlikely that a teacher who wears an Islamic headscarf would unduly influence pupils who face also other teachers without Islamic headscarves.

Another differentiation needs to be made between majority religion and minority religion. Pupils have some awareness of the religious climate in a society. A display of a majority religion can have more severe consequences on the negative freedom of religion of pupils than a display of a minority religion. Another factor is the shared religion between teacher and pupil. Pupils who do not share the religion with the teacher are less likely to feel pressure of conformism by a display of a religion by a teacher than by a display of a religion which the pupils share with the teacher. In the case of shared religion between teacher and pupil there is a greater danger of pressure of conformism. It is unlikely that the display of a religious symbol by a pupil can amount to a comparable situation of psychological pressure on other pupils because they do not have a similar position of authority to teachers.

Also, the fact if there is a plurality of religious symbols in schools is relevant. In a school, which has also Christian, Jewish and other symbols, the wearing of an Islamic headscarf will exercise less psychological pressure on pupils than in a school which

⁷⁷ German Constitutional Court, *Kruzifixentscheidung*, *supra* note 37, section C/II/c.

only contains Islamic symbols. The plurality of symbols reduces their potential to exert psychological pressure.

On the other hand, it is not obvious that a teacher who simply wears a religious symbol, without actually preaching a religion or engaging in missionary activity in school, violates the negative religious freedom of pupils. Not every manifestation of religion is a threat to the freedom of religion. A theoretical reflection which could be useful in this context could be the harm principle as developed by John Stuart Mill in his famous essay 'On liberty'.⁷⁸ According to Mill, liberty may be limited only if others are harmed. He contrasted such harmful behaviour with self-regarding or self-harming behaviour, behaviour which only harmed oneself. Concerning such self-harming behaviour, others could be offended, but Mill argued that being offended is something different from being harmed. In Mill's eyes harm could be established objectively; offence, by contrast, depends on the personal beliefs and attitudes of the person offended. In this perspective, the objections of Christian teachers and pupils against headscarves worn by Muslim teachers and pupils are to be understood more as offence than as harm. However, this distinction is not easy and there exist exceptions in existing legislation: legislation which prohibits racist propaganda⁷⁹ or holocaust denial, for example. Also concepts of psychological and other immaterial harm accepted in many legal systems blur the distinction. Nevertheless, the ECtHR has continuously upheld the principle that, for example the freedom of expression guaranteed under Article 10 of the ECHR, protects not only

the information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broad-mindedness without which there is no democratic society.⁸⁰

The point is that the objections against Islamic headscarves by other pupils, teachers and parents, who are not Muslim by faith and thus are not subject to the religious duty to wear headscarves, are mostly based on offence, shock and disturbance. Given the

⁷⁸ Mill, John Stuart, *On Liberty* (1859), Penguin Classics, London, 1985, p. 76.

⁷⁹ The US Supreme Court decided in the landmark case of *R.A.V vs City of St. Paul, Minnesota*, (90–7675) 505 U.S. 377 (1992), that a prohibition of racist symbols is unconstitutional because it violated the freedom of expression protected under the US Constitution. The main argument delivered by Justice Scalia was that prohibitions of speech need to be content-neutral and that the emotive impact of speech is not sufficient to justify a limitation. This is an idea which can be traced back to John Stuart Mill.

⁸⁰ ECtHR, *Handyside vs the United Kingdom*, 7 December 1976, Application No. 5493/72, Series A, No. 24; *Sunday Times vs the United Kingdom*, 26 April 1979, Application No. 6538/74, Series A, No. 30; *Lingens vs Austria*, 8 June 1986, Application No. 9815/82, Series A, No. 103; *Oberschlick vs Austria*, 23 May 1991, Application No. 11662/85, Series A, No. 204; *Jersild vs Denmark*, 23 September 1994, Application No. 15890/89, Series A, No. 298; and *Dichand and Others vs Austria*, 26 February 2002, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&source=tkp&highlight=dichand&sessionId=9886926&skin=hudoc-en> (accessed on 3 May 2007).

standards enunciated by the ECtHR based on the harm principle enunciated by John Stuart Mill, this would not be sufficient to warrant a limitation.

Much depends also on the religious climate in a society. A society which is dominated by one religion, in which non-believers or members of religious minorities face severe disadvantages or violence, the freedom of religion of religious minorities and of non-believers is likely to be violated. In such a society, the Islamic headscarf as a visible identification of religious affiliation can acquire compulsory nature and a ban of Islamic headscarves could be justified as a measure to protect religious freedom and privacy of those who do not wish to wear headscarves. The ECtHR in the *Leyla Sahin* Case seems to hint at this logic without demonstrating and explaining which disadvantages or violence women who do not wear Islamic headscarves would concretely face in Turkey, if Islamic headscarves would be generally permitted. On this topic, Judge Tulkens observes that only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of justifying interference with a fundamental right, the case-law of the ECtHR clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples.⁸¹

All in all, the concern that the wearing of Islamic headscarves by teachers is problematic with regard to the negative freedom of pupils, has some argumentative plausibility concerning very young pupils who face only one teacher, especially if the pupil shares the religion of the teacher in a society which places a lot of importance on religion.

5. ISLAMIC HEADSCARVES AND THE RIGHT TO EDUCATION

Article 2 of Protocol 1 to the ECHR concerns the right to education and states that no person shall be denied the right to education and that the State shall in the exercise of any functions, which it assumes in relation to education and to teaching, respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. In the case *Kjeldsen, Busk Madsen and Pedersen vs Denmark*⁸² the ECtHR dealt with a case of parents who wanted their children to be exempted from sex education and the refusal of the public school system of Denmark to grant such an exemption by pointing to the possibility of private schools and education at home which were both possible in Denmark. The Court remarked that it is the duty of the State to respect parents' convictions, be

⁸¹ Judge Tulkens in her dissenting opinion to the Judgement of the Grand Chamber of the ECtHR, *Leyla Sahin vs Turkey*, *supra* note 14, para. 5. See also ECtHR, *Smith and Grady vs the UK*, Judgement of 27 September 1999, Application Nos 33985/96 and 33986/96, Reports of judgments and Decisions 1999-VI, para. 89.

⁸² ECtHR, case of *Kjeldsen, Busk Madsen and Pedersen vs Denmark*, Judgement of 7 December 1976, Application Nos 5091/71, 5920/72 and 5926/72, Series A, No. 23.

they religious or philosophical, throughout the entire State education programme by taking care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.⁸³

In the Islamic headscarf debate, it is likely that the philosophical and religious views of different groups of parents oppose each other without any possibility of easy reconciliation. In such a situation, State neutrality means that the State must give both sides room for expression without interfering in the debate, while ensuring that the confrontation does not become violent or otherwise out of control. In France, the State seems to have taken side with one group of parents against the other group; it is difficult to see how this meets the test of neutrality and pluralism.

In this context, it could be fruitful to reflect on the question if the ban of Islamic headscarves from schools and universities is not in itself an attempt at indoctrination. The point is that the main reasons for objecting to Islamic headscarves are ideological, as headscarves worn for other reasons or as an expression of different traditions are commonly not considered objectionable (for example, in Europe it is a tradition for female farmers to wear headscarves as sun protection or for brides during weddings). Objections only concern Islamic headscarves. Thus, the ban has a special anti-Islamic and anti-religious connotation. In this light, the ban of headscarves itself can be seen as an attempt at indoctrination by the State. Under the freedom to hold opinions protected by Article 10 ECHR, States are not allowed to operate distinctions between individuals holding one opinion or another. Moreover, the promotion of one-sided information by the State about the significance of Islamic headscarves may constitute a serious and unacceptable obstacle to the freedom to hold opinions.⁸⁴

Also the sanction for wearing Islamic headscarves in France is problematic. In France, pupils can be ultimately dismissed from school for the wearing of Islamic headscarves. In the case of *Campbell and Cosans vs the United Kingdom*, the ECtHR found that the suspension from school of a pupil for a reason involving non respect for philosophical convictions of the parents (in that case the parents had objected to corporal punishment) amounts to a violation of Article 2 of Protocol No. 1 of the ECHR.⁸⁵ If the wearing of Islamic headscarves conforms to the religious convictions of parents, a dismissal from school for insisting on the Islamic headscarf could equally violate Article 2 of Protocol No. 1 of the ECHR.

On the other hand, a limitation of Islamic headscarves might be justified by reference to objective reasons which are independent of personal beliefs and attitudes of spectators. Thus, for example, a *burka* which completely covers the body of a

⁸³ *Ibidem*, para. 53.

⁸⁴ Macovei, *op.cit.* (note 46).

⁸⁵ ECtHR, *Campbell and Cosans vs the United Kingdom*, Judgement of 25 February 1982, Application Nos 7511/76 and 7743/76, Series A, No. 48.

pupil might not be acceptable because teaching necessitates communication which includes for example eye contact. Also, it is necessary for educational institutions to check the identity of pupils which would not be possible with a *burka*. However, these arguments are not valid for other kinds of Islamic headscarves which do permit adequate communication and identification. In sum, a limitation of the freedom of religion is plausible in case the process of teaching is objectively obstructed by special kinds of headscarves like the *burka*.

6. ISLAMIC HEADSCARVES AND DISCRIMINATION

The issue of discrimination with regard to headscarves has two aspects: firstly, in how far is the wearing of headscarves a religious practice of a discriminatory nature (gender discrimination) or a discriminatory statement in itself? Secondly, in how far is the ban of wearing headscarves discriminatory (religious discrimination)?

6.1. GENDER DISCRIMINATION

Most courts accepted the wearing of headscarves as a religious practice falling under the freedom of religion. The question is: Is the religious practice in itself a case of gender discrimination because it only applies to women and not to men? Many commentators see in the practice of wearing of headscarves something that is part of a traditional patriarchal society which obliges its female members to hide their hair (and sometimes faces) behind a headscarf to reduce their attraction to men. This arguably amounts to structural discrimination which is designed to keep women under control of the men in their families.

The problem in this argumentation is that the argument is valid if women are forced to wear headscarves, but loses its power when women themselves freely choose to wear headscarves. As a legal concept, discrimination refers to treatment of others, not treatment of oneself. It is not possible to legally discriminate against self.

The argument about headscarves as discrimination is in the final analysis a discussion about liberty. Following the famous essay of Isaiah Berlin about two concepts of liberty,⁸⁶ liberty has an external and an internal aspect. Externally, liberty refers to the availability of options. Negative liberty refers to this external aspect and concerns the availability of options which are not blocked by external factors (sanctions, threats, force, coercion, costs *etc.*). Positive liberty refers to the internal aspect of liberty and to the capacity, the predisposition to actually make genuine choices. Genuine choices require a certain kind of independence; a free person must ask herself 'what do I really want or really believe' and be able to reject second hand answers. Positive liberty can be limited by customs, social pressures, and religion.

⁸⁶ Berlin, Isaiah, *Four Essays on Liberty*, Oxford University Press, Oxford, 1969, pp. 118–173.

As Isaiah Berlin argued, negative liberty can be guaranteed by society, but positive liberty cannot be guaranteed. Some people are independent-minded by nature; others are born conformists. All that politics and law can do is to provide more favourable conditions for those who want to choose their own path in life to do so. A government that wants to promote positive liberty, the freedom to choose, could do so by encouraging social diversity – by exposing people to new ways of living, new forms of culture, and so on.

The Islamic headscarf debate is marred by a confusion of these two distinct kinds of liberty. Of course the State should guarantee the negative liberty of girls and women by for example creating a helpline for them to report pressures on them to wear Islamic headscarves even though they do not want to do so and to alert authorities and courts to be sensitive in this regard. Other possible measures could be the provision of houses where girls and women could stay if they need to leave their families or independent legal residence status for migrant women to reduce dependence from their families. Another possibility would be more control by youth protection authorities and courts to the effect that parents do not abuse their right to educate their children to enforce the wearing of Islamic headscarves. However, a general ban of headscarves from schools might protect those girls who do not want to wear headscarves, but will be harsh on those girls who consider it important for their cultural and religious identity and as a symbol of respect for their tradition. Thus, such a general ban cannot be justified by reference to its protection element for young girls. It is an excessive measure which is not proportionate because it limits also those girls who genuinely want to wear headscarves.

But the State cannot ban Islamic headscarves and hereby hope to ensure that women exercise their positive autonomy by emancipating themselves from their religious traditions. As Isaiah Berlin observed, positive autonomy cannot be ensured. In fact, the banning of headscarves from schools is a counterproductive measure in this respect, because it further reduces the prestige of a social group which is already suffering from a negative public image. Members of this social group are likely to withdraw even more from general society and to rely even more on their own group. The traditions of this group, including religious expectations, are likely to play an even greater role for its members. Thus, a ban of Islamic headscarves is likely to reduce positive autonomy, not increase it. Rather, the positive autonomy of women of a certain ethnic background should be encouraged by publicly valuing their ethnic identity, by highlighting the plurality of lifestyles compatible with this ethnic identity and by inviting them to cross cultural borders. This could be done by promoting multicultural social events and cultural activities within schools which display the variety of cultural practices within a given cultural tradition (for example, the history of women living without headscarves in Muslim societies).

A prohibition irrespective of the intentions or wishes of the individuals concerned actually wearing headscarves amounts to a paternalistic measure. In a political and

legal system committed to liberalism, every paternalistic measure requires special explanation. For example, in the case of female genital mutilation, a prohibition irrespective of the wishes of the victim will be justified because of the long term consequences. The consideration that large costs are caused for the social and health services of a country by drug abuse will justify the prohibition of drug abuse irrespective of the wishes of drug users. Similar justifications are difficult to detect in the headscarf debate: It is possible to simply stop wearing headscarves without any long term consequences and no large costs are triggered for society by the wearing of headscarves.

It is doubtful if a religious practice could be limited for paternalistic reasons.⁸⁷ The point is that a State which limits a religious practice for paternalistic reasons would not anymore be neutral. Neutrality precludes paternalism as it precludes indoctrination. As the ECtHR announced in the case *Manoussakis and Others vs Greece*, 'the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.'⁸⁸

6.2. ISLAMIC HEADSCARVES AND DISCRIMINATORY STATEMENTS

The wearing of Islamic headscarves has also a symbolic significance. Some Western feminists claim that Islamic headscarves are symbols of female submission.⁸⁹

Does every woman who wears an Islamic headscarf thereby make a discriminatory statement? The motives of women wearing headscarves are diverse. It is difficult to establish one common message of every woman who wears an Islamic headscarf. An Islamic headscarf could mean: loyalty to tradition, belief in the chastity of women, symbol of religious identity, respect for wishes of parents and families, signal of not being sexually available, expression of cultural identity, refusal to westernise.⁹⁰

At its heart, the conflict about Islamic headscarves is a cultural conflict about how they should be understood, what their value is and what they signify. From the point of view of some Muslim women, it is Western society which violates the dignity

⁸⁷ 'Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. Paternalism of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of Article 8.' Judge Tulkens in her dissenting opinion to the Judgement of the Grand Chamber of the ECtHR, *Leyla Sahin vs Turkey*, *supra* note 14, para. 12.

⁸⁸ ECtHR, *Manoussakis and Others vs Greece*, *supra* note 42, para. 47.

⁸⁹ This was the position of Elisabeth Badinter, a French intellectual and feminist. See Moruzzi, Norma, 'A Problem with Headscarves: Contemporary Complexities and Social Identity', *Political Theory*, Vol. 22, No. 4, 1994, pp. 661–662.

⁹⁰ German Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 1436/02 from 3 June 2003, www.bverfg.de/entscheidungen/rs20030924-2bv143602.htm, para. 52.

of women by the emphasis on physical appearance⁹¹ and the depiction of women in advertising and in the media. This is an instance of the need of what Bhikhu Parekh has called an intercultural dialogue.⁹² The problem is that cultural practices should be understood from 'within' before passing judgement on them because it is unlikely to make much sense to the concerned people, let alone have any impact on them, unless it resonates with their moral self-understanding.⁹³ Anthropologists speak of 'participant observation' as the appropriate method of understanding in this context.⁹⁴ If European courts assess the symbolic content of a religious practice, they should at least try to establish and take into account the views of the purported victims. From all courts, only the German Constitutional Court has done this and concluded that the wearing of Islamic headscarves cannot be understood simply as symbol of female submission.⁹⁵ This approach needs to be contrasted with the statement of the European Court of Human Rights, which qualifies Islamic headscarves as symbols which cannot be easily squared with the principle of gender equality, without bothering with trying to understand the motives of the individuals involved in this cultural practice.⁹⁶

The interpretation of a cultural practice for the purpose of legal assessment should give priority to the views of the people actually or potentially involved in the cultural practice rather than to the views of bystanders and observers because they might simply misunderstand the practice and might be subject to xenophobic stereotypes.

The relevant target group of the cultural practice of wearing headscarves are Muslim women and girls. As interviews show, the women who actually wear headscarves have very different views from those who criticise headscarves. Yasemin Karakasoglu-Aydin has held interviews with female students at faculties of arts and letters at German universities in the age group between 21 and 25 years.⁹⁷ She documents that the women who wear headscarves want to express mostly their identity and deny that they feel forced to do it against their will. On the contrary, they complain about discrimination by German society which in their eyes demands complete assimilation also in their visible appearance and which associates headscarves with a lack of modernity. In their view, headscarves just function as a trigger of general xenophobia.

⁹¹ See Karakasoglu-Aydin, Yasemin, 'Kopftuch-Studentinnen' türkischer Herkunft an deutschen Universitäten. Impliziter Islamismusvorwurf und Diskriminierungserfahrungen ['Headdress students' of Turkish origin in German universities – implicit allegation of Islamism and experiences of discrimination], in: Bielefeldt, Heiner and Heitmeyer, Wilhelm (eds), *Politisierte Religion. Ursachen und Erscheinungsformen des modernen Fundamentalismus* [Politicised religion – causes and manifestations of modern fundamentalism], Suhrkamp, Frankfurt am Main 1998, pp. 450–473.

⁹² Parekh, Bhikhu, *Rethinking Multiculturalism*, Palgrave, New York, 2000, p. 270.

⁹³ *Ibidem*, p. 173.

⁹⁴ Monaghan, John and Just, Peter, *Social and Cultural Anthropology*, Oxford University Press, Oxford, 2000.

⁹⁵ German Constitutional Court, *supra* note 90, p. 13.

⁹⁶ ECtHR, *Leyla Sahin vs Turkey*, *supra* note 4, para. 52.

⁹⁷ Karakasoglu-Aydin, *loc.cit.* (note 91), p. 460.

Often, it is this experience of discrimination which heightens the symbolic significance of headscarves as symbols of heroic resistance to discrimination of Western society and as a missionary statement in favour of multiculturalism.⁹⁸ These views contrast strongly with the views of those women and girls who report that they are victims of verbal, psychological and physical pressure to wear Islamic headscarves by their families and communities and for whom headscarves are primarily symbols of female submission in Islamic society.⁹⁹ The difficulty is to decide which interpretation of the cultural practice of wearing headscarves should inform legislation and legal interpretation. A proportionate legal measure would need to take account of both possible views of headscarves and distinguish between women who want to wear headscarves and those who refuse to do so.

The prohibition of discrimination needs to be distinguished from the prohibition of discriminatory statements. Thus, it is conceivable that a discrimination is prohibited, but discriminatory statements are not covered by this prohibition. This distinction is mostly not made in the Islamic headscarf debate.

In international anti-discrimination law, racial discrimination is special in this context. Article 4 of the International Convention on the Elimination of Racial Discrimination (CERD) obliges State parties to the Convention to declare as offence punishable by law all dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination. Because of its presumed conflict with the freedom of expression, many States including the US and the UK have made reservations to Article 4 CERD when ratifying the convention. A similar provision is missing in the Convention on the Elimination of All Forms of Discrimination against Women. Thus, even international law does not prohibit discriminatory statements in the field of gender discrimination.

As a matter of principle, freedom of expression extends to any expression notwithstanding its content.¹⁰⁰ Limits to the freedom of expression need to be viewpoint-neutral. This thought is best characterized by the statement commonly attributed to Voltaire: 'I disapprove of what you say, but I will defend to the death your right to say it.'¹⁰¹ In the same spirit, John Stuart Mill stated that 'if all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.'¹⁰² This principle is also the reason, why the US Supreme Court did not accept the prohibition of racist symbols.¹⁰³ The only exception to this principle in the form of a content-

⁹⁸ *Ibidem*, p. 464.

⁹⁹ Laicism report, *op.cit.* (note 26), section 3.3.2.1., p. 46.

¹⁰⁰ Macovei, *op.cit.* (note 46), p. 7.

¹⁰¹ Tallentyre, S.G., *The Life of Voltaire*, University Press of the Pacific, Honolulu, 2004, originally published in 1906.

¹⁰² Mill, *op.cit.* (note 78), p. 76.

¹⁰³ See *supra* note 79.

based restriction to the freedom of expression applied by the European Commission of Human Rights and of the ECtHR dealt with the dissemination of ideas promoting racism and the Nazi ideology, and incitement to hatred and racial discrimination.¹⁰⁴ This exception has mainly historical reasons and is based in international law (Article 4 CERD).¹⁰⁵ The ECtHR stated that there is no doubt that expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection as freedom of expression afforded by Article 10 of the Convention. But the ECtHR added that only statements which call for a certain level of violence qualify as hate speech.¹⁰⁶

This legal differentiation can be observed in many national legal systems which implement the various international instruments. At this moment in time, discriminatory statements in the field of gender discrimination are mostly not prohibited at international and national level. *De lege ferenda*, it could be discussed if gender discrimination law needs to be complemented by a prohibition of discriminatory statements. It is arguable that prohibition of discrimination needs to be complemented with a prohibition of discriminatory statements in all areas of anti-discrimination law, but it is doubtful if this should be accomplished first with regard to the practice of a minority religion. As a matter of fact, most religions have a history of gender discrimination and a prohibition to make discriminatory statements even on a symbolic level should be implemented for all religions equally. For example, the fact that the pope or other priests in Catholicism need to be men as a rule could also be seen as a powerful symbol of the inferiority of women. It is also not clear how such a prerogative of States to prohibit religious practices based on their symbolism would fit with the duty of neutrality of States on matters of religion.¹⁰⁷

The ECtHR confuses the issue of gender equality with the prohibition of making discriminatory statements. The principle of gender equality concerns the equal treatment of men and women, not the prohibition of making discriminatory statements about women or men. Concerning discriminatory statements about gender, no established case-law of the ECtHR exists which would establish a content based exemption from the principle of viewpoint neutrality concerning such discriminatory statements.¹⁰⁸

¹⁰⁴ Macovei, *op.cit.* (note 46), p. 7.

¹⁰⁵ *Kühnen vs the Federal Republic of Germany*, 12 May 1988, Application No. 12194/86, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&source=tkp&highlight=k%FC%Chnen&sessionid=9890097&skin=hudoc-en>; *D.I. vs Germany*, 18 October 1995, Application No. 26551/95 (unpublished); *Jersild vs. Denmark*, 23 September 1994, Application No. 15890/89, Series A, No. 298; and *Lehideux and Isorni vs France*, 23 September 1998, Application No. 24662/94, Reports 1998-VII.

¹⁰⁶ ECtHR, *Gündüz vs Turkey*, Judgement of 4 December 2003, Application No. 35071/97, Reports of Judgments and Decisions 2003-XI, para. 51.

¹⁰⁷ See *supra* note 29.

¹⁰⁸ According to Judge Tulkens in her dissenting opinion to the Judgement of the Grand Chamber of the ECtHR, *Leyla Sahin vs Turkey*, *supra* note 14, para. 9.

Another question in this context is: if headscarves represent discriminatory statements in themselves, why should they be permitted at all? Why are headscarves only banned in schools, but permitted elsewhere? If the wearing of headscarves constitutes a discriminatory religious practice, the logical conclusion would be that they should be banned everywhere, not just in schools.¹⁰⁹ Another question is: If the problem is the significance of a certain religious symbol, why should all religious symbols or all ostentatious religious symbols be banned from schools as happens in France?

6.3. RELIGIOUS DISCRIMINATION

Finally, the banning of headscarves from schools could also be analyzed within the framework of religious anti-discrimination legislation. Europe is currently in a process of development of anti-discrimination legislation. This process was initiated by two major directives of the EU in this field: Directive 2000/43/EC concerning racial discrimination and Directive 2000/78/EC concerning other grounds of discrimination including religion. The question is: Is the banning of headscarves for pupils and teachers in schools compatible with EU anti-discrimination legislation?

One of the innovations introduced in European legal systems is the concept of indirect discrimination. Indirect discrimination is defined as an apparently neutral provision, criterion or practice which would put persons having one of the features accepted as grounds of discrimination (*e.g.* religion) at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹¹⁰ Thus even a measure which is justified by reference to secularism might be indirectly discriminatory.

The concept of indirect discrimination is inspired by cases in the UK and in Canada. In 1983, the House of Lords ruled in the case *Mandla vs Dowell Lee*¹¹¹ that a sikh boy who was refused admission to a school based on the Christian faith because he insisted on wearing the turban was discriminated against because the 'no turban' rule was not justifiable without reference to the ethnic origins of the affected person. The headmaster had attempted to justify the 'no turban' rule by pointing out that he sought to run a Christian school and that he objected to the turban on the ground that it was an outward manifestation of a non-Christian faith. The court qualified this justification as unacceptable because the justification in the final analysis related to the ethnic origins of the person affected and was thus discriminatory in itself. This reasoning could equally be applied to justifications offered in the headscarf debate in Europe. One common argument is that permitting the headscarf in schools leads

¹⁰⁹ *Ibidem*, para. 12.

¹¹⁰ Article 2(2)(b) of Directive 2000/78/EC of 27 November 2000, OJ L 303/2000.

¹¹¹ House of Lords, 24 March 1983, [1983] 2 AC 548.

to conflicts between pupils, teachers and parents. The ban of headscarves is justified because conflicts can be prevented. However, this reasoning is faulty because if all concerned parties would behave tolerantly and in a non-discriminatory manner conflicts are unlikely to arise. Conflicts most likely arise because women with headscarves are discriminated against and thus the justification is discriminatory in itself. The avoidance of conflicts needs to be implemented by enforcing tolerance not by discriminating.

Other precedents concerning indirect discrimination in relation to dress are the exemption made to the uniform requirement of the Canadian Royal Mounted Police to permit a Sikh to wear the turban while on service¹¹² and an exemption from regulations to wear motor-cycle crash helmets for Sikhs wearing turbans in the UK.¹¹³ In labour law, there are cases in both Germany and in France, which confirm that dismissals because an employee insists on wearing the headscarf are unlawful.¹¹⁴

As Will Kymlicka points out, the traditional view of defining equality as 'colour blind' is not sufficient. He points out that this model was based on the consideration that religious tolerance based on the separation of church and State provides a model for dealing with ethno-cultural differences as well.¹¹⁵ On this view, ethnic identity, like religion, is something which people should be free to express in their private life, but which is not the concern of the State. The State does not oppose the freedom of people to express their particular cultural attachments, but nor does it nurture such expression – rather it responds with benign neglect.

¹¹² The campaign began in 1987 and succeeded in 1990, when Canadian solicitor general Pierre Cadieux adopted a new policy to allow the Sikh officer of the Royal Canadian Mounted Police Baltej Singh Dhillon the right to wear the turban while on service. See Gayer, Laurent, *The Globalisation of Identity politics – the Sikh experience*, Centre d'études et de recherches internationales [Centre for international studies and research], Paris, May 2002, www.ceri-sciences-po.org/archive/mai02/artlg.pdf.

¹¹³ Motor-Cycle Crash Helmets (Religious Exemption) Act 1976. It is noteworthy that in the case *X. vs the United Kingdom*, the European Commission for Human Rights decided that a requirement to wear motor-cycle crash helmets for Sikhs did not violate Article 9 of the European Human Rights Convention because it is reasonably and objectively justified, ECtHR, *X vs the United Kingdom*, Decision of 12 July 1978, Application No. 7992/77, D&R 14/234. In a similar case, the Human Rights Committee of the UN decided that legislation in Canada requiring workers to wear safety helmets is compatible with freedom of religion guaranteed by the International Covenant on Civil and Political Rights and does not constitute discrimination against Sikhs because it is reasonable and directed towards objective purposes, Human Rights Committee, *Singh Bhinder vs Canada*, 28 November 1989, Communication No. 208/1986, UN Doc. CCPR/C/37/D/208/1986.

¹¹⁴ In Germany, the case concerned a women working in a perfume shop who was dismissed because she insisted on wearing a headscarf. See Bundesarbeitsgericht, 10 October 2002, 2 AZR 472/01. In France, the labour court decided that the dismissal of an employee for wearing a headscarf without any valid justification constitutes discrimination. See Conseil des prud'hommes [Council of wise men], *Tahri vs Téléperformance France*, 17 December 2002 (the employee was working for a call centre).

¹¹⁵ Kymlicka, Will, *Multicultural Citizenship*, Clarendon Press, Oxford, 1995, p. 3.

This vision rests on the illusion that it is possible to completely separate State and ethnicity. But the ideal of complete separation is a myth. Government decisions on languages, internal boundaries, public holidays, and State symbols unavoidably involve recognising, accommodating and supporting the needs and identities of particular ethnic and national groups. A State may decide to officially endorse no religion, but a State needs to have one official language at least and thereby cannot avoid an ethnic identification. Also other State symbols most likely permit identification with a dominant ethnic group.

The question then is how to ensure that these unavoidable forms of support for particular ethnic and national groups are distributed in a manner which does not privilege some groups and disadvantages others. In so far as existing policies support the language, culture and identity of dominant nations and ethnic groups, there is an argument of equality for ensuring that some attempts are made to provide similar support for minority groups.

The issue of government uniforms and dress codes for teachers and pupils is part of this general issue. It is important to recognise how the existing rules about government uniforms and acceptable dress have been adopted to suit the majority population. For example, existing dress codes do not prohibit the wearing of wedding rings or Christian crosses, which are important religious symbols for many Christians. And it is virtually inconceivable that designers of government dress-codes would have ever considered designing a uniform that prevented people from wearing wedding rings or Christian crosses, unless this was strictly necessary for the job. Having implicitly adopted dress-codes that meet Christian needs, one can hardly object to exemptions for members of other religions on the ground that they violate State neutrality. The argument used in France that the symbols of one religion (Christianity) are discreet, whereas the symbols of another religion (Islam) are ostentatious, is nothing else than an open application of this indirectly discriminatory approach, which fails to convince in the final analysis.

7. ISLAMIC HEADSCARVES AND EXTREMISM

One of the main arguments the ECtHR uses against headscarves in the *Leyla Sahin* Case concerns the presumed link between the practice of wearing Islamic headscarves and political extremism. The Court states:

The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts (...) It has previously said that each Contracting

State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience.¹¹⁶

In the *Refah* Case of the ECtHR, the fact that leading representatives of the Refah party in Turkey had publicly advocated the wearing of Islamic headscarves in State schools and buildings occupied by public administrative authorities played a certain role in the dissolution of the party.¹¹⁷ The Court observed that these statements by *Refah*'s leaders, taken separately, did not constitute an imminent threat to the secular regime in Turkey. However, the Court found persuasive the Government's argument that these acts and policy statements were consistent with *Refah*'s unavowed aim of setting up a political regime based on *sharia*.¹¹⁸

The Court finds that *sharia* is difficult to reconcile with democracy and human rights and I fully agree with this statement.¹¹⁹ However, the *Refah* Case is different from the *Leyla Sahin* Case: in the *Refah* Case, the court is dealing with the dissolution of a political party which at the time of its dissolution had had the real potential to seize political power advocating the wearing of headscarves within a context of divine obligation created by *sharia* law and advocating that *sharia* law should prevail and become the law of Turkey; thus, there is a risk that the freedom of women not to wear headscarves would not be respected, if the party comes to power. There is little doubt that the *Refah* Case is a case which concerns a threat to negative freedom of religion. In the *Leyla Sahin* Case, the threat to negative freedom of religion is less convincing. A woman who simply exercises her right to manifest her religion by wearing a headscarf does not automatically force others to do the same.¹²⁰ The social and cultural climate in a country could be so oppressive that the permission to manifest religion amounts to the social pressure to participate in certain religious practices. This might be the assumption underlying the *Leyla Sahin* Case, but the ECtHR only hints at this and does not explain and substantiate its reasoning in this direction. On this topic, Judge Tulkens observes that only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of justifying interference

¹¹⁶ ECtHR, *Leyla Sahin vs Turkey*, *supra* note 4, para. 109.

¹¹⁷ ECtHR, *Refah Partisi and others vs Turkey*, Judgement of 31 July 2001, Application Nos 41342/98, 41343/98 and 41344/98, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&source=tkp&highlight=refah&sessionid=9890600&skin=hudoc-en> (accessed on 3 May 2007), para. 10.

¹¹⁸ *Ibidem*, at para. 73.

¹¹⁹ *Ibidem*, para. 72.

¹²⁰ The ECtHR stated that the mere fact of defending *sharia* without calling for violence to establish it, cannot be regarded as hate speech, ECtHR, *Gündüz vs Turkey*, *supra* note 106, para. 51. It does not seem coherent, if a statement promoting the *sharia* is protected, but the religious practice of wearing Islamic headscarves is not protected.

with a fundamental right, the case-law of the ECtHR clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples.¹²¹

The fight against political extremism is not a sufficient reason to prohibit women to wear a headscarf just because there are political parties who advocate the obligatory wearing of headscarves in Turkey in the context of a general application of *sharia* law. After all it is possible that women wear the headscarf for other reasons than political extremism or to show their support for *sharia* law. Just because extremist parties have taken up this issue does not necessarily make the religious practice in itself extremist.

Judge Tulkens echoes this reasoning:

While everyone agrees on the need to prevent radical Islamism, a serious objection may nevertheless be made to such reasoning. Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and 'extremists' who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views. She is a young adult woman and a university student and might reasonably be expected to have a heightened capacity to resist pressure, it being noted in this connection that the judgment fails to provide any concrete example of the type of pressure concerned. The applicant's personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism.¹²²

Based on this reasoning, a prohibition of wearing of Islamic headscarves to fight extremism is not a proportionate measure, but excessive in nature. It is possible to fight extremism even without prohibiting the wearing of headscarves to individual women, who engage in this practice not to support extremism, but for other reasons.

8. CONCLUSIONS

The decision of the ECtHR in the case *Dahlab vs Switzerland* could be justified on some strands of argument based on the body of case-law developed by the ECtHR, but the reasoning remains ultimately unsatisfactory.

Teachers are public servants and their public manifestation of religion could put doubt on the religious neutrality of the State. However, this argument loses value if religious symbols are traditionally to be found in schools (for example, there is a tradition in numerous member States to have Christian crosses in class rooms) and/or

¹²¹ Judge Tulkens in her dissenting opinion to the Judgement of the Grand Chamber of the ECtHR, *Leyla Sahin vs Turkey*, *supra* note 14, para. 5. ECtHR, *Smith and Grady vs the UK*, *supra* note 81, para. 89

¹²² Dissenting opinion of Judge Tulkens, *ibidem*, para. 10.

leading representatives of the State, like prime ministers or presidents, are not shy to display publicly their religious affiliation. Also, it is difficult to understand why neutrality should not be possible in a school environment which comprises a variety of religious symbols. Neutrality can be achieved in two ways: inclusive neutrality which accepts and celebrates religious plurality and irreligious neutrality which tries to keep all religion out of school. From a human rights perspective, inclusive neutrality is to be preferred because it is more respectful of the freedom of religion of teachers and pupils.

Another line of argument could be the negative freedom of religion of children. It is easier to influence young children with religious messages than adults; for this reason, the negative freedom of religion of children needs more protection than the negative freedom of religion of adults. However, if a teacher simply wears a headscarf without making religious declarations or religious conversion efforts, it is difficult to see how children can be unduly influenced, especially if it is a manifestation of a minority religion in a society which is relaxed about religion in a school environment which celebrates religious plurality and includes a variety of religious symbols from all religions in society. The perception of the ECtHR that this potentially constitutes a threat for the children is not convincing because children are aware of the general religious climate in a society and because the headscarf, in general, has a low symbolic standing in Switzerland. Islam is a minority religion in Switzerland and symbols of minority religions are less likely to exert pressure than symbols of majority religions, especially on those children who do not share the minority religion.

The ECtHR failed to analyse, if any girl in Mrs Dahlab's class was Muslim and could have felt some pressure to wear also the Islamic headscarf. This potentially would have been the strongest argument in favour of the decision of the ECtHR.

The decision of the ECtHR in the case *Leyla Sahin vs Turkey* was based on the protection of secularism and equality and as a measure against political extremism. The wearing of Islamic headscarves in the *Leyla Sahin* Case does not put in doubt State neutrality in religious matters because the behaviour of students as private citizens cannot be attributed to the State and religious neutrality is a duty of the State, not of the private citizen. The wearing of Islamic headscarves cannot be simply interpreted as a discriminatory behaviour against women, because this religious practice has many possible meanings and discrimination against women is only one of the possible ways of interpreting this practice. The prohibition of Islamic headscarves because it is a symbol of gender discrimination is not justified towards those women who wear the Islamic headscarf for other reasons and for whom the wearing of headscarves has another meaning and significance. It is not the role of the ECtHR to give authoritative interpretations of the significance of a religious practice. Even if the practice is proven to have a discriminatory significance, it cannot be prohibited on this basis alone because such a prohibition violates the requirement of viewpoint neutrality of limitations of the freedom of expression and wearing of Islamic headscarves does

not imply a promotion of violence. Finally, the prohibition of Islamic headscarves for students cannot be justified as a measure against political extremism, because not everybody wearing Islamic headscarves is an extremist.

The decision of the ECtHR in the *Leyla Sahin* Case could be justified on the basis of protection of negative freedom of religion, if the religious climate in a country is proven to be so oppressive that a permission to wear Islamic headscarves amounts to strong and compelling social pressure to wear Islamic headscarves. However, the ECtHR in the *Leyla Sahin* Case only hinted at this logic and does not explain and substantiate its reasoning in this direction.

Section 3: Case Summaries and Commentaries

A. ECHR Case News: Admissibility Decisions and Communicated Cases

Prohibition of torture or inhuman & degrading treatment

Ceylan v Turkey

(50973/06, 8672/07 and 8722/07)

European Court of Human Rights: Partial admissibility decision 30 August 2007

Ill-treatment whilst in custody – ineffective investigation into allegations of ill-treatment – right to a fair trial – no legal representation – no release pending trial – lack of an adequate remedy – Articles 3, 5(3), 5(5), 6(1), 6(3)(b-d) and 13

Facts

Arrest, detention and trial

At the relevant time, the three applicants, who are Turkish nationals, were detained in various prisons in Turkey.

In April 1999, the applicants were arrested on suspicion of membership of an illegal organisation, namely the Communist Party of Turkey/ Marxist Leninist-Workers' and Peasants' Liberation Army of Turkey (TKP/ML-TİKKO). They were placed in custody at the anti-terrorist branch of the İstanbul Police Headquarters. Whilst the applicants were detained in police custody, statements were taken from them by police officers. No lawyer was present during their questioning.

The applicants were subsequently brought before the duty judge of the İstanbul State Security Court. The applicants were questioned and their statements were recorded. Again, their legal representatives were not present. The duty judge ordered their remand in custody pending the introduction of criminal proceedings against them.

On 3 June 1999 the Prosecutor at the İstanbul State Security Court filed an indictment charging the applicants with the offence of attempting to undermine the constitutional order under Article 146(1) of the Criminal Code in force at the time.

The first hearing took place on 25 August 1999. In the course of 12 subsequent hearings, the applicants' requests for release were rejected by the court on the basis of the 'nature of the offence of which they stood accused, the evidence in the file and the continuing risk of escape'. Further, the applicants' request to widen the scope of the investigation by, *inter alia*, hearing a number of witnesses was rejected by the court.

On 22 May 2002 the court convicted and sentenced the applicants to death, which was subsequently commuted to life imprisonment.

On 17 April 2003 the Court of Cassation quashed the judgment and ordered a re-trial. The trial is still continuing and the applicants' requests for release have all been rejected and they are still detained on remand.

Ill-treatment

One of the applicants, Haydar Ceylan, alleged that, in the course of his detention in police custody, he was deprived of food, blindfolded, kept in a dirty cell and subjected to ill-treatment.

A medical report held that there were a number of bruised areas and lesions on various parts of the applicant's face and body. In a statement made to the prosecutor on 25 April 1999, the applicant maintained that he had been subjected to intensive torture whilst in custody; in particular, he was suspended from his arms, doused with water and beaten up.

On 25 August 2003 two police officers, suspected of ill-treating the applicant, were indicted and charged with the offence of ill-treatment. However the court held that it did not have the jurisdiction to examine the case. On referral to the Istanbul Court of Assizes, the case had become time-barred.

Complaints

Relying on Articles 3 and 13 of the Convention, the applicants submitted that whilst in custody, they were subjected to torture and ill-treatment and that the court had delayed the examination of their allegations until the investigation had become time-barred.

With regard to Article 5(3) of the Convention, the applicants submitted that they were detained for over eight years on remand and were not released pending the trials. Further, relying on Article 5(5), the applicants complained that they

did not have an enforceable right to compensation for their excessively long detention.

Relying on Article 6(1) and 6(3) (b-d) the applicants submitted that their right to a fair trial was violated and that they were not afforded adequate facilities to prepare their defence and did not have access to a lawyer.

Finally, invoking Article 13 of the Convention, the applicants complained that they did not have an adequate remedy in relation to their complaints under Articles 5 and 6.

Held

The Court held that, in light of the similarity of the three applications, it would be appropriate to join them.

With regard to the complaints under Articles 3 and 13, 5(3) and 5(5) and 6(1) of the Convention, the Court held that it could not, on the basis of the case file, determine the admissibility of these complaints and that it was necessary, in accordance with Rule 54(2) (b) of the Rules of the Court, to give notice of it to the respondent Government.

With regard to Article 6(3)(b-d) of the Convention, the Court noted that the criminal proceedings against the applicants are still pending. As their complaints were considered to be premature, the Court held that this part of the application had to be rejected under Articles 35(1) and (4) of the Convention for non-exhaustion of domestic remedies.

In conclusion, the Court decided to adjourn the examination of the complaints concerning ill-treatment as well as the complaints concerning the applicants' rights to be released from custody pending trial, to take proceedings to challenge the lawfulness of their detention, to an enforceable right to compensation, to a fair hearing within a reasonable time and to an effective remedy in respect of the reasonable time complaint. It declared all other applications inadmissible.

Right to liberty and security

Çağlayan v Turkey

(30461/02)

European Court of Human Rights: Partial admissibility decision 30 August 2007

Ill-treatment whilst in custody – failure to investigate – right to a fair trial – harassment on account of trade union membership – financial loss - Articles 3, 6, 11 and 14.

Facts

The applicant, Erol Çağlayan, is a Turkish national and lives in Muğla, Turkey.

The applicant is a member of the Haber-Sen trade union, formed by public employees. He is also a member of the Confederation of Public Employees' Trade Union (KESK).

On 29 October 1997 the applicant was arrested and taken to the Anti-Terrorism Branch of the Muğla Security Directorate. During his police custody, he was allegedly beaten and threatened by the police officers. He was subsequently examined by a doctor who found the presence of 'hyperaemia' (increased blood in an organ or other body part) on both cheeks and another 'hyperaemia' on his back. The doctor concluded that the applicant was unfit for work for three days.

The applicant complained that he had been beaten while in police custody and filed a complaint against the police officers. The prosecutor lodged an indictment against six police officers accusing them of ill-treatment under Article 245 of the Criminal Code. The court stayed the proceedings against the officers and subsequently decided not to authorise the prosecution. On appeal, the court suspended the proceedings against the officers.

On 4 November 1997 the prosecutor initiated criminal proceedings against the applicant, accusing him under Article 266 of the Criminal Code for resisting police officers on duty and insulting them. On 18 November the applicant was released pending trial and was subsequently acquitted due to insufficient evidence.

On 17 June 2000 the applicant was once again taken into custody for insulting and resisting police officers. Proceedings were initiated and on 12 March 2003 the applicant was found convicted and sentenced to one month and twenty days' imprisonment and a fine. On appeal the applicant's sentence was suspended. A further appeal is pending before the Court of Cassation.

On 15 November 2000 the applicant brought an action requesting pecuniary and non-pecuniary compensation for unjustified detention on remand. The court awarded the applicant non-pecuniary compensation but rejected the claim for pecuniary damage as the applicant had not been dismissed from his job whilst in detention. On appeal the judgment was upheld.

On 13 January 1999 the applicant, who had been working as a postman, passed an exam to obtain a post as civil servant at the Directorate General of Post, Telegraph and Telephone (PTT). Although he was successful, he was not appointed to a new post. He initiated proceedings contesting that decision and succeeded. He was appointed to a new post. The applicant again initiated proceedings requesting the payment of his monthly salaries and related monetary entitlements for the period during which he had been entitled to assume his duties. The court ruled in the applicant's favour and he was awarded pecuniary compensation.

Complaints

The applicant complained in respect of the five proceedings set out above:

- a) Whilst he was in custody he was subjected to ill-treatment and there had been no effective investigation into his allegations, in violation of Article 3 in conjunction with Article 14 of the Convention;
- b) He did not have a fair trial within the meaning of Article 6 of the Convention;
- c) He was harassed on account of his trade union membership in violation of Article 11 of the Convention;
- d) Without relying specifically on any particular article, he claimed that he suffered financial loss due to the refusal of the authorities to appoint him to a new post.

Held

Article 3 in conjunction with Article 14

The Court held that the applicant's allegation of ill-treatment should be examined on the basis of Article 3 alone, without any reference to Article 14. It found that it could not, on the basis of the case file alone, determine the admissibility of this complaint and that it was therefore necessary, in accordance with Rule 54(2)

of the Rules of the Court, to give notice of this part of the application to the Government.

Article 6

The Court recalled that it is not its task to act as a court of appeal for domestic decisions. It observed that the decisions of the national courts were given on the basis of domestic law and that there was no evidence to suggest that these had acted in an arbitrary or unreasonable manner.

Accordingly, the Court found that there was no appearance of a violation of Article 6(1) of the Convention and therefore that part of the application should be rejected as being manifestly ill-founded pursuant to Article 35(3) and (4) of the Convention.

With regard to the applicant's complaints about the fairness of the two criminal proceedings, the Court found that, any alleged unfairness in his trial must be considered to have been rectified by his acquittal. As a result, he can no longer be a victim of the alleged violation. It therefore rejected this complaint as manifestly ill-founded.

As to the proceedings that are still pending before the Court of Cassation, the Court held that this part of the application was premature and therefore should be rejected for non-exhaustion of domestic remedies within meaning of Article 35(1) and (4) of the Convention.

Article 11

The Court observed that none of the proceedings brought against the applicant concerned his trade union membership. There was nothing in the case file to support the applicant's allegations in this respect. Accordingly, the Court found that the applicant's complaint under Article 11 was unsubstantiated and rejected it as being manifestly ill-founded.

Financial loss

The Court found that the applicant's complaint should be examined from the standpoint of Article 1 Protocol 1. The Court held that, as the applicant was awarded non-pecuniary compensation there was no appearance of any violation of Article 1 of Protocol 1 of the Convention and thus the application was rejected as being manifestly ill-founded.

In conclusion, the Court unanimously decided to adjourn the examination of the applicant's complaints under Article 3 of the Convention and declared the remainder of the application inadmissible.

Baizi v Turkey

(7306/02)

European Court of Human Rights: Partial admissibility decision 30 August 2007

Ill-treatment in detention – unlawful arrest – failure to inform the defendant of the charges against him – right to a fair trial - Articles 3, 5(2) and 6(3)

Facts

The applicant, Ebrahim Baizi, is an Iranian national and lives in İzmir, Turkey.

On 12 September 2001, the applicant was arrested by officers of the Anti-Terrorism Division on suspicion of being a member of the PKK. He was placed in detention on remand with 14 other persons. The applicant signed the record of arrest and, on the following day, made a statement.

On 17 September 2001 the applicant was examined by a doctor. The medical report revealed that there were no injuries on the applicant's body. On the same day, the applicant appeared before the court in İzmir and rejected the accusations made against him, stating that he had made a statement detailing his version of events and the ill-treatment he had been subjected to whilst on remand. He requested to speak in Persian as this was his mother-tongue.

The applicant was subsequently indicted for being a member of the PKK pursuant to Article 168(2) of the Penal Code.

On 12 December 2002 the applicant was convicted and sentenced to twelve years' imprisonment. On the appeal, the sentence was reduced to six years and three months' imprisonment.

Complaints

Relying on Article 3 of the Convention, the applicant complained of ill-treatment whilst in detention. He alleged that he was electrocuted, beaten, insulted and forced to undress and hosed with freezing water.

The applicant complained that his arrest was unlawful and lengthy; he was not informed of the charges brought against him and he was denied the right to express himself in Persian amounting to a violation of Article 5(2) and 6(3) of the Convention.

Held

Article 3

The Court found that the applicant provided no evidence or explanation in support of his allegations of ill-treatment whilst in custody. Moreover, the applicant failed to exhaust domestic remedies with regard to his allegations for the ill-treatment.

Accordingly, the Court held that the applicant did not have a tenable complaint under Article 3 of the Convention. In the light of the foregoing, the Court found that this part of the application should be rejected as being manifestly ill-founded, pursuant to Article 35 (3) and (4) of the Convention

Articles 5(2) and 6(3)

The Court observed that the applicant signed the record of arrest and that he requested to speak in Persian before the Prosecutor and the Judge. The Court found that the applicant had a sufficient grasp of the Turkish language to understand the charges against him, which is evidence by the fact that he did not request an interpreter whilst on remand. Furthermore, during the hearing he benefited from a Persian translator and there is no evidence to suggest that this translation was not satisfactory.

Accordingly, the Court held that this part of the application should be rejected as being manifestly ill-founded, pursuant to Article 35(3) and (4) of the Convention.

In conclusion, the Court adjourned the examination of the applicant's complaint under Article 5(3) as to the length of his detention on remand and declared the remainder of the application inadmissible.

Right to a fair trial

Amiryan v Armenia (N.2)

(18516/05)

European Court of Human Rights: Communicated 17 July 2007 *

Unlawful detention - right to a fair trial – discrimination on the basis of political affiliation – lack of effective remedy - Articles 5(1), (2), (4), 6(1), (3)(a)-(d), 10, 11, 13, 14 and Article 3 of Protocol 1 of the Convention.

Facts

This is a KHRP assisted case. The applicant is an Armenian national living in Ashtarak, Armenia.

The applicant is a member of the Yerkrpah Voluntary Union (YVU), an NGO for Nagorno-Karabakh war veterans.

In 2003 the applicant won the presidential election and in 2004 he took part in a series of demonstrations, organised by the political opposition, calling for President Kocharyan's resignation.

The applicant alleges that, during this period, he was asked to attend a police station on several occasions where he was told by the Chief of the Police that it was not appropriate for a member of the YVU to show support for the opposition.

According to the applicant, in April 2004 police officer visited the applicant at work and asked him to follow them to the police station. Once at the Police Department, the applicant was told that he would be detained for three days as a result of his participation in the demonstrations. He was asked to write a public statement admitting that he had committed a public order offence by using offensive language in a public place. The applicant refused and instead drafted a statement stating his version of events, followed by a denial of the offences in question.

The police officers subsequently drew up a record of the applicant's arrest at the Police Station. They further drew up a record of administrative offences, namely that the applicant had used foul language and maliciously hindered the police officers from performing their duties. The applicant refused to sign these records.

At the applicant's hearing, he refused to admit the charges against him and presented his version of events, including the fact that he was arrested at work. According to the applicant, the hearing lasted about ten minutes.

The applicant was sentenced to a fine. The judge did not provide any reasoning for the judgment.

Complaints

The applicant complained under Article 5(1) of the Convention that he was arrested without having committed an offence and was kept in police custody for two hours before being taken into court. Moreover, his arrest was unlawful and arbitrary as it was carried out with the sole purpose of preventing the applicant from participating in demonstrations of the opposition and not as a result of a public order offence.

Relying on Article 5(2) the applicant complained that he was not informed of the legal and factual nature of his arrest; he was asked to sign a pre-prepared statement, which did not correspond to the true version of events.

The applicant complained under Article 5(4) that the hearing was not truly adversarial.

The applicant submitted under Article 6 that he was denied a fair and public hearing because of the manner in which the trial was conducted; the authorities failed to adequately inform him of the nature and cause of the charges against him; and he was denied access to a lawyer and the opportunity to call witnesses.

Relying on Articles 10 and 11 and Article 3 of Protocol 1 of the Convention, the applicant complained that the administrative sanction was imposed on him as a result of his participation in the demonstrations and therefore encroached on his rights.

The applicant complained that under Article 13 of the Convention no effective remedy was available to him under the provisions of the Code of Administrative Offences.

Finally, the applicant submitted that he was subjected to discriminatory treatment in violation of Article 14 of the Convention.

Communicated under Articles 5(1), (2), (4), 6(1), (3) (a)-(d), 10, 11, 13, 14 and Article 3 of Protocol 1 of the Convention. **

* The applicant has subsequently decided to withdraw the case.

Private & family life

Ponomaryov v Bulgaria

(5335/05)

European Court of Human Rights: Partial admissibility decision 18 September 2007

Articles 6, 8, 13, 14, 34, Article 1 of Protocol 1, Article 2 of Protocol 1, Article 1 of Protocol 7 and Article 2 of Protocol 4.

Facts

The three applicants are Russian nationals and live in Bulgaria.

Before 1994, the first and second applicants' parents divorced and their mother re-married a Bulgarian citizen. The applicants were granted permanent residence permits in Bulgaria on the basis of their mother's permit.

Permanent residence

After the first applicant turned 18, he applied for a Bulgarian personal identity card as, having attained legal age, the permit based on that of his mother was no longer valid. He was told that there were several procedures to comply with, including a fee of EUR 53 and that his failure to pay the fee would constitute grounds for barring the procedure. The first applicant applied for a permit but failed to pay the fee which resulted in the procedure being discontinued.

The first applicant lodged a petition on the grounds that the fee was discriminatory. The court dismissed the petition as Bulgarian law provided that every person who was not a Bulgarian citizen was an alien and as such had to pay the full amount of the fees.

Schooling fees

In 2005 the authorities enquired as to whether the first applicant had paid the schooling fees due by him as an alien without residence permit, and if not, whether measures had been taken to collect them.

The school subsequently ordered the first applicant to pay EUR 800 for schooling fees, failing which he would be barred from attending classes and would not be issued a certificate for having completed the respective school year. The first applicant sought judicial review of this decision. The court partly quashed and partly upheld the order. It found that there was no indication that the first applicant had a permanent residence permit, therefore he had to pay the fee in order to continue his studies. However, he should still be issued a certificate for having completed the respective school year. On appeal the judgment was upheld.

Judicial review for the Minister's fee-setting decision

The first applicant sought judicial review of the Minister's decision on tuition fees for aliens arguing that it was discriminatory and contrary to Article 14 of the Convention as education should be free of charge for everyone.

The court dismissed the application for judicial review on the ground that Article 14 did not prohibit discrimination on grounds of citizenship and differential treatment was allowed if provided by statute or an international treaty. The judgment was upheld on appeal.

Second applicant's schooling fees and ensuing proceedings for judicial review

The arguments made by the parties and the courts' findings were the same as those in the case of the first applicant.

Fine imposed on the first applicant

On 14 November 2005 the applicant was charged with residing in Bulgaria without a valid permit. A penal order was made against him and he was found guilty of the regulatory offence of remaining in the country after the expiry of his authorised stay. He was fined 500 Bulgarian leva (BGN).

The first applicant appealed on the ground that the immigration authorities had not specified when his authorised stay had expired. On appeal, the fine was quashed. The immigration authorities again appealed the decision and the court upheld the fine on the basis that the evidence showed that the applicant was aware of the illegality of his stay.

In 2006 the first and second applicants were informed that they had been granted permanent residence permits. They paid the required fees.

Third applicant

The third applicant was unable to pay the fees for obtaining a permanent residence permit upon turning 18 years of age. As a result, her stay in Bulgaria was unlawful. It is unclear whether she had obtained a residence permit. She completed her secondary studies and had to pay a fee to obtain her diploma. She subsequently attempted to enrol in a university however the tuition fees for aliens were too high preventing her from registering.

Complaints

In their first application to the Court, the applicants raised the following complaints:

- A) By reason of high fees, which the applicants could not afford to pay, they could not obtain a permanent residence permit after they turned 18 and this amounted to a disproportionate interference with their right to private and family life in violation of Article 8 of the Convention. Moreover, fixing the amount of the fees the was discriminatory and thus in breach of Article of 14 of the Convention;
- B) In violation of Article 13 of the Convention, there were no effective remedies available to the applicants;
- C) The different fees for obtaining permanent residence permits due by them and by aliens of Bulgarian origin was discriminatory in violation of Article 14 of the Convention;
- D) In violation of Article 2 of Protocol No. 1, not having obtained residence permits meant that they could not continue their education and receive their diplomas unless they paid the requisite school fees;
- E) As a result of their inability to obtain residence permits, they could be expelled from Bulgaria which amounted to a violation of Article 1 of Protocol No. 7;
- F) As a result of not having permanent residence permits, they could not move freely on the territory of Bulgaria which amounted to a violation of Article 2 of Protocol No. 4;
- G) The lack of fairness in the proceedings and, in particular, the failure of the court to provide full and proper reasons for their decisions was in violation of Article 6 of the Convention;

In a 2007 the first applicant raised the following further complaints:

- a) Under Article 6 of the Convention, the courts which had imposed a fine on him had not taken into account his arguments and the charges against him had not been particularised;
- b) The aforementioned fine, amounted an interference of his rights under Article 8 and it was based on a law that was not sufficiently precise. He also relied on Articles 13, 14 and Article 2 of Protocol No. 4 of the Convention.

Held

Article 8 in conjunction with Article 14

The Court held that it could not, on the basis of the case file, determine the admissibility of this part of the application and that it was therefore necessary, in accordance with Rule 54(2)(b) of the Rules of the Court, to give notice of it to the respondent Government.

Article 13

The Court held that according to its settled case-law, Article 13 does not go so far as to guarantee a remedy allowing domestic laws to be challenged before a national authority on the ground of being contrary to the Convention. Accordingly, it found the complaint to be manifestly ill-founded and rejected it in accordance with Article 35(3) of the Convention.

Article 14

The Court noted that a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification. It observed that the applicants, who were not aliens of Bulgarian origin, had to pay the full amount of the fee for obtaining a permanent residence permit as all others in their situation. Conversely, aliens of Bulgarian origin and Bulgarians living abroad had to pay 0.5 percent of that amount. This was aimed at making it easier for those with particularly strong ties with Bulgaria to settle and remain in the country, thus pursuing a legitimate aim.

With regards to the proportionality of the measure, the Court held that although the difference was considerable, there is a social reason for giving special treatment to those who have a special link with a country and was therefore reasonable.

Accordingly, the Court held that the complaint under Article 14 of the Convention was manifestly ill-founded.

Article 2 of Protocol No. 1

The Court held that it could not, on the basis of the case file, determine the admissibility of this part of the application and that it was therefore necessary to give notice of it to the respondent Government.

Article 1 of Protocol No. 7

The Court held that no action was taken to expel the applicants from Bulgaria and accordingly rejected this complaint as being incompatible *ratione materiae* with the provisions of the Convention.

Article 2 of Protocol No. 4

The Court found that it had not been shown that the applicants had been prevented from travelling around Bulgaria. Accordingly, it rejected this complaint as being manifestly ill-founded.

Article 6(1)

The Court rejected this complaint as being incompatible *ratione materiae* with the provisions of the Convention. It states that Article 6 does not apply to proceedings where the applicants seek to invalidate a piece of primary or secondary legislation.

Remainder of complaints

The Court found that these did not disclose any appearance of a violation of the rights set out in the Convention or the Protocols.

Freedom of expression

Allahverdiyev v Azerbaijan

(36083/05)

European Court of Human Rights: Communicated 17 July 2007

Ill-treatment in detention – organising public disorder – lengthy criminal proceedings - Articles 3, 5(1), 6(1), 9, 10

Facts

The applicant, Ilgar Allahverdiyev, is an Azerbaijani national and lives in Baku, Azerbaijan.

The applicant was a chairman of several non-governmental organisations dealing with issues concerning civil society and freedom of religion. He was also chief editor of a magazine and information portal, and a religious leader of a group of Muslims. During the presidential elections on 15 October 2003, he publicly supported the leading opposition candidate representing the election block *Bizim Azerbaijan*.

After the elections, there were concerns that the elections failed to meet generally accepted international standards. As a result, a number of opposition supporters held an unauthorised public demonstration protesting the results of the elections ending with public disorder and violent clashes between the crowd and the police. The applicant was present at the protest but he left before the eruption of violence and observed from a distance.

The following day, the applicant was leading a public prayer when a number of policemen surrounded the mosque with the intention to arrest the applicant. The applicant managed to avoid the arrest with the aid of some members of the international community, including representatives of the OSCE, Council of Europe and embassies. The applicant was later accompanied to the Norwegian Embassy where he stayed for three days.

On leaving the Norwegian Embassy, the applicant received the guarantee that no unlawful actions would be taken against him. He subsequently visited Georgia where he learned that reporters were stating that '[having] committed a crime, [he] fled the country'.

In Azerbaijan, the applicant was charged with 'organising public disorder' and 'use of violence against state officials' and the court ordered his detention on remand for three months.

During the first three days of detention, the applicant was kept in a cold single cell where he had to sleep on a metal bed without a mattress. He was thereafter transferred to a cell which had previously been used for convicts awaiting execution of their death sentence.

On 2 April 2004 the applicant was convicted and conditionally sentenced to five years' imprisonment. He was released. On appeal, in the applicant's absence, the judgment was upheld. The Supreme Court dismissed the applicant's appeal to the Court of Cassation.

Complaints

Relying on Article 3, the applicant complained that his conditions of detention amounted to ill-treatment under Article 3 of the Convention. His arrest and pre-trial detention had not been lawful and based on a reasonable suspicion, violating Article 5(1) of the Convention. Further, relying on Article 6, the applicant submitted that the length of the criminal proceedings had not been reasonable and that the courts admitted evidence without giving him the opportunity to test the evidence. Finally, the applicant complained that he had been persecuted with the aim of suppressing his freedom of thought and expression in violation of Articles 9 and 10 of the Convention.

Communicated under Articles 3, 5(1), 6(1), 9(1) and 10(1) of the Convention.

Right to enjoy property

Sargsyan v Azerbaijan

(40167/06)

European Court of Human Rights: Communicated 06 July 2007

Military attacks of villages – forced displacement - right to peaceful enjoyment of possessions – respect for private and family life - Articles 3, 8, 9, 13, 14 and Article 1 Protocol 1 of the Convention.

Facts

The applicant, Minas Sargsyan, is an ethnic Armenian.

The Nagorno-Karabakh Autonomous Oblast (NKAO) was, prior to the dissolution of the USSR, an autonomous province of the Azerbaijan Soviet Socialist Republic (Azerbaijan SSR). In 1989 the population of NKAO was approximately 75 percent ethnic Armenian and 25 percent ethnic Azeri. There was no common border between NKAO and the Armenian Soviet Socialist Republic (Armenian SSR), which were separated by the Azerbaijani region of Lachin.

The Armenian-Azerbaijani conflict over Nagorno-Karabakh escalated into a full-scale war by 1992 resulting in hundreds of thousands of internally displaced persons and refugees on both sides.

The applicant and his family lived in the village of Gulistan of the Shahumyan region of the Azerbaijan SSR in a two-floor house with auxiliary premises. According to the applicant, prior to the conflict, 82 percent of the population of Shahumyan were ethnic Armenians.

In 1991 military operations took place in the region of Shahumyan. The official purpose of the operation was 'passport checking' and disarming local Armenian militants in the region. However, according to various sources, the official purpose was merely a pretext for the government forces to deport the Armenian population of a number of villages in the region, forcing them to leave their homes and to flee to Nagorno-Karabakh or Armenia. The applicants remained in the village after the operation was aborted; hence it is not clear whether the village of Gulistan was affected by the military operations.

Gulistan did however come under attack by the Azerbaijani forces in 1992 and the the entire village to flee, including the applicant whose house was destroyed.

According to the applicant, many Armenian cemeteries in Azerbaijan have been vandalised, damaged or destroyed. In 2003 the Mayor of Baku announced a plan to rebuild a road across a part of the old cemetery in Baku which, inter alia, contained the graves of many ethnic Armenians. The graves affected by this plan would be relocated. Many contended that the Armenian refugees who had fled Baku would not be able to authorise the reburial of the deceased. Furthermore, there were reports alleging that as of 2002, an ancient Armenian cemetery in the region of Julfa in Azerbaijan, would be demolished.

The applicants were not given any information as to the graves of their loved ones.

Complaints

Relying on Article 1 of Protocol No.1, the applicant complained that the destruction of his house and his eviction from his property were in violation of his right to peaceful enjoyment of his possessions. He contended that he remained the rightful owner of the house from which he was evicted as he was unaware of any decision by the Azerbaijani court annulling his right over the property.

The applicant complained that, under Article 8 of the Convention, his rights to respect for private and family life and his home were violated due to his forced displacement and the continual refusal by the Government to allow him access

to his property. Moreover, the Government failed to comply with its positive obligations under Article 8.

The applicant submitted that the demolition or vandalism of Armenian cemeteries in Azerbaijan violated his rights under Articles 3, 8 and 9 of the Convention.

The applicant complained under Article 13 of the Convention that in conjunction with other complaints, there were no effective remedies available to ethnic Armenians who were forced to leave their homes in Azerbaijan.

Finally, relying of Article 14 of the Convention in conjunction with other complaints, the applicant submitted that he had been subjected to discrimination on the basis of his religious and ethnic affiliation.

Communicated under Articles 3, 8, 9, 13, 14 and Article 1 Protocol 1 of the Convention.

Poghosyan and others v Armenia
(3310/06)

European Court of Human Rights: Communicated 3 September 2007

Expropriation – right to property - Articles 6, 8 and Article 1, Protocol 1 of the Convention.

Facts

The four applicants are Armenian nationals and jointly owned a flat in Yerevan, Armenia.

On 1 August 2002 the Government adopted a decree approving the expropriation zones of the real estate situated within the administrative boundaries of the Kentron District of Yerevan to be taken for State needs. The street on which the applicants lived was listed as one of those falling within such expropriation zones.

On 17 June 2004 the Government adopted another decree contracting out the construction of one of the sections of the street to 'Vizkon Ltd'.

On 1 October 2004, Vizkon Ltd and the Yerevan Mayor's Office signed an agreement which authorised Vizkon to negotiate directly with the owners of the property subject to expropriation and, should negotiations fail, to institute court proceedings on behalf of the State seeking forcible expropriation of such property.

According to the applicant, Vizkon Ltd unsuccessfully attempted to organise an assessment of the applicant's property in order to offer them compensation for the purpose of expropriation.

On 25 January 2005 Vizkon Ltd informed the first applicant that his house was situated within the expropriation zone and was to be taken for State needs and requested the applicant to provide a valuation of his property.

The first applicant refused the valuation and Vizkon Ltd instituted proceedings on behalf of the State, seeking to oblige him to do so and sign an agreement for the expropriation of the property, evicting the first applicant and his family. The applicant's house was subsequently valued at USD 13,900.

Subsequently, Vizkon Ltd instituted further proceedings against all the applicants seeking to oblige them to sign an agreement on the taking of their property for State needs and to evict them. The District Court of Yerevan granted their claim.

The applicants' appeal and cassation appeal were dismissed.

Complaints

Relying on Articles 6 and 8 of the Convention and Article 1 of Protocol No.1 the applicants complained that the expropriation was in violation of their right to property.

Communicated under Articles 6, 8 and Article 1 of Protocol No.1 of the Convention.

B. Substantive ECHR Cases

Right to life

Akhmadova and Sadulayeva v Russia

(40464/02)

European Court of Human Rights: Judgment dated 10 May 2007

Disappearance and death after being detained by Russian servicemen in Chechnya - Articles 2, 3, 5, 6 and 13 ECHR

Facts

The applicants, Ms Tamusa Akhmadova and Ms Larisa Sadulayeva, are residents of Argun, Chechnya. At present they live in Ingushetia. The first applicant's son, Shamil Akhmadov, married the second applicant in 1992.

On 12 March 2001 Shamil Akhmadova was detained by military servicemen as a result of a "mopping-up" operation in Argun. That month a total of 170 people were detained in Argun, within several days most were released without charge. However eleven men including Shamil Akhmadova remained in detention.

The Government submitted that in 2001 Shamil Akhmadova had been charged with possession of illegal drugs without the intention to sell, but was a fugitive from justice.

Immediately after his detention, the applicants began a search for Mr Akhmadova with the relatives of the other ten men who had "disappeared". On numerous occasions, appeals were made to the prosecutors of various levels. In spite of this the applicants received very little substantive information from the authorities about the investigation. A record was kept of these communications however in early 2002 the first applicant's house was raided by soldiers who took these records away. This was part of constant pressure and harassment that the applicants were subjected to by the military.

Shortly after the "mopping-up" operation, four bodies were discovered on the edge of the Russian main military base in Khankala. These men were later identified as four of the eleven missing persons who had been detained on 12 March 2001. On 23 March 2001 the Argun District Prosecutor's Office opened a criminal investigation into the abduction of several persons. However this

was suspended by the military prosecutor on 21 March 2002 due to a failure to identify those responsible.

In late April 2002 Shamil Akhmadova's body was discovered by local residents in a field outside Argun. An examination of the body showed that Mr Akhmadova's death had been caused by violence, estimated at having occurred in March 2001.

On 23 May 2002 the military prosecutor resumed the investigation into Mr Akhmadova's abduction. However, the investigation was suspended owing to an inability to identify the culprits.

In December 2003 the case was communicated to the Russian Government by the European Court of Human Rights, who was requested to submit a copy of the investigation file. In May 2004 the Government responded that they could not provide copies of the file because the case was still under investigation. On 13 October 2005 the application was declared admissible. The Government presented several documents mostly consisting of procedural decisions and an outline of the investigation. They stated that the submission of further documents was impossible because it contained State secrets.

In November 2005 the investigation into Mr Akhmadova's kidnapping was still ongoing at the Chechnya Prosecutor's Office.

Complaints

The Russian Government requested the Court to declare the case inadmissible as the applicants had failed to exhaust domestic remedies. It submitted that the investigation was continuing and an examination of the complaint by the Court would be premature. The applicants disagreed arguing that potential domestic remedies in their case were inadequate, ineffective and illusory.

The applicants complained, under Article 2 of the Convention, that Shamil had been unlawfully killed by agents of the State. In support of this they referred to the fact that a large scale "sweeping" operation had taken place in Argun on 12 March 2001, as a result of which more than a hundred persons were detained, and eleven "disappeared", none of which was challenged by the Government.

The applicants also submitted that, under Article 2, the authorities had failed to carry out an effective and adequate investigation into the circumstances of

Shamil Akhmadova's apprehension and death. They indicated the passage of time, more than five years, without any known results.

The applicants claimed that the anguish and emotional distress that they had suffered fell within the scope of Article 3.

It was further submitted by the applicants that Shamil Akhmadova had been subjected to unacknowledged detention, in violation of Article 5. The Government stressed that the investigation had failed to establish that Mr Akhmadova had been detained by law-enforcement bodies.

The applicants submitted that they had been denied effective access to a court. They submitted that a civil claim for damages would have depended on the outcome of the criminal investigation. In the absence of any findings by the investigators, they had been unable to make a claim for damages.

The applicants complained that they had been denied an effective remedy in respect of the violations alleged under Articles 2, 3 and 5 of the Convention, contrary to Article 13.

The second applicant complained that she had been subjected to harassment in reprisal for her application to the Court, in contravention of Article 34 of the Convention. Article 34 and 38(1) (a) were also complained to have been breached as the Government failed to furnish the Court with the required documents, hindering the individual application process.

Damages were claimed by the applicants under Article 41 of the Convention. This was in respect of Mr Akhmadova's lost wages from the time of his arrest and subsequent disappearance. It was submitted that it was reasonable to suppose that he earned at least the official minimum wage until the life expectancy age for men in Russia.

Held

The Court unanimously dismissed the Government's preliminary objection on the basis that the applicants were not obliged to pursue a civil action as it would not resolve the issue of effective remedies in the context of claims brought under Article 2 of the Convention. Further a civil court would be unable to pursue

** Note: On 10 September 2007 the case of *Gasparyan v Armenia* (Application n. 22571/05), also a KHRP assisted case with similar facts, was communicated under Articles 5(1), (2), (4), 6(1), (3)(a)-(d), 11, 13 and 14 of the Convention on similar grounds.

any independent investigation and would be incapable, without the benefit of the conclusions of a criminal investigation, to make any meaningful findings regarding the identity of the perpetrators of fatal assaults; nor could it establish their responsibility. As regards criminal-law remedies, the Court observed that an investigation has been pending since March 2001.

The Court held unanimously that there had been a violation of Article 2 of the Convention in respect of Shamil Akhmadova. The Court stated that it was prevented from reaching factual conclusions because of the lack of documents, which were exclusively in the Government's possession. Subsequently it was for the Government to argue conclusively why the documents in question could not provide a satisfactory and convincing explanation of how the events in question occurred. The Court found that it was proved "beyond reasonable doubt" that Mr Akhmadova was apprehended as part of a special security operation carried out by State. The Court held that the incidents were part of a single sequence of events and this supported the assumption that Mr Akhmadova and the ten other men were extra-judicially executed by State agents.

The Court held that there had been a violation of Article 2 of the Convention in respect of the failure to conduct an effective investigation into the circumstances in which Shamil Akhmadova died. The Court found that in cases of abduction, a delay of eleven days before initiating an investigation was likely to seriously affect the effectiveness of the investigation. In fact the crucial elements of an investigation were not carried out until years later. Such delays and omissions therefore severely compromised the effectiveness of the investigation. The Court also dismissed the Government's preliminary objection regarding the applicants' failure to exhaust domestic remedies within the context of the criminal investigation on this basis.

The Court found that there had also been a violation of Article 3 of the Convention in respect of both applicants. They suffered distress and anguish as a result of the disappearance of their son and husband and their inability to find out what had happened to Shamil Akhmadova or to receive up-to-date information about the investigation. The manner in which their complaints had been dealt with by the authorities was considered to constitute inhuman treatment within the meaning of Article 3.

In addition a violation of Article 5 of the Convention was found in respect of Shamil Akhmadova. The Court concluded that Mr Akhmadova was a victim of unacknowledged detention, as the Government did not provide any explanation

or any documents of substance in support of the domestic investigation into his detention. This constituted a grave violation of the right to liberty and security enshrined in Article 5 of the Convention.

The Court however held that there were no separate issues under Article 6 of the Convention because the applicants submitted no information to prove their alleged intention to apply to a domestic court to claim compensation.

The applicants were not able to avail themselves of effective and practical remedies capable of leading to the identification and punishment of those responsible or to an award of compensation, for the purposes of Article 13. Therefore a violation of Article 13 was found in respect of the alleged violations of Articles 2 and 3 of the Convention. The Court however held that no separate issues arose in respect of Article 13 read in conjunction with Article 5 of the Convention, which itself contains a number of procedural guarantees related to the lawfulness of detention.

The Court held that it did not have sufficient material before it to conclude that the respondent Government had violated its obligations under Article 34 of the Convention by putting undue pressure on the second applicant in order to dissuade her from pursuing her application to the Court.

The Court did however find that there was a failure to comply with Article 38(1) of the Convention in that the Government refused to submit documents requested by the Court without a satisfactory explanation. Having regard to the importance of cooperation by the respondent Government and the difficulties associated with the establishment of the facts, the Court found that the Russian Government fell short of its obligations under Article 38(1).

The applicants were jointly awarded EUR 15,000 in respect of pecuniary damage, as there was a direct causal link between the violation of Article 2 in respect of the applicants' son and husband and the loss by the applicants of the financial support which he could have provided. The Court awarded each of the applicants EUR 20,000, for non-pecuniary loss for the emotional distress and anguish they endured. Costs and expenses were also awarded to the sum of EUR 7,285.

Kamil Uzun v Turkey

(37410/97)

European Court of Human Rights: Judgment dated 10 May 2007

Right to life – Failure to investigate – Abuse of authority - Articles 2, 6, 8 and 13 of the Convention and Article 1 of Protocol 1

Facts

This is a KHRP assisted case. The applicant, Kamil Uzun, was born in 1964 and lives in Frankfurt, Germany. At the material time, the applicant's parents lived in the town of Yayladere, Hasköy, Turkey, situated in the region where a state of emergency had been declared and where serious clashes between the security forces and the members of the PKK were widespread.

On the 16 September 1994, a mortar shell landed on the applicant's parents' house killing Mrs Uzun, the applicant's mother. That morning, the applicant's father lodged a complaint with the local police. The gendarmes investigated the scene of the accident but witnesses subsequently stated that they had they had seen, inter alia, pieces of the mortar shell being taken away. The officer in charge denied being responsible for the blast and authorised the immediate burial of Mrs Uzun without an autopsy. The victim's body was exhumed for an autopsy only in 1996.

In December 1994, the applicant lodged a complaint with the ECHR from İstanbul. The Kiğı Prosecutor charged two gendarmes with abuse of authority, in particular for having failed to transmit Mr Uzun's complaints to the public prosecutor, for having precipitated the burial of the body before an autopsy could be performed and for the disappearance of potential evidence, namely the shrapnel.

This decision was confirmed in 1999 by the appeal court in Yayladere, which convicted the gendarmes for misuse of authority and perverting the course of justice. However, there was a stay on the execution of their sentence. The Turkish government was asked to pursue an investigation into the death of Mrs Uzun. No developments have been advanced to date on the identity of those responsible for Mrs Uzun's death.

Complaints

The applicant submitted that the Turkish military had been responsible for the mortar fire that killed his mother and threatened the life of his father. He claimed violation of Articles 2, 6, 8 and 13 of the Convention and Article 1 of Protocol 1.

Held

The Court accepted that the origin and context of the mortar fire gave rise to doubts. However, the allegation that Mrs Uzun had been the victim of an intentional fire or of an error on the part of the local gendarmerie could not be merely rooted in a dubious presumption. Accordingly, the Court found that, despite its doubts, the evidence before it did not allow it to conclude, beyond reasonable doubt, that the applicant's mother had been killed by members of the armed forces.

The Court observed that in the initial stages of the investigation, there had been an overlap between the members of the gendarmerie that were presumed to be responsible for the incident and those that were conducting the investigation. This conduct resulted in the investigation being removed from public and judicial scrutiny and prevented those responsible from being identified and called in to account.

The Court noted that, more than 12 years after the incident, the investigation had made no progress. Furthermore, the Court found that the Government had provided no concrete information on the status of the investigation, confirming the atmosphere of impunity and insecurity.

Accordingly, the Court unanimously held that there had been a procedural violation of Article 2 of the Convention as the Turkish Government failed to protect the life of Mrs Uzun and failed to find those responsible for her death.

The Court awarded the applicant EUR 20,000 non-pecuniary damage (EUR 5,000 to the applicant and EUR 15,000 to the victim) and EUR 5,000 for costs and expenses.

Canan v Turkey

(39436/98)

European Court of Human Rights: Judgment dated 26 June 2007

Military operations – right to life – Articles 2, 3 and 5

Facts

The applicant, Vehap Canan, is a Turkish national and lives in Hakkari, Turkey. At the relevant time, his father, Abdullah Canan, was a well-known businessman in Yüksekova, Turkey. He died at the age of 43.

On 27 October and 23 November 1995, two military operations were carried out by members of the Mountain and Commando Battalion in the village of Ağaçlı and Karlı, next to the Yüksekova district. Three people were reported missing after the first military operation.

The applicant and seven members of this family lodged a criminal complaint against the battalion commander, Mehmet Emin Yurdakul, alleging that their homes and household effects had been deliberately damaged during the second military operation. According to the applicant, his father was subsequently put under pressure to withdraw the complaint.

According to the applicant, on 17 January 1996 in the course of an inspection on the road between Yüksekova and Van, his father was arrested by soldiers linked to the battalion led by Mehmet Emin Yurdakul. His father was driven away in a military vehicle and taken into custody at the battalion headquarters. The applicant and his relatives attempted to seek information from the authorities regarding Abdullah Canan's whereabouts, but their requests were not dealt with. The family proceeded to lodge a criminal complaint.

On 21 February 1996, Abdullah Canan's body was found, bound and gagged, beside the Esendere Road. The autopsy revealed that there were seven bullet entry holes on the body. The forensic examiner concluded that the shots had been fired at a very close range and the marks on the fingers and wrists showed that the deceased had been bound by the wrists for some time.

Three people were accused of the death of Abdullah Canan. On 12 November 1999, the Court acquitted the men, referring to two other lines of inquiry that were to be explored in order to clarify the circumstances of the killing, namely

terrorism and intertribal conflict. The Court ordered a separate investigation in respect of Mehmet Emin Yurdakul for abuse of authority and restriction of personal freedom. The case was discontinued in May 2001 as the prosecution of the offences had become time-barred.

Complaints

Relying on Articles 2, 3 and 5 of the Convention, the applicant submitted that his father had been the victim of an extra-judicial execution.

Held

Articles 2 & 3

The Court noted that certain witness statements supported the applicant's assertion that his father had been arrested and taken into custody by members of the security forces. Conversely, there were also a large number of witnesses who had been present at the site where Abdullah Canan had allegedly been arrested and they stated that they had not seen anything. The soldiers on duty had categorically denied that he had been arrested and taken into custody.

Further, the Court observed that certain pieces of witness evidence had been disregarded by the Turkish courts; statements indicating that Mr Canan had been present at the battalion barracks and that he had been injured and had had his head bandaged, were ignored.

The Court had regard to the limited scope of proceedings in the Turkish courts and the conduct of the authorities who had, uncritically, accepted the security forces' denials and that had made clear their intention not to examine the allegations against the officers in question.

With regard to the investigation, the Court found that after Abdullah Canan's body had been discovered, the authorities had promptly initiated an investigation. However, the examination of the accused and the witnesses had not begun until almost a year after the body was found. Moreover, a full autopsy had initially not been deemed necessary. The deceased's body was exhumed and an autopsy carried out more than two years after the body had been found, and its result shed no light on the circumstances of the death. The lengthy gap between the death and the autopsy undermined the autopsy's effectiveness.

The Court further noted that the criminal proceedings had also concerned the killing of three other people who had been reported missing at the same time and

in the same region. However no link between these killings and that of Abdullah Canan had been found.

In conclusion, the Court held that the investigation into the circumstances surrounding the death of Abdullah Canan could not be regarded as effective. As a result it found that there had been a serious breach of Turkey's procedural obligations under Article 2.

In light of its findings with regard to Article 2, the Court did not consider it necessary to examine the complaint under Article 3.

Articles 5 & 13

The Court did not consider it necessary to examine separately the complaints under Articles 5 and 13 of the Convention.

The Court awarded the applicant EUR 60,000 for pecuniary damage and EUR 20,000 for non-pecuniary damage. It also awarded the applicant EUR 3,000 for legal costs.

Musayev and Others v Russia

(57941/00, 58699/00 and 60403/00)

European Court of Human Rights: Judgment dated 26 July 2007

Unlawful killing by State agents in Chechnya - Articles 2, 3 and 13

Facts

The five applicants are all residents of Novye Aldy in the Chechen capital of Grozny. In October 1999 hostilities resumed in Chechnya between the Russian forces and Chechen fighters. From late December 1999 parts of the city came under the control of the Russian forces.

The first applicant's account of the events of 5 February 2000

The first applicant and several members of his extended family remained in Grozny. Most of the 6,000 persons who had lived in Novye Aldy before the hostilities had fled, and only a few hundred remained. Early in the morning on 5 February 2000 the first applicant heard shots, whilst at his cousins' house.

Abdurakhman Musayev, another of the applicant's cousins, rushed into the courtyard and told him that that morning he and his two nephews were stopped by a group of Russian soldiers. Abdurakhman Musayev managed to escape unseen, but was worried about his nephews' safety. Abdurakhman and Umar Musayev (another cousin) went outside to look for them.

A group of servicemen later entered the courtyard, shouting and firing from automatic weapons. For the following few hours there was continued gunfire. The first applicant later heard cries from women in the street and he went outside: six bodies were found. They were *inter alia*, the first applicant's cousins Abdurakhman Musayev and Umar Musayev.

As the first applicant started to take the bodies inside the yard, a soldier fired a shot, wounding a neighbour who died from his wound the following day.

In the late afternoon of the same day the first applicant noticed that the house of his relative Yakub Musayev was on fire. Later that day another relative came and said that they had found the bodies of the first applicant's relatives who had been missing since the morning.

On 5 February 2000 the first applicant was thus a witness to nine killings, seven of the deceased being his relatives.

On 8 February 2000 a military truck with soldiers came to the first applicant's house. The applicant submitted that some of the soldiers were the same ones who had been involved in the killings of 5 February. They looted the applicant's home and left. The first applicant watched their actions from a neighbour's house, but could not distinguish the registration plates of the vehicle.

The first applicant submitted that until the end of February 2000 groups of officials came to the town asking the residents about the events.

Second and Third applicants: Killing of Salman Magomadov and Abdula Magomadov

The second and third applicants submitted that in the winter of 1999 to 2000 they had stayed in Ingushetia because of the fighting in Grozny. Their relatives had remained in Grozny to look after the family property. They were Salman Magomadov, the husband of the third applicant and the second applicant's brother, and Abdula Magomadov, the second applicant's other brother.

On 5 February 2000 Russian forces conducted an operation in Novye Aldy, as a result numerous houses were burnt and civilians killed. On 10 February 2000 their neighbours discovered the remains of Salman and Abdula Magomadov in the cellar. On 19 May 2000 death certificates were issued, stating that the deaths had occurred as a result of numerous bullet wounds to the head and body.

Fourth and Fifth applicants: Killing of Zina Abdulmezhidova and Khuseyn Abdulmezhidov

During the winter of 1999 to 2000 the fourth and fifth applicants remained in Grozny. Within the same courtyard there lived the fifth applicant's sister and brother, Zina Abdulmezhidova and Khuseyn Abdulmezhidov.

On 4 February 2000 Russian troops entered the settlement of Novye Aldy. The residents were instructed to remain at their homes because on the following day there would be a "mopping-up" operation.

On 5 February 2000 the fourth applicant visited her husband's relatives, the Abdulkhanovs, to see if the "mopping-up" had finished there. She met Akhmed Abdulkhanov, who had told her that there were dead bodies everywhere in the street. The fourth applicant opened the gates and saw four bodies of their neighbours.

Later that day the fourth applicant heard some loud noise in the courtyard and opened the door. Zina Abdulmezhidova and Khuseyn Abdulmezhidov also came out and stood in the doorway. There were several soldiers in the courtyard, they had brought Akhmed Abdulkhanov with them. The servicemen were shouting that they had an order to kill them all. One soldier pointed an automatic gun at the fourth applicant's head, she pleaded for her life. The soldiers then shot Akhmed Abulkhanov in the courtyard, and Khuseyn Abdulmezhidov and Zina Abdulmezhidova inside the house.

On 16 May 2000 death certificates issued for Zina Abdulmezhidova and Khuseyn Abdulmezhidov stated that the deaths occurred as result of numerous bullet wounds to the head and body.

On 5 March 2000 the Grozny Town Prosecutor's Office opened a criminal investigation into the killing.

Complaints

The Government requested that the case be declared inadmissible for failure to exhaust domestic remedies. They submitted that the investigation into the killings was continuing and the applicants had not applied to a court with a complaint against the investigating authorities. The applicants argued that they had sought criminal prosecution through the prosecutors' offices, but this had proved ineffective. They further argued that the civil remedies would not be able to establish the identities of the perpetrators in the absence of a criminal investigation.

The applicants alleged that their relatives had been unlawfully killed by agents of the State, in violation of Article 2. The applicants submitted that there was overwhelming evidence to conclude that their relatives had been intentionally deprived of their lives, based on the Government's admission that on 5 February 2000 a special operation had been carried out by the federal forces.

The applicants also submitted that the authorities had failed to carry out an adequate investigation into the circumstances of their deaths, in violation of the procedural aspect of Article 2. The investigation had not been prompt and the authorities had systematically failed to inform the applicants of the proceedings.

Article 3 was also pleaded by the first applicant. He submitted that he had been subjected to inhuman treatment.

The applicants complained that they had had no effective remedy in respect of the violations under Article 2, contrary to Article 13. The applicants argued that the Government's failure to submit the documents requested disclosed a failure to comply with their obligations under Article 34 and Article 38 (1) (a).

Damages were claimed by the first applicant, on behalf of his brother, for loss of earnings of the latter's breadwinner, Suleyman Musayev. In respect of non-pecuniary damage the third applicant claimed compensation for the lost wages of her husband. The third applicant claimed compensation in respect of herself and her two youngest daughters. In addition, the third applicant claimed EUR 100,000 for each of her five daughters who had suffered as a result of their father's killing.

Held

The Court unanimously dismissed the Government's preliminary objection on the basis that the applicants were not obliged to obtain redress for damage sustained through the alleged illegal acts or unlawful conduct of State agents, as this procedure alone could not be regarded as an effective remedy in the context of claims brought under Article 2. Further a civil court would be unable to pursue any independent investigation. As regards criminal-law remedies, the Court noted that an investigation into the killings had been ongoing since March 2000.

The Court held that there had been a violation of Article 2 of the Convention in respect of the deaths of the applicants' relatives. The domestic authorities indicated on a number of occasions that the deaths had been unlawful. Although the investigation was never completed and individuals were not identified, it follows from the case file that the only version of the events considered by the prosecution was that put forward by the applicants. No explanations were forthcoming from the Russian Government as to the circumstances of the deaths, nor were any ground of justification relied on by the Government in respect of the use of lethal force by their agents.

It was also held that there was a violation of Article 2 of the Convention in respect of the failure to conduct an effective investigation into the circumstances in which the applicants' relatives died. The national court was found to be struck by a series of serious and unexplained delays and failures to act once the investigation had commenced. The investigation was also opened one month after the killings. On several occasions, the supervising prosecutors criticised the investigation and ordered that steps be taken. However, these orders were either ignored or were followed after unacceptable delays. Notwithstanding the domestic and international public outcry caused by the execution of more than 50 civilians in Novye Aldy, almost six years after the events no meaningful result was achieved in the task of identifying and prosecuting the individuals who had committed the crimes.

The Court further held that there had been a violation of Article 3 of the Convention in respect of the first applicant. The Court had no doubt that the shock he experienced on that day, coupled with the authorities' wholly inadequate and inefficient response in the aftermath of the events, caused the first applicant to suffer the threshold of inhuman and degrading treatment proscribed by Article 3.

The Court also held that there had been a violation of Article 13 in respect of the alleged violation of Article 2 of the Convention. The applicants should have been able to avail themselves of effective and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation. However the criminal investigation into the deaths was ineffective and the effectiveness of any other remedy that may have existed, including the civil remedies suggested by the Government, was consequently undermined.

The Court held that there was no need to examine separately the applicants' complaints under Article 34 and Article 38(1) (a) of the Convention. As to Article 38(1) (a), the Court could not find that the non-submission of the information requested prior to the admissibility decision prejudiced the establishment of facts or otherwise prevented the proper examination of the case. As to Article 34, there was no indication that there was any hindrance of the applicants' right of individual petition, either through interference with their communications with the Court or representation before the Convention institutions or through the exertion of undue pressure on them.

With regard to damages the Court held that the claim brought by the first applicant on behalf of his brother, in respect of his deceased nephew's loss of future earnings, was not that the first applicant was in any way dependent on such earnings. Therefore the Court did not find it appropriate to make an award for pecuniary damages.

As to the claim brought by the third applicant, the Court found that there was a direct causal link between the violation of Article 2 in respect of the third applicant's husband and the loss by her of the financial support which he could have provided. She was awarded EUR 8,000 in respect of pecuniary damage.

The Court held that the violations of Articles 2 and 13 of the Convention on account of the killings of the applicants' relatives and the deficient domestic investigation required an award in respect of non-pecuniary damage. In addition the first applicant was found to be the victim of a violation of Article 3 in relation to the stress and anguish he endured. The Court award EUR 30,000 to the first applicant in respect of the violations found under Articles 2 and 13 and EUR 5,000 for violation of Article 3. EUR 30,000 was awarded to the second applicant in respect of the violations found under Articles 2 and 13. The third applicant was awarded EUR 40,000, also in respect of Salman Magomadov's five heirs, in respect of the violations found under Articles 2 and 13. The fourth and

fifth applicants were jointly awarded EUR 30,000 for the violations found under Articles 2 and 13.

EUR 14,050 and GBP 4,580 were granted in respect of costs and expenses. The Court dismissed the remainder of the applicants' claim for just satisfaction.

Angelova and Iliev v Bulgaria

(55523/00)

European Court of Human Rights: Judgment dated 26 July 2007

Effective Investigation into Death and Ill Treatment, - Articles 2, 3 in conjunction with Articles 13 and 14 and Article 6 ECHR

Facts

The two applicants are Bulgarian nationals and live in Ivanski. The first applicant was the mother and the second applicant was the brother of Angel Dimitrov Iliev, who was of Roma origin.

On 18 April 1996 the victim was attacked by seven teenagers and beaten severely. He was also stabbed several times by one of the assailants. The victim was taken to a hospital after the attack but died the following morning.

All but one of the assailants were detained and questioned by the police on the day of the attack. The assailants were all released after questioning, with the exception of the first assailant. Two of the assailants had implicated him as the person who had used the weapon.

On 19 April 1996 the assailants were again questioned. One of the assailants gave a statement saying that the victim had not provoked them in any way and that they had beat him because he was of Roma origin.

On 15 and 16 May 1996 four of the assailants were charged with hooliganism, they were questioned and then released. On 14 June 1996 the Prosecutor's Office found that there was a lack of evidence that the first assailant had stabbed the victim, dismissed the charges and released him. He was then charged with hooliganism. 'NB', another assailant, was later charged with negligent homicide, but pleaded not guilty. The investigator in charge concluded that the case should proceed to trial.

On several occasions the applicants made requests for information on the progress of the case, but were refused. In spring 1999 the applicants' lawyer was granted access to the case file. On 18 December 1999 the applicants filed a complaint with the Prosecutor's Office alleging that the investigation was being prolonged, no action was taken in response.

On 12 June 2001 the investigator again concluded that the case should proceed to trial, however no development ensued during the following four years.

On 18 March 2005 the Prosecutor's Office dismissed the charges of hooliganism against all of the assailants who had been juveniles at the time of the attack, because the statute of limitation had expired in respect of them.

The Prosecutor's Office argued that the first assailant had stabbed the victim. It dismissed the charges against NB and remitted the case for further investigation. On 16 May 2005 the applicants were informed that the case file was being held by the Ministry of Justice. There have been no further developments.

Complaints

The applicants complained under Articles 2, 3 and 13 of the Convention that the authorities failed to carry out a prompt, effective and impartial investigation.

The Government argued that the application should be declared inadmissible on account of a failure to exhaust domestic remedies, by not waiting for the criminal proceedings to be completed. The applicants claimed that this was linked to the merits of the complaint and in respect of part of the assailants the criminal proceedings had been terminated. Furthermore regarding the murder charge, the applicants noted that there had been no further developments.

The applicants also argued that the State's duty to investigate and prosecute the offenders included a time component and if the investigation was unduly prolonged it would render it ineffective. The applicants made similar submissions in respect of the investigation into their relative's ill-treatment.

The applicants alleged a violation of Article 14, in conjunction with Articles 2 and 3 of the Convention, with respect to its procedural aspect; in particular that there is a duty to investigate where there is evidence of a racially motivated violent offence. The Government claimed that the applicants could have initiated an action under the Protection against Discrimination Act if they believed that there had been discrimination.

The applicants also complained under Article 6 in respect of the excessive length of the criminal proceedings. They alleged that this denied them access to a court to claim damages, because a civil action was dependent on the criminal findings.

Held

The Court joined the question of exhaustion of domestic remedies to the merits of the applicants' complaint that the length of the investigation in itself rendered it ineffective.

The Court held that there had been a violation of Article 2(1) of the Convention, because in spite of the authorities having identified the assailants almost immediately after the attack and having determined with some degree of certainty the identity of the stabber, no one was brought to trial over a period of more than eleven years. The Court also found that the applicants should not have waited for the completion of the criminal proceedings before filing their complaints, as the conclusion of those proceedings would not remedy their overall delay.

The Court held that the authorities failed in their obligation under Article 2 to effectively investigate the victim's death promptly, considering the racial motives of the attack. The Court did not deem it necessary to make a separate finding under Articles 3 and 13 of the Convention.

Regarding the complaint under Article 14, the Court held that the Government did not sufficiently substantiate its argument about the Protection against Discrimination Act. The Court was not convinced that this would have been an effective remedy.

The racist motives of the assailants in perpetrating the attack became known to the authorities at a very early stage of the investigation, but the authorities failed to make the required distinction from non-racially motivated offences. The Court held this to constitute unjustified treatment irreconcilable with Article 14. Consequently, there had been a violation of Article 14 taken in conjunction with the procedural aspect of Article 2 of the Convention. The Court did not deem it necessary to make a separate finding under Article 14 taken in conjunction with the procedural aspect of Article 3.

The Court held that the complaint under Article 6 was manifestly ill-founded because the applicants did not bring a civil action and that it would be pure speculation to consider that the civil proceedings would have remained stayed

for a period, so as to give rise to a *de facto* denial of justice, as claimed by the applicants.

The applicants were jointly awarded EUR 15,000 in respect of non-pecuniary damage and EUR 3,500 for costs and expenses.

Commentary

The applicants in this case did not contend that the authorities of the respondent State were responsible for the death of their relative; nor did they imply that the authorities knew or ought to have known that he was at risk of physical violence at the hands of third parties and failed to take appropriate measures to safeguard him against such a risk. The present case was therefore distinguished from cases involving the alleged use of lethal force either by agents of the State or by private parties with their collusion. However, the absence of any direct State responsibility for the death of the applicants' relative did not exclude the applicability of Article 2 of the Convention.

Alikhadzhiyeva v Russia

(68007/01)

European Court of Human Rights: Judgment dated 5 July 2007

Disappearance after being detained by Russian servicemen in Chechnya – Articles 2, 3, 5 and 13 ECHR

Facts

The applicant, Mrs Zura Chiiyevna Alikhadzhiyeva, a Russian national, and lives in Shali, Chechnya.

From 1997 to 1999 the applicant's son Ruslan Alikhadzhiyev was the speaker of the Chechen Parliament.

On 17 May 2000 Ruslan Alikhadzhiyev was at home when several armoured personnel carriers (APCs) of the Russian forces arrived. Masked men in camouflage entered the applicant's house. They then put handcuffs on the applicant's son and forced him into an APC. Together with Ruslan Alikhadzhiyev, five of the applicant's neighbours were taken away from their homes. The five men were released the following day.

They testified that they were placed in an APC, were blindfolded, and a black bag was placed on Ruslan Alikhadzhiyev's head. The detainees were led into some underground premises. There they were ordered to squat along the walls and each of them was hit on the head with an iron rod and told to keep silent. Three of the detainees were questioned by masked servicemen. The detainees were asked about their identity, whether they had taken part in the hostilities and what they knew about Ruslan Alikhadzhiyev.

The five men were all taken to a cellar, where they spent the night, apart from Ruslan Alikhadzhiyev. The men were then taken by APC and left on the road. They were picked up by passing transport and returned to Shali. Ruslan Alikhadzhiyev has not been seen since 17 May 2000.

Immediately after the detention of Ruslan Alikhadzhiyev the applicant started to search for him, she applied to prosecutors at various levels asking for assistance and details of the investigation. Although very little official substantive information was forthcoming.

On 25 May 2000 the first deputy to the Chief of Staff of the Russian Armed Forces announced that a number of commanders of illegal armed groups had been detained or killed, which included Ruslan Alikhadzhiyev.

On 8 December 2000 the Chechnya Prosecutor stated that on 7 July 2000 the Shali District Prosecutor's Office had opened a criminal investigation into the detention of Mr Alikhadzhiyev. The whereabouts of Mr Alikhadzhiyev had not been established. The investigation was under the special supervision of the Chechnya Prosecutor.

In August 2004 the Russian Government was requested to submit a copy of the investigation file to the ECHR. The Government stated that the investigation was pending and that the disclosure of the documents would be in violation of the Code of Criminal Procedure.

During the course of proceedings various detention centres, military and law-enforcement bodies denied that Ruslan Alikhadzhiyev's name had ever been in their records. Between July 2000 and April 2004 the investigation was adjourned 11 times. No one was ever charged with any crime.

Complaints

The applicant alleged a violation of Article 2, claiming that her son had been unlawfully killed by Russian State agents.

The applicant also alleged that the authorities had failed to conduct an effective investigation, in violation of the procedural obligations under Article 2. She contended that the investigation had not been prompt because of the delay in opening it and in taking important steps, and that the authorities had systematically failed to inform her of the proceedings. The Government contended that the applicant had been granted victim status, was represented by a lawyer and had had every opportunity to participate effectively in the proceedings.

The applicant further contended that her son had been subjected to treatment in violation of Article 3. Furthermore in view of the known circumstances of his arrest the authorities had failed to effectively investigate this complaint in violation of the procedural aspect of Article 3. The applicant also claimed that she was a victim of treatment falling within the scope of Article 3 as a result of the anguish and emotional distress she had suffered in relation to her son's disappearance and the response of the authorities to her complaints. The Government argued that the investigation had not obtained information to support the allegation that the applicant's son had been subjected to such treatment.

The applicant submitted that Ruslan Alikhadzhiyev had been subjected to unacknowledged detention, in violation of Article 5. The Government stressed that the investigation had failed to establish that Ruslan Alikhadzhiyev had in fact been detained by law-enforcement bodies and that the identity of those responsible remained unknown.

The applicant complained that she had had no effective remedy for the alleged breaches of Articles 2, 3 and 5, in violation of Article 13. The Government disagreed, stating that the investigation had been conducted in accordance with the domestic legislation.

The applicant argued that the Government's failure to submit the documents requested by the Court at the communication stage disclosed a failure to comply with its obligations under Article 34 and Article 38 (1) (a) of the Convention. The Government stated that it submitted the investigation file after the case was declared admissible.

Held

The Court explained that a civil court was unable to pursue any independent investigation and incapable, without the benefit of the conclusions of a criminal investigation, of making any meaningful findings regarding the perpetrators of fatal assaults. This was therefore held to be an ineffective remedy. The Court

thus confirmed that the applicant was not obliged to pursue civil remedies and dismissed the preliminary objection.

In regards to criminal remedies, the applicant complained to the law-enforcement agencies immediately after Ruslan Alikhadzhiyev's arrest that the investigation had been pending since July 2000. The Court held that this was closely linked to the merits of the complaints and thus considered these matters under the substantive provisions of the Convention.

The Court held that the fact that a large group of armed men in uniform, equipped with military vehicles, proceeded in broad daylight to apprehend several persons at their homes strongly supported the applicant's allegation that these were State servicemen. The absence of Ruslan Alikhadzhiyev or any news from him for over six years also supported the assumption that he had been killed. The Court therefore held it established that Ruslan Alikhadzhiyev was apprehended by State agents and should be presumed dead. Accordingly, the Court found a violation of Article 2.

The Court further held that the investigation carried out by the authorities did not meet the requirements of Article 2 of the Convention. The reasons given were *inter alia* the delay in opening the investigation and delays in performing essential tasks. In a period of fewer than four years the investigation was adjourned and reopened at least 11 times. The Court accordingly dismissed the Government's preliminary objection regarding failure to exhaust domestic remedies and held that there had been a procedural breach of Article 2.

The Court could not find a violation of Article 3 in regards to Ruslan Alikhadzhiyev as the exact way in which he died and whether he was subjected to ill-treatment had not been revealed.

The Court however did find a violation of Article 3 in respect of the applicant. The applicant was the mother of the individual who had disappeared, had witnessed his arrest and had had no news of him for more than six years or any plausible explanation. The Court held that the applicant suffered, and continued to suffer, distress and anguish, which constituted inhuman treatment contrary to Article 3.

The Court found a particularly grave violation of the right to liberty and security enshrined in Article 5. The Court established that Ruslan Alikhadzhiyev was detained by State servicemen on 17 May 2000 and not seen since. This enabled those responsible to conceal their involvement in the crime.

The criminal investigation into Mr Alikhadzhiyev's disappearance and death was inadequate and therefore the State had failed in its obligation under Article 13 in conjunction with Articles 2 and 3 of the Convention. No separate issue was found to arise in respect of Article 13 read in conjunction with Article 5 of the Convention.

Taking into account the Government's compliance with the Court's request for information after the admissibility decision, the Court could not find a breach of Article 38 of the Convention. As to Article 34, the Court found that there was no indication of any hindrance of the applicant's right of individual petition, thus there had been no failure by the Government to comply with Article 34 and Article 38(1) (a) of the Convention.

The applicant was awarded EUR 40,000 in respect of non-pecuniary damage, EUR 3,150 and GBP 1,000 in respect of costs and expenses.

Ramsahai and others v The Netherlands

(52391/99)

European Court of Human Rights, Grand Chamber: Judgment dated 15 May 2007

Failure to investigate – independence and impartiality of the investigation – involvement of the applicants in the investigation – role of the Public Prosecutor – Articles 2, 6(1) and 13

Facts

The case concerns an application brought by three Dutch nationals. The applicants are the grandmother, grandfather and father of Moravia Ramsahai who was shot dead by a policeman in July 1998. On the day of the incident, the deceased had stolen a scooter from its owner at gunpoint and driven off.

The police were notified and subsequently spotted a scooter, driven by a person fitting the description of the suspect, and arrested him. The suspect was later identified as Moravia Ramsahai. It later transpired that one of the officers saw Moravia Ramsahai draw a pistol from his trouser belt. The officer drew a service pistol and ordered Moravia Ramsahai to drop his weapon but he failed to do so. The officer approached the suspect, who pointed his pistol at the officer. The

officer drew his pistol and fired at Moravia Ramsahai, who was hit in the neck. By the time the ambulance arrived on the scene, Moravia Ramsahai had deceased.

A criminal investigation was ordered. It was initially carried out by the Amsterdam/Amstelland Police Force (to which the officers belonged) after which it was taken over by the State Criminal Investigation Department.

The public prosecutor held that the officer had acted in self-defence and therefore no prosecution should be brought against him. The decision was endorsed by the Court of Appeal.

Complaints

In 2005, the Court unanimously held that there had been no violation of Article 2 concerning the shooting of Moravia Ramsahai, and, by five votes to two, that there had been violations of Article 2 in that the investigation into his death was not independent. Furthermore, it held that the decision of the Court of Appeal was not public.

In February 2006 the Government requested that the case be referred to the Grand Chamber under Article 43. In April 2006 the panel of the Grand Chamber accepted that request.

The applicants submitted that the circumstances surrounding the shooting and the lack of an effective investigation into his death were in violation of Articles 2, 6(1) and 13 of the Convention.

Held

Article 2

The shooting

The Court held that it was concerned about the independence and quality of the investigation into Moravia Ramsahai's death. However its establishment of the facts had not been seriously contested by the parties. Moreover, the account of Moravia Ramsahai's behaviour given by the officers was consistent with other information, namely that he had threatened other people with a pistol earlier in the day. In the circumstances and given the position taken by the parties as regards the establishment of the facts by the Court, the Grand Chamber decided to consider the case on the basis of those facts.

The investigation

The Grand Chamber noted that there had been flaws in the investigation, such as the failure to test the hands of the officers for gunshot residue, a reconstruction of the incident had not been staged, as well as the failure to examine the weapons or ammunition and the lack of an adequate pictorial record of the trauma caused to Moravia Ramsahai's body by the bullet.

Furthermore, the Grand Chamber noted that the officers had not been kept separate after the incident and they had not been questioned until three days after the incident. Although there was no evidence of collusion, these facts show that appropriate steps were not taken to reduce the risk of collusion and therefore amounted to a significant shortcoming in the adequacy of the investigation.

Accordingly the Grand Chamber found a violation of Article 2 on the ground of an inadequate investigation.

With regard to the independence of the investigation, the Grand Chamber noted that fifteen-and-a-half hours passed before the State Criminal Investigation Department became involved in the investigation. Hence, during that time, essential parts of the investigation were carried out by the same force to which the officers belonged.

The Grand Chamber found that the delay was unacceptable and that it could not be justified on the basis of any special circumstances that necessitated immediate action by the local police force. The Grand Chamber held that the Department's subsequent involvement was not sufficient to remove the taint of the force's lack of independence. Accordingly, the Grand Chamber found a violation of Article 2 on the ground that the investigation had not been sufficiently independent.

The role of the Public Prosecutor

The Grand Chamber noted that the police investigation had been carried out under the supervision of an Amsterdam public prosecutor, who was specifically responsible for the police work carried out at the local police station. The same prosecutor had taken the decision not to prosecute the officers. The Grand Chamber held that that should have been supervised by a public prosecutor unconnected to the Amsterdam Police Force, especially given their involvement in the investigation itself. Furthermore, the Grand Chamber noted the degree of independence of the Netherlands Public Prosecution Service, the fact that the ultimate responsibility for the investigation was borne by the Chief Public Prosecutor and the possibility of review by an independent tribunal. Accordingly,

the Court found that there had been no violation of Article 6 concerning the role of the public prosecutor.

Involvement of the applicants

The Grand Chamber reiterated that, under Article 2, there was no automatic requirement that the next of kin of a deceased's victim be granted access to an investigation whilst in process. Nor did Article 2 impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation. Accordingly the Grand Chamber held that there had not been a violation of Article 2 with regard to the involvement of the applicants in the investigation.

Procedure followed by the Court of Appeal

The Grand Chamber reiterated that the test to determine whether proceedings should be held in public was whether there was a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or the tolerance of unlawful acts.

The Grand Chamber agreed with the Court of Appeal that proceedings did not have to be open to the public and the Court's decision was not required to be made public either. As the applicants had been allowed full access to the investigation file, they had been enabled to participate effectively in the Court of Appeal's hearing and they had been provided with a reasoned decision, it was unlikely that any authority might have concealed any relevant information. Moreover, the applicants had not been prevented from making the decision public themselves and therefore this was sufficient to obviate the danger of any improper cover up by the authorities.

Accordingly the Grand Chamber did not find a violation of Article 2.

Articles 6(1) and 13

The Grand Chamber agreed with the Court that Article 6 was not applicable and that no separate issue arose under Article 13.

The Grand Chamber awarded the applicants jointly EUR 20,000 in respect of non-pecuniary damage and EUR 7,299 for costs and expenses.

Kurnaz and Others v Turkey

(36672/97)

European Court of Human Rights: Judgment dated 24 July 2007

Ill-treatment in Detention, Authorities Responsible for Death, Denied an Effective Remedy - Articles 2, 3 and 13 ECHR

Facts

The application was initially introduced by Mehmet Kurnaz, who was living in Antalya. Following his death on 22 December 1997, his parents, brothers and sister continued the application. The applicants live in Antalya.

Mehmet Kurnaz was a member of the United Socialist Party (*Birleşik Sosyalist Partisi*). The applicants claimed that he was in poor health as a result of the ill-treatment that he had received during his periods of detention in custody. In 1994 Mehmet Kurnaz was diagnosed as suffering from chronic renal insufficiency.

Incident at Buca Prison and the Subsequent Investigation

On 11 September 1995 Mehmet Kurnaz was transferred to Buca prison after a medical examination found that there were no physical signs of ill-treatment on the applicant's body. On 21 September 1995 Mehmet Kurnaz was wounded with a blow to his head during a prison riot and was hospitalised for treatment, where he remained until 25 October 1995.

According to the investigation conducted by three public prosecutors, the detainees awaiting trial for alleged membership or accused of aiding and abetting an illegal armed organisation, namely the Turkish People's Liberation Party/Front (*DHKP/C*) were held together in a dormitory. They made a certain number of demands. When these demands were not met, they refused to be counted by prison officers. The detainees failed to comply despite warnings and as a result the gendarmes were enlisted to enter the dormitory by force. The detainees piled metal cupboards against the steel door and the gendarmes had to use welders to force their entry into the dormitory. Fifteen gendarmes and forty detainees, including Mehmet Kurnaz, were injured.

On 12 October 1995 the prosecutors decided not to pursue the prison officers due to a lack of evidence. As regards the gendarmes, the prosecutors gave a decision of incompetence *ratione materiae* and transferred the investigation file to the İzmir Governor's Office. On the same day, the prosecutors filed a joint bill

of indictment against the detainees, including Mehmet Kurnaz, accusing them of rioting.

On an unspecified date, criminal proceedings had also commenced against the applicant before the İzmir State Security Court, where he was accused of membership of an illegal organisation. On 25 October 1995 the applicant was brought before the court unable to stand or walk. He was subsequently released pending trial.

On 10 November 1995 Mehmet Kurnaz's lawyers filed a petition with the court complaining about the extensive injuries sustained by him at Buca prison. On 2 August 1996 the public prosecutor at the İzmir office decided not to investigate Mehmet Kurnaz's allegations of ill-treatment on the ground that there was already a decision of non-prosecution against the prison officers in respect of the same event and that the case file against the gendarmes was before the İzmir Governor's Office. Mehmet Kurnaz's objection against this decision was dismissed by the İzmir Assize Court on 31 October 1996.

On 22 October 1996 İzmir State Security Court acquitted Mehmet Kurnaz of the charges against him. According to the medical report of Akdeniz hospital, dated 4 February 1997, Mehmet Kurnaz had very bad health and therefore a renal transplantation was not possible. On 22 December 1997 Mehmet Kurnaz died of renal insufficiency. The criminal proceedings against the prisoners were suspended on 25 December 2000.

Complaints

The applicants alleged a violation of Article 2 as they held the State responsible for Mehmet Kurnaz's death. They considered that his health had deteriorated significantly after the ill-treatment he had received in Buca prison. The Government disputed the applicants' arguments; maintaining that Mehmet Kurnaz had died two years after the events complained of, from a condition unrelated to the injuries sustained during the prison riot. The applicants maintained that Mehmet Kurnaz's death was the result of a complex process arising from the ill-treatment he had received in prison and the lengthy treatments he had to undergo upon his release.

The applicants further complained that the treatment to which Mehmet Kurnaz had been subjected while in detention amounted to torture and inhuman treatment, in violation of Article 3 of the Convention. They also noted that an adequate investigation had not been conducted into the complaint. The

Government submitted that the incident at Buca prison was serious and that Mehmet Kurnaz had actively taken part in the riot. The Government further disputed that no effective investigation had been conducted.

The applicants submitted that Mehmet Kurnaz did not have an effective domestic remedy in respect of his grievances in accordance with Article 13 of the Convention. The applicants also requested the publication of the Court's judgment in a Turkish newspaper.

Held

The Court noted that only in exceptional circumstances physical ill-treatment inflicted by State officials which does not result in death would disclose a violation of Article 2. The Court further noted that there was no dispute as to the cause of death of Mehmet Kurnaz. What was in dispute was whether or not the national authorities could be held responsible for his death resulting from renal insufficiency.

On 21 September 1995 Mehmet Kurnaz received a blow to his head which resulted in a serious head injury. The Court was in no doubt that this injury contributed to the deterioration of Mehmet Kurnaz's health. However, the Court also noted that Mehmet Kurnaz was suffering from a number of conditions, including chronic renal insufficiency, prior to his incarceration in Buca prison. There was no indication that the applicant was denied adequate medical assistance and it was also noted that Mehmet Kurnaz had died two years after the incident, following lengthy treatment. Consequently, the Court held that there was insufficient factual and evidentiary basis on which to conclude "beyond reasonable doubt" that the State was responsible for Mehmet Kurnaz's death. Thus there had been no violation of Article 2 of the Convention.

With regard to Article 3 both substantive and procedural violations were found. The Court noted the potential for violence in a prison setting, but stated that the incident was at all times confined to the dormitory and commenced with the detainees' refusal to be counted by prison officers. There was thus some warning of impending difficulties and the escalation of violence occurred only after the gendarmes forcibly entered the dormitory. Therefore Mehmet Kurnaz was not injured in the course of a random and widespread insurrection which might have given rise to unexpected developments to which the gendarmes had been called upon to react without prior preparation. The Court subsequently held that the burden rested on the Government to show that the use of force was not excessive.

The Government did not provide any information to show that the operation was properly regulated and organised in such a way as to minimise risk of serious bodily harm to the detainees. It merely stated that force had to be used without providing any explanation which could shed light on the exact nature of the force inflicted on the applicant.

The Court held that the head injuries sustained by Mehmet Kurnaz, who was already in poor health had had lasting consequences for his health. Therefore concluding that the force used against the applicant at Buca prison was excessive and thus the State was responsible, under Article 3 of the Convention, for the injuries sustained.

Article 3 also requires the authorities to investigate allegations of ill-treatment when they are “arguable” and “raise a reasonable suspicion”. An investigation was initiated promptly by the public prosecutor’s office and led to a decision of non-prosecution concerning prison officers since the prosecutors found that only gendarmes had entered the dormitory and used force. However, the case file against the gendarmes was transferred to the İzmir Governor’s Office and the outcome of this was not established. The Court held that the investigation carried out by the administrative councils could not be regarded as independent since they are composed of local representatives who are dependent on the governors. The Court therefore also concluded that the domestic authorities failed to conduct an effective and independent investigation, in violation of Article 3.

The Court examined the complaint under Article 13 in conjunction with Article 3 of the Convention alone, but found that no separate issue arose under Article 13.

The applicants were jointly awarded EUR 10,000 in respect of non-pecuniary damage and EUR 3,000 for costs and expenses. The Court did not find it appropriate to rule on the publication of the judgment in a Turkish newspaper.

Prohibition of torture or inhuman & degrading treatment

Gorodnitchev v Russia

(52058/99)

European Court of Human Rights: Judgment dated 24 May 2007

Prison conditions – detention in isolation – torture – lengthy proceedings - Articles 3 and 6(1)

Facts

The applicant, Arkadij Petrovich Gorodnitchev, is a Russian national born in 1965 and lives in Novosibirsk, Russia.

On 19 February 1995 the applicant was arrested in Novosibirsk on suspicion of theft and two assaults committed in 1994 and 1995. On 21 February he was detained pending trial.

In a judgment dated 12 November 1997, the Kirovskii Regional Court convicted and sentenced the applicant to five years' imprisonment for grievous bodily harm with intent and eight years' imprisonment for murder. He was acquitted of the charge of theft.

In a judgment dated 4 March 1998, the Novosibirsk Regional Court partly upheld the judgment of 12 November 1997. It quashed the part of the judgment concerning assault causing death and ordered a re-examination of the case.

In a final judgment, dated 29 March 1999, the Kirovskii District Court found the applicant guilty of murder and sentenced him to eight years' imprisonment, to be served in an ordinary prison.

The applicant maintained that he was forced to appear in handcuffs at all public hearings from February 1999 onwards. The applicant made several requests for them to be removed, but to no avail.

Conditions of detention

According to the applicant, in November 1995 he was diagnosed with pulmonary tuberculosis. He was admitted to hospital and held with 24 other detainees suffering from tuberculosis in a cell designed for six people. The applicant subsequently suffered from haemoptysis (coughing up blood) before

the tuberculosis became 'bilateral'. In 1999 the doctors observed that one of his lungs had 'deteriorated'.

Between February 2000 and March 2001, the applicant was detained in the prison's 'antituberculosis clinic'. Despite his deteriorating health, in October 2000 he was placed in a disciplinary isolation cell ('SHIZO') for 15 days. His detention in the cell was later extended by 10 days. The prison internal regulations prohibit placing an ill detainee in an isolation cell.

Complaints

The applicant submitted that the conditions of his detention and the lack of appropriate treatment for the pulmonary tuberculosis he contracted in prison had to be regarded as torture. He further maintained that having to appear before the Kirovskii District Court in handcuffs amounted to inhuman and degrading treatment. The applicant also complained of the excessive length of the proceedings against him. He relied on Articles 3 and 6(1) of the Convention.

Held

Article 3

Conditions of detention

The Court held that the evidence established that the applicant had been suffering from pulmonary tuberculosis since November 1995 and that his condition required appropriate medical treatment.

The Court noted that, despite his illness, the applicant had been held in a SHIZO for 25 consecutive days. Such a measure was one of the most severe forms of punishment that could have been imposed on him during his detention, especially in light of his condition. It meant that he was prohibited from buying additional food and receiving parcels of food which his father would have otherwise sent to him. In view of the food restrictions and the fact that the applicant had been denied a 5B-type dietary regime, which according to doctors was necessary to improve his health, the Court found that the applicant had been severely undernourished.

Furthermore, domestic law limited the maximum duration of such punishment to 15 days. Accordingly, the Court held that the authorities had inflicted particularly acute hardship on the applicant and therefore he had been subjected to conditions of detention that amounted to inhuman treatment in violation of Article 3 of the Convention.

Wearing handcuffs

The Court noted that none of the evidence suggested that, had the applicant not worn handcuffs when appearing before the District Court, there might have been a risk of violence or injury, or that he would have absconded or hindered the proper administration of justice. The Court therefore did not find that the use of handcuffs was intended to exercise reasonable restraint and considered that the measure was disproportionate to the security requirements cited by the Government.

Accordingly, the Court held that, although there was no evidence that wearing handcuffs in public had humiliated the applicant, there was also no evidence to suggest that it was reasonably necessary to ensure public safety or the proper administration of justice and, as such, it amounted to degrading treatment within the meaning of Article 3.

Article 6

Taking into account the length of the proceedings, namely four years and ten months, the Court noted that these had not been particularly complex and the length could not be attributed to the applicant's conduct.

Further, the Court noted that the failings of the investigation authorities and Kirovskii District Court meant that the case had not been examined with the requisite thoroughness and expedition. Applying the principle of apportioning responsibility, as developed in its previous case-law, the Court held that there had been a violation of Article 6(1) of the Convention.

The Court awarded the applicant EUR 10,000 for non-pecuniary damages.

Kucheruk v Ukraine

(2570/04)

European Court of Human Rights: Judgment dated 6 September 2007

Disproportionate Use of Force and Unlawful Detention - Articles 3, 5 and 13 ECHR

Facts

The applicant was born in 1980 and lives in the city of Kharkiv, Ukraine.

Since being diagnosed in 1998 as suffering from schizophrenia, the applicant attended the City Psycho-neurological Healthcare Centre for outpatient treatment. In March 2001 the applicant was convicted of theft and hooliganism and sentenced to one and a half year's imprisonment suspended on probation.

In April 2002 the applicant was arrested and sentenced on the basis of the same charges. After medical examination at the City Hospital, he was found to suffer schizophrenia but fit for detention. The Kominternovsky Court ordered he remain in detention on remand.

A medical assessment in May 2002 ordered by Kharkiv Regional Pre-trial Detention Centre offered no conclusion on the applicant's sanity at the time of the offences.

Following a medical assessment undertaken in early June 2002 the Kominternovsky Court ordered compulsory psychiatric treatment and suspended the criminal proceedings against Mr. Kucheruk pending his recovery.

Upon return to the Detention Centre the applicant displayed agitated behaviour and assaulted a cellmate in July 2002. Failing to obey shift guard orders, the prison shift guards used force on the applicant to reduce him to the ground and handcuffed him.

Mr. Kucheruk was then locked up in a disciplinary cell for approximately twenty-three hours a day over a 10-day period. This is a grave violation of the prison regime.

On 17 July 2002 the applicant was transferred to the hospital for compulsory treatment. Meanwhile the government did not follow through the investigation of a criminal complaint filed by the applicant's mother against the guards involved in the incident; no wrongdoing was found.

In December 2002 she was informed that her complaint and an additional internal inquiry found no wrongdoing on the part of the prison guards. She was twice denied access to the final report and case-file. These decisions were challenged before a court.

In late February 2003 the Kominternovsky Court ordered an extension of the applicant's compulsory psychiatric treatment pending his recovery. In April 2003 the applicant's mother filed a petition with the Moskovskyy Court seeking

to have her son declared incapable by reason of mental disorder. Upon appeal from the Zhovtevy Court, on 7 July 2003 the Kominternovsky Court lifted the compulsory treatment order and criminal proceedings were resumed on 1 August 2003. In August 2003, psychiatric experts concluded that the applicant's mental disorder prevented him from understanding the consequences of his actions and directing his conduct.

In early September 2003 the applicant was discharged; criminal proceedings were terminated and restarted several times by various authorities.

In July 2005 the Chervonozavodskyy District Court quashed Kharkiv Regional Prosecutor's Office's decision regarding the prison guards based on the final report of 1 November 2004. The court ordered further investigations as the authorities had failed to fulfil the instructions of the Zhovtnevy Court. In September of that year a senior prosecutor of the prison supervision department, following additional investigation, decided not to bring any charges against the prison officials. In October 2005 the applicant's mother challenged this report before the Chervonozavodskyy Court where the proceedings are still pending.

Complaints

The applicant, relying on Article 3 and 13 of the Convention, complained about unreasonable and disproportionate use of force by the prison guards during detention and the lack of an effective and independent investigation into the alleged ill-treatment. The applicant stated that the domestic remedies referred to by the Government were ineffective in his case.

The applicant submitted that the conditions of his detention in the disciplinary cell were inadequate. He claimed that the constant handcuffing, deemed proportionate and necessary by the Government, and the insufficiency of the medical assistance afforded to him in the disciplinary cell amounted to a violation of Article 3. The Government confirmed that the applicant received no medication but that this was due to his refusal of any treatment.

The applicant also submitted that the investigation into the excessive use of force by the prison guards violated Article 13. It did not meet a number of crucial procedural safeguards and was partial and lengthy.

The applicant claimed illegality of his detention on the basis of Article 5(1) of the Convention. The alleged illegality arose from the fact that his detention extended

beyond the time period warranted for in his original detention order as well as after the revocation on 7 July 2003.

Article 5(4) of the Convention was invoked against the applicant's inability to access a court with jurisdiction to review the lawfulness of his continued detention.

In regard of the above articles, the applicant submitted that the six-month period should be calculated only from the tardy moment his representatives gained access to his case file.

Held

The European Court of Human Rights held that the applicant was not obliged to pursue a civil action in order to exhaust domestic remedies. As the Government failed to reach a decision in which the domestic courts were able, in the absence of any results from the criminal investigation, to consider the merits of a claim relating to alleged serious criminal actions.

In regards to the non-exhaustion of domestic remedies with respect to the complaints about the medical conditions of detention, the applicant's mental condition was such as to substantially impair his ability to communicate with the outside world. The prison authorities were well aware of this and therefore, in the circumstances, the applicant could not be expected to have raised specific complaints about the conditions. The Court noted that, in regards to Article 35(1), the Government did not show how recourse to civil proceedings could have brought about an improvement in the applicant's conditions of detention. The Court, therefore, rejected this submission.

The Court held, in regards to the six month rule, that it was not unreasonable for the applicant to have awaited the results of the criminal investigation. The applicant was only provided with a reason to doubt the effectiveness of the investigation after receipt of the second unsatisfactory answer. Thus the six months' time-limit started from this point, consequently the complaints under Article 3 of the Convention were brought within the time-limit.

The Court held that the use of truncheons was unjustified and amounted to inhuman treatment, in violation of Article 3 of the Convention. The Court noted that the applicant's shoulders and buttocks bore distinct injuries as a result of the prison guards beating him with rubber truncheons. This was unjustifiable as the guards outnumbered the applicant and were aware of the possibility of the

applicant's violent outbursts, therefore they should have been prepared for this situation.

The Court found that the handcuffing of the mentally ill applicant, without any psychiatric justification or medical treatment for injuries sustained during the confinement, both self-inflicted and due to forced restraint, constituted inhuman and degrading treatment. State authorities are under an obligation to protect the health of persons deprived of liberty. Accordingly, the Court found a violation of Article 3.

The Court found that there had been a procedural violation of Article 3 of the Convention. The initial inquiry into the applicant's complaints did not satisfy the minimum requirement of independence since the investigating body represented the authority involved. The inquiries into the applicant's complaints lasted for five years and still continue. Furthermore the investigation did not lead to charges being brought against any officials. The lack of independence, promptness, and public scrutiny on the part of the investigative authorities meant that the investigation failed to meet the minimum standards of effectiveness.

The Court did not examine the lack of an effective investigation in the context of Article 13.

In relation to the applicant's complaints under Article 5, concerning his detention in July 2002, the Court found that it was out of the six months' time-limit. The reason for this is that the applicant's mother was informed of the transfer from the Detention Centre shortly after 17 July 2002. However the first letter was submitted to the Court on 29 December 2003, which is more than six months after she received the information.

In relation to Article 5(1) of the Convention the Court held that there was no violation prior to the court order for the applicant's compulsory psychiatric treatment being revoked in July 2003. Subsequent to the court order revoking the compulsory treatment, the applicant's continued detention in the hospital could not be regarded as a first step in the execution of the order for his release. As this did not come within sub-paragraph 1 (e) of Article 5 accordingly there had been a violation of Article 5(1) on this count.

The Court also held that there had been a violation of Article 5(4) of the Convention with respect to the applicant's inability to take proceedings to test the lawfulness of his detention in the Kharkiv Psychiatric Hospital.

The Court awarded the applicant EUR 20,000 in respect of non-pecuniary damage. EUR 2,129 for costs and expenses. The applicant did not submit any claim for pecuniary damages therefore no award was made.

Commentary

In relation to Article 3 of the Convention the assessment of whether the treatment concerned is incompatible with Article 3 standards has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability to complain about how they are being affected by any particular treatment.

A key guarantee under Article 5(4) is that a patient compulsorily detained for psychiatric treatment must have the right to seek judicial review on his or her own motion. Article 5(4) therefore requires an independent legal device by which the detainee may appear before a judge who will determine the lawfulness of the continued detention. The detainee's access to the judge should not depend on the good will of the detaining authority, which appeared to be the case here.

Tremblay v France

(37194/02)

European Court of Human Rights: Judgment dated 11 September 2007

Prostitution - forced prostitution amounting to degrading treatment - paying contributions - forced labour - Articles 3 and 4

Facts

The applicant, Viviane Tremblay, is a French national and lives in Paris.

On 20 August 1990, having decided to give up prostitution, the applicant applied to the social-security contributions collection agency (URSAFF) to be registered as self-employed, as she took up the profession of decorator.

On 24 August 1995, the National Institute of Statistics and Economic Studies (INSEE) sent the applicant a certificate dated 6 July 1995 as evidence that she was registered with the Directory of National Companies and Places of Business under the heading of 'unspecified occupation' and her name was entered in the 'liberal professions' category.

Between 1991 and 1999 URSAFF requested the applicant to pay a total of almost EUR 40,000 in contributions and surcharges. She challenged the payment orders before the relevant courts but without success.

Complaint

The applicant complained that the obligation imposed on her to pay family-allowance contributions was forcing her to continue in prostitution and, as such, amounted to a violation of Articles 3 and 4 of the Convention.

Held

Article 3

The Court stated that it would not pronounce itself on the legitimacy of prostitution. It would suffice to note that there is no European consensus on the question of prostitution in relation to Article 3 of the Convention. However, it did stress very firmly that forced prostitution is incompatible with human rights and dignity.

The Court stated that the relevant question was whether the applicant was in reality placed in such a position by the obligation imposed on her by URSAFF, which forced her to continue in prostitution.

The Court found that URSAFF had never required the applicant to fund her contributions by continuing to work as a prostitute, and had been prepared to put special arrangements in place for payment. Further, the Court noted that the applicant had not provided any real evidence to show that she had been unable to pay the contributions in question by any means other than by engaging in prostitution. Accordingly, the Court held by six votes to one that it was not satisfied that the applicant was forced to continue working as a prostitute as a result of her treatment by URSAFF and therefore there had been no violation of Article 3 of the Convention.

Article 4

The Court held that, as it had found no violation of Article 3 due to the lack of evidence that the applicant was forced to engage in prostitution, there were no grounds for examining a violation of Article 4 on the basis of forced labour.

97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 others v Georgia

(71156/01)

European Court of Human Rights: Judgment dated 3 May 2007

Religious attacks – failure to investigate – freedom of religion – ill-treatment - Articles 3, 9 and 14

Facts

The applicants are 97 members of the Gldani Congregation of Jehovah's Witnesses and four other members of the Congregation.

The case concerns an attack in October 1999 against members of the Congregation by a group of Orthodox believers led by Basil Mkalavishvili (known as 'Father Basil').

Father Basil had been a priest in the autocephalous Orthodox Church of Georgia prior to being defrocked by that denomination on 31 July 1995 following his adhesion to the League of Separatist Priests of Greece. He had been accused of various acts of physical aggression against members of the Orthodox Church, insulting the Catholic-Patriarch of All Georgia and had boasted to the media about having organised a series of attacks against Jehovah's Witnesses.

On 17 October 1999 dozens of Father Basil's supporters, as identified by the applicants, surrounded and entered the theatre in which 120 members of the Congregation were meeting. The attack was filmed by one of Father Basil's supporters. The Jehovah's Witnesses, including women and children, were violently assaulted; they were kicked, punched, struck with sticks and iron crosses and some of the women were pulled to the ground by their hair, pushed down staircases and whipped with their belts. A member of the Congregation also had his head shaved whilst those holding him down recited a prayer.

When the members of the Congregation managed to leave the hall, they found themselves surrounded by Father Basil's supporters who searched them and threw any symbol of their belief (Bibles, religious literature etc) and personal items they had removed from the victims into a large fire. The police visited the site of the attack.

As a result of the attack, 16 people were admitted into hospital and 44 made statements concerning the attacks to which they had been subjected. Following the attack, national television broadcasted recordings of the events clearly identifying the attackers. Their names were also provided to the relevant authorities by the victims. One of the recordings also contained an interview in which Father Basil expressed his satisfaction and explained the validity of his actions.

Forty-two applicants subsequently lodged a complaint. Criminal proceedings were opened yet only 11 applicants were recognised as civil parties in the case and the remaining 31 never received a reply. As for the 11 applicants, the case was transferred between the various departments of the prosecution service and the police and the proceedings were suspended on several occasions, on the ground that it was not possible to identify the perpetrators of the attack.

The police investigator responsible for the case stated that, on account of his Orthodox faith, he could not be impartial in conducting the investigation.

From October 1999 to November 2002, 138 violent attacks were carried out against the Jehovah's Witnesses and 784 complaints were lodged with the Georgian authorities. An investigation was not carried out into any of these complaints.

Complaints

Relying on Articles 3, 9, 10, 11, 13 and 14 the applicants complained that they had been attacked by a group of Orthodox believers and that no effective investigation had been carried out in that respect.

Held

Article 3

The Court noted that the allegations of ill-treatment made by the ten applicants were corroborated by their medical and video records of the attack. As well as very similar descriptions of the ill-treatment by many of the applicants; these were not challenged by the Georgian Government.

The Court held that, with regard to those 25 applicants, the treatment inflicted on them could be described as inhuman within the meaning of Article 3.

With regard to 14 other applicants, whose statements did not specify the nature and gravity of the treatment inflicted, the Court found that the video recordings,

filmed by one of the attackers, showed that they had nonetheless been subjected to degrading treatment.

Accordingly, the Court held that these had been a violation of Article 3 of the Convention with regard to 45 of the applicants.

Conversely, the Court held that there had been no violation of Article 3 with regard to the 16 applicants who had stated that they had escaped the attack, and the 37 applicants who had not complained to the authorities about the ill-treatment.

As to the authorities' reaction and the action taken in response to 42 applicants' complaints, the Court found that it had not been shown that the authorities were aware that Father Basil was planning to carry out the attack in question. Conversely however, after being informed of the attack, the officers did not act with due diligence.

The Court was not persuaded by the Georgian Government's claim that it had been impossible to identify the perpetrators of the violence. The Court found it shocking that the authorities' inaction could be justified in such a way, especially as the police had gone to the site of the event and not arrested a single attacker; that the television channels had broadcasted entire sequences illustrating the violence committed against the applicants; that the recording of showed Father Basil and the majority of the attackers very clearly and in light of the interview given by Father Basil himself.

In conclusion, the Court held that the attitude on the part of the authorities, who were under a duty to investigate criminal offences, was tantamount to undermining the effectiveness of any other remedies that may have been available to the applicants.

Accordingly the Court concluded that there had been a violation of Article 3 with regard to 42 of the applicants.

Article 9

The Court noted that, through the lack of action, the Georgian authorities had failed in their duty to adopt the necessary measures to ensure that the group of Orthodox extremists would tolerate the existence of the applicants' religious community and enable them to enjoy the free exercise of their right to freedom of religion.

Accordingly, it concluded that there had been a violation of Article 9 in respect of 96 applicants but could not make a determination with regard to the remaining five applicants.

Article 14 in conjunction with Articles 3 and 9

The Court held that the comments and attitudes of the authorities contravened the principle of equality of every person before the law. Furthermore, no justification for the discriminatory treatment in respect of the applicants had been put forward by the Georgian Government.

The Court held that the authorities' attitude had allowed Father Basil and his supporters to continue to advocate hatred through the media and to pursue his acts of violence, motivated by religious beliefs. This suggested that the State had been complicit with the criminals.

Accordingly, the Court concluded that there had been a violation of Article 14 in conjunction with Articles 3 and 9.

With regard to Articles 10, 11 and 13, the Court held that it was unnecessary to examine these complaints separately.

The Court awarded the applicants sums varying from EUR 160 to EUR 10,000, the full details of which are set out at the end of the judgment.

Benediktov v Russia

(106/02)

European Court of Human Rights: Judgment dated 10 May 2007

Conditions of detention – lack of adequate medical treatment – overcrowded cells – lack of effective remedy for allegations of ill-treatment - Articles 3, 13 and 5.

Facts

The applicant was born in 1973 and lived in Moscow until his arrest on suspicion of robbery in December 1999. He is now serving his sentence in a correctional colony in the Mordoviya Republic of the Russian Federation.

When the applicant was arrested, on 16 December 1999, he was not issued with a copy of the report until April 2000. An officer informed the applicant of his statutory defence rights. The applicant countersigned a record indicating that he had voluntarily refused legal assistance and decided to answer the officer's questions. On the same day, he was confronted with the victim, the co-defendant and the witness.

Subsequently, the Prosecutor authorised the remand of the applicant in custody without the latter being present. Further, in December 1999 and January 2000 an officer ordered three expert examinations, notifying the applicant only in April 2000.

On 24 November 2000, the district court of Moscow found the applicant guilty of robbery and sentenced him to nine years' imprisonment in a high-security colony.

From 19 December 1999 to November 2001 the applicant was detained in facilities nos. IZ-77/2 and IZ-77/3 in Moscow.

Conditions of detention

a) Facility no. IZ-77/2

During his detention in Facility IZ-77/2, the applicant was kept in three cells. The applicant alleged that given the lack of beds in one of the cells, inmates slept in shifts. According to the Government, the information on the number of inmates kept in some of the cells was not available as the documents had been destroyed.

The submissions made by the Government and the applicant were at odds with regards to the sanitary conditions in the cells. According to the applicant, the cells were infected with bed-bugs and lice but the administration did not provide any insecticides. Further, the cells were extremely cold in winter and hot and damp in the summer; inmates only had an hour-long walk during the day; the bedding provided was dirty and smelt badly and no toiletries were distributed.

b) Facility no. IZ-77/3

According to the applicant, he was detained in six different cells, which were all severely overcrowded; hence there was a lack of bunk beds available to the detainees. The sanitary conditions were similar to Facility IZ-77/2, except that in the summer detainees were allowed a one-hour walk at night as the cells were

so hot and some detainees had died of a heart attack. The Government did not comment on this.

With regards to the applicant's state of health and medical assistance, there were discrepancies in the submissions made by the applicant and those made by the Government. The applicant argued that when he was transferred to the facility hospital because he had contracted hepatitis, he was merely put on a drip for five or six times but no other medication was administered to him. He further submitted that he was not given food to suit his dietary requirements and therefore could not eat. He unsuccessfully complained to the head of the hospital about the inadequate medical assistance and was told that he should ask his relatives to bring him the necessary medication.

Complaints

The applicant complained that his detention in appalling conditions, leading to hepatitis, was in breach of Article 3 of the Convention. He also claimed that there was no effective remedy at his disposal for the violation of the guarantee against ill-treatment, hence in violation of Article 13 of the Convention.

Finally, relying on Article 5(1) (c) and (3) of the Convention, the applicant submitted that the report of his arrest had not been promptly drawn up and he had not been notified of it. Further, he had not been duly informed of the reasons of his arrest, the Prosecutor had authorised his detention on remand in his absence and subsequently extended the remand and took other procedural actions without informing the applicant.

Held

Article 13

The Court observed that the Government did not demonstrate what redress could have been afforded to the applicant. Further, the Government failed to submit evidence as to the existence of any domestic remedy by which the applicant could have complained about the general conditions of his detention, in particular with regard to the structural problem of overcrowding in Russian detention facilities, or that the remedies available to him were effective, that is to say, that they could have prevented violations from occurring or continuing or that they could have afforded the applicant appropriate redress.

Accordingly the Court found a violation of Article 13 of the Convention.

Article 3

The Court observed that it has frequently found a violation of Article 3 of the Convention on account of lack of personal space afforded to detainees. The Court noted that the Government has not put forward any fact or argument capable of persuading it to reach a different conclusion. Although there is no indication that there was a positive intention to humiliate or debase the applicant, the Court held that the fact that the applicant was obliged to live, sleep and use the toilet in the same cell as so many other inmates for almost two years was itself sufficient to cause distress or hardship exceeding that inherent in detention.

Furthermore, while the Court could not establish ‘beyond reasonable doubt’ that the ventilation, heating, lighting or sanitary conditions in the facilities were unacceptable within the meaning of Article 3, the Court nonetheless observed that the Government did not dispute that the cell windows had been covered with metal shutters to block out natural light and fresh air.

The Court also observed that the applicant was diagnosed with hepatitis after his admission in facility IZ-77/2 and therefore it was most probable that he was infected whilst in detention. Although this did not automatically imply a violation of Article 3, especially given that the applicant received treatment and that he has fully recovered, these factors show that the applicant’s detention conditions went beyond the threshold tolerated by Article 3.

Accordingly, the Court found a violation of Article 3 of the Convention.

Article 5

The Court reiterated that, pursuant to Article 35 of the Convention, it can only deal with matters that have occurred within a period of six months from the date of the final decision. The applicant’s detention and remand ended on 24 November 2000 when he was convicted and sentenced by the Moscow District Court and the applicant lodged his application with the Court on 23 November 2001, which is more than six months after his detention on remand ended.

Accordingly, the Court rejected the application under Article 5 as it was lodged out of time.

The Court awarded the applicant EUR 10,000 in respect of non-pecuniary damage.

Diri v Turkey

(68351/01)

European Court of Human Rights: Judgment dated 31 July 2007

Torture and ill-treatment whilst in custody – practice of falaka – conditions of detention – failure to investigate - Article 3 and 13.

Facts

The applicant was convicted of membership of an illegal organisation. At the material time, he was serving a prison sentence in the Ümraniye E-type prison in İstanbul.

Following prison protests in December 2000, the applicant was transferred to the Kocaeli F-type prison. On 22 December 2000, in a medical report issued by the Kocaeli prison doctors, it was noted that the applicant had scars on the right side of his jaw and nose, bruises on his eye lids and swelling on his head and abdomen.

On 23 February 2001, the applicant was transferred to the Tekirdağ F-type prison. He alleged that he was strip searched and beaten and his hair and moustache forcibly cut. He also stated that he was placed in a cell alone and was forced to listen to loud music. According to the applicant, he refused to stand up and shout his name during the daily headcounts and, as a result, was subjected to ill-treatment by the prison guards, in particular *falaka* (beating on the soles of the feet).

On 8 March 2001 the Tekirdağ Public Prosecutor initiated an investigation, requested by the applicant's lawyer, into the applicant's allegations. The applicant was examined once again by the prison doctor, who reported that there were no signs of ill-treatment on his body.

On 14 March 2001 the Prosecutor issued a decision of non-prosecution relying on the medical reports. The applicant subsequently filed an appeal against the decision of the public prosecutor, however this was rejected.

Following the application to the European Court of Human Rights on 31 May 2001, the Court requested the Government to conduct further medical examinations on the applicant, namely a bone scintigraphy and an MRI scan.

The medical report stated that one examination showed no signs of ill-treatment whilst the other showed signs of trauma.

On 2 September 2006 the applicant's lawyer requested a forensic expert report from Dr Şebnem Korur Fincancı. In her report, she concluded that the findings resulting from the examinations corresponded with the applicant's allegations of *falaka*. She further stated that the trauma complained of was inflicted on the applicant about three months prior to the test. In response to this report, the Government submitted another report which contradicted that of Dr Şebnem Korur Fincancı.

Complaints

The applicant submitted that firstly, the conditions and his treatment in prison, namely the strip search, having his hair and moustache forcibly cut and being kept alone in a cell forced to listen to loud music were in violation of Article 3 of the Convention; secondly, he alleged that being beaten and subjected to the practice of *falaka* on two occasions amounted to torture or inhuman or degrading treatment or punishment within the meaning of Article 3. Further, the applicant complained that the authorities had not conducted an adequate investigation into his complaints of ill-treatment.

Relying on Article 13 of the Convention, the applicant submitted that the domestic authorities failed to conduct an effective investigation into his allegations of ill-treatment.

Held

Article 3

The Court could not find an explanation as to why the doctors who examined the applicant on 22 December 2000 would not have reported the injuries to the applicant's feet if they had been sustained on that occasion. It further noted that the Government maintained that the trauma could have been caused by stress or insufficiency fractures; however the Court found that these submissions are not supported by any convincing evidence. As a result, the Court concluded that the injuries to the applicant's feet must be attributable to a form of ill-treatment for which the authorities at Tekirdağ bore responsibility.

With regard to the seriousness of the treatment in question, the Court reiterated that on the basis of previous case-law, in order to determine whether a particular form of ill-treatment should be qualified as torture, it must be distinguished from inhuman or degrading treatment. The Court stated that the intention of

the Convention is to attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

In light of the above, the Court observed that the treatment complained of was inflicted on the applicant intentionally by the prison guards, with the purpose of punishing him and of breaking his physical and moral resistance to the prison administration. Accordingly, the Court found that this act was particularly serious and cruel and capable of causing severe pain and suffering amounting to torture in breach of Article 3 of the Convention.

With regard to the inadequacy of the investigation, as alleged by the applicant, the Court recalled that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other State agents, that provision, read in conjunction with the State's general duty under Article 1 to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be an effective official investigation. Furthermore, under Article 2, such an investigation should be capable of leading to the identification and punishment of those responsible.

The Court noted that the Public Prosecutor failed to request any further medical examination, to take statements from the accused prison guards or to question any potential witnesses or the prison doctor who drafted the medical reports. Furthermore, the Court reiterated that proper medical examinations are an essential safeguard against ill-treatment and, as such, the forensic doctor must enjoy formal and *de facto* independence. In the present case, the Court held that the medical reports were compiled by the prison's doctor, it provided limited medical information and it did not include any explanation by the applicant as regards his complaints.

Furthermore, the Court observed that after the report confirming that the injuries to the applicant's feet could not only have been sustained by a trauma, the Prosecutor should have, by reason of his authority under Article 167 of the Criminal Code, restarted the domestic investigation but instead he took no action.

Accordingly, the Court concluded that the applicant's claim that he was subjected to *falaka* during his detention was not subject to an effective investigation by the domestic authorities as required by Article 3 of the Convention.

Article 13

The Court held that it was not necessary to examine separately whether there had been a violation of Article 13.

The Court awarded the applicant EUR 15,000 for non-pecuniary damage and EUR 2,500 for legal costs.

Zelilof v Greece

(17060/03)

European Court of Human Rights: Judgment dated 24 August 2007

Police Brutality, Inadequate Investigation, Racial Prejudice – Articles 2, 3, 6, 13 and 14 ECHR

Facts

The applicant is a Greek citizen of Russian-Pontic origin who was born in 1978 and lives in Salonika.

On 23rd December 2001 the applicant was walking in Salonika, when he saw a police patrol carrying out an identity check on the passengers of a car. The applicant, who knew the passengers, asked one of them what was going on.

The Applicant's Version

A police officer asked him to identify himself. The applicant replied that he did not have his identity card and suggested that they go to the police station for an identity check. Seconds later, one of the officers wrapped his handcuffs around his fist and punched the applicant in the mouth. He fell to the floor and was kicked twice.

The applicant managed to leave the scene at which time he had heard three to four gunshots being fired. The applicant then went to the police station, where he complained about his ill-treatment. The police officers then seized him and dragged him inside the police station. They handcuffed him and started beating and kicking him for approximately thirty minutes. The applicant passed out and was transferred to hospital, where he remained until 28 December 2001.

Four other individuals of Kazakh origin, acquaintances of Mr Zelilof, who were also involved at the event, were arrested that night and taken to the police

station where the applicant was detained. They were charged with assaulting police officers. In their defence they stated that they had been the victims of a discriminatory attitude due to their ethnic origin.

The Government's Version

The police officers initially warned the applicant not to come close to the car so as to be able to complete the check unobstructed. The applicant ignored the warning, approached the car and started talking to the passengers.

The applicant was asked to identify himself, he refused and shoved the police officer with his arm. Other officers attempted to assist their colleagues but were punched and kicked by Mr Zelilof.

In the meantime others had got involved in the argument. The applicant subsequently fled the scene. A shot was then fired in the air to scare the assailants. The applicant was arrested later the same day and taken to the police station, where he was charged with resisting lawful authority and causing bodily harm. The Government stated that neither the applicant nor his acquaintances were ever abused by police officers while at the police station.

Medical Record

The forensic expert found that Mr Zelilof had suffered from a medium-intensity bodily injury, caused by blunt instruments.

Administrative Investigation

On 8 January 2002 Salonika police headquarters ordered an administrative investigation. The investigating police officer summoned the three police officers who had been involved in the incident to give witness statements. A report issued on 9 August 2002 described that the persons involved refused to comply with the police officers. It added that the police officers properly assessed the circumstances and acted correctly.

Criminal Proceedings

On 24 December 2001 charges were brought against the applicant. On 13 January 2004 the applicant contended that the information about his criminal record as submitted by the officers was inaccurate. On 14 January 2005 the Salonika Court of First Instance sentenced the applicant to fourteen months' imprisonment. The case is currently pending before the domestic courts.

On 14 January 2002 the applicant lodged a criminal complaint with the Public Prosecutor's Office, against the police officers involved. On 2 July 2002 the Prosecutor at the Salonika Court of First Instance dismissed the applicant's complaint as "factually unfounded". On 16 October 2002 the applicant lodged an appeal at the Court of Appeal, which was subsequently declared inadmissible.

On 22 November 2002 the applicant lodged a new appeal, which was again dismissed as "factually unfounded". The prosecutor confirmed the previous conclusions without personally questioning the witnesses.

Complaints

The applicant complained that there had been a breach of Article 2. He claimed that one of the police officers had used a weapon during the course of his arrest. Mr Zelilof also complained that the authorities had failed to launch a prompt and effective official investigation into the legitimacy of the use of force.

The applicant further submitted that during his arrest and subsequent detention he was subjected to acts of police brutality which caused him great physical and mental suffering amounting to torture, inhuman and/or degrading treatment, in breach of Article 3. The applicant claimed that, contrary to Article 3, taken together with Article 13 of the Convention, he had had no effective domestic remedy for the harm suffered. The Government submitted that the police officers had acted in self-defence when faced with an unfair and unprovoked attack.

The applicant complained that there had been a breach of Article 6(1) of the Convention. He argued that inaccurate information from his criminal record had been submitted to the investigating judge in the context of the criminal complaint lodged against the police officers. The applicant asserted that the submission of these documents violated the "equality of arms" as he had been unable to obtain a copy of the police officer's disciplinary records, as these were confidential.

The applicant also complained that the ill-treatment he had suffered, together with the subsequent lack of an effective investigation into the incident, was at least partly attributable to his ethnic origin. He thus alleged discrimination, violating Article 14 of the Convention. The applicant argued that the burden of proof had to shift to the respondent Government when the claimant established a *prima facie* case of discrimination.

Held

The Court noted that the use of armed force did not result in deprivation of life and was not even potentially lethal as the shots were in the air with the sole intention of intimidating the applicant. The Court therefore rejected the complaint under Article 2.

The Court found that the complaints under Article 3 and 13 were admissible. It reiterated that the burden of proof, “beyond reasonable doubt”, could be regarded as resting on the authorities to provide a convincing explanation as strong presumptions of fact arise in respect of injuries that occur during detention in custody. The Court went on to emphasise that it was undisputed that the applicant’s injuries were caused by the police and therefore the Government had to demonstrate that the use of force was not excessive.

The Court held that the acts of self-defence could not justify the infliction of serious injuries on the applicant, who, by that time, was not the one threatening the physical integrity of the police officers. Regard being had to the applicant’s allegations, which were corroborated by the medical reports, and to the circumstances in which the applicant sustained the injuries. The Court considered that the Government had failed to furnish convincing or credible arguments which would provide a basis to explain or justify the degree of force used against the applicant; therefore concluding that there had been a violation of Article 3.

The Court was unable to reach a decision regarding the police conduct within the police station as it was confronted with divergent accounts of the events which were not corroborated by a judicial decision. The Court held it unnecessary to consider the alleged violation at the police station due to its finding regarding the degree of force used in the street.

In regards to the effectiveness of the investigation the Court held that the medical evidence and the applicant’s complaints created at least a reasonable suspicion that the applicants injuries might have been caused by excessive use of force. The Greek authorities were thus obliged to conduct an effective investigation. An administrative investigation was lunched and entrusted to the special agency of the police dealing with disciplinary investigations, which reinforced the independence of the inquiry. However the thoroughness of the investigation was held to be unsatisfactory. The Court found that there had been a selective and inconsistent approach to the assessment of evidence. The investigating agent based his conclusions mainly on the testimonies given by the police officers

involved in the incident and applied different standards when assessing the testimonies given, as those given by the civilians were recognised as subjective but those given by the police officers were not. Furthermore investigating authority omitted to take into account the report on the forensic medical examination.

Judicial proceedings were instituted, however they were not launched *ex officio* by the competent authorities but only after the applicant had lodged a criminal complaint. Also, the prosecuting authorities concluded that the applicant's allegations were "factually unfounded" by endorsing the testimonies given in the context of the judicial investigation carried out by the police. Neither the Prosecutor at the Court of First Instance nor the Prosecutor at the Court of Appeal questioned personally the eyewitnesses or the applicant and the police officers. The Court accordingly held that the investigations were not sufficiently effective and therefore there had been a violation of Article 3 under its procedural limb.

Due to the Court's findings regarding the procedural aspect of Article 3, it considered it unnecessary to examine the complaint under Article 13 of the Convention separately.

The Court held that the complaint under Article 6 of the Convention was premature as proceedings were still pending in the domestic courts. It therefore declared the complaint inadmissible under Article 35 (1) for non-exhaustion of domestic remedies.

It was further held that racist attitudes had not been established beyond reasonable doubt to have played a role in the applicant's treatment by the police. Accordingly, the complaint under Article 14 in conjunction with Article 3 was rejected as manifestly ill-founded pursuant to Article 35(3) and 4 of the Convention.

The applicant was awarded EUR 1,400 in respect of pecuniary damage, EUR 15,000 in respect of non-pecuniary damage and EUR 3,500 for costs and expenses.

Commentary

Judge Loucaides and Judge Malinverni expressed the opinion that the Government's failure to furnish credible arguments to explain the degree of force used against the applicant covered all of the applicant's allegations regarding his ill-treatment. Judge Loucaides failed to see how the majority could find that the medical reports corroborate the applicant's allegations only in respect of the

period before the applicant was inside the police station. Further he expressed his lack of understanding as to why the majority had failed to examine the applicant's allegations as regards his ill-treatment by the police at the station. He restated that the task of the Court is to decide where the truth lies irrespective of the account given by the authorities. It is precisely because of the scope and object of the Court's task in such cases that the judicial review it carries out ensures effective protection of the relevant individual human rights.

In certain cases of alleged discrimination the respondent Government may be required to disprove an arguable allegation of discrimination and if they fail to do so the Court may find a violation of Article 14 of the Convention on that basis. However, where it is alleged that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned.

Cafer Kurt v Turkey

(56365/00)

European Court of Human Rights: Judgment dated 24 July 2007

Torture – injuries sustained whilst in police custody - Article 3

Facts

The applicant, Cafer Kurt, was born in 1967 and lives in Athens, Greece. He was arrested in İstanbul in May 1998 on suspicion of being a member of the revolutionary party *Türkiye Devrim Partisi*.

Whilst in custody the applicant made a statement incriminating himself, which he amended when he met the Public Prosecutor. The applicant claimed that, whilst in custody, he was tortured by the police and was forced to make the initial incriminating statement. In detailing the methods of torture he was subjected to, the applicant stated that he had been sexually molested by the prison officers by penetration with wooden objects and pipes.

When the applicant was released from custody, he underwent a medical examination which revealed bruising on his neck and left arm; an injury to his left knee; irritation around his anus and severe pain in the testicles.

In November 1998, the applicant lodged a complaint with the Prosecutor against the police officers who had tortured him. In January 2000, the charges were dropped due to lack of evidence against the officers.

The applicant was detained in Fatih prison and prevented from attending his trial. He was not informed of the details of the hearing and was not given the assurance by the authorities that he would be safe during the transit from İstanbul. In May 2001, the applicant lodged a complaint regarding his treatment at trial but this was refused by the Court.

The applicant was detained for four years, during which he was transferred from the prison in Fatih to that in Kandıralı. Whilst he was detained in Kandıralı prison, the applicant staged a hunger strike in protest of his conditions of detention.

The applicant developed Wernicke Korsakoff's disease (a brain disorder involving loss of specific brain functions), as a result of which he was released from detention. He sought asylum in Greece.

Complaints

The applicant submitted that during his detention in police custody he had been subjected to treatment contrary to Article 3 of the Convention. Moreover, the applicant noted that the investigation into his torture had been dismissed.

Held

The Court stated that, when a person is injured whilst in custody under the supervision of police officers, all the injuries that take place during this period give rise to strong presumptions of fact. The burden of proof therefore lies with the Government to provide a plausible explanation for the cause of the injuries and to provide evidence to cast doubt on the victim's allegations, particularly if these are supported by medical evidence.

The Court noted that the criminal inquiry did not provide an explanation of the cause of the injuries. The authorities have an obligation to be held accountable for those under their supervision. It follows, that a judicial decision based on lack of evidence does not relieve the State of its responsibilities under the Convention.

The Court found that, on the basis of the facts before it and the lack of an alternative explanation given by the Government, the State bears the responsibility for the applicant's injuries. The violence committed against the applicant appears to

be particularly grave and cruel, causing acute pain and suffering, and as such qualifies as ‘torture’ within the meaning of Article 3 of the Convention.

Accordingly, the Court held unanimously that there had been violation of Article 3 of the Convention.

The applicant was awarded EUR 10,000 for non-pecuniary damage and EUR 1,000 for legal costs, less the EUR 650 already received from the Council of Europe by way of legal aid.

Nevruz Koc v Turkey

(18207/03)

European Court of Human Rights: Judgment dated 12 June 2007

Ill-treatment whilst in police custody – lack of an effective investigation – impunity – Articles 3, 6 and 13.

Facts

The applicant was born in 1954 and lives in İstanbul.

On 30 November 1997 the applicant had been drinking alcohol after his shift. On his way home, he got into an argument with a group of people waiting at a bus stop. He was arrested by a patrolling police officer (H.Ö), who allegedly kicked and punched the applicant during the arrest. He was taken into custody at the Sariyer police station, where he was allegedly subjected to ill-treatment.

On the same day, a deputy superintendent and the H.Ö drew up a police report. It stated that the applicant had insulted the H.Ö, punched him and head-butted him and that the applicant had continued to behave aggressively towards the police officers. The police also took statements from three persons who had been at the scene of the incident, and these confirmed the applicant’s unruly and violent behaviour.

On 1 December 1997 the applicant was examined by a doctor who noted no injuries on his body. Subsequently, a judge ordered the applicant’s detention on remand. On the same day, the H.Ö was subjected to a medical examination which found bleeding and swelling from his nose, justifying four days’ sick leave.

The H.Ö filed a complaint against the applicant on account of his insults and physical assault.

The applicant was subsequently indicted for obstructing and insulting a police officer on duty and for aggressive drunkenness.

On 16 December 1997 the applicant was examined by an expert at the Forensic Medicine Institute who noted a graze on his left wrist and a prominent oedema on his left ankle. However, the expert held that a final report could only be drawn up once the applicant had been treated at a hospital.

The applicant subsequently filed a complaint with the Human Rights Foundation in Turkey and with the Sariyer Public Prosecutor claiming that he had been subjected to ill-treatment whilst in custody. In his statement, the applicant stated that he was a member of HADEP (the *People's Democracy Party*) and that people were antagonistic towards him because of his Kurdish origin. The applicant went to explain that he presumed that this was the reason he had been assaulted at the bus stop. He also described how, following his arrest, he was taken to a room and blindfolded. The police officers beat and punch him, kicking his legs and ankles.

On 5 March 1998 the applicant was convicted and sentenced to a fine which was subsequently suspended.

In an indictment lodged on 20 May 1998, the public prosecutor initiated criminal proceedings against the police officers who had been on duty at the Sariyer police station when the applicant was arrested. A further medical examination of the applicant was requested by the court. This concluded that, although an exact date could not be determined, the applicant's injuries must have occurred between 1 and 9 December 1997 and that they had been inflicted with a blunt instrument. The applicant's appeal was dismissed due to the coming into force of Law no. 4616 which related to conditional release.

Complaints

The applicant complained that he had been subject to ill-treatment in violation of Article 3. Further, he submitted that, in violation of Articles 6 and 13, the authorities had failed to conduct an effective investigation into his complaints of ill-treatment and that the proceedings against the police officers were suspended in accordance with Law 4616.

Held

Article 3

The Court reiterated that, in respect of a person deprived of liberty, recourse to physical force which has not been made strictly necessary by the individual's own conduct diminishes human dignity and is in principle an infringement of the right enshrined in Article 3. However, the use of force in the context of an arrest, even if it entails injury, may fall outside Article 3, particularly in circumstances resulting from an applicant's own conduct. Accordingly, the Court noted the applicant's reckless, drunken and aggressive behaviour on the day of the incident. It observed that he resisted the policeman during the arrest, injuring the officer, who was reported to be unfit for duty for four days. However, the applicant did not undergo a medical examination on his arrest. The Court held that such an examination would have been an appropriate step for the authorities to take.

Furthermore, in light of the gravity and nature of the applicant's injuries, the Court did not find it likely that these were self-inflicted as alleged by the applicant. Consequently, the Court held that there had been a violation of Article 3 of the Convention.

Article 3 and 13

On the basis of the evidence adduced, the Court found that Turkey is responsible, under Article 3 of the Convention, for the ill-treatment suffered by the applicant whilst in custody. The applicant's complaints in this regard are therefore 'arguable' for the purposes of Article 13 of the Convention in connection with Article 3.

The Court reiterated that investigations must be able to lead to the identification and punishment of those responsible. However the proceedings in question did not produce any result due to the application of the Law n. 4616, which created virtual impunity for the perpetrators of the acts of violence, despite the evidence against them.

Accordingly, the Court found a violation of Article 13 of the Convention.

The Court awarded the applicant EUR 10,000 in respect of non-pecuniary damage and EUR 1,500 for pecuniary damage.

Asan and Others v Turkey

(56003/00)

European Court of Human Rights: Judgment dated 31 July 2007

Torture and ill-treatment in custody – Articles 3, 5, 13 and 14 ECHR

Facts

The twelve applicants are all Turkish nationals and live in Şırnak.

The applicants were arrested by gendarmes on suspicion of aiding and abetting the PKK in September 1999. They were all held at the Provincial Gendarmerie Headquarters and questioned between 15 and 21 September 1999.

On 13 September 1999 the first ten applicants underwent medical examinations. The medical reports stated that no physical injuries had been identified, though in Abdullah Aşan's case chronic bronchitis was identified and Bazi Aşan's lumbar area was tender when touched. Ahmet Aşan had a graze on his neck and tenderness in the lumbar area.

On 18 September 1999 a medical report was carried out on the remaining two applicants, Zeki Aşan and Zübeyir Aşan. The report on Zeki Aşan indicated no sign of any physical violence to the body. The report on Zübeyir Aşan identified a healed fracture and an old surgery scar on his right knee and also a surgical scar on the right ankle resulting from a fracture.

On 22 September 1999 all twelve applicants underwent a second medical examination, in which injuries of some sort were identified on their bodies.

Later that day the applicants were brought before the public prosecutor, where they claimed that they had been subjected to torture in custody. The applicants were then brought before the First Instance Penal Court, the applicants' were ordered to be detained on remand.

On 23 September 1999 the applicants filed objections with the Beytüşşebap Assize Court against the detention order. They claimed that they were not guilty and that they should be released on bail pending trial. Their request was dismissed.

On 4 October 1999 the Beytüşşebap Chief Public Prosecutor issued a decision of non-jurisdiction in respect of the applicants and sent the case file to the Chief Public Prosecutor's office at the Diyarbakır State Security Court. On 20 October

1999 the Chief Public Prosecutor filed a bill of indictment, he requested that all the applicants be convicted and sentenced under various sections of the Criminal Code and the Prevention of Terrorism Act.

On 9 December 1999 the Security Court heard the applicants' complaints regarding ill-treatment during detention. The applicants also alleged that they had been forced under torture to sign statements prepared by the gendarmes. The Court ordered the release pending trial of the applicants, with the exception of Halit Aşan, Süleyman Aslan and Mehmet Sıddık Aslan.

In February and March 2000 the applicants Zeki Aşan, Bazi Aşkan, Ahmet Aşan, Zübeyir Aşan and Adil Aşan applied to the Diyarbakır branch of the Human Rights Foundation of Turkey for a medical examination and treatment. The applicants were diagnosed as suffering from post-traumatic stress disorders.

On 18 May 2006 the applicants' representative applied to the Forensic Medicine Experts' Association and asked for an assessment of the medical reports in the light of the applicants' allegations of ill-treatment.

On 7 June 2006 the applicants furnished the Court with the assessment reports prepared by three forensic medical experts who concluded that the reports dated 22 September 1999 were insufficient since there was no indication that the patients had been subjected to sufficient medical examinations or psychological tests. In the absence of a sufficient examination, it was considered that the allegations matched the findings in the medical report.

Meanwhile, following a constitutional amendment in 2004, the State Security Courts were abolished and the applicants' case was transferred to the Diyarbakır Assize Court. On 10 April 2007 the Diyarbakır Assize Court acquitted the applicants of the charges.

Complaints

The applicants complained that they had been subjected to various forms of ill-treatment while in custody, in violation of Article 3 of the Convention. This included *inter alia* being deprived of food and water and given electric shocks. The Government asked the Court to dismiss the application as being inadmissible for failure to exhaust domestic remedies.

The applicants further alleged that they had been denied an effective domestic remedy in respect of their complaint of ill-treatment, in violation of Article 13.

They contended that they had raised their complaints of ill-treatment before the public prosecutor and various courts. Thus taking all reasonable steps to ensure that their complaints could be properly investigated, however the response of the authorities was inadequate.

The applicants complained under various sections of Article 5 of the Convention. Firstly under Article 5(1) (c), that they had been unlawfully deprived of their liberty as there had been no reasonable suspicion for their arrest. Relying on Article 5(2), they submitted that they were not informed of the reasons for their arrest. Under Article 5(3), the applicants alleged that they had been held in police custody without being brought before a judge. The applicants also complained under Article 5(4) that they had no remedy in domestic law to challenge the lawfulness of their detention. Lastly under Article 5(5) the applicants complained that they had no right to compensation for the alleged violations of Article 5.

The applicants also submitted that they had been detained and tortured on account of their Kurdish origin in violation of Article 14 of the Convention.

Held

The Court reiterated that it had already examined and rejected the Governments argument for the preliminary object of non-exhaustion of domestic remedies in previous cases and found no reason to depart from its previous conclusion. Consequently, the Court rejected the Government's preliminary objection.

The Court unanimously held that there had been a violation of Article 3 in respect of Zeki Aslan, Übeyt Yacan, Şahbaz Aslan, Süleyman Aslan and Zeki Aşan. The Court compared the medical reports given on 13 September 1999 and 22 September 1999 and noted the findings referred to signs of violence, which were consistent with the applicants' allegations of having been beaten. The Government failed to provide any explanation as to the manner in which the injuries were sustained. Therefore the injuries were the result of treatment for which the Government bore responsibility.

The Court however found that there had been no violation of Article 3 of the Convention in respect of Halit Aşan, Abdullah Aşan, Mehmet Sıddık Aslan, Adil Aşan, Bazi Aşkan, Ahmet Aşan and Zübeyir Aşan. The Court distinguished these applicants from the previous five because of the injuries indicated in the medical reports. Although the applicants furnished alternative reports which indicated that some of them suffered from post-traumatic stress disorder, these reports were issued almost seven years after the alleged events, and did not indicate

with sufficient certainty that the applicants were subjected to ill-treatment. The Court held that the evidence did not enable it to find that these applicants were subjected to ill-treatment.

The Court held that there had been a violation of Article 13 of the Convention in respect of all the applicants. In relation to those of which a violation under Article 3 was found their complaints were “arguable” for the purposes of Article 13. As regards the remaining applicants it was held that this did not preclude the complaint in relation to Article 3 from being an “arguable” one for the purposes of Article 13. The Court held that the difficulty in determining whether there was any substance to these applicants’ allegations rested with the failure of the authorities to investigate their complaints. The applicants raised their allegations of ill-treatment before various courts and authorities, who turned a blind eye to the allegations. The inactivity displayed by the authorities was inconsistent with the notion of an “effective remedy”. Thus all the applicants were denied an effective remedy.

The Court held that there was no violation of Article 5(1) (c) as the applicants were arrested in the course of an operation carried out against the PKK. Following their arrest, the applicants were detained on remand and tried by the Diyarbakır State Security Court and Assize Court; therefore sufficient to support the conclusion that there was a “reasonable suspicion” for the applicants’ arrest.

The Court found that the alleged violation of Article 5(2) was manifestly ill-founded, as the arrest protocols clearly mentioned the reasons for the applicants’ arrest. The applicants therefore should have been aware of the legal basis for their arrest.

The Court held that there had been a violation of Article 5(3). The applicants claimed to have been in custody between four and nine days prior to being brought before a judge on 22 September 1999. The Government failed to counter these allegations by providing information as to the length of the applicants’ detention. Detention in police custody which lasts for such periods without judicial control falls outside the constraints as to time laid down by Article 5(3).

The Court reiterated its decision in previous similar cases, rejecting the Government’s submission that there was a remedy in domestic law to challenge the lawfulness of the applicants’ detention. The Court therefore found a violation of Article 5(4) of the Convention.

The Court observed that an action for compensation could only be brought for damage suffered as a result of an unlawful deprivation of liberty. The applicants' detention in custody was in conformity with the domestic law. Consequently, they did not have a right to compensation. The Court dismissed the Government's objection as to non-exhaustion of domestic remedies, and found a violation of Article 5(5).

The Court held that no violation of Article 14 could be established on the basis of the evidence before it.

Halit Aşan, Abdullah Aşan, Mehmet Sıddık Aslan, Adil Aşan, Bazi Aşkan, Ahmet Aşan were awarded EUR 7,700. Zeki Aslan, Übeyt Yacan, Şahbaz Aslan and Süleyman Aslan were awarded EUR 12,700. Zeki Aşan was awarded EUR 10,500 and EUR 5,500 was awarded to Zübeyir Aşan. All awards were made for non-pecuniary damage. The Court awarded a further EUR 5,000 jointly to all the applicants for costs and expenses.

Commentary

In the *Cafer Kurt v Turkey*, *Nevruz Koc v Turkey* and *Asan and Others v Turkey* cases above, the Court reiterated that where an individual is taken into custody in good health but, on his release, he is found to be injured, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim's allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Article 3 of the Convention.

This finding is significant in so far that it highlights the importance of State and government accountability, bringing it to the fore of human rights concerns. States may no longer hide behind the actions of its officials or behind the lack of conclusive evidence to escape from its obligations to ensure the physical integrity of those held within its custody. Here again, within the context of Articles 1, 3 and 15 of the Convention, it is seen how the prohibition against torture does not accept derogations. In those regrettable instances where an individual is indeed subject to torture, the State is obliged to provide redress under article 13 of the Convention.

Right to liberty & security

Modarca v Moldova

(14437/05)

European Court of Human Rights: Judgment dated 10 May 2007

Detention of individual on remand – whether reasons for detention “relevant and sufficient” – whether detention after 30 days had a legal basis – whether conditions of detention and denial of medical assistance constituted inhuman treatment – whether confidential and effective client-lawyer communication impeded – Articles 3 and 5(1),(3) and (4) ECHR

Facts

Applicant’s detention pending trial

The applicant was born in 1949 and lives in Chisinau, Moldova. At the time of the application he worked as Head of the Chisinau Council Planning Department.

On 24 September 2004, the applicant was remanded in custody by the District Court for 30 days, for alleged abuses of power in connection with land privatisation. This was deemed necessary because the applicant was claimed to be a danger to society and liable to abscond, re-offend, obstruct the investigation, influence witnesses and evidence if at large.

The applicant’s requests to have the detention replaced with house arrest were rejected, successive courts simply repeating the District Court’s reasons above. On 26 October 2004, however, the Chisinau Court of Appeal acknowledged that the 30 days’ detention had expired, but left the applicant in detention.

On 15 November 2005, the applicant’s detention was replaced by house arrest.

Interference with client-lawyer communication

Whilst in detention, the applicant had to communicate with his lawyer through a glass partition, which required them to shout to hear each other and precluded the passing of documents.

The applicant also pointed to indirect proof that the authorities were recording or listening to his conversations with his lawyer. For instance, remand centre officers urged his lawyer not to refer to them in impolite terms, the very same terms he had used in a meeting with his client. Moreover, in one meeting the

applicant informed his lawyer of the location of certain documentation, but, when the lawyer arrived at the location, remand centre officers were already there.

Conditions of Detention

The applicant suffered from several medical complaints which required regular treatment and the avoidance of cold and damp. The applicant asserted that he was given no such treatment whilst in detention.

One cell in which the applicant was detained housed four detainees, each with a living space of 1.19m². Moreover, it had little access to daylight, no proper heating or ventilation, water and electricity were unavailable at certain periods (including during the whole night) during which the toilet could not be used, and on bath day it had no running water. Only EUR 0.28 was allocated for food per detainee. The applicant was imprisoned in the cell for 23 hours per day and, although he was allowed to walk around for the remaining hour, the area for walks was directly under the ventilation exhaust of the wing which housed inmates with tuberculosis.

Complaints

The applicant complained that: the conditions of his detention and the lack of medical assistance violated Article 3 ECHR; his detention after 24 October 2004 had not been “lawful”, contrary to Article 5(1); his detention on remand had not been based on “relevant and sufficient” reasons, in violation of Article 5(3); and that conversations with his lawyer were through a glass panel and possibly overheard and recorded by the authorities, contrary to Article 5(4).

Held

Article 3: Detention Conditions and Medical Assistance

The Court found the complaints relating to medical assistance to be manifestly ill-founded. The applicant’s doctor had recommended several treatments, and these had not been administered during detention. However, they had also not been administered in the year prior to detention. The medical assistance was therefore not needed and its absence could not, of itself, amount to a violation of Article 3.

However, the other conditions of detention, viewed cumulatively, did disclose a violation of Article 3. For instance, the detainee spent 23 hours per day in a cell with only 1.19² of space, whereas the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) considered

that 4m² was appropriate and desirable. Moreover, the cell was deprived of daylight, the lack of running water precluded use of the toilet, the food was not only insufficient but “repulsive and virtually inedible” according to the CPT, and no bed linen or prison clothing had been provided.

Article 5(1): detention after 24 October 2004

The Court agreed that the applicant’s detention on remand after 24 October was not based on any legal provision, contrary to Article 5(1).

Article 5(3): reasons for detention

The reasons relied upon by the domestic courts to remand the applicant in detention were simply reproduced from the Moldovan Code of Criminal Procedure, without any attempt to show how they actually applied to the applicant’s case. The requirement that the reasons for detention be “relevant and sufficient” was therefore unfulfilled, contrary to Article 5(3).

Article 5(4): client-lawyer communication

Article 5(4) incorporates a right to a defence, which in turn requires that detainees receive effective assistance from a lawyer. Such effective assistance depends, in part, on confidentiality of information exchanged between lawyer and client. Interference with the lawyer-client privilege does not require actual interception or eavesdropping to have taken place; a genuine belief held on reasonable grounds is sufficient. In this case, the applicant did have such a genuine belief. Moreover, that belief was objectively reasonable: various incidents had suggested eavesdropping on, or the recording of, Modarca’s conversations with his lawyer, and the whole legal community in Moldova had long held serious concerns over confidentiality, evidenced in particular by the Moldovan Bar Association’s requests to verify the presence of listening devices in the remand centre meeting room.

Effective assistance from the applicant’s lawyer was also impaired by the glass partition in the meeting room, which lacked any aperture meaning that documents could not be exchanged. The use of a glass partition had to be justified by reference to individual detainees’ circumstances; in this case it could not be justified, since there was no evidence that the applicant had a criminal record or had been prosecuted for violent offences. The Government’s arguments on grounds of security were rejected.

In the light of the above, the Court found that the applicant’s right to an effective defence under Article 5(4) had been violated.

The applicant was awarded EUR 7,000 in non-pecuniary damages and EUR 1,800 in legal costs.

Birdal v Turkey

(53047/99)

European Court of Human Rights: Judgment dated 2 October 2007

Independent and Impartial Court and Freedom of Expression – Articles 6 and 10 ECHR

Facts

The applicant, Mr Akin Birdal a Turkish national, was born in 1948 and lives in Ankara.

On 6 September 1995, on World Peace Day, the applicant spoke at a panel discussion which was organised by the United Socialist Party in Mersin. He said, "... We have observed the consequences of an unjust and dirty war in the country. This war has continued for 11 years as the rights of the Kurdish people have not been recognised... The Kurdish problem exists in Turkey. Turks should also recognise this problem. We, the Turks, Kurds, Alevis and Sunnis, are all against the war. We want peace. We want the lives of Kurds to be also protected by the Constitution. We want peace for the fraternity of the peoples."

On 2 July 1996 the Konya State Security Court convicted the applicant under Article 312(2) of the Criminal Code of incitement to hatred and hostility by making distinctions on the basis of race and region. The applicant was sentenced to one year's imprisonment and a fine of 300,000 Turkish liras.

The applicant appealed. On 20 April 1998 the Court of Cassation quashed the judgment of the first-instance court, holding that the speech in question consisted of a critical assessment concerning the country's problems and that it did not contain any element which could constitute an offence.

The Adana State Security Court, which was composed of three judges including a military judge, subsequently acquired jurisdiction over the case. On 16 December 1998 the Adana Court held that the judgment of the First Instance Court was in accordance with law. It sentenced the applicant to one year imprisonment and a fine. The applicant appealed again. On 20 April 1999 the Court of Cassation

upheld the judgment of the Adana Court. The applicant served his prison sentence in 2000.

Following the amendments to Article 312 of the Criminal Code, the applicant applied to the Adana Court and requested a re-trial. In 2004 the State Security Courts were abolished and the applicant's case was transferred to the Adana Assize Court.

On 1 February 2005 the Adana Assize Court acquitted the applicant of the charges against him. However the applicant was unable to claim compensation for the time spent in prison, as the relevant law entered into force on 1 June 2005, four months after the applicant was acquitted.

Complaints

The applicant complained under Article 6(1) of the Convention that he had not been tried by an independent and impartial court on account of the presence of a military judge on the bench of the Adana State Security Court which convicted him. He further maintained under Article 10 of the Convention that his criminal conviction and sentence had infringed his right to freedom of expression.

The Government suggested that, since the applicant had been acquitted in 2005, he could no longer be considered a victim. They further contended that the applicant's complaint under Article 10 of the Convention should be rejected for non-exhaustion of domestic remedies; since he had not at any stage in the domestic proceedings relied on the provisions of the Convention.

The Government also submitted that the interference with the applicant's right to freedom of expression was justified under the provisions of the second paragraph of Article 10.

Held

The Court decided that the Government's objection that the applicant can no longer be considered as a victim could not be upheld because the applicant was not entitled to claim compensation for the time he had spent in prison.

The Court stated that complaints intended to be made in Strasbourg should first be raised before the national authorities. Although in the present case, the applicant had submitted before the domestic courts that he had not incited to hatred and hostility by making distinctions on the basis of race and region. Therefore the Court concluded that the applicant's complaint under Article 10

had been brought, at least in substance, to the attention of the domestic courts. The complaint was subsequently declared admissible.

The Court held that the applicant's apprehension about being tried by a bench which included a regular army officer and consequent fear as to the State Security Court's lack of independence and impartiality was objectively justified. The Court therefore found a violation of Article 6(1) of the Convention.

The Court confirmed that the issue in regards to Article 10 was whether the interference was "necessary in a democratic society". It held that the Government had not submitted any arguments capable of leading to a decision that such interference was necessary. The Court noted that, although the applicant had been acquitted of the charges, he nevertheless served his prison sentence and there was no remedy under domestic law by which he could request compensation. Furthermore it decided that taken as a whole, the applicant's speech did not encourage violence and therefore did not constitute hate speech. In conclusion it was held that the applicant's original conviction and sentence was disproportionate to the aims pursued; therefore finding a violation of Article 10.

The applicant was awarded EUR 5,000 in respect of non-pecuniary damage and EUR 2,000 in respect of costs and expenses.

Kąkol v Poland

(3994/03)

European Court of Human Rights: Judgment dated 6 September 2007

Pre-trial detention and being brought promptly before judge - Articles 5(3) ECHR

Facts

The applicant, a Polish national, Mr Jarosław Kąkol, was born in 1969 and lives in Gdynia, Poland.

On 21 April 1999 the applicant was arrested on suspicion of armed robbery. On 22 April 1999 the Gdańsk District Court remanded him in custody.

Later, several other persons were detained and charged in connection with the same investigation. In the course of the investigation, the applicant's detention was prolonged several times by the Gdańsk Court of Appeal. It relied on the

reasonable suspicion that the applicant had committed the offences with which he had been charged and the severity of the anticipated penalty.

The Court of Appeal held that the detention on remand was the only measure which could secure the proper conduct of the proceedings. On 15 May 2001 the applicant was charged with several dozen counts of armed robbery which had been committed in an organised armed criminal group. The case file comprised 114 volumes and the prosecution asked the court to hear evidence from 366 witnesses.

During several hearings in 2002 the trial court ordered the removal of the applicant on the grounds that he had disrupted the trial. The applicant was ordered to be held in custody until 30 September 2002. The Court of Appeal found that the prolongation of detention was justified by the particular complexity of the case. It further observed that the delays in the trial were partly attributable to some of the defendants who had attempted to disrupt the proceedings and, consequently, had to be removed from the court room.

The Code of Criminal Procedure established a presumption to the effect that the likelihood of a severe penalty being imposed on the applicant might induce him to obstruct the proceedings. The Court added that the risk of absconding or tampering with witnesses in the present case did not have to be supported by any concrete facts, but resulted from the above presumption. The Court of Appeal also observed that although the applicant and other defendants were free to make use of their procedural rights, the abuse of those rights undoubtedly led to delays in the trial.

On 1 September 2003 a new legal-aid counsel was appointed for the applicant. Subsequently, the Court of Appeal prolonged the applicant's detention on several occasions, ordering his continued detention until 30 September 2005. In all the decisions the Court of Appeal stated that the grounds previously given for the applicant's detention were still valid.

On 8 March and 24 May 2005 the trial court dismissed the applicant's application for release on health grounds. The applicant was diagnosed with *inter alia* a brain tumour. However the experts determined that he could remain and receive treatment in detention.

During the trial the applicant filed numerous but unsuccessful applications for release and appealed, likewise unsuccessfully, against the decisions prolonging

his detention. He maintained that the length of his detention was excessive and that the charges against him lacked a sufficiently strong basis.

On 20 September 2005 the Court of Appeal prolonged the applicant's detention until 31 January 2006. The applicant appealed against that decision. On 18 October 2005 a different panel of the Court of Appeal quashed the decision and ordered the applicant's release under police supervision. The applicant was released on 19 October 2005.

On 24 November 2005 the trial court severed the trial and divided the case into eleven separate cases. Proceedings are still pending before the first-instance court.

Complaints

The applicant complained that the length of his pre-trial detention, namely 6 years and 6 months, had been excessive and thus violated Article 5(3) of the Convention. The applicant submitted that the courts prolonging his detention repeatedly invoked similar grounds and did not impose other preventive measures. The applicant alleged that the domestic court had handled the trial incompetently. He further submitted that the complexity of the case resulted from the court's decision to examine jointly all the charges against the very many defendants in one set of proceedings.

The Government argued that in organised crime cases the authorities were faced with particular problems, relating to the taking and assessment of evidence and various logistical issues. The Government submitted that the applicant's pre-trial detention had been justified by the existence of substantial evidence of his guilt, the nature of the offences and the severity of the anticipated penalty. The risk that the defendants might obstruct the proceedings was aggravated by the fact they had been members of an organised criminal group. Thus, the domestic courts had considered it necessary to remand the applicant and his co-defendants in custody until all relevant witnesses had been heard. The necessity of the applicant's continued detention had been thoroughly examined by the courts which on each occasion had given sufficient reasons for their decisions.

The Government also maintained that the defendants bore the main responsibility for the length of the trial. They had lodged hundreds of applications and appealed against every decision, even when they had been informed that the appeal had been inadmissible.

Held

The Court held that the fact that the case concerned a member of a criminal group had to be taken into account when assessing compliance with Article 5(3).

The Court accepted that the reasonable suspicion against the applicant of having committed the serious offences could initially warrant his detention. It also noted that the authorities were faced with the difficult task of determining the facts and the degree of alleged responsibility of each of the defendants. However, with the passage of time, these grounds became less and less relevant.

The Court therefore had to establish whether the other grounds adduced by the courts were “relevant” and “sufficient”. According to the authorities, the likelihood of a severe sentence being imposed on the applicant created a presumption that the applicant would obstruct the proceedings. The Court reiterated that the gravity of the charges could not by itself justify long periods of detention on remand.

The Court also reiterated that the existence of a general risk flowing from the organised nature of the alleged criminal activities may be accepted as the basis for his detention at the initial stages of the proceedings and in some circumstances also for subsequent prolongations of the detention.

Furthermore, the Court accepted that in such cases, the process of gathering and hearing evidence is often a difficult task. Moreover, it considered that the risk that a detainee if released might obstruct the proceedings is often particularly high.

It was held that while all those factors could justify a relatively long period of detention, they did not give the domestic courts an unlimited power to prolong this measure. The Court concluded that the grounds given by the domestic authorities could not justify the overall period of the applicant’s detention, accordingly finding a violation of Article 5(3) of the Convention.

The Court held that the applicant had suffered some non-pecuniary damage which was not sufficiently compensated by the finding of a violation of the Convention. The applicant was awarded EUR 2,000 in respect of non-pecuniary damage; no claim for costs and expenses was made.

Right to a fair trial

Bayam v Turkey

(26896/02)

European Convention on Human Rights: Judgment dated 31 July 2007

Detention and trial for PKK activities – prohibition of ill-treatment – liberty and security of person - right to a fair trial – Articles 3, 5(3) and 6(1) ECHR

Facts

The applicant, Mr. Rifat Bayam, is a Turkish national born in 1975, and was detained in Batman prison at the time of the application.

He was initially taken into custody on suspicion of membership of an illegal organisation (the PKK) on 14 December 1993, following which his detention on remand was ordered on 28 December 1993.

On 25 January 1994, the public prosecutor lodged an indictment with Diyarbakır State Security Court (DSSC), charging the applicant and 12 others with carrying out activities aimed at disrupting the unity of the State. The Prosecutor requested the Court to sentence the applicant in accordance with Article 125 of the Criminal Code, which carried the death penalty.

On 27 December 1996, the DSSC convicted the applicant under Article 168(2) for membership of the PKK, and sentenced him to 12 years and six months' imprisonment. In November 1997, the Court of Cassation quashed that decision and referred the case to the Diyarbakır State Security Court, holding that the applicant should also have been convicted for throwing explosives under Article 264. In November 1998, the DSSC convicted the applicant accordingly, imposing an additional sentence of six months and twenty days' imprisonment. However, in June 1999, the Court of Cassation again quashed the decision, following which the DSSC, in September 2000, convicted the applicant of PKK membership under Article 168(2), but acquitted him of throwing explosives contrary to Article 264.

In February 2001, the Court of Cassation dismissed the applicant's appeal, as the statutory time limit had been exceeded.

Complaints

The applicant complained that: his detention on remand exceeded the “reasonable time” requirement under Article 5(3); the length of the proceedings violated Article 6(1); and during the trial he lived in fear of the death penalty, contrary to Article 3.

The applicant also made several other complaints under Articles 3, 5 and 6; these, however, were not considered by the Court by virtue of falling foul of the six month rule under Articles 35(1) and (4) ECHR.

Held

For the purposes of Article 5(3) ECHR, consecutive periods of detention are to be viewed cumulatively. After deducting the periods when the applicant was detained following conviction under Article 5(1)(a) ECHR, the duration of pre-trial detention totalled 5 years and 3 months. Following its previous case-law, the Court found that to be excessive and a violation of Article 5(3).

Turning to Article 6(1), the Court noted the complexity of the case, since it involved several accused and concerned membership of an illegal organisation. Any periods of inactivity could not be attributable to the domestic courts, and the Court of Cassation decided on the appellant’s appeal in less than one year. Accordingly, the length of the criminal proceedings did not exceed the reasonable time requirement of Article 6(1).

In relation to Article 3, the Court noted that the applicant only faced charges under Article 125 of the Criminal Code (which carried the death penalty) until 27 December 1996, and thereafter charges were brought under Article 168(2) of the Criminal Code. Moreover, the Turkish National Assembly had not authorised the enforcement of the death penalty since 1984. Since the threat of the death penalty was therefore illusory, the applicant could not be considered to have experienced mounting anguish at the prospect of being executed, and the severity threshold set by Article 3 ECHR had not been crossed.

The Court awarded the applicant EUR 4,000 in non-pecuniary damages, due to the undue length of his pre-trial detention contrary to Article 5(3). No pecuniary award was made, however, there being no causal link between the pecuniary damage alleged and the Article 5(3) violation.

Saccetin Yildiz v Turkey

(38419/02)

European Court of Human Rights: Judgment dated 5 June 2007

Detention of individual by police - confession extracted under ill-treatment - effectiveness of investigation into ill-treatment - denial of access to lawyer - whether criminal proceedings unfair - Articles 3 and 6 ECHR

Facts

Preliminary Investigation

The applicant was born in 1970 and lives in İstanbul.

On 18 August 2001, he was arrested and detained on suspicion of murder. During questioning, he was allegedly denied access to a lawyer, beaten on the soles of his feet and given electric shocks.

In his statements of 19 August 2001, Yıldız confessed to the police.

On 24 August 2001 he was examined by a doctor, whose medical report noted that the applicant had significant lesions under both feet. On the same day, Yıldız was taken to the Public Prosecutor's office, where he repeated his earlier confession and maintained that he had sustained no ill-treatment whilst in detention. Referring to the medical report, he also said that the lesions had been caused by the prolonged wearing of his shoes. The applicant also re-iterated the foregoing before Kadıköy Magistrates' Court, which ordered his detention on remand.

The criminal trial

During the criminal trial at Kadıköy Assize Court, the applicant denied involvement in the murder and claimed that his police confession was obtained through coercion. Moreover, he had only confessed to the public prosecutor and magistrate because the police had threatened to take him back if he did not.

The Assize Court convicted Yıldız, imposing a sentence of life imprisonment. Its judgment relied mainly on the confessions given to the police, Public Prosecutor and magistrates' court. The Court of Cassation upheld the conviction, on the basis of the applicant's confessions.

Investigation into applicant's allegations of torture

On 7 January 2002, the applicant complained to the public prosecutor about the alleged ill-treatment sustained in police detention. The Prosecutor declined to prosecute the police officers on the basis that the applicant had previously denied any ill-treatment.

Complaints

The applicant complained of ill-treatment during detention and the lack of an effective investigation into the treatment, contrary to Article 3 ECHR. He also submitted that the criminal proceedings were unfair, particularly since he was deprived of legal assistance during the preliminary investigation, contrary to both Articles 6(1) and 6(3)(c).

Held

On Article 3, the Court repeated its previous case law to the effect that, where an individual is taken into custody in good health but is found to be injured at the time of his release, the State must provide a plausible explanation as to cause of the injuries, failing which an issue under Article 3 will arise.

Even though the applicant had not been medically examined upon initial detention, the medical report detailing lesions was consistent with his allegations, and the Government had not provided any plausible explanation as to their origin. The circumstances taken as a whole therefore suggested, beyond a reasonable doubt, that the lesions resulted from ill-treatment for which the State bore responsibility.

Turning to the investigation into the ill-treatment, the Court noted that, although the Public Prosecutor had launched an investigation immediately upon receipt of the applicant's complaint, the Prosecutor's final decision not to prosecute was based solely on the applicant's initial statements that he had not been ill-treated. There was nothing to indicate that the Prosecutor had taken testimony from the applicant, policemen or any possible witnesses. As a result, the investigation was ineffective, contrary to Article 3.

On Article 6, the Court held that the applicant received no legal assistance during his time in police detention, and that his statements before the police, the Public Prosecutor and the Magistrates' Court were all made without legal representation. Moreover, the statements were the result of ill-treatment contrary to Article 3. The fact that statements provided under ill-treatment and in the absence of a

lawyer were used in the criminal proceedings against the applicant rendered his whole trial unfair.

No sum was awarded to the applicant on account of the above violations, as his just satisfaction claims were not submitted in time. However, the Court remarked that, in cases involving conviction by a court lacking independence and impartiality, a re-trial or re-opening of the case constitutes appropriate redress.

Yildiz and others v Turkey

(6749/03)

European Court of Human Rights: Judgment dated 24 July 2007

Unreasonable delay in the proceedings – failure to provide an effective remedy - Articles 6(1) and 13.

Facts

The five applicants, Turkish nationals, reside in Trabzon, Konya and Ankara. They are the heirs of Ali Rıza Yıldız, author of the poem 'Baba, letter to the after-life'. This poem was interpreted by a singer, Adnan Şenses - working for the recording company 'Raks Müzik' - without having obtained the consent of the author of the poem.

On 6 September 1996 Ali Rıza Yıldız instituted proceedings against the singer and recording company before the Tribunal of Commerce in Ankara. He demanded a judgment for 500,000,000 Turkish Lira for pecuniary and 500,000,000 Turkish Lira for non-pecuniary damage.

In 2001, Ali Rıza Yıldız died and his heirs carried on the proceedings on his behalf.

On 30 April 2001, the applicants demanded a further sum of 1,526,922,000 Turkish Lira for pecuniary damages.

By a judgment dated 8 November 2001 the Tribunal awarded Ali Rıza Yıldız 500,000,000 Turkish Lira for pecuniary damage and 300,000,000 Turkish Lira for non-pecuniary damage as author of the poem in question.

On 1 October 2002, the Court of Cassation reversed the decision made by the Tribunal on the ground that it had failed to rule on the sum requested by the applicants.

By a judgment dated 5 March 2003, the Tribunal held that the poem belonged to Ali Rıza Yıldız, father of the applicants, and accepted the request for the further sum. In conclusion, it awarded the applicants 2,025,922,000 Turkish Lira for pecuniary damage and 300,000,000 for non-pecuniary damage.

Complaint

The applicants submitted that the length of the proceedings infringed the principle of ‘reasonable delay’ in violation of Article 6(1). Further, in Turkey there exists no means of redress for an excessive delay in the proceedings, violating Article 13 of the Convention.

Held

Article 6

The Court observed that the reasonable character of the length of proceedings depends on the circumstances, the complexity of the issues in question and the approach of the authorities and the applicants.

After having considered all the issues arising in the present case, it held that the Government did not put forward any convincing argument to aid the Court in finding that there had been an ‘unreasonable delay’ in the proceedings. Accordingly, the Court found a violation of Article 6(1) of the Convention.

Article 13

The Court noted that Article 13 guarantees an effective remedy before a national body. The Government contended that the applicants could have initiated an action before the Public Prosecutor or a civil action against the judiciary for negligent exercise of their function.

The Court held that the Government’s argument had been rejected on numerous occasions in previous ECtHR case-law and found that there was no reason to reach a different conclusion in the present case.

Accordingly, the Court found that there had been a violation of Article 13 as a result of the lack of an effective remedy available to the applicants to obtain a judgment on the unreasonable delay that they endured in their legal proceedings.

The Court awarded the applicants EUR 3,000 for non-pecuniary damage.

Ulke v Turkey

(39437/98)

Committee of Ministers: adopted on 17 October 2007

Judgment

In a judgment dated 24 January 2007 (made final on 24 April 2006) the Court held the applicant's repeated convictions and imprisonment for having refused to perform compulsory military service on account of his beliefs as a pacifist and conscientious objector amounted to degrading treatment within the meaning of Article 3 of the Convention.

The Court found that the existing legislative framework was insufficient, as there was no specific provision in Turkish law governing the sanctions for those who refused to perform military service on conscientious or religious grounds and that the only relevant applicable rules appeared to be the provisions of the Military Criminal Code, which made any refusal to obey the orders of a superior an offence.

Execution

Pursuant to Article 46(2) of the Convention, the Committee's role is to supervise the execution of final judgments of the Court.

The Committee stressed the obligation of every state, under Article 46(1) of the Convention to abide by the judgments of the Court, through, *inter alia*, the adoption of individual measures putting an end to the violations found and removing as far as possible their effects for the applicant, as well as general measures not least to prevent similar violations.

The Committee observed that at the 997th meeting of the Committee of Ministers in June 2007, the Turkish authorities declared that a draft law had been prepared aiming to prevent new violations of Article 3 similar to that found in the present case, and that this draft would be transmitted to the Prime Minister's Office for submission to Parliament following the opinions received from the relevant ministers.

Further, the Committee noted that the Turkish authorities' declaration that this law, once adopted, would prevent repetitive prosecutions and convictions of those who refuse to perform military service for conscientious or religious

reasons, on grounds of “persistent disobedience” of military orders and that it was also intended to cover the necessary individual measures to be taken in this case.

The Committee observed that following the government’s declaration, the applicant was summonsed on 9 July 2007 to present himself in order to serve his outstanding sentence resulting from a previous conviction. His request for a stay of execution of his sentence was rejected by the Eskişehir Military Court on the ground that the said declaration before the Committee of Ministers could not lead to a stay of execution of the applicant’s sentence because the content of the law under preparation - including whether or not it contained provisions that would apply for or against the applicant’s case - was unknown.

The Committee emphasized that the Convention and the judgments of the Court have direct applicability in Turkish legal order by virtue of Article 90 of the Turkish Constitution. Despite this provision, the applicant is nonetheless facing a real risk of being imprisoned on the basis of a previous conviction.

In light of the above, the Committee urged the Turkish authorities to take all necessary measures to put an end to the violation of the applicant’s rights under the Convention without further delay and to adopt rapidly the legislative reform necessary to prevent similar violations of the Convention.

Furthermore, it invited the Turkish authorities rapidly to provide the Committee with information concerning the adoption of the measures required by the judgment.

The Committee decided to examine the implementation of the present judgment at each human rights meeting until the necessary urgent measures are adopted.

No punishment without law

Jorgic v Germany

(74613/01)

European Court of Human Rights: Judgment dated 7 July 2007

Interpretation of the crime of genocide – jurisdiction to try a crime of genocide in a domestic court – Articles 5, 6 and 7.

Facts

The applicant was a national of Bosnia-Herzegovina and of Serb origin. He had legally resided in Germany between 1969 and 1992, and at the time of the present case, he was serving a life sentence in a German prison.

In 1992 the applicant left Germany to return to Bosnia Herzegovina. On his return to Germany, in 1995, he was arrested and placed in pre-trial detention on suspicion of having committed acts of genocide during the ethnic cleansing which took place in the Doboj region in 1992. The applicant was accused of setting up a paramilitary group which participated in the arrest, detention, assault, ill-treatment and killing of Muslim men from three villages in Bosnia-Herzegovina; shooting 22 inhabitants of another village, including women, elderly, and disabled persons; expelling 40 men from their village, subjecting them to ill-treatment and ordering six of them to be shot; and killing a prisoner with a wooden truncheon with the sole aim of demonstrating a new method of killing.

The Düsseldorf Court of Appeal found the basis of its jurisdiction in the Criminal Code as there was a legitimate link which allowed prosecution in Germany in accordance with Germany's military and humanitarian missions in Bosnia Herzegovina; the applicant had resided in Germany for more than 20 years and was arrested there and there were no rules under public international law which barred the German courts from trying the case. Accordingly, the court convicted the applicant on 11 counts of genocide, 22 counts of murder, dangerous assault and deprivation of liberty. He was sentenced to life imprisonment.

The applicant appealed but was unsuccessful.

Complaints

Relying on Articles 5 and 6 of the Convention, the applicant submitted that the German courts did not have the jurisdiction to try him. Further, he alleged that his conviction for genocide violated Article 7 as the national courts' interpretation of genocide had no basis in German law or public international law.

Held

The Court observed that the German courts' interpretation of the Genocide Convention and of the Criminal Code, which established their jurisdiction to hear the case, was widely confirmed by the statutory provisions and case law of the European Court of Human Rights and International Criminal Tribunal for the former Yugoslavia (ICTY). Furthermore, the ICTY statute confirmed the German courts' view in that it provided for concurrent jurisdiction of the ICTY and national courts. Therefore, in finding that the 'intent to destroy a group' did not necessitate the destruction of a group, the domestic court had not been unreasonable.

The Court noted that the interpretation of the applicable provisions and rules of public international law by the German courts was not arbitrary. The courts had reasonable grounds for establishing their jurisdiction to try the applicant on charges of genocide. Accordingly the Court found that the applicant's case had been heard by a tribunal established by law within the meaning of Article 6. Further, it held that the applicant had also been lawfully detained after conviction by a competent court within the meaning of Article 5(1) of the Convention.

With regard to Article 7, the Court noted that there was conflicting case-law as to the interpretation of the crime of genocide, some adopting a narrow definition whilst others adopting a more broad one. The Court held that once that the requirements of foreseeability had been met, it was for the German courts to decide which interpretation of the crime of genocide to adopt.

Accordingly, the Court found no violation of Article 7.

Private & family life

Tan v Turkey

(9460/03)

European Court of Human Rights: Judgment dated 3 July 2007

Freedom of expression – interception of prisoners’ correspondence – lack of an effective remedy - Articles 8 and 13

Facts

The applicant, Erdal Tan, was born in 1975. He is currently serving a sentence of twelve years and six months’ imprisonment in an F-type prison in Sincan for membership of an illegal organisation.

On 31 July 2002 the applicant wrote a letter, addressed to a journalist of the daily newspaper *Radikal*, criticising the conditions of detention in the F-type prison and describing them as being contrary to human dignity.

The prison disciplinary board found that the letter contained information which could damage the reputation of the prison and refused to forward it to the newspaper editor. On 16 August 2002 the applicant appealed this decision, asserting his right to respect of correspondence but was unsuccessful. His subsequent appeals were also of no avail.

Complaint

Relying on Article 8 of the Convention, the applicant disputed the interception of his correspondence. Further, the applicant claimed a violation of Article 13 because an effective remedy was not available to him.

Held

Article 8

The Court held that the interception of correspondence constituted an interference within the meaning of Article 8(2) of the Convention. Accordingly the Court moved on to consider whether such interference was ‘prescribed by law’, ‘in pursuance of a legitimate aim’ and ‘necessary in a democratic society’ and therefore justified.

The Court observed that regulating prisoners’ correspondence is a power provided in articles 144 and 147 of Regulation no. 647 on prison management

and the execution of sentences. The question to be considered was whether these regulations limited the rights of prisoners to receive or send correspondence and whether it conferred on the prison authorities, with the supervision of the disciplinary board, the authority to censor and/or dispose of correspondence that could be regarded as ‘embarrassing’ for the prison.

The Court found that prison correspondence appeared to be controlled solely by these regulations which are not sufficiently clear and fail to define what is meant by ‘embarrassing’. It held that the regulation does not specify with sufficient clarity the powers of the prison authorities. Accordingly, the interference was not ‘prescribed by law’ within the meaning and it held unanimously that there had been a violation of Article 8.

Article 13

The Court observed that it had already previously ruled on a very similar issue. In the present case, it held that the applicant had had the opportunity to challenge the refusal of the disciplinary commission to send his letter to the newspaper by appealing to the Court. Accordingly the Court did not find a violation of Article 13.

The Court awarded the applicant EUR 1,000 for costs and expenses.

Freedom of thought, conscience and religion

Hasan and Eylem Zengin v Turkey

(1448/04)

European Court of Human Rights: Judgment dated 9 October 2007

Right to Education, Conformity with Religious Convictions – Second Sentence of Article 2 of Protocol No. 1 ECHR

Fact

Hasan Zengin, who was born in 1960, and his daughter Eylem Zengin, who was born in 1988, live in İstanbul.

The applicants are adherents of Alevism, which has deep roots in Turkish society and history and is generally considered as one of the branches of Islam, though

its religious practices differ from those of the Sunni schools of law in certain aspects such as prayer, fasting and pilgrimage.

On 23 February 2001 the applicant submitted a request to the Directorate at the İstanbul Governor's Office, seeking to have his daughter exempted from religious culture and ethics classes. Pointing out that his family were followers of Alevism, he stressed that under international treaties, such as the Universal Declaration of Human Rights, parents had the right to choose the type of education their children were to receive.

On 2 April 2001 the Directorate replied that it was impossible to grant the exemption request. Following the Directorate's refusal, the applicant applied to the İstanbul Administrative Court for judicial review. Hasan Zengin challenged the compulsory nature of this school subject alleging that the classes were essentially based on Hanafite Islam and that no teaching was given on his own faith.

In a decision on 28 December 2001, the Administrative Court dismissed the applicant's request. The applicant appealed on points of law against that judgment. In a judgment served on 5 August 2003, the Supreme Administrative Court dismissed his appeal and upheld the first-instance judgment, holding that procedural rules and legislation were complied with.

On 9 July 1990 the Supreme Council for Education adopted a decision on religious, culture and ethics classes and pupils who were entitled to exemption from them. It stated "...pupils of Turkish nationality who belong to the Christian or Jewish religions... are not obliged to follow the classes in religious culture and ethics, provided they affirm their adherence to those religions..."

Complaints

It was submitted by the applicants that the way in which religious culture and ethics were taught in primary and secondary schools infringed their rights under the second sentence of Article 2 of Protocol No. 1. In particular, classes for these subjects did not fulfil the criteria, identified by the Court in the context of its interpretation of Article 2 of Protocol No. 1. The school syllabus lacked objectivity as it taught predominantly and praised the Sunni interpretation of the Islamic faith and tradition.

The applicants challenged government assertions of the holistic approach of their religious teaching. They asserted that schools employed the inclusion of

morality in their syllabus as a means to hide their main aim of strengthening the pupils' Islamic culture.

In addition, the applicants submitted that a secular State could not have a wide margin of appreciation in the field of religious education. This would be incompatible with the State's duty of neutrality and impartiality.

A violation of Article 9 of the Convention was also claimed by the applicants, namely that their right to thought, conscience and religion had been compromised.

The applicants made no claim for compensation in respect of pecuniary and non-pecuniary damage. On the other hand, they claimed the sum of EUR 3,726.80 jointly to cover legal costs.

Held

Pursuant to the Turkish Constitution, Ms Zengin was obliged to attend classes in religious culture and ethics from the fourth year of primary school. The intentions of the syllabus, namely to be taught in compliance with respect for the principles of secularism and freedom of thought, religion and conscience to "foster a culture of peace and a context of tolerance", were held to be compatible with the principles of pluralism and objectivity enshrined in Article 2 of Protocol No. 1. However the teaching programme was also aimed at raising awareness among pupils on fundamental aspects of the Islamic religion. The textbooks used appear to provide instruction in the major principles of the Muslim faith. Equally, pupils had to learn several parts of the Koran by heart. Thus, the syllabus gave greater priority to knowledge of Islam than to that of other religions, although this in itself could not be viewed as a departure from the principles of pluralism and objectivity.

In the religious culture and ethics lessons, pupils received no teaching on the Alevi faith, although the proportion of the Turkish population belonging to this faith is very large. The Court considered that, in the absence of instruction in the basic elements of the Alevi faith in primary and secondary school, the fact that the life and philosophy of two individuals who had a major impact on its emergence are taught in the 9th grade was insufficient to compensate for the shortcomings in this teaching.

It was held that where Contracting States include the study of religion in the school curricula, pupils' parents may expect that the subject will be taught in such

a way as to meet the criteria of objectivity and pluralism, and with respect for their religious convictions. The Court noted that almost all of the member States offer at least one route by which pupils can opt out of religious education classes. Religious culture and ethics lessons are compulsory but have the possibility for exemption; however only children of Turkish nationality who belong to the Christian or Jewish religion have the option of exemption provided they affirm their adherence to those religions.

The Court held that the instruction provided was likely to lead certain pupils facing conflicts between the religious instruction given by the school and their parents' religious convictions, which is why Christian and Jewish children were allowed to opt out. It was held that if the course was in fact on the different religious cultures, there was no reason to make it compulsory for Muslim children alone. Conversely, if the course was essentially designed to teach the Muslim religion, it would be a course on a specific religion and thus should not be compulsory.

The Court decided that the possibility for exemption was an inappropriate means of ensuring respect for their freedom of conviction, because parents would be obliged to inform the school authorities of their religious convictions. The Court subsequently concluded that there had been a breach of the applicants' right under the second sentence of Article 2 of Protocol No. 1.

The Court held that no separate question arose under Article 9, having regard to its finding of a violation of Article 2 of Protocol No. 1.

It was further held that the finding of a violation with regard to Article 2 of Protocol No. 1 constituted in itself sufficient just satisfaction for the non-pecuniary damage the applicants sustained. The applicants' were awarded the entirety of the amount claimed, EUR 3,726.80, less the EUR 850 granted in legal aid.

The Court also found a violation of the Convention on account of the inadequacy of the Turkish educational system, as it did not meet the requirements of objectivity and pluralism and provided no appropriate method for ensuring respect for parents' convictions. The Court considered that bringing the Turkish educational system and domestic legislation into conformity with the Convention would represent an appropriate form of compensation making it possible to end the violation.

Commentary

The Court explained that the two sentences of Article 2 of Protocol No. 1 must be read not only in the light of each other but also, in particular, of Articles 8, 9 and 10 of the Convention. Furthermore the second sentence of Article 2 is aimed at safeguarding the possibility of pluralism in education, a possibility which is essential for the preservation of the democratic society as conceived by the Convention. The Court went on to add that this should be realised through State teaching.

The Court also discussed how Article 2 of Protocol No. 1 did not permit a distinction to be drawn between religious instruction and other subjects. Parents' convictions should be respected by the state throughout the entire State education programme, which was described to be a broad duty as it applies not only to the content and manner of education but also to the performance of all the *functions* assumed by the State. However, the second sentence of Article 2 of Protocol No. 1 did not prevent the States from disseminating in State schools, by means of the teaching given, objective information or knowledge of a directly or indirectly religious or philosophical kind.

It was stressed that in a pluralist democratic society the State's duty of impartiality and neutrality towards various faiths is incompatible with any assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed.

In addition the Court considered that the fact that parents were required to make a prior declaration to schools stating that they were part of the Christian or Jewish faith in order for their children to be exempted from the religious culture and ethics classes could raise a problem under Article 9 of the Convention.

Freedom of expression

Ulusoy v Turkey

(52709/99)

European Court of Human Rights: Judgment dated July 2007

Conviction for membership of an illegal organisation – torture whilst in detention – delay in bringing to judge – conviction for disseminating material harmful to indivisibility of the State – military judge on bench – Articles 3, 5, 6 and 10 ECHR

Facts

The applicant, Mr. Ziya Ulusoy, is a Turkish national born in 1953 who lives in Tunceli, south-east Turkey.

Incident 1

On the sixth of November 1992, the applicant alleged that he was detained by police officers from the anti-terror branch and tortured. He was then brought before the İstanbul State Security Court (ISSC) on 20 November, which ordered his detention on remand. The ISSC then convicted him – on an unspecified date – of membership of an illegal organisation under Article 168 of the Criminal Code.

On 21 December 2000, Law no. 4616 came into force governing, *inter alia*, early release for sentences committed before 23 April 1999. However, the applicant was ineligible for parole as the law did not apply to Article 168 offences.

Incident 2

The applicant was also convicted, on 15 April 1997, of disseminating propaganda against the indivisibility of the State, contrary to Article 8(1) of the Prevention of Terrorism Act (Law no. 3713). He admitted having written a published article which referred to the “dirty war” being waged against the Kurds “with the aim of genocide”. The article protested against the massacre of 35 intellectuals in Sivas in eastern Turkey, allegedly carried out by the State.

The ISSC observed that the applicant committed the offence by referring to a part of Turkey as “Kurdistan” and stating that it belonged to the Kurdish nation, as well as through defining terrorist acts as a “national liberation movement” and the fight against terrorism as a “dirty war”.

The applicant began his one year and four months’ sentence on 30 April 1999. However, this was subsequently suspended on 1 November 1999 pursuant to Law no. 4454, which entered into force in August 1999 and suspended penalties in media related offences.

Complaints

On incident 1 above, the applicant complained that during the course of his detention he had been tortured contrary to Article 3 ECHR; he had been detained in custody for 14 days before being brought before a judge on 20 November 1992, contrary to Article 5(3); and his inability to benefit from early release under Law no. 4616 violated Article 5(1).

However, as the applicant provided no evidence of either his detention in 1992 nor of the alleged torture, the Court concluded that he had failed to lay the factual basis for the complaints, which were therefore manifestly ill-founded pursuant to Article 35(3) and (4) ECHR.

On incident 2, the applicant complained that the presence of a military judge on the bench of the ISSC deprived him of a fair hearing by an independent and impartial tribunal, contrary to Article 6(1). He also submitted that his conviction violated the right to freedom of expression, contrary to Article 10.

Held

The Court noted that it had, in similar cases involving Turkey, found a violation of Article 6(1). The present case being no different, Article 6(1) had been violated by the presence of a military judge on the ISSC bench.

Turning to Article 10, the Court noted that the applicant's right to freedom of expression had been interfered with. The question was then whether the interference could be justified under Article 10(2). The Court observed, firstly, that the interference was prescribed by law (Article 8(1) of the Prevention of Terrorism Act) and pursued the legitimate aims of protecting territorial integrity and preventing disorder or crime. Turning to whether the interference was "necessary in a democratic society", the Court noted that the article, when viewed as a whole, did not encourage violence or armed resistance, nor constitute hate speech. Therefore, neither the Government's view (that the article was provocative in nature and incited armed struggle against the State) nor the reasons given in the ISSC's judgment, constituted sufficient justification for the interference, which was consequently disproportionate and not "necessary in a democratic society".

Tapkan and Fifteen Others v Turkey

(66400/01)

European Court of Human Rights: Judgment dated 20 September 2007

Freedom of expression – petition not made public – failure to inform defendants of the proceedings - Articles 6(1), 6(3) (b), 10 and 14.

Facts

The 16 applicants were detainees in an E-type prison in Aydin.

On 25 February 1999 the applicants sent a petition to the Ministry of Justice, via the prison administration. They criticised the arrest of Abdullah Öcalan, the leader of the illegal PKK organisation, and the actions Turkish authorities. They went on to make a number of demands, announcing that until these were met, they would stage an unlimited hunger strike.

On 24 March 1999, a report compiled by a panel of three experts concluded that the content of the petition did not constitute incitement to hatred but possessed the characteristics of separatist propaganda against the territorial integrity of the state under Article 8 Law n.3713, relating to the fight against terrorism.

The Prosecutor charged the applicants with disseminating separatist propaganda against the territorial and national integrity of Turkey and called for their conviction under Article 8(1), Law no. 3713.

The Court sentenced the applicants to ten months' imprisonment and a fine of 666,666,666 Turkish Lira (approximately EUR 1,260) pursuant to Article 8(1), Law no. 3717.

Complaints

Relying on Article 10 of the Convention, the applicants complained of an infringement of their right to freedom of opinion and expression. Two of the applicants also relied on Article 6(1) and 3(b), contending that they had not had the adequate time and facilities for the preparation of their defence. Furthermore, they relied on Article 14, in conjunction with Article 6(1), on the ground that they had been discriminated against on the basis of their political opinion as a result of which the proceedings against them had not been fair, in particular on account of the failure to supply them with a copy of the opinion of the Public Prosecutor at the Court of Cassation.

Held

Article 6

The Court held that, in a similar case, it had found a violation where the defendants had not been informed of the proceedings. In the present case, the Government provided no convincing argument to aid the Court to reach a different conclusion.

As to the violation of Article 6 in conjunction with Article 14, the Court held that the applicant has not provided sufficient evidence in support of the allegation that he had not been informed of the content of the expert report. Accordingly

it unanimously held that there had been no violation of Article 6 taken together with Article 14. However, as regards the applicant's allegation concerning the failure to supply him with a copy of the Principal Public Prosecutor's opinion, the Court observed that it had previously examined complaints identical to the one raised by the applicant and had found violations of Article 6(1). It accordingly held that there had been a violation of Article 6(1).

Article 10

The Court held that the measures in question had been 'established by law' as they were based on Article 8, Law no.3713 and were for a legitimate aim as prescribed by Article 10(2), namely the protection of territorial integrity. Accordingly, the Court was left to examine whether the interference with the applicants' right to freedom of expression was 'necessary in a democratic society'.

The Court reiterated that the applicants were convicted and sentenced for disseminating separatist propaganda as a result of a petition that they sent and addressed to the Ministry of Justice whilst they were imprisoned. The Court noted that detainees continue to enjoy fundamental rights and liberties and therefore a regular detention within the scope of Article 5 of the Convention.

The Court stated that the applicants' sentence should be examined in light of the context in which the petition was circulated. The applicants' demands had never been made public and had never been circulated within the prison or to other detainees nor had they been made accessible in any way. The Court highlighted the importance of the absence of publicity in examining proportionality in an interference with freedom of expression as it did in previous cases. The impact of the petition, intended for, and seen solely by the Ministry of Justice, could not represent a risk, as stated by the Government, and therefore could not amount to separatist propaganda.

The reasons advanced by the Government (ie. supporting a terrorist organisation and supporting a terrorist leader) for the conviction were therefore insufficient to convince the Court that the interference in the applicants' freedom of expression was 'necessary in a democratic society'. In light of the above the Court found Turkey to be in violation of Article 10.

The Court awarded the applicants EUR 5,000 for non-pecuniary damages and EUR 5,000 in legal costs.

Güzel v Turkey

(6586/05)

European Court of Human Rights: Judgment dated 24 July 2007

Freedom of expression – political statements – freedom of association – proportionality -- Articles 10 and 11.

Facts

The applicant, Hasan Celal Güzel, was born in 1945 and lives in Ankara, Turkey. At the material time, he was a senior MP and President of the Renaissance Party (*Yeniden Doğuş Partisi*). His political statements often made him the subject of criminal proceedings.

On 3 May 1999 the applicant was convicted on a charge of insulting the President of the Republic on the basis of a public statement he made on 23 June 1997 to the paper *Yeni Günaydın*. The applicant was sentenced to one year and three months' imprisonment. The Court held that the statement could not be construed as an admissible critique of the President as it contained references to his mental stability and other attacks to his person.

On 30 September 2001 the applicant was convicted on a charge of insulting the Public Prosecutor for having dissolved the political party *Refah Partisi* in a statement made to the paper *Milli Gazete* on 23 May 1997. Again, the Court held that the statement involved insulted the Public Prosecutor personally.

On 8 June 1999 the Court in Batman sentenced the applicant to ten months' imprisonment with probation for having insulted and shamed the Government.

The applicant was sentenced on similar charges before the courts in Beyoğlu, Yozgat and Ankara.

Complaints

Relying on Article 10 of the Convention, the applicant alleged that his convictions impinged on his right to freedom of expression. Despite having been placed on probation, the restrictions indirectly imposed by the probationary measures limited his chances of expressing his opinion.

Relying on Article 11 of the Convention, the applicant contended that the criminal charges brought against him and the legal procedures he had to endure had a detrimental effect on his political career and elections.

Held

The Court stated that the question to consider was whether the interference was ‘necessary in a democratic society’.

The Court examined the present case in light of previous case-law and found that the Government has not provided any convincing explanation to aid the Court in reaching a different conclusion to that in previous, similar, cases.

The Court examined, in particular, the terms used by the applicant in his political statements and the context in which these were made. It found that, with regard to ‘admissible criticism’, it had already held that these are more acceptable with regard to a politician that is acting in his public capacity.

The Court reiterated that this legal principle has been expressed in many different forms: public statements to the press, journal articles, radio and television broadcasts both regional and national and conferences. The applicant expressed himself in his capacity of president of a political party and, in doing so, criticised the actions of other political figures, namely the State and institutions. He addressed subjects which are part of the social discourse. His remarks were meant to be a critique and they took the form of political discourse due to the content and terms used.

The Court examined the reasons underlying the domestic decisions and found that, in certain cases, the texts in question were particularly bitter and touched on the most negative aspects of the personality of the people and institutions in question. These could have been regarded as defamatory. However, even though the reasons set out by the domestic courts were acceptable, the Court also had to take into consideration the nature and weight of the sentences imposed to ascertain whether these comply with the principle of proportionality.

The Court considered the number of proceedings instituted against the applicant and the probationary measures imposed and how these have had the effect of partially censuring the applicant’s activities whilst he was on probation. Further, these greatly limited his chances of expressing, in public, any criticism that may be part of a public debate.

Accordingly, the Court held that the sentences imposed on the applicant were not proportionate to the legitimate aim. The infringement on the applicant's freedom of expression, seen as a whole, was not 'necessary in a democratic society'. Hence the Court found a violation of Article 10 of the Convention.

The Court awarded the applicant EUR 5,000 for legal costs.

Dzhavadov v Russia
(30160/04)

European Court of Human Rights: Judgment dated September 2007

Refusal to register a newspaper title deemed misleading – prior restraint on freedom of expression – whether the legislative provision upon which refusal was based was sufficiently precise to be “in accordance with the law” – Article 10 ECHR

Facts

The applicant was born in 1959 and lives in Belgorod. On 23 October 2002, he attempted to register a newspaper entitled *Letters to the President*. The Ministry for the Press, Television and Radio Broadcasting rejected his application, and both the District Court of Moscow and Moscow City Court upheld the decision. Overall, the reasons given were twofold: firstly, the proposed title suggested that the newspaper was affiliated to the Administration of the Russian President, which was not true; and secondly, the newspaper purported to cover a broader range of subjects than its title suggested. This meant that the applicant's application could be refused under S. 13(1) (2) of the Mass Media Act 1991, since the title was inconsistent with “the real state of affairs”.

Complaints

The applicant complained that the refusal to register his newspaper under the title *Letters to the President* violated his freedom of expression under Article 10 ECHR.

Held

On the general principles pertaining to Article 10, the Court reiterated that freedom of expression is one of the essential foundations of a democratic society.

Although freedom to impart information may be made subject to “conditions” or “formalities”, such prior restraints are inherently dangerous and call for the

utmost scrutiny. Moreover, relevant domestic law must clearly stipulate when such restraints are permissible.

Applying the law to the facts, the Court noted that the refusal to register was an interference under Article 10(1). The question was then whether the interference was prescribed by law, pursued a legitimate aim, and was necessary in a democratic society to achieve the relevant aim(s).

The Court noted that the first criterion requires that the law be framed in sufficiently precise terms so as to be foreseeable and allow citizens to regulate their conduct.

In the present case, the refusal was based on S. 13(1) (2) of the Mass Media Act, which permits authorities to refuse to register titles deemed inconsistent with “the real state of affairs”. The Russian courts, however, interpreted that phrase as permitting refusal where the title of a publication was untruthful or conveyed a misleading impression. In the European Court’s view, such an interpretation introduced new criteria which were not capable of being foreseen on the basis of the text. Consequently, the way in which the legislation was applied to the applicant’s case was not sufficiently precise or foreseeable, and thus not “in accordance with the law” in violation of Article 10.

The Court awarded the applicant EUR 1,500 in non-pecuniary damage.

Freedom of assembly and association

DKP and Elci v Turkey

(51290/99)

European Court of Human Rights: Judgment dated 3 May 2007

Dissolution of a political party – right to freedom of expression – right to freedom of association - Articles 9, 10, 11 in conjunction with article 14 and 18 of the Convention; and Articles 1 and 3 of the 1st Protocol

Facts

The first applicant, the Democratic Peoples’ Party (DKP), is a political party dissolved by the Constitutional Court. The second applicant, Şerafettin Elçi, is, at the relevant time, the President of the party.

The DKP was founded on 3 January 1997.

On 18 June 1997 the Public Prosecutor initiated an action for the dissolution of the DKP. In the indictment, the Prosecutor accused the party of attempting to jeopardise the integrity of the State. He alleged that certain statements, made by the President of the party to the press and the party's manifesto, violated the Constitution and the law on the regulation of political parties.

On 11 August 1997, the DKP submitted its written observations on the allegations made by the Prosecutor. It contended that the law regulating political parties contained clauses which were contrary to the fundamental rights guaranteed by the Constitution. Moreover, the State had to accept that the Kurdish question was a reality in Turkey and that it had to abandon its 'official ideology', namely the repudiation of the Kurdish language and culture.

On 26 February 1999, the Constitutional Court ruled that the DKP should be dissolved. In its judgment it considered that the people residing on Turkish territory, whatever their ethnic origin, were united by a common culture and these people formed the 'Turkish nation'. Moreover, it noted that the last paragraph of Article 42 of the Constitution stipulates that, with deference to international conventions, no other language, other than Turkish, can be taught to Turkish citizens as their mother tongue. However, the national court went to state that the use of any other language is permitted in citizens' private life.

With regard to the statements made by the President of the DKP, the Turkish court held that these did not violate the law regulating political parties nor the Constitution.

In considering the party's manifesto, the domestic court held that supporting the existence of minorities on the territory of the Turkish Republic, on the basis of their cultural differences or belonging to a race or language group, justified the dissolution of the party. As a result, it concluded that the real aim of the DKP was the destruction of the integrity of the State and not, as they attempted to portray, the dissemination of non-Turkish languages and culture or the creation of minorities on the Turkish territory.

Complaints

The applicants submitted that the dissolution of the DKP infringed their rights guaranteed under Articles 9, 10 and 11 of the Convention in conjunction with Articles 14 and 18 and Articles 1 and 3 of the 1st Protocol.

Held

The Court observed that the interference was ‘prescribed by law’ and was ‘pursuing a legitimate aim’, namely to safeguard the territorial integrity of the State within the meaning of Article 11(2). Hence, the question left to consider was whether the interference was ‘necessary in a democratic society’.

The Court noted that the DKP had been dissolved merely on the basis of its manifesto and not due to the statements made to the press. The Court therefore went on to consider the implications of the manifesto.

According to the Court, a political party can lead a campaign in favour of change in legislation or the legal or constitutional structure of the State in two circumstances: a) the means used must be legal and democratic and b) the proposed changes must be compatible with democratic principles. It follows that a political party that advocates violence or that proposes a political project that does not respect democratic rules and that aims at the destruction of a democracy, cannot avail itself of the protection of the Convention.

The Court observed that the contentious parts of the manifesto call for an analysis of the Turkish/Kurdish question and for a critique of the manner in which the Government deals with separatist activities. The Court accepted that the principles advocated and protected by the DKP are not contrary to fundamental democratic principles.

The Court held that the principles supported by the DKP are not in themselves contrary to the fundamental principles of democracy. If, by merely advocating those principles, a political group were held to be supporting acts of terrorism, that would reduce the possibility of dealing with related issues in the context of a democratic debate and would allow armed movements to monopolise support for the principles in question. That, in turn, would strongly contradict the spirit of Article 11 and the democratic principles on which it is based.

Moreover, the Court found that, even if proposals inspired by such principles are likely to clash with the main strands of government policy or the convictions of the majority of the public, it is necessary for the proper functioning of democracy that political groups should be able to introduce them into public debate in order to help find solutions to general problems concerning politicians of all persuasions

Accordingly, the Court found a violation of Article 11 of the Convention.

The Court did not consider it necessary to examine separately the complaints under Articles 9, 10, 14, 18 of the Convention and Articles 1 and 3 of the 1st Protocol.

The Court awarded the applicants EUR 15,000 for pecuniary and non-pecuniary damage and EUR 1,000 for legal costs.

Satılmış and others v Turkey

(74611/01, 26876/02 and 27628/02)

European Court of Human Rights: Judgment dated 17 July 2007

Violation of the liberty of assembly and association – violation of the equal opportunity (non discrimination) –disrespect towards private belongings – Articles 2, 11, 14 of the Convention, and 1 of the Protocol.

Facts

The 42 applicants worked as toll-booth cashiers on the Bosphorus bridge in İstanbul and are all members of the *Yapı-Yol Sen* trade union (called *Enerji Yapı-Yol Sen* at the material time), federated to the Confederation of Public-sector Workers' Trade Unions (the *KESK*).

On two separate occasions, in March 1998 and February 1999, the applicants, who were all civil servants employed on fixed-term contracts, took part in a protest organised by their syndicate. They left the toll-booths unattended for a period of three hours, with the result that motorists were able to drive past the toll barriers without having to pay.

The administrative authorities brought actions against them for damages on the grounds that they had left their work post without prior permission causing a loss to the company. The applicants were requested to pay back the sum of 45,354,240,000 Turkish Lira, to be detracted from their salaries. The administrative authorities obtained judgment in their favour from the Turkish courts.

Complaints

Relying on Articles 11 and 14 of the Convention, the applicants submitted that the Turkish court's decision violated their right to freedom of assembly and association and disregarded their right to protest for their work conditions.

Held

Article 11(1) provides that members of trade unions have the right to be heard but ensures that each State has the discretion to employ the means it sees fit. Therefore the Convention allows trade unions to defend the interests of its members, provided that it does not contravene Article 11.

The Court noted that the legal basis for the measure complained of had been Law No. 657 which provided that it was forbidden for State officials to fail to report for work or deliberately work slowly. In so far as the measure had been intended to prevent the proper running of the public service being disrupted, it pursued legitimate aims including the prevention of disorder.

The Court further observed that the protest had been agreed by the trade union to which the applicants belonged and the authorities had received advance warning. By taking part, the applicants had exercised their freedom of peaceful assembly. In addition, the decisions of the Turkish courts to hold the applicants civilly liable had been given on account of their participation in the collective action organised by their trade union in order to defend their working conditions.

Finally, the Court found that the Turkish Government had not explained whether the trade union would have been able to defend civil servants' rights by other peaceful means, given that the domestic provisions contained a general prohibition of collective action by State officials.

Accordingly, the Court unanimously held that there had been a violation of Article 11 as holding the applicants civilly liable was not 'necessary in a democratic society'.

The Court awarded the applicants the overall sum of EUR 33,615, apportioned as specified at the end of the judgment, for pecuniary damage; EUR 300 to each applicant for non-pecuniary damage and EUR 5000 to each applicant for legal costs.

C. Committee of Ministers – Execution of Judgments

Harutyunyan v Armenia

(36549/03)

European Court of Human Rights: Judgment dated 28 June 2007

Facts

In 1998 the applicant was drafted into the army. In 2002 the applicant was found guilty of premeditated murder of a fellow serviceman and sentenced to ten years' imprisonment. The domestic court relied, *inter alia*, on the applicant's confession and on the testimony of two other servicemen, while acknowledging that coercion had been applied to them. The police officers at issue were subsequently found guilty of abuse of power and sentenced to imprisonment. The court established that the applicant and the two witnesses had been beaten with a rubber club and their soles clubbed and their fingernails had been squeezed causing injuries of various degrees. By threatening to continue the ill-treatment, they had forced the applicant to confess to murder and the two servicemen to state that they had witnessed it. They had also threatened the victims with retaliation if they informed any higher authority about the ill-treatment. Referring to the above findings, the applicant lodged unsuccessful appeals against his conviction.

Complaints

The applicant complained that the confession obtained under duress hindered his right to a fair trial in violation of Article 6 of the Convention.

Held

The applicant had been coerced into making a confession statement and the two witnesses into making a statement substantiating his guilt. These statements, obtained under duress, had been used as evidence despite that fact that ill-treatment had already been established in parallel proceedings instituted against the police officers in question. The domestic courts had justified the use of those statements by the fact that the applicant had confessed to the investigator and to the police officers and by the fact that both witnesses had later made similar statements, at the confrontation and at the hearing.

The Court however, was not convinced by such justification. It found that where there was compelling evidence that a person had been subjected to ill-treatment, including physical violence and threats, the fact that this person had confessed – or confirmed a coerced confession in his later statements – to an authority other than the one responsible for this ill-treatment should not automatically lead to

the conclusion that such confession or later statements had not been made as a consequence of the ill-treatment and the fear that a person might experience thereafter.

The Court observed that there had been ample evidence before the domestic courts that the witnesses had been subjected to continued threats of further torture and retaliation. Furthermore, the fact that they still had been performing military service could undoubtedly have added to their fear and affected their statements, which was confirmed by the fact that the nature of those statements had essentially changed after demobilisation. Hence, the credibility of the statements made by them during that period should have been seriously questioned and these statements should certainly not have been relied upon.

The Court held that regardless of the impact that the statements obtained under torture had had on the outcome of the applicant's criminal proceedings, the use of such evidence had rendered the trial as a whole unfair.

D. UK Cases

Court of Appeal

MT (Algeria) v Secretary of State for the Home Department

([2007] EWCA Civ 808)

Court of Appeal (Civil Division): Judgment dated 30 July 2007

Deportation; state security; use of closed material; breach of rights under Article 3, 5 and 6 of the European Convention on Human Rights

Judgment by Sir Anthony Clarke MR, Buxton and Smith LJ

Facts

The case involved an appeal from three Algerian nationals, Mustapha Taleb, BB and U. Mr Taleb fled Algeria where he was subjected to torture, he arrived in the UK in March 2000, where he was later recognized as a refugee. In November 2001 Mustapha Taleb was granted indefinite leave to remain in the UK. In 2005 Mr Taleb was charged with the instigation, preparation or commission of acts of terrorism contrary to section 41 of the Terrorism Act 2000, also known as the "ricin attacks", but was later acquitted. Mr Taleb was released from custody in April 2005 but was later rearrested and held pending deportation to Algeria

on reasons of “national security”. This was based on conclusions of the Secretary of State for the Home Department, under section 97(1) (a) of the *Nationality, Immigration and Asylum Act 2002*.

BB and U were in similar situations, also being found to be a risk to “national security”. Deportation proceedings commenced in August 2005 in the Special Immigration Appeals Commission (SIAC) with the men appealing the deportation orders as their return would expose them to a real risk of torture or inhuman/degrading treatment contrary to the Article 3 of the European Convention on Human Rights. Even if not a breach of Article 3, the expected treatment was cumulatively said to be sufficiently grave that it would cause SIAC to exercise its discretion under the Immigration Rule differently.

The UK authorities asserted that they would successfully negotiate an agreement with their Algerian counterparts to obtain assurances ensuring that the appellants’ human rights be respected upon return. By May 2006 it had transpired that the Algerian authorities had made assurances that on the deportees’ return they would only be detained for a few days, although these assurances were never made in writing.

The deportation orders were upheld by the SIAC. BB was unable to challenge this finding as the case was decided almost entirely in secret. U waived his right to challenge this decision at the SIAC on the basis that he felt that he would not receive a fair hearing.

The appellants appealed to the Court of Appeal, which had jurisdiction to hear the case by section 7 of Special Immigration Appeals Commission Act 1997. Although this jurisdiction was limited to *any question of law material* to the decision, not the facts themselves.

Complaints

The cases principally centred on whether there was a real risk that the appellants would be subjected to treatment contrary to Article 3 of the Convention if returned to Algeria. The appellants submitted that SIAC erred in law in concluding that there were no substantial grounds for believing that they would be exposed to such a real risk. BB and U were also concerned that, if returned to Algeria, they would face a real risk of treatment contrary to Articles 5 and/or 6 of the Convention.

The judgment was made principally in two parts, an open judgment and a closed judgment. The appellants complained that the information used to make the deportation order and the subsequent upholding of the orders was based on secret intelligence provided by the UK authorities to which the appellants had no access. The appellants contended that this procedure was unlawful.

The appellants submitted that Article 3 obliged the state to ensure that the proceedings in which the issue was considered were fair, and that proceedings were not fair if evidence used was not seen by the appellants in open proceedings. The appellants further submitted that their presence, and access to all the evidence, were fundamental principles of legality in English domestic law. The appellants' case was that the SIAC was prevented from relying on undisclosed evidence by the jurisprudence of the ECtHR and/or the rules of English common law.

Arguments on behalf of MT

In October 2005 the Algerian Charter for Peace and National Reconciliation was approved in a referendum and provided for an amnesty for individuals involved in earlier terrorist acts. That subsequent legislation took the form of the Ordonnance. Article 9 provided that the right to bring a public prosecution shall be extinguished in respect of anyone held in custody and having not been charged with a prescribed offence. The first of three points of appeal raised by MT was whether the SIAC erred in holding that MT would be able to take advantage of Article 9 of the Ordonnance.

In June 1997 MT was convicted in his absence in Algeria of an offence of organising an armed group prejudicial to the security and integrity of the state. He was sentenced to life imprisonment. In February 1998 he was convicted of the same offence, again in his absence. He was sentenced to death. The Home Office had hoped that assurances could be obtained from Algeria which would ensure that there was no real risk of such suspects being subjected to treatment contrary to Article 3.

The case for the Secretary of State was that MT would be entitled to the benefit of Article 8 of the Ordonnance on his return to Algeria. Namely that since MT was convicted and sentenced in his absence the right to prosecute him again was extinguished. The case for MT was that that would only be so if MT presented himself to the competent authorities in Algeria and made the declaration required by Article 8. MT could not make such a declaration in time because the time expired six months from the date of publication of the Ordonnance. The SIAC rejected the Secretary of State's case because it was not conclusively

demonstrated. The SIAC did however hold that there was no real risk to MT if he were returned to Algeria because “the right to bring a public prosecution” against him was or would be extinguished by Article 9 of the Ordonnance.

The second point of appeal was whether the SIAC erred in placing any reliance upon closed material in its consideration of MT’s case on safety on return to Algeria. The Secretary of State should either have made his case on the basis of material that was disclosed to the appellant, or have accepted that the appellant could not lawfully be removed to Algeria.

The third point of appeal was whether the SIAC erred in concluding that Article 1F(c) of the Refugee Convention 1951 extended to acts committed by MT after his recognition as a refugee. SIAC considered that MT had lost his status as a refugee by reason of Article 1F(c) of that Convention.

Arguments on behalf of BB

The principal complaint and ground of appeal in BB’s case was that the SIAC erred in its approach to the assurances provided by the Algerian authorities as to whether, on return to Algeria, BB would be at risk of torture. Further concern was also expressed as to whether prison conditions in Algeria involved a breach of Article 3.

BB complained that there was a risk in Algeria that Article 6 would be violated as the judiciary was not impartial. The SIAC had found that the Algerian judiciary was formally and effectively independent of the executive.

Arguments on behalf of U

U appealed to the SIAC against the decision to deport him but he did not challenge the Secretary of State’s decision that he posed a risk to national security. U argued only that return to Algeria would infringe his Convention rights under Articles 3, 5 and 6. If returned, there was a real risk that he would be subject to torture or inhuman and degrading treatment or punishment and, if put on trial, as was likely, the processes would not comply with Articles 5 and 6.

In its open judgment the SIAC concluded that U had been involved in facilitating terrorist activity overseas. The issue on the appeal to SIAC was safety on return. New evidence relevant to the risk on return had become available which had not been available at BB’s hearing. The information was regarding the way in which Algeria had treated four men who had withdrawn their appeals to SIAC and had been deported to Algeria in January 2007. The four men alleged that they were

exposed to sounds of others being ill-treated in order to frighten them. The SIAC accepted that this was capable of amounting to treatment infringing Article 3. The SIAC however concluded that a breach of the assurances given in U's case was no more than a mere possibility.

BB, although held to be a security risk, could not be regarded as an important figure in the terrorist world; by contrast, U was regarded thus. SIAC accepted that, if returned to Algeria, U would be of interest to the authorities and was likely to be charged with offences related to terrorism.

U also submitted that the prison conditions in Algeria amounted to inhuman and degrading treatment. He further submitted that the legal system in Algeria could not provide U with a fair trial in accordance with Article 6. Both arguments were rejected by the SIAC on the basis that there were no substantial grounds.

The question of jurisdiction of the Court was also raised in the appeals of BB and U.

Held

It was held that the SIAC was entitled to use closed material. The statutory scheme under section 5(3) (a) of the Special Immigration Appeals Commission Act 1997 provides that rules may be made which enable proceedings before SIAC to take place without the appellant being given full particulars of the reasons for the decision. Therefore the presence throughout of the appellant was not a necessary component of the rigorous scrutiny. Parliament was well aware that the SIAC procedure would be used in claims under the Convention. However, in creating the commission and its procedures Parliament knew what it was doing, it was not open to the Court to interfere with the statutory scheme.

It was held that Article 9 of the Ordonnance had not been relied upon by the Secretary of State or explored in evidence. The decision of the SIAC to reach a conclusion on the issue without any evidential basis for it led to potential injustice for MT. In the absence of evidence the SIAC could not properly be said to have given anxious scrutiny to whether it could safely hold that there was no real risk of MT being tortured if returned to Algeria. The process which led SIAC to conclude that MT would be entitled to the benefit of Article 9 was not fair to him. It infringed the principles of natural justice. That was an error of law and the case was remitted to the commission for reconsideration on this basis.

The Court of Appeal held that it should not dismiss the appeal on the basis that it was safe to send MT back to Algeria. Whether it is safe to do so was essentially

a matter for SIAC and not for the Court. It was therefore concluded that it would not be appropriate for the Court to analyse the facts and reach a conclusion on the issue of risk.

It was held that the SIAC had been correct to hold that the Refugee Convention 1951 Article 1F(c) applied to acts committed both before and after recognition as a refugee, so that MT had lost his status as a refugee. The Refugee Convention does not require or start with a formal state act of recognition of status.

The relevance of the Court's jurisdiction was principally applicable to the appeals of BB and U. An appeal from the SIAC only lay in regards to a point of law, not fact. The question of whether the treatment fell within the terms of Article 3 was held to be a question of law. The obligation of the national state under Article 13 of the Convention is to provide an effective remedy for violations of Convention rights. The prime instrument for providing that remedy is SIAC. It was claimed that the Court would be acting incompatibly with BB's Article 3 rights if it does not admit the possibility of an appeal against SIAC's factual findings. This assumed that that BB's Article 3 rights were indeed put at risk by SIAC's findings. The Court of Appeal was therefore being asked to act differently from the limits placed on its jurisdiction by section 7 of the 1997 Act, which it could not do. However, the point was said to have been merely academic in these appeals. In MT the appeal succeeded on other grounds and in BB and U, all issues raised with the factual findings of the SIAC failed.

The question of what treatment the appellants risked receiving when returned to Algeria was a pure issue of fact that the instant court had no jurisdiction to reconsider. Whether that treatment fell within Article 3 was a question of law, which it could consider. The Court held that the SIAC had been entitled to conclude that the assurances given by the Algerian government could be relied upon, and that the Algerian judiciary was both formally and effectively independent of the executive.

The first ground of appeal relevant only to U's appeal relates to SIAC's approach to its assessment of the facts when deciding whether there were substantial reasons to believe that there was a real risk of torture on return to Algeria. The Court held that there must be substantial grounds for believing that there is a real risk of such treatment. In the Court's opinion the SIAC had considered all the relevant evidential matters and therefore this ground of appeal failed.

Another submission made by U was that the extradition of a person to a state where there was history of torture could amount to a violation of Article 3. This was regarded to be without merit and also failed.

Both BB and U complained that the prison conditions to which they would be subject gave rise to a real risk that their Article 3 rights would be infringed. SIAC summarised that "...the risk can be established either by evidence specific to the appellant's own circumstances or by reference to evidence applicable to a class of which he is a member. In the latter case, he will only succeed if he can point to a consistent pattern of gross and systematic violation of rights under Article 3." The SIAC concluded that it could not sensibly be claimed that there was a consistent pattern of gross and systematic violation of Article 3 rights in respect of prison conditions. It was held that there was no misdirection of law and thus this ground also failed.

Both U and BB contended that there were substantial grounds for believing that if returned and if charged with any offence, they would suffer a *flagrant denial of a fair trial*. SIAC held that it was unlikely that BB would be of interest to the Algerian authorities and he was therefore unlikely to be charged. However, in U's case, it was held that U would be of interest and would probably be charged with an offence of membership of a terrorist organisation. He would then face a prolonged period in custody awaiting trial. SIAC's conclusion was that there was no real risk of a flagrant denial of justice by reason of the lack of independence of the judges. SIAC considered whether there was a danger that U might be convicted on evidence obtained by torture. SIAC considered that this evidence was of very limited effect. It was open to SIAC to hold, as it did, that the judiciary was both formally and effectively independent of the executive.

In conclusion, MT's appeal was allowed because of the SIAC's inappropriate reliance upon Article 9 of the Ordonnance. In BB's case, the commission had made no error of law on the open material, but for reasons set out in the closed judgment and looking at the case as a whole, his appeal was allowed and returned to the SIAC for further consideration. Lastly in U's case, in regards to the open evidence the SIAC's conclusion that in deporting U the UK would not be in breach of its Convention obligations could not be challenged. However, the closed evidence was capable of undermining that conclusion. U's case was remitted to the SIAC to reconsider the closed evidence and its effect on its judgment.

Commentary

This case principally raises two main issues, firstly the effectiveness of diplomatic assurances and secondly whether the process implemented by the SIAC can be considered to be fair within the context of Article 6. The system of diplomatic assurances to protect against torture is questionable as there is no mechanism to provide for their enforcement and therefore cannot suffice to protect against such risk. It is arguable that states engaging in such assurances are undermining the absolute nature of Article 3.

According to the UK authorities, it would be complying with its obligations under the ECHR by obtaining assurances from the Algerian authorities as each case arose, this was based on its interpretation of amnesty laws. However the UK authorities were informed by its Algerian counterpart that the SIAC's interpretation of the amnesty law was not an interpretation that had been recognised under Algerian law.

In regards to the fairness of the SIAC process, it appears that the Court of Appeal was right to hold as it did, namely not to give an opinion on the fairness of the process, as this was an issue for Parliament. However the nature of the SIAC and its closed evidence seems to hinder the principal of the equality of arms. One cannot appeal a decision made in secret. Justice should not only be done, but should manifestly and undoubtedly be seen to be done. In creating such a process Parliament has again undermined the Convention.

Another point worthy of mention is that Mustapha Taleb was acquitted of all charges, but nonetheless the UK authorities' case against him in regards to his deportation was based primarily on the same arguments as those submitted in the criminal trial.

House of Lords

R (Al-Skeini and others) v Secretary of State for Defence

[2007] UKHL 26

House of Lords: Judgment dated 13 June 2007

Actions of British troops in Iraq leading to deaths of six Iraqi civilians – whether victims within UK's jurisdiction under Article 1 ECHR – whether UK breached

procedural obligation to investigate under Articles 2 and 3 ECHR -- whether Human Rights Act 1998 applied extraterritorially

Facts

The claimants were the relatives of 6 individuals killed in southern Iraq (Basra) between 4 August and 10 November 2003. The first five were shot dead in separate incidents involving British military patrols, whereas the sixth individual was beaten to death by British troops whilst in detention. With the exception of the third case, the Secretary of State (SST) accepted that the killings were by British forces. In March 2004, the SST refused to order an independent inquiry into the deaths.

Complaints

The claimants challenged the SST's refusal, relying on both Section 6 of the Human Rights Act 1998 (HRA) and Articles 2 and 3 of the European Convention on Human Rights (ECHR).

However, since the deaths all occurred outside the UK, the case centred on two questions concerning the scope of the ECHR and HRA:

1. Were the deceased within the UK's jurisdiction for the purposes of Article 1 ECHR?
2. Could the HRA apply outside the UK?

Both the Divisional Court and Court of Appeal held that only the sixth individual fell within the UK's jurisdiction under Article 1, and that, while the HRA had extraterritorial scope, it was accordingly only applicable to that case.

The claimants appealed to the House of Lords, arguing that the ECHR and HRA were also applicable to cases one to five. The SST cross-appealed, denying that the HRA had any extra-territorial effect.

Held

The House of Lords rejected the claimants' appeal, upholding the Court of Appeal's decision that only the sixth individual fell within the UK's jurisdiction. It also rejected the SST's cross-appeal, thus confirming the HRA's extraterritorial effect and application to the sixth case.

The sixth case was remitted to the Divisional Court for a decision on whether there had been a violation on the facts.

(i) *Scope of Article 1 ECHR*

Jurisdiction was an essentially territorial concept, with extra-territorial jurisdiction arising exceptionally, such as: (i) where a State exercised “effective control” of an area; (ii) where an individual was under the control and/or authority of State agents; or (iii) through the activities of embassies and consulates.

The effective control base was inapplicable to the case, since it could only apply within the *espace juridique* (territory or ‘legal space’ within which the Convention applies) of the Council of Europe. Moreover, citing *Banković and Others v Belgium and 16 Other Contracting States*¹ the Lords held that a State fixed with Article 1 jurisdiction was obliged to secure *all* the Convention rights and freedoms; accordingly, the doctrine was applicable only where a State had a degree of control sufficient to enable it to do so, which was lacking in the present case.

None of the other jurisdictional bases applied to the first five individuals either, thus leaving them outside the UK’s jurisdiction. “Authority and/or control”, for instance, had to be interpreted in the light of *Bankovic*, and since that made clear that simply being “adversely affected” by a military operation would not *ipso facto* bring a victim within a State’s jurisdiction, the first five victims could not have been within the UK’s authority and/or control.

The sixth victim could, however, avail of the embassies and consulates exception by analogy, thus bringing him within the UK’s jurisdiction.

(ii) *Scope of the HRA*

With the exception of Lord Bingham, their Lordships held that the HRA was capable of applying to UK public authorities acting abroad, whenever the UK had jurisdiction under Article 1 ECHR.

Firstly, the presumption against the extra-territoriality of domestic statutes was rebutted: the purpose of the HRA was to enable victims of Convention violations to obtain redress in the UK instead of Strasbourg, and this object applied equally to extra-territorial cases. Moreover, the rationale for the presumption was to safeguard other states’ sovereignty, and such sovereignty would not be infringed by providing a remedial process under UK domestic law for the acts of UK authorities abroad.

1 Application no. 52207/99, 19 December 2001

Secondly, the rule that domestic statutes enacting international treaty obligations must be construed compatibly with those obligations applied. The HRA was therefore to be construed compatibly with Article 13 ECHR, which provides a right to an “effective remedy before a national authority”. Were the HRA not to apply to extra-territorial cases, Article 13 would be violated.

Thirdly, Section 6 of the HRA simply obliges public authorities to act compatibly with Convention rights, without mention of any geographical limitation.

Commentary

On extra-territorial jurisdiction, the Lords concluded that there were several inconsistencies between *Bankovic* and post-*Bankovic* cases, and opted to side with the former, it being a unanimous decision of the Grand Chamber.

One inconsistency concerned the rationale for extra-territorial jurisdiction. In *Issa and Others v Turkey*² the Court remarked that:

[Extraterritorial] accountability...stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory.

However, had the NATO bombing in *Bankovic* occurred *within* the territory of a Contracting State, it would plainly have engaged Article 2 ECHR, but the Court nevertheless denied jurisdiction. This therefore suggests a narrower basis for jurisdiction than that proffered in *Issa*.

The principal inconsistency, however, concerned whether or not the effective control doctrine could apply to non-Contracting States’ territories, or whether it was limited to the territories of Contracting States. In *Bankovic* the Court suggested that it was so limited:

[T]he Convention is a multilateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The [Federal Republic of Yugoslavia] clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a vacuum in human rights’ protection has so

2 Application no. 31821/96, 16 November 2004

far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.

However, in *Issa v Turkey* the Court accepted that the Convention could have applied to Iraq – a territory *outside* the ECHR's legal space – *had* Turkey been in effective control of Iraqi territory (which on the facts it had not been).

The House of Lords chose to view this as a clear, irreconcilable, conflict between two cases, but it need not have done so. Firstly, the above statement in *Bankovic* does not in express terms rule out the Convention's application to non-Contracting States' territories. Indeed, the words "essentially" and "notably" qualify the Court's remarks and leave open the possibility of such wider extra-territorial jurisdiction. Secondly, as pointed out by the Court of Appeal, the European Court's remarks were directed specifically to the applicants' submission that a refusal to recognise jurisdiction would lead to a "regrettable vacuum in the Convention system of human rights' protection". It was simply pointing out that a vacuum could only arise in cases of Contracting States' territories, such as in the case of *Cyprus v Turkey*, because only there would inhabitants of a territory be deprived of Convention rights which they had previously enjoyed. Thirdly, the "legal space" comments only came *after* the Court had found the case inadmissible, having earlier held that the air strikes were not sufficient to satisfy the effective control criterion; in other words, they were *obiter dictum*. Indeed, that the Court dealt with the effective control test without even mentioning the FRY's status as a non State Party, suggests that the latter was irrelevant to the test. Fourthly, the Court in *Issa* expressly interpreted the "legal space" doctrine, remarking that had Turkey effectively controlled Iraqi territory, such territory would have fallen:

within the jurisdiction of Turkey (and not that of Iraq, which is not a contracting state and clearly does not fall within the legal space [*espace juridique*]...of the contracting states...)

This is a clear attempt by the Court to resolve any uncertainties surrounding the legal space doctrine, by stating, authoritatively, that it is not a bar to jurisdiction over non Contracting States' territories.

However, recognising the ECHR's applicability to States such as Iraq is not without practical difficulty. For instance, *Bankovic* makes clear the "indivisibility" of the Convention, meaning that a state with effective control must secure *all* the

Convention rights and freedoms. Doing so in certain parts of the world may seriously conflict with local practices, culture, or even religion in the case of Shar'ia law. As Lord Rodger stresses: "the idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq is manifestly absurd".³

That argument, however, confuses an "ought" with an "is": the question of whether the Convention *ought* to apply to Iraq because of differences between Europe and the Middle East is different to the question whether the Convention actually *does* apply when a State has effective control. The former is a matter of policy and prudence, whereas the latter is a matter of law. Moreover, even if the problems Lord Rodger highlights do exist, the answer is not to bar the Convention's application entirely by a restrictive "legal space" doctrine. A less severe alternative would be for the European Court to oblige States to guarantee ECHR rights and freedoms "with due regard...to local requirements". Significantly, this is already the case for dependent territories under Article 56, and it is not clear why States should be allowed to take into account "local requirements" in the case of dependent territories outside the Council of Europe area, but not in the case of other territories outside the Council of Europe subject to effective control. It would also not conflict with the "indivisibility" of the Convention, since all the Convention rights would still apply, albeit in a modified form.

In sum, the application of the effective control doctrine to territories outside the Council of Europe is arguably consistent with Strasbourg case law, and practical difficulties in its application are not insurmountable. Moreover, as Happold points out, to bar the Convention's application in such cases "would be to erect a rather distasteful distinction between what Contracting States can do 'at home' and what they can do abroad".⁴

3 *R (Al-Skeini and others) v Secretary of State for Defence*, [2007] UKHL 26, 13 June 2007 at para.78

4 M. Happold, *Bankovich v Belgium and the Territorial Scope of the European Convention on Human Rights*, *Human Rights Law Review* (2003) 3 p88.

E. United Nations Convention against Torture (UNCAT)

Article 3 UNCAT

Pelit v Azerbaijan

(No. 281/2005 – UN Doc. CAT/C/38/D/281/2005 (2007))

UN Committee Against Torture: Judgment dated June 2007

Fear of torture and inhuman treatment if returned to Turkey – UN Convention Against Torture – Article 3 obligation of non-refoulement – 1951 Convention relating to the Status of Refugees – whether refugee status granted by one State is binding on other States

Facts

The complainant, a Turkish national of Kurdish origin, was born in 1972, and, at the time of the complaint's submission, was facing extradition from Azerbaijan to Turkey.

Between 1993 and 1996, Ms. Pelit was detained in Turkey on charges of carrying out “subversive activities and terrorism” for the PKK. Eventually released because of insufficient evidence, she alleged that she was tortured whilst in detention.

In 1998, the complainant fled to Germany, where she was granted refugee status. Once there, she commenced working for a pro-Kurdish news agency, and was sent to Iraq in 2003 to report on, *inter alia*, a PKK conference in the north of the country. In 2004 her travel documents were stolen in Mosul, so she entered Azerbaijan to contact the German embassy to have them re-issued, but the Azerbaijani authorities arrested and detained her for illegal entry.

In December 2004, the İstanbul Court for Grave Crimes sentenced her, in absentia, to ten years' imprisonment for attending the abovementioned PKK conference. It also requested her extradition from Azerbaijan, which successive Azerbaijani courts confirmed.

Complaints

Ms. Pelit complained to the Committee seeking immediate release, claiming that her extradition would violate the *non-refoulement* obligation of Article 3 of the Convention Against Torture 1984 (UNCAT).

In her view, the following disclosed a real risk of torture and other inhuman treatment in Turkey: (i) her alleged torture by Turkish authorities between 1993-6 for alleged PKK links; (ii) Germany's granting of refugee status and recognition, as credible, of her fear of torture; and (iii) the fact that others, in similar situations, had been tortured in the recent past.

Azerbaijan replied that she did not face a "real, foreseeable and personal" risk of being tortured because: (i) the situation for Kurds in Turkey had improved in recent times, as evidenced by its adoption of the 'Reintegration into Society Act 2003'; (ii) her alleged torture occurred as long ago as 1993, and was uncorroborated; (iii) it had received "clear and convincing" diplomatic assurances from Turkey which ruled out torture and other ill-treatment, and also offered Azerbaijani authorities the opportunity to monitor Pelit's rights; and (iv) Germany's granting of refugee status under the 1951 Refugee Convention was non-binding on Azerbaijan, and since the complainant had committed a "serious non-political crime" under Article 1(F) (b), *non-refoulement* protections did not apply.

Held

The Committee against Torture found that Azerbaijan had violated Articles 3 and 33 of UNCAT.

(i) *Views on Interim Measures: Breach of Article 22*

The Committee had previously requested Azerbaijan to stay extradition pending its merits decision. Despite this, Azerbaijan extradited the complainant in October 2006. By doing so, Azerbaijan had nullified the right of individual petition and disregarded the Committee's competence, thus violating Article 22.

(ii) *Views on the Merits- Breach of Article 3*

Citing 'Conclusion No. 12' of the UNHCR's Executive Committee, Germany's grant of refugee status was binding on Azerbaijan, and so the principle of *non-refoulement* applied. Moreover, the general situation of persons such as the complainant raised "real issues" under Article 3 UNCAT.

On the diplomatic assurances, the Committee held that their very existence was an acknowledgement that expulsion raised issues of mistreatment. Moreover, Azerbaijan had not provided the Committee with the assurances for it to undertake an assessment of their satisfactoriness. Finally, although the assurances provided for monitoring, Azerbaijan failed to specify the monitoring undertaken and the steps taken to ensure it was "objective, impartial and sufficiently trustworthy".

In such circumstances, and considering Pelit's extradition in disregard of the interim measures, both: (i) the way Azerbaijan had handled the case; and (ii) the extradition itself, violated Article 3 UNCAT.

F. European Court of Justice (ECJ)

Jose Maria Sison v Council of the European Union

(T-47/03 – 2007/445/EC)

Court of First Instance: Judgment dated July 2007

Security Council resolution ordering financial sanctions against those involved in terrorism – sanctions subsequently imposed under Community law against an individual – complaint that the Community measures violated fundamental rights recognised in Community law – duty to state reasons, rights of the defence, right to effective judicial protection

Facts

In the aftermath of the attacks on New York and Washington on 11 September 2001, the United Nations Security Council (SC) adopted Resolution 1373 (SCR 1373) which, *inter alia*, called on States to freeze the funds and other financial resources of persons and entities involved in terrorism. The resolution left it to States to identify the targeted persons and entities.

SCR 1373 was given effect in the Community by, *inter alia*, Common Position 2001/931 and Council Regulation 2580/2001. These ordered the freezing of funds and other financial resources of persons and entities named in a list drawn up and regularly updated by Council decisions.

According to Common Position 2001/931, names are to be added to the list on the basis of precise information or material which indicates that a decision has been taken by a judicial authority in respect of the persons or entities concerned, irrespective of whether that decision concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence, or sentence for such deeds. Listed names are reviewed at least once every six months to ensure that there are grounds for their continued presence on the list.

An individual, Jose Maria Sison, brought an action before the Court of First Instance seeking annulment of the decisions ordering his funds to be frozen. The applicant is a Filipino national who has resided in the Netherlands since 1987. His applications for refugee status and a residence permit in the Netherlands were refused on the ground that he was the head of the military wing of the Communist Party of the Philippines (the NPA), which was responsible for terrorist attacks.

Complaints

The applicant complained that the relevant Council decisions violated the following fundamental rights recognised by Community law.

(i) the duty to give reasons

The decisions failed to explain why the applicant had been added to the list, and, in particular, what “precise information or material” the Council relied upon.

(ii) rights of the defence

Sanctions had been imposed on the applicant, and he was accused of the crime of terrorism, without the applicant previously having been heard, and without having had access to the confidential documents and information upon which the measures were based.

(iii) right to effective judicial protection

He had been denied an effective and fair hearing, as guaranteed by Article 6(1) ECHR and recognised in Community case law.

Held

Did the rights apply?

The Court first observed that the rights invoked did apply to the contested decisions. The parties had not disputed the applicability of the duty to give reasons, whereas the right to effective judicial protection of rights under Community law formed part of the general legal principles derived from the common constitutional traditions of Member States, as enshrined in Article 6 ECHR, and applied in particular to measures to freeze funds. In relation to the rights of the defence, the present case was to be distinguished from the previous cases of *Yusuf* and *Kadi* (T-306/01 and T-315/01 respectively) where the Court of Justice confirmed that the rights of the defence (other than those guaranteed

by *jus cogens*) were not applicable. In that case the Community institutions were bound to simply transpose into the Community legal order, without any discretion, resolutions of the SC and decisions of the Sanctions Committee. In the present case, however, the SC did not specify the targeted individuals, and therefore the freezing of funds involved the exercise of the Community's *own* powers, entailing a discretionary assessment by the Community, and so required Community institutions to observe the rights of the defence as guaranteed under Community law.

Were the rights violated?

The Court observed that the purpose of the duty to give reasons is, first, to provide the person concerned with sufficient information to make it possible for him to determine whether an act is well founded or whether it is vitiated by an error which may permit its validity to be contested by the Community judicature and, second, to enable the latter to review an act's lawfulness. The reasons must be notified to a person at the same time as the act adversely affecting him, and must disclose in a clear and unequivocal fashion the reasoning underlying the relevant measure. Although certain restrictions are permissible due to security concerns of the Community and the Member States, in the applicant's case the contested decisions did no more than state that it was "desirable" or that it had been "decided" to adopt a list of persons to which the sanctions would apply. Such general and formulaic wording equated to a total failure to state reasons, in violation of the relevant duty.

Observance of the rights of the defence requires that evidence adduced against a party should be notified to it either concomitantly with, or as soon as possible after, an initial decision to freeze funds. It does not, however, require that evidence be notified to a party *prior* to the adoption of such an initial measure. Moreover, any subsequent decision to freeze funds must, as a rule, be preceded by notification of any new incriminating evidence and a hearing. None of this was done in the applicant's case, in breach of the rights of the defence.

Finally, the Court found a violation of the right to effective judicial protection. Review was all the more important in the present case since it constituted the only procedural safeguard capable of ensuring that a fair balance was struck between the need to combat international terrorism and the protection of fundamental rights. However, since neither the contested decisions nor the defendant institution (the Council) had made clear the actual and specific grounds justifying the sanctions, the applicant was not placed in a position to

make good use of his right of action and the Court was unable to effectively carry out its review function.

Commentary

This judgment is similar to that of Case T-327/03 *Stichting Al Aqsa v Council of the European Union* and Case T0228/02 *Organisation des Mojahedines du peuple d'Iran v Council of the European Union*. These decisions are a positive step towards ensuring that the member states' discretion in identifying persons and entities involved in terrorism is exercised in compliance with human rights standards. Most importantly, the Court acknowledged that certain restrictions are permissible due to national security but that this cannot be used a blanket justification for the targeting of certain members of society due to their ethnicity, religion or political affiliation.

In this case Mr. Sison not only requested the annulment of Council Decision 2002/974/EC but also claimed compensation for the loss and damage suffered as a consequence of it. However, the Court annulled that decision on procedural grounds. The Court of First Instance confirmed failure to fulfil the obligation to state reasons is not, in itself, such as to cause the Community to incur liability (Case T-18/99 *Cordis v Commission* paragraph 79). The fundamental principle that the rights of the defence must be observed being essentially a procedural guarantee (Case C-344/05 P *Commission v De Bry* [2006] ECR I-10915 paragraph 39) the Court considered that, in the circumstances, annulment of the contested act would constitute adequate compensation for the damage caused by that breach.

For an analysis of the approach adopted by the European Court of Justice in recent decisions regarding a number of European terrorist proscription regimes see also *Guarding the Gates to Justice: the European Court of Justice and Terrorism*, Ed Grieves (2007) 11 KHRP LR

G. International Court of Justice (ICJ)

Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)

[2007] ICJ Rep, 26 February 2007, General List No.91

International Court of Justice: Judgment dated 26 February 2007

Whether genocide committed against Bosnian Muslims – whether Federal Republic of Yugoslavia responsible for genocide and related offences including the duty to prevent and punish – attribution of the events at Srebrenica to the FRY under the rules of State responsibility – Genocide Convention 1948

Facts

The case arose out of the conflict which accompanied the break-up of the former Yugoslavia (the Socialist Federal Republic of Yugoslavia). During the conflict various atrocities were committed by Bosnian Serbs, chiefly against Bosnian Muslims, the most infamous being the massacre at Srebrenica in 1995. As a result, Bosnia and Herzegovina filed an application against the Federal Republic of Yugoslavia (FRY, later Serbia and Montenegro) alleging various violations of the Genocide Convention.

Complaints

Bosnia complained that Serbia, either through its organs or persons and entities acting under its instructions, direction or control, was responsible for the following: genocide, conspiring to commit genocide, complicity in genocide, attempting to commit genocide, incitement to commit genocide, and aiding and abetting others in the commission of genocide. Bosnia and Herzegovina also argued that Serbia had failed in its duty to prevent and punish genocide.

Held

The Court found Serbia responsible only for a violation of the duty to prevent and punish.

Does the Genocide Convention Prohibit States from Committing Genocide?

One of the preliminary issues to be resolved was whether the Genocide Convention only concerned individual criminal responsibility, or whether it also prohibited *States* from committing genocide. This was significant since Bosnia

had accused another State of committing genocide, and thus unless the Court answered the question in the affirmative, there could be no claim against Serbia.

A majority of the Court found an implied obligation on States not to commit genocide in Article I of the Convention, which provides:

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

The judges noted that the recognition by States of genocide as a crime under international law necessarily implied an undertaking by States not to commit the act so described. Moreover, Article I clearly obliged States to prevent genocide, and that obligation could not be complied with unless they themselves refrained from its commission.

Was Genocide Committed?

To establish the offence of genocide, one must satisfy both the *material* and *mental* elements of Article II of the Genocide Convention, which lays down the definition of the offence. In relation to the former, one of a series of acts must be directed against members of a “national, ethnical, racial or religious group”. These acts include killing, serious bodily or mental harm, infliction of conditions of life calculated to bring about destruction of the group, prevention of births, and forcible transfer of children of the group to another group.

To satisfy the mental element, one must show that the above acts were accompanied by a specific “intent to destroy, in whole or in part” the group.

The Court proceeded by first defining the relevant “group” positively, as Bosnian Muslims, as opposed to negatively as “non-Serbs” present in Bosnia. This was justified because the applicant had made very little reference to acts against non-Serbs, such as Croats.

It then investigated whether the *material* and *mental* elements of genocide were present. It considered the massacre of Srebrenica separately to all the other incidents and it accepted that the material element of genocide had been established: people who were “in large majority members of the protected group” had been “systematically” targeted for killing (Art II(a)); massive mistreatment, beatings, rape and torture causing serious bodily or mental harm (Art II(b)); and the infliction of inhumane conditions of life whilst in detention (Art II(c)).

However, the evidence did not establish that any of the above acts was accompanied by a specific intent (*dolus specialis*) to destroy, in whole or in part, the group. The Court considered whether intent could be inferred from the “overall pattern of acts perpetrated throughout the conflict”. It confirmed that although in principle this was possible, the pattern “would have to be such that it could only point to the existence of such intent”, and that test was not satisfied on the facts. It therefore found that the requisite mental element had not been proved.

Turning to Srebrenica, however, the Court held that both the *material* and *mental* elements of genocide were satisfied. The Army of the Republika Srpska (the VRS), had killed and caused serious bodily and mental harm to the group (Arts II(a) and (b)) with the necessary intent.

However, in order to establish whether the FRY was internationally responsible for the genocide at Srebrenica, the Court next had to ask whether the actions of the VRS could be attributed to the FRY under the customary rules of State responsibility.

Attribution of the Genocide at Srebrenica to the FRY

First, the Court considered whether the genocide had been committed by a *de jure* or *de facto* organ of the FRY, as reflected in Article 4 of the ILC Articles on State Responsibility. Although the army and political leaders of the FRY were *de jure* organs of the FRY, there was no evidence that either had been involved. Moreover, neither the Republika Srpska nor the VRS could be considered *de jure* organs of the FRY, since neither had the status of an organ under the FRY’s internal law.

Relying on the test laid down in *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility* (1984 ICJ REP. 392 June 27, 1986), the Court also denied that the above entities and groups could be considered *de facto* organs, since they had not acted in “complete dependence” on the FRY.

Second, the Court considered whether the events at Srebrenica could nonetheless be attributed to the FRY on the basis that the VRS and Republika Srpska acted under the FRY’s “instructions” or “direction or control”, as reflected in Article 8 of the ILC Articles. On the issue of the required standard of control, the Court opted for the restrictive standard enunciated in *Nicaragua*, that of “effective control” of each individual military operation in which the alleged violations occurred.

Turning to the facts, the Court concluded that the relevant tests were not satisfied: “the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from, or [direction or] effective control by, the FRY.”

Complicity in Genocide

Having found the FRY not responsible for genocide *per se* (Article III(a)), the Court considered whether it could nevertheless be held responsible for complicity in genocide (Article III(e)).

Complicity is not defined by the Genocide Convention, and so the Court drew an analogy between complicity and the rule of State responsibility concerning “aid or assistance” furnished by one State for the commission of a wrongful act by another State, as reflected in Article 16 of the ILC Articles of State Responsibility. Accordingly, the question was whether the organs of the FRY, or persons acting on its instructions or under its direction or effective control, furnished “aid or assistance” in the commission of the genocide at Srebrenica. Complicity also required, however, that the FRY acted “knowingly”, i.e. with awareness of the specific intent to commit genocide on the part of the principal perpetrators (Republika Srpska and the VRS).

In the ICJ’s view, there was little doubt that the events at Srebrenica were committed, at least in part, with the resources provided by the FRY’s general policy of aid and assistance, which included provision of a political, military and financial nature. However, it had not been shown that the FRY authorities provided such assistance with *knowledge* that, not only were massacres about to be carried out or already under way, but that “their perpetrators had the *specific intent* characterising genocide, namely, the intent to destroy, in whole or in part, a human group, as such”.

As a result, the Respondent was not liable for complicity in genocide.

Breach of the Obligation to Prevent and Punish Genocide

The obligation to prevent and punish is found in Article I of the Genocide Convention. Starting with the former, the Court noted its status as an obligation of “due diligence”, not of *result*; that is, responsibility only arises if a State manifestly fails to take all measures to prevent genocide which are within its power, and which might contribute to preventing genocide. Amongst other measures, this requires a State to use its ability to *influence* the perpetrators of genocide.

This obligation of due diligence arises from the moment a State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. The level of knowledge required is therefore significantly less than for complicity, which the Court held requires actual knowledge of the specific intent to commit genocide on the part of the chief perpetrators.

The Court held that, during the period under consideration, the FRY was in a position of unrivalled influence over the Bosnian Serbs who devised and implemented the genocide, owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and VRS on the other. Moreover, the FRY authorities could hardly have been unaware of the serious risk of genocide once the VRS forces had decided to occupy the Srebrenica enclave. Despite this, the Yugoslav federal authorities took no initiative to prevent what happened, in violation of the duty to prevent.

Obligation to Punish

The Court also held that Serbia was under an obligation to cooperate with the ICTY, since it had accepted its jurisdiction. Despite this, it had impeded the capture of General Ratko Mladić, contrary to both the foregoing obligation and Article VI of the Genocide Convention. This therefore entailed a violation of the duty to punish.

Reparation

In the Court's view, a declaration of the violation of the duty to prevent and punish constituted sufficient reparation.

Commentary

There are at least two points of significance in the judgment. The first concerns the issue of State responsibility for genocide. It will be recalled that the ICJ implied an obligation on States not to commit genocide from Article I of the Convention. Six of the judges, however, held that the Convention solely concerned individual responsibility, and to support this relied on the *travaux préparatoires*, since an express reference to State criminal responsibility was rejected during the drafting process.

It is submitted that the minority's opinion is incorrect. First, due to the nature of the act, genocide is often committed with the support of a State, and to deny State responsibility for genocide would therefore lead to an unnecessary accountability vacuum. It would also completely overlook the history of the Convention, which was adopted in response to the Holocaust, which was committed by a *State*. The

aim of the Convention is therefore not simply to criminalize the *individuals* who carry out genocidal acts, but also the State which organises such acts. Second, the meaning supported by the minority is contrary to not only the “object and purpose” of the Convention, which is to safeguard individuals’ human rights, but also its status as a *jus cogens* norm, which requires its provisions to be broadly, not narrowly, construed.

The second point concerns the test employed, by the Court, when assessing whether the Srebrenica atrocity could be attributed to Serbia. In adopting the Nicaragua test of “effective control”, the ICJ rejected the applicant’s submission that a lower standard, that of the FRY’s “overall control” of the groups and entities in question, was sufficient.

The latter test was adopted by the ICTY in *Prosecutor v Tadic* (Case No. IT-94-1-Abis, Appeals Chamber, July 15, 1999) when considering whether the conflict in Bosnia was “international” for the purposes of international humanitarian law. In the ICJ’s view, overall control may well be a “suitable” test for determining the internationality of a conflict, but it is not the correct rule for determining whether the acts of non-State actors can be attributed to a State for the purposes of State responsibility.

The consequence for the present case was that, despite the undeniably massive military, financial and political support given by Serbia to the Republika Srpska and VRS, including to Mladic who, it is alleged ordered, the genocide, Serbia could not be held responsible for the genocide. This may be an unnecessarily high standard, and arguably makes it exceedingly difficult to hold a State responsible for genocide when acting through surrogates.

The Court’s reaffirmation of the effective control test is also significant for other areas of international law, including the right of self-defence against non-State actors. If one accepts the ICJ’s view that attribution to a State is a requirement of self-defence (*Wall* Advisory Opinion, 2003), the judgment may mean that forcible action may not be taken against armed attacks committed by non-State actors, unless one can show that such attacks were “effectively controlled” by the State in which the action in self-defence is to take place. This will be much more difficult to establish than a test of “overall control”, and in practice means that a State which harbours and provides extensive military and logistical support to armed bands, such as Taliban-controlled Afghanistan in 2001, may not easily be targeted in self-defence.

Appendix 1

**UN Declaration on the Rights of
Indigenous Peoples, 13 September
2007**

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/61/L.67 and Add.1)]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,¹ by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

*107th plenary meeting
13 September 2007*

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

¹ See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53)*, part one, chap II sect A

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights² and the International Covenant on Civil and Political Rights,² as well as the Vienna Declaration and Programme of

² See resolution 2200 A (XXI), annex.

Action,³ affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights⁴ and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

³ A/CONF.157/24 (Part I), chap. III.

⁴ Resolution 217 A (III).

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d) Any form of forced assimilation or integration;
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the

community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

